STATE OF MICHIGAN

COURT OF CLAIMS

NORTH AMERICAN VAN LINES, INC.,

Plaintiff,

v

DEPARTMENT OF TREASURY,

Defendants.

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OPINION AND ORDER

Case No. 17-000336-MT

Hon. Colleen A. O'Brien

Pending before the Court is defendant's motion for summary disposition pursuant to MCR 2.116(C)(10), as well as plaintiff's motion for partial summary disposition under the same subrule. For the reasons that follow, defendant's motion is GRANTED, and plaintiff's motion is DENIED. Because of the thorough and adequate briefing submitted by the parties, this matter is being decided without oral argument. See LCR 2.119(A)(5).

I. BACKGROUND

This case involves the 2010 and 2011 amended Michigan Business Tax (MBT)[1] returns filed by plaintiff as the designated member of a Unitary Business Group (UBG). Plaintiff filed its amended returns for the 2010 and 2011 tax years on or about February 25, 2014. Pertinent to the instant matter, plaintiff deducted from its gross receipts the costs of purchasing residential

[1] The MBT was replaced by the Corporate Income Tax, effective January 2012. See MCL 206.601 *et seq.*

real property (homes) from the employees, i.e., private individuals, of clients to whom it provides relocation services. Plaintiff deducted these purchases from its gross receipts as "purchases from other firms." See MCL 208.1113(6). In July 2016, defendant sent plaintiff a Preliminary Audit Report indicating an MBT deficiency in the amount of $249,310 (exclusive of statutory interest owed) for the 2010 and 2011 tax years. On audit, defendant's auditor disallowed the deductions, for the reason that real property could not be "inventory" purchased from another firm. The auditor also concluded that plaintiff did not, during its ordinary course of business, sell homes.

On January 17, 2017, defendant issued a Final Audit Determination Letter that specified the amount of taxes owed, plus interest, for a total amount owed of $298,305. The letter invited plaintiff to contact the Department of Treasury's Tax Compliance Bureau in the event plaintiff had any "questions regarding this notice[.]" On January 20, 2017, defendant issued Notices of Intent to Assess and Bills for Taxes Due with respect to plaintiff's 2010 and 2011 tax years in the amounts of $102,318.17 and $208,377.87, respectively. The listed "Reason for Tax Bill" on the 2010 Notice of Intent to Assess was: "RETURN RECEIVED WITH INSUFFICIENT PAYMENT. DEFICIENCY DUE PER PREVIOUS COMMUNICATION." The 2011 "Reason for Tax Bill" was that plaintiff's return was "RECEIVED WITH INSUFFICIENT PAYMENT OF TAX, PENALTY AND/OR INTEREST." Both notices provided plaintiff with contact information should plaintiff wish to learn more about the reason(s) why the notices were issued.

Plaintiff, through counsel, requested an informal conference. Plaintiff raised the same three issues it now raises in the instant matter: (1) that the Intents to Assess were too vague; (2) that the Intents to Assess were untimely; and (3) "to the extent the Intents to Assess relate to a denial of the deductions for the cost of residential properties held as inventory by the Taxpayer,

the Taxpayer is entitled to all deductions claimed for inventory in its MBT returns." The hearing referee disagreed, and defendant issued a decision and order upholding the referee's recommendation. On or about October 6, 2017, defendant issued Final Assessments for taxes due for the 2010 and 2011 tax years. The Final Assessments indicated that the reason(s) for the deficiencies were disclosed per "PREVIOUS COMMUNICATION" and that they were "BASED ON AN AUDIT CONDUCTED BY" defendant.

Plaintiff filed a three-count complaint in this Court in December 2017. Plaintiff alleged that when it purchased residential properties, it held the properties in inventory until they were resold. As a result, plaintiff alleges that the "costs at issue in this case qualify for deduction in computing Plaintiff's modified gross receipts tax base under MCL 208.1203, and under both MCL 208.1113(6)(a) and MCL 208.113(6)(b) [sic]." Plaintiff's complaint raises three counts. Count I alleges that the Intents to Assess issued in this case are untimely. Count II alleges that the Intents to Assess and Final Assessments were too vague. Count III alleges that that the cost of acquired residential property is deductible from gross receipts. In short, plaintiff alleges that the cost of all residential properties was either deductible as inventory held for resale, or that the residential properties were assets that were deductible because they were eligible for depreciation.

II. ANALYSIS

This matter is before the Court on the parties' competing motions filed pursuant to MCR 2.116(C)(10). Summary disposition is appropriate under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." The issues in this case concern the meaning of words and phrases employed in the MBT Act. When interpreting statutes, this Court is to ascertain the

Legislature's intent from the plain language of the statutes at issue. *Total Armored Car Serv, Inc v Dep't of Treasury*, __ Mich App __, __; __ NW2d __ (2018) (Docket No. 340495), slip op at p. 3. The issue in this case concerns a deduction from plaintiff's gross receipts tax base. Deductions from taxation are disfavored, and the Court must strictly construe any statute setting forth a deduction. *Menard Inc v Dep't of Treasury*, 302 Mich App 467, 474; 838 NW2d 736 (2013). In addition, plaintiff, as the taxpayer, bears the burden of demonstrating entitlement to the claimed deduction. *Id.* at 473-474.

This case involves plaintiff's modified gross receipts tax under MCL 208.1203 for the 2010 and 2011 tax years. The modified gross receipts tax is one that is "imposed upon the privilege of doing business and not upon income or property." MCL 208.1203(2). The MBT Act defines "gross receipts" in pertinent part as "the entire amount received by the taxpayer as determined by using the taxpayer's method of accounting used for federal income tax purposes . . . ." MCL 208.1111(1). The modified gross receipts tax is imposed on what is known as a taxpayer's "modified gross receipts tax base." MCL 208.1203(1). A taxpayer's "modified gross receipts tax base" means the taxpayer's gross receipts, as defined in MCL 208.1111(1), "subject to the adjustment in subsection (6),[2] if applicable, *less purchases from other firms before apportionment under this act*." MCL 208.1203(3) (emphasis added).[3] Hence, the taxpayer's qualifying "purchases from other firms" are a permissible deduction from the taxpayer's gross receipts tax base. *Total Armored Car Serv*, __ Mich App at __, slip op at p. 2.

[2] The adjustment in subsection (6) is not applicable to this case. See MCL 208.1113(6).

[3] For a unitary business group (UBG) such as plaintiff, the modified gross receipts base for the UBG "is the sum of modified gross receipts of each person . . . included in the [UBG] less any modified gross receipts arising from transactions between persons included in the [UBG.]" MCL 208.1203(3).

The phrase "less purchases from other firms" requires further discussion. The MBT defines the phrase "purchases from other firms" to mean, in pertinent part:

> (a) Inventory acquired during the tax year, including freight, shipping, delivery, or engineering charges included in the original contract price for that inventory.
>
> (b) Assets, including the costs of fabrication and installation, acquired during the tax year of a type that are, or under the internal revenue code will become, eligible for depreciation, amortization, or accelerated capital cost recovery for federal income tax purposes. [MCL 208.1113(6)(a)-(b).]

Plaintiff's complaint expressly invokes MCL 208.1113(6)(a)-(b) and contends that the costs plaintiff incurred while purchasing residential homes from its clients' employees fit within the meaning of "purchases from other firms" as defined by those subsections.

A. THE HOMES WERE NOT PURCHASED FROM "OTHER FIRMS"

At the outset, defendant has raised the issue, by way of its reply to plaintiff's motion, of whether the costs incurred by plaintiff when purchasing residential homes from individuals in the course of providing relocation services can even qualify as "purchases from *other firms*," generally. The MBT Act contains a list of items purchased by the taxpayer that can meet the definition; however, the Act does not define "firms." Nor does the Internal Revenue Code does not provide any pertinent guidance. See MCL 208.1103 (specifying that a term used in the MBT Act "and not defined differently shall have the same meaning as when used in comparable context in the laws of the United States relating to federal income taxes in effect for the tax year unless a different meaning is clearly required.").

Because the term "firms" is undefined, resort to a dictionary is appropriate. In *Black's Law Dictionary* (10th ed), "firm" is defined to mean "The title under which one or more persons conduct business jointly" or "The association by which persons are united for business

purposes." The definition continues, explaining that the term "firm" "frequently refers to a company." *Id.* Similarly, *Merriam-Webster's Collegiate Dictionary* (11th ed), defines "firm" to mean "a business or unit of enterprise." With these definitions as a backdrop, the Court concludes that the term "firms" is most commonly understood as a term that refers to a business or commercial entity. It does not refer to individuals. This is significant, because there is no dispute in this case that any homes purchased by plaintiff were purchased from individuals. While plaintiff may have had contracts with "firms" to provide relocation services, there is no dispute that the only homes purchased were those of the employees of the firms, i.e., private individuals. That is, the only homes plaintiff purchased were from private individuals, not from businesses or "firms." As a result, the Court agrees that plaintiff, as a threshold matter, has not made "purchases from *other firms*" as it concerns the purchases at issue. Therefore, the plain language of the MBT disqualifies these purchases from deduction because they were not made from "other firms." For this reason alone, plaintiff cannot prevail.

B. THE HOMES WERE NOT PLAINTIFF'S "INVENTORY"

Moreover, the Court agrees that the residential homes purchased in this case do not otherwise qualify as "inventory." As noted, plaintiff argues that the homes fall within MCL 208.1113(6)(a)'s definition of "purchases from other firms" because they were "Inventory acquired during the tax year, including freight, shipping, delivery, or engineering charges included in the original contract price for that inventory." The MBT Act defines the term "inventory" to mean, in pertinent part:

> (a) The stock of goods held for resale in the regular course of trade of a retail or wholesale business, including electricity or natural gas purchased for resale.
>
> (b) Finished goods, goods in process, and raw materials of a manufacturing business purchased from another person. [MCL 208.1111(4)(a)-(b).]

In short, in order to be "inventory," the item(s) in question must be "goods" held for resale—including electricity or natural gas," or they must be "finished goods," "goods in process," or "raw materials" of a manufacturing business.

Defendant argues that the residential real estate at issue in this case cannot be "inventory" because "inventory" must be a "good," and because real estate is not a "good" as that term is commonly understood. The term "good" is not defined by the MBT Act, nor is the federal code instructive. *Black's Law Dictionary* (10th ed) defines "goods" as "Tangible or movable personal property other than money[.]" The subject of this case, real estate, is *not* personal property. Indeed, *Black's* specifies that personal property is "Any movable or intangible thing that is subject to ownership *and not classified as real property*." *Id.* (emphasis added).

In light of these definitions, the Court concludes that the residential real property at issue cannot be plaintiff's "inventory" acquired during the tax year. The MBT Act refers to "inventory" as "goods," in various stages and held for various reasons—or as "raw material" that will later be turned into goods. The ordinary and common meaning of "goods" refers to personal property, not real property. In fact, the ordinary and common understanding of "goods" excludes real property. Here, by all accounts, plaintiff's deduction involves the purchase of residential real property. These purchases are not purchases involving goods under the plain language employed by the MBT. As a result, the costs of residential real property purchased from individuals do not fit within MCL 208.1113(6)(a)'s definition of "Inventory acquired."

In arguing for a contrary result, plaintiff urges this Court to construe the definition of "inventory" in the MBT Act in conformity with what plaintiff asserts is the definition of "inventory" under federal income tax law. Plaintiff correctly notes that MCL 208.1103 requires

this Court to define all terms not defined by the MBT Act in conformity with federal income tax law and the Internal Revenue Code. The problem with plaintiff's assertion, however, is that plaintiff has not identified any pertinent federal law. Instead, plaintiff asserts that it classified the homes as "inventory" on its federal income tax returns. The Court is unmoved by plaintiff's position. Plaintiff's own characterization of the homes as "inventory" is not a substitute for a definition supplied by federal law.

For its next contention, plaintiff notes the statutorily defined exclusions from inventory in MCL 208.1111(4)(e), and observes that "real property" is not among the items so excluded. Plaintiff contends that the list of exclusions is exhaustive and that, because "real property" is not included on this exhaustive list, real property can, as a matter of law, qualify as inventory under the MBT Act. The Court disagrees. There is no indication from the plain language of MCL 208.1111(4)(e) that the two items listed therein are intended to be the sole exclusions from "inventory" under the act. Indeed, the statute simply states that "Inventory does not include either of the following" and proceeds to list: (*i*) personal property under lease; and (*ii*) property allowed a deduction or allowance for depreciation under the Internal Revenue Code. This language demonstrates the intent of the Legislature to specifically exclude from the definition of "inventory" two identified items. It does not indicate an exclusive list specifying the only exceptions to the statutory definition. More importantly, and as described in more detail above, the real estate at issue here plainly does not fit within the definition of "inventory" as that term is defined in the MBT. Under plaintiff's view, the definition in MCL 208.1111(4)(a)-(b) would be rendered essentially meaningless, because as long as the exclusion in MCL 208.1111(e) did not apply, the item at issue would qualify as "inventory" under MCL 208.1111(4)(a)-(b). In other words, regardless of whether the item was a "good" held for resale, or was a "finished good,"

"good in process," or raw material, plaintiff would view the item as "inventory," so long as it was not one of the excluded items. The Court will not adopt a construction of the statute that would allow the exception to effectively render the rest of the statute meaningless. See *Haynes v Village of Beulah*, 308 Mich App 465, 468; 865 NW2d 923 (2014) (citation and quotation marks omitted) (when interpreting a statute, a reviewing court is to "avoid an interpretation that would render any part of the statute surplusage or nugatory.").[4]

C. THE HOMES ARE NOT ELIGIBLE FOR DEPRECIATION

As noted above, MCL 208.1113(6)(b) contains a multifaceted definition of "purchases from other firms." The second prong of the definition is that which defines "purchases from other firms" as "Assets, including the costs of fabrication and installation, acquired during the tax year of a type *that are, or under the internal revenue code will become, eligible for depreciation*, amortization, or accelerated capital cost recovery for federal income tax purposes." MCL 208.1113(6)(b) (emphasis added). In this case, plaintiff has not asserted that it depreciates homes it purchases from employees of its clients; instead, it merely asserts that, if used to generate rental income, the homes could be eligible for depreciation.

Plaintiff is correct that real property held by a lessee can be eligible for depreciation for federal income tax purposes. See, generally, 26 CFR 1250(b) (2018). However, the MBT Act requires more of assets than that they be, in theory, eligible for depreciation. MCL 208.1113(6)(b) specifies that the assets must be, "or under the internal revenue code, will become, eligible for depreciation[.]" Here, plaintiff has admitted that the homes are not, based

[4] Because the Court reaches this result, it need not consider defendant's alternative arguments, such as whether purchasing the homes was part of defendant's regular course of business.

on how plaintiff uses them eligible for depreciation. Nor will the assets become eligible for depreciation, based on how plaintiff has used them. Rather, plaintiff merely asserts that the homes *could* be eligible for depreciation, if used by someone else as rental property. Plaintiff's interpretation of the statute substitutes the words "will become" eligible for depreciation with the phrase "could be eligible" for depreciation. This Court must construe MCL 208.1113(6)(b) as it has been written, and it is not free to substitute plaintiff's choice of phraseology for the language employed by the Legislature. See *Menard Inc*, 302 Mich App at 479. Where plaintiff has not alleged that the homes are eligible for depreciation or that they will become eligible for depreciation as plaintiff uses them, the Court concludes that the homes at issue do not fit within the confines of MCL 208.1113(6)(b).

In this sense, the Court agrees with defendant's contention that the deduction in MCL 208.1113(6)(b) is concerned with how the particular taxpayer uses the assets, not how any theoretical taxpayer could use the same assets. Plaintiff's position runs contrary to the common understanding of depreciation. As explained by the Michigan Supreme Court in *Continental Cablevision of Mich, Inc v City of Roseville*, 430 Mich 727, 744; 425 NW2d 53 (1998), depreciation under pertinent provisions contained in the Internal Revenue Code, see, 26 USC 167, is understood as:

> an allowance for deterioration of income-producing assets. The theory of depreciation assumes that property wears out with use and age and will have to be replaced. *Ordinarily, only the owner of the asset suffers wear and tear and, therefore, only the owner is eligible for depreciation deductions*. [Emphasis added.]

Here, plaintiff is attempting to claim depreciation that a hypothetical owner of the same real property could claim. Plaintiff cannot do so, because only the owner of property is eligible to claim depreciation of an asset. See *id*. Where plaintiff has not alleged that it uses the real estate

at issue in a manner that would make the real property eligible for depreciation by plaintiff, the property is not, nor will it become in plaintiff's hands, eligible for depreciation. See *id.* As such, the real property transactions at issue in this case are not "purchases from other firms" within the plain meaning of MCL 208.1113(6)(b).[5]

In sum, plaintiff's contentions about whether the purchases of the homes could be included as "purchases from other firms" are meritless.[6]

III. TIMELINESS OF ASSESSMENTS

Plaintiff contends that the assessments in this case were untimely because they were issued more than four years after the date set for the filing of the original return(s). See MCL 205.27a(2). Plaintiff's position fails to account for the fact that the amended returns were filed on February 25, 2014, and that MCL 205.27a(2) gives defendant four years to issue assessments from the later of the date set for the filing of the original return, or after the return was actually filed. Here, the final assessments were issued well within four years of February 24, 2014, and thus were timely. Plaintiff's arguments to the contrary are unavailing, as is plaintiff's invitation

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[5] MCL 208.1113(6)(b) states that an asset fits the statutory definition if it is, or will become, eligible for depreciation "amortization, or accelerated capital cost recovery for federal income tax purposes." Plaintiff in the instant case only makes an argument about depreciation, and has not addressed amortization or accelerated capital cost recovery.

[6] At times, plaintiff's briefing appears to invoke another exclusion from gross receipts. However, plaintiff's complaint has not pled any counts or theories invoking any other exceptions, and in fact expressly limits its scope to MCL 208.1113(6)(a)-(b). This Court is without authority to consider a claim that was never pleaded in the complaint. *Reid v State*, 239 Mich App 621, 630; 609 NW2d 215 (2000). Moreover, to the extent plaintiff has hinted at another exclusion, plaintiff has not addressed the argument in any meaningful detail, and the Court will not make the argument on plaintiff's behalf. See *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002).

to await decision in this case until the Supreme Court decides whether to grant leave to appeal in *Alticor Inc v Dep't of Treasury*, 324 Mich 403; __ NW2d __ (2018).

IV. NOTICE

The final issue raised by the parties' briefing concerns the adequacy of notice afforded to plaintiff in the Intents to Assess and in the Final Assessments issued by defendant. Plaintiff alleges that it never received adequate notice of the reason(s) for the deficiencies in this case. Plaintiff contends that the assessments must be cancelled because defendant failed to provide adequate notice of the reason(s) for the assessments. Plaintiff also contends that Intents to Assess and Final Assessments, which reference prior communications, do not provide adequate notice. As noted above, the Intents to Assess issued by defendant in this case stated, with respect to the reasons for the deficiencies, that the same was disclosed by defendant's "PREVIOUS COMMUNICATION." Both notices also encouraged plaintiff to contact defendant with any questions. The Final Assessments likewise referred to defendant's "PREVIOUS COMMUNICATION" as well as the audit conducted in this case.

The MBT Act provides, with respect to notice, that upon completion of an audit, "the department, after determining the amount of tax due from a taxpayer, shall give notice to the taxpayer of its intent to assess the tax." MCL 205.21(b). The notice sent by defendant "shall include the amount of the tax the department believes the taxpayer owes, *the reason for that deficiency*, and a statement advising the taxpayer of a right to an informal conference, the requirement of a written request by the taxpayer for the informal conference that includes the taxpayer's statement of the contested amounts and an explanation of the dispute, and the 60-day time limit for that request." MCL 205.21(2)(b) (emphasis added). In addition to this statutory authority, Mich Admin Code, R 205.1001 sets forth a "Taxpayer Bill of Rights." The Bill of

Rights simply states that a "Notice of intent to assess" is the notice that "advises the taxpayer of the department's intent to assess the tax and provides the amount of the tax the department believes the taxpayer owes, the reason for the deficiency[.]" Mich Admin Code, R 205.1001(i)(*i*). The notice is to advise the taxpayer of: (i) the right to an informal conference; (ii) the requirement of a written request for informal conference; and (iii) a 60-day limit for requesting informal conference. Rule 205.1001(i)(*i*)-(*iii*).

Neither MCL 205.21(2)(b) nor Rule 205.1001 *et seq.* specify the manner in which notice must be given, nor do they bar defendant from referencing prior communications in order to apprise a taxpayer of the reason(s) for tax deficiencies. Here, although neither the Intents to Assess nor the Final Assessments expressly stated the reasons for the deficiencies, they nevertheless referenced defendant's prior communications, such as the audit conducted by defendant and the accompanying report. These referenced materials clearly gave plaintiff notice of the reasons for the deficiencies, given that plaintiff requested an informal conference and successfully identified the very issues it now litigates in this instant matter. Any suggestion by plaintiff that the Intents to Assess and Final Assessments themselves had to list each and every detail for the deficiencies, rather than referencing previous communications of which plaintiff was in possession, is an elevation of form over substance that finds no support in statutes or caselaw. And if plaintiff was unsure about the reasons, it could have requested additional information, which it never opted to do. Accordingly, and looking at the entirety of the materials provided to plaintiff—and referenced in the notices in this case—plaintiff was afforded notice and an opportunity for a meaningful hearing. Moreover, plaintiff participated at the informal conference in a way that belies the notion it was uninformed. This notice was adequate. See *By*

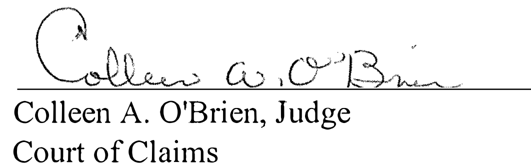
Lo Oil Co v Dep't of Treasury, 267 Mich App 19, 30; 703 NW2d 822 (2005) (discussing the adequacy of notice under MCL 205.21 for purposes of a due process claim).

V. CONCLUSION

IT IS HEREBY ORDERED that defendant's motion for summary disposition is GRANTED pursuant to MCR 2.116(C)(10), and plaintiff's motion for partial summary disposition is DENIED.

This order resolves the last pending claim and closes the case.

Dated: February 5, 2019



Colleen A. O'Brien, Judge
Court of Claims