STATE OF MICHIGAN

COURT OF CLAIMS

ERIC A. PREISS v DEPARTMENT OF TREASURY **Hon. Michael J. Talbot**

Case No. **16-000079-MT**

ORDER

At a session of said Court held,
Detroit, Wayne, Michigan, on
June 6, 2017.

Defendant having filed a motion for summary disposition pursuant to MCR 2.116(C)(10) and Plaintiff having filed a cross-motion for summary disposition pursuant to MCR 2.116(C)(10);

IT IS HEREBY ORDERED that Defendant's motion for summary disposition is GRANTED and Plaintiff's cross-motion is DENIED.

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

Michael J. Talbot, Judge

A true copy entered and certified by Jerome W. Zimmer Jr., Clerk, on

JUN - 6 2017
Date

Clerk

STATE OF MICHIGAN

COURT OF CLAIMS

ERIC A. PREISS, d/b/a PREISS OUTDOOR SERVICES & SUPPLY, Plaintiff, v DEPARTMENT OF TREASURY, Defendant.	**OPINION** Case No. 16-000079-MT Hon. Michael J. Talbot

Before the Court are the parties' competing motions for summary disposition in this action concerning the validity of a claimed use-tax exemption on certain equipment Plaintiff purchased and used. Because the Court concludes that Plaintiff was not engaged in an industrial processing activity on behalf of an industrial processor, summary disposition is GRANTED to Defendant.

I. BACKGROUND

Plaintiff's business involves two primary components: selling landscaping materials and clear-cutting brush and trees over natural gas pipelines on behalf of DTE Energy Company. The equipment at issue in this case involves the latter part of that business. During the relevant timeframe, Plaintiff purchased equipment, including a stump grinder, tractors, an excavator, loader, skid-steer, and various attachments for the equipment, for use in the clear-cutting work. Plaintiff did not pay use or sales tax on the equipment, claiming the equipment as exempt from use-tax under the industrial-processing exemption found in MCL 205.94o.

The contract between Plaintiff and DTE called for Plaintiff to perform "brushing" on various rights-of-way possessed by DTE throughout the state. High-pressure natural gas pipelines ran underneath the rights-of-way. Eric Preiss, Plaintiff's owner and operator, testified that "brushing" a right-of-way entailed clearing all vegetation from the right-of-way, whether it be grass, shrubs, small saplings, or large trees. Plaintiff used the equipment it claimed was exempt in performing this task. According to Preiss, as part of the brushing activities, he would "inspect and look at the gas pipe," and look for burn spots in the vegetation because such spots could be indicative of a gas leak. A DTE technician would typically accompany Plaintiff's employees and Plaintiff's employees would report problems to the technician if any arose.

Chris Conley, an employee at DTE who was familiar with Plaintiff's brushing activity testified that a "Pipeline technician" employed by DTE would accompany Plaintiff's employees during the brushing process. According to Conley, Plaintiff's employees only cleared the ground above the grade and did not do anything underneath the surface. If Plaintiff's employees saw a problem, such as an exposed pipeline, they were to notify someone at DTE. Plaintiff was not to touch the pipeline.

Moreover, Plaintiff was not required to patrol the pipeline. "It's just if they find anything while they're doing the work for us," clarified Conley, "the expectation would be that they'd point it out to us." In addition, Conley testified that, unlike DTE employees who were charged with monitoring the pipelines, DTE did not require Plaintiff to keep records of any pipeline incidents or issues. However, Plaintiff's employees performing the brushing work had to satisfy certain "Operation Qualification Requirements," which was essentially training about how and when to report potential issues with pipelines.

Aside from facilitating visual inspection of the pipelines, "one of the other reasons" for brushing was to remove trees and kill the root systems of hardwood trees before the roots could reach and potentially damage the pipeline. Conley testified that hardwood tree-root systems were particularly concerning, and stated that "one of the main reasons we clear the right of ways is because" of concerns that roots from hardwood trees could corrupt the coating on the pipes.

When asked in his deposition if brushing the rights-of-ways assisted in the production of natural gas, Conley responded, "I'm not going to use the word production. It assists us in the safe transportation of natural gas." When asked if the work that Plaintiff did was considered "maintenance of the pipelines," Conley replied, "We consider it pipeline, yeah, maintenance and operation. I mean it's—we're maintaining our right of way."

II. ANALYSIS

Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. "When entertaining a summary disposition motion under Subrule (C)(10), the court must view the evidence in the light most favorable to the nonmoving party, draw all reasonable inferences in favor of the nonmoving party, and refrain from making credibility determinations or weighing the evidence."[1] The party moving for summary disposition has the initial burden of demonstrating that there are no genuine issues of material fact and must support that assertion with affidavits and documentary evidence.[2]

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[1] *Dillard v Schlussel*, 308 Mich App 429, 445; 865 NW2d 648 (2014).

[2] *Bronson Methodist Hosp v Auto-Owners Ins Co*, 295 Mich App 431, 440; 814 NW2d 670 (2012). See also MCR 2.116(G)(3).

Resolution of this matter involves interpretation of the Use Tax Act (UTA), MCL 205.91 *et seq*. When construing a statute, a reviewing court's primary concern "is to discern and give effect to the intent of the Legislature."[3] "The first step in that process is to examine the language in the statute itself. If the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written."[4] Because tax exemptions are generally disfavored, they are strictly construed against the taxpayer and the taxpayer has the burden of proving its entitlement to the exemption.[5]

A. INDUSTRIAL-PROCESSING EXEMPTION

The UTA imposes a use tax for the privilege of using, storing or consuming tangible personal property in the state, subject to a number of exceptions.[6] At issue in this case is the industrial processing exception to the use tax which provides, in pertinent part, as follows:

> (1) The tax levied under this act does not apply to property sold to the following . . . :
>
> (a) An industrial processor for use or consumption in industrial processing.
>
> (b) A person, whether or not the person is an industrial processor, if the tangible personal property is intended for ultimate use in and is used in industrial processing by an industrial processor.
>
> (c) *A person, whether or not the person is an industrial processor, if the tangible personal property is used by that person to perform an industrial processing activity for or on behalf of an industrial processor.*[7]

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[3] *Midamerican Energy Co v Dep't of Treasury*, 308 Mich App 362, 369; 863 NW2d 387 (2014).

[4] *Id.* (citation and quotation marks omitted).

[5] *Elias Bros Restaurants, Inc v Treasury Dept*, 452 Mich 144, 150; 549 NW2d 837 (1996).

[6] See generally, MCL 205.91 *et seq*.

[7] MCL 205.94o (emphasis added).

An industrial processor is "a person who performs the activity of converting or conditioning tangible personal property for ultimate sale at retail or use in the manufacturing of a product to be ultimately sold at retail or affixed to and made a structural part of real estate located in another state."[8] For purposes of the UTA, the term "industrial processing" means

> the activity of converting or conditioning tangible personal property by changing the form, composition, quality, combination, or character of the property for ultimate sale at retail or for use in the manufacturing of a product to be ultimately sold at retail or affixed to and made a structural part of real estate located in another state. Industrial processing begins when tangible personal property begins movement from raw materials storage to begin industrial processing and ends when finished goods first come to rest in finished goods inventory storage.[9]

The UTA also provides that industrial processing activities include the "[d]esign, construction, or *maintenance of production or other exempt machinery, equipment*, and tooling."[10] By contrast, it explicitly excludes the "[d]esign, engineering, construction, or *maintenance of real property and nonprocessing equipment*," from the scope of industrial processing activities.[11]

In this case, the parties are in apparent agreement that Plaintiff is not an industrial processor with respect to its brushing services. It is also undisputed that DTE *is* an industrial processor, engaged in the activity of converting natural gas, and that DTE's natural gas pipelines constitute exempt machinery. Thus, if Plaintiff used the subject equipment to perform "maintenance" of the exempt machinery, i.e., the pipelines, for or on behalf of DTE, then it qualifies for the industrial processing exemption set forth in MCL 205.94o(1)(c). The parties'

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[8] MCL 205.94o(7)(b).

[9] MCL 205.94o(7)(a).

[10] MCL 205.94o(3)(f) (emphasis added).

[11] MCL 205.94o(6)(d) (emphasis added).

primary disagreement is what, exactly, Plaintiff's brushing services maintained. Plaintiff argues that its activities constituted maintenance of DTE's pipelines and, therefore, qualified as an industrial processing activity under MCL 205.94o(3)(f). Defendant takes the opposite position, arguing that the exemption is disallowed because Plaintiff's activities constituted maintenance of real property—the rights-of-way over which the pipelines ran—which, pursuant to MCL 205.94o(6)(d), is not a qualifying industrial processing activity.

This Court agrees with Defendant's position. Plaintiff maintained real property, not the pipelines themselves. Plaintiff's contracts with DTE called for Plaintiff to perform "brushing" along DTE's rights-of-way. This entailed clear-cutting of any and all vegetation—from grass to shrubbery to large trees—growing in the rights-of-way. Plaintiff used an assortment of equipment and machinery to perform these clear-cutting and brushing tasks; however, none of the equipment ever came in contact with the pipelines. Nor did Plaintiff ever perform any tasks that maintained the underground pipelines themselves. All of Plaintiff's activities took place above the surface and Plaintiff was expressly prohibited from touching any of the pipelines. In short, Plaintiff's equipment was used for one purpose: maintaining the real property in the rights-of-way. At most, Plaintiff's activities in clearing the right-of-ways allowed for the *future* maintenance of the pipelines by the industrial processor, DTE.

Plaintiff's briefing makes much of the fact that Plaintiff's brushing activities killed trees and tree roots, which helped to preserve the integrity of the pipeline. In addition, according to Plaintiff, because its activities cleared the rights-of-way for visual inspection, Plaintiff's activities made it possible for others to maintain the pipeline, which means that Plaintiff essentially maintained the pipeline. However, this Court does not agree. As it concerns the nature of the work, Conley testified, as noted above, that brushing allowed for visual inspection

of the pipelines and it provided a benefit by killing tree roots that could potentially cause problems for the pipelines. Thus, the record does not support Plaintiff's contention that the purpose of brushing was solely about killing tree roots. At most, Plaintiff's activities in clearing the right-of-ways allowed for the *future* maintenance of the pipelines by the industrial processor, DTE.

Plaintiff also points to deposition testimony from Preiss and argues that it did more than merely maintain the real estate. According to Preiss, Plaintiff's employees who were performing the clear-cutting and brushing helped inspect the pipelines and they were charged with helping to identify potential leaks. However, the amount of inspection Plaintiff performed or did not perform is irrelevant for purposes of determining entitlement to the industrial-processing exemption. Indeed, the exemption is an exemption to *use tax*. Entitlement to the exemption "does not depend on the nature or existence of a transaction between the processor and the retailer. Rather, the application of the industrial processing exemption depends on the use to which equipment is put."[12] Thus, this Court's focus is solely on the use to which the equipment was put, and not on what Preiss or any other employee may have done while walking along the pipelines.[13] And as noted above, that use was in maintaining real estate, not the pipeline itself.

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[12] *Elias Bros Restaurants*, 452 Mich at 156.

[13] *Id.* See also *Detroit Edison Co v Dep't of Treasury*, 498 Mich 28, 37; 869 NW2d 810 (2015) ("[T]o determine whether the industrial processing exemption applies, it is necessary to consider the *activity* in which the equipment is engaged and not the *character* of the equipment-owner's business." (Citation omitted) (alteration in the original)).

Plaintiff also argues that the exclusion in MCL 205.94o(6)(d) only applies to "[d]esign, engineering, construction, or maintenance of real property *and* nonprocessing equipment."[14] That is, Plaintiff urges this Court to conclude that its activities are only excluded if they can be considered maintenance of *both* real property *and* nonprocessing equipment, simultaneously. According to Plaintiff, it maintained real property and DTE's pipelines, which are considered processing equipment. But the Court disagrees that Plaintiff even maintained the pipelines. As noted above, Plaintiff maintained real property by clear-cutting the vegetation that grew in the rights-of-way. Plaintiff did not touch or otherwise maintain the pipelines themselves. Accordingly, regardless of whether Plaintiff's interpretation of the exception to the exemption found in MCL 205.94o(6)(d) is correct, Plaintiff is not entitled to the claimed exemption in this case.

In any event, Plaintiff's interpretation of MCL 205.94o(6)(d) lacks merit. The Court of Appeals has addressed this exemption and suggested an interpretation that is contrary to Plaintiff's position. In *Granger Land Development Co v Dep't of Treasury*,[15] the Court of Appeals explained that MCL 205.94o(6)(d) means that "personal property used or consumed in the design, engineering, construction, or *maintenance of real property* will not fall within the exemption applicable to personal property used or consumed during industrial processing." In other words, the Court did not interpret this section as containing the dual requirement for which Plaintiff advocates in the instant case.

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[14] MCL 205.94o(6)(d) (emphasis added).

[15] *Granger Land Development Co v Dep't of Treasury*, 286 Mich App 601, 614; 780 NW2d 611 (2009) (emphasis added).

To the extent the Court's interpretation in *Granger* could be considered dicta, this Court would conclude, on its own, that MCL 205.94o(6)(d) does not contain the dual requirement that Plaintiff contends it does. This state's appellate courts have often recognized that the words "and" and "or" are often misused in the drafting of statutes.[16] While a reviewing court is not to treat the words "or" and "and" as interchangeable, it is to be mindful that "their strict meaning is more readily departed from than that of other words, and one read in place of the other in deference to the meaning of the context."[17] In this case, Plaintiff's argument cannot survive a commonsense application of the statute. Neither maintenance of nonprocessing equipment by itself or maintenance of real property by itself would fall within the exemption for industrial processing activities under even the most strained interpretation of the statute. Thus, MCL 205.94o(6)(d) can be read as excluding from the definition of "industrial processing" maintenance of a single item—whether real estate or nonprocessing equipment—that would, in and of itself, not be exempt under the statute. When maintenance of either of these items by themselves would plainly be excluded, the Court is disinclined to adopt Plaintiff's interpretation of MCL 205.94o(6)(d).

B. EQUAL PROTECTION

Plaintiff filed an amended complaint on or about January 6, 2017, and asserted an equal protection claim, as well as a claim premised on the Uniformity of Taxation Clause of the

[16] See, e.g., *General Motors Corp v Dep't of Treasury*, 290 Mich App 355, 390; 803 NW2d 698 (2010).

[17] *Root v Insurance Co of North America*, 214 Mich App 106, 109; 542 NW2d 318 (1995).

Michigan Constitution. Essentially, Plaintiff argues that it was treated differently from similarly situated taxpayers. "To comply with the Equal Protection Clause of the United States Constitution . . . and the Uniformity of Taxation Clause of the Michigan Constitution, . . . defendant is required to exercise equal treatment of similarly situated taxpayers."[18] A party asserting an equal-protection violation has the burden of showing not only unequal treatment, but unequal treatment of taxpayers who were similarly situated.[19] "Defendant, on the other hand, is only required to show a rational basis for its decision."[20]

Defendant is entitled to summary disposition on this claim because Plaintiff cannot show unequal treatment of similarly situated taxpayers. As discussed above, Plaintiff maintains real property. Plaintiff has not identified a similarly situated taxpayer—a taxpayer who only maintained real estate—that was denied an exemption under MCL 205.94o. Accordingly, Plaintiff's equal protection and uniformity of taxation claims must fail.[21]

C. REMAINING ISSUES

There are two categories of equipment that are treated separately in the parties' briefing. The first is equipment that was attached to or installed—permanently or otherwise—on a Ford F-550 truck. Plaintiff claimed these items were exempt under the industrial-processing exemption because they were used in performing the brushing activities for DTE. However, as Defendant notes, if Plaintiff is not entitled to claim the industrial-processing exemption, the items cannot be

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[18] *Lear Corp v Dep't of Treasury*, 299 Mich App 533, 538; 831 NW2d 255 (2013) (citation and quotation marks omitted).

[19] *Id.*

[20] *Id.*

[21] See *id.*

claimed as exempt under the UTA. Plaintiff also argues that Defendant improperly included the cost of labor to install certain brackets to the truck. However, there is no documentation to support that position. The only invoice provided in the record is for the purchase of the equipment. The invoice, attached as Exhibit D to Defendant's Motion for Summary Disposition, is blurry and difficult to read. However, it appears to show that the price paid was for "THE ABOVE UNIT"—that being the equipment at issue, "UNINSTALLED." Accordingly, the only documentation before this Court does not support Plaintiff's position.

That leaves two remaining items—the "snow plow equipment" and a "997 John Deere Bagger System." Although Plaintiff's briefing refers to these items, they were not mentioned in Plaintiff's original or amended complaints. In fact, both the complaints only raise arguments about the work Plaintiff performed with respect to the pipelines and, according to Preiss's own deposition testimony, neither the snow plow nor the John Deere Bagger System were used in connection with clear-cutting the pipeline rights-of-way. A trial court does not have authority to grant relief based on a claim that was not pled in a complaint.[22] Moreover, even if this Court had authority to address these matters, Plaintiff makes little effort to explain how this equipment qualified as exempt under MCL 205.94o and this Court will not make such arguments on Plaintiff's behalf.[23]

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[22] *Reid v State of Michigan*, 239 Mich App 621, 630; 609 NW2d 215 (2000).

[23] See *Cheesman v Williams*, 311 Mich App 147, 161; 874 NW2d 385 (2015).

III. CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED that Defendant's motion for summary disposition is GRANTED and Plaintiff's cross-motion for summary disposition is DENIED.

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

Dated: June 6, 2017

Michael J. Talbot, Judge