STATE OF MICHIGAN

COURT OF CLAIMS

SPRUNGER PIPE & TOBACCO, L.L.C., Plaintiff,	**OPINION AND ORDER**
v	Case No. 13-000008-MT
STATE OF MICHIGAN, DEPARTMENT OF TREASURY, Defendant.	Hon. Michael J. Talbot

This case comes before the Court on defendant's motion for summary disposition pursuant to MCR 2.116(C)(8) and (10) and plaintiff's counter-motion for summary disposition pursuant to MCR 2.116(C)(10). For the reasons stated below, the Court GRANTS defendant's motion pursuant to MCR 2.116(C)(10) and DENIES plaintiff's counter-motion.

INTRODUCTION

Plaintiff Sprunger Pipe & Tobacco, L.L.C. (Sprunger Pipe) seeks a refund under the Tobacco Products Tax Act (TPTA), MCL 205.421 *et seq.*, for taxes and interest assessed from August 2007 through September 2010. Sprunger Pipe claims that to arrive at its proper tobacco products tax (TPT) base, the total amount it paid should be reduced by a third-party supplier's reimbursed costs for state and federal tobacco trust fund assessments. Defendant State of Michigan, Department of Treasury (the Department) argues that under the plain language of the TPTA, Sprunger Pipe is not entitled to make such subtractions. The Department asserts that Sprunger Pipe underreported its wholesale price of tobacco purchased from a third-party supplier and consequently underpaid TPT for the time period in question.

FACTS

Sprunger Pipe is a Michigan tobacco retailer located in Mt. Pleasant, Michigan.[1] Under the TPTA, it is required to file monthly TPT returns and remit a 32% tax to the state based on the wholesale price it pays to tobacco manufacturers and suppliers. The dispute in this matter arises from a disagreement over the correct tax base against which the TPT should be applied with respect to Sprunger Pipe's wholesale purchases of tobacco from third-party supplier Daughters & Ryan, Inc. (D&R).[2]

To arrive at its wholesale price for purposes of determining its TPT base, Sprunger Pipe made two types of subtractions from the price it actually paid to D&R. These subtractions were based on a spreadsheet provided by D&R showing a breakdown of the total amount paid.[3] Both subtractions represented D&R's reimbursed costs for tobacco trust fund assessments that it was required to make under state and federal laws.

The first subtraction was made pursuant to an allocation by D&R representing its reimbursed costs for state assessments levied on tobacco manufacturers under the Tobacco Product Manufacturers Escrow Account Act (TPMEAA).[4] Such assessments, based on the amount of tobacco sold,[5] are derived from a Master Settlement Agreement (MSA) entered into

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[1] Sprunger Pipe is in the business of selling, loose, "roll-your-own" tobacco.

[2] D&R is a tobacco manufacturer and distributor located in North Carolina.

[3] After being contacted by the Department, D&R agreed to discontinue its practice of breaking down the total invoiced amount by the costs of the trust fund payments.

[4] MCL 445.2051; MCL 445.2052.

[5] With respect to "roll-your-own" tobacco, the assessment is based on the numbers of containers sold. MCL 445.2051(n).

by Michigan to settle existing and potential suits filed by states against tobacco product manufacturers.[6]

The second amount Sprunger Pipe subtracted to arrive at its tax base represented an allocation made by D&R for reimbursed costs on its remittance to the U.S. Department of Agriculture (USDA) under its Total Transition Payment Program (TTPP). The program, mandated by the Fair and Equitable Tobacco Reform Act of 2004 (FETRA),[7] compensates certain tobacco farmers for the loss of quotas and price supports as a result of the deregulation of the tobacco industry. The program is funded by quarterly assessments on tobacco product manufacturers such as D&R. The assessments are based on market share of various classes of tobacco and are measured by pounds of tobacco sold. See 7 USC 518d(g)(3)(B).

In this case, the legal incidents of both of these assessments were on D&R, which passed on the costs to Sprunger Pipe and included them in the total invoiced amount.[8] For purposes of calculating its TPT base, Sprunger Pipe simply deducted these amounts from the total it paid to D&R and reported the difference as its wholesale price. Sprunger Pipe asserts that the meaning of "wholesale price" under the TPTA permits the subtraction of payments for trust fund

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[6] On November 23, 1998, Michigan signed the MSA along with 45 other states, the District of Columbia, several territories and a number of tobacco product manufacturers. Under the MSA, participating tobacco product manufacturers agreed to deposit funds into an escrow account for subsequent distribution to the settling states. On December 28, 1999, the Legislature enacted the TPMEAA. See 1999 PA 244. TPMEAA requires that tobacco product manufacturers either participate in the MSA or, as a nonparticipating manufacturer, deposit funds into an escrow account based on the number of cigarettes sold in each calendar year.

[7] 7 USC 518 *et seq.*

[8] With respect to assessments under FETRA, the preamble to the final regulations promulgated under the Act states that "[m]anufacturers and importers are expected to pass these costs on to consumers of tobacco products and increase sales prices." See 70 Fed Reg 17157 (2005).

assessments made by D&R. This is so, it claims, because the trust fund remittances represent costs unrelated to the actual price of the tobacco.[9]

On October 15, 2010, the Department conducted an audit at Sprunger Pipe's place of business. During the audit, the Department compared the invoices and checks paid to D&R against the tax base reported on Sprunger Pipe's TPT returns. Although the invoice and checks matched, the tax base against which the 32% tax was imposed reflected a reduction for the state and federal tobacco trust fund assessments paid by D&R. Reasoning that statutory definition of "wholesale price" is clear, the Department determined that Sprunger Pipe incorrectly arrived at its TPT base by reducing the actual amount paid by D&R's reimbursed costs for the tobacco trust fund assessments. Disallowing the reductions from the total paid, the Department recalculated the tax owed based on the actual price paid to D&R and ultimately issued multiple Intents to Assess covering periods from August 2007 to September 2010. After an informal conference, the tax and interest as reflected in the final assessments were upheld by a Department of Treasury Hearings Referee.[10]

Sprunger Pipe paid the taxes under protest and filed this action to obtain a refund.

STANDARD FOR GRANTING SUMMARY DISPOSITION

The issues come before the Court in the context of the motion for summary disposition filed by the Department pursuant to MCR 2.116(C)(8) and (10) and the counter-motion filed by Sprunger Pipe pursuant to MCR 2.116(C)(10). Because resolution of the motion requires

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[9] The parties agree that the tobacco trust funds amounts in question are not taxes within the meaning of the TPTA.

[10] The Department agreed to waive penalties.

consideration of evidence beyond the pleadings, this Court relies on MCR 2.116(C)(10). See *Steward v Panek,* 251 Mich App 546, 554-555; 652 NW2d 232 (2002). A motion for summary disposition under MCR 2.116(C)(10) is properly granted if no genuine factual dispute exists, and the moving party is entitled to judgment as a matter of law. *Rice v Auto Club Ins Ass'n*, 252 Mich App 25; 31; 651 NW2d 188 (2002). In deciding a motion brought under subrule (C)(10), a court considers all the evidence, affidavits, pleadings, and admissions in the light most favorable to the nonmoving party. *Id.* at 30-31.

ISSUES AND ANALYSIS

Under the TPTA, Michigan imposes a 32% tax on the purchases of tobacco by wholesalers or unclassified acquirers of tobacco.[11] See MCL 205.421 *et seq*. The TPT is based on "wholesale price," which is defined as

> the *actual price paid* for a tobacco product, including any tax, by a wholesaler or unclassified acquirer to a manufacturer, *excluding any discounts or reductions.* [MCL 205.422(bb) (emphasis added).]

Sprunger Pipe, an unclassified acquirer under the TPTA, maintains that the actual price paid to D&R is not the same as the actual price paid *for the tobacco*. It asserts that the wholesale price of the tobacco is the actual price paid to D&R, less D&R's reimbursed costs for tobacco trust fund assessments. The Department maintains that the wholesale price of the tobacco, under

[11] "Unclassified acquirer" means a person, except a transportation company or a purchaser at retail from a retailer licensed under the general sales tax act, MCL 205.51 to 205.78, who imports or acquires a tobacco product from a source other than a wholesaler or secondary wholesaler licensed under this act for use, sale, or distribution. Unclassified acquirer also means a person who receives cigars, noncigarette smoking tobacco, or smokeless tobacco directly from a manufacturer licensed under this act or from another source outside this state, which source is not licensed under this act. An unclassified acquirer does not include a wholesaler. MCL 205.422(z).

the plain meaning of the statute, is the actual price paid to D&R, unreduced by reimbursed costs for the tobacco trust fund assessments. Resolution of the motions for summary disposition in this case rests upon the proper statutory construction of the term "wholesale price."

When interpreting a statute, the primary goal "is to give effect to the Legislature's intent, focusing first on the statute's plain language." *Malpass v Dep't of Treasury*, 494 Mich 237, 247-248; 833 NW2d 272 (2013). When the words of a statute are unambiguous, the provisions must be enforced as written, and no further judicial construction is permitted. *Id.* at 249.

An examination of the plain language of "wholesale price," as defined under the TPTA, reveals that the Legislature intended that the TPT be applied to the actual price paid to the third-party manufacturer or supplier, exclusive of discounts or reductions. Sprunger Pipe's position that it is entitled to reduce the actual price it paid to D&R is not supported by the language of the statute, which specifically states that reductions from the actual price paid are not permitted. "Wholesale price" of the tobacco does not mean actual price paid, reduced by amounts allocated by the supplier for assessments it was required to pay. Rather, "wholesale price" means the actual, unreduced amount paid, which in this case is evidenced by the invoice and checks written by Sprunger Pipe to D&R. Any other reading would be contrary to the statute's plain language. Thus, the Department is correct in arguing that Sprunger Pipe's actual price paid, exclusive of any reductions for D&R's reimbursed costs, was the wholesale price against which the TPT should be applied.

Sprunger Pipe asserts that the assessments made for the time period from August 2007 to December 2007 were barred by the statute of limitations. However, the Court agrees with the Department that under MCL 205.27a(3)(a), the statute of limitations was tolled as of the October

15, 2010, commencement date of the audit, and therefore the intents to assess covering the time period from August 2007 to December 2007 were timely made.

CONCLUSION

In calculating tax under the TPTA, the plain and unambiguous language of MCL 205.422(bb) prohibits the discount or reduction of the actual price paid in determining wholesale price. Therefore, Sprunger Pipe improperly calculated its TPT base when it subtracted the third party supplier's reimbursed costs for tobacco trust fund assessments from the actual amount paid. Sprunger Pipe's wholesale price for determining its tax under the TPTA is the actual price it paid as reflected on the respective invoices and payments made by check to the third-party supplier and not the reduced amount as reported on Sprunger Pipe's returns and schedules. Sprunger Pipe's remaining arguments, including its assertion that the assessments issued for August 2007 to December 2007 are barred by the statute of limitations, are without merit.

IT IS HEREBY ORDERED that the Department's motion for summary disposition is granted pursuant to MCR 2.116(C)(10). Sprunger Pipe's counter-motion for summary disposition is denied.

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

Dated: APR - 2 2014

Hon. Michael J. Talbot
Court of Claims Judge