

STATE OF MICHIGAN
COURT OF CLAIMS

TOTAL FOUNDATIONS, LLC,

Plaintiff,

v

DEPARTMENT OF TREASURY,

Defendant.

OPINION AND ORDER

Case No. 13-000022-MT

Hon. Michael J. Talbot

This case comes before the Court on plaintiff Total Foundations, LLC's (Total Foundations) motion for reconsideration of the Court's October 9, 2013 opinion and order denying plaintiff's motion for summary disposition. Plaintiff's motion for reconsideration is DENIED.

The core issue originally presented in this case was whether materials purchased by plaintiff on behalf of ITC Transmission Company (ITC)¹ qualified for a use tax exemption under the Use Tax Act (UTA), MCL 205.91, *et seq.* In its opinion denying plaintiff's motion for summary disposition, the Court considered the following issues: (1) whether plaintiff qualified for relief under the "good faith" exception that permits a seller to rely on an exemption certificate obtained from a buyer after it is found that the sale did not qualify for an exemption under the Sales and Use Tax Act; (2) whether the tangible personal property at issue (i.e., the foundations) was eligible for the exemption under the UTA; and (3) whether plaintiff was engaged in an

¹ ITC is an electric transmission company.

industrial processing activity on behalf of an industrial processor within the meaning of the UTA.

A party bringing a motion for reconsideration under MCR 2.119(F)(3) must establish that “the trial court made a palpable error and that a different disposition would result from correction of the error.” MCR 2.119(F)(3); *Herald Co, Inc v Tax Tribunal*, 258 Mich App 78, 82; 669 NW2d 862 (2003). “Moreover, a motion for reconsideration that merely presents the same issues already ruled on by the court generally will not be granted.” *Id.* at 82-83.

First, plaintiff argued in its motion for summary disposition that it was not liable for use tax because it had accepted exemption certificates from ITC and was therefore protected under the “good faith” exception of the UTA which states in pertinent part that:

A seller who complies with the requirements of this section is not liable for the tax under this act if a purchaser improperly claims an exemption. A purchaser who improperly claims an exemption is liable for the tax due under this act. MCL 205.104b(5).

The Court found that plaintiff was not a seller within the meaning of MCL 205.104b(5), but rather a contractor, and therefore a consumer not entitled to rely on the good faith exemption. The Court finds that there was no palpable error made regarding that determination.

Second, plaintiff asserted in its motion for summary disposition that the property in question was eligible for the exemption because it was not permanently affixed to real property. In deciding whether or not foundations used in industrial processing are taxable, the UTA makes it clear that foundations for machinery and equipment are exempt when used in industrial processing, unless the foundations are permanently affixed to real property. MCL 205.94o(4)(b), (d); MCL 205.94o(5)(a). The UTA also makes clear that when used in industrial processing, tangible personal property, including foundations for machinery and equipment, are exempt only when they are not permanently affixed to real property. *Id.* Thus, the resolution of plaintiff’s

motion for summary disposition rested on a proper determination of whether the foundations in question were permanently affixed to real property.

Under *Granger Land Dev Co v Dep't of Treasury*, 286 Mich App 601; 780 NW2d 611 (2009), whether property qualifies as personal or real for purposes of the industrial processing exemption is determined by application of the following three tests: (1) whether the property was actually or constructively annexed to the real estate; (2) whether the property was adapted or applied to the use or purpose of that part of the realty to which the property in question is connected or appropriated; and (3) whether the property owner intended to make the property a permanent accession to the realty. In applying this test, this Court determined that there was insufficient evidence to find that the foundations were not permanently affixed to real property. Specifically, it found a lack of evidentiary support with respect to whether installation of the foundations by the plaintiff involved an intent to make the land more valuable, or whether they were installed for the sole purpose of facilitating electrical processing. The Court's conclusion that there was insufficient evidence to support a finding that the foundations were not "permanently affixed to real property" did not constitute palpable error.

Finally, this Court would note that it previously declined to render an opinion on the issue of whether plaintiff was engaged in industrial processing on behalf of an industrial processor. The Court's decision was based on cases then pending in the Michigan Court of Appeals, and was made because it found that such a determination was unnecessary since the foundations themselves are not eligible for the industrial processing exemption regardless of whether they were used in an industrial processing activity. Plaintiff asks the Court to reconsider its decision because of the Court of Appeals' recent decision in *Detroit Edison Co v Dep't of Treasury*, ___ Mich App ___; ___ NW2d ___ (Docket No. 309732, issued January 9, 2014). In *Detroit Edison*,

the main issue was whether equipment used by the same taxpayer for both a taxable activity (transmission of electricity)² and a non-taxable activity (processing of electricity)³ was eligible for the industrial processing exemption. Looking at the transactions as a whole, the Court in *Detroit Edison* decided that the transmission equipment was part of an integrated system of processing electricity, a nontaxable activity. In the instant case, the Court's opinion was not dependent on whether plaintiff engaged in industrial processing with an industrial processor. Rather, as explained above, it hinged on the taxable nature of the property involved. Therefore, making a determination regarding *Detroit Edison's* application to this case is unnecessary as it would not change the result. Thus, no palpable error exists.

IT IS HEREBY ORDERED that plaintiff's motion for reconsideration is DENIED.

Dated: MAR 21 2014



Hon. Michael J. Talbot
Court of Claims Judge

² See MCL 205.93a(1)(e).

³ See MCL 205.94o(7)(a).