STATE OF MICHIGAN

COURT OF CLAIMS

B & M TOWER TECHNOLOGIES, INC. v DEPARTMENT OF TREASURY

Case No. **16-000229-MT** **Hon. Michael J. Talbot**

ORDER

At a session of said Court held,
Detroit, Wayne, Michigan, on
October 4, 2017.

Plaintiff B & M Tower Technologies, Inc., having filed a motion for summary disposition pursuant to MCR 2.116(C)(10);

Defendant Department of Treasury, having filed a cross-motion for summary disposition under MCR 2.116(C)(10);

IT IS HEREBY ORDERED that Plaintiff's motion for summary disposition is DENIED and Defendant's cross-motion for summary disposition is GRANTED pursuant to MCR 2.116(C)(10).

This is a final order that resolves the last pending claim and closes the case.

Michael J. Talbot, Judge

Court of Claims State of Michigan

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

OCT - 4 2017
Date

Clerk

STATE OF MICHIGAN

COURT OF CLAIMS

B & M TOWER TECHNOLOGIES, INC., Plaintiff,	**OPINION**
v	Case No. 16-000229-MT
DEPARTMENT OF TREASURY, Defendant.	Hon. Michael J. Talbot

Currently before the Court are the parties' competing motions for summary disposition under MCR 2.116(C)(10). The underlying dispute concerns an assessment under the Use Tax Act (UTA), MCL 205.91 *et seq.*, against Plaintiff in the amount of $90,577.07 for unpaid use tax, interest, and penalties. For the reasons stated herein, Defendant's motion for summary disposition is GRANTED pursuant to MCR 2.116(C)(10) and Plaintiff's motion is DENIED.

I. PERTINENT FACTS

Plaintiff is a service provider that installs equipment on cellular telephone towers, as directed by telecommunications companies or by other entities that act as contractors for telecommunication companies. Plaintiff's work includes installing antennas, remote radio units, fiber optic and power cables, and mounting hardware. The equipment—often referred to as the "Installed Equipment"—is provided to Plaintiff by its customers.

Plaintiff does not own the equipment it installs at the behest of its customers. Instead, Plaintiff picks up the equipment from a warehouse—typically a warehouse operated by a third

party—and installs the equipment on the cellular telephone towers. Typically, Plaintiff receives a bill of materials form the customer that includes all the equipment, parts, materials, and supplies to be used on the job. The customer, not Plaintiff, purchases the telecommunications equipment; Plaintiff only installs the new equipment and removes the old equipment. Pursuant to its installation contracts, Plaintiff bears the risk of loss for the equipment after receiving it.

Darren Willis, one of Plaintiff's employees, testified at deposition that Plaintiff installed the pertinent equipment on three different types of towers during the audit period: "self-support towers," "guide towers," and "mono poles." The self-support towers have three support legs, are made from steel, and are anchored to a concrete slab with bolts. The self-support towers are generally between 70 and 750 feet tall. The guide towers are typically made out of steel, sit on a concrete foundation, and are supported by wires or cables. Although some guide towers could be taller, the height of the guide towers on which Plaintiff typically performed work could range from 300 to 500 feet. The mono poles, as the name suggests, consist of a single pole that is bolted to a concrete slab. The mono pole towers are typically less than 250 feet in height. According to Willis, Plaintiff's work primarily consisted of attaching the supplied antennas and radios to the towers. The antennas weighed approximately 40 to 50 pounds, and were attached to a steel "mounting pipe" with u-bolts. The mounting pipe, which served to help elevate the equipment, was bolted to the tower. The radios were attached in a similar manner.

The instant dispute arises out of an audit conducted by Treasury for the tax periods of December 1, 2010, through November 30, 2014. As a result of the audit, Treasury issued an

assessment in the amount of $90,577.07[1] for unpaid tax, penalties, and interest attributable to the equipment Plaintiff installed on cellular telephone towers for its customers.

In January 2015, Treasury requested information from Plaintiff regarding the value of the installed equipment. Treasury continued to request the information for more than a year, but despite Plaintiff's promise to the contrary, it never received the requested information. According to Treasury employee Steven Engel, if Plaintiff could have demonstrated that its customers paid tax—either use or sales tax—on the installed equipment, Plaintiff would not have any tax liability for the equipment. And because Treasury never received information from Plaintiff, Engel employed an "indirect audit procedure," as is specified under MCL 205.104a. Engel arrived at a figure using what he described as "the best information available," which was information taken from Plaintiff's most recent Michigan Business Tax return.

Plaintiff filed a three-count complaint in this Court in September 2016, challenging the imposition of the tax and, as an alternative, challenging the amount of the tax imposed. Plaintiff moved for summary disposition. Treasury responded and moved for summary disposition in its favor. The Court, having reviewed the parties' briefing and exhibits, concludes that summary disposition should issue in favor of Treasury.

[1] The amount due was originally $117,362; this figure reflected certain taxes owed on a Peterbilt Crane. Plaintiff subsequently paid the taxes on the crane, and the only amount in dispute is the amount of use tax for the installed equipment.

II. ANALYSIS

The first issue in this case is whether use tax may be assessed against Plaintiff, an entity that does not own, but merely installs, the subject equipment. The UTA, which is designed to complement the general sales tax act and to cover those transactions not subject to general sales tax, imposes a tax based on the price of the property at issue. *WMS Gaming, Inc v Dep't of Treasury*, 274 Mich App 440, 442-443; 733 NW2d 97 (2007). To that end, the UTA "imposes a 6% tax 'for the privilege of *using*, *storing*, or *consuming* tangible personal property in this state . . . .' " *Detroit Edison Co v Dep't of Treasury*, 498 Mich 28, 32; 869 NW2d 810 (2015), quoting MCL 205.93(1) (emphasis added). Here, the activity at issue implicates "consumption" of personal property. In short, the issue of whether liability can be imposed under the UTA turns on whether Plaintiff is a "consumer" of the Installed Equipment.

A. HAS PLAINTIFF "CONSUMED" THE PROPERTY UNDER THE UTA?

The UTA defines "consumer" as "the person who has purchased tangible personal property or services for storage, use, or other consumption in this state . . ." MCL 205.92(g). The statutory definition continues by specifying examples of those to whom the term "consumer" applies, including "[a] person acquiring tangible personal property if engaged in the business of constructing, altering, repairing, or improving the real estate of others." MCL 205.92(g)(*i*). Construing Subsection 92(g), it is apparent that the plain language of the act generally defines "consumer," and then expands on that general definition by specifying that the term "includes, but is not limited to," certain items. The Court of Appeals has explained that a phrase such as "including but not limited to" is not a phrase of limitation, but instead is one that "connotes an illustrative listing, one purposefully capable of enlargement." *Orthopaedic Assoc of Grand Rapids, PC v Dep't of Treasury*, 300 Mich App 447, 453; 833 NW2d 395 (2013)

(citation omitted). In other words, the phrase "includes, but is not limited to" indicates an enlargement of the preceding term by specifying additional items that fit within the statutory understanding of that particular term. Thus, one can be a consumer if one "acquir[es] tangible personal property if engaged in the business of constructing, altering, repairing, or improving the real estate of others." MCL 205.92(g)(*i*). Under this understanding of "consumer," one is a consumer under the UTA if: (1) he or she "acquires" tangible personal property; and (2) constructs, alters, repairs, or improves the real estate of others.

1. DID PLAINTIFF "ACQUIRE" THE INSTALLED EQUIPMENT?

The UTA does not define the term "acquire," so a dictionary can be used in ascertaining the plain and ordinary meaning of the word. See *Weaver v Giffels*, 317 Mich App 671, 678; 895 NW2d 555 (2016). Black's Law Dictionary defines "acquire" to mean "[t]o gain possession or control of; to get or obtain." *Black's Law Dictionary* (10th ed). This definition does not suggest that one must own, or even obtain title, to something in order to "acquire" it. Rather, merely gaining possession or control of the thing will suffice. Similarly Meriam-Webster's defines "acquire" to mean "to get as one's own: a: to come into possession or control of . . . ." *Merriam-Webster's Collegiate Dictionary* (11th ed). Again, this definition suggests that one can "acquire" something by merely possessing or controlling it, and does not suggest that title must pass to the acquirer.

The idea that one can "acquire" materials under the UTA without obtaining title is further supported by pertinent administrative rules. See *Brunt Assoc, Inc v Dep't of Treasury (On Reconsideration)*, 318 Mich App 449, 458; 898 NW2d 256 (2017) (explaining that a reviewing court may turn to pertinent administrative code sections for guidance in construing undefined statutory terms); *Mich Milk Producers Ass'n v Dep't of Treasury*, 242 Mich App 486, 494; 618

NW2d 917 (2000) (same). Mich Admin Code, R 205.71(2) specifies that "contractors," like Plaintiff,[2] "are consumers of the materials used by them." Stated otherwise, a contractor "consumes" a material by "using" it, not necessarily by owning it or obtaining title to the material.

Two Revenue Administrative Bulletins (RABs) cited by Treasury buttress the above conclusion. RABs, issued under the authority granted to Treasury under MCL 205.3(f), lack the force of law, but can nevertheless be given "respectful consideration." *Ally Fin, Inc v State Treasurer*, 317 Mich App 316, 336; 894 NW2d 673 (2016). See also *Catalina Mktg Sales Corp v Dep't of Treasury*, 470 Mich 13, 20; 678 NW2d 619 (2004). Revenue Administrative Bulletin 2016-18 ("RAB 2016-18") and Revenue Administrative Bulletin 1999-2 ("RAB 1999-2") each contain pertinent sections on contractors and specify when liability for use tax falls on a contractor. For instance, RAB 1999-2 begins by opining that a contractor "incurs sales and use tax responsibilities *as a consumer* in the business of constructing, altering, repairing, or improving real estate for others." RAB 1999-2, p 2 (emphasis added). Moreover, it provides that "a contractor is required to pay sales or use tax if he or she *acquires* tangible personal property even if he or she *does not purchase or own* the tangible personal property if sales or use tax has not already been paid on the tangible personal property." RAB 1999-2, p 3. RAB 2016-18 expresses a similar idea: it begins by noting that "[f]or purposes of use tax, contractors are 'consumers' of materials used and/or consumed by them when engaged in the business of constructing, altering, repairing, or improving real estate of others." RAB 2016-18, p 3. RAB

[2] Indeed, a "contractor" under Mich Admin Code, R 205.71(1) includes "only prime, general, and subcontractors directly engaged in the business of constructing, altering, repairing, or improving real estate for others."

2016-18 continues by stating that "[a] contractor is required to pay sales or use tax on all items used to provide the contractor's services . . . ." RAB 2016-18, p 4. Moreover, the "contractor is required to pay use tax if the contractor *acquires* tangible personal property that it affixes to real property of others in Michigan, *even if the contractor does not purchase or own* the tangible personal property, if sales or use tax has not already been paid on the property." RAB 2016-18, p 4 (emphasis added).

With the above understanding of "acquire," the Court concludes that Plaintiff, under the facts as they have been presented in this case acquires' the Installed Equipment. It is undisputed that Plaintiff, prior to installing the equipment, obtains possession of it by picking it up from a specified location. Having obtained physical possession of the property, Plaintiff has a degree of control over it. According to the dictionary definitions of acquire, as well as the meaning the term has been given in the authorities noted above, this is enough for Plaintiff to acquire the property under the UTA. Indeed, Plaintiff bears responsibility for the equipment at that point, as there is no dispute that Plaintiff bears the risk of loss after it obtains the property. Although Plaintiff does not obtain title to the Installed Equipment and is not free to dispose of the equipment in any manner it sees fit, the plain and ordinary meaning of "acquire" does not necessitate that Plaintiff obtain title to the property. Rather, merely "possessing" or "controlling" it is enough.

2. DID PLAINTIFF IMPROVE THE REAL ESTATE OF OTHERS?

The next issue is whether Plaintiff was "engaged in the business of constructing, altering, repairing, or improving the real estate of others." See MCL 205.92(g)(*i*). As noted by the parties, fixtures, i.e., items affixed to the realty, may be annexed and assimilated into realty. *Kent Storage Co v Grand Rapids Lumber Co*, 239 Mich 161, 164; 214 NW 111 (1927). Here,

the Court must examine whether the cellular telephone towers were affixed to realty, and whether the Installed Equipment was affixed to the towers such that it can be considered to have been an improvement to the realty. Courts typically employ a three-part test in order to determine whether something has been affixed to real property:

> (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. [*Granger Land Dev Co v Dep't of Treasury*, 286 Mich App 601, 611; 780 NW2d 611 (2009) (citation omitted).]

As an initial matter, the towers themselves are fixtures. The towers are bolted to cement slabs and are often hundreds of feet tall. It is apparent that they are affixed to real estate, that adaptation occurred, and that, given the size of the towers and the manner in which they were affixed, they were intended to be permanent accessions to realty. In fact, Plaintiff largely does not contest whether the towers themselves are fixtures, but instead focuses its efforts on arguing that the Installed Equipment is personal property and is not affixed to the towers.

Having concluded that the cellular telephone towers are fixtures, the next question becomes whether the Installed Equipment is permanently affixed to the towers, such that the it can be considered part of the fixture or realty. Regarding annexation, Willis testified that the Installed Equipment was attached to a steel pipe with u-bolts, and that the pipe was in turn bolted to the towers. Thus, the Installed Equipment was clearly "physically attached" or annexed to the towers. See *Brunt Assoc, Inc*, 318 Mich App at 460 (finding that office equipment was physically attached to realty by way of screws, bolts, clips, or fasteners).

As to the second prong of the test, the Installed Equipment was also adapted to the use or purpose of the towers. The purpose of the equipment is relatively undisputed: to help broadcast

a cellular telephone signal. Without this equipment, the utility of the towers as cellular telephone towers would be hampered. This is enough to satisfy the second prong of the test. See *id.* (concluding that office equipment tailored to fit specific needs at the site where it was installed was adapted to the purpose or use of the building in which it was installed).

As for the third factor—intent to be permanent accessions—it should be noted that "the permanence required is not equated with perpetuity." *Id.* (citation and quotation marks omitted). Thus, that the radios and equipment were to remain in place only "until worn out" or they become outdated, is not dispositive. *Id.* Rather, the objective, visible facts control. *Wayne Co v William G Britton and Virginia M Britton Trust*, 454 Mich 608, 619; 563 NW2d 674 (1997). Here, the objective, visible facts are that the Installed Equipment typically consisted of a radio, sometimes weighing in excess of fifty pounds, and an antenna, sometimes weighing approximately 36 pounds, that were bolted to a steel pipe, which in turn was bolted to the tower, oftentimes to a steel plate on the tower. And this entire assembly, which could weigh in excess of 80 pounds, was bolted to a steel plate on the towers in a location that was often hundreds of feet in the air. The size and weight of the equipment, combined with where it was installed and the manner in in which it was installed, demonstrates an intent that it remain as a permanent accession to the towers. See *Brunt Assoc, Inc*, 318 Mich App at 460. The reason the Installed Equipment was installed in the first instance implies the same intent. The equipment was designed to broadcast cellular telephone signals, which is an essential function to the towers' very existence. See *id.* Thus, contrary to Plaintiff's suggestions, that the equipment was replaced when it became outdated is not dispositive. Rather, the intent to remain exists regardless of the fact that the equipment was "affixed until worn out" or replaced by updated equipment. See *id.*

Plaintiff argues that the Installed Equipment was not intended to be affixed to the towers, because the owners of the towers typically do not own the real estate on which the towers are located. According to Plaintiff, there is no evidence that the owners of the towers intended for the towers, or anything affixed thereto, to become part of the real estate on which they are located. In essence, Plaintiff appears to argue that the towers and/or Installed Equipment were essentially "trade fixtures," or "fixture[s] installed on a leasehold by a tenant that the tenant may remove at the termination of the lease." *Wayne Co*, 454 Mich at 612 n 2. This argument is unpersuasive. Even assuming Plaintiff's claim about the leases is accurate—there is no evidence in the record of any such lease agreements—the objective, visible facts, demonstrate that the towers and property attached thereto were intended to be permanently affixed to the realty. Furthermore, and more importantly, the Court of Appeals has explained that "[a]lthough as between lessor and lessee trade fixtures might be personal property, as to third parties they are properly considered as a part of the realty." *Mich Nat'l Bank, Lansing v City of Lansing*, 96 Mich App 551, 556; 293 NW2d 626 (1980). Thus, as far as it concerns Plaintiff, the objective facts show that the towers were fixtures and that the Installed Equipment was permanently affixed to the towers; any leasehold agreements are irrelevant to the question of whether Plaintiff improves "the real estate of others" under MCL 205.92(g)(*i*).

B. WAS THE TAX OTHERWISE PAID?

Having concluded that Plaintiff meets the definition of "consumer" and is therefore subject to the imposition of use tax, one issue remains as to whether use tax could be imposed in the first instance. Plaintiff claims that Sprint, purportedly its largest customer, paid tax on the Installed Equipment, thereby relieving Plaintiff of liability for the tax in this case. In support, Plaintiff cites an affidavit it procured from Anthony M. Whalen, Senior Tax Counsel for Sprint.

Plaintiff argues that Whalen confirmed that Sprint, not Plaintiff, should bear the responsibility for tax on the Installed Equipment.

In situations where there is uncertainty as to which party is responsible for the payment of tax under the UTA or whether an exemption could apply because another party might have already paid the tax, Treasury can require the audited taxpayer to prove that the tax was, in fact, paid by another party. See *Andrie Inc v Dep't of Treasury*, 496 Mich 161, 177-178; 853 NW2d 310 (2014). Here, Plaintiff has not demonstrated that any of its customers paid the requisite taxes on the Installed Equipment. Firstly, Plaintiff admittedly installed equipment for entities other than Sprint, and it only provides an affidavit from a Sprint representative. Thus, even if the Court accepted Plaintiff's characterization of Whalen's affidavit, this would not demonstrate that the entirety of the deficiency was erroneously assessed. Secondly, Whalen's affidavit does not state that Sprint paid taxes on the Installed Equipment. Rather, the affidavit states that Sprint "managed internally the application of sales or use tax on its purchases of Equipment used by" Plaintiff and that "Sprint is responsible for the tax treatment of this Equipment." This does not state that Sprint paid the tax at issue in this case. In fact, in the affidavit of Whalen procured by Treasury, Whalen avers that he undertook a "limited investigation," in response to subpoenas issued by Treasury, of "taxes paid on Sprint's purchases of telecommunications equipment placed in service in Michigan during" the audit period. According to Whalen, this investigation revealed that "it appears Sprint *did not pay any Michigan sales or use tax* on telecommunications equipment placed in service in Michigan . . . ." Thus, the only time Whalen answered the question of whether Sprint paid taxes on the Installed Equipment, he denied that Sprint had done so. Plaintiff's argument falls short of demonstrating the tax was not owed. See *id.*

C. USE OF AN INDIRECT AUDIT PROCEDURE

The last issue in this case concerns the amount of the tax imposed. Under MCL 205.93(1), the tax levied under the UTA for the privilege of using, storing, or consuming tangible personal property is "equal to 6% of the price of the property . . . ." Plaintiff essentially raises two issues about the "price of the property." First, Plaintiff argues that it is undisputed that it paid nothing for the property, hence, the "price" of the property under the UTA is zero, meaning that its tax liability under the UTA is also zero. Second, Plaintiff challenges Treasury's use of an indirect audit methodology in this case.

The UTA imposes a tax based on "price," which the act defines as follows:

> "Purchase price" or "price" means the total amount of consideration paid by the consumer to the seller, including cash, credit, property, and services, for which tangible personal property or services are sold, leased, or rented, valued in money, whether received in money or otherwise, and applies to the measure subject to use tax. Purchase price includes the following subparagraphs (i) through (vii) . . . :
>
> * * *
>
> (ii) Cost of materials used, labor or service cost, interest, losses, costs of transportation to the seller, taxes imposed on the seller other than taxes imposed by this act, and any other expense of the seller. [MCL 205.92(f).]

In light of this definition, the fact that Plaintiff did not pay for the materials is not dispositive, nor must Plaintiff's tax liability be zero. Adopting Plaintiff's position would ignore the plain language of MCL 205.92(f)(*ii*), which specifies that "price" under the act can be the "cost of materials used," regardless of whether the consumer or contractor paid for the materials. Further, adopting Plaintiff's position would render meaningless, in part, the definition of "consumer," which, as noted above, imposes tax liability on a contractor for consuming, though not necessarily purchasing, property.

Plaintiff's next argument challenges Treasury's the ability to rely on an "indirect audit" methodology in calculating the amount of tax due on the Installed Equipment. The UTA imposes certain record-keeping requirements on taxpayers. See MCL 205.104a. This includes an obligation to keep "sufficient records," which the act defines as "records that meet the department's need to determine the tax due under this act." MCL 205.104a(7)(b). A taxpayer's failure to maintain "sufficient records" enables Treasury to employ alternative methods to determine the amount of tax due. As specified in Subsection 104a(4), in the event a taxpayer

> fails to file a return or to maintain or preserve sufficient records as prescribed in this section, or the department has reason to believe that any records maintained or returns filed are inaccurate or incomplete and that additional taxes are due, the department may assess the amount of the tax due from the taxpayer based on an indirect audit procedure or any other information that is available or that may become available to the department. [MCL 205.104a(4).]

Should Treasury employ an indirect audit procedure to calculate an assessment, "[t]hat assessment *is considered prima facie correct* for the purpose of this act and the burden of proof of refuting the assessment is upon the taxpayer." MCL 205.104a(4) (emphasis added).

There is no merit to Plaintiff's position that Treasury was precluded from using an indirect audit procedure in this case. Treasury determined that Plaintiff did not keep sufficient records to enable Treasury to make a determination of the tax due on the Installed Equipment. This was enough to permit the use of the indirect audit procedure. See MCL 205.104a(4) and (7)(b). Moreover, not only does the record show that Plaintiff did not have the pertinent records, but it failed to provide them despite Treasury's repeated requests—made over the course of approximately one year—for the records. This was in spite of a purported promise from Plaintiff to provide the records.

Because Treasury's decision to employ an indirect audit procedure was permitted under the statute, the assessment derived from its procedure was "prima facie correct" and "the burden of proof of refuting the assessment" is on Plaintiff. MCL 205.104a(4). Plaintiff has not offered any evidence to refute the validity of the assessment. In fact, the only argument Plaintiff makes in regard to the amount imposed is to selectively quote portions of Engel's deposition testimony in which he testified that, given the complete lack of records, his chosen methodology could have "wildly overstated" or "wildly understated" the amount of tax due. However, as noted above, Engel also testified that he arrived at his methodology by utilizing what he described as "the most reliable" information he had, the 2010 tax return, as this was essentially the *only* information he had. And Engel explained that the 2010 tax return included costs of materials, such as an antenna, that at least bore some relation to the Installed Equipment. Accordingly, on this record, Plaintiff has not refuted the statutory presumption that the assessment was "prima facie correct."

Lastly, the Court rejects Plaintiff's argument that Treasury should have contacted Plaintiff's customers in order to either obtain the purchase price of the equipment, or to confirm whether its customers paid sales or use tax on the Installed Equipment. Plaintiff can point to no authority in support of this position. And although MCL 205.104a(4)(c) references the use of third-party records for purposes of conducting an indirect audit, the statute permits, but does not require, Treasury to do so. See MCL 205.104a(4)(c) (explaining that Treasury "may use third-party records in the reconstruction"). See also *Perkovic v Zurich American Ins Co*, 500 Mich 44, 61-62; 893 NW2d 322 (2017) (recognizing that the word "may" indicates a permissive directive, rather than a mandatory directive).

III. CONCLUSION

For the foregoing reasons, the Court finds that summary disposition in favor of Treasury is warranted.

Dated: October 4, 2017

Michael J. Talbot, Judge