IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS

Gadola, P.J., and K.F. Kelly and Riordan, JJ.

TOMRA OF NORTH AMERICA, INC., Plaintiff-Appellee, v DEPARTMENT OF TREASURY, Defendant-Appellant.	Supreme Court No. 158333 Court of Appeals No. 336871 Court of Claims No. 16-000118-MT

TOMRA OF NORTH AMERICA, INC., Plaintiff-Appellee, v DEPARTMENT OF TREASURY, Defendant-Appellant.	Supreme Court No. 158335 Court of Appeals No. 337663 Court of Claims No. 14-000091-MT

BRIEF ON APPEAL OF PLAINTIFF-APPELLEE

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Treatises

STATEMENT OF BASIS OF JURISDICTION

Plaintiff-Appellee, TOMRA of North America, Inc., ("TOMRA"), agrees with Defendant-Appellant, Department of Treasury, State of Michigan's (the "Department"), Statement of Jurisdiction.

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

The industrial processing exemption from sales and use tax was enacted to prevent a "pyramiding" of tax. That is, if a process results in a product that is subject to tax when sold, the components used or consumed in its production are not taxed so that the product is not subject to double taxation. *Elias Bros Restaurants, Inc v Dep't of Treasury*, 452 Mich 144, 152; 549 NW2d 837 (1996). Plaintiff-Appellee TOMRA of North America, Inc. ("TOMRA") sells and leases Container Recycling Machines and related parts, which begin the recycling process through testing, sorting, puncturing, and crushing recyclable beverage containers that are remanufactured into consumer products. Subsections (3) and (7)(a) of MCL 205.54t of the General Sales Tax Act ("GSTA") and the identical provisions of MCL 205.94o of the Use Tax Act ("UTA") exempt equipment used in certain defined exempt activities.[1] With that background, the questions presented are:

1. Did the Court of Appeals properly hold that industrial processing activities specifically defined as industrial processing in Subsections (3) are exempt without regard to the general definition in Subsection (7)(a) and depends upon the use made of the equipment at issue?

Plaintiff- Appellee answers, "Yes."

Defendant- Appellant answers, "No."

The Court of Claims answered, "No."

Court of Appeals answered, "Yes."

2. Did the Court of Appeals properly hold that raw material storage is not a condition precedent to the existence of exempt industrial processing and that imposition of raw material storage as a temporal requirement would render portions of Subsection (3) of the statute meaningless?

Plaintiff- Appellee answers, "Yes."

Defendant- Appellant answers, "No."

The Court of Claims answered, "No."

Court of Appeals answered, "Yes."

[1] For brevity, these subsections will be acknowledged as "Subsection (3)" and "Subsection (7)".

3. Are TOMRA's Container Recycling Machines exempt under the industrial processing exemption when the Container Recycling Machines perform the following functions that are statutorily defined as exempt activities pursuant to the relevant statute:

- changing the form through crushing and puncturing, changing the combination and composition of a mixed stream of recyclable cans and bottles into a separated homogeneous collection of glass, aluminum and plastic for ultimate sale at retail (MCL 205.54t(7)(a));
- performing inspection, quality control, and testing of the mixed stream of recyclable cans and bottles (MCL 205.54t(3)(d));
- remanufacturing (MCL 205.54t(3)(g));
- handling the bottles and cans as production materials (MCL 205.54t(3)(j));
- recycling of aluminum, plastic and glass containers by testing, separation of mixed recyclables by material and color, then crushing and puncturing (MCL 205.54t(3)(i)); and,
- storing separated, crushed, punctured and shredded in-process materials for transport to the next phase of recycling (MCL 205.54t(3)(k))?

Plaintiff- Appellee answers, "Yes."

Defendant- Appellant answers, "No."

The Court of Claims answered, "No."

Court of Appeals answered: "Remanded to the Court of Claims."

I. INTRODUCTION

The issue before this Court is the proper interpretation of the statutory provisions of the industrial processing exemption from the Michigan Sales Tax Act, 1933 PA 167, MCL 205.51 *et seq.* ("Sales Tax Act" or the "GSTA") and the identical provisions under the Michigan Use Tax Act, 1937 PA 94, MCL 205.91 *et seq.* ("Use Tax Act" or "UTA"). The industrial processing exemption has existed in the GSTA and UTA for decades.[2] In 1999, however, the industrial processing exemption was extensively amended by the Legislature in 1999 PA 116 (amending the GSTA) and 1999 PA 117 (amending the UTA). Because the amendments of the industrial processing exemption of the GSTA and UTA were identical, 1999 PA 116 and 1999 PA 117 are referred to collectively as the "1999 Amendments." The interplay of two subsections of the 1999 Amendments is the primary issue before this Court. Specifically, Subsection (7)(a)[3], the general definition of "industrial processing," and Subsection (3)[4], a specific definition of industrial processing activities.

The Department's argument in this appeal is that an activity listed in Subsection (3) must also meet the provisions of Subsection (7)(a) to be considered an industrial processing activity. The Department's argument fails to address the obvious fact that if an activity met the general definition of industrial processing in Subsection (7)(a), it would be exempt regardless of the provisions of Subsection (3) and, therefore, the Department's position renders Subsection (3) surplusage. In Subsection (3), the Legislature plainly intended that the listed activities were to be considered to be industrial processing regardless of whether they met the general definition of

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[2] See, e.g., *Mich Allied Dairy Ass'n v Auditor General*, 302 Mich 643; 5 NW2d 516 (1942).

[3] Subsection (7)(a) of MCL 205.54t and MCL 205.94o.

[4] Subsection (3) of MCL 205.54t and MCL 205.94o.

industrial processing in Subsection (7)(a) and the Department's position negates both the clear intent and the plain language of the 1999 Amendments.

Furthermore, every single activity listed in Subsection (3) could never meet the provisions of Subsection (7)(a), which is exactly why the Legislature specifically provided that the activities enumerated in Subsection (3) were to be considered industrial processing. For example, "[r]esearch or experimental activities" and "[d]esign, construction, or maintenance of production or other exempt machinery, equipment, and tooling" would not meet the definition of industrial processing in Subsection (7)(a) because they do not convert or condition property for sale by changing the form, composition, quality, combination, or character of the property and also do not occur after property begins movement from raw materials storage.[5]

The Court of Appeals properly held that Subsection (3) means what it says – those listed operations are industrial processing and to require those activities also to satisfy the requirements of the general definition under Subsection (7)(a) would disqualify most of the those activities from the industrial processing exemption, contrary to statutory language and legislative intent. In so holding, the Court of Appeals ensures that the Subsection (3) listing of the exempt industrial processing activities was not rendered meaningless. *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002) (courts must give effect to every word, phrase and clause in a statute).

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[5] Likewise, "storage of in-process materials" and "[p]lanning, scheduling, supervision, or control" do not change "the form, composition, quality, combination, or character of the property" and would not be industrial processing under Subsection (7)(a). "Design, construction, or maintenance of production or other exempt machinery, equipment, and tooling" do not change "the form, composition, quality, combination, or character of the property" and occur before any raw material storage and would not be industrial processing under Subsection (7)(a).

The Defendant-Appellant Michigan Department of Treasury's ("Department") argument that, despite the clear and unambiguous language of the statute, a limitation must be read into Subsection (3) of the statute is contrary to the fundamental principles of statutory interpretation. The language of the statute controls and prohibits insertion of language and restrictions not included by the Legislature. *Ford Motor Co v Dep't of Treasury*, 496 Mich 382, 389; 852 NW2d 786 (2014). The Department turns the specific/general rule of statutory construction on its head, arguing that the general definition of industrial processing controls over the specific definition in Subsection (3). The Department's argument that raw material storage is required is legally and factually erroneous because it: (1) renders nugatory and fails to give meaning to the definitions of industrial processing and eligible machinery under Subsections (3) and (4); (2) violates general/specific rule of statutory interpretation; (3) imposes a requirement for raw material storage as a precondition for the exemption; (4) ignores temporary raw material storage prior to containers entering the Container Recycling Machines; and (5) misapplies this Court's holding in *Detroit Edison Co v Dep't of Treasury*, 498 Mich 28, 49; 869 NW2d 810 (2015) that certain activities that do not satisfy the general definition under Subsection (7)(a) constitute industrial processing by definition under Subsection (3).[6]

The Container Recycling Machines and parts sold by TOMRA at issue are familiar to many consumers as the machines that accept recyclable beverage containers and test, sort, crush, puncture and shred those containers in the first step in a mandatory beverage container redemption and recycling system in Michigan that is continued by recycler Schupan Recycling for eventual

[6] *Detroit Edison*, 489 Mich at 49 n 13.

conversion into new products for sale at retail. These machines perform activities defined as industrial processing under Subsection (3) and qualify as exempt.

For the foregoing reasons, and as more fully explained herein, this Court should affirm the decision below.

II. COUNTER-STATEMENT OF STANDARD OF REVIEW AND CONSTRUCTION OF TAX STATUTES

This case requires interpretation of the GSTA and the UTA. Questions of statutory interpretation, as well as motions for summary disposition, are reviewed *de novo*. *Malpass v Dep't of Treasury*, 494 Mich 237, 245; 833 NW2d 272 (2013). As this Court held:

> When interpreting statutes, 'our primary task ... is to discern and give effect to the intent of the Legislature.' *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999) (citations omitted). To accomplish that task, we begin by examining the language of the statute itself. *Id.* (citation omitted). '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.' *Id*. (citation omitted). [*Ford Motor Co*, 496 Mich at 389.]

Thus, clear and unambiguous language in a tax statute should be interpreted and enforced as written. *Ford Motor Co*, 496 Mich at 389. Tax exemption statutes are construed against the taxpayer. *Guardian Indus Corp v Dep't of Treasury*, 243 Mich App 244, 249; 621 NW2d 450 (2000); *Elias Bros*, 452 Mich at 152. While a taxpayer has the burden of proof to show that it is entitled to a tax exemption, a tax exemption should not be contracted or expanded by implication or a forced construction. *Ally Financial, Inc v State Treasurer*, 502 Mich 484; 918 NW2d 662 (2018) (a strained construction of an exemption, contrary to Legislature's intent, is not permitted); *Mich Allied Dairy Ass'n v Auditor General*, 302 Mich 643, 650; 5 NW2d 516 (1942); *Mich Milk Producers, Ass'n v Dep't of Treasury*, 242 Mich App 486, 493; 618 NW2d 917 (2000); *Mich Bell Tel Co v Dep't of Treasury*, 229 Mich App 200, 208-210; 581 NW2d 770 (1998).

III. STATUTES AT ISSUE

The industrial processing exemption has existed for decades. The Legislature expanded the scope and reach of the industrial processing exemption in 1999 PA 116 and 117. First, the Legislature added apportionment of the exemption in response to the *Mich Bell*, 229 Mich App 200 decision. App 236a. Second, the Legislature added subsections that expanded and enlarged the controlling definition of "industrial processing" to apply to more types of users, activities and equipment than were previously allowed. See, e.g. Senate Legislative Analysis, SB 544, HB 4744, 4745, and 4586 (July 19, 1999), App 207b at 4 ("The bills provide for revised and expanded industrial processing exemption for personal property sold after March 30, 1999"). See also App 236a. The exemption was expanded to apply to sales of tangible personal property to persons who are not industrial processors if the tangible personal property is used to perform an industrial processing activity. MCL 205.54t(1)(c) and 205.94o(1)(c). The Legislature added specific delineated operations and activities that constitute industrial processing and machinery and equipment that qualifies in MCL 205.54t(3), 205.54t(4), 205.94o(3) and 205.94o(4) as well as a general definition of industrial processing, MCL 205.54t(7)(a) and 205.94o(7)(a).

Parallel sections under MCL 205.54t and MCL 205.94o establishes an industrial processing exemption from the sales tax and use tax, respectively providing:

> (1) The sale of tangible personal property to the following after March 30, 1999, subject to subsection (2), is exempt from the tax under this act:
>
> * * *
>
> (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.

* * *

(3) Industrial processing includes the following activities:

(a) Production and assembly.

(b) Research or experimental activities.

(c) Engineering related to industrial processing.

(d) Inspection, quality control, or testing to determine whether particular units of materials or products or processes conform to specified parameters at any time before materials or products first come to rest in finished goods inventory storage.

(e) Planning, scheduling, supervision, or control of production or other exempt activities.

(f) Design, construction, or maintenance of production or other exempt machinery, equipment, and tooling.

(g) Remanufacturing.

(h) Processing of production scrap and waste up to the point it is stored for removal from the plant of origin.

(i) Recycling of used materials for ultimate sale at retail or reuse.

(j) Production material handling.

(k) Storage of in-process materials.

(4) Property that is eligible for an industrial processing exemption includes the following:

* * *

(b) Machinery, equipment, tools, dies, patterns, foundations for machinery or equipment, or other processing equipment used in an industrial processing activity and in their repair and maintenance.

* * *

(6) Industrial processing does not include the following activities:

(a) Purchasing, receiving, or storage of raw materials.

* * *

(7) As used in this section:

(a) '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. 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.

(b) 'Industrial processor' means 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.

* * *

(d) 'Remanufacturing' means the activity of overhauling, retrofitting, fabricating, or repairing a product or its component parts for ultimate sale at retail.

Michigan's Beverage Containers Act, 1976 IL 1, MCL 445.571 *et seq.* (hereinafter the "Bottle Bill"), was enacted to mandate recycling of bottles and containers. The Bottle Bill prohibits the sale of certain beverages in nonrefundable containers. Refundable containers may not be disposed of in a landfill.[7] The Bottle Bill requires beverage wholesalers, distributors, or bottlers to initiate a 10 cent deposit on returnable beverage containers by collecting 10 cents for each bottle sold to a retailer. Retail stores selling beverages in returnable containers must collect

[7] See also MCL 324.11514 and MCL 324.11502(a).

10 cents for each bottle sold and are made whole. Retail sellers must also accept, on their premises, used returnable beverage containers offered for sale by them for recycling and deposit return. The retailer remits the deposit to the consumer returning the container and is reimbursed by the beverage wholesaler, distributor or bottler. The distributors must transport returned beverage containers from the retailers to processing centers for recycling. MCL 455.572(2).

IV. COUNTER-STATEMENT OF FACTS

In Michigan, TOMRA operates in the used beverage container recycling industry. As Charles W. Riegle, Jr., Senior Vice President of TOMRA, testified, "[TOMRA] provide[s] technologies and services that facilitate the recycling of used beverage containers."[8] Specifically, TOMRA sold and leased Container Recycling Machines and TOMRA also serviced and sold parts for Container Recycling Machines.[9] TOMRA did not sell any other items of tangible personal property in Michigan during the tax periods at issue.[10] TOMRA entered into maintenance contracts with its customers to repair a Container Recycling Machine if it was not working properly.[11]

A. Container Recycling Machines.

Uncontroverted testimony established that Container Recycling Machines are the first step in recycling aluminum, plastic, and glass containers into new aluminum, plastic, and glass

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[8] Riegle Dep, App 167a at 9:10-12; Mailloux Aff, App 169b at ¶¶6-8

[9] Riegle Aff, App 220a at ¶¶6-7; Mailloux Aff, App 169b at ¶¶6-8; TOMRA claims a refund only for repair parts it sells, even if other companies, such as UBCR, may also service and repair these machines.

[10] Riegle Aff, App 220a at ¶7; Mailloux Aff, App 169b at ¶8.

[11] Mailloux Aff, App 169b at ¶¶9-10.

containers and products for reuse and resale.[12] Grocery stores and other retailers do not need Container Recycling Machines to comply with the Bottle Bill.[13] Retailers can and do manually accept bottles and containers, count returned items, provide consumers the deposit and receive reimbursement from distributors/wholesalers. The Container Recycling Machines go far beyond counting returned containers and begin the recycling process.[14]

In the typical curbside recycling operation, mixed materials are collected and delivered to a recycling facility.[15] The recycler must first sort the waste by material type and color, then consolidate each type by crushing or shredding. The success of the remainder of the recycling process downstream is contingent upon having a bulk of raw material of glass, plastic, and aluminum that is extremely pure and free of contaminants, such as ferrous metal containers in the recyclable aluminum container inventory or green glass containers in the recyclable clear glass container inventory so sorting is a key process for the recycler.[16] The materials are then further compacted and baled.[17] The baled materials are then sold to the manufacturer for production into consumer products.[18]

Container Recycling Machines perform the first two key components of recycling through sorting and compaction, as the Department auditor acknowledged.[19] These machines initiate

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[12] Riegle Aff, App 220a at ¶¶8-10; Riegle Dep, App 175a-176a at 17:24 to 18:10; App 180a at 22:7-11; App 188a at 30:20-24; App 190a-191a at 32:18 to 33:8.

[13] Riegle Dep, App 170a-171a at 12:23 to 13:12.

[14] *Id.*

[15] Riegle Dep, App 196a-197a at 38:2-8.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] Kolbig Dep, App 002b-003b at 17:25 to 18:22; Riegle Dep, App 190a-193a at 32:18 to 35:7.

recycling by transforming a mixed stream of bottles and cans into single, recyclable homogenous materials (aluminum, glass or plastic) separated by color and flattened or punctured and shredded. This creates efficiency because the next recycling facility does not have to perform those steps.[20] The machines sort, inspect, perform quality control, perform production material handling and are otherwise engaged in activities that constitute industrial processing activities.[21]

Container Recycling Machines are typically located in separate recycling rooms in larger retailers and grocers.[22] During the tax periods at issue, the Container Recycling Machines in Michigan accepted glass, aluminum or plastic containers, the combination of aluminum and plastic containers, or all three container types.[23] Individuals collect used bottles and cans from waste containers, separate out returnable used beverage containers, transport such containers to a store with a Container Recycling Machine and input the containers from their trash bags through the machine's acceptance slot onto a conveyor belt. The machine then performs inspection, quality control and testing on the container to determine whether the container conforms to specific parameters, including whether any liquid is within the container.[24]

The Container Recycling Machine conveyor moves the containers to an optical reader. The machine scans the universal product code ("UPC"). TOMRA programs additional information linked to the UPC for the material type and weight of the container.[25] The machine uses the

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[20] Riegle Dep, App 195a-196a at 37:2 to 38:8.

[21] Riegle Aff, App 220a at ¶11; Riegle Dep, App 188a-189a at 30:24 to 31:2; App 190a-191a at 32:21 to 33:8.

[22] Riegle Dep, App 173a at 15:21-25.

[23] Riegle Aff, App 220a-221a at ¶12; Riegle Dep, App 174a-175a at 16:11-17; App 192a at 34:2-20.

[24] Riegle Aff, App 221a at ¶¶13-14; Riegle Dep, App 180a at 22:3-11; App 192a at 34:7-20.

[25] Riegle Dep, App 190a at 32:3-17.

programed information and the UPC to determine if the container is an acceptable returnable container for recycling and the parameters of the TOMRA customer.[26] If a container is not an acceptable container or is the incorrect material type, the container is rejected.[27] The Container Recycling Machine uses the programed information to determine the material content of the container, the weight of the container, and the amount of material content along with the color of the content.[28] The Container Recycling Machine maintains a count of containers, their raw material content and quantity and color. [29] The containers are further sorted by material content into aluminum, plastic, and glass.[30] Aluminum cans are crushed and crushing is part of the recycling process. Cans then move to an in-process bin within the Container Recycling Machine.[31] Plastic bottles are sorted by color and converted and conditioned by making waffle punctures and then compacted and moved to an in-process bin.[32] Glass containers are sorted by color: clear, green and amber, and moved to in-process bins.[33] The beverage containers are then transported by Used Beverage Container Recycling LLC (UBCR) to a processing plant owned by Schupan Recycling. UBCR is a joint venture between TOMRA and Schupan Recycling. At Schupan Recycling the beverage containers are further compacted into bales of material and sold to

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[26] Riegle Aff, App 221a-222a at ¶¶14-21; Riegle Dep, App 177a-178a at 19:3-10 to 20:25; App 180a at 22:3-11; App 189a at 31:3-7; App 189a-190a at 31:22 to 32:17; App 191a-192a at 33:19 to 34:1.

[27] Riegle Aff, App 221a at ¶20; Riegle Dep, App 177a-178a at 19:11 to 20:5.

[28] Riegle Aff, App 222a at ¶24; Riegle Dep, App 179a-180a at 21:20 to 22:11; App 182a at 24:2-10; App 192a at 34:2-20.

[29] Riegle Aff, App 222a at ¶¶23-24; Riegle Dep, App 180a-181a at 22:3-23:7.

[30] *Id.*, App 223a at ¶26.

[31] *Id.*, App 223a at ¶28; Riegle Dep, App 180a at 22:7-11; App 181a at 23:1-7.

[32] Riegle Aff, App 223a at ¶29; Riegle Dep, App 193a-194a at 35:18 to 36:17.

[33] Riegle Aff, App 223a at ¶¶27-31; Riegle Dep, App 192a-193a at 34:2 to 35:17.

beneficiator or end users who turn the materials into consumer products, such as new containers, carpeting, automotive parts or other products.[34] Contrary to the Department's assertion, Appellant's Brief at 6, these containers must be recycled and may not be disposed of in a landfill. See earlier at 7 n 7.

B. TOMRA's Sales of Container Recycling Machines.

During the tax periods at issue, TOMRA did not realize that the Container Recycling Machines were exempt under the industrial processing exemption and erroneously charged its customers Michigan sales tax on the sale or lease of Container Recycling Machines, as well as on the sales of parts and supplies for the Container Recycling Machines. TOMRA only sold or leased Container Recycling Machines and parts and charged sales tax on the sales. TOMRA remitted all sales tax to the Department. TOMRA also remitted use tax to the Department on repair parts that were used by TOMRA to repair Container Recycling Machines in Michigan.

C. The Audit and Claims for Refund.

The Department conducted an audit of TOMRA for tax periods from October 1, 2003 through December 31, 2008. During the audit, the Department's auditor erroneously believed that TOMRA could not claim an industrial processing exemption for the machines and did not consider the exemption.[35] The auditor became confused about TOMRA's recordkeeping and remittance of sales tax, particularly as it relates to capital leases. Kolbig Dep, App 128a at 23:14-23. TOMRA treated capital leases as sales of the Container Recycling Machines at issue and collected tax upon the execution of the lease and immediately remitted such amounts to the Department, even though

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[34] Riegle Aff, App 223a at ¶32 App 224a at ¶40; Riegle Dep, App 184a-185a at 26:21 to 27:14; App 186a at 28:4; App 187a at 29:10; App 198a-200a at 40:6 to 41:25. See also at 33-34 below for further detail about products made from recycled containers.

[35] Kolbig Dep, App 003b-005b at 18:2 to 20:7.

TOMRA continued to collect the financed purchase price from the customer. Mailloux Aff, App 170b-171b at ¶¶15-16, 175b-176b at ¶¶50-57; Plaintiff's Response to Department's Third Discovery Requests, App 026b-028b at 3-5. The Department's auditor assumed that additional monthly remittances of financed purchase price payments from capital lease customers were sales without remittance of sales tax and, thus, assessed additional amounts thereon. *Id.* Accordingly, the amount of the assessed tax was unrelated to actual sales but, rather, was an amount calculated by the Department's auditor as purported sales based upon the auditor's misunderstanding of TOMRA's tax remittance processes. *Id.* The Department issued an Intent to Assess sales taxes in the amount of $516,562 plus negligence penalty of $58,502 and interest of $197,601.50.

When a taxpayer receives an exemption claim from a customer, it is not required to collect sales tax, even if the purchaser improperly claims the exemption. MCL 205.62(5). TOMRA received a claim of exemption under the industrial processing exemption from Meijer and WalMart, and a resale exemption from Spartan.[36] The Department refused to honor these exemption claims. TOMRA submitted claims for refund to the Department for Michigan sales tax collected from TOMRA's customers and detailed the calculations and the bases for the refund claim.[37] TOMRA filed a request for informal conference. The Department's hearing referee determined that the aluminum crushing and plastic compaction were industrial processing but sorting glass by color was not.[38] The Hearing Referee denied the exemption due to lack of proof

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[36] The Department admits that TOMRA may rely upon the exemption certificates to obtain a refund. Wilkinson Dep, App 022b at 25:3-11. Other customers may not have submitted an exemption certificate due to the Department's erroneous published position that those machines are not exempt. Michigan Department of Treasury - *Revenue Technical Tax Training, Sales and Use Tax: The Industrial Processing Exemption*, July 2002, App 339b.

[37] Koutroumanis Aff, App 044b-045b at ¶¶8-10 and Tab A.

[38] Department Informal Conference Decision and Recommendation, App 006b.

that the aluminum, glass and plastic were ultimately made into products for resale to consumers. The Department denied TOMRA's refund for tax periods October 1, 2003 through December 31, 2008.

In Court of Claims Docket No. 16-118-MT, TOMRA submitted a claim for refund to the Department for Michigan sales tax collected from TOMRA's customers and remitted to the Department, as well as the use tax TOMRA remitted to the Department for the 2011 tax period. TOMRA's refund request included detailed calculations and the bases for the refund claim. The Department did not act on TOMRA's 2011 refund claim and TOMRA filed a suit for refund.

D. Proceedings Before the Court of Claims.

TOMRA timely filed a complaint contesting the denial of its refund request (Docket No. 14-91-MT) and a complaint contesting the Department's assessment (Docket No. 14-185-MT). The cases were consolidated and the parties engaged in extensive discovery. On February 18, 2015, the parties filed cross motions for summary disposition under MCR 2.116(C)(10). On March 13, 2015, however, the Department filed a motion under MCR 2.116(C)(4), arguing that TOMRA did not make a full payment under protest of the sales tax assessment as the transmittal letter mistakenly referenced "use tax;" thus, the Court of Claims lacked subject-matter jurisdiction. The Court of Claims never addressed the parties' February 18, 2015 cross motions for summary disposition but instead granted the Department's (C)(4) motion and dismissed both actions for lack of subject-matter jurisdiction, not on the merits. The Court of Appeals reversed that decision of the Court of Claims.[39] On remand, the Court of Claims issued a Sua Sponte Order for the Filing of Briefs, ordering the parties to file Briefs. In response, TOMRA filed its Brief on March 16,

[39] See *TOMRA of N Am, Inc v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals (November 17, 2016, Docket Nos. 328545 and 329932).

2017. One day later, the Court of Claims granted summary disposition to the Department. To date, the Court of Claims has never addressed the parties February 18, 2015 cross motions for summary disposition.

On October 17, 2016, TOMRA filed a Motion for Partial Summary Disposition and Declaratory Judgment in Docket No. 16-118-MT with the Court of Claims. After briefing by both parties, the Court of Claims granted Summary Disposition to the Department.

In both cases, the Court of Claims held that regardless of whether the machines performed tasks were specifically defined as industrial processing under Subsection (3), the machines also perform raw material storage that is non-exempt under MCL 205.54t(6) and therefore the machines' activities are not industrial processing.

E. The Court of Appeals' Published Decision and Further Proceedings.

The Court of Appeals held that the definition of industrial processing under MCL 205.54t(7)(a) ("Subsection (7(a))") does not exclude specifically defined industrial activities under subsections MCL 205.54t(3) ("Subsection (3)") and MCL 205.54t(4) ("Subsection (4)"). Under Subsection (4), machinery used to perform an industrial processing activity is exempt. *TOMRA of N Am, Inc v Dep't of Treasury,* 325 Mich App 289, 298-299; 926 NW2d 259 (2018). Subsections (7)(a) and (3) define industrial processing. Thus, activities that are plainly defined as industrial processing under these two subsections are exempt even if there is no raw material storage. The Court of Appeals refused to limit qualified industrial processing activities to only those activities preceded by raw material storage in Subsection (7)(a). *Id.* at 302-303. The Court of Appeals interpreted the reference to raw material storage as a delineation of when the non-exempt activity ended, rather than a precondition for the exempt activity to begin just as this Court has determined that finished goods storage is not a necessary condition for the exemption in *Detroit Edison*. *Id.* at 302 n 5. Judge K.F. Kelly dissented.

The Department filed an application for leave to appeal. On March 27, 2019, this Court granted leave and invited interested persons to move the Court for permission to file briefs amicus curiae. The case was remanded to determine the entitlement to the exemption.

V. ARGUMENT

A. Under the Plain Language of the Statute and the Fundamental Principles of Statutory Interpretation, Machinery That Performs Industrial Processing as Defined in Subsection (3) is Exempt.

The Department no longer challenges the determination that the Container Recycling Machines conduct activities (inspection, testing, quality control, sorting, crushing, shredding and recycling) that are identified as industrial processing activities under Subsection (3). Rather, the Department takes issue with the Court of Appeals' application of Subsection (3) and Subsection (7)(a), both of which define the parameters of exempt industrial processing operations. The Department asks this Court to interpret the specific statement of industrial processing operations in Subsection (3) as limited and controlled by the more general definition of Subsection (7)(a). The Department's argument is incorrect. First, under rules of statutory interpretation, a specific provision controls over a general provision on the same subject. A definitional section that identifies specific activities that are "included" in the generally defined term is an expansion of the general definition. Second, this Court has already recognized that industrial processing is defined under both Subsections (3) and (7)(a). Finally, under this Court's *Detroit Edison* decision, neither raw material storage nor finished good storage is a necessary condition for industrial processing. For those reasons, this Court should affirm the Court of Appeals' judgment.

1. The Specific Statutory Definition of Industrial Processing Activity Controls Over the General Definition of Industrial Processing.

The principle rule for statutory construction is to discern and give effect to the Legislature's intent as expressed in the statutory language. *Massey v Mandell*, 462 Mich 375, 379-380; 614

NW2d 70 (2000); *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000). "The Legislature is presumed to have intended the meaning it plainly expressed." *Linsell v Applied Handling, Inc*, 266 Mich App 1, 15; 697 NW2d 913 (2005). If the language is plain and unambiguous, then judicial construction is neither necessary nor permitted. *Ally Financial, Inc*, 502 Mich at 493.

In this case, the statute is not ambiguous and must be applied as written. The industrial processing exemption is structured as follows. Subsection (1) defines persons entitled to claim the exemption. Subsection (2) provides for apportionment of the tax between exempt and non-exempt use. Subsection (3) defines specific industrial processing activities and Subsection (6) defines activities excluded from industrial processing. Subsection (4) identifies eligible property and Subsection (5) identifies ineligible property. Finally, Subsection (7) provides general definitions, including a general definition of "industrial processing" in Subpart (a). The first sentence of Subsection (7)(a) defines activities and operations that generally constitute industrial processing. The second sentence identifies when non-exempt raw material storage ends and industrial processing begins and when exempt industrial processing ends.

When machinery is sold to a person entitled to claim the exemption, the exemption applies if the machinery performs industrial processing activity under Subsection (3). If the machinery does not perform one of the specific activities listed under Subsection (3), but the machine's activities meet the general definition of industrial processing under Subsection (7)(a), then the exemption applies to the sale or use.

In this case, the Container Recycling Machines perform activities defined as industrial processing activities under Subsection (3) and this plain language controls. The Department fails to identify any ambiguity in the statutory language. Instead, the Department argues that the

taxpayer must also identify an antecedent incidence of raw material storage in order to qualify for the exemption. Under this Court's application of general/specific rule of statutory construction, the Department's argument fails. Under the general/specific rule "[I]t is a settled rule of statutory construction that where a statute contains a specific statutory provision and a related, but more general, provision, the specific one controls." See *In re Haley*, 476 Mich 180, 198; 720 NW2d 246 (2006); see also *Ter Beek v City of Wyoming*, 495 Mich 1, 22; 846 NW2d 531 (2014) ("It is well accepted that when two legislative enactments seemingly conflict, the specific provision prevails over the more general provision."). This rule applies when there is a statutory tension or conflict between two possible treatments of a subject. *Detroit Edison* at 44. In this case, the Subsection (3) specific delineation of exempt industrial processing operations controls over Subsection (7)(a) general provisions. The Department's argument that the general definition of industrial processing's limits and must be applied to trump the specific definition of industrial processing of Subsection (3) must fail.

The Court of Appeals correctly applied the statutory definitions of industrial processing. Subsection (7)(a) states:

> '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.

Subsection (3) lists eleven categories of activities and operations that are also defined as industrial processing by stating, "Industrial processing includes the following activities: . . .." The purpose of the separate listing of these eleven activities was to ensure inclusion in the exempt industrial processing category despite any apparent disqualification under the general definition of Subsection (7)(a). "[W]here there is an apparent conflict between two statutes, a fundamental rule of statutory construction requires that the specific statute control over the general and that the

specific statute be viewed as an exception to the general rule." *In re Johnson Estate,* 152 Mich App 200, 205; 394 NW2d 136 (1986); *Evanston YMCA Camp v State Tax Comm'n,* 369 Mich 1, 8; 118 NW2d 818 (1962). Subsection (3) activities are exempt without regard to Subsection (7)(a).

Under the specific/general rule, Subsection (3) controls and the Container Recycling Machines, by performing multiple activities under Subsection (3), qualify for the exemption. The Court of Appeals properly construed the statute as a whole to hold that the activities listed in Subsection (3) are NOT limited by the further statement in Subsection (7)(a) that "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." *TOMRA* at 296.

Moreover, where a term, such as industrial processing, is defined by declaring what it "includes", the definition is enlarged because "includes" is a term of enlargement, not restriction. *NACG Leasing v Dep't of Treasury,* 495 Mich 26, 31; 843 NW2d 891 (2014) ("As we have stated previously, 'including' is a term of enlargement, not limitation."); see also *Mich Bell Tel Co v Dep't of Treasury*, 445 Mich 470, 479; 518 NW2d 808 (1994), citing 2A Singer, Sutherland Statutory Construction (5th ed), § 47.07, pp 151-156. The Department previously agreed stating, "These modifiers [in Subsection 3, 4, 5 & 6] demarcate the contours of 'industrial processing'—regardless of whether the activity satisfies the definition of 54t(7)(a)." Department's Motion for Summary Disposition, App 161b at 18. The Department argues the statutory phrase "industrial processing includes" in Subsection (3) is not an expansion of the Subsection (7)(a) definition. This is an error and is contrary to this Court's holdings.

Sections of statutes on the same subject must be construed to give all sections effect. *Fradco, Inc v Dep't of Treasury,* 495 Mich 104; 845 NW2d 81 (2014); *Guitar v Bieniek*, 402 Mich

152; 262 NW2d 9 (1978). Thus, Subsection (3) and (4)(b)'s use of the words "industrial processing includes" and "property that is eligible . . . includes" requires these subsections to be treated as *expansions and specific inclusions* within the Subsection (7)(a) general exemption definition. *Detroit Edison*, 498 Mich at 39, 42-45. Those activities specifically identified as exempt processing in Subsection (3) must be excluded from any purported limitation for this subsection to have meaning as a definitional enlargement. The MCL 205.54t(3) Subsections (d), (g), (i), (j), and (k) qualifying activities performed by the machines are exempt processing followed by storage of in-process property, not raw materials. See *Detroit Edison*, 498 Mich at 55-56.

2. Limiting Exempt Industrial Processing Activities to Certain Time Periods Unlawfully Negates Much of Subsection (3), Contradicts Published Departmental Guidance and is Contrary to Legislative Purpose.

The Department argues that property may only be eligible for the exemption if it meets the supposed temporal requirement included in the second sentence of Subsection (7)(a) because otherwise the language would be rendered nugatory in violation of a bedrock rule of statutory construction. Appellant's Brief at 16. But what about the first sentence of Subsection (7)(a)? Under that same logic, isn't is also required to be applied to all exempt activity in order to not be rendered nugatory in the same way as the second sentence? Under the Department's argued for interpretation of the statute, all of the (7)(a) general definition must apply to all sections of the statute. Every activity listed in Subsection (3) only qualifies if the property "converts and conditions property . . . by changing the form, composition, quality, combination, or character of the property" ***and*** that activity occurs between raw material storage and final good storage. Taking the Department's argument to its logical conclusion, the research or experimental activities [40];

[40] MCL 205.54t(3)(b) and MCL 205.94o(3)(b).

engineering[41]; inspection, quality control, or testing[42]; planning scheduling, supervision or control of production[43]; design, construction by changing the form, composition, quality, combination, or character of the property[44]; and storage of in-process materials [45]would not constitute industrial processing because these activities fail to meet the requirements. This renders most of Subsection (3) meaningless and fails to harmonize the statute. The Department appears to argue that "industrial processing" can be defined and applied without regard to the first sentence of Subsection (7)(a) but the second sentence of (7)(a) is a mandatory requirement. This makes no logical sense. Nor has the Department identified a rule of statutory construction under which the first sentence of a definition is not required to apply to all other portions of the statute but the second sentence is. This conflicting application of the two parts of the "industrial processing" definition must be rejected.

Even applying only the purported temporal requirement to all of Subsection (3) simply does not work and fails to harmonize the statute. Again, this restriction would have to apply to *all* of the delineated operations listed under Subsection (3), and doing so would render most of Subsection (3) nugatory and is at odds with principles of statutory construction. *State Farm Fire & Cas Co*, 466 Mich at 146 (holding that courts must give effect to every word, phrase and clause

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[41] MCL 205.54t(3)(c) and MCL 205.94o(3)(c).

[42] MCL 205.54t(3)(d) and MCL 205.94o(3)(d). Logically, raw material testing occurs before use in production for quality control. The Department states that testing raw materials is exempt and equipment used to test raw materials and for quality control function are exempt. Revenue Admin Bull 2000-4 Example 5, App 219b.

[43] MCL 205.54t(3)(e) and MCL 205.94o(3)(e).

[44] MCL 205.54t(3)(f) and MCL 205.94o(3)(f).

[45] MCL 205.54t(3)(k) and MCL 205.94o(3)(k).

in a statute and avoid an interpretation that would render any part of the statute surplasage or nugatory).

Subsection (3) includes activities that occur wholly separate and apart from raw material storage and in some case prior to raw materials storage. For example, "research or experimental activities," "engineering related to industrial processing," "design [and] construction . . . of production or other exempt machinery, equipment, and tooling" are all activities that necessarily occur before raw material storage and would never meet the requirement of the second sentence of Subsection (7)(a). Likewise, "recycling" and "remanufacturing" occur after an item has entered finished goods storage and would not meet the requirement of the third sentence of Subsection (7)(a) and, again, the Department gives no reason why the first, second and third sentences of Subsection (7)(a) apply to some of the specifically enumerated activities in Subsection (3) but not others. While inspection, quality control, or testing[46] may occur after movement from raw material storage, such a restriction renders negates the language of Subsection (3)(d) that qualifies those activities when they occur "*at any time* before materials or products first come to rest in finished goods inventory storage." MCL 205.54t(3)(d). If the supposed temporal limitation was meant to apply to all of Subsection (3), the broader Subsection (3)(d) time period of "any time" would be unnecessary. Application of the second sentence of Subsection (7)(a) as a limitation renders the allowable activity period of Subsection(3)(d) nugatory and surplusage. Because Department's proposed construction of the statute renders parts of the statute meaningless, it must fail. *Johnson v Recca*, 492 Mich 169, 177; 821 NW2d 520 (2012); *King v Michigan*, 488 Mich 208, 218; 793

[46] MCL 205.54t(3)(d)

NW2d 673 (2010). In short, the Department's argument seeking selective enforcement of Subsection (7)(a), must be rejected.

In addition, the Department's published guidance does not require the supposed temporal limitation for industrial processing activities. Revenue Admin Bull 2000-4 titled *Sales and Use Tax – Industrial Processing*, June 13, 2000, App 216b sets forth the Department's published guidance. The explanations and examples on pages 3 through 7 and examples 3 through 19 apply the definitions of Subsection (3). None of the explanations or examples impose a requirement that raw material storage be specifically identified as occurring prior to the exempt industrial processing activity. Specifically, Examples 5 and 6 state that equipment and supplies used and consumed in testing raw materials meet the testing and quality control function and are exempt as long as the testing occurs prior to finished goods storage.

Finally, the Department's argument is contrary to the legislative purpose of the industrial processing exemption. 1999 PA 116 and 117 were enacted to "revise and expand the industrial processing exemption."[47] There is no indication of any legislative purpose to narrow or otherwise limit the exemption as the Department claims.

3. Under This Court's Decision in *Detroit Edison* Subsection (3) Activities Qualify Without Meeting the Subsection (7)(a) Definition of Industrial Processing.

The Court of Appeals interpretation is in accord with this Court's decision in *Detroit Edison*. In *Detroit Edison*, this Court was tasked with applying the industrial processing statute to the generation and transmission of electricity to determine what activities constituted industrial

[47] See, e.g. Senate Legislative Analysis, SB 544, HB 4744, 4745, and 4586 (July 19, 1999) at 4, App 207b; House Legislative Analysis, HB 4744, HB 4745, and SB 544 (July 16, 1999) at 4, App 239a.

processing. This Court began by applying the definitions of industrial processing under both Subsection (7)(a) and Subsection (3). As the Court stated, "MCL 205.94o(7)(a) and MCL 205.94o(3) set forth the activity that does constitute 'industrial processing.'" *Detroit Edison*, 498 Mich at 55. This Court stated:

> '[i]ndustrial processing' activity is generally defined by MCL 205.94o(7)(a). However, the statute also provides that certain specific activities that do not satisfy the general MCL 205.94o(7)(a) definition nonetheless constitute "industrial processing" activity for purposes of the statute. [*Detroit Edison*, 498 Mich at 49 n 13.]

See also *Id.* at 48 n 12 stating that inspection, quality control or testing are industrial processing; and *Id.* at 54 n 19 disagreeing with the dissent's position that industrial processing activity occurring outside a factory is a taxable activity. Thus, this Court has recognized that the industrial processing activities in Subsection (3) are defined as exempt processing as an expansion of the definition in Subsection (7)(a) and the Court of Appeals adhered to that holding.

The Court of Appeals faithfully followed this Court's holding that "[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." *Elias Bros*, 452 Mich at 157 (emphasis added). Under MCL 205.54t(4)(b), if the machines conduct an industrial process they are exempt. The only issue before the Court of Appeals was whether the activities of testing, inspecting, performing quality control, sorting, performing production material handling, crushing, shredding and recycling beverage containers constituted industrial processing as a matter of law. The Court of Appeals properly found that these activities qualify under the plain language of the statute and this Court's precedential decisions.

The Department argues that any in-machine storage must be "raw material storage" and anything that comes before it is disqualified, nonexempt activities. However, when storage occurs *after* the processing activities specifically identified under Subsections (3) and (7)(a), such storage

is exempt storage of in-process materials under Subsection (3)(k). *Granger Land Dev Co v Dep't of Treasury*, 286 Mich App 601; 780 NW2d 611 (2009) (holding that storage of sorted and compacted waste in landfill cells for methane production is industrial processing). There is no storage of raw, unprocessed, untested, unsorted, uncrushed or nonpunctured bottles and cans in the Container Recycling Machines. The Court of Claims' conclusion that "regardless of whether Plaintiff's recycling machines perform tasks that might fit within any specific provision of MCL 205.54t(3) or MCL 205.94o(3), because those activities occur before the industrial process begins, the exemptions . . . do not apply" is directly contrary to *Detroit Edison* and was properly reversed.

B. The Court of Appeals Decision Harmonizes the Provisions of the Statute.

The Court of Appeals decision below properly harmonized the application of the language of Subsection (7)(a) to mean what it says – that the *movement* away from raw material storage indicates the beginning of industrial processing. The Court recognized the lack of a mandate for raw material storage because none exists in the language. The language does not require that industrial processing "must" begin or "may only begin" with raw material storage. Interpreting the statute to require raw material storage as a precondition to exempt industrial processing, as argued for by the Department, unlawfully reads into the statute a requirement not included in the plain language. "A court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature *as derived from the words of the statute itself*." *SBC Health Midwest v Kentwood*, 500 Mich 65, 72; 894 NW2d 535 (2017), (quoting *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002), itself quoting *Omne Financial, Inc v Shacks, Inc*, 460 Mich 305, 311; 596 NW2d 591 (1999)) (emphasis added).

Moreover, reading in a temporal limitation misreads the language of the statute. The provision actually expands the scope of the exemption to transportation equipment that transports raw material from storage- a nonexempt activity - to production – an exempt activity. The second

sentence states, "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*." MCL 205.54t(7)(a) (emphasis added). Both raw material storage and finished goods storage are nonexempt under MCL 205.54t(6). Activities that constitute industrial processing are defined under Subsection (3) and (7)(a). The second sentence of Subsection (7)(a) explains that transportation equipment that moves property from raw material is exempt when used for that purpose, as is transportation equipment that moves goods to finished goods storage. Otherwise there is no guidance on the status of equipment that moves raw or finished goods from one place to another. In this way, the legislative purpose, to "re-define when industrial processing begins and ends"[48] is accomplished because the transportation equipment may begin the process, rather than the processing machinery. Interpreting this sentence as an expansion, rather than a limitation, harmonizes the interaction between the specific and general industrial processing definitions, the language of the statute and the legislative purpose.

C. Failure to Perform a Non-Exempt Activity Does not Disqualify Machines Performing an Activity Defined as Industrial Processing.

Under MCL 205.54t(4)(b) machinery that is used in an industrial processing activity is exempt. In *Granger*, 286 Mich App at 614, the Court held that sorting and compacting waste to remove pockets of air and to make waste uniform qualified as industrial processing activities. The waste was crushed and compacted and placed into landfill cells to produce methane gas sold to another entity that used the gas to make electricity sold to the local utility and then sold to consumers. Thus, the bulldozers, compactors, and trashmasters manipulating the trash and conducting the waste sorting and compacting activities at the landfill qualified under the industrial

[48] House Legislative Analysis, HB 4744, HB 4745, and SB 544 (July 16, 1999), App 246a.

processing exemption.[49] Under *Granger*, the Container Recycling Machines, that sort and compact used beverage containers, conduct industrial processing activities. The Department agreed during informal conference that the Container Recycling Machines conduct recycling and other industrial processing activities.[50]

The Department argues that the Container Recycling Machines cannot be exempt unless there is first raw material storage and movement away from that storage. In support of it argument, the Department describes an industrial processing journey from raw materials, through processing plant, to finished goods storage and to an ultimate consumer. Appellant's Brief at 23. However, this journey fails to describe modern manufacturing and the allowable exemption set forth in the statute. The 1999 Amendments recognize that not all processing occurs in one location by one manufacturer. In these days of specialization of labor and economies of scale, most manufacturing occurs in stages conducted by different persons at different locations. Thus, the statute allows the exemption to be claimed by persons who are not industrial processors but who run machinery that conducts industrial processing activities, where the processed property is ultimately used by an industrial processor. MCL 205.54t(1)(b) & (c). The Department's quips that consumers or grocery

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[49] See also *Rouge Steel Co v Dep't of Treasury*, 17 MTT 521 (Docket No. 315388), issued November 30, 2009, App 374b (holding that a conveyer moving raw materials for processing is exempt as the start of industrial processing); *Louis Padnos Iron & Metal Co v Dep't of Treasury*, 10 MTT 462 (Docket No. 240432), issued March 31, 1999, App 196b (holding that recycler's equipment used to sort waste from heterogeneous piles of raw materials into homogenous piles changes the physical composition and is exempt industrial processing equipment). These unpublished nonprecedential decisions by the Michigan Tax Tribunal are cited as the only tax cases directly addressing application of the industrial processing exemption to conveyer belts and recycler's sorting equipment.

[50] The Department's Order and Determination held that the shredding and crushing processes for aluminum and plastic are industrial processing but erroneously held that sorting waste does not constitute industrial processing. That position is contrary to *Granger*, 286 Mich App at 614.

stores or TOMRA are not industrial processors is irrelevant.[51] Industrial processing, as described by the statute since March 31, 1999, may begin with a person using a machine to perform industrial processing and providing the in-process product to another processor and another until the final processor transforms the property into the finished good for sale to the consumer. *Granger,* 286 Mich App 601 (allowing the exemption for waste processing to produce methane for an intermediary to produce electricity sold to a utility and consumers.) Multiple processes may occur and all machinery performing those processes at multiple locations[52] are equally exempt as long as the process ultimately results in a good for sale to the consumer. The machinery that performs the processing activity is entitled to the exemption. Thus, this Court's holding in *Elias Bros*, 452 Mich at 157, that the test for industrial processing for machinery is use to which equipment is put, is still controlling.

Here, under MCL 205.54t(4) the machines need only perform industrial processing to be exempt. The Container Recycling Machines perform exempt activities under Subsection (3) and the in-process cans, containers and bottles are transported to Schupan Recycling, for further processing and sale to aluminum can manufacturers[53], plastic reclaimers and manufacturers[54] and glass container manufacturers. [55] The Department's assertion[56] that there is no evidence that the machines are part of the process to create a new item at retail is not supported by the record and

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[51] See Appellant's Brief at 5, 20, 32 and 33.

[52] Transport between processing locations operated by different persons is specifically not exempt because it occurs after each processor's finished good storage. MCL 205.54t(6)(b).

[53] Riegle Dep, App 186a-187a at 28:23 to 29:15.

[54] Riegle Dep, App 205a-206a at 47:10 to 48:13.

[55] *Id;* See also Riegle Dep, App 198a-199a at 40:6 to 41.14.

[56] Appellant's Brief at 32.

Vice President Riegle's extensive testimony. The Container Recycling Machines fit under the expanded industrial processing exemption as the first machine processing step in the multi-step process of recycling bottles and cans.

The machines do not have to perform raw material storage, or movement from raw material storage or even be sitting near raw material storage to be exempt. Many manufacturers use "Just in Time Manufacturing," in which there is no raw material storage.[57] Raw material inventory is delivered to manufacturing machines as it is needed for processing and production.[58] The Department's published guidance recognizes the use of just-in-time manufacturing and exempts machinery "whether [raw material] goes directly to the production machinery or to a staging area near the production process."[59] Indeed, in Example 4 therein, parts are unloaded onto an exempt conveyer to the production area, without any storage. *Id.* ("In this example, there is no taxable material handling area activity as the movement of the purchased parts is to the production area, being driven by the production process."). The Department's Industrial Processing Training Manual recognizes that delivery of raw materials to a machine that processes the materials is exempt even in the absence of raw materials storage.[60]

In this case, the Container Recycling Machine is similar to a just-in-time process. The machine begins activity by conveying the bottle or can to equipment to weigh and read the bar

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[57] See Hunt, *The "Just-In-Time-Method"* <http://smallbusiness.chron.com/justintime-method-31185.html> (accessed March 13, 2017), App 384b.

[58] *Id.*

[59] Michigan Department of Treasury - *Revenue Technical Tax Training, Sales and Use Tax: The Industrial Processing Exemption*, July 2002, App 255b. This is the guidance in effect during the years in issue. The manual cited by the Department, App 248a-343a, is a re-write of the original manual that occurred while this case was pending and was issued after the years in issue. The Department, not surprisingly, cites re-written sections in support of its arguments.

[60] *Id.*

code[61] for inspection[62], testing and sorting, all of which are processing activities, followed up by physical sorting, separation, crushing, puncturing and shredding. This is the start of recycling and industrial processing. The Department's argument that raw material storage must occur first before any activity, even those defined by statute, can qualify as industrial processing, improperly reads into the statute a limitation not imposed by the Legislature.[63] Moreover, as the Court of Appeals noted, a raw material requirement is nonsensical because the machines would qualify for the exemption if consumers were required to first put used beverage containers into a bin before putting them into the Container Recycling Machines even though the Container Recycling Machine's activities would be unchanged. *TOMRA*, 325 Mich App at 298 n 3.

Finally, as the Court of Appeals noted, the Department's assumption that raw material storage does not occur prior to machine operations is not supported by the record. Importantly, Subsection (7)(a) does not state who must perform raw material storage. Recycling begins with a person's waste. Empty beverage containers are collected by consumers and often from waste receptacles or the ground.[64] The individual recycler's trash bag or grocery cart used to transport

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[61] While the Bottle Bill only requires scanning for returnability, the machines are programed to scan for material content, color, weight and other information to be provided to the recycling company. Riegle Dep, App 190a at 32:3-17.

[62] In fact, the Container Recycling Machines are required by law to perform the exempt processing activities of testing, quality control and sorting under the Reverse Vending Machine AntiFraud Act, 2008 PA 387.[62]

[63] *SBC Health Midwest v Kentwood*, 500 Mich 65, 72; 894 NW2d 535 (2017) ("it is not within the province of this Court to read therein a mandate that the Legislature has not seen fit to incorporate.")

[64] The Bottle Bill was enacted to prevent litter and require container recycling. MCL 445.571 to 445.576.

the containers to the machines are waste storage and for recycling are a form of raw material storage.[65]

Any purported requirement that there be "raw material storage" prior to industrial processing is at odds with the Legislature's definition of "remanufacturing" and "recycling" as industrial processing activities because remanufacturing and recycling activities do not begin with raw materials but instead begin with a finished product to be repurposed. Indeed any such raw material requirement essentially renders the industrial processing exemption for repurposing activities nugatory. One way to avoid this conflict is to recognize that a product that is being recycled or remanufactured, such as a beverage container, started its movement from raw material storage when it was first manufactured and remanufacturing or recycling is therefore always occurring after raw material storage. Another way to avoid the conflict in this case is to note that, even if there were a requirement for raw material storage, there is no rule about who must perform it. Therefore, the shopping cart or trash bag that consumers use to store used beverage containers would qualify as raw material storage. The insertion of the container onto the Container Recycling Machine's conveyer belt is the first movement from raw material storage to processing operations.

D. Recycling is an Industrial Processing Activity.

The Department misconstrues the bottle and can recycling process. MCL 205.54t(3)(i) states that "recycling" of used materials is an industrial processing activity. Recycling is not defined by the statute, but is defined in the dictionary[66] as "to process (something, such as liquid

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[65] *TOMRA*, 325 Mich App at 302 n 5, noting that the cans and bottles are not in raw material storage other than in the hands of the consumer.

[66] In the absence of contrary direction by the Legislature, words used in a statute are to be given their ordinary meaning. *Sanchick v State Bd of Optometry*, 342 Mich 555, 559; 70 NW2d 757 (1955) ("Words will be given their usual and customary meanings, save as otherwise defined. ..." [Emphasis added.]).

body waste, glass, or cans) in order to regain material for human use."[67] Recycling is a process that occurs in stages, often with each stage conducted by separate persons, but for which all stages are necessary to reprocess waste into a new product for sale to consumers.[68] Production from recycled materials requires uncontaminated bottles and cans separated by material into aluminum, plastic and glass with plastic further separated by grade and color and glass further separated by color. Inspection and sorting the waste stream is the start of the industrial process of recycling. [69]

The Container Recycling Machines begin the process of recycling bottles and cans by conducting the first steps of recycling through not only inspecting and testing an offered bottle or can but also by quality control, sorting by material, grade and color and crushing or puncturing of accepted containers followed by in-process storage. Material sorting by composition, grade and color is an essential part of recycling so that pure inputs are converted into the new product. The machines at issue conduct recycling processing and are entitled to the industrial processing exemption as a matter of law. The Bottle Bill requires retailers to participate in recyclable container collection. Where, as here, the retailer purchases or leases a machine that start the

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[67] *Merriam-Webster's Collegiate Dictionary* (11th ed) <https://www.merriam-webster.com/dictionary/recycling> (accessed August 7, 2017), App 388b.

[68] Riegle Dep, App 178a-187a at 20:22 to 29:10.

[69] Sorting and compression is the first step in aluminum recycling. Riegle Aff, App 220a at ¶8; see also *Aluminum Recycling* <http://www.conserve-energy-future.com/aluminum-recycling.php> (accessed August 10, 2017), App 392b. Sorting glass by color is the first step for recycling. See *The Glass Recycling Process* <http://www.all-recycling-facts.com/glass-recycle.html> (accessed August 10, 2017), App 405b and *Glass Recycling* <http://www.conserve-energy-future.com/recyclingglass.php> (accessed August 10, 2017), App 401b. Sorting by resin content and color is the first step in plastic bottle recycling, *The Ultimate Guide to Plastic Recycling* <http://www.conserve-energy-future.com/recyclingplastic.php> (accessed August 10, 2017), App 408b.

recycling process, these machines should receive the same exemption that Schupan Recycling would receive if machines were located on their property.

E. The Lack of a Temporal Limitation Does not Open Floodgates.

The purported additional exemptions for cardboard and paper shredders or others simply will not materialize because the exemptions apply to manufacture of a product for resale. In the end, all persons claiming the exemption must demonstrate ultimate use by or on behalf of an industrial processor who manufactures a product for sale at retail. MCL 205.54t(1) and (7)(b). In fact, the Department's Industrial Processing Manual has a section discussing the application of the industrial processing exemption to paper shredding equipment, stating:

> **Paper Shredding Equipment**
>
> Tax Treatment: This type of equipment is exempt for IP if the shredded property is eventually sold at retail. [App321a]

Thus, a grocery store merely shredding paper will not qualify for the exemption unless shredding is part of a recycling process that results in a sale at retail, which the grocery store must demonstrate. In this case, the record is replete with evidence that the beverage containers at issue were recycled into new products for sale. The record contains uncontroverted testimony by Charles W. Riegle, TOMRA Sr. Vice President of Government Affairs that:

- The crushed aluminum cans were delivered to Novelis, Alcoa, and Coca-Cola recycling for manufacturing into new containers; Riegle Dep, App 186a-187a at 28:23 – 29:15.
- The punctured and color and grade sorted plastics were sold to a variety of plastic reclaimers who converted them for use to manufacture bottles, carpeting, automobile parts and other higher end uses; Riegle Dep, App 205a-206a at 47:10 – 48:13.
- The color sorted glass containers are ultimately delivered to Owens Illinois and Verailia for manufacturing into new glass containers. *Id;* See also Riegle Aff, App 223a at ¶32.

The whole purpose of Michigan's mandated deposit law is to put the bottles and cans into the recycling process.[70] Unlike any hypothetical exemption claims, there is no real dispute that the aluminum, plastic and glass containers that begin recycling in the Container Recycling Machines are ultimately used by industrial processors for manufacture into products for sale at retail as required by MCL 205.54t and 205.94o. If other taxpayers can produce the same proofs, they will be entitled to the exemption. However, there is no evidence in the record that the Department will be inundated by such claims.

VI. CONCLUSION

For the reasons set forth above, TOMRA respectfully asks this Court to affirm the decision of the Court of Appeals below, grant TOMRA's refund of the Department's 2003 to 2006 sales tax assessment[71] and 2011 use tax refund[72] and remand the case to address the remaining legal issues pending in the motions for summary disposition before the Court of Appeals.

Respectfully submitted,

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Attorney for Plaintiff-Appellee

Dated: July 17, 2019

By: /s/ June Summers Haas
June Summers Haas (P59009)

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[70] Schultz, *State Beverage Container Deposit Laws* <http://www.ncsl.org/research/environment-and-natural-resources/state-beverage-container-laws.aspx> (accessed 8/10/2017), App 415b.

[71] This refund was requested in case 337663 and the amount was not contested.

[72] This refund was requested in case 336871 and the amount was not contested.