STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Gadola, P.J., Kelly, K.F. 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

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.

REPLY BRIEF OF APPELLANT MICHIGAN DEPARTMENT OF TREASURY

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Dated: August 7, 2019

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INTRODUCTION

The outcome of this case will turn on whether this Court finds that the language in a definitional statute identifying the beginning and ending of an event means what it says and constitutes a temporal limitation. The brief on appeal filed by Appellee Tomra of North America, Inc. (Tomra) argues that statutory construction principles require a finding in its favor. But Tomra fails to properly apply these rules and does not account for the well-established requirement that tax exemption statutes be read in favor of the taxing authority. Tomra's arguments also rely on a misreading of the holding in this Court's *Detroit Edison* decision. And, finally, Tomra has misunderstood Treasury's position on certain points and included a request for relief that is unsupported in law. For these reasons, and those set forth in Treasury's brief on appeal, this Court should reverse the Court of Appeals and reinstate the trial court's decision in Treasury's favor.

ARGUMENT

I. The principles of statutory construction require a finding in favor of Treasury.

Tomra urges this Court to reject Treasury's argument that the bedrock principles of statutory interpretation require a finding in its favor and instead conclude that those rules are more favorable to Tomra's position. In support of this claim, Tomra first argues that subsection (3) of the industrial processing statute, MCL 205.54t, is a more specific definition of industrial processing that should prevail over the general definition set forth in subsection (7)(a). Tomra next argues that Treasury's position should be rejected because it negates much of subsection (3). For the reasons explained below, both of these claims should fail.

A. The rule requiring a specific provision to control over a general one does not preclude Treasury from prevailing here.

Treasury acknowledges that Michigan case law provides that a more specific statutory provision controls over a general one. *Detroit Edison Co v Dep't of Treasury*, 498 Mich 28, 42–45 (2015). Treasury also agrees that the Legislature defined industrial processing in subsection (7)(a). Treasury strongly opposes, however, Tomra's assertion that subsection (3) constitutes a more specific definition that controls over the entirety of subsection (7)(a). Subsection (3) is not a definitional provision and it does not define industrial processing by stating what industrial processing "means" as would typically occur in a definitional provision. Instead, it simply provides a non-exhaustive list of potential industrial processing *activities*. This is a critical distinction because the Legislature did define "industrial processing" and its limited scope in subsection (7)(a) in terms of two components: (1) the type of eligible activity; and (2) the necessary timing of such activity. MCL 205.54t(7)(a). While it is true that Treasury discussed in its principal brief activities in subsection (3) that include some actions that may not otherwise satisfy the first sentence of subsection (7)(a), see p 24, even so each of the activities relates in some manner back to the timing requirement set forth in the second sentence of subsection (7)(a).

Tomra disagrees and argues that subsection (3) cannot be limited by any temporal requirement that might exist in subsection (7)(a) as evidenced by the fact that subsection (3)(d) permits an exemption for certain activities that occur "at any time before materials or products first come to rest in finished goods inventory storage." (Appellee's Br, p 22, citing MCL 205.54t(3)(d).) To the contrary, the Legislature's inclusion of this language in only one of the several subparts of subsection (3) buttresses Treasury's argument. If the Legislature intended that the timing requirement be modified for all of the subparts, it would have included such

language before providing the list of activities. It did not do so but was clearly aware that it knew how to create special carve-outs from the temporal limitations established in subsection (7)(a) for industrial processing exemptions, as evidenced by the language in subsection (3)(d). The Legislature's choice of language is telling and must be given effect. Thus, should this Court agree that subsection (3) is a more specific provision than subsection (7)(a), that specificity should only govern the first sentence subsection (7)(a), unless as can be seen in subsection (3)(d), the language demonstrates a plain intent to modify both sentences of subsection (7)(a).

B. Tomra can only prevail if an entire sentence in the definition of industrial processing is rendered meaningless.

Treasury argued in its brief on appeal that the list of activities in subsection (3) must be read in context with the temporal limitation in the second sentence of subsection (7)(a) and that failure to apply this limitation violates statutory construction principles requiring every word of a statute to be given meaning. In response, Tomra argues that Treasury is the party ignoring plain statutory language, stating that "every single activity listed in Subsection (3) could never meet the provisions of Subsection (7)(a). . . ." (Appellee's Br, p 2.) Treasury disagrees.

Treasury's position does not render the entirety of subsection (3) meaningless because a taxpayer would not be prevented from claiming the exemption when engaged in any activity identified in subsection (3)—so long as the activity fell within the timeframe required by subsection (7)(a). Instead, Treasury recognizes that the list of activities may expand the *type* of activity that can qualify for the exemption, but nonetheless the temporal limitation in subsection (7)(a) applies to those activities. This view honors the Legislature's apparent aim to expand the scope of the exemption to more types of activities, but also honors its goal of

avoiding a wholesale give-away by imposing certain restrictions, such as the timing requirement in the second sentence of subsection (7)(a) and the apportionment requirement in subsection (2).

C. Treasury is not advocating that the industrial processing exemption be contracted by implication.

Tomra further argues that Treasury's position contradicts the statutory construction rule prohibiting a tax exemption from being expanded or contracted by implication. Treasury not only rejects the assertion that it is attempting to contract the industrial processing exemption by implication, but also maintains that Tomra seeks to improperly expand the exemption.

The cases Tomra relies on demonstrate that an attempt to reduce the availability of an exemption by implication occurs when a party argues that a limitation not expressed by the statutory language applies. See *SBC Health Midwest Inc v Kentwood*, 500 Mich 65, 73 (2017) (court declined to read the word "nonprofit" into statute); *Mich Bell Tel Co v Dep't of Treasury*, 229 Mich App 200, 208–210 (1998) (court declined to read an apportionment requirement into an earlier version of the industrial processing statute). Here, Treasury is not asking this Court to read a temporal requirement into the statute that has no basis in the text of the statute, but instead asks this Court to apply the existing statutory language.

Because Treasury's argument is based on express statutory language and Tomra's position requires that existing language limiting the availability of the exemption be disregarded, a more accurate understanding of the parties' respective positions is that Treasury seeks to enforce the statute as written and Tomra is improperly advocating for an expansion of the exemption. Tomra attempts to avoid running afoul of this principle by erroneously describing the second sentence as something other than a temporal requirement—namely an expansion of "the scope of the exemption to transportation equipment that transports raw material from

storage – a nonexempt activity – to production – an exempt activity." (Appellee's Br, p 25.) This claim is illogical when the statute is considered in its entirety. As Tomra recognizes, the industrial processing exemption statute has several components, including subsection (4) that specifically identifies property eligible for the exemption. (Appellee's Br, p 17.) Tomra's suggestion that the Legislature included the second sentence of subsection (7)(a) to expand the availability of the exemption to one particular type of property, cannot be reconciled with the fact that the Legislature also adopted subsection (4) to identify the types of property that qualify for the exemption.

In support of its reading of the second sentence of subsection (7)(a) as something other than a temporal requirement, Tomra states that the language was necessary because "[o]therwise there is no guidance on the status of equipment that moves raw or finished goods from one place to another." (Appellee's Br, p 26.) This is inaccurate. Subsection (3)(j) identifies "production material handling" as an industrial processing activity and subsection (4)(b) states that equipment "used in an industrial processing activity" is eligible for the exemption. Likewise, subsection (4)(f) indicates that equipment used for "movement of tangible personal property in the process of production" is eligible for the exemption. These provisions clearly provide guidance on the status of equipment that move property from raw materials storage to finished goods inventory storage. Nothing in subsection (7)(a)'s second sentence limits its application to the status of equipment that moves goods.

D. If neither party can prevail without a portion of the statutory language being rendered nugatory, this Court must choose the outcome that favors Treasury.

Both parties have argued that the other's claims require that some statutory language be ignored or rendered nugatory and both have also asserted that their respective interpretations harmonize the statutory provisions. If this Court finds that an irreconcilable conflict exists

between the respective provisions of the statute, a point that Treasury does not concede, the matter must be resolved in Treasury's favor even if the opposing views are equally reasonable.

For more than a century, Michigan case law has consistently held to the rule that tax exemptions must be clearly stated and cannot be enlarged by construction. *Lake Shore & MS Ry Co v Grand Rapids*, 102 Mich 374, 380 (1894). The requirement for a clear intent to create a tax exemption cannot be established "when the language of the statute on which it depends is doubtful or uncertain." *Manistee & GRR Co v Turner*, 115 Mich 291, 294 (1897). Likewise, the U.S. Supreme Court long ago held that when the parties present "two different constructions of [an] exemption clause, each of which might be maintained with some plausibility" the narrower view should prevail. *Chicago Theological Seminary v Illinois*, 188 US 662, 674 (1903). This is true even when "a construction either way would not be clearly erroneous." *Id.*

Adopting Treasury's view would not result in an outcome that interprets the statute "so grudgingly as to thwart the purpose of the lawmakers." See *Trotter v Tennessee*, 290 US 354, 356 (1933). Treasury does not dispute that subsection (3)(*i*) identifies recycling as an industrial processing activity. Nor does Treasury argue that recycling can never qualify for the exemption, only that those seeking the benefit of the exemption for engaging in a recycling activity must show that the recycling activity occurred within the temporal framework set forth in the second sentence of subsection (7)(a), from the time that tangible personal property begins movement as raw materials to when finished goods come to rest.

II. Tomra's discussion of the *Detroit Edison* case appears to be based on a flawed reading of the decision.

Tomra argues that the *Detroit Edison* decision establishes that subsection (3) activities qualify for the exemption without meeting the subsection (7)(a) definition of industrial

processing. (Appellee's Br, pp 23–24.) This is an oversimplification and misunderstanding of the *Detroit Edison* holding.

It is correct that the *Detroit Edison* Court stated that both subsection (3) and subsection (7)(a) inform whether industrial processing is occurring. 498 Mich at 39. But Tomra's conclusion that the temporal requirement set forth in the second sentence of subsection (7)(a) has no bearing if a taxpayer can point to an activity listed in subsection (3) then eliminates the "next inquiry" that the *Detroit Edison* Court stated is required under the analysis. 498 Mich at 41.

In *Detroit Edison*, this Court recognized the importance of the temporal requirement in the second sentence of subsection (7)(a) when it took pains to identify when the end of industrial processing occurred for purposes of the facts of that case. The Court concluded that, because there could be no "finished goods storage" due to the unique nature of electricity, industrial processing ended when the electricity was delivered to the customer's meter and emphasized that even though the electricity may be further modified by the customers' needs after it was deemed to be a finished product at the meter, this could not constitute industrial processing. 498 Mich at 41–42, n 6. This statement recognizes that the timing of the activity is crucial to determining whether, or the extent to which, the exemption applies.

Just as the fact that Detroit Edison's customers may modify electricity after it is delivered to their meters for their own use cannot be viewed as a continuation of Detroit Edison's industrial processing, Tomra's customers' use of the reverse vending machines for their compliance with the Bottle Bill does not constitute exempt industrial processing. Even if the use of those machines benefits a downstream recycling operation, it is clear from the record that they primarily serve the purpose of Bottle Bill compliance. Riegle's testimony establishes that the

machines collect information to streamline the accounting necessary to reimburse the dealers for the deposits on the beverages they sell and accept for return and that the compaction functions performed by the machines "save storage space" and "reduce trucking costs." (App 169a–171a, 180a.) Notably, the crushed containers can still be separated and at least one more step must occur to further compact them into cubes, at which point they could no longer be separated from the cube, before the material would be sold as a commodity for use in the production of a new product. (App 185–186a, 197a.) And while the Bottle Bill may have the practical effect of increasing recycling in the state, strictly speaking and contrary to Tomra's assertion, nothing in the Bottle Bill actually requires distributors to "transport returned beverage containers from the retailers to processing centers *for recycling*." (Appellee's Br, pp 7–8; emphasis added.) The words "recycling" or "recycle" do not appear anywhere within the Bottle Bill. MCL 445.572(2) mandates only that a dealer (e.g., grocery store) provide "a convenient means" for customers to return beverage containers subject to the required deposit. Likewise, MCL 445.572(6), requires a distributor to accept returned containers from dealers and pay the full refund value in cash.

Yet even if this Court agrees with Tomra that the compaction performed by the machines is "part of the recycling process" (Appellee's Br, p 11), this Court must recognize that there is a difference between exempt recycling activities and nonexempt recycling activities. If any action that contributes to downstream recycling operations constitutes exempt industrial processing activity, anyone that shreds paper or returns a used beverage container for the bottle deposit—actions that nearly every Michigander has taken at some point—would be considered to be engaging in exempt industrial processing. This cannot have been what the Legislature intended. In fact, even Tomra acknowledges that not every recycling action undertaken by an individual would be exempt. (Appellee's Br, p 33.) The line between actions that qualify as exempt

recycling and those that are nonexempt is drawn by looking to the second sentence of subsection (7)(a) that identifies when industrial processing begins and ends.

The *Detroit Edison* Court's emphasis on the importance of identifying the beginning and ending of industrial processing is vital when one considers that a single piece of tangible personal property may be a part of multiple industrial processing operations conducted by different manufacturers over time. For example, one entity may manufacture bolts. For purposes of that manufacturer, the industrial process begins when the raw materials needed to create the bolt are removed from storage and ends when the completed bolt comes to rest in finished goods storage. The bolt may then be sold to another entity that manufactures steering gear. Thus, the bolt that served as a finished good for the bolt manufacturer becomes a raw material for the steering gear manufacturer. The industrial processing timeline for that entity begins when the bolt and other components are removed from raw materials storage and end when the assembled steering gear comes to rest in finished goods inventory storage. Likewise, the steering gear unit, which incorporated the bolt, also then transforms from a finished good to a raw material after if it is then sold to a vehicle manufacturer to be incorporated into an automobile. These different and independent operations cannot be viewed as a single, ongoing industrial processing operation. Instead, each entity would separately qualify for the exemption for their respective qualified activities that take place within the discrete, identifiable statutory beginning and end points for each respective manufacturer.

III. Tomra misunderstands Treasury's position and seeks improper relief.

Tomra inaccurately states, without reference, that Treasury "argues that any in-machine storage must be 'raw material storage.' " (Appellee's Br, p 24.) Such a position would be contrary to subsection (3)(k), which expressly indicates that storage of in-process materials is an

exempt activity. Treasury understands that there are numerous operations that may include a step where a product in the process of being manufactured comes to rest inside a machine for a time before the next step occurs. Instead, Treasury has argued that the machines at issue in this case perform an activity that occurs before the statutorily defined time period identified in the second sentence of subsection (7)(a). This position is not only required by the language of the statute but is logically necessary to avoid an interpretation of the statute that would vastly expand the availability of the exemption beyond what was contemplated by the Legislature.

Finally, the request for relief set forth in the conclusion of Tomra's brief must be rejected because its asks that this Court grant its refund even though additional issues remain to be addressed on remand. Not only did the Court of Appeals recognize this by ordering a remand "for further proceedings consistent with this opinion" (App 045a), rather than remanding for entry of summary disposition in favor of the taxpayer, Tomra itself acknowledges this fact by also requesting a remand "to address the remaining legal issues pending in the motions for summary disposition." (Appellee's Br, p 34.)[1]

CONCLUSION AND RELIEF REQUESTED

The statutory provision defining "industrial processing" includes language identifying when it "begins" and "ends"; this language must be viewed as a temporal limitation that applies to all types of industrial processing activities. For the reasons set forth above, and those in Treasury's brief on appeal, this Court should reverse the Court of Appeals and reinstate the trial court's decision in Treasury's favor.

[1] The request for relief includes what appears to be an inadvertent error because the remaining legal issues yet to be addressed in the motions for summary disposition must be decided by the Court of Claims, not the Court of Appeals.

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