STATE OF MICHIGAN
IN THE SUPREME COURT
On Appeal from the Court of Appeals
(Fitzgerald, P.J., and Hoekstra and Markey, JJ.)

CATALINA MARKETING SALES CORPORATION,

Petitioner-Appellant,

v

REVENUE DIVISION, DEPARTMENT OF TREASURY, STATE OF MICHIGAN,

Respondent-Appellee.

Supreme Court No. 121673

Court of Appeals No. 221811

Michigan Tax Tribunal No. 0231397

CATALINA MARKETING SALES CORPORATION,

Petitioner-Appellant,

v

REVENUE DIVISION, DEPARTMENT OF TREASURY, STATE OF MICHIGAN,

Respondent-Appellee.

Supreme Court No. 121674 (Consolidated)

Court of Appeals No. 221890 (Consolidated)

Michigan Tax Tribunal No. 0231398 (Consolidated)

BRIEF OF RESPONDENT-APPELLEE REVENUE DIVISION, DEPARTMENT OF TREASURY, STATE OF MICHIGAN

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QUESTION PRESENTED FOR REVIEW

This Court granted leave limited to the following question:

Whether the Petitioners-Appellants' "coupon checkout program" constitutes "sales at retail" under MCL 205.52.

COUNTER-STATEMENT OF PROCEEDINGS AND FACTS

I. Introduction

At issue in this appeal are transactions involving the distribution of paper coupons to consumers. Petitioners-Appellants Catalina Marketing Sales Corporation and Catalina Marketing Corporation (collectively "Petitioners") contracted with various product manufacturers to print and distribute paper coupons for distribution to consumers at the checkout lanes of grocery stores. Stipulation of Facts ("SOF") Exhibits A and B, Appendix G, App 118a-124a. Petitioners also contracted with retailers to print and distribute paper coupons at the checkout lanes. SOF Exhibit C, Appendix G, App 125a-132a. The case pertains to those coupons printed and distributed in Michigan.

Catalina Marketing Corporation (CMC), prior to early 1992, originated orders from manufacturers to print and distribute "Checkout Coupons" ™ using equipment that it owned and had installed in various retail stores. Catalina Marketing Sales Corporation (CMSC), was created in early 1992 and assumed the function of originating orders. SOF, ¶6, Appendix G, App 114a. CMSC has paid a "distribution fee" to CMC to make and distribute the coupons to shoppers in Michigan stores. SOF, ¶ 5, Appendix G. App 112a. Petitioners entered into standard performance agreements with manufacturers to allow them to participate in the Checkout Coupon ™ program. SOF ¶5, Appendix G, App 112a. The manner in which CMSC and CMC performed their business activities in Michigan and other states included the following: The standard performance agreement which CMC and CMSC entered into during the audit period identified and categorized the product for which coupons would be prepared; the markets in which the coupon would be issued; the periods during which the program would be in effect; the base fee for participation in the program; and the payment rate for each coupon issued. SOF ¶5, Appendix G, App 112a. Typically, differential rates were charged for issued coupons,

depending upon the nature of the coupon. As an example, a rate of $.06 may be charged for each coupon issued upon the purchase by a consumer of a competitor's similar product; a rate of $.05 per coupon for a coupon issued to promote a different product manufactured by the manufacturer of a product purchased by a consumer (e.g., a coupon for Company X's refried beans may issue upon the purchase of Company X's salsa); and a rate of $.035 per coupon to promote the same product purchased by a consumer. SOF ¶5, Appendix G, App 112a.

During the same period, CMC also entered into Checkout Coupon ™ Distribution Agreements with retailers who wished to distribute coupons and other promotional materials in their retail outlets through use of the CMC's Checkout Coupon ™ system. SOF ¶5, Appendix G, App 112a. The standard distribution agreement stated the retailer's agreement to distribute coupons designated for distribution by CMC and the manufacturer. SOF ¶5, Appendix G, App 113a. CMC typically remunerated the retailer for its distribution of the coupons by paying it a flat fee (such as $.005) for each coupon or manufacturer incentive printed, as well as an additional sum (e.g., $.0025) for each coupon printed in excess of 50% of the retailer's customer counts. SOF ¶5, Appendix G, App 113a; Exhibit C, ¶5, App 128a. CMC also had the ability to charge (although it may not actually have charged) the retailer a fee of $0.035 per coupon for those coupons or promotions printed by the retailer for its private label or in other noncompetitive situations. SOF ¶5, Appendix G, App 113a; Distribution Agreement, Exhibit C, ¶1.b., App 125a.

The parties have agreed that each performance agreement with manufacturers during the audit period was entered into either by CMC or CMSC and that the activity of entering into contracts with manufacturers shifted from CMC to CMSC during the early part of 1992. The parties have further agreed that Petitioners will be responsible for any additional tax that may

become owing as a result of this litigation, regardless of which Petitioner entered into a particular performance agreement and on which date. See SOF, ¶ 6, Appendix G, App 114a.

The Respondent-Appellee Michigan Department of Treasury ("Respondent" or "the Department") conducted a sales tax audit applying the Department's theory that the distribution of paper coupons to consumers was a transfer of tangible personal property subject to sales tax. Such audit was conducted in 1993. SOF, ¶7, Appendix G, App 114a.

Petitioners did not timely pay either use or sales tax for the years in question. SOF Exhibit D, audit workpapers, Appendix G, App 146a, 187a. Since Petitioners did not voluntarily pay sales or even use tax, the Department also conducted a use tax audit to establish the amount of use tax that would be owed if Petitioners' rather than the Department's position were correct. The use tax audit was conducted in 1993 with use tax liability and interest computed to September 15, 1993, totaling $38,002. SOF Exhibit D-3, p 1, Appendix G, App 164a. Petitioners subsequently remitted payment of use tax in the amount of $38,002 for the audit period, posted on or about October 14, 1993. This represented payment of the lesser of the two potential amounts of tax: (1) Sales tax and interest liability as of December 1, 1995 (in G902765) of $324,701.83 for the period January 1, 1992 to June 30, 1993; and (in G902721) of $59,154.23 for the period January 1, 1991 through March 31, 1992, or (2) Use tax of $38,002.00 based upon a use tax audit – not an assessment. SOF ¶ 9, 13, 14, Appendix G, App 114a-115a.

II. <u>The Parties and the Characterization of Petitioners' Business Activity</u>

The Respondent-Appellee accepts Petitioners references to the Stipulation of Facts, that the parties submitted to the Michigan Tax Tribunal, as the facts of record upon which the Tax Tribunal relied in rendering its decision. The Stipulation of Facts (SOF) is in the Joint Appendix as Appendix G. App 111a-117a. The contracts, called performance agreements, are Exhibits A

and B within Appendix G. App 118a-124a. The agreed-to exhibits to the SOF are Exhibits A through I. App 118a-367a. Respondent objects to references to Petitioners' affidavits and revised affidavits of Christopher W. Wolf and Daniel D. Granger, Appendices E and F, respectively, App 61a-110a, those being filed after the Stipulation of Facts.

Petitioners' Statement of Facts in their Brief on Appeal (Pet Br) at p 1 characterizes the Catalina transactions as "strategic targeted marketing distribution services to product manufacturers." This case pertains to the amount of liability for Michigan Sales Tax for manufacturer's or retailer's coupons printed and distributed at retailer checkouts in Michigan. In fact, CMC distributed over 875 million Checkout Coupon and other Catalina Marketing promotions in fiscal 1992 for over 350 leading brand name food and consumer products. SOF Exhibit I, 1992 10-K p 1, App 277a. The coupon has become an increasingly prevalent promotional tool. SOF Exhibit I, 1992 10-K p 1, App 277a.

Catalina provided standard Catalina Coupon rollstock to the retailer's supply warehouse. Appendix G, Exhibit C, ¶2.b., App 126a.

III. <u>The Department's Sales and Use Tax Audits</u>

Petitioners did not timely pay either use or sales tax for the years in question. SOF Exhibit D, audit workpapers, Appendix G, App 146a, 187a.

The Department conducted a sales tax audit applying to the Department's theory that the distribution of paper coupons to consumers was a transfer of tangible personal property subject to sales tax. Such audit was conducted in 1993.

Since Petitioners did not voluntarily pay even use tax, the Department also conducted a use tax audit to establish the amount of use tax that would be owed if Petitioners' rather than the

Department's position were correct. (Petitioners asserted a lesser amount of use tax might be owed on the cost of consumed materials in Michigan.)

The Department's conduct of concurrent sales and use tax audits was not the basis for Leave to Appeal being granted.

IV. Informal Conference Proceedings

The Respondent accepts the Petitioners' statements in regard to the informal conference proceedings.

V. The Final Assessments

The Respondent accepts the Petitioners' statements in regard to the Final Assessments.

VI. The Michigan Tax Tribunal's Final Order and Court of Appeals Decision

The Respondent accepts the Petitioners' statements in regard to the Michigan Tax Tribunal's Final Order and Court of Appeals Decision.

The parties stipulated to the facts in this matter and filed Cross-Motions and Briefs for Summary Disposition. However, Petitioners persist (e.g., at Pet Br, pp 11, 12), in including and referring to affidavits of Christopher W. Wolf and Daniel D. Granger in its Brief on Appeal. Respondent submits the Court of Appeals Opinion was proper to acknowledge the affidavits, but to not make further reference to Petitioners' self-serving affidavits. At the Tax Tribunal, Petitioners attached to their Brief in Support of Petitioners' Motion for Summary Disposition, filed on April 16, 1998, two affidavits, of Christopher W. Wolf and Daniel D. Granger, with accompanying documents. These two affidavits were not included in the exhibits accompanying the Stipulation of Facts. On June 25, 1998, Respondent filed its reply brief and its motion to strike these affidavits as irrelevant, incompetent, and inadmissible. On August 14, 1998,

Petitioner submitted revised affidavits. These revised affidavits should have been stricken, and although they were acknowledged they were otherwise disregarded by the Court of Appeals Opinion. Appendix C, App 50a-59a.

VII. The Order Granting Leave to Appeal

The Respondent accepts the Petitioners' statements in regard to the Order Granting Leave to Appeal.

VIII. The Record

The Respondent accepts the Petitioners' statements in regard to the record. Respondent-Appellee objects to references to Petitioners' affidavits and revised affidavits of Christopher W. Wolf and Daniel D. Granger, Appendices E and F, respectively, App 61a-110a, and attached exhibits, those being filed after the Stipulation of Facts.

The Opinion and Judgment of the Michigan Tax Tribunal is at Appendix B. App 14a-49a. The Opinion of the Court of Appeals is at Appendix C. App 50a-59a.

ARGUMENT

The Petitioners-Appellants' "coupon checkout program" constitutes "sales at retail" under MCL 205.52.

I. Introduction

The issue in this case is whether the transfer of ownership of the coupons to consumers, at the direction of manufacturers or retailers, pursuant to contracts with product manufacturers or retailers, is a sale of tangible personal property, or the mere provision of a service.

The Department contends that the transactions involve the retail sale of tangible personal property -- the coupons – to the manufacturers, with delivery to the consumer in Michigan, pursuant to Petitioners' contracts with individual manufacturers (SOF Exhibit A, ¶1.0, Appendix G, App 119a), and Petitioners' contracts with grocery retailers (SOF Exhibit C, ¶1, Appendix G, App 125a). (An industrial processing exemption would be allowed for certain equipment used in the production of the coupons.)

There is a sale of tangible personal property to the manufacturers, consideration paid, transfer of ownership of those coupons to the consumer at the direction of the manufacturer, and there is no resale of those coupons.

Petitioners contend that the transactions represent only the provision of a nontaxable service, notwithstanding the physical distribution to shoppers of the coupons themselves. Petitioners therefore contend that it owes only use tax on the property it acquired to produce the coupons. (No industrial processing exemption would be available under Petitioners' theory.)

The Department submits that the distribution of paper coupons to consumers in exchange for substantial consideration by manufacturers (or by retailers for retailer coupons) are plainly sales of tangible personal property subject to sales tax. The Department, believing the Opinion

of the Michigan Tax Tribunal to be correct in both analysis and conclusion, requested and received affirmance by the Court of Appeals.

II. An Overview of the Tax Statutes

To assist the Court in its understanding of the case the Respondent-Appellee believes it is helpful to first provide an overview of the pertinent Michigan tax statutes.

A. The General Sales Tax Act

Michigan law imposes a tax on the privilege of making sales at retail. Section 2(1) of the General Sales Tax Act (the "STA"), MCL 205.51 *et seq.*, provides:

> Except as provided in section 2a, there is levied upon and there shall be collected from all persons engaged in the business of making sales at retail, as defined in section 1, an annual tax for the privilege of engaging in that business equal to 6% of the gross proceeds of the business, plus the penalty and interest if applicable as provided by law, less deductions allowed by this act.[1] MCL 205.52(1)

"Gross proceeds," upon which the amount of tax is computed, is defined in section 1(i) as follows:

> "Gross proceeds" means the amount received in money, credits, subsidies, property, or other money's worth in consideration of a sale at retail within this state, without a deduction for the cost of the property sold, the cost of material used, the cost of labor or service purchased, ...
>
> In section 1(b) of the STA, "sale at retail" is defined, in part, as follows:
>
> (b) "Sale at retail" means a transaction by which the *ownership of tangible personal property is transferred for consideration*, if the transfer is made in the ordinary course of the transferor's business and is made to the transferee for consumption or use, or for any purpose *other than for resale*, or for lease, ... [Emphasis added.]

[1] The applicable tax rate during the audit period in this case was 4%.

B. The Use Tax Act

The use tax is complementary to the sales tax and is designed to cover those transactions not covered by the General Sales Tax Act, MCL 205.51 *et seq*. See also *Kellogg Co v Dep't of Treasury*, 204 Mich App 489; 516 NW2d 108 (1994). The Use Tax Act ("UTA"), MCL 205.91 *et seq*., applies to every person in this state "for the privilege of using, storing, or consuming tangible personal property in this state." MCL 205.93(1). Section 2 of the UTA very broadly defines "use" as "the exercise of a right or power over tangible personal property incident to the ownership of that property including transfer of the property in a transaction where possession is given." MCL 205.92(b). "Consumer" means the person who has purchased tangible personal property for use, storage, or consumption in this state, MCL 205.92(g). By statute, the "consumer" bears the legal incidence of the tax for the privilege of using, storing or consuming tangible personal property. MCL 205.97.

All persons using, consuming or storing personal property in Michigan are liable for use tax unless some exemption or exclusion applies. Perhaps the most frequently claimed exemptions relate to sales tax. Section 4 of the UTA exempts, in part, property bought either in a retail transaction on which sales tax has been paid or in a wholesale transaction in which the item purchased will later be resold at retail. MCL 205.94.

C. Sales Versus Service Questions in Single Transactions

The sales and use tax acts do not provide for the apportioning or splitting of single transactions involving both services and goods into separate transactions (or into separate service and sales components) except in one limited, specifically-defined context not at issue in this case.

In the case of a "pure" sale of tangible personal property (e.g., the sale of screws at a hardware store), in which no service whatsoever is provided, the sale is subject to tax as a "sale at retail." On the opposite end of the spectrum, a pure service transaction (e.g., window washing) is not taxable at all under the sales tax act as there is no transfer of tangible personal property involved.

In between these extremes are single transactions involving both goods and services. A single transaction that involves both the provision of a service and the transfer of tangible personal property must be categorized as either a sale or a service transaction. In other words, should the single transaction be classified as a sale at retail of tangible personal property, or as the provision of a service with an incidental transfer of tangible personal property?

The "real object test" (also known as the "true object test") has evolved nationally in the context of "mixed" single transactions to determine whether the transaction should be considered a service or a sale of tangible personal property. (An article, J. Elaine Bialczak, "Determining the Taxability of Sales Involving Services: The True Object Test," Sales and Local Taxes Weekly, February 12, 1996, is attached for the Court's reference as Appendix H, Exhibit 5, App 410a-419a.)

The question of whether a sale of tangible personal property has occurred or services have been rendered is answered by inquiring whether the "true object" of the buyer was to acquire the finished product or the service. See Hellerstein & Hellerstein, State Taxation § 10.07, pp 12-20. As stated by one court:

> The test applied by a preponderance of the authorities from other jurisdictions with sales tax statutes similar to our [Virginia] statute is: If the "true object" sought by the buyer is the services per se, the exemption is available, but if the true object of the buyer is to obtain the property produced by the service, the exemption is not available.

STAR Radio-TV Corp v Commonwealth, 217 Va 877, 883; 234 SE2d 245, 249 (1977). See also *Koch v Kosydar*, 32 Ohio St 2d 74; 290 NE2d 847 (1972); *Fingerhut Prods Co v Commissioner of Revenue*, 258 NW2d 606 (Minn 1977); *Janesville Data Co v Wisconsin Dep't of Revenue*, 84 Wis 2d 341; 267 NW2d 656 (1978); *Houghton Mifflin Co v State Tax Comm'n*, 373 Mass 772; 370 NE2d 441 (1977).

In Michigan, the Department applies the real object test to distinguish a single transaction for a sale of a service from a sale of tangible personal property. To assist others in this determination, the Department has published a Revenue Administrative Bulletin RAB 1995-1, pursuant to its statutory powers. MCL 205.3(f).[2] That subsection provides: "The department may periodically issue bulletins that index and explain current department interpretation of current state tax laws." This RAB is attached at Appendix H, Exhibit 4, App 402a-409a. RAB 1995-1 sets forth and discusses the "real object" test, which seeks to determine, from the perspective of an impartial third party, whether the purchaser is primarily seeking a tangible end product produced by a service, or primarily the service itself when the purchaser enters into a single transaction.

[2] The Department recognizes, as Petitioners-Appellants suggest, that it may not, through the issuance of a Revenue Administrative Bulletin, create law or adopt rules conflicting with applicable statutes and binding court decisions.

III. Petitioners-Appellants' printing and distribution of manufacturer's and retailer's coupons on behalf of manufacturers and retailers at retailer checkouts in Michigan constitutes transfer of ownership of tangible personal property at retail and is subject to Michigan Sales Tax.

A. Standard of Review

Whether the Petitioners-Appellants' business activities, i.e. the sale of their coupons to manufacturers, are subject to Michigan's sales tax is a question of law. This Court reviews questions of law *de novo*. *Kelly v Builders Square, Inc.*, 465 Mich 29, 34; 632 NW2d 912 (2001). The factual findings of the tribunal are to be upheld if they are supported by competent, material, and substantial evidence on the entire record. *Marrs v Board of Medicine,* 422 Mich 688, 693-694; 375 NW2d 321 (1985); Const 1963, art 6, § 28.

B. Analysis

The Tribunal's Opinion thoroughly discusses the relevant facts and law, and it reaches the correct result.

The facts in this matter were stipulated. Facts supporting the Tribunal's conclusion that Petitioners were involved predominantly in a sale of tangible personal property at retail are as follows:

> CMC and CMSC. . . provid[ed] the necessary printing equipment, programming and roll stock for printing coupons and advertisements for distribution to retail consumers, and otherwise fulfilling its contractual obligations with the enlisted manufacturers. On a paper tape are printed out, according to certain targeted purchases, coupons entitling the retail consumers to discount(s) on future purchase(s) at the same supermarket outlet, with advertising messages printed as a result of various other purchases. Tribunal Order, p 4, Appendix B, App 17a. See also SOF, Appendix G, Exhibits A and B, ¶¶1-3, and C, ¶¶1-3, pp 122a, 126a.
>
> [After April, 1992, CMC] continued to own the equipment and programming necessary for the referenced Checkout Coupon program. CMC continued to contract, as it had done prior, with product retailers (supermarkets), via "distribution agreements." Tribunal Order, p 5, Appendix B, App 18a.

> CMC also continued to print coupons and product messages (the tangible product produced by the program). The subsidiary corporation, CMSC, solicited manufacturer-clients for contractual enlistment in Catalina's proprietary coupon program; negotiated and entered into Checkout Coupon Performance Agreements with manufacturers-clients (SOF, Exhs A and B). Tribunal Order, p 5, Appendix B, App 18a.
>
> Coupon Rates are apparently calibrated based on the assumptions that the level and value of Petitioners' services are greater in those instances where consumers are targeted based upon having purchased product(s) of a competitor. (SOF, Exhs A and B). Tribunal Order, p 8, Appendix B, App 21a.

The Tax Tribunal, Tribunal Order, p 15, Appendix B, App 28a, identified the key issue stating:

> [T]he **linchpin issue** requiring review and resolution is whether, from the perspective of the manufacturer-clients, the "real object" sought by them from the business activities of CMC and CMSC during the audit period involved the purchase, for distribution to retail consumers, of tangible coupons pursuant to contracts between Petitioners and the manufacturers, or whether the real object sought by the manufacturers consisted of the receipt of nontaxable computer and informational services from Petitioners. [Emphasis in original.]

The Court of Appeals Opinion, p 2, Appendix C, App 51a analyzed the Agreements as follows:

> Those agreements [footnote omitted] identified and categorized the product for which coupons would be prepared; the markets in which the coupon would be issued; the periods during which the program would be in effect; the base fee for participation in the program; and the payment rate for each coupon issued. Typically, differential rates were charged for issued coupons, depending upon the nature of the coupon. As an example, a rate of $.06 may have been charged for each coupon issued upon the purchase by a consumer or a competitor's similar product; a rate of $.05 per coupon for a coupon issued to promote a different product manufactured by the manufacturer of a product purchased by a consumer (e.g., a coupon for Company X's refried beans may issue upon the purchase of Company X's salsa); and a rate of $.035 per coupon to promote the same product purchased by a consumer. . . .
>
> CMC typically remunerated the retailer for its distribution of the coupons by paying it a flat fee (such as $0.005) for each coupon or manufacturer incentive printed, as well as an additional sum (e.g., $0.0025) for each coupon printed in excess of 50% of the retailer's customer counts. CMC also had the ability to charge (although it may not actually have charged) the retailer a fee of $0.035 per

coupon for those coupons or promotions printed by the retailer for its private label or in other noncompetitive situations.

The Court of Appeals then correctly affirmed the Tax Tribunal Opinion.

1. The Tax Tribunal final decision is consistent with the "Real Object" test of Revenue Administrative Bulletin 1995-1 and case law.

The test applied in determining whether the predominant nature of the transaction is a sale or a service is the "real object test." See RAB 1995-1. Appendix H, Exhibit 4, App 402a-409a; *Shelby Graphics v Michigan Department of Treasury*, 5 MTT 63, 69 (1986). Appendix H, Exhibit 2, App 372a-380a. The test seeks to determine from the buyer's perspective whether "the purpose of the transaction lies in the transfer of an end product or in the acquisition of services." *Shelby Graphics*, 5 MTT at 69. Appendix H, Exhibit 2, App 378a. An analysis of the factual scenario presented in this case reveals that under the real object test, the purpose of Petitioners' transactions with manufacturers clearly lies in the transfer of an end product (the coupons), not in the acquisition of services.

The "performance agreements" between Petitioners and the manufacturers are quite clearly agreements for the payment of money (consideration) by the manufacturers in exchange for the transfer of coupons to consumers. SOF Exhibits A and B; Appendix G, App 118a-124a. Moreover, the manufacturers agreed to pay Petitioners on a per-coupon basis with a minimum base fee. (Some contracts required the manufacturers to pay a per-coupon fee with a set minimum contract fee and a per-coupon; other contracts required the manufacturers to pay a per-coupon charge not to exceed a sum 10% greater than the minimum contract fee with the manufacturer's authorization.)

The performance agreements are not service contracts calling on Petitioners to conduct market analyses, furnish demographic information, or provide other data. SOF Exhibits A and B, Appendix G, App 118a-124a. The manufacturers in this case did not contract to receive a

marketing analysis or any reports of an analytical nature, as the contract does not call for Petitioners to perform collection, analysis or compilation of information. They are strictly contracts for the creation and distribution of paper coupons, that can then be used by those who received the coupons to buy the manufacturer's products at a discount.

Whatever services Petitioners perform in fulfilling these contracts is of less significance, either to the manufacturer who contracted for the physical distribution of the coupons, or to the consumer who must present the coupon in order to receive the discount promised by the coupon, than the actual receipt of the coupon by the ultimate customer. Only by receiving physical possession of the coupon can the consumer receive the discount; and without distribution of the coupons, the manufacturer's purpose -- to stimulate future purchases of its product by offering discounts -- is not accomplished.

In short, the manufacturers' objective is that prospective customers receive physical possession of tangible personal property. The coupons are printed and distributed by Petitioners because of the consideration received by Petitioners from the manufacturers (or retailers for retailer coupons). The real object of the transaction is the transfer, by Petitioners, of tangible personal property to consumers, in exchange for substantial monetary consideration from the manufacturers (or retailers). There is a transfer of ownership of the coupons by delivery to the consumer purchasing products at the retail checkout at the direction of the manufacturer under the performance agreements (SOF Exhibit A, ¶ 1.0, App 119a).

Petitioners' argument is that they are only performing computer and informational services, with a paper strip of negligible value serving as a mere medium for the provision of that service. Pet Br, p 36. This argument is flawed. Michigan's sales tax scheme does not contain a *de minimus* exception for the sale of tangible personal property where material components constitute only a small percentage of the total cost. As noted above, the tax is computed on

"gross proceeds," not on the cost of materials; indeed, the act specifically provides that deductions for such costs are not available (except in situations involving the maintenance or repair of property of others).

Petitioners (at Pet Br, p 32) try to distinguish the instant matter from *Shelby Graphics,* based upon who controls the content of the advertising message, and upon the different resolution of print quality. In *Shelby Graphics,* the taxpayer created the content whereas in this case, Petitioners allow the manufacturer to create the message. These differences are not distinctions that are pertinent to the applicability of *Shelby Graphics, supra,* to this case as explained in the examples below.

Petitioners (at Pet Br, pp 47-48) assert that their situation is directly analogous to Examples 3, 4 and 7 in RAB 1995-1. However, Petitioners' case is not consistent with Examples 3 and 4 nor Examples 5 and 7 they cited from RAB 1995-1 in their Petition for Review. For instance, Example 3 illustrates an individual hiring an attorney to prepare his will, where the transaction is for the attorney's nontaxable services. Appendix H, Exhibit 4, App 406a. Petitioners' case is clearly distinguishable from the attorney's services insofar as the Petitioners claim it is the manufacturer who controls the content of the advertising message. The coupons are the key medium, not inconsequential, for transmitting information to the customer.

Example 4 illustrates the purchase of a packaged set of preprinted will documents and instructions. Appendix H, Exhibit 4, App 406a. Like Example 4, the Petitioners are engaged in the transfer of property which is a consequential element of the transaction. The intellectual expertise or input of CMSC or CMC, while such exist, is not the real object of the performance agreements, which is to distribute coupons. Example 5 illustrates a taxpayer hiring a CPA to prepare her income tax return. Appendix H, Exhibit 4, App 406a. In this example, a taxpayer has purchased a non-taxable service because she is really seeking the specialized knowledge of

the CPA. In Example 5, the tangible personal property (the tax return) is not the real object of the transaction. In contrast to the present case, the CPA's services can be embodied in various forms -- the CPA can file an electronic return, file a paper return, or furnish figures for the taxpayer to verify before filling in amounts and submitting the return. The information can be transmitted in any way the taxing authority will allow.

The transactions between Petitioners and the manufacturers with whom they contract are completely different. Petitioners are contracting with the manufacturers to furnish coupons to consumers at retail checkout. (Over 875 million Checkout Coupons and other Catalina Marketing promotions distributed in fiscal 1992.) 1992 10-K, p 1, Appendix G, Exhibit I, App 277a. The real object of the transactions at issue, from the manufacturer's perspective, is to get the coupons into the hands of shoppers at checkout. Petitioners cannot meet their contractual obligations with the manufacturers/retailers unless they furnish tangible personal property (coupons) to shoppers. Petitioners cannot deliver the information through another medium -- for example, by reading the content of the coupon over the store's public address system.

The computer and informational "services" Petitioner provides are utterly worthless without the manufacture and transfer of tangible personal property (the coupons) into the hands of consumers. Indeed, the "services" could not be provided to consumers in some other medium -- e.g., by verbal delivery, in a cassette tape, on a billboard, etc. -- without a breach of contract. In short, from the perspective of the manufacturers, the purpose of the transaction is the transfer of the end product, the coupon, into the hands of shoppers.

Any comparison to Example 7 of RAB 1995-1 is similarly not germane. Appendix H, Exhibit 4, App 407a. There, a manufacturer has contracted with a corporation for the formulation of a customer satisfaction questionnaire. The corporation drafts the questionnaire, mails it to registered purchasers, receives the replies, compiles the results, and prepares a

customer profile which is then transmitted to the manufacturer. In Example 7 of RAB 1995-1, the medium used to transmit the information sought is not the real object, the information is. Thus, the transaction is a service, not a retail sale of tangible personal property.

Example 7 is simply not analogous to the facts of this case. As noted above, the contracts between Petitioners and the manufacturers simply do not call for Petitioners to perform a marketing analysis or other services, which is erroneously claimed by Petitioners to represent the object of the transactions. The distribution of the paper coupons themselves into the hands of consumers is the substance of the transaction between Petitioners and the manufacturers. The coupons must be printed and distributed to shoppers in order to meet the manufacturers' objective; the delivery of coupons that bear advertising messages and entitle the bearer to a discount on future purchases. The coupons are tangible personal property that is transferred by Petitioners to consumers for ample consideration received by Petitioners from the manufacturers. The transfers are plainly subject to Michigan sales tax according to the clear language and import of the Sales Tax Act.

In reaching its conclusions of law based upon the record before it, the Tax Tribunal made several important factual and legal findings:

> [A]s concerns targeted printed advertising messages, it appears that those end products reasonably have at least as much value as other nontargeted, free-standing advertising media and, likewise, at least as much value as the nontargeted banners, posters, signs and point-of-sale displays and trade show items which were held, in *Shelby Graphics*, *supra*, to constitute tangible personal property. [Tribunal Order, pp 33-34, Appendix B, App 46a-47a.]
>
> Far from being the "inconsequential medium used to transmit information" as portrayed by Petitioners, the targeted coupons and advertising messages at issue in the instant cases are the medium designed to motivate consumer purchases through use of Petitioners' "targeted consumer marketing strategy." This is in contrast to the nonredeemable, after-the-fact, even inert customer profile report described in Example 7, RAB 95-1 (this Order, footnote 12, pp 18-19, supra) upon which Petitioners, in part, rely in the instant cases. [Tribunal Order, p 34, Appendix B, App 47a.]

> The effectiveness of the discount coupons and advertising messages is enhanced by the services which CMC and CMSC offer their manufacturer-clients. [Tribunal Order, p 34, Appendix B, App 47a.]
>
> Viewing the transactions as a whole, therefore, the Tribunal concludes that Petitioners' activities result in tangible end products which are the real object of, and the reason for, the services performed on behalf of their manufacturing clients pursuant to their printing and delivery contracts, called "Checkout Coupon Performance Agreements." [Tribunal Order, p 34, Appendix B, App 47a.]
>
> Furthermore, the transfer of ownership of tangible and intangible content from CMC, as printer, to its manufacturer-clients is a primary consideration in determining that the money-off coupons and advertising messages, printed with CMC's equipment and distributed in checkout lanes, constitute sales at retail subject to Michigan's sales tax act. *Speaker-Hines & Thomas, Inc v Treasury, supra.* [Tribunal Order, p 34, Appendix B, App 47a.]

The factual findings of the Michigan Tax Tribunal are final, provided that they are supported by competent, material and substantial evidence. *Meadowlanes Ltd. Dividend Housing Ass'n v Holland,* 437 Mich 473, 482-483; 473 NW2d 636 (1991).

Petitioners' extensive review of administrative and judicial decisions, in its brief below, preceding and following the Michigan Tax Tribunal's adoption of the "real-object test" in *Shelby Graphics v Department of Treasury*, *supra*, is curiously limited to a footnote reference the more recent lengthy opinion of the Tax Tribunal in *Speaker-Hines & Thomas, Inc v Department of Treasury*, 9 MTT 129 (1991) (Docket No. 88326, October 9, 1991), aff'd 207 Mich App 84; 523 NW2d 826 (1994). However, *Speaker-Hines* is significant for two reasons. First, because the Tax Tribunal applied *Shelby Graphics* and, secondly, because it involved the same sort of question at issue in the present case -- whether transactions involving the preparation and distribution of printed material is properly treated as a sale of tangible personal property or the provision of a service. (*Speaker-Hines* is attached as Appendix H, Exhibit 3, App 380a-401a.) *Speaker-Hines, supra,* is not even cited in Petitioners' Brief on Appeal to this Court. In fact, *Shelby Graphics* and the real object test have been applied in at least two Tax Tribunal decisions.

The only one involving contracts for the preparation and distribution of printed material -- and which cuts against Petitioners' position in this case -- is *Speaker-Hines*, in which the Tax Tribunal explicitly referred to *Shelby Graphics* as adopting the "real object" test and as establishing that the taxpayer's work "fits squarely within the definition of 'sale at retail' rendering it taxable under the STA unless otherwise exempt." *Speaker-Hines*, 9 MTT 129, 142. Appendix H, Exhibit 3, App 394a. The Tax Tribunal below noted that the hearing officer that initially decided *Speaker-Hines* was Petitioners' trial counsel in this case. Importantly, the Court of Appeals reviewed the Tax Tribunal decision and affirmed it. *Speaker-Hines,* 207 Mich App at 87.

2. Under Speaker Hines, the transactions at issue in this case clearly constitute "sales at retail" under the Sales Tax Act.

Speaker-Hines involved the question whether printing jobs could be deemed sales at retail of tangible personal property even though the paper was supplied by the customer and not sold to the printer-taxpayer as part of the printing job. Appendix H, Exhibit 3, App 380a-401a.

Some years earlier, the Michigan Court of Appeals in *Flexitype & Douglas Offset Co v Department of Treasury*, 52 Mich App 153; 216 NW2d 609 (1974), had considered a similar question -- whether the printer-taxpayer, who had provided publishing services for Detroit Edison's company magazine, had furnished goods or services. In *Flexitype, supra,* the Court of Appeals affirmed the decision of the State Board of Tax Appeals, which found that the taxpayer had provided services in part because the customer, rather than the printer, had supplied the subject matter, the artwork, and the paper.

The Court of Appeals in *Flexitype* explained that there had been no "sale at retail" because "there was no transaction which transferred the ownership of tangible personal

property." *Id*, 52 Mich App, at 156 (emphasis in original). The Court of Appeals quoted with approval the following excerpt from the board's opinion:

> [The printer-taxpayer] did not make a sale at retail of tangible personal property ... since it never owned either the tangible or intangible content of the finished product. From the very beginning, appellant's customer, the Detroit Edison Company, was in complete control and ownership of the tangible or intangible content of its magazine. Since the Detroit Edison Company did not make a later sale of the magazine, it was not only the producer and owner of same, but also the ultimate consumer. [*Id*, 52 Mich App, at 156 (emphasis added).]

While the issue to be resolved in *Speaker-Hines* was similar to that in *Flexitype*, the taxpayer in *Speaker-Hines* was in a diametrically opposite situation and argued for the opposite result on the sale/service issue. Whereas in *Flexitype*, the taxpayer had argued that it had not engaged in a retail sale of tangible personal property and therefore was not liable for sales tax, the taxpayer in *Speaker-Hines*, by contrast, contended that its preparation of printed material to the State of Michigan pursuant to contract was indeed a sale of tangible personal property rather than the provision of a service.

Accordingly, *Speaker-Hines* contended that its sales to the State of Michigan were exempt from sales tax under the governmental sales exemption, MCL 205.54(6), and, further, that its purchases of equipment for use in preparing printed materials would be exempt from use tax under the industrial processing exemption, MCL 205.94 (g)(i) (exempting use of tangible personal property sold to an "industrial processor" for transforming tangible personal property for ultimate sale at retail).

The Department, in litigating *Speaker-Hines*, attempted to follow *Flexitype*. The Department noted that the taxpayer in *Speaker-Hines*, like that in *Flexitype*, had not sold the tangible personal property itself -- the paper on which the printing services were rendered -- but had used paper supplied by the customer. However, the Tax Tribunal -- adopting the hearing officer's proposed judgment -- criticized the Department's position and found that a transaction in which printing services are performed may constitute a sale at retail of tangible personal property even though the paper itself is supplied by the customer, not by the printer-taxpayer.

Indeed, the Tax Tribunal decided the Department misapplied *Flexitype*. The following extended excerpt from *Speaker-Hines* is reproduced not only to illustrate the Tribunal's approach to the sales/service question, but also to convey the Tribunal's vehement disapproval of the Department's attempt to characterize a mixed transaction as the provision of a service rather than a sale of tangible personal property.

> The case at hand does not require that the stitches which comprise the knit of the *Flexitype* decision be cast off and reworked: *Flexitype*, as guided by the peculiar facts of that case, remains undisturbed as an appropriate characterization of applicable sales tax law. Instead, the question offered here concerns the validity of the department's internal delineation of the parameters of *Flexitype*, and the propriety of its further application of this analysis to Speaker as a basis for a use tax assessment. The answer to this question readily presents itself: the department is misguided both in its understanding of *Flexitype*, and in its further application of its erroneous interpretation in assessing Speaker for use tax.
>
> As clearly evidenced by the testimony of its two representatives at the hearing, the department viewed Edison's provision of paper to the printer as the decisional crux of *Flexitype*. From this cramped perception, the department developed the oversimplified and inflexible rule -- one which, when invariably applied, produces erroneous results -- that whenever a taxpayer-printer receives paper from a customer in the performance of a contractual obligation, *regardless of the character of the printer's other contributions toward the final product*, the taxpayer's effort constitutes the provision of a service, and the materials and equipment used, stored or consumed in performing the service are taxable.
>
> *Flexitype* does not, as the department suggests, propose that the provision of paper to the printer by a customer is the single, or even the paramount, criterion in determining whether use tax liability arises. Although the relevant agency/Court opinions which considered *Flexitype* admittedly refer to the fact that Edison supplied the printer with its own paper, this element was only one of several factors which, considered in combination, confirmed that the printer provided a service. The department's inept and telescoped attention to whether the customer furnished paper misses the critical point of *Flexitype*, that *primary consideration must be given to whether the printer has at some point owned, and then transferred, tangible or intangible content in performing its contract.* If the printer has owned and transferred tangible or intangible content, then it has engaged in a sale at retail; if it has not, then it must be deemed a servicer subject to use tax on its acquisitions.
>
> * * *

> In the case at hand, it was wholly inappropriate for the department to mechanically categorize Speaker as a servicer for contracts involving State-supplied paper absent a correlative examination of whether Speaker owned and transferred to the State other tangible or intangible content. Again -- and not to belabor the point -- the provision of paper by the customer is not the determinative criterion, but simply exists as one item of many to be reviewed in ascertaining whether the statutory definition of "sale at retail" is satisfied. *Speaker-Hines*, 9 MTT 129, 141 [emphasis in original].

The rule laid down in *Speaker-Hines* (and for which the Department was criticized for not recognizing) is clear -- where a printer-taxpayer transfers tangible or intangible content as part of a contract involving printing or publishing, then a "sale at retail" occurs.

In this case, there is no argument by Petitioners that its manufacturer-customers (e.g., Proctor & Gamble, etc.), the retailers that distribute the coupons (e.g., Farmer Jack, Meijer, etc.) or the end user-consumer supplied paper, ink, or other tangible supplies used by Petitioners to print the coupons. Thus, at the very least, there was a transfer of tangible personal property to the end user pursuant to Petitioners' contracts. In this case, Petitioners provided standard Catalina Coupon roll stock to the retailer's supply warehouse. App G, Exh C, ¶ 2.b, App 126a. Under *Speaker-Hines*, the transfer of either tangible or intangible content is sufficient to deem the transaction a sale at retail under the Sales Tax Act.

The sales/service question in this case is easily disposed of under *Speaker-Hines*. The transfer of tangible personal property -- the coupons -- to consumers, at the direction of and for the consideration by the manufacturer, is enough under *Speaker-Hines* to render the transfers sales rather than services. It is a sale "at retail" since there is no resale of the coupon. MCL 205.51(b).

Clearly, neither the Michigan Tax Tribunal nor the Court of Appeals erred in concluding that the transactions involved a "sale at retail" of tangible personal property.

3. The cases cited by Petitioners are not on point.

Petitioners cited several cases involving pre-"real object" test formulations of the "retail sale vs. service" issue. Petitioners assert that this Court must consider those cases involving

"otherwise exempt service transactions that also happen to involve an incidental transfer of tangible personal property." Based upon the clear language of the contracts involved, the instant case is not "an otherwise exempt service transaction that also happens to involve an incidental transfer of tangible personal property." (See the contracts, SOF Exhibits A and B, Appendix G, App 118a-124a). In this case the information that a manufacturer will honor coupons is worthless without the presentation of the coupon itself. Here, the Petitioners are not selling information that is incidentally on tangible personal property. The Performance Agreement says, "Catalina is engaged in the distribution of coupons for manufacturers of consumer goods and services." SOF Exhibit C, ¶A, Appendix G, App 125a.

The cases cited by Petitioners are clearly distinguishable. In *Manatron, Inc v Dep't of Treasury*, 4 MTT 537 (1986), the Tax Tribunal found that the transferred tangible personal property was incidental to the provision of services. The Tribunal there, as in this case, considered the language of the contracts and looked at the following factors in determining the presence or absence of a sale at retail: whether (1) the delivery or use of tangible personal property is incidental to the service transaction; (2) the primary value of the property is derived from the service performed; (3) the property is negotiated and contracted for separately from the service; and (4) the cost of the property is incorporated in the cost of the service. *Manatron*, 4 MTT at 548.

If one examines the factors utilized in *Manatron*, cited by Petitioner (Pet Br, pp 16, 24 and 39) in this case, one must conclude, based upon the contracts, that the tangible personal property -- the coupons -- were the primary object of the contracts. The analysis, the reports, and service enhanced the value of the coupons in the eyes of the manufacturers, not the other way around. In this case, the primary value of the tangible personal property is in the distribution of

the property itself, the coupons. There is no separate service agreement providing for the sales research and reports referred to by Petitioners.

The cost of the tangible property was not incorporated in the cost of the service. In this case, the service aspect is incorporated into and incidental to the distribution of coupons.

Petitioners also cite *Macabees Mutual Life Ins Co v Dep't of Treasury*, 122 Mich App 660; 332 NW2d 561 (1983) and *DAIIE v Dep't of Treasury*, 138 Mich App 696; 361 NW2d 373 (1984) for the notion that customized software programs are the provision of intangible information, albeit in the form of a tangible program, and outside the use tax act. The software programs in this case are installed at the retailers (e.g. Meijer, Farmer Jack, etc.) and covered by Distribution Agreement, between CMC and the Retailer (see SOF Exhibit C, Appendix G, App 125a-132a.)

In this case, the Department's focus is on the intent of the manufacturers as indicated by the language of the Performance Agreements. As the Court of Appeals and Tax Tribunal agreed, the focus is on the distribution of coupons, the tangible personal property. The custom software cases, *Macabees* and *DAIIE*, are not dispositive in this case.

Petitioners rely on the case of *University of Michigan Bd of Regents v Dep't of Treasury*, 217 Mich App 665; 553 NW2d 349 (1996), even though it is clearly distinguishable on its facts. In that case, the property at issue was photocopies made by students, considered a service and an incidental part of the library operations, and replacement diplomas furnished by the registrar's office. The Court of Appeals held that the service was primary and the providing of the tangible paper was incidental. The university was providing in various locations copier copies or replacement diplomas as the case may be as a result of primarily services (e.g., library or registrar) rendered. Here, both the Court of Appeals and the Tax Tribunal have reviewed the

contracts and viewed the transaction as a whole, determining that the tangible end products are the real object of, and the reason for, the services performed.

Petitioners at Pet Br pp 15, 23, 27-28 refer to a recent case, *Liquid Dustlayer, Inc v Dep't of Treasury*, Court of Appeals Docket No. 217912 (September 15, 2000) rev'g MTT Docket No. 240837 (1999), *lv den* 464 Mich 857; 630 NW2d 332 (2001) (Appendix H, Exhibit 7, App 426a-437a) in support of its argument that it is rendering primarily a service rather than a sale of tangible personal property. Contrary to Petitioner's argument, *Liquid Dustlayer, Inc v Dep't of Treasury*, supports Respondent's position in finding that the "real object" was to purchase tangible personal property, the calcium chloride, in a mixed sales at retail and service context.

While Petitioner claims *Liquid Dustlayer* supports the proposition that a mixed transaction is entirely non-taxable if the property sold is incidental to the non-taxable services provided in the same transaction, in this case, it is the other way around. As the Court of Appeals and Tax Tribunal agreed, the focus in this case is on the distribution of coupons, the tangible personal property. The marketing services provided, not mentioned in the Performance Agreements, are what is incidental.

In *Liquid Dustlayer*, the Court of Appeals held, in reviewing the language of the bid sheets and other documentary evidence submitted below, that the governmental entity involved in that case primarily sought to purchase liquid calcium chloride, as opposed to the application service. Because the governmental entity's purchases were exempt from sales tax, no sales tax was owed. The holding was <u>not</u> that a mixed transaction is entirely non-taxable. In *Liquid Dustlayer, Inc,* the transaction for liquid calcium chloride, although spread on county roads, is a sale at retail of tangible personal property, but tax exempt as a sale to a governmental unit. *Id* at 11. App 436a.

Other cited cases are not on point. Petitioners also rely on four cases, all decided prior to *Shelby Graphics* and *Speaker-Hines*, that were not even cited in Petitioners' Court of Appeals Brief: *Kal-Aero, Inc v Dep't of Treasury*, 123 Mich App 46; 333 NW2d 171 (1983) *lv den* 417 Mich 1093 (1983); *RCA Service Company Division, RCA Corporation v Dep't of Treasury*, 135 Mich App 807; 355 NW2d 679 (1984), *Natural Aggregates Corporation v Dep't of Treasury*, 133 Mich App 441; 350 NW2d 272 (1984) *lv den* 419 Mich 949 (1984), and *Sims v Firestone Tire & Rubber Co*, 397 Mich 469; 245 NW2d 13 (1976). Any argument that these cases should apply as *stare decisis* is erroneous. Most importantly each one of these cases is distinguishable and not applicable to the facts of this case.

In *Kal-Aero, Inc v Dep't of Treasury*, *supra,* some customers utilized flight instruction of pilot services offered by the taxpayer without renting the taxpayer's aircraft. *Id* at 49. The Court of Appeals in *Kal-Aero* found the services were neither necessary nor incidental to complete performance of the taxable transaction. *Id* at 52. The court concluded that the distinct and identifiable service transactions (the instruction) were clearly severable from the aircraft rental transaction and thus were not subject to use tax. In this case, as remuneration for their activities Petitioners required the manufacturer, pursuant to certain performance agreements, to remit the greater of the base program fee identified in the agreement or a sum determined by reference to the coupon rate not to exceed ten percent of the base amount chargeable in the cycle absent the written approval of the manufacturer, or to remit a program fee equal to the higher of the base program fee or per coupon rate identified in the agreement. There is no distinct and identifiable service transaction clearly severable from the issuance of coupons, so *Kal-Aero, Inc v Dep't of Treasury* is clearly distinguishable.

RCA Service Company Division, RCA Corporation v Dep't of Treasury, *supra*, dealt with a similar situation. There the taxpayer had clearly made rental and service transactions separable

and distinct, both in form and in fact. As a result, the service contract was not part of a taxable lease agreement, and was not taxable under the Use Tax Act. In *RCA*, the Court of Appeals concluded that the maintenance services were not "necessary or incidental to complete performance of the taxable transaction." *Id*, 135 Mich App at 812. The Court went on to state that "[i]f the services are, in fact incidental and necessary to complete performance of the taxable transaction, they are subject to tax." *Id.* In this case, a review of the Performance Agreements (See the contracts, SOF, Exhibits A and B, Appendix G, App 118a-124a) reveals the charges for marketing services were not severable from the charges for the coupons by reference to the coupon rate.

Natural Aggregates Corporation v Dep't of Treasury, *supra*, pertained to the taxability of delivery services under the General Sales Tax Act, and the Court of Appeals found that the delivery charge could hardly be characterized as "incidental" to the purchase price where the price of gravel was 30 cents per ton and the price of trucking services was between $1.30 and $1.55 per ton. In *Natural Aggregates*, the Court held that the sand and gravel company's delivery service for its customers was a "separate conceptual and temporal transaction from the sale." *Id,* 133 Mich App at 446. *Natural Aggregates* is simply not analogous to this case. In this case, the marketing efforts are not distinct and severable from the performance of the taxable transaction, the sale of tangible personal property at retail.

Lastly, *Sims v Firestone Tire & Rubber Co*, *supra,* is not on point. In *Sims*, the defendants shifted the economic burden of a penalty for failing to keep separate records of taxable and non-taxable transactions to the plaintiffs. The defendants claimed they were permitted to reimburse themselves by adding the amount of the penalty to the sales price of products sold. The plaintiffs sued claiming they unlawfully subjected to payments of "sales

taxes" on services. This Court held that the statutory scheme allowed defendants to reimburse themselves for a penalty.

In this case, as recognized by the Court of Appeals, the contracts are for the creation and distribution of paper coupons to be used by customers to buy the manufacturer's products at a discount, and without the distribution of the coupons, the manufacturer's purpose of stimulating future purchases of its product by offering discounts is simply not accomplished. (Court of Appeals Opinion, p 7, Appendix C, App 56a) The issuance of checkout coupons is the sale of tangible personal property at retail. The coupons are not for subsequent resale. The contracts speak for themselves; they are not the indicia of targeted marketing services.

Petitioners (at Pet Br, p 42) clearly move beyond what is in the record before this Court when they address future speculative action of Catalina in e-credit commerce. This supposed activity is clearly a dozen years past the audit period and not at issue in this case. Nonetheless, the possibility of an e-credit to a shopper's account is just that – a possibility in the future. It was not a matter brought before the Tax Tribunal and should not be addressed now.

Based upon the record that was before the Tax Tribunal, this Honorable Court, as did the Court of Appeals, should conclude that Petitioners-Appellants' printing and distribution of manufacturer's and retailer's coupons on behalf of manufacturers and retailers at retailer checkouts in Michigan is the sale of tangible personal property at retail subject to the Michigan Sales Tax.

IV. The Court of Appeals Opinion, affirming the Michigan Tax Tribunal Opinion that a person who prints and distributes manufacturer's coupons on behalf of manufacturers at retailer checkouts is involved in the sale of tangible personal property at retail, does not expand the scope of the Sales Tax Act.

A. Standard of Review

The Court of Appeals addressed the standard of review. Appendix C, App 53a. Citing *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998):

> This Court's authority to review a decision of the Tax Tribunal is very limited. In the absence of an allegation of fraud, this Court's review of a Tax Tribunal decision is limited to determining whether the tribunal committed an error of law or adopted a wrong legal principle. The tribunal's factual findings will not be disturbed as long as they are supported by competent, material, and substantial evidence on the whole record. [*Michigan Milk Producers Ass'n v Department of Treasury*, 242 Mich App 486, 490-491; 618 NW2d 917 (2000) (citations omitted); see also Const 1963, art 6, § 28; *Michigan Bell Telephone Co v Dep't of Treasury*, 445 Mich 470, 476; 518 NW2d 808 (1994).]

B. Analysis

As both the Court of Appeals and Tax Tribunal agreed, the focus of this dispute is on the distribution of coupons, the tangible personal property. The marketing services provided, not mentioned in the Performance Agreements, are what is incidental. The Court of Appeals and Tax Tribunal did not err in determining from the documents provided that the contracts were for the creation and distribution of paper coupons for customers to use to buy manufacturer's products at a discount, nor did the Tax Tribunal nor the Court of Appeals err in determining that without distribution of the coupons, the manufacturer's purpose of stimulating future purchases of its product by offering discounts would not be accomplished. (Court of Appeals Opinion, p 7, Appendix C, App 56a) The issuance of checkout coupons is the "sale of tangible personal property", not the provision of targeted marketing services. As the coupons are not subsequently resold, the transaction is a sale at retail. Coupons are tangible personal property transferred at

the direction of the manufacturer for consideration, and in accordance to such direction distributed to consumers by Petitioner. Each of the cases Petitioner cited above for the "pre-real object test" analysis *Kal-Aero, Inc v Dep't of Treasury*, *RCA Service Company Division, RCA Corporation v Dep't of Treasury*, *Natural Aggregates Corporation v Dep't of Treasury*, and *Sims v Firestone Tire & Rubber Co*, pertain to services that are distinct and severable from the sale of tangible personal property at retail. Those cases are distinguishable from the case at issue. For all those reasons, the Court of Appeals Opinion does not expand the scope of the Sales Tax Act, MCL 205.51 *et seq*.

V. The Court of Appeals Opinion, affirming the Michigan Tax Tribunal Opinion, concluding that a person who prints and distributes manufacturer's coupons on behalf of manufacturers at retailer checkouts is involved in the sale of personal property at retail, did not solely or unduly rely on Revenue Administrative Bulletin 1995-1 thus giving it de facto "rule" status.

A. Standard of Review

The Court of Appeals addressed the standard of review. Appendix C, App 53a. Citing *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998):

> This Court's authority to review a decision of the Tax Tribunal is very limited. In the absence of an allegation of fraud, this Court's review of a Tax Tribunal decision is limited to determining whether the tribunal committed an error of law or adopted a wrong legal principle. The tribunal's factual findings will not be disturbed as long as they are supported by competent, material, and substantial evidence on the whole record. [*Michigan Milk Producers Ass'n v Department of Treasury*, 242 Mich App 486, 490-491; 618 NW2d 917 (2000) (citations omitted); see also Const 1963, art 6, § 28; *Michigan Bell Telephone Co v Dep't of Treasury*, 445 Mich 470, 476; 518 NW2d 808 (1994).]

B. Analysis

The Department of Treasury is, by Section 3 of the Revenue Act, MCL 205.3(f), permitted to periodically issue bulletins that index and explain current department interpretations of current state laws. Those interpretations, if correct, should be endorsed by our courts.

The Petitioner at Pet Br, p 16, refers to *Danse Corporation v City of Madison Heights*, Opinion Per Curiam of Michigan Supreme Court, 466 Mich 175; 644 NW2d 721 (2002) remanding unpublished per curiam opinion of the Court of Appeals, decided March 23, 2001 (Docket No. 215486), *aff'g* 10 MTT 399 (MTT Docket No. 230939, October 13, 1998) (Appendix H, Exhibit 9, App 450a-463a) for the proposition that the lower court had wrongly given the administrative instruction the "force of law." Such is not the case in this matter.

MCL 205.3(f) provides in pertinent part:

> The department may periodically issue bulletins that index and explain current department interpretations of current state tax laws.

The Court of Appeals Opinion in this case correctly viewed the legal arguments of the Petitioner:

> In the present case, petitioners do not challenge the department's ability to issue a RAB or adopt the "real object test" guidelines. Nor do they argue that the test is inconsistent with the General Sales Tax Act (STA), MCL 205.51 *et seq*. Rather, they suggest that the Tax Tribunal failed to take into consideration all of the formulations other than the real object test. (Court of Appeals Opinion, p 6, Appendix C, App 55a)

In fact, the observation of the Court of Appeals is accurate. The Court of Appeals correctly characterized the "real object test" as a guideline. Respondent, in its Brief on Appeal to the Court of Appeals below recognized that it may not, through issuance of a Revenue Administrative Bulletin, create law or adopt rules conflicting with applicable statutes and binding court decisions. (Respondent's Brief on Appeal, February 17, 2000, p 7, footnote 2) It may and did, consistent with MCL 205.3, issue a bulletin that explains the Department's interpretation of current state tax law. At the Court of Appeals, the Petitioners adopted their own spin on the application of the "real object" approach. (Petitioners-Appellant's Brief on Appeal, November 19, 1999, Argument I. E., pp 26-38) Petitioners merely argued that pre-"real object" test formulations of the "retail sales vs. service" dichotomy provide an important backdrop and a

valid approach to analyzing the activities presented. (Petitioners-Appellant's Brief on Appeal, November 19, 1999, Argument I. D., pp 19-25)

The Court of Appeals Opinion cites and relies upon *Shelby Graphics, Inc v Michigan Department of Treasury*, 5 MTTR 63 (Docket No. 83611, October 7, 1986) (Appendix H, Exhibit 2, App 372a-380a), and *Speaker-Hines & Thomas, Inc v Michigan Dep't of Treasury*, 9 MTTR 129 (Docket No. 88326, October 9, 1991), aff'd 207 Mich App 84; 523 NW2d 826 (1994). (Appendix H, Exhibit 3, App 381a-401a)

There is no administrative pronouncement in regard to Revenue Administrative Bulletin 1995-1 that was somehow erroneously relied upon by the Court of Appeals. The Department's interpretation of current state law is correct.

VI. The Michigan Tax Tribunal's Decision Was Supported By Competent, Material And Substantial Evidence On The Whole Record, on Stipulated Facts, and Should Be Affirmed.

A. Standard of Review

The Court of Appeals addressed the standard of review. Appendix C, App 53a. Citing *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998):

> This Court's authority to review a decision of the Tax Tribunal is very limited. In the absence of an allegation of fraud, this Court's review of a Tax Tribunal decision is limited to determining whether the tribunal committed an error of law or adopted a wrong legal principle. The tribunal's factual findings will not be disturbed as long as they are supported by competent, material, and substantial evidence on the whole record. [*Michigan Milk Producers Ass'n v Department of Treasury*, 242 Mich App 486, 490-491; 618 NW2d 917 (2000) (citations omitted); see also Const 1963, art 6, § 28; *Michigan Bell Telephone Co v Dep't of Treasury*, 445 Mich 470, 476; 518 NW2d 808 (1994).]

B. Analysis

This court may not substitute its discretion for an administrative agency decision, which is based on substantial evidence. Great deference must be given as a reflection of the Tribunal's expertise.

The standard of judicial review requires this Court to determine whether there is "competent, material and substantial evidence on the whole record" to support the Tribunal's factual determination. Under this test it is not sufficient to merely show that reasonable minds may differ. It is also not sufficient to show that the weight of the evidence was contrary to the agency decision. This Court must uphold the Tribunal's decision when it is supported by evidence from which "legitimate and supportable inferences were drawn." The Court of Appeals wrote:

> Under this test, it does not matter that the contrary position is supported by more evidence, that is, which way the evidence preponderates, but only whether the position adopted by the agency is supported by evidence which legitimate and supportable inferences were drawn. . . .*When there is sufficient evidence, a reviewing court may not substitute its discretion for that of the administrative tribunal, even if the court might have reached a different result. Great deference must be given to an agency's choice between two reasonable differing views as a reflection of the exercise of administrative expertise.* (Emphasis added). *McBride v Pontiac Sch Dist* (On Remand), 218 Mich App 113, 123; 553 NW2d 646 (1996). Also, see *In re Kurzyniec Estate*, 207 Mich App 531, 537; 526 NW2d 191 (1994).

The parties in this matter stipulated to the facts. They are not in dispute.

In *Dana Corp v Employment Security Comm*, 371 Mich 107; 123 NW2d 277 (1963) this Court clearly stated:

> To the bench, the bar, and administrative agencies, be it known herefrom that the practice of submission of questions to any adjudicating forum, judicial or quasi-judicial on stipulation of fact, is praiseworthy in proper cases. It eliminates costly and time-consuming hearings. It narrows and delineates issues. But once stipulations have been received and approved they are sacrosanct. Neither a hearing officer nor a judge may thereafter alter them. This holding requires no supporting citation. The necessity of the rule is apparent. A party must be able to rest secure on the premise that the stipulated facts and stipulated ultimate conclusionary facts as accepted will be those upon which adjudication is based. Any deviation therefrom results in a denial of due process for the obvious reason that both parties by accepting the stipulation have been foreclosed from making any testimonial or evidentiary record. [371 Mich 107 at 110.]

Dana, supra, has been the long standing rule with regard to the acceptance of a stipulation of facts. In *Grand Haven Twp v City of Grand Haven*, 389 Mich 360; 207 NW2d 325 (1971), the Court held that stipulations of fact which are received and approved by the Court cannot thereafter be altered by the trier of fact. In *Novi v Detroit*, 166 Mich App 397, 404; 446 NW2d 118 (1988), the Court reiterated: "That stipulation, which was received and approved by the court, became binding upon the parties." 166 Mich App at 404.

In *DeRush v DeRush*, 218 Mich App 638, 641; 554 NW2d 322 (1996), the Court held that stipulations of law are not binding on courts but that stipulations of fact are sacrosanct.

Deference must be given to the Tribunal's finding of fact as they are based upon the Stipulation of Facts. See the Tribunal's Order, Appendix B, App 14a-28a. Judicial review must be undertaken with considerable sensitivity in order that the court accord due deference to administrative expertise and not invade the province of exclusive administrative fact finding by displacing an agency's choice between two reasonably differing views. *Merc v Detroit Symphony Orchestra,* 393 Mich 116, 124; 223 NW2d 283 (1974)

This Court has determined that judicial review of administrative agencies should be marked by judicial restraint. As stated in *Westland Convalescent Center v Blue Cross*, 414 Mich 247, 270; 324 NW2d 851 (1982):

> The distinct nature of the administrative hearing has been addressed by this Court.
>
> The relationship of the courts to administrative agencies and tribunals has been one marked by judicial restraint born of several considerations.
>
> Foremost is the separation of powers. Administrative agencies are a part of the executive branch of government. While they often act in a quasi-judicial capacity, it is recognized that they are established to perform essentially executive functions.
>
> An appreciation of the theory of administrative law dictates that courts move very cautiously when called upon to interfere with the assumption of jurisdiction by an administrative agency.

> There are other practical considerations. The courts have recognized the expediency of permitting the administrative process to function to the extent of its capacity before intervening at the behest of one who conceives himself aggrieved or threatened by administrative action.
>
> Matters consigned to administrative determination are often technical in nature, and closely related to the carrying out of some statutorily defined public policy.
>
> Judicial restrain tends to permit the fullest utilization of the technical fact-finding expertise of the administrative agency and permits the fullest expression of the policy of the statute, while minimizing the burden of scarce resources. *Judges of 74th Judicial Dist v Bay County*, 385 Mich 710, 727-728; 190 NW2d 219, 226 (1971).

Based upon the record, this Court should conclude that the Tax Tribunal's factual decision was based on substantial, material and competent evidence and should be affirmed.

CONCLUSION

Clearly the transactions at issue are, pursuant to MCL 205.51(b) and MCL 205.52, transactions by which the ownership of tangible personal property, in this case checkout coupons, are transferred for consideration in the ordinary course of Petitioners' business, and are made to the transferee, the consumer, at the manufacturer's direction for consumption or use other than resale of the tangible personal property.

The opinion of the Tax Tribunal carefully outlined the evidence, made credible decisions and determined that Petitioners failed to carry their burden of proof in challenging the assessment at issue. Respondent-Appellee, Department of Treasury, submits that the Tax Tribunal's determination is supported by competent, substantial and material evidence on the record. The Respondent-Appellee urges that this Court AFFIRM the Court of Appeals Decision for the reason that the Court of Appeals Opinion was correct in finding that the Tax Tribunal made no error of law in upholding the Department's methodology.

RELIEF SOUGHT

For the reasons set forth above, Respondent-Appellee Michigan Department of Treasury requests this Court to affirm the Opinion of the Court of Appeals which affirmed the thorough and sound Opinion and Judgment issued by the Michigan Tax Tribunal.

Respectfully submitted,

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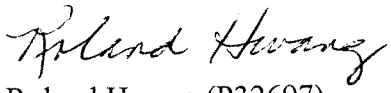

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