STATE OF MICHIGAN

COURT OF APPEALS

EMBOSSING PRINTERS, INC., Plaintiff-Appellant,	UNPUBLISHED July 12, 2005
v	No. 252894 Court of Claims
DEPARTMENT OF TREASURY, Defendant-Appellee.	LC No. 02-000090-MT

Before: Fitzgerald, P.J., and Meter and Owens, JJ.

PER CURIAM.

In this case involving Michigan's Single Business Tax Act (SBTA), MCL 208.1 *et seq*., plaintiff appeals as of right a Court of Claims' order granting defendant summary disposition and dismissing plaintiff's case. This case involves a tax assessment by defendant for the years 1995 through 1997. At the heart of this appeal is the sales factor apportionment arrived at in determining plaintiff's tax base. See MCL 208.45. We affirm.

Plaintiff's principal office is located in Battle Creek, Michigan. Plaintiff's business consists of a printing division and a fulfillment division. The fulfillment division engages primarily in the issuance of rebate checks and premium items to its customers' consumers. Plaintiff's customers provide the premium items to plaintiff for storage and eventual mailing to qualified recipients. Plaintiff also purchases check stock to print the rebate checks and purchases packaging materials used to package the premium items and checks. Often the largest line item of plaintiff's contracts with its customers is packaging costs. Plaintiff ensures that the recipients of the premium items or rebate checks meet certain requirements, and performs all the necessary steps to ship the premium items or issue the rebate checks. Plaintiff filed suit to recover its payment under protest of taxes assessed by defendant for 1995 through 1997. Defendant moved for summary disposition, and the trial court granted summary disposition to defendant on the basis of defendant's argument that plaintiff's business activity was mixed but that plaintiff's customers were primarily seeking services and the sale of tangible personal property was incidental to those services.

Plaintiff argues that packaging material shipped to persons outside Michigan should have been considered non-Michigan sales and, thus, should not have been taxed. We disagree.

We review a grant of summary disposition de novo. *Maskery v Univ of Michigan Bd of Regents*, 468 Mich 609, 613; 664 NW2d 165 (2003). A motion for summary disposition brought

under MCR 2.116(C)(10) tests the factual basis of a claim. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). In ruling on a motion for summary disposition under MCR2.116(C)(10), the trial court must consider the admissible evidence submitted by the parties in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). If the evidence does not establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Id*.

In granting summary disposition, the trial court utilized the "real object" test set forth in *Shelby Graphics, Inc v Dep't of Treasury*, 5 MTTR 63 (1986) (with respect to sales tax), which the Supreme Court recently rejected in *Catalina Marketing Sales Corp v Dep't of Treasury*, 470 Mich 13, 20 n 5, 21-23; 678 NW2d 619 (2004). Although the trial court based its decision on a test now rejected by our Supreme Court, and we do not find the "incidental to service" test articulated by the Supreme Court with respect to sales tax applicable to the single business tax, we affirm the grant of summary disposition because we reach the same result as the trial court when applying the correct test articulated in *Guardian Corp v Dep't of Treasury*, 198 Mich App 363, 370; 499 NW2d 349 (1993). See *Gray v Pann*, 203 Mich App 461, 464; 513 NW2d 154 (1994) (Reversal is not required when a trial court's decision reaches the right result albeit for the wrong reason).

> The SBT is best understood as a value added tax, although it is not a pure value added tax because it permits various exclusions, exemptions, and industry specific adjustments. "Value added is defined as the increase in the value of goods and services brought about by whatever a business does to them between the time of purchase and the time of sale. In short, a value added tax is thus a tax upon business or economic activity without regard to the economy's legal structure. The SBTA employs a value added measure of business activity, but its intended effect is to impose a tax upon the privilege of conducting business activity within Michigan and is not to impose a tax upon income. [*ANR Pipeline Co v Dep't of Treasury*, ___ Mich App ___, ___; ___ NW2d ___ (2005), slip op at 5 (internal citations omitted).][1]

For the sake of argument, we assume that plaintiff's mailing of packaging to out-of-state consumers constituted sales to those consumers rather than sales to plaintiff's customers, which were mailed to someone else.[2] A transfer of personal property is not subject to the SBT if the

---

[1] In contrast, the purpose of a sales tax is "'to make all tangible personal property, whether acquired in, or out of, the state subject to a uniform tax burden'" but does not apply to a provision of services *Catalina Marketing, supra* at 19, 19 n 3, quoting 85 CJS 2d, Taxation, § 1990, 2 950. Because MCL 208.7 under the SBTA defines sales for the purpose of the SBT as both the transfer of title to property and the provision of services, we find that the "incidental to service" test does not apply to the single business tax.

[2] A sale is defined in relevant part as consideration received for the transfer of "property held by the taxpayer primarily for sale to customers in the ordinary course of its trade or business." MCL 208.7(1)(a)(*i*). We question whether the end consumer, to whom plaintiff ships packaging, constitutes a customer when the consumer has not purchased anything from plaintiff. See MCL

(continued…)

transaction is actually taxed by the state to which the property is shipped, or the target state has jurisdiction to impose one of the taxes enumerated in MCL 208.42.[3] *Guardian Corp*, *supra* at 370. Plaintiff here did not indicate that it was actually subjected to tax by the states to which it shipped packages or that any of the states had jurisdiction to impose taxes. However, a tax may not be imposed by a foreign state if the tax violates the interstate commerce clause. *Id.*, at 376, citing US Const, art I, §8, cl 3. A tax violates the interstate commerce clause if there is no substantial nexus between the taxpayer's activities and the target state. *Id.* The taxpayer bears the burden of establishing a substantial nexus. *Id.* at 377. And a taxpayer, "whose only contacts with the taxing state are by mail or common carrier, lacks the substantial nexus required by the commerce clause." *Id.* at 376. Because plaintiff failed to establish a substantial nexus, we conclude that the out-of-state transfers were properly subject to the SBT.

Plaintiff also argues that a remand to the trial court is necessary because it failed to address plaintiff's request for an additional refund. We disagree. Plaintiff is correct that the trial court did not specifically consider its request for an additional refund of $72,590. However, plaintiff fails to argue why it is entitled to this refund and why the court's determination of the sales factor apportionment did not resolve the issue. Plaintiff asserts that there are other issues besides the apportionment, but does not state what these issues are or how they relate to the refund plaintiff requested. Moreover, plaintiff has not cited to any portion of the trial court record that would indicate plaintiff was entitled to prevail on this issue. Therefore, we conclude that this issue has been abandoned on appeal because plaintiff failed to adequately explain or support this argument. *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959) ("It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.").

We also reject plaintiff's argument that the trial court erred in affirming the department's granting of a ten percent exemption. Plaintiff asserts that the exemption should have been much greater. Tax exemptions are disfavored, and the party claiming the exemption bears the burden of proving entitlement. *Elias Bros Restaurants, Inc v Dep't of Treasury*, 452 Mich 144, 150; 549 NW2d 837 (1996). Plaintiff did not present any evidence that it was entitled to a larger exemption; it merely disagreed with the percentage used and stated that the industrial processing exemption was "significantly greater" than ten percent in an audit based on use and sales tax. We agree with the trial court that plaintiff failed to refute the ten percent exemption with any substantive facts. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), citing *McCart v J Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991). ("Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party

(…continued)

208.52, which provides in relevant part that sales of tangible property are considered sales in the state of Michigan if they are delivered to a *purchaser*. Purchaser is not defined in the act. Purchase is defined in *Random House Webster's College Dictionary* (2001), as "to acquire by the payment of money or its equivalent." Nevertheless, we need not reach a decision on this issue because it does not affect the outcome of our conclusion.

[3] The taxes enumerated in MCL 208.42 are a business privilege tax, a net income tax, certain types of franchise taxes, a corporate stock tax, or a tax similar to the single business tax.

may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists.").

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter
/s/ Donald S. Owens