

STATE OF MICHIGAN
COURT OF APPEALS

HOME PROPERTIES LP,

Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,

Defendant-Appellee.

UNPUBLISHED

June 16, 2009

No. 280939

Court of Claims

LC No. 05-000221-MT

Before: Sawyer, P.J., and Servitto and M. J. Kelly, JJ.

PER CURIAM.

In this action disputing the interpretation of the Michigan Single Business Tax (SBT), plaintiff appeals as of right from the order of the court of claims denying plaintiff's motion for summary disposition and granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

During the taxable years in dispute, plaintiff Home Properties LP, a Delaware limited partnership, was in the business of owning and operating residential apartment buildings and complexes, both in Michigan and in other states. Defendant Department of Treasury is charged with the administration of Michigan's SBT. MCL 208.1 *et seq.*

In dispute are plaintiff's SBT payments for the 1999 and 2000 tax years. In 2004, plaintiff filed amended SBT returns for those years requesting a refund of \$160,513 for 1999 and \$226,950 for 2000. Defendant denied plaintiff's claim for a refund.

The SBT is not a tax on income, but a tax placed on the value-added portion of a product. *ANR Pipeline Co v Dep't of Treasury*, 266 Mich App 190, 198; 699 NW2d 707 (2005). When taxing a business, "[a]s a general principle, a State may not tax value earned outside its borders." *Trinova Corp v Dep't of Treasury*, 433 Mich 141, 149; 445 NW2d 428 (1989), *aff'd* 498 US 358; 111 S Ct 818; 112 L Ed 2d 884 (1991), quoting *ASARCO, Inc v Idaho Tax Comm*, 458 US 307, 315; 102 S Ct 3103; 73 L Ed 2d 787 (1982). So, after income subject to SBT liability is calculated, "[a] taxpayer whose business activities are taxable both within and without this state" has to apportion that income to Michigan. MCL 208.41.

The apportionment formula for the years in question was:

- (a) The property factor multiplied by 5%
- (b) The payroll factor multiplied by 5%.
- (c) The sales factor multiplied by 90%. (MCL 208.45a.)

At dispute is the calculation of the sales factor. The sales factor is the percentage of sales made in Michigan during the taxable year, and is calculated by dividing the taxpayer's total sales in this state by the taxpayer's total sales everywhere.¹ MCL 208.51. Plaintiff argues that according to the clear language of the Single Business Tax Act (SBTA), rental receipts should not be included as a part of the sales factor within the apportionment formula. We disagree.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Collins v Comerica Bank*, 468 Mich 628, 631; 664 NW2d 713 (2003). Summary disposition should be granted under MCR 2.166(C)(10) if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v Roberson*, 212 Mich App 45, 48; 536 NW2d 834 (1995). A genuine issue of material fact exists when, giving the benefit of reasonable doubt to the opposing party, the record leaves open an issue upon which reasonable minds could differ. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

This issue also presents a question of statutory interpretation, which is a question of law that this Court reviews de novo. *Griffith v State Farm Mut Automobile Ins Co*, 472 Mich 521, 525-526; 697 NW2d 895 (2005). When interpreting a statute, the primary goal is to give effect to the intent of the Legislature. *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004). The words of the statute are the best source for determining legislative intent. *Id.* If the plain and ordinary meaning of the language is clear, judicial construction is normally neither necessary nor permitted. *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 720; 691 NW2d 1 (2005). If a statute is ambiguous, judicial construction is appropriate. *People v Warren*, 462 Mich 415, 427; 615 NW2d 691 (2000). A statutory provision is ambiguous only if it irreconcilably conflicts with another provision or it is equally susceptible to more than a single meaning. *People v Gardner*, 482 Mich 41, 50 n 12; 753 NW2d 78 (2008). If the statute defines a term, that definition controls. *Haynes v Neshewat*, 477 Mich 29, 35; 729 NW2d 488 (2007).

The relevant definition of "sales" during the timeframe of this dispute was found in MCL 208.7(1):

- (1) "Sale" or "sales" means the gross receipts arising from a transaction or transactions in which gross receipts constitute consideration: (a) for the transfer of title to, or possession of, property that is stock in trade or other property of a

¹ As an example, if a taxpayer sold \$50,000 in Michigan for a taxable year, and had \$450,000 in total sales everywhere for that same taxable year, the Michigan sales factor under MCL 208.51 would be \$50,000 / \$450,000 or 11.1%. This means that the taxpayer sold 11.1% of its total sales for that year in Michigan.

kind which would properly be included in the inventory of the taxpayer if on hand at the close of the tax period or property held by the taxpayer primarily for sale to customers in the ordinary course of its trade or business, or (b) for the performance of services, which constitute business activities other than those included in (a), or from any combination of (a) or (b). [MCL 208.7 (1).]

So, included as a portion of “sales” are “the performance of services, which constitute business activities” MCL 208.7(1). The term “business activity” is defined in MCL 208.3(2) as:

(2) “Business activity” means a transfer of legal or equitable title to or rental of property, whether real, or personal, or mixed, tangible, or intangible, or the performance of services, or a combination thereof, made or engaged in or caused to be made or engaged in, within this state, whether in intrastate, interstate, or foreign commerce, with the object of gain, benefit, or advantage whether direct or indirect, to the taxpayer or to others, but shall not include the services rendered by an employee to his employer, services as a director of a corporation, or a casual transaction. Although an activity of a taxpayer may be incidental to another or other of his business activities, each activity shall be considered to be business engaged within the meaning of this act. [MCL 208.3(2).]

The language of the statute is unambiguous that rental receipts from transferring possession of real property are to be included as a part of the sales factor. Plaintiff argues that “gross receipts” has been defined in MCL 208.7(3) as “the sum of sales, as defined in subsection (1), and rental or lease receipts.” MCL 208.7(3). So, to read MCL 208.7(1) to include “rental and lease receipts” would cause a surplus of language in the statute. In construing a statute, this Court should avoid any construction that would render any part of a statute surplusage or nugatory. *People v Perkins*, 473 Mich 626, 638; 703 NW2d 448 (2005).

However, if “rental and lease receipts” were removed from the definition of sales in MCL 208.7(1), the term “business activities” would be rendered nugatory. When interpreting a statute, this Court must reconcile seeming inconsistencies, if possible, and construe the statute to avoid absurd consequences. *Nowell v Titan Ins Co*, 466 Mich 478, 483; 648 NW2d 157 (2002). It would be unreasonable to presume the Legislature did not intend rental and lease receipts to be included in the definition of sales at all.

Plaintiff also argues that since the SBT taxes plaintiff on the depreciation of its apartment buildings and complexes, a tax on rental revenues will subject plaintiff to a double tax. We disagree. Plaintiff was allowed a full deduction for the cost of the asset in the year of acquisition under MCL 208.23. In return, “the [plaintiff] was expected to make an adjustment to its tax base in subsequent years to reflect the depreciation for that year.” *Manske v Dep’t of Treasury*, 282 Mich App 464, 469; ___ NW2d ___ (2009).

Because the Legislature could not have intended otherwise, we hold there is no genuine issue of material fact that the definition of sales includes rental or lease receipts under the performance of services, which constitute business activities. Thus, the trial court correctly

denied plaintiff's motion for summary disposition and granted defendant's motion for summary disposition.

Affirmed.

/s/ David H. Sawyer
/s/ Deborah A. Servitto
/s/ Michael J. Kelly