STATE OF MICHIGAN

COURT OF APPEALS

HONIGMAN MILLER SCHWARTZ AND COHN LLP, Plaintiff-Appellee/Cross-Appellant,	UNPUBLISHED July 30, 2009
v	No. 282768 Court of Claims
DEPARTMENT OF TREASURY, Defendant-Appellant/Cross-Appellee.	LC No. 05-000200-MT

Before: Sawyer, P.J., and Murray and Stephens, JJ.

PER CURIAM.

Defendant, Department of Treasury, appeals as of right from the grant of summary disposition in favor of plaintiff, entered on December 10, 2007. This litigation arises out of plaintiff's claim that it was improperly assessed certain taxes pursuant to the Single Business Tax Act (SBTA), MCL 208.1 et seq.[1] In addition to defendant's appeal, plaintiff has filed a cross appeal in which it alleges that the trial court erred in failing to specify the exact amount of interest plaintiff was owed as a consequence of a tax payment that was made in protest and that was ultimately ordered refunded. We affirm the lower court's grant of summary disposition and remand with instructions to determine the amount of statutory interest to which plaintiff is entitled.

I. Statement of Facts

The facts in this case are largely undisputed. Plaintiff is a limited liability partnership that has its headquarters in Detroit and that maintains offices in Lansing, Bloomfield Hills and Bingham Farms, Michigan. In the course of its business, plaintiff provides legal services to clients inside Michigan and to clients in other states. While providing these services, plaintiff's attorneys bill their clients in 15-minute intervals. Plaintiff does not enter into a formal contract

[1] The Single Business Tax is no longer in use.

for services with its clients. Rather, plaintiff's attorneys perform services for clients as those services are requested or become necessary. The attorneys also make detailed reports regarding the nature and location of the performed services.

In 1999, 2000, and 2001, plaintiff timely filed its Single Business Tax (SBT) returns. In determining its SBT liability, plaintiff referred to its attorneys' daily reports. Every 15-minute interval that was billed in Michigan was apportioned to Michigan for SBT purposes, while every 15-minute interval that was billed outside of Michigan would be apportioned to the state the service was performed in. In 1999, 2000, and 2001, the amount of services that were apportioned to states other than Michigan ranged from 3.5% to 3.99%. Defendant audited plaintiff for each of those three years and subsequently concluded that plaintiff had improperly apportioned legal services.

On December 23, 2003, Defendant issued an Intent to Assess. Pursuant to MCL 205.21, plaintiff requested an Informal Conference in order to protest the tax assessment. The informal conference was held on May 4, 2005, and the referee at the conference concluded that the Intent to Assess accurately reflected plaintiff's SBT deficiency. Consequently, she recommended that defendant issue the proposed assessment. Thereafter, the Director of the Bureau of Tax and Economic Policy, Dale P. Vettel, issued his Decision and Order of Determination. Vettel determined that the $89,575.00 tax assessment was proper and deferred any decision regarding the amount of interest that plaintiff owed. On September 1, 2005, defendant issued the Final Bill for Taxes Due, which assessed the aforementioned $89,575.00 in taxes plus $25,053.06 of interest. On September 26, 2005, plaintiff paid the final bill of $114,628.06 under protest.

On November 18, 2005, plaintiff filed its complaint. In the complaint, plaintiff explained that pursuant to the SBTA, a business activity that was performed in multiple states is considered to be a sale that occurred in Michigan if the majority of that business activity occurred in Michigan. Plaintiff alleged that in calculating its SBT liability, it properly allocated personal services that were performed outside of Michigan to the state that the service was performed in. Based on this allegation, plaintiff concluded that it was entitled to a full refund of the payment that was made under protest and was also entitled to costs, interest and attorney fees. Plaintiff further alleged that defendant had improperly changed its own interpretation of the SBTA and that any such change in interpretation could not be retroactively applied where plaintiff had relied on defendant's previous interpretation. Finally, plaintiff alleged that defendant's interpretation of the SBTA violated both the fair apportionment requirement of the Commerce Clause of the United States Constitution and the Taxpayer Bill of Rights. Defendant filed its answer on December 13, 2005. In its answer, defendant largely agreed with plaintiff's factual allegations. However, defendant denied any allegation that plaintiff's initial computation of its SBT liability was accurate and it urged the court to deny plaintiff the requested relief.

On April 20, 2007, plaintiff filed its motion for summary disposition pursuant to MCR 2.116(C)(10). Plaintiff first argued that it was entitled to summary disposition where MCL 208.53 indicates that the performance of services is to be sourced to the state in which those services were performed. According to plaintiff, a lawyer performs a number of legal services for each client and each service must be considered separately for SBT purposes. Plaintiff additionally argued that defendant's interpretation of the SBTA was impermissible where that interpretation would violate the fair apportionment prong of the commerce clause of the United States Constitution.

On that same day, defendant filed a cross motion for summary disposition pursuant to MCR 2.116(C)(8) and MCR 2.116(C)(10). Defendant argued that plaintiff's interpretation of the SBTA was erroneous. Rather, defendant argued that the SBTA would classify the representation of a client as the business activity. Therefore, if in the course of representing a client, if plaintiff billed the client for a total of 60 hours of service for activities performed in Michigan and 15 hours of service for activities performed elsewhere, all 75 hours of service would be subject to the SBT as the majority of the entire contract was executed in Michigan. Defendant asserted that its position in this case was consistent with its previous interpretations of the SBTA. Defendant further argued that its interpretation of the SBTA did not violate the fair apportionment elements of the commerce clause where that interpretation demonstrated that the SBTA was both internally and externally consistent.

The trial court held a hearing on the summary disposition motions on August 29, 2007. At the short hearing, the parties essentially relied on their summary disposition briefs and succinctly argued regarding the SBTA's application to out of state business activities. The trial court issued its opinion regarding the summary disposition motions on December 10, 2007. The court held that plaintiff was entitled to summary disposition pursuant to MCR 2.116(C)(10). The court explained that it was not persuaded by defendant's argument that the time spent on the various legal services provided to a client had to be aggregated in order to determine which state was entitled to the apportionment. According to the court, the SBT provided that a business activity was to be apportioned to the state where the activity was performed. The court further concluded that a single service is a business activity, particularly when plaintiff did not enter into formal contracts with its clients. In issuing its opinion, the court did not address whether defendant's arguments in this case represented a change in position from previous instances, nor did the court address whether defendant's interpretation of the SBTA would be in violation of the fair apportionment prong of the commerce clause. Finally, while the court ordered defendant to reimburse the entirety of the payment that was made under protest, the court did not address plaintiff's request for costs, interest and fees.

II. Summary Disposition in Favor of Plaintiff was Proper

Defendant incorrectly asserts that MCL 208.53(b) controls this matter. Pursuant to that provision, if part of a service was performed in this state and part of the service was performed in a different state, the service is considered a sale that occurred in Michigan if a greater portion of the service was performed in Michigan. However, the services at issue in this case were not even partially performed in this state. The trial court correctly concluded that MCL 208.53(a) controlled this dispute and, consequently, determined that plaintiff was entitled to summary disposition. Relief is not required.

This Court reviews a trial court's decision regarding summary disposition pursuant to MCR 2.116(C)(10) or MCR 2.116(C)(8) de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition is proper when, upon examining the pleadings, admissions and other evidence in the light most favorable to the non-moving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Brown v Brown*, 478 Mich 545, 551-552; 739 NW2d 313 (2007). Furthermore, this case presents an issue of statutory interpretation, which is also subject to a de novo review. *Grossman v Brown*, 470 Mich 593, 598; 685 NW2d 198 (2004).

As the Supreme Court has explained, the SBTA created a business activity tax. *Fluor Enterprises, Inc v Revenue Div, Dept of Treasury*, 477 Mich 170, 174; 730 NW2d 722 (2007). "[T]he act by definition encompasses taxation of services that are performed not only within the state . . . but also some that are performed out of state, as long as the reason those services are engaged in has its source within this state." *Id*. at 175. When a business activity occurs partially in Michigan and partially elsewhere, the SBTA provides an apportionment system so that Michigan only taxes the receipts that are properly sourced to this state. *Id*. In order to determine the proper apportionment of taxes, the SBTA provides a formula in which the sales that occurred in Michigan form a numerator of a fraction and the total sales of the party form the denominator.[2] *Id*.; MCL 208.51. When determining whether something is considered a Michigan sale and should be placed in the numerator of the apportionment fraction, MCL 208.53 provides instruction. That statute provides:

> Sec. 53. Sales, other than sales of tangible personal property, are in this state if:
>
> > (a) The business activity is performed in this state.
> >
> > (b) The business activity is performed both in and outside this state and, based on costs of performance, a greater proportion of the business activity is performed in this state than is performed outside this state.

As described above, plaintiff had a practice of billing its clients in 15-minute increments. In determining its SBT liability, it appears that each 15-minute increment that was billed for a service performed in Michigan was put into the numerator of the apportionment fraction. If the 15 minutes of service were performed outside of Michigan, the sale was only included in the fraction's denominator. Plaintiff asserts that this practice was consistent with the SBTA's provisions as MCL 208.53(a) provides that a business activity should be apportioned to that state that it is performed in. In making this argument, plaintiff emphasizes that each service should be separately considered because the service was not completed in furtherance of a formal contract. In contrast, defendant asserts that MCL 208.53(b) controls and requires the whole of plaintiff's business activity to be apportioned to Michigan where the greater portion of those services were performed in Michigan. Defendant argues that each service was completed in furtherance of an implied contract or a formal agreement for legal services.

The dispute between the parties essentially depends on the meaning of the phrase "business activity." Plaintiff contends that each 15-minute increment of work is a unique business activity under the SBTA. Under this approach, all of plaintiff's business activities would have to be sourced to the state the service was performed in pursuant to MCL 208.53(a). In contrast, defendant contends that plaintiff's business activity is the whole of the services provided to a client. Under defendant's approach, every 15-minute increment of service to a client must be tallied, and if the majority of those increments are properly credited to Michigan,

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[2] In determining proper apportionment, the SBTA also provides formulas relating to property and payroll. MCL 208.45a(1). However, the property and payroll figures are not at dispute in this case and are therefore not discussed in detail.

the other increments must also be credited to Michigan pursuant to MCL 208.53(b). This aggregation theory improperly inserts language that was not authorized by the legislature into the statue. "[P]rovisions not included by the Legislature should not be included by the courts." *Polkton Charter Twp v Pellegrom*, 265 Mich App. 88, 103, 693 NW2d 170 (2005).

The legislature specifically authorized the taxing of services performed wholly within the state and aggregation and apportionment of services that were partially performed within and outside of the state. The record does not provide a factual basis to find that the income received by plaintiff for the out of state billings were in fact the product of work that was performed partially within the state and partially outside of it. Instead, defendant argues that because the attorneys hold Michigan licensure and because the firm has significant offices within the state, that one must presume that the contract for services was entered into in this state. They assert that on that basis the business activity was conducted in Michigan.

In support of its argument that the entirety of plaintiff's legal services should have been apportioned to Michigan, defendant first cites to *Ammex, Inc v Dept of Treasury*, 273 Mich App 623, 732 NW2d 116 (2007). In *Ammex,* the taxpayer owned two "duty-free" stores in Detroit, both of which were located near the Canadian border crossings. *Id*. at 626-627. In addition to selling items from these stores, the taxpayer also provided financial services to Ambassador Money Exchange. *Id*. at 628. Among other unrelated holdings, this Court held that the financial services were considered to solely occur in Michigan for SBT purposes where Ammex received $150,000 in fees for financial services and only $15,000 of those fees was generated from work outside of Michigan. *Id*. at 656. According to this Court, because the greater portion of the financial services occurred in Michigan, MCL 208.53(b) considered all of the activity to be taxable under the SBTA. *Id*. However, *Ammex* is distinguishable in the sense that it does not appear that the taxpayer in that case argued that its financial services should be viewed as a series of separate transactions. Therefore, this Court's focus was not on defining "business activity."

Similarly, defendant relies on *Detroit Lions, Inc v Dept of Treasury*, 157 Mich App 207; 403 NW2d 812 (1986). In *Detroit Lions*, the taxpayer was the National Football League (NFL) team located in Detroit. *Id*. at 210. In the tax years in question, the NFL had distributed funds to teams upon the conclusion of the playoffs. *Id*. at 224. Teams received these funds, regardless of whether they actually participated in the playoffs. *Id*. The Detroit Lions did not participate in the playoffs and asserted that the funds should not be subject to the SBT where they were generated from football games not occurring in Michigan. *Id*. at 225. In concluding that the funds were subject to Michigan taxation under the SBT, the lower court stated:

> "Here, although the post-season revenues were most directly generated by business activity conducted outside of Michigan, plaintiff's entitlement to a share thereof can only be deemed to have arisen from its status as a franchised member of the NFL. As a franchised member of the NFL, plaintiff engaged in business activity both in and outside of Michigan. It was and continues to be a Michigan corporation with its principal place of business in Pontiac, Michigan. Review of plaintiff's tax returns for 1976 through 1979 indicates that, based on costs of performance, a greater proportion of plaintiff's business activity was performed in Michigan than was performed outside of Michigan. Hence, under SBTA § 53(b), plaintiff's post-season revenues in 1976 through 1979, representing consideration

> for its overall operation of an NFL club, were properly treated as Michigan sales. The Department's assessment was, therefore, correct in this respect as well." [*Id.* at 225-226.]

In affirming the lower court, this Court stated, "the lower court's approach was correct." *Id*. at 226. This Court explained that the proper focus was not whether the Detroit Lions participated in the playoff games, but was the fact that the Detroit Lions were entitled to postseason revenue as a consequence of their membership in the NFL. *Id*. Because the majority of plaintiff's business activities associated with its NFL membership occurred in Michigan, MCL 208.53(b) required the postseason revenue to be allocated to Michigan. *Id*. However, unlike the Detroit Lions, the attorneys from plaintiff's firm are required to do something on the client's behalf before they can claim a fee. The mere existence of the law firm did not entitle plaintiff to the revenue in question.

Plaintiff's analogy to the Multistate Tax Commission Model Uniform Regulation IV.17(4)(B)(c) (2004) offers more analytical guidance than the *Detroit Lions* case. The MTC regulation urges that services be sourced based upon single items of income. If a client was serviced pursuant to an annual retainer contract, the income was generated at the time of the creation of the contract and therefore sourced to the state in which the contract was entered. Conversely, if the only contract is for service as needed, the income is generated and sourced both when and where the service is performed. Such an approach is consistent with the SBTA. The SBTA includes a definition of "business activity" in MCL 208.3(2), which provides:

> (2) "Business activity" means a transfer of legal or equitable title to or rental of property, whether real, 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 in within the meaning of this act. [Emphasis added]

It is not membership in the State Bar of Michigan, nor is it the contact with the client via phone, fax, or email in Michigan, that generates plaintiff's income. Rather, it is work performed on the client's behalf that generates the income. Because each quantum of work performed by plaintiff's attorneys was a distinct service, the trial court properly granted plaintiff's motion for summary disposition

III. The Trial Court Erred in Failing to Award Statutory Interest

Finally, because the trial court properly found that the tax payment in this case was improperly assessed and collected, MCL 205.30(1) requires defendant to refund the entire payment, plus interest. MCL 205.23 controls the amount of interest to be paid. In failing to award statutory interest to plaintiff after it granted plaintiff's motion for summary disposition, the

trial court clearly erred. Therefore, upon remand the trial court shall calculate the proper amount of interest to which plaintiff is entitled.

Affirmed and remanded to determine the amount of statutory interest. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Christopher M. Murray
/s/ Cynthia Diane Stephens