STATE OF MICHIGAN

COURT OF APPEALS

MASCO CORPORATION, TEXWOOD INDUSTRIES, L.P., LANDEX, INC., and MASCO SERVICES, INC.,	UNPUBLISHED October 7, 2010
Plaintiffs-Appellees,	
v	No. 290993 Court of Claims
DEPARTMENT OF TREASURY,	LC No. 07-000064-MT
Defendant-Appellant.	

Before: FORT HOOD, P.J., and BORRELLO and STEPHENS, JJ.

PER CURIAM.

In this case brought under Michigan's Single Business Tax Act (SBTA), MCL 208.1 *et seq.*, repealed by 2006 PA 325, defendant appeals as of right from an order granting plaintiffs' motion for summary disposition and ordering defendant to accept plaintiffs' combined returns for tax years 2005 and 2006, and issue refunds of $777,982.60 for 2005 and $643,590.00 for 2006, with statutory interest. We affirm in part and reverse and remand in part.

Defendant first argues on appeal that plaintiffs cannot collectively be considered an affiliated group because Texwood Industries, LP does not issue capital stock with voting rights and, therefore, parent company Masco Corporation cannot own at least 80 percent of Texwood's capital stock with voting rights, as required by MCL 208.3(1). We disagree.

We review de novo a trial court's decision on a motion for summary disposition and questions of statutory interpretation. *Collins v Comerica Bank*, 468 Mich 628, 631; 664 NW2d 713 (2003); *In re MCI Telecommunications*, 460 Mich 396, 413; 596 NW2d 164 (1999). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Summary disposition should be granted under MCR 2.116(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).

Under the SBTA, an affiliated group is entitled to file a consolidated return. MCL 208.77. MCL 208.3(1) defines an affiliated group as:

> (1) "Affiliated group" means 2 or more United States corporations, 1 of which owns or controls, directly or indirectly, 80% or more of the capital stock with voting rights of the other United States corporation or United States corporations. As used in this subsection, "United States corporation" means a domestic corporation as those terms are defined in section 7701(a)(3) and (4) of the internal revenue code.

The SBTA relies, in large part, on the federal Internal Revenue Code (IRC). "For ease of administration . . . the SBTA uses the federal income tax system as a reference and starting point, and through various required additions and subtractions, converts the federal tax base into a consumption-type [value-added tax] VAT base." *Mobil Oil v Dep't of Treasury*, 422 Mich 473, 497; 373 NW2d 730 (1985). MCL 208.2 provides that terms used in the SBTA that are not defined differently "shall have the same meaning as when used in comparable context in the laws of the United States relating to federal income taxes in effect for the year unless a different meaning is clearly required."

The parties agree that Texwood is a "United States corporation" under MCL 208.3(1). They do not agree on whether Texwood issues "capital stock with voting rights." Defendant argues that because Texwood, as a limited partnership, does not issue capital stock with voting rights, it cannot be part of an affiliated group with Masco. Plaintiffs argue that the definition of stock in the IRC includes shares in an association, and therefore Texwood's shares constitute "stock." Defendant further asserts that to accept plaintiffs' generic definition of "stock" would render nugatory the words "capital" and "with voting rights" in the statute.

"Tax laws generally will not be extended in scope by implication or forced construction. When there is doubt, tax laws are to be construed in favor of the taxpayer." *Sharper Image Corp v Dep't of Treasury*, 216 Mich App 698, 702; 550 NW2d 596 (1996). When a tax statute grants tax credits or exemptions, the statute is to be narrowly construed in favor of the taxing authority because such statutes reduce the amount of tax imposed. *Alliance Obstetrics & Gynecology v Dep't of Treasury*, 285 Mich App 284, 286; 776 NW2d 160 (2009). Thus, to the extent that plaintiffs are challenging their tax liability, the tax laws are to be construed in their favor.

The goal in statutory construction is to discern and give effect to the Legislature's intent. *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004). The intent of the Legislature is most reliably evidenced through the words used in the statute. *Id*. If the language in the statute is unambiguous, judicial construction is neither required nor permitted. *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 720; 691 NW2d 1 (2005), citing *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). However, if a statute is ambiguous, judicial construction is appropriate. *Adrian School Dist v Michigan Pub School Employees Retirement Sys*, 458 Mich 326, 332; 582 NW2d 767 (1998). A statute is ambiguous "only if it 'irreconcilably conflict(s)' with another provision or when it is *equally* susceptible to more than a single meaning." *Fluor Enterprises, Inc v Dep't of Treasury*, 477 Mich 170, 177-178 n 3; 730 NW2d 722 (2007) (emphasis in original), quoting *Lansing Mayor v Pub Service Comm*, 470 Mich 154, 166; 680 NW2d 840 (2004).

The full phrase "capital stock with voting rights" is a designation used exclusively for a traditional corporation because other business entities will not issue stock with voting rights. Here, defendant contends that Masco could not own or control 80 percent of Texwood's stock

because Texwood does not issue stock. There is no comparable use of "capital stock with voting rights" in the IRC, although it does define stock as: "shares in an association, joint-stock company, or insurance company." IRC § 7701(a)(7). Therefore, because Texwood is an association, its shares can be considered stock for purposes of MCL 208.3. Nevertheless, Texwood's shares would not necessarily constitute stock "with voting rights."

The MCL 208.3(1) definition of an affiliated group is ambiguous with regard to how an association without voting stock should be taxed. On the one hand, the statute specifically points to the IRC for its definition of a United States corporation, which includes an association. As discussed above, an organization can be an association if it elects to be taxed as a corporation for federal tax purposes. On the other hand, the statute also requires one corporation to have "80% or more of the capital stock with voting rights" of a second corporation in order to have an affiliated group. We cannot disregard the language in the statute that refers to the IRC definition of a corporation. However, by including language in the statute to limit the definition of an "affiliated group" to only those corporations that issue voting stock, the Legislature has created an irreconcilable conflict within the statute, thus requiring judicial construction.

In construing a statute, this Court must presume that every word has some meaning, and this Court should avoid any construction that would render any part of a statute surplusage or nugatory. *Jenkins v Patel*, 471 Mich 158, 167; 684 NW2d 346 (2004); *People v Borchard-Ruhland*, 460 Mich 278, 285; 597 NW2d 1 (1999). The statute here must be read to include the IRC's definition of a corporation, while also seeking to enforce the requirement that the corporation have 80 percent stock with voting rights. The modifier "with voting rights" presumably ensures that the first corporation has actual control over the second corporation. An entity with 80 percent stock in a second company is meaningless if the stock is nonvoting stock. To have control, it is imperative that the stock has voting rights. Without a vote, there is no control. In the same manner, a LP with membership interests that do not provide control to the members would not meet this requirement. Clearly, the Legislature has written the SBTA to include inconsistent language, thus requiring construction of the statutory language as a whole.

A statute should be construed "'as a whole to harmonize its provisions and carry out the purpose of the Legislature.'" *Nowell v Titan Ins Co*, 466 Mich 478, 482 n 5; 648 NW2d 157 (2002), quoting *Macomb Co Prosecutor v Murphy*, 464 Mich 149, 159; 627 NW2d 247 (2001). "Statutes should be construed so as to prevent absurd results, injustice, or prejudice to the public interest." *McAuley v Gen Motors Corp*, 457 Mich 513, 518; 578 NW2d 282 (1998), overruled in part on other grounds 461 Mich 265 (1999), citing *Franges v Gen Motors Corp*, 404 Mich 590, 612; 274 NW2d 392 (1979); see also *Detroit Int'l Bridge Co v Commodities Export Co*, 279 Mich App 662, 675; 760 NW2d 565 (2008) ("a statute need not be applied literally if no reasonable lawmaker could have conceived of the ensuing result").

In reading this statute from that perspective, the Legislature pointed to the IRC for a definition of "corporation," which includes associations in the class of corporations, even though they do not issue "capital stock with voting rights." Because the statute specifically points to the federal code for guidance relative to what a corporation is, it would be unreasonable to presume

that the Legislature did not intend to use that definition. When there is doubt, tax laws are to be construed in favor of the taxpayer. *Sharper Image Corp*, 216 Mich App at 702.[1] Thus, in an effort to reconcile this seeming inconsistency, and to read the statute as a whole in accordance with the IRC, MCL 208.2, this Court should read the definition of an affiliated group to include both traditional corporations and associations, provided that one corporation/association has an 80 percent control over another.[2]

Plaintiffs contend that Masco indirectly owned all equity in Texwood by means of its ownership over Masco Cabinetry Holdings, Inc, and Masco Cabinetry, LLC. Because defendant does not dispute that Masco owns these entities, we affirm.

Defendant next argues that the Court of Claims erred in ordering a refund based on a return that plaintiffs had not yet officially filed. We agree.

The issues that were before the Court of Claims were (1) whether plaintiffs could file a consolidated return, and (2) whether plaintiffs were entitled to a refund. The Court of Claims concluded that plaintiffs were entitled to file a consolidated return and also concluded that their returns, as filed with the court, were accurate and that defendant should issue refunds based on the documents as presented.

However, plaintiffs moved for summary disposition pursuant to MCR 2.116(C)(10), and the court rule provides that "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." Thus, a motion based on MCR 2.116(C)(10) "tests the factual underpinnings of a claim other than an amount of damages[.]" *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 30; 651 NW2d 188 (2002). "The purpose of summary disposition is to avoid extensive discovery and an evidentiary hearing when a case can be quickly resolved on an issue of law." *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 259 Mich App 315, 324; 675 NW2d 271 (2003). In the present case, the purpose of the motion for summary disposition was to resolve

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[1] We also note that this construction of the statute is consistent with the legislative purpose. Facilitation of consolidated filing was designed to encourage multistate corporations to remain in this state or to build new production facilities in Michigan. *W R Grace & Co v Dep't of Treasury*, 115 Mich App 69, 72; 320 NW2d 62 (1982).

[2] "Capital stock" has been defined as "[t]he shares of stock representing ownership of a business. . . . Amount of stock that a corporation may issue[.]" Black's Law Dictionary, (6th ed), p 209. We note that the affidavit of Lawrence Leaman presented by plaintiffs provides that the companies at issue are affiliated through indirect ownership of stock and that Texwood was managed and controlled by an affiliated corporation. Thus, the Leaman affidavit provides that the affiliation relationship effectively satisfies the phrase "capital stock with voting rights" because of the manner in which the corporations are set up and controlled. Application of the law to the facts is reviewed de novo. *Centennial Healthcare Mgt Corp v Dep't of Consumer & Industry Services*, 254 Mich App 275, 284; 657 NW2d 746 (2002). Defendant did not present documentary evidence in opposition to this affidavit to create a genuine issue of material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

the issue of law regarding the propriety of the affiliated filing. The amount of any refund arising from the resolution of the legal issue was not properly before the trial court, MCR 2.116(C)(10), *Rice*, 252 Mich App at 30, and therefore, the trial court erred in adopting plaintiffs' representation regarding the refund amount.

Additionally, MCL 205.30 sets forth the procedure a taxpayer must follow in order to obtain a refund:

> A taxpayer who paid a tax that the taxpayer claims is not due may petition the department for refund of the amount paid within the time period specified in section 27a. If a tax return reflects an overpayment of credits in excess of the tax, the declaration of that fact on the return constitutes a claim for refund. If the department agrees the claim is valid, the amount of overpayment, penalties, and interest shall be first applied to any known liability as provided in section 30a, and the excess, if any, shall be refunded to the taxpayer or credited, at the taxpayer's request, against any current or subsequent tax liability.

The Court of Claims' conclusion that plaintiffs were entitled to file a consolidated return was not dispositive of the return amount. It does not appear that the court engaged in a factual determination that the return was accurate, but instead placed the burden on defendant to challenge any and all questionable items in the return through the context of the pending lawsuit.

The procedure for filing and obtaining a tax refund is not subject to judicial modification. Defendant was not required to engage in a premature review of plaintiffs' return until the court concluded whether the return should be filed in a separate or consolidated manner. The Court of Claims erred in ordering that defendant provide a refund to plaintiffs before defendant had the opportunity to officially review plaintiffs' consolidated return. We reverse with direction that plaintiffs file a return for the tax years at issue to defendant for processing and review, and the Court of Claims can retain jurisdiction over the case.

We affirm in part and reverse and remand in part. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello
/s/ Cynthia Diane Stephens