STATE OF MICHIGAN

COURT OF APPEALS

E I DU PONT DE NEMOURS & COMPANY, Petitioner-Appellee,	UNPUBLISHED August 7, 2012
v	No. 304758 Court of Claims
DEPARTMENT OF TREASURY, Respondent-Appellant.	LC No. 09-000092-MT

Before: GLEICHER, P.J., and SAAD and BECKERING, JJ.

PER CURIAM.

In this appeal involving the now repealed single business tax act (SBTA), MCL 208.1 *et seq*.,[1] respondent-appellant Department of Treasury appeals the order of the court of claims that granted appellee-petitioner's motion for summary disposition pursuant to MCR 2.116(C)(10) and denied respondent's motion for summary disposition pursuant to MCR 2.116(C)(8). For the reasons set forth below, we affirm.

Petitioner, a corporate taxpayer headquartered and domiciled in Delaware, filed this complaint to contest respondent's audit of petitioner for tax years 2001 through 2004. In 1991, petitioner formed the DuPont Merck Pharmaceutical Company—later renamed the DuPont Pharmaceuticals Company (DPC)—in a joint venture with Merck & Co., Inc. (Merck), wherein each company owned 50 percent of the partnership. After Merck sold its interest in DPC to petitioner's subsidiary in 1998, petitioner decided to maintain DPC's existing legal structure as a separate and independent company, rather than reincorporating the partnership into petitioner's business. In 2001, petitioner sold its entire ownership interest in DPC to Bristol-Myers Squibb Company, resulting in capital gains of approximately $2 billion. Respondent audited petitioner and determined that the capital gains from the DPC sale should have been included in its tax base under the SBTA.

Before the court of claims, petitioner challenged this conclusion on the ground that the entities were not unitary and therefore it was unconstitutional for Michigan to tax the proceeds from the sale. Petitioner also contested respondent's exclusion of profits on currency exchanges

[1] The SBTA has been repealed for tax years beginning after December 31, 2009.

from foreign exchange contracts ("FECs") during the disputed years when calculating petitioner's sales factor under the SBTA. The court agreed on both issues, and respondent is contesting both issues on appeal.

This Court reviews de novo a trial court's decision on a motion for summary disposition, *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008), issues of statutory interpretation, *Briggs Tax Service, LLC v Detroit Pub Schs*, 485 Mich 69, 75; 780 NW2d 753 (2010), and legal questions involving constitutional interpretation. *Midland Cogeneration Venture Ltd Partnership v Naftaly*, 489 Mich 83, 89; 803 NW2d 674 (2011).

"'The single business tax is a form of value added tax . . . [or] a tax on business activity.'" *Midwest Bus Corp v Dep't of Treasury*, 288 Mich App 334, 338-339; 793 NW2d 246 (2010), quoting *Trinova Corp v Dep't of Treasury*, 433 Mich 141, 149; 445 NW2d 428 (1989). Tax liability is calculated by first determining a taxpayer's tax base, which is the taxpayer's contribution to the economy (also described as business income before apportionment). MCL 208.9(1); *Midwest Bus Corp*, 288 Mich App at 338. When the taxpayer's business activities occur in multiple jurisdictions, "only a certain part of its tax base is allocated to Michigan because a state may not tax value earned outside of its borders." *Midwest Bus Corp*, 288 Mich App at 338; see also MCL 208.41. "[I]n the case of a tax on an activity, there must be a connection to the activity itself, rather than a connection only to the actor the State seeks to tax . . . ." *Allied-Signal, Inc v New Jersey Div of Taxation*, 504 US 768, 778; 112 S Ct 2251; 119 L Ed 2d 533 (1992). Without a sufficient nexus to Michigan, the state is not permitted to include "discrete business enterprise[s]" in the taxpayer's tax base that do not form a unitary part of the foreign taxpayer's business, as doing so would violate the Due Process and Commerce Clauses of the United States Constitution. *Id.* at 777-778. In other words, a state may tax an apportioned share of a taxpayer's multistate business, so long as the business activity is unitary. *Id.* at 772. This is known as the unitary business principle.[2]

If the business activity involves the sale of an asset, including another business or subsidiary, the sale is considered unitary with the taxpayer's business if the court finds that the two entities share (1) functional integration, (2) centralized management, and (3) economies of scale. *MeadWestvaco Corp v Illinois Dep't of Revenue*, 553 US 16; 128 S Ct 1498; 170 L Ed 2d 404 (2008), citing *Allied-Signal, Inc*, 504 US at 781. These determinations are factual in nature, subject to determination by the fact-finder, and the following considerations are relevant: (1) a flow of value between the entities that serves operational (rather than investment) functions is evidence of functional integration; (2) arm's-length transactions are evidence of a lack of integration; and (3) "occasional oversight—with respect to capital structure, major debt, and dividends—that any parent gives to an investment in a subsidiary" is evidence of a lack of centralized management. *Container Corp of America*, 463 US 159, 180 n 19; 103 S Ct 2933; 77 L Ed 2d 545 (1983) (citation omitted).

Respondent argues that the court of claims erred in granting summary disposition to petitioner because the record clearly established that petitioner and DPC were engaged in a

[2] Respondent abandons on appeal its claim that the UBP does not apply to the SBTA.

unitary business relationship. Respondent's argument refers to specific documents contained in the record that were outside of the joint stipulation of facts. Moreover, respondent failed to bring the court's attention to these facts in its written brief or at oral argument on the summary disposition motions. Further, the court's oral statements and written opinion do not indicate that it ever considered this evidence when it rendered its decision. On review of a court's decision on a dispositive motion, this Court may only consider "evidence properly presented to the trial court," or actually considered by the court, even if it was contained in the record. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 380-381; 775 NW2d 618 (2009). "This Court will not entertain on appeal factual recitations not presented to the district court any more readily than it will tolerate attempts to enlarge the record itself." *Barnard Mfg Co, Inc*, 285 Mich App at 380-381 (citation and internal quotation marks omitted).

In light of the facts presented to and addressed by the lower court, petitioner was entitled to judgment as a matter of law. The evidence before the court on the motion established that DPC and petitioner were not engaged in a unitary business relationship. After its creation, the two entities did not engage in the same line of business, nor did their respective enterprises synergize with or benefit each other. All transactions between the entities were negotiated and performed at arm's length. While there was an initial flow of capital from petitioner to DPC when DPC was formed, respondent offered no proof before the lower court that this flow of value served an operational, rather than investment, function. The two entities did not pool their resources or otherwise collectively bargain with suppliers for reduced prices by means of bulk transactions. Before the lower court, respondent did not present any evidence establishing that petitioner's management of DPC was any different than the occasional oversight that any responsible investor would have over a valuable asset. Because petitioner identified the matters having no disputed factual issues, and respondent failed to offer sufficient proof that would raise any genuine issue of material fact to overcome petitioner's motion, the court properly granted summary disposition to petitioner.

Respondent also argues that petitioner's profits from exchanges on its FECs should have been excluded from its sales factor under the SBTA because they do not qualify as "sales" as the term was defined in MCL 208.7(a). We disagree. When interpreting a statute, the court's goal is to "give effect to the intent of the Legislature." *Superior Hotels, LLC v Mackinaw Twp*, 282 Mich App 621, 628-629; 765 NW2d 31 (2009). Unless ambiguous, statutory language should be given its ordinary meaning and is presumed "to have intended the meaning expressed in the statute." *Id.* at 629. While clear and unambiguous language in a tax statute should be enforced as written, any ambiguities should be construed against the government in favor of the taxpayer. *Signature Villas, LLC v Ann Arbor*, 269 Mich App 694, 699, 702; 714 NW2d 392 (2006).

Under the SBTA, tax liability is apportioned to Michigan by considering three factors of the taxpayer's business activities: (1) sales (90 percent); (2) payroll (five percent); and (3) property (five percent). MCL 208.45a. Under the statutory scheme, "[t]he sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this state during the tax year, and the denominator of which is the total sales of the taxpayer in the United States during the tax year." MCL 208.51(1); see also *Midwest Bus Corp*, 288 Mich App at 339. "Sales" were defined in MCL 208.7(a) as

the amounts received by the taxpayer as consideration from the following:

> (*i*) The transfer of title to, or possession of, property that is stock in trade or other property of a 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.
>
> (*ii*) The performance of services, which constitute business activities . . . or from any combination of business activities described [in subsections (*i*) or (*ii*)].
>
> (*iii*) The rental, lease, licensing, or use of tangible or intangible property which constitutes business activity.

MCL 208.3(2) also broadly defined "business activity" in relevant part as activities performed "with the object of gain, benefit, or advantage . . . to the taxpayer." The statute also instructed: "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." *Id.*

Under the statutory definition of the word "sales," it is clear that the court of claims correctly held that petitioner's FECs should have been included in its sales factor when calculating its tax liability under the SBTA. Subsection (*iii*) is quite broad, essentially including all consideration received from the use of tangible or intangible property, as long as it constitutes business activity. The stipulated record established that petitioner received substantial revenue as consideration from exchanges on its FECs. The contracts involved exchanging U.S. dollars for foreign currency at fixed rates, which involves the use of tangible property. These contracts were made to minimize the risk of market volatility on exchange rates, and were essential to the performance of petitioner's corporate goals and policy. Accordingly, the performance of FECs constituted business activity. As each element of MCL 208.7 is satisfied, petitioner's gains from its FECs clearly qualified as "sales" under the SBTA.

Further, while MCL 208.7(b) excluded as "sales" any dividends, interest, and royalties subject to deduction from MCL 208.9(7), the FECs do not fall into these excluded categories.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Henry William Saad
/s/ Jane M. Beckering