

STATE OF MICHIGAN
COURT OF APPEALS

PFG ENTERPRISES,

Plaintiff-Appellee,

v

DEPARTMENT OF TREASURY,

Defendant-Appellant.

UNPUBLISHED
December 27, 2012

No. 305948
Court of Claims
LC No. 09-000002-MT

Before: SAWYER, P.J., and SAAD and METER, JJ.

PER CURIAM.

Defendant appeals by leave granted a Court of Claims order granting plaintiff's motion for summary disposition under MCR 2.116(C)(10) in this tax dispute involving the Single Business Tax Act (SBTA), MCL 208.1 *et seq.*, repealed effective December 31, 2007. We affirm.

Plaintiff is a Michigan manufacturing corporation known in the automotive industry as a "Tier 2" supplier. As such, plaintiff engages in secondary manufacturing operations for its customers, who are most often "Tier 1" suppliers—direct suppliers to automobile manufacturers. Specifically, plaintiff formulates and applies proprietary coatings to automotive parts. To that end, plaintiff purchases large quantities of chemicals and coatings that it holds in inventory to formulate its proprietary coatings. Typically, plaintiff applies its proprietary coatings to automotive parts owned by its customers, who ship their parts to plaintiff specifically for this purpose.

Plaintiff characterizes its business activities as sales of tangible personal property. Plaintiff, therefore, filed its Single Business Tax (SBT) returns for the years 2002-2004 (years in issue) based on MCL 208.52, which sources to Michigan only those sales of tangible personal property that remain within the state. Defendant subsequently audited plaintiff's returns for the years in issue and assessed an additional SBT liability of \$129,445.32, including tax and interest. Contrary to plaintiff's position, defendant characterized plaintiff's business activities as a service. Defendant, therefore, assessed this additional liability based on MCL 208.53, which applies to sales other than of tangible personal property and sources to Michigan all sales based on business activity that occurred within the state.

Plaintiff paid the assessment in full, under protest, and filed suit against defendant for the full refund plus costs and attorney fees. Plaintiff subsequently filed a motion for summary

disposition under MCR 2.116(C)(10), which was granted by the Court of Claims. This appeal followed.

The sole issue on appeal is whether the Court of Claims erred in finding that plaintiff's application of its proprietary coatings constituted the sale of tangible personal property pursuant to MCL 208.52. Plaintiff maintains that because its proprietary coatings are unequivocally considered tangible personal property, the sale of those coatings—even when applied to its customers' parts—is necessarily the sale of tangible personal property. Plaintiff further argues that its customers sought plaintiff's proprietary coatings, the application of which was ancillary to the tangible product itself. We agree.

This Court reviews de novo decisions by the Court of Claims regarding summary disposition and issues of statutory interpretation. *Midwest Bus Corp v Dep't of Treasury*, 288 Mich App 334, 337; 793 NW2d 246 (2010). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). The moving party has the initial burden of specifying which factual issues are undisputed and to support those specifications by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3)(b); *Coblentz v City of Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006). The non-moving party then has the burden of showing, by offering evidentiary proof, that a genuine issue of material fact exists. MCR 2.116(G)(4); *Coblentz*, 475 Mich at 569. The moving party is entitled to judgment “as a matter of law” under MCR 2.116(C)(10) if the non-moving party fails to establish a genuine issue of material fact exists. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). A genuine issue of material fact exists when, viewed in the light most favorable to the non-moving party, reasonable minds could differ on an issue. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

This Court interprets statutes according to the intent of the Legislature. *Farrington v Total Petroleum, Inc*, 442 Mich 201, 212; 501 NW2d 76 (1993). In the absence of ambiguities, this Court looks first to the plain language of the statute. *House Speaker v State Admin Bd*, 441 Mich 547, 567; 495 NW2d 539 (1993). Where ambiguities exist, tax laws are generally construed in favor of the taxpayer. *Int'l Business Machines v Dep't of Treasury*, 220 Mich App 83, 86; 558 NW2d 456 (1996).

Neither MCL 208.52 nor MCL 208.53 contains ambiguities. We, therefore, look to the intent of the Legislature and the plain language of the SBTA to determine plaintiff's proper SBT liability for the years in issue.

The SBTA sought to “impose a tax upon the privilege of conducting business activity within Michigan.” *Trinova Corp v Dep't of Treasury*, 433 Mich 141, 149; 445 NW2d 428 (1989). To determine a business's SBT liability, the SBTA included a formula to apply to a business's tax base. MCL 208.45; *Trinova Corp*, 433 Mich at 151. A business's overall SBT liability is reduced by dividing the business's sales within Michigan by its total sales. MCL 208.45; *Trinova Corp*, 433 Mich at 151. To determine how much of a business's sales should be considered “sales within Michigan,” the sales first must be characterized as either “sales of tangible personal property,” or “sales other than of tangible personal property.” The sales of tangible personal property are sourced to Michigan only if they are “shipped or delivered to a

purchaser” within Michigan. MCL 208.52(b). On the other hand, sales other than of tangible personal property are sourced to Michigan if “[t]he business activity is performed in this state.” MCL 208.53(a).

The SBTA broadly defined “sales,” in pertinent part, as follows:

(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 other than those included in subparagraph (i), or from any combination of business activities described in this subparagraph and subparagraph (i). [MCL 208.7(1)(a)(i), (ii).]

Although the SBTA did not provide a definition of “tangible personal property,” this Court may consult a legal dictionary to define a legal term not defined within a statute. *Horace v City of Pontiac*, 456 Mich 744, 756; 575 NW2d 762 (1998). Black’s Law Dictionary defines tangible personal property as “personal property that can be seen, weighed, measured, felt, or touched, or is in any way perceptible to the senses.”

Here plaintiff annually purchased tens of thousands of gallons of chemicals and coatings that it held in inventory and used to formulate its proprietary coatings. Undisputedly, both the inventory used to formulate the coatings, as well as plaintiff’s proprietary coatings, could be “seen, weighed, measured, felt, or touched.” Likewise, there is no dispute that, when plaintiff applied its coatings to its customers’ automotive parts, plaintiff transferred title from those tangible coatings it held in inventory to its customers. This transfer of property falls squarely within the definition of sales in MCL 208.7(1)(a)(i), indicating that plaintiff’s sales should be considered sales of tangible personal property.

However, because plaintiff not only transferred its proprietary coatings to its customers, but also applied its coatings, it could also be argued that plaintiff’s sales are “the performance of services,” as defined by MCL 208.7(1)(a)(ii). We must, therefore, address plaintiff’s application services within the context of SBT liability.

To properly address this issue, we look to guidance from our Supreme Court. In *Catalina Mktg Sales Corp v Dep’t of Treasury*, 470 Mich 13; 678 NW2d 619 (2004), our Supreme Court adopted a test, originally proposed by this Court,¹ to determine whether business transactions involving both the transfer of tangible property and services should be considered principally the provision of services or sales of tangible personal property. *Catalina*, 470 Mich at 24-25. When

¹ See *Univ of Mich Bd of Regents v Dep’t of Treasury*, 217 Mich App 665; 553 NW2d 349 (1996).

applying this objective test, which considers the totality of the transaction, we look at the following six factors to make our determination:

[W]hat the buyer sought as the object of the transaction, what the seller or service provider is in the business of doing, whether the goods were provided as a retail enterprise with a profit-making motive, whether the tangible goods were available for sale without the service, the extent to which intangible services have contributed to the value of the physical item that is transferred, and any other factors relevant to the particular transaction. [*Id.* at 26.]

Although this “incidental to service” test was originally used by both this Court and our Supreme Court to determine sales tax liability, we believe the same test is applicable here.

When this test is applied in this case, plaintiff prevails. Plaintiff’s customers sought its proprietary coatings, and plaintiff is in the business of formulating and supplying these proprietary coatings. Plaintiff held chemicals and coatings in inventory to transfer to its customers. The transfer of these coatings established plaintiff’s profit-making venture. Furthermore, it was the actual coatings, provided by plaintiff, that added value to its customers’ automotive parts. Without plaintiff’s coatings, plaintiff’s customers could not supply its parts to their customers—the automobile manufacturers.

We conclude that plaintiff’s application services were incidental to the sales of its proprietary coatings. Therefore, plaintiff correctly characterized its business activity as the sales of tangible personal property and correctly calculated its SBT liability for the years in issue by applying MCL 208.52.

Affirmed.

/s/ David H. Sawyer
/s/ Henry William Saad
/s/ Patrick M. Meter