STATE OF MICHIGAN

COURT OF APPEALS

P & M HOLDING GROUP, LLP, Plaintiff-Appellee,	UNPUBLISHED November 15, 2012
v	No. 307037 Court of Claims
DEPARTMENT OF TREASURY, Defendant-Appellant.	LC No. 10-000074-MT

Before: TALBOT, P.J., and BECKERING and M. J. KELLY, JJ.

PER CURIAM.

The Department of Treasury ("the Department") appeals as of right the Court of Claims' order granting P & M Holding Group, LLP's ("P & M") motion for reconsideration and denying the Department's motion for reconsideration. We affirm.

P & M is a fiscal year taxpayer whose fiscal year begins on July 1 and ends on June 30 of the next year. On January 1, 2008, Michigan transitioned from using the Single Business Tax ("SBT")[1] to the Michigan Business Tax ("MBT").[2] For the tax period beginning July 1, 2007 and ending December 31, 2007, P & M filed a short year SBT return using the "actual method." At the same time, P & M filed a short year MBT return for the tax period beginning January 1, 2008 and ending June 30, 2008, using the "annual method."

On June 2, 2010, the Department notified P & M that it was voiding its MBT return because P & M's final SBT and initial MBT were filed using different filing methods. In the notice, the Department advised P & M that the filing methods for its final SBT and initial MBT had to match, and requested that P & M submit its initial MBT return "correcting the filing method." In response, P & M filed a complaint for declaratory judgment requiring the Department to accept its MBT return as originally filed.

On October 12, 2010, the Department issued P & M a bill for taxes due of $182,521, plus $25,859.70 in interest, which P & M paid in full under protest. P & M then filed a motion for

[1] MCL 208.1, *et seq.*

[2] MCL 208.1101, *et seq.*

summary disposition requesting a refund of the amount paid, and an order that required the Department to accept its initial MBT return.

On September 6, 2011, the court issued an opinion and order finding that P & M was required by MCL 208.152 to file its final SBT return using the annual method. As such, the Department's assessment, which the court indicated was in connection with P & M's final short SBT year, was proper. Additionally, the court found that Revenue Administrative Bulletin ("RAB") 2007-5 "does not have the force of law" and directly contradicts the Legislature's intent in enacting MCL 208.1503.[3] Finally, the court determined that because MCL 208.1503 lacked a consistency requirement, the statute treated similarly situated taxpayers nonuniformly in violation of the uniformity guarantee of the Michigan Constitution,[4] thus MCL 208.1503 was unconstitutional and must be severed from the Michigan Business Tax Act ("MBTA"). As a result, the court affirmed the Department's assessment of taxes due, and ordered the Department to process and accept P & M's short year MBT return.

On October 19, 2011, the court granted P & M's and denied the Department's motion for reconsideration and ordered the Department to refund the amount paid by P & M, plus statutory interest. The court affirmed that RAB 2007-5 was non-binding, but held that it erred in finding that P & M had to use the annual method to calculate its final SBT because the parties agreed that using the actual method was proper. The court also concluded that the uniformity guarantee in the Michigan Constitution was not violated by MCL 208.1503 because the purpose of providing the taxpayer with two choices for calculating its initial short year MBT met the rational basis standard of review.

"This Court reviews de novo a trial court's decision on a motion for summary disposition."[5] "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint."[6] When deciding if summary disposition was appropriately granted under this subsection, we must consider "affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties . . . in the light most favorable to the party opposing the motion."[7] Summary disposition is appropriate "when there is no genuine issue of material fact and the

[3] RAB 2007-5 states that it is necessary that the final short year SBT and initial short year MBT returns for fiscal year filers use the same filing method. MCL 208.1503 indicates that either the annual or the actual method can be used for the initial MBT return.

[4] 1963 Const, Art 9, § 3.

[5] *JW Hobbs Corp v Dep't of Treasury*, 268 Mich App 38, 43; 706 NW2d 460 (2005).

[6] *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

[7] *Id.*

moving party is entitled to judgment as a matter of law."[8] We also review statutory interpretation, which is a question of law, de novo.[9]

On appeal, the Department argues that the trial court incorrectly interpreted MCL 208.1503. We disagree.

"The primary goal when construing a statute is to ascertain and give effect to the intent of the Legislature"[10] "through reasonable construction in consideration of the purpose of the statute and the object sought to be accomplished."[11] [T]his Court must begin by examining the language of the statute."[12]

> If a statute is clear, it must be enforced as plainly written. Nothing will be read into a clear statute that is not within the manifest intention of the Legislature, as derived from the language of the statute itself, and courts may not speculate about the probable intent of the Legislature beyond the language expressed in the statute.[13]

MCL 208.1503(1), which applies to P & M's initial short MBT year, states:

> If a taxpayer's tax year to which this act applies ends before December 31, 2008 or if a taxpayer's first tax year is less than 12 months then a taxpayer subject to this act may elect to compute the tax imposed by this act for the portion of that tax year to which this act applies or that first tax year in accordance with 1 of the following methods:
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> (a) The tax may be computed as if this act were effective on the first day of the taxpayer's annual accounting period and the amount computed shall be multiplied by a fraction, the numerator of which is the number of months in the taxpayer's first tax year and the denominator of which is the number of months in the taxpayer's annual accounting period. [Annual Method.]
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> (b) The tax may be computed by determining the business income tax base and modified gross receipts tax base in the first tax year in accordance with an accounting method satisfactory to the department that reflects the actual business

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[8] *JW Hobbs Corp*, 268 Mich App at 43.

[9] *Id*.

[10] *Farmers Ins Exch v AAA of Mich*, 256 Mich App 691, 695; 671 NW2d 89 (2003) (citation and quotations omitted).

[11] *King v Reed*, 278 Mich App 504, 513; 751 NW2d 525 (2008).

[12] *Id*.

[13] *Id*. at 513-514 (citations omitted).

income tax base and modified gross receipts tax base attributable to the period. [Actual Method.][14]

Review of the statute[15] reveals that it does not apply to all taxpayers equally. Rather, it applies to taxpayers whose tax year will end before the calendar year, or whose first tax year will be less than 12 months. While the statute could apply to calendar year taxpayers whose business activities will end before a full calendar year passes, it appears to primarily apply to fiscal year filers. The statute states that the taxpayer "may elect to compute tax . . . in accordance with 1 of the following methods[.]"[16] To "elect" means "to determine in favor of (a method, course of action, etc.)"[17] The statute does not indicate that the method elected by the taxpayer must be the same method as was used by the taxpayer when computing its final short year SBT return. Because the statute clearly provides the applicable taxpayers with an unconditional choice of methods for their initial short year MBT return, we will "not speculate about the probable intent of the Legislature beyond the language expressed in the statute."[18]

The Department appears to assert that the Legislature's intent that taxpayers were to utilize the same accounting method for their final SBT and initial MBT returns is supported by the statute addressing the transition from the MBT to the corporate income tax ("CIT"),[19] which occurred on January 1, 2012. "Courts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there."[20] Therefore, because the consistency requirement was not included in MCL 208.1503, it should not be included in its interpretation.

We are not persuaded by the Department's argument that when MCL 208.1503 is read in conjunction with MCL 208.1513 and MCL 208.152, it becomes clear that the Legislature intended the interpretation of MCL 208.1503 to include a consistency requirement. "Statutes that relate to the same subject or that share a common purpose are *in pari materia* and must be read together as one law, even if they contain no reference to one another and were enacted on different dates."[21] The objective "of the *in pari materia* rule is to give effect to the legislative intent expressed in harmonious statutes. To the extent that the statutes that are *in pari materia*

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[14] The language cited is the language that was in effect at the time this case arose. Effective January 1, 2012, MCL 208.1503 was amended by 2011 PA 209.

[15] MCL 208.1503(1).

[16] *Id*.

[17] *Random House Webster's College Dictionary* (1997).

[18] *King*, 278 Mich App at 513.

[19] MCL 206.683.

[20] *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993).

[21] *Mich Deferred Presentment Servs Ass'n, Inc v Comm'r of the Office of Fin & Ins Regulation*, 287 Mich App 326, 334; 788 NW2d 842 (2010) (citation and quotations omitted).

are unavoidably in conflict and cannot be reconciled, the more specific statute controls."[22] Statutes are not *in pari materia* when "the scope and aim of the two statutes are distinct and unconnected."[23] "[T]he interpretive aid of the doctrine of *in pari materia* [however] can only be utilized in a situation where the section of the statute under examination is itself ambiguous."[24] Because we find that MCL 208.1503 is not ambiguous, the Department's *in pari materia* argument must fail. Additionally, even if this Court were to use *in pari materia* techniques to assist in determining the Legislative intent, this Court's interpretation of MCL 208.1503 would not change.

MCL 208.1513, states in part:

> (1) The tax imposed by this act shall be administered by [the Department] pursuant to 1941 PA 122, MCL 205.1 to 205.31, and this act. . . .
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> (2) The department shall promulgate rules to implement this act pursuant to the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328.
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> (3) The department shall prescribe forms for use by taxpayers and may promulgate rules in conformity with this act for the maintenance by taxpayers of records, books, and accounts, and for the computation of the tax, the manner and time of changing or electing accounting methods and of exercising the various options contained in this act, the making of returns, and the ascertainment, assessment, and collection of the tax imposed under this act.

The Department contends that MCL 208.1513 demonstrates a recognition by the Legislature that the Department cannot promulgate every form and requirement pursuant to the Administrative Procedures Act ("APA").[25] Thus, the Department asserts that because it was permitted by the Legislature to "flesh out" the MBTA by preparing bulletins which outline its interpretation of the current state tax laws, RAB 2007-5 must be followed. The Department is authorized to "periodically issue bulletins that index and explain current department interpretations of current state tax laws."[26] It is well-settled, however, that unless an RAB is adopted under the APA, it "does not have the force of law."[27] Additionally, there is no implication in MCL 208.1513 that promulgation of forms and requirements regarding the manner and time of changing or electing accounting methods was not required. Although RAB 2007-5 clearly directs taxpayers to use the same accounting method for both the final SBT and

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[22] *Id*. (citations and quotations omitted).

[23] *Beznos v Dep't of Treasury*, 224 Mich App 717, 722; 569 NW2d 908 (1997).

[24] *Tyler v Livonia Pub Sch*, 459 Mich 382, 392; 590 NW2d 560 (1999).

[25] MCL 24.201, *et seq*.

[26] MCL 205.3(f).

[27] *Catalina Mktg Sales Corp v Dep't of Treasury*, 470 Mich 13, 21; 678 NW2d 619 (2004).

the initial MBT, it was not adopted under the APA. Thus, it was "merely explanatory."[28] Moreover, the Department is only permitted to prescribe forms and promulgate rules that conform with the MBTA, and RAB 2007-5 clearly does not.[29] Accordingly, the Department's argument is unpersuasive.

The Department next points to MCL 208.152, which is part of the act repealing the SBT. MCL 208.152 states: "The department of treasury shall prorate the liability for the tax imposed under the single business tax act as necessary to impose the equivalent of a tax at the rate of zero on business activity after December 31, 2007." The language of the statute clearly contemplates an end to SBT tax liability by December 31, 2007. The Department argues that the Legislature only provided minimal guidance for the transitory rule because the initiative petition process creating the statute did not allow for the Legislature to carefully draft and coordinate the end of the SBT with the beginning of the MBT. As a result, the Department asserts, MCL 208.152 "is not susceptible to a plain meaning interpretation" in order to ascertain legislative intent. The Department provides no authority for such an assertion and so we find it lacks merit.[30]

Additionally, the statute indicates that proration shall occur "as necessary." As P & M aptly notes, if a taxpayer uses the actual method of accounting, it will not be necessary to prorate, but if the taxpayer uses the annual method, proration is (or could be) necessary. Therefore, the statutory language contemplates the use of either the annual or the actual accounting method for computing the taxpayer's final SBT, which does not change our interpretation of MCL 208.1503.

The Department also argues that if the court's interpretation is upheld it will create an implied tax exemption. Tax exemption is defined as "[i]mmunity from the obligation of paying taxes in whole or in part."[31] The Legislature's intent to grant a tax exemption "must be expressed in clear and unmistakable terms, or must appear by necessary implication from the language used[.]"[32] The Department argues that if P & M were permitted to use different accounting methods for its final short SBT year and initial short MBT year, P & M would avoid taxation on a portion of its tax base that would not occur if it used the same accounting methods for both. The Department has failed to demonstrate that its assertion is true. Assuming arguendo that the Department is correct in its assertion, this Court has held that a transaction that reduces a taxpayer's tax base and "is not initially taxed," is not a tax exemption because the transaction's exclusion from consideration does not reduce the amount of tax.[33] Because MCL 208.1503 does

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[28] *Danse Corp v City of Madison Heights*, 466 Mich 175, 181; 644 NW2d 721 (2002).

[29] MCL 208.1513(3).

[30] *Houghton v Keller*, 256 Mich App 336, 339; 662 NW2d 854 (2003).

[31] *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295, 334 n 40; 806 NW2d 683 (2011) (citation and quotations omitted).

[32] *Guardian Indus Corp v Dep't of Treasury*, 243 Mich App 244, 249; 621 NW2d 450 (2000) (citation and quotations omitted).

[33] See *Manske v Dep't of Treasury*, 265 Mich App 455, 458; 695 NW2d 92 (2005).

not create a tax exemption, the "statute should be construed in favor of the taxpayer,"[34] and thus, P & M's argument must fail.

The Department next claims that if the court's interpretation prevails and MCL 208.1503 does not require consistency in the methods of filing the final SBT and initial MBT returns, MCL 208.1503 must be stricken from the MBTA because it violates the Constitution's uniformity guarantee.[35] We disagree.

P & M challenges whether the Department has standing to bring this constitutional claim. Appellate review of whether a party has standing "is a question of law that we reviewed de novo."[36]

"Michigan standing jurisprudence" is "a limited, prudential doctrine" intended to "'ensure sincere and vigorous advocacy' by litigants."[37] "[W]henever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment."[38]

> In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted.[39] An actual controversy exists when declaratory relief is needed to guide a plaintiff's future conduct in order to preserve the plaintiff's legal rights. The existence of an actual controversy is a condition precedent to the invocation of declaratory relief. In the absence of an actual controversy, the trial court lacks subject-matter jurisdiction to enter a declaratory judgment.[40]

Here, the Department is an administrative agency "of this state responsible for the collection of taxes[.]"[41] To preserve the Department's right to collect taxes pursuant to the MBTA, declaratory judgment regarding the constitutionality of MCL 208.1503 is necessary. Thus, the Department has standing to raise this claim.

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[34] *Evanston YMCA Camp v State Tax Comm*, 369 Mich 1, 7; 118 NW2d 818 (1962).

[35] 1963 Const, Art 9, § 3.

[36] *Manuel v Gill*, 481 Mich 637, 642; 753 NW2d 48 (2008) (citation and quotations omitted).

[37] *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 359, 372; 792 NW2d 686 (2010) (citations omitted).

[38] *Id*. at 372.

[39] MCR 2.605(A)(1).

[40] *Lansing Sch Ed Ass'n v Lansing Bd of Ed (On Remand)*, 293 Mich App 506, 515; 810 NW2d 95 (2011) (citations and quotations omitted).

[41] MCL 205.1(1).

"Statutes are presumed to be constitutional, and courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent."[42] "The presumption of constitutionality is especially strong" when tax legislation is concerned.[43] "Absent an imposition on a fundamental right or a suspect class, tax legislation is reviewed to determine whether its classifications bear a rational relation to a legitimate state purpose."[44] "Rational-basis review does not test the wisdom, need, or appropriateness of the legislation, or whether the classification is made with 'mathematical nicety,' or even whether it results in some inequity when put into practice."[45] "Thus, to have the legislation stricken, the challenger would have to show that the legislation is based 'solely on reasons totally unrelated to the pursuit of the State's goals,' or, in other words, the challenger must 'negative every conceivable basis which might support' the legislation."[46] Here, the parties agree that a purpose behind providing alternative methods for tax computation[47] was "ease of administration." Accordingly, because the statute meets rational-basis review, the Department's constitutional challenge lacks merit.

Affirmed.

/s/ Michael J. Talbot
/s/ Jane M. Beckering
/s/ Michael J. Kelly

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[42] *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich at 307 (citation and quotations omitted).

[43] *Id*. at 308.

[44] *TIG Ins Co, Inc, v Dep't of Treasury*, 464 Mich 548, 550-551; 629 NW2d 402 (2001).

[45] *Crego v Coleman*, 463 Mich 248, 260; 615 NW2d 218 (2000).

[46] *TIG Ins Co, Inc*, 464 Mich at 558 (citations omitted).

[47] MCL 208.1503.