STATE OF MICHIGAN

COURT OF APPEALS

PHARMACIA & UPJOHN COMPANY, Plaintiff-Appellant,	UNPUBLISHED May 10, 2002
v	No. 225060 Court of Claims
DEPARTMENT OF TREASURY, Defendant-Appellee.	LC No. 98-016981-CM

Before: Gage, P.J., and Hoekstra and Meter, JJ.

PER CURIAM.

Plaintiff Pharmacia & Upjohn Company appeals as of right from a grant of summary disposition to defendant, the Revenue Division of the Michigan Department of Treasury. Plaintiff alleged below that on its single business tax (SBT) returns for the tax years 1992 through 1995, it overstated its tax base by (1) reporting as income technical assistance payments from its subsidiary foreign sales corporation (FSC), and (2) including commissions paid to the FSC as if they were commissions paid to a subsidiary domestic international sales corporation (DISC). Plaintiff sought a tax refund due to the alleged overstatements, but defendant denied its request. Plaintiff then filed suit in the Court of Claims. The parties agreed on a stipulated set of facts, at which point plaintiff filed a motion for summary disposition under MCR 2.116(C)(10). The Court of Claims denied the motion and instead granted summary disposition to defendant under MCR 2.116(I)(2). We affirm.

Plaintiff first argues that the Court of Claims erred by holding that it was required to include in its SBT base certain technical assistance payments to plaintiff's employees from its FSC, Pharmacia and Upjohn Foreign Sales Corporation (PUFSC). We disagree. A motion under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). This Court must look at all the evidence in the light most favorable to the nonmoving party. *Atlas Valley Golf & Country Club, Inc v Goodrich*, 227 Mich App 14, 25; 575 NW2d 56 (1997). "Summary disposition is properly granted to the opposing party under MCR 2.116(I)(2) if it appears to the court that that party, rather than the moving party, is entitled to judgment." *Sharper Image v Dep't of Treasury*, 216 Mich App 698, 701; 550 NW2d 596 (1996).

The SBT is levied on the adjusted tax base of every person with business activity in this state that is allocated or apportioned to this state. MCL 208.31(1). The SBT act defines "business activity" as:

> the performance of services . . . 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. [MCL 208.3(2).]

A taxpayer's SBT base is calculated by adding back to federal taxable income certain items that may qualify as deductions under the federal tax code, including "compensation." MCL 208.9(5). "Compensation" means "all wages, salaries, fees, bonuses, commissions, or other payments made in the taxable year on behalf of or for the benefit of employees, officers, or directors of the taxpayers." MCL 208.4(3).

The primary goal of judicial interpretation of statutes is to ascertain and give effect to the Legislature's intent. *Frankenmuth Mutual Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998). "The first criterion in determining intent is the specific language of the statute." *Rose Hill Center, Inc v Holly Twp,* 224 Mich App 28, 32; 568 NW2d 332 (1997). The Legislature is presumed to have intended the meaning it plainly expressed. *Guardian Industries Corp v Dep't of Treasury*, 243 Mich App 244, 248-249; 621 NW2d 450 (2000). "If the plain and ordinary meaning of a statute's language is clear, judicial construction is normally neither necessary nor permitted." *Heinz v Chicago Rd Investment Co,* 216 Mich App 289, 295; 549 NW2d 47 (1996).

In this case, because the reimbursements at issue were salary payments to plaintiff's employees, it is clear that they qualify as compensation under MCL 208.4(3). Moreover, the activity that gave rise to this dispute clearly falls within the definition of "business activity" under MCL 208.3(2). Plaintiff's employees provided technical assistance to PUFSC. Plaintiff compensated its employees for their work, and PUFSC reimbursed plaintiff for that compensation. Plaintiff's argument that the services performed by its employees for PUFSC did not have the object of benefit for plaintiff is without merit. Indeed, plaintiff and PUFSC exist in a close, mutually beneficial relationship, with a large portion of the income generated by PUFSC being assigned to plaintiff. This necessitates the conclusion that one object of the technical assistance provided to PUFSC was to create a benefit for plaintiff. Because the scope of benefit set forth in MCL 208.3(2) includes both "direct" and "indirect" benefit, plaintiff cannot escape a finding that it engaged in a business activity when it directed its employees to provide services to PUFSC. The Court of Claims properly granted summary disposition to defendant on this issue.

Plaintiff next argues that commissions it paid to PUFSC should not have been included in its SBT base. We disagree.

As noted, certain deductions that a taxpayer makes in determining its federal taxable income must be added back when determining the taxpayer's SBT base. One of these is "the

payment of commissions or other fees to . . . a domestic international sales corporation or any like special classification the purpose of which is to reduce or postpone the federal income tax liability." MCL 208.9(4)(e). Plaintiff does not dispute having paid commissions to PUFSC and that sixty-five percent of those commissions were exempt from federal taxation. In the face of these apparently dispositive facts, however, plaintiff does dispute the conclusion that PUFSC should be considered a "like special classification the purpose of which is to reduce or postpone federal income tax liability."

Plaintiff's main argument on appeal is that an FSC is different from a DISC because an FSC is required to have economic substance independent from its parent corporation, while a DISC may be a purely paper corporation. This point, however, can be granted without forcing the conclusion that plaintiff must prevail on appeal; indeed, MCL 208.9(4)(e) does not mandate adding back commissions only for DISCs and other *identical* entities. We agree with the Court of Claims, which focused on the specific language of MCL 208.9(4)(e). As noted by the court:

> The fact that an FSC is required to have substantially more economic substance as compared to a . . . [DISC] has little bearing on the intent and purpose of section 208.9(4), which is to reflect in the current year the value added to the economy that is otherwise deferred by a [DISC] or like classification deduction.

PUFSC served to defer plaintiff's federal income tax liability, and under the plain language of MCL 208.9(4)(e), the commissions paid to PUFSC are includable in plaintiff's SBT base. The trial court did not err in granting defendant summary disposition on this issue.

Plaintiff argues that defendant's interpretation of the SBT act with regard to the commissions issue serves to violate the Commerce Clause, US Const, Art I, § 8, 3. Plaintiff contends that if the commissions are included in plaintiff's Michigan SBT base *and* in PUFSC's SBT base in another state,[1] PUFSC would face an unconstitutional burden. However, plaintiff did not raise its Commerce Clause issue below and thus has waived it for purposes of appeal. *Lantz v Southfield City Clerk*, 245 Mich App 621, 627 n 4; 628 NW2d 583 (2001); see also *Guardian Photo, Inc v Dep't of Treasury*, 243 Mich App 270, 281-282; 621 NW2d 233 (2000). Moreover, there are no exceptional circumstances here requiring us to abandon the "cardinal rule" that issues not raised below are not subject to review on appeal. See *id.* Indeed, we note the following language from MCL 205.27a(6):

> Notwithstanding the provisions of subsection (2), a claim for refund based upon the validity of a tax law based on the laws or constitution of the United States or the state constitution of 1963 shall not be paid unless the claim is filed within 90 days after the date set for filing a return.

Plaintiff did not make its constitutional argument within this time frame, rendering the argument ineligible for relief.

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[1] We note that defendant did not tax PUFSC as a separate entity because PUFSC does not have a sufficient nexus with Michigan.

Affirmed.

/s/ Hilda R. Gage
/s/ Joel P. Hoekstra
/s/ Patrick M. Meter