

STATE OF MICHIGAN
COURT OF APPEALS

ALCOA, INC.,

Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,

Defendant-Appellee.

UNPUBLISHED

February 3, 2004

No. 241170

Court of Claims

LC No. 01-017935-MT

Before: Fitzgerald, P.J., and Neff and White, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition in favor of defendant and dismissing plaintiff's complaint seeking a refund of \$208,808.71 in single business tax (SBT) and interest assessed by defendant for the 1994 tax year. We affirm.

I

Plaintiff is a Pennsylvania corporation that in 1994 transacted business in Michigan and was subject to the single business tax act (SBTA), MCL 208.1 *et seq.* During 1994, plaintiff sold its interests in three foreign entities, ACAP-Singapore PTE, Ltd., Jamalco, LLC, and Suralco, LLC, realizing a gain for federal income tax purposes.¹ Plaintiff did not include the gain realized in its SBT base on its 1994 tax return. In January 2001, defendant assessed plaintiff additional SBT taxes for 1994 in the amount of \$136,492 and interest of \$72,316.71 for a total alleged liability of \$208,808.71. Plaintiff paid the assessed taxes and interest under protest.

In April 2001, plaintiff filed a four-count complaint in the Court of Claims, seeking recovery of the additional taxes and interest paid. Plaintiff's complaint alleged that 1) the sale at

¹ Plaintiff entered into a corporate merger transaction with Western Mining Corporation Holdings Limited (WMC), an Australian company. Pursuant to the merger agreement, plaintiff sold its interests in three foreign entities, ACAP-Singapore PTE, Ltd., Jamalco, LLC, and Suralco, LLC, and formed a new company, Alcoa World Alumina, LLC, jointly owned by plaintiff and WMC. Alcoa World Alumina then became owner of certain other entities, including the three entities involved in the sale at issue.

issue constituted a “casual transaction” under MCL 208.4(1), and therefore plaintiff was entitled to exclude the gain from its SBT tax base (Count I); 2) defendant’s denial of the casual transaction exclusion on the basis that it was available to only noncorporate taxpayers violated equal protection guarantees and the uniformity of taxation clause, US Constitution, Am XIV, and 1963 Const, art 1, § 2 (Count II); 3) the gain was excludable pursuant to MCL 208.9(9) because it was attributable to another entity (Count III); and 4) the gain was excludable under the unitary business principle because no unitary business relationship existed between the foreign business entities and plaintiff’s business, or, if a unitary business relationship existed, the inclusion of the gain constituted taxation of extraterritorial values in violation of the Equal Protection, Due Process, and/or Commerce clauses of the US Constitution.

II

This Court reviews de novo a trial court’s grant of summary disposition pursuant to MCR 2.116(C)(10). *Spiek v Dep’t of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Summary disposition under MCR 2.116(C)(10) is properly granted when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). The court considers the pleadings, affidavits, depositions, admissions and other documentary evidence in the light most favorable to the nonmoving party. *Id.* The party opposing the motion then has the burden of showing by evidentiary proofs that a genuine issue of material fact exists. *Id.* at 455.

The meaning of a statute is a question of law, subject to review de novo. *Guardian Photo, Inc v Dep’t of Treasury*, 243 Mich App 270, 276; 621 NW2d 233 (2000). The primary goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature:

The first criterion in determining intent is the specific language of the statute. The Legislature is presumed to have intended the meaning it plainly expressed. If the plain and ordinary meaning of the language is clear, judicial construction is normally neither necessary nor permitted. [*Id.* at 276-277 (citations omitted).]

III

Plaintiff first argues that the trial court erred in granting summary disposition of Count I because a corporate taxpayer may exclude a casual transaction² from business activity under the SBT act. We disagree.

This Court addressed this issue previously in *Guardian Photo, id.* at 277-279, and concluded that the SBT statutory provision for excluding a casual transaction from a taxpayer’s

² Casual transaction is defined in the SBTA as: “ a transaction made or engaged in other than in the ordinary course of repeated and successive transactions of a like character, except that a transaction made or engaged in by a person that is incidental to that person's regular business activity is a business activity within the meaning of this act.” MCL 208.4(1).

tax base plainly does not apply to corporations. We find the analysis in *Guardian Photo* dispositive of plaintiff's argument in this case.

"The single business tax is levied and imposed on 'the adjusted tax base of every person with business activity in this state that is allocated or apportioned to this state.'" *Id.* at 277, quoting MCL 208.31(1).

"Tax base" means business income, before apportionment or allocation as provided in chapter 3, even if zero or negative, subject to the adjustments in this section. [MCL 208.9(1).]

"Business income" means federal taxable income, *except that for a person other than a corporation it means that part of federal taxable income derived from business activity.* For a partnership, business income includes payments and items of income and expense which are attributable to business activity of the partnership and separately reported to the partners. [MCL 208.3(3); emphasis added.]

* * *

"Business activity" means a transfer of legal or equitable title to or rental of property, whether real, personal, or mixed, tangible or intangible, or the performance of services, or a combination thereof, 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).]

The statutory language is clear and unambiguous and defeats plaintiff's argument that because the term "person" is broadly defined to include a corporation, the act evinces an intent to apply the casual transaction exclusion to corporations. Reasonable minds could not differ that subsection 3(3) of the act plainly equates a corporation's "business income" with its federal taxable income, and that the exclusion from this definition, limiting business income to "that part of federal taxable income derived from 'business activity'" expressly and clearly does not apply to corporations. *Guardian Photo, supra* at 279. If the statutory language is clear, judicial construction is neither necessary nor permitted. *Id.* at 277, 279.

IV

Plaintiff claims that the disparate treatment of corporate taxpayers with respect to taxation of a casual transaction violates the Equal Protection Clauses of United States and the

Michigan constitutions, US Const, Am IV and Const 1963, art 1, § 2.³ We concur in the Court of Claims' finding that plaintiff has failed to overcome the presumption of constitutionality with regard to the casual transaction claim.

A

A statute is presumed constitutional and must be so construed absent a clear showing to the contrary. *McDougall v Schanz*, 461 Mich 15, 24; 597 NW2d 148 (1999).

"[I]t is the duty of the Court to give the presumption of constitutionality to a statute and construe it as constitutional unless the contrary clearly appears." The presumption of constitutionality is especially strong with respect to taxing statutes. State legislatures have great discretionary latitude in formulating taxes. "The legislature must determine all questions of State necessity, discretion or policy in ordering a tax and in apportioning it. And the judicial tribunals of the State have no concern with the policy of State taxation determined by the legislature. A taxpayer challenging a tax on constitutional grounds must overcome a strong presumption in favor of the taxing statute's validity and point out with specificity the constitutional provision that is violated. A taxing statute must be shown to "clearly and palpably violate[] the fundamental law" before it will be declared unconstitutional. [*Caterpillar, Inc v. Dep't of Treasury*, 440 Mich 400, 413-415; 488 NW2d 182 (1992) (citations and footnotes omitted).]

With regard to an equal protection claim, "[a]bsent 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." *TIG Ins Co, Inc v Dep't of Treasury*, 464 Mich 548, 550-551; 629 NW2d 402 (2001).

B

Plaintiff's equal protection argument is premised on the undisputed fact that a noncorporate taxpayer may exclude from its tax base, income arising from a casual transaction while a corporate taxpayer may not, even though the factual circumstances that underlie the respective transactions are identical. Plaintiff asserts that defendant "has not, and cannot, show that the "distinguishing characteristics" of corporate and non-corporate taxpayers have any

³ Plaintiff raises in its statement of questions, but does not argue, a claim of a violation of the Uniformity of Taxation Clause of the Michigan Constitution. This issue is abandoned because plaintiff has failed to properly argue the merits of the issue. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002). Regardless, the controlling principle under the uniformity clause is one of equal treatment of similarly situated taxpayers, and thus, as a practical matter, in cases involving tax statutes, there is no discernable difference between the Equal Protection and Uniformity of Taxation Clauses. *Armco Steel Corp v Dep't of Treasury*, 419 Mich 582, 592; 358 NW2d 839 (1984); see also *TIG Ins Co, Inc v Dep't of Treasury*, 464 Mich 548, 550, 557; 629 NW2d 402 (2001).

reasonable relation to the revenue raising object of the SBTA.” However, in challenging the treatment of casual transactions on equal protection grounds, plaintiff, not defendant, has the burden of showing that the SBT statutory scheme is unrelated to any legitimate state purpose.

"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." Rather, it tests only whether the legislation is reasonably related to a legitimate governmental purpose. The legislation will pass "constitutional muster if the legislative judgment is supported by any set of facts, either known or which could reasonably be assumed, even if such facts may be debatable." To prevail under this standard, a party challenging a statute must overcome the presumption that the statute is constitutional. 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. [*TIG Ins Co, supra* at 557-558 (citations omitted; emphasis added).]

Nonetheless, plaintiff argues that defendant cannot show that the distinguishing characteristics of corporate and noncorporate taxpayers have any reasonable relation to the revenue raising object of the SBTA. Plaintiff also argues that the limited-liability aspect of a corporation cannot serve as the justification for the distinction because other entities possess limited liability as well. Further, the legislative history of the SBT evidences an intent not to distinguish between forms of business entities because the object is to impose a tax upon all economic actors engaging in business activity in Michigan, MCL 208.31(1). Finally, plaintiff contends that its corporate status has no bearing on the fundamental questions whether a transaction results from “business activity” in Michigan, generates “business income” or qualifies as a “casual transaction.” Plaintiff’s general arguments do not rise to the level of the requisite showing for deeming a statute unconstitutional.

Michigan’s SBTA is a value-added tax using a consumption-type base. *Mobil Oil Corp v Dep’t of Treasury*, 422 Mich 473, 496; 373 NW2d 730 (1985). Total value added is the contribution to the size of the economy from each business firm in the economy. Haughey, *The economic logic of the single business tax*, 22 Wayne LR 1017, 1018 (1976). However, as the Court of Claims noted, Michigan’s SBT is not a pure value-added tax because it permits various exemptions, exclusions, and industry-specific adjustments. *Caterpillar, supra* at 408-409.

The SBTA statutory scheme for calculating the tax base of corporations differs from that of noncorporations, and specific calculations were included to counteract certain preferences given to income by federal law. Kasischke, *Computation of the Michigan single business tax: Theory and mechanics*, 22 Wayne L R 1069, 1075, 1078 (1976); Haughey, *supra* at 1027. Further, the Legislature is not necessarily bound by value-added theory in its designation of who shall be a taxpayer under the SBTA. *Mobil Oil, supra* at 498 n 16.

Under the SBTA, the tax bases for corporations and noncorporations have different starting points and are subject to different calculations, to account for different factors in arriving at the adjusted tax base. Kasischke, *supra*. The beginning tax base for corporations is federal taxable income, after which a series of additions and/or subtractions is made, e.g., for tax

deductions and credits allowed for income tax purposes, to arrive at the SBT base. MCL 208.3(3), MCL 208.9(1); *id.* at 1071; *Mobil Oil, supra* at 497, n 15. On the contrary, the beginning tax base for noncorporations is not federal taxable income. MCL 208.3(3), MCL 208.9(1); Kasischke, *supra* at 1071. Under these circumstances, it is reasonable that a specific exclusion may apply to a noncorporation, but not apply to a corporation, in arriving at the SBT tax base.

In both design and practical effect, the SBTA has built-in distinctions between corporations and noncorporations. The provisions of the SBT deviate from value-added theory in part because they were designed to lighten the tax burden on those industries most adversely affected by the switch to the SBT, e.g., by reducing the tax burden of small, labor intensive, service and unincorporated firms. Haughy, *supra* at 1027. “[U]ncorporated firms, unless eligible for the small business exemption, will gain less (or lose more) than their corporate competitors.” *Id.* at 1023. “One of the assumptions inherent in the enactment of the SBT was that businesses and individuals should be taxed on different standards. This requires treating an unincorporated business as two separate entities—the business and its owner.” *Id.*

Plaintiff has not shown that the challenged distinction in the SBT between corporations and noncorporations is totally unrelated to the pursuit of the State’s goals, nor has plaintiff negated every conceivable basis that might support the distinction. Unlike in *Armco Steel Corp v Dep’t of Treasury*, 419 Mich 582, 595; 358 NW2d 839 (1984), where the plaintiff’s equal protection claim was found valid, plaintiff here has set forth no alleged *improper* basis for the challenged distinction between corporations and noncorporations. In *Armco Steel*, the plaintiff argued that the Department of Treasury’s disparate treatment of two groups of taxpayers was based simply on the distinction that one group had paid their tax deficiencies while the other had not. *Id.* at 595. The Treasury Department denied refunds of improperly assessed franchise fee deficiencies to corporate taxpayers that paid the deficiencies, while excusing payment by taxpayers that withheld payments pending redetermination of assessments or that refused to pay without seeking redetermination. *Id.* at 590, 595. The Court agreed that the distinction was improper because it was not based on a natural distinguishing characteristic that bears a reasonable relationship to the object of the classification. *Id.* at 595. In reality, these groups were but one class. *Id.* at 596. In the circumstances of this case, unlike in *Armco Steel*, we agree with defendant that corporations and noncorporations are not in the same “class” for equal protection purposes and therefore plaintiff’s claim must fail. *Syntex Laboratories v Dep’t of Treasury*, 233 Mich App 286, 290-291; 590 NW2d 612 (1998).

V

Plaintiff claims that the Court of Claims decision is inconsistent with the SBTA because the decision results in duplicative taxation. Plaintiff reasons that any increase in the value of the foreign entities is attributable to their business activity and would be taxed under the SBTA if those entities were subject to the tax. Thus, imposing SBT on plaintiff’s gain from the sale of its interests in the entities would result in taxing that value twice, contrary to the intent of MCL 208.9(9). We find this reasoning unpersuasive.

MCL 208.9(9) provides:

To the extent included in federal taxable income, add the loss or subtract the gain from the tax base that is attributable to another entity whose business activities are taxable under this act or would be taxable under this act if the business activities were in this state.

Plaintiff's assertion of duplicative taxation is theoretical. It is not based on the actuality of taxation and therefore is not violative of subsection 9(9), which provides for one of the adjustments to be made in arriving at "tax base." See *Wismer & Becker Contracting Engineers v Dep't of Treasury*, 146 Mich App 690, 697-698; 382 NW2d 505 (1985) (subsection 9(9) was added by amendment to prevent double taxation). Plaintiff's theoretical argument is insufficient to override the statutory mechanics of the SBTA. *Consolidated Aluminum Corp v Dep't of Treasury*, 206 Mich App 222, 234; 521 NW2d 19 (1994); see also *Wismer & Becker, supra* at 697, 703 (subsection 9(9) excludes from the tax base income or loss from any other entity [including joint ventures] that is subject or would be subject to the SBT).

It is undisputed that the gain from the sale of its ownership interest in the foreign entities was reported on plaintiff's federal income tax. Subsection 9(9) applies where a gain is attributable to another entity. Plaintiff does not argue that its gain from the sale of the foreign entities is, in fact, attributable to them. Plaintiff in essence argues that taxing its gain does not comport with value-added theory. However, as noted above, Michigan's SBT is not a pure value-added tax, and the Legislature is not necessarily bound by value-added theory in its designation of who shall be a taxpayer under the SBTA. *Caterpillar, supra* at 408-409; *Mobil Oil, supra* at 498 n 16.

VI

Plaintiff claims that taxation of the gain from the restructuring violates the unitary business principle and the Equal Protection, Due Process and Commerce Clauses of the United States Constitution. Plaintiff argues essentially that the taxation of the gain on the sale of its interest in the foreign entities violates the unitary business principle, which holds that a state may not tax value earned outside its borders, because the activities of the foreign entities were unrelated to plaintiff's business activity in Michigan. As defendant notes, the Court of Claims found that the restructuring transaction involved business activities that are incidental to plaintiff's business activities, which renders the casual transaction inapplicable, and the gain realized taxable. We find no basis for reversing the court's finding. Moreover, for the reasons discussed above, we find no constitutional violation based on the unitary business principle.⁴

⁴ Plaintiff's reliance on decisions of the United States Supreme Court, discussing the unitary business principle, does not persuade us that a different result is mandated. See e.g., *Allied Signal, Inc v Director, Division of Taxation*, 504 US 768; 112 S Ct 2251; 119 L Ed 2d 533 (1992); *FW Woolworth Co v New Mexico Taxation & Revenue Dep't*, 458 US 354; 102 S Ct 3128; 73 L Ed 2d 819 (1982); *Mobil Oil Corp v Comm'r of Taxes of Vermont*, 455 US 425; 100 S Ct 1223; 63 L Ed 2d 510 (1980). Plaintiff has failed to sustain its burden of proving unrelated business activity on the part of foreign entities that would raise the question of nonapportionability. *Id.* at 1234.

A unitary business is one in which its various parts are interdependent and form one business unit. *Wismer & Becker, supra* at 702. “If the unitary concept has any relevance at all within the framework of the SBTA, it is only as a tool to determine whether a taxpayer should utilize the exceptional relief of separate accounting under § 69.”⁵ *Id.* at 703.

We disagree with plaintiff’s contention that the gain plaintiff realized is attributable to the foreign entities and not to plaintiff because the gain reflects value-added business activities of the foreign entities, not plaintiff. As noted, the SBT is not a pure value-added tax and therefore any argument that value-added theory, in and of itself, requires the particular result advocated by plaintiff, fails.

Further, plaintiff fails to distinguish between its income and that of the foreign entities. The gain on the sale of plaintiff’s interests is *attributable to plaintiff* and therefore does not fall within the purview of MCL 208.9(9). The gain was reported as income *to plaintiff* for federal income tax purposes. Plaintiff’s reasoning would require that the gain on the sale of *its ownership interest* in the foreign entities be treated as *income to the foreign entities* and not plaintiff, a result that in our view, is anomalous. Contrary to plaintiff’s argument, we conclude that taxation of plaintiff’s gain does not result in taxation of extraterritorial value in violation of the unitary business principle.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Janet T. Neff

/s/ Helene N. White

⁵ Section 69, MCL 208.69, provides relief to a taxpayer when the apportionment formula in the SBTA results in an unconstitutional apportionment of a taxpayer’s business activity. *Consolidated Aluminum, supra* at 230. Section 69 allows the use of various methods of apportionment, including separate accounting, where the formulary apportionment does not fairly represent the extent of the taxpayer’s business activity in this state. *Wismer & Becker, supra* at 702-703.