STATE OF MICHIGAN

COURT OF APPEALS

BANTAM DOUBLEDAY DELL PUBLISHING, Petitioner-Appellant,	UNPUBLISHED February 24, 2004
v	No. 243672 Tax Tribunal
DEPARTMENT OF TREASURY, Respondent-Appellee.	LC No. 00-249480

Before: Hoekstra, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Petitioner, Bantam Doubleday Dell Publishing (Bantam), appeals as of right from an opinion and order of the Michigan Tax Tribunal affirming tax and penalty assessments against Bantam for the years 1989 through 1996 pursuant to the Single Business Tax Act, MCL 208.1 *et seq*. We affirm.

I. Facts and Procedural History

Bantam, a publisher and seller of books, was a Delaware Corporation with its principal place of business located in New York.[1] During the period in question, Bantam did not print books in Michigan or maintain any book storage or distribution facility in the state. Rather, it employed two field sales representatives in Michigan to solicit orders of books from wholesalers and retailers. The two sales representatives were also in charge of the administration of Bantam's cooperative advertising reimbursement program. The orders were processed outside of Michigan and the books were shipped to the Michigan wholesalers and retailers by common carrier from locations other than Michigan.

The Department of Treasury assessed Bantam with a single business tax for the years 1989 through 1996 that comprised of $200,000 in tax, $64,133.52 in interest[2] and $90,000 in penalty. Bantam appealed the tax assessment to the Michigan Tax Tribunal on the ground that that it was not subject to the tax because its activities in Michigan did not constitute a "business

[1] Random House, Inc., is now the successor of Bantam.

[2] Bantam did not challenge the assessed interest below.

activity" within the meaning of MCL 208.3. Bantam also argued that the decision in *Gillette Co v Dep't of Treasury*, 198 Mich App 303; 497 NW2d 595 (1993) was inapplicable to the facts in this case. Bantam further maintained that the decision in *Gillette* was wrongly decided. It asserted that, contrary to the holding in *Gillette*, 15 USC 381 (PL 86-272) bars the imposition of single business taxes on an interstate commerce person who conducts only order solicitations in the state. Additionally, Bantam challenged the penalty, arguing that its failure to pay the tax was reasonable. The tribunal determined that Bantam was subject to the single business tax and affirmed the tax assessment and the penalty.

II. Standard of Review

This Court's authority to review a decision of the Tax Tribunal is very limited. *Michigan Milk Producers Ass'n v Dep't of Treasury*, 242 Mich App 486, 490; 618 NW2d 917 (2000). Absent a claim of fraud, this Court may determine only whether the tribunal committed an error of law or adopted a wrong legal principle. *Id*. The tribunal's factual findings will not be disturbed if they are supported by competent, material, and substantial evidence on the whole record. *Id.* at 490-491. This case also presents a question of statutory interpretation which we review de novo. *In re MCI*, 460 Mich 396, 413; 596 NW2d 164 (1999).

III. Analysis

Bantam first asserts the tribunal erred in concluding it was engaged in "business activity" that subjected it to liability under the single business tax act, MCL 208.1 *et seq*.[3] We disagree.

The SBTA imposes a tax on persons conducting business activity in Michigan. MCL 208.31(1) and (3). A "business activity" is defined as follows:

> "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) (emphasis added).]

[3] In 2002, the Legislature repealed the single business tax act, 1975 PA 228, effective for the tax years that begin after December 31, 2009. 2002 PA 531. This opinion discusses that statute in effect during the tax years in quest, 1975 PA 228.

The primary goal of statutory interpretation is to determine and give effect to the Legislature's intent as expressed in the statutory language. *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000). If the language is unambiguous, "we presume that the Legislature intended the meaning clearly expressed– no further judicial construction is required or permitted, and the statute must be enforced as written." *Id*.

At issue in this case is the definition of "within this state" as emphasized in the above subsection of the statute. Bantam asserts that, for it to be subject to the definition of "business activity," the legal title of the personal property must be transferred *within this state*. We disagree. The plain language of the statute does not mandate that the transfer, itself, be made in Michigan. Rather, the statute clearly provides that the definition of "business activity" includes an action conducted within this state that *causes* a subsequent transfer in legal or equitable title of property located in intrastate, interstate or foreign commerce. We must avoid constructions that render any part of a court rule surplusage or nugatory. *Yudashkin v Linzmeyer*, 247 Mich App 642, 652; 637 NW2d 257 (2001). To read the statute otherwise would render as nugatory the clause "whether in intrastate, interstate, or foreign commerce."

We conclude that the tribunal correctly decided petitioner's sales solicitations in Michigan constituted business activity under the statutory definition. Although petitioner did not transfer title to property in Michigan because it processed its customers' orders and shipped the books from locations outside the state, MCL 440.2401(2)(a), petitioners' sales representatives *caused* the transfer of title to be made by soliciting purchasing orders from Michigan wholesalers and retailers. Petitioner does not dispute that its sales representatives undertook their activities "with the object of gain, benefit, or advantage, whether direct or indirect, to the taxpayer or to others." Thus, petitioner's activities satisfy the definition of "business activity" under MCL 208.3(2).

Further, the order-solicitation actions of Bantam's sales representatives did not qualify for the exception the statute carves out for "services rendered by an employee to his employer, services as a director of a corporation, or a casual transaction." As previously mentioned, Bantam does not dispute that its sales representatives undertook their activities "with the object of gain . . . ." Further, Bantam maintains that the decision in *Gillette* does not control because the facts in this case are distinguishable from those in *Gillette*. We disagree. The central fact in both cases was that the sales representatives were soliciting sales orders from Michigan customers. This fact clearly indicates that the respective sales representatives were serving not only their employer, but their employer's customers as well. Accordingly, this excludes Bantam, as it did the employer in *Gillette*, from asserting any exception in the statute.

Bantam next contends the tribunal erred as a matter of law in finding that federal PL 86-272 was inapplicable. We disagree. Bantam raises on appeal, as it did below, essentially the same arguments that were raised and determined in *Gillette*, *supra*. Bantam presents nothing to persuade us of the need to revisit our decision in that case.

Finally, Bantam asserts the tribunal erred in declining to waive the penalty assessed against it. We disagree. MCL 205.24(2) requires a penalty be imposed on taxpayers who fail or refuse to timely comply with the tax filing and payment obligations. The penalty must be waived if "it is shown to the satisfaction of the [treasury] department that the failure was due to

reasonable cause and not to willful neglect . . . ." MCL 205.24(4). The petitioner bears the burden of establishing reasonable cause by clear and convincing evidence. 1999 AC, R 205.1013(4). We conclude that Bantam did not meet its burden.

While Bantam's failure to file or pay arguably may have been reasonable before the decision in *Gillette*, its actions after that ruling cannot be excused. The tribunal correctly determined that Bantam's disagreement with *Gillette* or its belief that the ruling would be overturned on appeal did not grant it the right not to comply with paying the taxes due. Additionally, Bantam could not reasonably have concluded *Gillette* would have prospective-only application. "[T]he general rule is that judicial decisions are to be given complete retroactive effect" and the application of such decisions are limited only where the decisions "have overruled prior law or reconstrued statutes." *Hyde v Univ of Michigan Bd of Regents*, 426 Mich 223, 240; 393 NW2d 847 (1986). Finally, while Bantam challenges the tribunal's finding that an agreement to waive the penalty did not exist, Bantam does not challenge the tribunal's finding that the person with whom Bantam may have secured such waiver was not a commissioner or an authorized commissioner as required by MCL 205.24(4).

Affirmed.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot