STATE OF MICHIGAN

COURT OF APPEALS

FIRST INDUSTRIAL, L.P., Plaintiff-Appellant,	UNPUBLISHED August 18, 2009
v DEPARTMENT OF TREASURY, Defendant-Appellee.	No. 282742 Court of Claims LC No. 06-000004-MT

Before: Fort Hood, P.J., and Cavanagh and K.F. Kelly, JJ.

PER CURIAM.

In this case brought under Michigan's former Single Business Tax Act (SBTA),[1] plaintiff appeals as of right following a ruling in favor of defendant on its motion for summary disposition pursuant to MCR 2.116(C)(10). Before the subject transaction, plaintiff was a 99% limited partner in First Industrial Financing Partnership, LP (FIFP). This case surrounds the transfer of Michigan assets from FIFP to plaintiff. We affirm in part, reverse in part, and remand for further proceedings.

Plaintiff first argues that the court erred in concluding that the transfer of assets did not entitle plaintiff to a carryover business loss deduction. We agree. We review a motion for summary disposition de novo, *Collins v Comerica Bank*, 468 Mich 628, 631; 664 NW2d 713 (2003), testing the factual sufficiency of the complaint by considering the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party, *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). The parties to a civil action may submit stipulated facts to the court, and if the stipulated facts are sufficient to allow the court to render judgment in the action, the court shall do so. MCR 2.116(A)(1), (2). When the parties submit stipulated facts, we do not deal with factual findings, but with the application of the law, and our review of the decision is solely for errors of law. *In re Butterfield Estate*, 405 Mich 702, 715; 275 NW2d 262 (1979); *Federal Land Bank of St Paul v Bay Park Place, Inc*, 162 Mich App 1, 6; 412 NW2d 222 (1987). We review questions of statutory interpretation de novo. *In re MCI Telecommunications*, 460 Mich 396, 413; 596 NW2d

[1] The SBTA was repealed on business activity in Michigan after December 31, 2007. MCL 208.151.

164 (1999). When statutory language is plain and unambiguous, appellate courts presume that the Legislature intended the plainly expressed meaning and further construction is neither permitted nor required. *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000).

The SBTA allowed taxpayers to deduct available business losses from their tax base. MCL 208.23b(h). Revenue Administrative Bulletin (RAB) 1992-3 addresses the issue of when a transferee is entitled to a SBT business loss carryover:

> E. Transfers of property through certain tax-free events described in sub-paragraphs (1) through (8) of this section receive the following tax treatment for SBT purposes: transferor is not required to recapture CAD on such property; transferee is not entitled to a CAD on such property; transferee holds the property as if such property was in the hands of the transferor, therefore, the transferee must recapture CAD depending on the acquisition date of the property by the transferor; and transferee is entitled to an SBT business loss carryover for any unused business loss of the transferor when transferor *completely discontinues operations and is no longer a taxpayer under the Single Business Tax Act* (SBTA). [RAB 1992-3(3)(E) (emphasis added).]

This issue pertains to whether plaintiff was entitled to a business loss deduction (BLD) under the SBTA for losses incurred by FIFP before FIFP discontinued operations in Michigan. The focus of the parties' argument is on the phrase "completely discontinues operations" from RAB 1992-3(3)(E). RAB 1992-3 represents an interpretation of MCL 208.23b(h) by the agency formally charged with carrying out its provisions. Although MCL 205.3(f) grants defendant the authority to issue "bulletins that explain the current department interpretations of current state tax laws," they are not rules promulgated in accordance with the Administrative Procedures Act, MCL 24.201 *et seq.* See MCL 205.3(b). Thus, RABs do not have the force of law. *Catalina Marketing Sales Corp v Dep't of Treasury*, 470 Mich 13, 21; 678 NW2d 619 (2004).

MCL 208.23b(h) provided as follows:

> Deduct any available business loss. As used in this subdivision, "business loss" means a negative amount after allocation or apportionment as provided in chapter 3 and after adjustments as provided in section 23 and subdivisions (a) to (g) without regard to the deduction under this subdivision. The business loss shall be carried forward to the year next following the loss year as an offset to the allocated or apportioned tax base including the adjustments provided in subdivisions (a) to (g), then successively to the next 9 taxable years following the loss year or until the loss is used up, whichever occurs first, but for not more than 10 taxable years after the loss year.

"The SBTA employs a value-added measure of business activity, but its intended effect is to impose a tax on the privilege of conducting business activity within Michigan . . . ." *ANR Pipeline Co v Dep't of Treasury*, 266 Mich App 190, 198; 699 NW2d 707 (2005). The SBTA defined the term "taxpayer" as "a person liable for a tax, interest or penalty under this act." MCL 208.10(2). Under the SBTA, a person was liable for tax, interest, or penalties if the person had business activities within Michigan. MCL 208.31(1). MCL 208.3(2) defined "business activity" in relevant part as:

> 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 . . . .

In defining a "business loss" as "a negative amount after *allocation or apportionment*" that "shall be carried forward . . . as an offset to the *allocated or apportioned tax base,*" MCL 208.23b(h) (emphasis added), the Legislature clearly tied the BLD to business activity in Michigan. See MCL 208.41 ("A taxpayer whose business activities are taxable both within and without this state, shall apportion his tax base as provided in this chapter.").

Thus, in keeping with the recognized purposes of the SBTA and its plain language, a transferee should be able to take advantage of the transferor's BLD when the latter ceases operations in Michigan and is no longer liable for the SBT. In keeping with this understanding, as used in RAB 1992-3(3)(E), "completely discontinues operations" should be read to refer only to Michigan operations.

It is conceivable that the Legislature intended to allow a transferee a business loss deduction only from a transferor that completely discontinued operations both inside and outside of Michigan such that a taxpayer could not essentially "sell" or transfer its business loss deductions to a high-earning sister company, and then proceed with business as usual after the losses have been dissolved. It is a well established rule of construction that a tax exemption must be construed strictly in favor of the government. *Elias Bros Restaurants, Inc v Dep't of Treasury*, 452 Mich 144, 150; 549 NW2d 837 (1996). However, the plain language of the statutory BLD does not provide for allowing a transferee to claim a BLD only if the transferor discontinues operations worldwide. Construing RAB 1992-3(3)(E) as defendant contends provides for such an outcome, but RABs do not carry the force of law and cannot be understood to override Legislative intent as expressed in the applicable statutes. *Catalina Marketing, supra*; *DiBenedetto, supra*. In sum, the court erred in concluding that plaintiff is not entitled to a BLD carryover.

Alternatively, plaintiff argues that it is entitled to a CAD for the disputed tax years under RAB 1992-3. We disagree. As an alternative to year-over-year capital asset depreciation, the SBTA allowed taxpayers to claim a capital acquisition deduction (CAD) in the year an asset is acquired for the full purchase price. MCL 208.23; *Caterpillar, Inc v Dep't of Treasury*, 440 Mich 400, 409; 488 NW2d 182 (1992). "This consumption-type element of the CAD and SBT thereby provides a cash-flow advantage to the purchaser/user of capital assets." *Caterpillar, supra* at 410.

RAB 1992-3(3)(E)(4) provides as follows:

(4) Property distributed by a partnership to a partner(s) in a partial or complete liquidation of the partner(s) interest and the property is used in a business activity of an organization in which the partner(s) own a controlling interest (i.e., partners having at least 80% ownership in original partnership must have at least 80% ownership in new entity).

Plaintiff contends that it is entitled to a CAD because it does not meet the above definition, or any others listed in RAB 1992-3, as the transfer of assets from FIFP was a non-liquidating distribution for federal tax purposes pursuant to IRC Section 732(a)(1). The enumerated list in RAB 1992-3 does not contain a non-liquidating distribution as one of the tax-free events that receive special tax treatment under the SBTA.

Defendant acknowledges that there was a non-liquidating distribution, but argues that the non-liquidating distribution was merely a return of plaintiff's capital investment in FIFP. Defendant presented the affidavit of defendant's auditor, John Clancy, which outlined the transactions between plaintiff and FIFP. Clancy stated that FIFP purchased property in 1994 and 1995, for which it claimed CAD and a resulting business loss deduction. In 1998, the subject property was transferred to plaintiff in a tax-free distribution. Plaintiff claimed a business loss deduction of $135,099,663 for the same property in 1998. Clancy stated, "During the audit, my review of [plaintiff's] single business tax returns and other documents did not disclose that [plaintiff] ever paid or accrued a cost for the assets that [FIFP] transferred to [plaintiff]."

Plaintiff also presented the affidavit of Scott Musil, who was employed with First Industrial Realty Trust, Inc., a 50% owner of plaintiff's partnership. Musil stated that FIFP distributed a majority of its assets to plaintiff for $312.9 million as a return of capital to plaintiff.

If a limited partner could purchase a substantial interest in a partnership (99% or more in this case), have the partnership obtain any and all tax benefits from the assets purchased with the limited partner's contribution, and then have those assets transferred back to the limited partner for a second opportunity to obtain the same tax benefits from the tax-depleted assets, the purposes of the SBT in general and the CAD specifically would be subverted.

Moreover, exemptions from tax are not favored, must be construed strictly in favor of the government, and the party asserting the exemption bears the burden of proof. See *Elias Bros, supra*. The CAD statute was created to "allow[] the taxpayer's tax base to be reduced by the amount expended during the tax year to acquire capital assets." *Caterpillar, supra* at 409. Here, plaintiff did not prove that it expended any amount of money during the tax year to acquire the assets, but instead merely provided evidence that it acquired the assets through a non-liquidating distribution. Therefore, either plaintiff owned the assets in full through its partnership interest prior to the non-liquidating distribution, or it did not prove that it paid any additional money for the assets, and therefore the incremental investment is zero. In either situation, plaintiff is not entitled to a substantive CAD.

We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly