# STATE OF MICHIGAN

# COURT OF APPEALS

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| BARR LABORATORIES, INC., | UNPUBLISHED<br>October 21, 2010 |
| Plaintiff-Appellee, | |
| v | No. 291968<br>Court of Claims |
| DEPARTMENT OF TREASURY, | LC No. 07-000039-MT |
| Defendant-Appellant. | |

Before: O'CONNELL, P.J., AND BANDSTRA AND MARKEY, JJ.

PER CURIAM.

Defendant appeals by right the trial court's order granting plaintiff's motion for summary disposition. We reverse and remand for further proceedings consistent with this opinion.

At issue is plaintiff's business tax liability for tax years July 1, 1994, through June 30, 2005, which plaintiff paid under protest. Plaintiff is a corporation with its principal offices located out of state. At all times here at issue, plaintiff had no property or employees permanently located in Michigan. According to plaintiff, its only contacts with Michigan were two employees who infrequently came to the state to maintain relationships with its customers, pharmaceutical distributors who already had existing contacts with plaintiff. These contacts formed the basis of defendant's assertion that plaintiff conducted taxable business activity in the state.

Plaintiff's agent completed "Nexus Questionnaires," one for 1989-2000 and one for 2001-2004. The first described defendant's business activity in Michigan, stating, "Barr only solicits sales in the state, all of which must be approved in NY," and included the statement, "A sales rep. calls upon Michigan customers less than once a month. Customer calls New York to place an order where the order is received and approved. Product is shipped to customer via common carrier." The later questionnaire similarly stated, "2 sales reps calls [sic] upon Michigan customers quarterly or less. Customers call NJ to place orders. Orders are accepted and approved in NJ. Product is shipped to customers via common carrier." On both questionnaires, defendant answered "Yes" to the question, "Do your employees, agents, representatives, independent contractors, brokers or others (both Michigan residents and nonresidents) conduct business activity in Michigan on your behalf?" and indicated for 1989-2000 that for "2-9" days a year, the activity conducted in Michigan was "Solicit sales." Likewise, for 2001-2005, defendant checked the box for "2-9" days each year of "Physical

contact within Michigan soliciting sales through employees, agents, representatives independent contractors or others acting on your behalf."

Defendant imposed a final assessment of over $500,000, including tax owed, interest, and penalties, on the basis of the informal conference recommendation that found that this contact created a substantial nexus subject to taxation. The recommendation noted that "solicitation" has been interpreted by the United States Supreme Court as meaning not only "the ultimate act of inviting an order but the entire process associated with the invitation." The recommendation also concluded that the nexus standard identified in Revenue Administrative Bulletin (RAB) 1998-1 could be applied to tax years predating issuance of the bulletin, but that penalties for nonpayment should apply to only the years after issuance of RAB 1998-1. The recommendation found that plaintiff had no reasonable cause for failing to file returns after the bulletin was issued.

Plaintiff paid under protest and filed a complaint in the Court of Claims alleging constitutional and statutory violations on the grounds that its activity in Michigan was insufficient to constitute taxable "business activity" and that imposing the tax was contrary to the Commerce Clause and Due Process Clause of the United States Constitution. It also asserted that defendant could not retroactively change the standard and that penalties should not be imposed because defendant never responded after plaintiff completed the Nexus Questionnaires in 2000 and 2001. After defendant answered, plaintiff moved for summary disposition, attaching the affidavit of its Vice President of Taxation, which stated that defendant's representatives did not visit Michigan to solicit sales: they came to visit and gather information, and these visits took place less than twice per year up until 2000, then approximately four times in 2000 and seven times per year after that.

The trial court found that plaintiff did not have a "substantial nexus" with Michigan. Although plaintiff's employees came to Michigan, they had "very little connection." The court applied the "substantial nexus" test under the Commerce Clause and concluded that the "slightest presence" was not enough to impose tax liability. The court also concluded that plaintiff did not conduct solicitation during these visits. As the result, the court ordered defendant to refund the entire payment of $581,668.43.

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). When substantively admissible evidence submitted at the time of the motion viewed in the light most favorable to the party opposing the motion supports the motion, the non-moving party must come forward with at least some evidentiary proof upon which to base his or her case. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999); *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

Soliciting sales is taxable "business activity" under the statute. *Gillette Co v Dep't of Treasury*, 198 Mich App 303, 314-315; 497 NW2d 595 (1993). The "substantial nexus" standard required by the Constitution is satisfied by any in-state, physical presence that is "more than a slightest presence." *Magnetek Controls, Inc v Dep't of Treasury*, 221 Mich App 400, 412; 562 NW2d 219 (1997). Plaintiff does not dispute these principles, but argues that there was no genuine issue of material fact regarding its lack of business activity.

We disagree and conclude that summary disposition was incorrectly granted. Plaintiff's argument in the trial court was based on its assertion that the best evidence presented showed that its employees visited fewer than two times per year before 2000 and that there was no evidence that its employees solicited sales during any of the visits. But defendant presented evidence in the form of Nexus Questionnaires in which plaintiff stated it solicited sales two to nine times per year for the tax years in question. On the basis of these questionnaires, defendant imposed the tax liability in question. RAB 1998-1 indicates that where the activity is soliciting sales, two contacts per year constitute sufficient business activity to impose the tax.

In response, plaintiff presented an affidavit stating that it did not solicit sales and that there were fewer than two visits per year until 2000, then four to seven for 2000 through 2004. This conflicting evidence brings to light a material question of fact that should not be resolved as a matter of law. The trial court implicitly found the affidavit to be the most credible evidence. This was erroneous. In deciding motions for summary disposition, "The court may not make factual findings or weigh credibility." *Manning v Hazel Park*, 202 Mich App 685, 689; 509 NW2d 874 (1993). The evidence should have been viewed in favor of defendant, the non-moving party. *Maiden*, 461 Mich at 120. Viewing the evidence that way shows the possibility that plaintiff engaged in taxable business activity.

Defendant also raises issues concerning retroactive application of the nexus standard set forth in RAB 1998-1 and whether plaintiff should be assessed the statutory penalty under MCL 205.24(2). Plaintiff does not dispute that the standard can be retroactively applied. See *JW Hobbs v Dep't of Treasury*, 268 Mich App 38, 43-47; 706 NW2d 460 (2005); *Rayovac Corp v Dep't of Treasury*, 264 Mich App 441, 448-449; 691 NW2d 57 (2004). Whether the statutory penalty applies depends on the outcome on remand; the record is insufficiently developed for us to decide that question in this appeal. We therefore decline to address it at this time.

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, a question of public policy involved.

/s/ Peter D. O'Connell
/s/ Richard A. Bandstra
/s/ Jane E. Markey