STATE OF MICHIGAN

COURT OF APPEALS

THE LANE COMPANY INCORPORATED, Plaintiff-Appellee,	UNPUBLISHED January 25, 2011
v	No. 294456 Court of Claims
DEPARTMENT OF TREASURY, STATE OF MICHIGAN, Defendant-Appellant.	LC No. 06-169-MT

Before: METER, P.J., and M. J. KELLY and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant the Department of Treasury appeals by right an order of dismissal entered by the Court of Claims. The order of dismissal was entered by stipulation of the parties after the Court of Claims granted partial summary disposition in favor of plaintiff regarding plaintiff's claim that defendant should have waived a penalty for plaintiff's failure to make Single Business Tax (SBT) payments for tax years 1998 and 1999. Defendant contends that summary disposition was improperly granted. We affirm.

Michigan's now-repealed[1] Single Business Tax Act (SBTA), MCL 208.1 *et seq*., was originally promulgated by the Legislature in 1975 PA 228. Over the years, various standards have been used to determine whether out-of-state corporations have a "substantial nexus" with Michigan to be subject to SBT taxation in Michigan. Plaintiff is a Virginia corporation with no Michigan employees or property, but rather contracts with independent contractors to solicit requests for sales of its products, and those requests are considered and approved in Virginia. In 1988, plaintiff sought information from defendant about SBT returns for tax years 1981 through 1986. Defendant sent plaintiff a letter explaining that "[a] manufacturer receiving orders for its products, whose orders are sent outside the state for approval or rejection and if approved, are filled by shipment or delivery from a point outside the state, is afforded immunity from SBT

[1] The SBTA was repealed in 2007, but any tax liabilities incurred prior to the date of repeal remain due and owing. MCL 208.151 *et seq*.

under Public Law 86-272.[2]" The letter requested clarification from plaintiff "before we will clear your company of a possible SBT liability." Plaintiff replied that according to the list of "[e]xamples of non-immune activities" attached to defendant's letter, it "is not conducting business in Michigan," and "the only activity is the solicitation of orders which require acceptance outside the state of Michigan."

The matter rested there for many years, and neither party contacted the other until 2000. In the meantime, this Court decided *Gillette Co v Dep't of Treasury*, 198 Mich App 303; 497 NW2d 595 (1993). Among other things, *Gillette Co* held that PL 86-272 did not apply to the Single Business Tax Act. *Id*. at 307-311. Immediately after this Court's *Gillette Co* decision, defendant took the position that the "resident employee nexus standard," simply meaning that a company must have a resident employee in Michigan, was the touchstone for SBT liability. We perceive no argument that plaintiff had SBT liability under this standard. Defendant contends that it again changed the standard for determining "substantial nexus" on the basis of subsequent appellate court decisions, presumably referring to *Magnatek Controls Inc v Treasury Dep't*, 221 Mich App 400; 562 NW2d (1997), in which this Court addressed the Commerce Clause "substantial nexus" standard and concluded that it required more than a "slightest presence" in a state, but substantial presence was not required.

On February 24, 1998, defendant promulgated Revenue Administrative Bulletin (RAB) 1998-1, which set forth the newest standard for determining a "substantial nexus" for SBT purposes. Under RAB 1998-1, a "substantial nexus" for SBT liability purposes will be established by an out-of-state company "regularly and systematically conduct[ing] in-state business activity through . . . independent contractors," and this is rebuttably presumed to occur if the company spends two or more days soliciting sales (RAB 1998-1, I(6)(b)(i)(1)). For purposes of this appeal, it is conceded that plaintiff is subject to SBT liability for 1998 and 1999 under this standard. At issue is the 50% penalty that defendant assessed against plaintiff for plaintiff's failure to remit SBT payments for 1998 and 1999. Plaintiff contends that it was unaware of RAB 1998-1, it relied on the 1988 letter from defendant, and because the standard in RAB 1998-1 is significantly broader than any Michigan case law would support, its enforceability was dubious until it was finally upheld by decisions from this Court in 2005 and our Supreme Court in 2007.[3] Plaintiff argued that this constituted "reasonable cause" for its failure to pay the SBT, so the penalty should have been waived. The trial court agreed.

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, this Court considers all

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[2] The Interstate Income Tax Act of 1959, codified at 15 USC §§ 381-384.

[3] *Hobbs Corp v Treasury Dep't*, 268 Mich App 38, 53; 706 NW2d 460 (2005); *Int'l Home Foods v Dep't of Treasury*, 268 Mich App 356; 708 NW2d 711 (2005), reversed for reasons stated by the dissent 477 Mich 983 (2007).

evidence submitted by the parties in the light most favorable to the non-moving party and grants summary disposition only where the evidence fails to establish a genuine issue regarding any material fact. *Id*., 120. We review de novo the interpretation of both statutes and administrative rules, and in both cases the primary goal is to effectuate the intent of the drafters. *Aaronson v Lindsay & Hauer Int'l Ltd*, 235 Mich App 259, 270; 597 NW2d 227 (1999). A trial court's decision whether to permit or deny discovery is reviewed for an abuse of discretion. *Lantz v Southfield City Clerk*, 245 Mich App 621, 629; 628 NW2d 583 (2001).

In the absence of any dispute on point in this appeal, we presume without deciding that plaintiff was obligated to file a SBT return and remit SBT payment in 1998 and 1998. It is not disputed that plaintiff failed to do so. Pursuant to MCL 205.24(2), plaintiff is therefore subject to imposition of a penalty. However,

> [i]f a return is filed or remittance is paid after the time specified and it is shown to the satisfaction of the department that the failure was due to reasonable cause and not to willful neglect, the state treasurer or an authorized representative of the state treasurer shall waive the penalty prescribed by subsection (2). [MCL 205.24(4).]

Defendant has promulgated an administrative rule specifically addressing "reasonable cause and not . . . willful neglect" for purposes of this penalty waiver. The rule reiterates the functional language from MCL 205.24(4), and it establishes that the taxpayer "bears the burden of affirmatively establishing, by clear and convincing evidence, that the failure to file or failure to pay was due to reasonable cause." 1999 AC, R 205.1013(4). It also establishes that any justification for a waiver must constitute *both* "reasonable cause" *and* the absence of willful neglect. 1999 AC, R 205.1013(3). Finally, it states that taxpayers are "required to exercise ordinary business care and prudence in complying with filing and payment requirements." 1999 AC, R 205.1013(5).

A taxpayer may not obtain a penalty waiver for failing to file an SBT return on the basis of the multiple changes to the nexus standard in a short period and claiming that the taxpayer did not know if it could rely on the most recent change. *Hobbs Corp v Treasury Dep't*, 268 Mich App 38, 53; 706 NW2d 460 (2005). This Court found that the changes were undoubtedly annoying and frustrating, but because the taxpayer in *Hobbs Corp* was actually aware of RAB 1998-1 and its requirement that the taxpayer pay the SBT, the taxpayer could not claim reasonable cause for not making that payment. *Id*., 54. But *Hobbs Corp* is critically distinguishable from this case. First, plaintiff contends that it was not actually aware of RAB 1998-1 until it was too late to remit SBT payments for 1998 or 1999. Second, plaintiff had been directly advised by defendant—admittedly, several years previously with no promise of continuing validity—that it was not responsible for SBT filings.

Defendant contends that *Hobbs Corp* is directly on point and precludes plaintiff from claiming that it had reasonable cause for failing to remit SBT payments. We disagree. The essential underpinnings of this Court's decision in *Hobbs Corp* are missing from this case. In contrast, plaintiff has a minimal but genuine basis for honestly believing that it had no SBT liability. We conclude that, as the trial court found, plaintiff has shown that it did not willfully

neglect to pay the SBT in 1998 and 1999, and plaintiff has shown that it had reasonable cause for failing to do so. We therefore affirm the trial court's grant of summary disposition.

Defendant contends that summary disposition was premature because it had not had discovery. Summary disposition should not be granted lightly, and it is generally premature under MCR 2.116(C)(10) if discovery has not closed. *St Clair Medical, PC v Borgiel*, 270 Mich App 260, 271; 715 NW2d 914 (2006). However, summary disposition is appropriate if "there is no fair likelihood that further discovery would yield support for the nonmoving party's position." *Id*. Critically, the nonmoving party must do more than "simply state that summary disposition is premature," but rather must identify a factual dispute and support the issue with some independent evidence. *Id*.

Defendant's argument is solely that it should have been allowed the chance to see what, if anything, it could find that might support its view that plaintiff *did* know about RAB 1998-1 in time to remit SBT payments for 1998 and 1999. We disagree. Plaintiff presents nothing more than conjecture that such evidence even exists, and it does not identify the evidence or any basis for believing that there is anything to be found. We are wary of dismissing any suit in which a party has not had a meaningful opportunity to present its case. Nevertheless, "Michigan's commitment to open and far-reaching discovery does not encompass 'fishing expedition[s].'" *VanVorous v Burmeister*, 262 Mich App 467, 477; 687 NW2d 132 (2004). Consequently, conjecture is not sufficient to overcome a motion for summary disposition, even when discovery is incomplete. *Davis v City of Detroit*, 269 Mich App 376, 379-380; 711 NW2d 462 (2005). Because defendant has not supported its assertion that a factual dispute exists with any independent evidence, we find that the trial court did not abuse its discretion in denying discovery and granting summary disposition.

Affirmed.

/s/ Patrick M. Meter
/s/ Michael J. Kelly
/s/ Amy Ronayne Krause