STATE OF MICHIGAN

COURT OF APPEALS

LASON SYSTEMS, INC., Petitioner-Appellant,	UNPUBLISHED January 26, 2012
v	No. 300267 Michigan Tax Tribunal
DEPARTMENT OF TREASURY, Respondent-Appellee.	LC No. 00-342603

Before: BECKERING, P.J., and OWENS and SHAPIRO, JJ.

PER CURIAM.

In this case involving the denial of a Michigan Single Business Tax[1] ("SBT") refund, petitioner Lason Systems, Inc. ("Systems") appeals as of right the order of the Michigan Tax Tribunal denying Systems's motion for summary disposition under MCR 2.116(C)(10) and granting respondent Department of Treasury's ("the Department") motion for summary disposition under MCR 2.116(C)(10). We affirm.

I

Systems is a Delaware corporation with a principal place of business in Troy, Michigan. Systems provides record management services, document workflow reports, and imaging systems and services to "both private industry clients and state and local government managed operations, both within and without Michigan." All of Systems's executives are located in Troy. Systems does not have an employee base separate from its executives.

In 2000 and 2001, Systems had business contracts with customers that needed to be fulfilled. Because Systems did not have an employee base separate from its executives, Systems acquired "non-executive staffing needs" from an affiliated company: Lason Services, Inc. ("Services"). Services had a "personnel pool" of over 1,000 workers across the United States. According to Systems, the workforce of Services was utilized under a leasing agreement with

[1] The Single Business Tax Act ("SBTA"), MCL 208.1 *et seq.*, has been repealed. *Tyson Foods, Inc v Dep't of Treasury*, 276 Mich App 678, 679 n 1; 741 NW2d 579 (2007); see also 2006 PA 325.

Systems to carry out Systems's "day-to-day functions." Systems leased about 1,200 workers from Services. Services's leased employees were at various Systems locations throughout the United States; approximately 250 of the 1,200 leased employees were located in Michigan. In addition to the workforce of Services, Systems also contracted with other companies to obtain a workforce to fulfill its business contracts. The leased employees performed work that resulted in revenue to Systems.

Systems and Services filed separate SBT returns in 2000 and 2001. In 2002 and 2003, Systems and Services filed a single SBT return. Systems filed its 2000 and 2001 SBT returns using what it regarded as the "market sourcing" method. In these returns, Systems reported that its Michigan sales accounted for 21.6514% and 14.9181% of its total sales in 2000 and 2001, respectively. However, Systems later came to believe that the "market sourcing" method was an incorrect method for calculating the Michigan sales apportionment factor; instead, Systems believed that it should have employed the "cost of performance" approach. Thus, Systems timely filed amended 2000, 2001, 2002, and 2003 SBT returns. The amended 2000 and 2001 returns apportioned 100% of Systems's sales in 2000 and 2001 to Michigan by using Systems's payroll costs—the compensation to its executives working in Troy—to calculate Systems's costs of performance. Systems's recalculation of the Michigan sales factor for 2000 and 2001 resulted in an increase in business loss of $44 million. The recalculation resulted in a refund of $89,834 due to the carryover of the business losses to the 2002 and 2003 tax periods.

The Department rejected the amended returns and denied Systems's claim for a refund. Systems filed a petition with the Michigan Tax Tribunal, requesting a refund in the amount of $89,834. The tax tribunal granted summary disposition in favor of the Department under MCR 2.116(C)(10) and affirmed the Department's denial of Systems's claim for the refund.

II

The sole issue before this Court is whether the tax tribunal properly granted summary disposition in favor of the Department.

"This Court's review of Tax Tribunal decisions in nonproperty tax cases is limited to determining whether the decision is authorized by law and whether any factual findings are supported by competent, material, and substantial evidence on the whole record." *Toaz v Dep't of Treasury*, 280 Mich App 457, 459; 760 NW2d 325 (2008) (quotations and citation omitted). "Issues involving the interpretation and application of statutes are reviewed de novo as questions of law." *Id.*

"This Court reviews de novo a trial court's grant or denial of a motion for summary disposition under MCR 2.116(C)(10)."[2] *Tyson Foods, Inc v Dep't of Treasury*, 276 Mich App

[2] The Department moved for summary disposition under MCR 2.116(C)(8) and (C)(10). However, as the trial court relied on matters outside of the pleadings when it decided the parties' motions for summary disposition, this Court applies the standard of review for a motion under

678, 683; 741 NW2d 579 (2007). "The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered by the court when ruling on a motion brought under MCR 2.116(C)(10)." *Id.* "[T]his Court must consider the documentary evidence presented to the trial court in the light most favorable to the nonmoving party." *Id.* (quotations and citation omitted). Summary disposition is properly granted where there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law. *Id.*

Systems first argues that the tribunal erroneously granted summary disposition in favor of the Department because it concluded as a matter of law that Systems's costs of performance for purposes of determining Systems's sales apportionment factor included Systems's cost of labor for work performed by the leased employees. We do not agree.

"The SBT is imposed upon all persons who engage in business activity, measured by value added, within the State of Michigan." *Corning Inc v Dep't of Treasury*, 212 Mich App 1, 2; 537 NW2d 466 (1995). "Under the SBT, the first step in determining a taxpayer's tax liability is to determine its tax base." *Caterpillar, Inc v Dep't of Treasury*, 440 Mich 400, 409; 488 NW2d 182 (1992). "The tax base is then apportioned between Michigan and other states in which the taxpayer conducts business activities." *Id.* see also 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."). "Michigan uses a three-factor apportionment formula to determine what part of a multistate taxpayer's tax base represents business activity in Michigan." *Corning*, 212 Mich App at 3. The three factors are as follows: (1) the ratio of Michigan property to total property; (2) the ratio of Michigan payroll to total payroll; and (3) the ratio of Michigan sales to total sales. *Id.*

"The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this state during the tax year, and the denominator of which is the total sales of the taxpayer everywhere during the tax year." MCL 208.51(1). Under MCL 208.7(1)(a)(*ii*), a "sale" includes the amounts that the taxpayer receives as consideration from "[t]he performance of services, which constitute business activities other than those included in subparagraph (*i*), or from any combination of business activities described in this subparagraph and subparagraph (*i*)."[3] MCL 208.3 defines "business activity" as the following:

MCR 2.116(C)(10). See *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 457; 750 NW2d 615 (2008).

[3] Subparagraph (*i*) provides that sales include the amounts that the taxpayer receives as consideration for the following:

> The transfer of title to, or possession of, property that is stock in trade or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the tax period or property held by the taxpayer primarily for sale to customers in the ordinary course of its trade or business. [MCL 208.7(1)(a)(*i*).]

> 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).]

MCL 208.53 addresses when a "sale," other than a sale of tangible personal property, is a "Michigan sale" to be included in the numerator of the sales apportionment factor:

> Sales, other than sales of tangible personal property, are in this state if:
>
> (a) The business activity is performed in this state.
>
> (b) The business activity is performed both in and outside this state and, based on costs of performance, a greater proportion of the business activity is performed in this state than is performed outside this state. [MCL 208.53(a)-(b).]

"The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature." *Ford Motor Co v Dep't of Treasury*, 288 Mich App 491, 496; 794 NW2d 357 (2010). "The first step in determining the intent of the Legislature is to look at the language of the statute." *Alliance Obstetrics & Gynecology v Dep't of Treasury*, 285 Mich App 284, 286; 776 NW2d 160 (2009). "The Legislature is presumed to have intended the meaning it plainly expressed." *Id.* "Where the language poses no ambiguity, this Court need not look outside the statute, nor construe the statute, but need only enforce the statute as written." *Ammex, Inc v Dep't of Treasury*, 273 Mich App 623, 648; 732 NW2d 116 (2007). "A provision is ambiguous if it is susceptible to more than a single meaning or if it irreconcilably conflicts with another provision." *TMW v Dep't of Treasury*, 285 Mich App 167, 172; 775 NW2d 342 (2009).

In the present case, we conclude—and the parties agree—that the pertinent provisions of the Michigan Single Business Tax Act ("SBTA"), MCL 208.1 *et seq.*, are not ambiguous. Therefore, we must enforce the relevant provisions of the SBTA as written. See *Ammex*, 273 Mich App at 648. The starting point for the calculation of Systems's sales apportionment factor is to determine what constitutes Systems's "sales" and "business activities." In the lower court, the parties stipulated that Systems's business activity was "the provision of record management services, document workflow reports, and imaging systems and services to both private industry clients and state and local government managed operations." We agree. Systems received consideration from its customers for the provision of "record management services, document workflow reports, and imaging systems and services" pursuant to business contracts. Although Systems provided these services through the workforce of Services and other third parties, Systems "caused [the services] to be made or engaged in" by workers from Services and the other third parties to benefit both Systems and the customers. See MCL 208.3(2).

Consequently, Systems's sales were the consideration that it received for the performance of these business activities. See MCL 208.7(1)(a).

Systems asserts that its business activity was the following work performed by Systems's executives: marketing, identification of customer needs, brokering, acquiring contracts, and retention of customers. We do not agree. Systems did not receive consideration from its customers for this work. Moreover, this work by the executives cannot be business activity under MCL 208.3(2) because it constitutes "services rendered by an employee to his employer." See MCL 208.3(2); MCL 208.5(1) ("'Employee' means an employee as defined in section 3401(c) of the internal revenue code."); 26 USC 3401(c) ("The term 'employee' also includes an officer of a corporation.").

The next inquiry to determine Systems's sales apportionment factor is which of Systems's sales constitute Michigan sales. When allocating Systems's sales to the numerator of the sales apportionment factor, it is important to observe that a taxpayer's sales are considered individually, not in the aggregate, to determine whether business activity is within or without Michigan. See, e.g., *Midwest Bus Corp v Dep't of Treasury*, 288 Mich App 334, 336, 343, 346; 793 NW2d 246 (2010) (considering each of Midwest Bus Corporation's remanufacturing contracts as separate "sales"); *Detroit Lions, Inc v Dep't of Treasury*, 157 Mich App 207, 224-226; 403 NW2d 812 (1986) (analyzing only a single source of the Detroit Lions's revenue for purposes of the sales apportionment factor: post-season revenue). Systems amended its 2000 and 2001 SBT returns to reflect that all of its sales were Michigan sales because 100% of its costs of performance were in Michigan. According to Systems, 100% of its costs of performance (its payroll to its executives) were in Michigan because its executives were all located in Michigan performing Systems's business activity. We conclude that Systems's amended returns were erroneous for several reasons.

First, Systems's representation that 100% of its costs of performance for its sales were in Michigan rests on the erroneous assertion that Systems's business activity was its executives' marketing, identification of customer needs, brokering, acquiring of contracts, and retention of customers. As discussed above, this simply is not the case.[4] Second, Systems's consideration of its costs of performance to source all of its sales to Michigan assumes that Systems's business activity *relative to each sale* occurred both in and outside of Michigan. See MCL 208.53(b). While the parties stipulated that Systems conducts business activity both in and outside of Michigan, the record does not support the conclusion that Systems's business activity *relative to each sale* occurred both in and outside of Michigan. Third, even assuming that Systems's business activity relative to each sale occurred both in and outside of Michigan, Systems's characterization of the payroll of its executives as its costs of performance under MCL 208.53(b) is misplaced. The SBTA does not define "costs of performance." MCL 208.2 provides that

[4] Even assuming that Systems's characterization of its business activity was correct, all of its sales would be Michigan sales under MCL 208.53(a) because it would have no business activity outside of Michigan. Thus, there would be no need for Systems to consider costs of performance under MCL 208.53(b).

"terms not defined within the SBTA are to be accorded the same meaning as when used in comparable context in the laws of the United States relating to federal income taxes." *Consumers Power Co v Dep't of Treasury*, 235 Mich App 380, 385; 597 NW2d 274 (1999). However, "the IRC also lacks a standard definition" for "costs of performance"; thus, for further guidance, this Court may consult a dictionary to obtain the plain and ordinary meaning of "costs of performance." See *id.*; see also *TMW*, 285 Mich App at 172 (explaining that if the statute does not define a term, this Court may consult a dictionary to afford a statutory term its plain and ordinary meaning). Random House Webster's College Dictionary defines "cost" as "the price paid to acquire, produce, accomplish, or maintain anything" and also as "an expenditure of money, time, labor, etc." *Random House Webster's College Dictionary* (2001). Random House Webster's College Dictionary defines "performance" as "the execution or accomplishment of work, acts, feats, etc." *Id.* Thus, the plain and ordinary meaning of "costs of performance" is "the price paid" or the "expenditure of money, time, labor, etc." for "the execution or accomplishment of work, acts, feats, etc." Therefore, in this case, the "costs of performance" are the expenditures Systems incurred to provide the services it promised to its customers under its business contracts, i.e., Systems's cost of labor.[5] The payroll of Systems's executives was not "the price paid" for the "execution or accomplishment of" Systems's business activity.

The final pertinent inquiry in this case is where a sale arising from business activity both in and outside of Michigan is sourced after determining the costs of performance. The parties do not dispute that sales are sourced on the basis of where the majority of Systems's costs of performance took place.[6] In the present case, the lower court concluded that "[t]he sourcing of sales for determining [Systems's] costs of performance is based on where the services are provided," i.e., "at client sites . . . not 100% in Michigan." We agree. Each of Systems's sales arising from business activity both in and outside Michigan should be sourced based on where the greater proportion of the labor to accomplish the sale occurred. See MCL 208.53(b) (providing that a sale is in Michigan if the greater proportion of the business activity is

[5] We note that the lower court concluded that Systems's costs of labor were the compensation paid to the leased employees. We disagree as the record does not establish that Systems was the source of the leased employees' compensation. Rather, the record establishes that Systems's costs of labor were the prices Systems paid to both Services and other sources of leased employees "through arm's length pricing arrangements" to obtain the leased employees to fulfill Systems's business contracts. Nevertheless, we consider this distinction inconsequential in the present case. Systems's costs of performance were its labor costs, regardless of whether it paid its own employees to perform labor or paid Services or a third party to obtain a workforce to perform labor. And, as will be discussed further, Systems's sales arising from business activity both in and outside Michigan must be sourced based on where the greater proportion of the labor to accomplish the sale occurred.

[6] More specifically, Systems contends that its sales should be sourced to Michigan because all of its costs of performance (the compensation of its executives) arose because of the executive's work in Michigan. And, the Department contends that Systems's sales should be sourced based on where the majority of the costs of performance took place: the locations where the leased employees worked.

performed in Michigan); *Detroit Lions*, 157 Mich App at 225-226 (sourcing the Detroit Lions's post-season revenue to Michigan because the greater proportion of the Lions's activity giving rise to its entitlement to the revenue occurred in Michigan).

Systems argues that the Legislature's intent when enacting the SBTA was to exclude the costs of subcontracted labor from the costs of performance analysis for purposes of the sales apportionment factor. According to Systems, the SBT was modeled after the Multistate Tax Compact ("MTC"), which provides that activities performed by an independent contractor on behalf of a taxpayer are excluded from a taxpayer's "income producing activity"; thus, Systems asserts that its costs of labor to perform its business contracts—specifically the costs of the leased employees—should not be considered when determining the sales apportionment factor. We reject this argument for several reasons. First, the provisions of the SBTA that are applicable in this case are not ambiguous; therefore, we will not look to other statutes when interpreting these provisions. See *Ammex*, 273 Mich App at 648. Second, Systems provides no citation to legal authority for the propositions that the SBT was modeled after the MTC and that there is a "policy of treating the SBT[, a value added tax,] like other corporate income taxes." While Systems provides this Court with citation to this Court's unpublished decision in *Honigman Miller Schwartz & Cohn LLP v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued July 30, 2009 (Docket No. 282768), for the proposition that this Court has looked to the MTC for "analytic guidance," Systems's discussion of this nonbinding decision is cursory. See *Nuculovic v Hill*, 287 Mich App 58, 68; 783 NW2d 124 (2010) (explaining that unpublished decisions have no precedential force). Therefore, Systems has abandoned this argument on appeal. See *Wolfe v Wayne-Westland Community Sch*, 267 Mich App 130, 139; 703 NW2d 480 (2005).

We also reject Systems's argument that we should hold that the Department must comply with Proposed Rule R 208.25(6), which provides that "business activity" does not include transactions and activities performed by an independent contractor on behalf of a taxpayer. A proposed rule "does not have binding effect of law." *Barkau v Ruggirello*, 100 Mich App 617, 624; 300 NW2d 342 (1980). Moreover, Systems has not provided this Court with any legal authority supporting its contention that the Department must follow a proposed rule when it has not promulgated a rule; therefore, this argument is also abandoned. See *Wolfe*, 267 Mich App at 139.

Finally, Systems argues that where its business activity occurred is a genuine issue of material fact that precluded summary disposition. According to Systems, "there is no evidence to conclude that [Systems's] business activity included subcontracted labor at client sites outside of Michigan." We disagree. Under MCR 2.116(A)(1), "[t]he parties to a civil action may submit an agreed-upon stipulation of facts to the court." "If the parties have stipulated to facts sufficient to enable the court to render judgment in the action, the court shall do so." MCR 2.116(A)(2). The parties stipulated to the tribunal that Systems's business activity was both in and outside of Michigan: "Petitioner's business activity, during the tax period at issue, was the provision of record management services, document workflow reports, and imaging systems and services to both private industry clients and state and local government managed operations, both within and without Michigan." Furthermore, Systems explained in its statements accompanying its amended 2000 and 2001 SBT returns that "Lason Systems, Inc. is a service provider with

activity both inside and outside Michigan." And, moreover, Systems continuously represented to the tax tribunal that it conducted business activity both in and outside of Michigan.

Accordingly, the tax tribunal properly granted summary disposition in favor of the Department under MCR 2.116(C)(10) where Systems's costs of performance included the cost of labor performed by its leased employees as a matter of law and where no genuine issues of material fact precluded summary disposition.

Affirmed.

/s/ Jane M. Beckering
/s/ Donald S. Owens
/s/ Douglas B. Shapiro