

STATE OF MICHIGAN
COURT OF APPEALS

MJR GROUP, L.L.C.,

Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,

Defendant-Appellee.

UNPUBLISHED
February 25, 2014

No. 312745
Tax Tribunal
LC No. 00-441767

Before: OWENS, P.J., and BORRELLO and GLEICHER, JJ.

PER CURIAM.

Between 2007 and 2010, petitioner MJR Group, Inc. remitted to the state sales tax on bottled water and prepackaged candy sold at its theaters' concession stands. Those items were not actually subject to sales tax under our state tax code. MJR therefore sought a refund of the sales tax erroneously paid over the years. The Michigan Tax Tribunal (MTT) granted summary disposition in the Department of Treasury's favor, denying MJR the refund. Because MJR did not owe the challenged sales tax amount to the state, specifically alleged in its petition that it did not charge sales tax to its customers, and created a genuine issue of material fact that it did not charge to or collect from its customers sales tax on bottled water and prepackaged candy, we reverse and remand for further proceedings.

I. BACKGROUND

Under Michigan law, it is the retailer who is on the hook to the state for sales tax. *World Book, Inc v Dep't of Treasury*, 459 Mich 403, 408; 590 NW2d 293 (1999). Retailers can choose to pass the burden of sales tax onto their customers by adding the tax to their prices or as a separate item on a sales receipt. *Sims v Firestone Tire & Rubber Co*, 397 Mich 469, 473; 245 NW2d 13 (1976), citing MCL 205.73. Retailers can also choose to absorb the sales tax themselves, without passing the cost along to their customers. MJR claims that it chose the second option and did not charge its customers sales tax. According to MJR, it made this choice to speed service at its theaters' concession stands. By charging round figures for its goods and not adding sales tax to each purchase, MJR's customers could calculate their expected cost before reaching the register and have the appropriate funds ready for payment rather than rummaging in their pockets and purses for loose change. Not tacking on sales tax, MJR further contended, allowed it to competitively price its concession items.

For several years, MJR miscalculated the sales tax it owed to the state. It simply multiplied its gross sales by the sales tax quotient and remitted those funds to the state. Not all food items are taxable, however. Accordingly, MJR should have subtracted its sales of bottled watered and prepackaged candy from its gross sales before calculating the tax owed. See MCL 205.54d(d) (bottled water); MCL 205.54g(4)-(5) (nonprepared food). Once MJR realized its mistake, it contacted the Department of Treasury seeking a refund of the sales tax overpayment, totaling \$409,760.05. The Department denied the refund request, stating:

Please be advised that the department requires all tax collected to be remitted to the state, even if collected in error. The Michigan General Sales Tax Act, [MCL 205.73,] states that a person other than this state may not enrich himself or herself or gain any benefit from the collection or payment of the tax. Therefore, if tax was collected in error or overcharged, a refund or credit of the tax may be taken by the seller only if the seller first refunds or credits the tax to the customer, thereby avoiding unjust enrichment.

MJR challenged the decision and an informal conference was held before a Department hearing referee. Before the informal conference, MJR presented a memorandum providing the following information:

The taxpayer has always operated the concession function in the following manner:

- Advertised concession sale prices to the customer include sales tax
- The preceding fact is clearly stated on each concession price board so
- The taxpayer does not reimburse itself by adding sales tax to the sale price in the manner permitted by the Michigan General Sales Tax Act.
- The taxpayer remits sales tax due on taxable sales, which are calculated by reducing gross sales first by sales of food for human/home consumption, then by tax included in gross

MJR further argued, “The advertised prices for concession items comprising sales of food for human/home consumption did not include sales tax because those items were not taxable.” In an accompanying memorandum, MJR’s accountant reaffirmed, “The taxpayer did not pass the burden of the tax to the consumer. Instead the taxpayer bore the direct legal incidence of the tax.” The accountant continued, “No sales tax has ever been collected in error from, or overcharged to, customers.”

MJR also presented affidavits ahead of the conference. MJR’s controller, Donna Kondek, swore that “[t]here was never any tax collected in excess of the [market price for concession items] because there were no sales to which tax was added (sales at advertised price plus tax.)” MJR’s vice president of operations, Dennis Redmer, asserted that he was tasked with overseeing “day-to-day operations” and “assure[d] that the advertised concession pricing at all [theaters] is accurate.” According to Redmer, “During my entire tenure with the Company, the concession price boards at each [theater] have contained the phrase ‘All Prices Include Sales Tax.’”

Following the informal conference, the hearing referee recommended that the Department reaffirm the denial of MJR's refund request. The referee concluded that bottled water and prepackaged candy are not subject to sales tax, but reasoned that refunding the requested amount would result in unjust enrichment to MJR in violation of MCL 205.73(4). Acknowledging MJR's theory of why it alone bore the burden of sales tax, the referee opined that MJR's "reasoning is misguided."

Whether or not the petitioner tacked on or deducted 6% from the advertised price of the bottled water and candy, it is the customer who is ultimately paying the 6% sales tax. The 6% in both situations is coming from the proceeds of sales to customers. By reducing gross sales by 6%, the petitioner is simply selling the bottled water and candy at a lower cost. If 6% were tacked on to the advertised price of bottled water and candy, the petitioner would be selling the product at a higher cost. The customers, therefore, paid sales tax on the bottled water and candy.

Upon review of the referee's recommendation, the Department accepted the referee's conclusion but stated an additional ground for its decision. The Department determined that the bottled water and prepackaged candy sold by MJR to its customers was actually subject to sales tax. Under MCL 205.54g(4), sales tax applies to "prepared food." And pursuant to Admin Rule 205.136(5), prepackaged food can be considered "prepared food" if the seller's "prepared food sales percentage [is] greater than 75%" and it makes eating utensils available to its customers.

MJR then filed a petition for an appeal before an MTT judge. In that petition, MJR asserted that "[t]he advertised or stated price for menu items is based on market" and "is the final transfer price, what the customer pays." MJR alleged, "Sales tax is NOT added to the stated price for menu items." And MJR reiterated that it "does not reimburse itself by adding sales tax to the stated price as a separate item." MJR indicated that its message "All Prices Include Sales Tax" was "in conformity with Michigan Law." MJR also challenged the Department's conclusion that prepackaged candy and bottled water became taxable based on the availability of napkins and straws at its theaters.

Following the filing of the petition, both sides sought summary disposition; the Department under MCR 2.116(C)(8) and MJR under (C)(10). Along with its motion, MJR included a new affidavit from company president, Michael Mihalich. Mihalich asserted that he is a "hands on" owner operator and approved of all current policies affecting concession sales. He further swore that "[t]he advertised or stated price for menu items is based on market" and that "[s]ales tax is not factored, in any form or manner, into the sales price of the menu items." Mihalich repeated the claims of his corporate officers that the menu price was the final transfer price of the item and that sales tax was not added to the menu price "either directly or indirectly." He further informed the MTT that MJR had charged its customers sales tax in the past and included that tax as a separate line item on receipts. "Approximately 12 years ago," however, MJR "changed [its] policy and stopped adding sales tax to the price of the food or beverages as a separate item." Mihalich decided to discontinue adding sales tax "to eliminate change problems and to make MJR a better value than [its] competitors." Mihalich emphasized, "We are in fact eating the sales tax charge." As proof of that point, Mihalich noted that MJR's concession prices were considerably lower than its competitors.

In relation to the “All Prices Include Sales Tax” message on the concession boards, Mihalich contended that MJR was “telling [its] customers that we were paying the sales tax and that sales tax was NOT going to be added to the stated menu price.” The message was designed to “avoid[] any confusion over whether the sales tax was paid and who was paying the sales tax.”

The MTT ruled in the Department’s favor. In the introduction to the opinion, the MTT judge erroneously stated that MJR asserted that it had collected sales tax from its customers in relation to bottled water and prepackaged candy sales. The judge described MJR’s action as seeking a refund of the sales tax paid to the state on items not actually subject to sales tax. The judge quickly dispensed with the Department’s contention that MJR’s sales of bottled water and prepackaged candy became subject to sales tax because the theater provided eating utensils such as napkins and straws, finding it clear under the law that these items were not subject to the tax.

The MTT judge included a section entitled “findings of fact” in the opinion. In this section, the judge described that MJR sold nontaxable bottled water and prepackaged candy at its concession stands and included a message on the menu board that “All Prices Include Sales Tax.” The judge also noted that MJR paid to the state sales tax on bottled water and candy between 2007 and 2010. In its “conclusions of law,” the MTT judge determined that MJR failed to state a claim upon which relief could be granted and therefore summarily dismissed its petition pursuant to MCR 2.116(C)(8). The facts and law established that MJR would be unjustly enriched by the refund in the judge’s estimation. In making this ruling, the MTT judge again erred in quoting MJR as “claiming to charge a tax on sales items not subject to sales tax.” After charging and collecting the tax, MJR would be unjustly enriched if the overpaid tax were returned to it. The judge recognized that Mihalich averred that MJR paid the sales tax without charging the tax to its customers. The judge ruled, “The [MTT] finds this argument to be without merit because [MJR] requests a refund from the state for an amount which its customers paid.” The judge thereby rejected MJR’s averments that it, and not its customers, had paid the sales tax. The MTT concluded that MJR would be unjustly enriched by any refund of the erroneously remitted sales tax on bottled water and candy because there was no way it could reimburse the affected customers.

II. SUMMARY DISPOSITION WAS WRONGLY GRANTED

The MTT applied wrong standards when reviewing the parties’ cross-motions for summary disposition and therefore rendered an erroneous ruling. We note that appellate review of an MTT decision is limited. *Briggs Tax Serv, LLC v Detroit Pub Sch*, 485 Mich 69, 75; 780 NW2d 753 (2010). In the absence of fraud, this Court reviews the MTT’s decisions for misapplication of the law or adoption of a wrong principle. *Id.*

We review a trial court’s decision on a motion for summary disposition de novo. A motion under MCR 2.116(C)(8) “tests the legal sufficiency of the complaint on the basis of the pleadings alone to determine if the opposing party has stated a claim for which relief can be granted.” We *must accept all well-pleaded allegations as true and construe them in the light most favorable to the nonmoving party*. The motion should be granted only if no factual development could possibly justify recovery.

A motion under MCR 2.116(C)(10) “tests the factual support of a plaintiff’s claim.” “Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law.” “In reviewing a motion under MCR 2.116(C)(10), this Court *considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party* to determine whether any genuine issue of material fact exists to warrant a trial.” “A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.” [*Zaher v Miotke*, 300 Mich App 132, 139-140; 832 NW2d 266 (2013) (citations omitted, emphasis added).]

Further, we review de novo the interpretation and application of statutes, such as those under the tax code. *Briggs Tax Serv*, 485 Mich at 75.

Ultimately, the MTT based its decision regarding MJR’s entitlement to a sales tax refund solely on MCL 205.73(4), which provides: “A person other than this state may not enrich himself or herself or gain any benefit from the collection or payment of the tax.” Under the statute, any sales tax actually collected from the consumer to reimburse the seller for its tax liability must be remitted to the state. *Sims*, 397 Mich at 476. In deciding that MJR would be unjustly enriched as a matter of law, the MTT improperly rejected the well-pleaded allegations in MJR’s petition. As noted, MJR specifically averred, “Sales tax is NOT added to the stated price for menu items” and “Petitioner does not reimburse itself by adding sales tax to the stated price as a separate item.” Accepting as true that MJR did not include sales tax in the menu prices, MJR did not collect any funds to reimburse itself for its sales tax liability. These statements, if proven true, would justify recovery. Therefore, the MTT erred in summarily dismissing MJR’s petition under MCR 2.116(C)(8).

But contrary to MJR’s position, summary disposition in its favor under MCR 2.116(C)(10) would have been improper as well. MJR created a factual issue regarding whether it collected sales tax from its customers precluding summary relief in either party’s favor. MJR presented affidavits from three company officials involved in the pricing policy for concession items. All swore that MJR made a calculated decision not to charge customers sales tax. Furthermore, they all interpreted the message on the concession menu board as telling customers that they would not be responsible for sales tax. The assertions in MJR’s affidavits were not supported by written or documentary evidence. The Department presented no evidence to rebut these affidavits. Yet, we do not conclude that this mandated summary disposition in MJR’s favor. The most the Department could have offered as discovery had not yet been conducted would have been an allegation that the MJR representatives were untruthful. The statements create a credibility contest that cannot be resolved in a summary disposition motion. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Summary disposition therefore would be inappropriate.

The Department also continues to argue that MJR’s sales of bottled water and prepackaged candy are pulled into the definition of taxable prepared food because MJR makes eating utensils available to its customers. The Department raises this argument as an alternate ground to support denial of MJR’s (C)(10) motion. However, MCL 205.54d(d) expressly

exempts bottled water from the sales tax requirement. And prepackaged candy is “[f]ood sold in an unheated state by weight or volume as a single item, without eating utensils.” Therefore, it is “not include[d]” in the definition of “prepared food.” MCL 205.54g(5)(c). Admin R 205.136(4)(b) specifically states that “‘prepared food’ does not include items as specified in MCL 205.54g(5).” Accordingly, the “prepared food” sales tax does not apply to these items.

We reverse and remand to the MTT for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Stephen L. Borrello
/s/ Elizabeth L. Gleicher