STATE OF MICHIGAN

COURT OF APPEALS

ZIMMER US INC.,

Petitioner-Appellant,

v

DEPARTMENT OF TREASURY,

Respondent-Appellee.

UNPUBLISHED
July 23, 2020

No. 349358
Tax Tribunal
LC No. 17-005054-TT

Before: METER, P.J., and BECKERING and O'BRIEN, JJ.

PER CURIAM.

Petitioner, Zimmer US Inc., appeals by right an order of the Tax Tribunal granting summary disposition to respondent, Department of Treasury, regarding petitioner's petition for a refund of $872,464 in use tax. On appeal, petitioner argues that it did not "use" the property under the Use Tax Act, MCL 205.91 *et seq*. We affirm.

I. FACTUAL BACKGROUND

Petitioner is an Indiana-based company that manufactures and markets orthopedic implants, such as prosthetic joints. It also provides its customers with the medical instruments that are used to install the implants, usually on an indefinite basis, at no extra charge. Petitioner retained ownership of the instruments, and its contracts required the customer to reimburse petitioner for any loss, damage, or destruction of the instruments. Petitioner sought a refund of use tax on the basis that it did not use the instruments in Michigan within the definition of "use" under the Use Tax Act. The Tax Tribunal granted summary disposition in favor of respondent under MCR 2.116(C)(10) (no genuine issue of material fact) after determining that petitioner used the instruments because it ceded control of the instruments in a transaction with a significant connection to Michigan.

II. STANDARD OF REVIEW

This Court's review of a decision by the Tax Tribunal is limited. *Mich Props, LLC v Meridian Twp*, 491 Mich 518, 527; 817 NW2d 548 (2012). When a party does not dispute the facts or allege fraud, this Court reviews whether the tribunal "made an error of law or adopted a

wrong principle." *Id*. at 527-528. This Court reviews de novo the interpretation and application of tax statutes. *Id*. at 528. This Court also reviews de novo a decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). "In evaluating a motion for summary disposition brought under [MCR 2.116(C)(10)], a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion." *Id*. at 120. "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Id*.

III. ANALYSIS

Petitioner argues that the Tax Tribunal erred as a matter of law because it adopted an inappropriate "nexus" test that did not apply in its case. Petitioner also argues that it did not use the instruments because it relinquished control of them when it gave them to a common carrier. While petitioner is correct that the tribunal erred by adopting an inapplicable nexus test, the Tax Tribunal reached the right result for the wrong reason because petitioner exercised control over the instruments in Michigan by requiring hospitals to inform it about lost or damaged instruments.

The Use Tax Act imposes a tax on "the privilege of using, storing, or consuming tangible personal property" in Michigan. MCL 205.93(1). The purpose of the act is to govern transactions not covered by the General Sales Tax Act. *Podmajersky v Dep't of Treasury*, 302 Mich App 153, 162-163; 838 NW2d 195 (2013).

> "Use" means the exercise of a right or power over tangible personal property incident to the ownership of that property including transfer of the property in a transaction where possession is given. Converting tangible personal property acquired for a use exempt from the tax levied under this act to a use not exempt from the tax levied under this act is a taxable use. [MCL 205.92(b).]

Petitioner is correct that the Tax Tribunal adopted a wrong principle because it applied a nexus standard to petitioner's case that applied to sellers of property, and petitioner did not sell the instruments. In this case, citing MCL 205.95a, the Tax Tribunal held that petitioner ceded control of the instruments "in a transaction with a significant connection to Michigan because it was specifically directed, and occurred in, Michigan." MCL 205.95a provides that a person who sells tangible personal property is presumed to have a substantial nexus with Michigan if certain requirements are met, including when the seller "conducts any other activities in this state that are significantly associated with the seller's ability to establish and maintain a market in this state . . . ." MCL 205.95a(h). A "seller" is a "person from whom a purchase is made and includes every other person selling tangible personal property or services for storage, use, or other consumption in this state." MCL 205.92(d). A purchase occurs when something is "acquire[d] for a consideration . . . ." MCL 208.92(e). In this case, the stipulated facts stated that petitioner "provide[d] purchasers of its prosthetics with use of these instruments, usually on an indefinite basis, at *no extra cash charge*." Therefore, MCL 205.95a did not apply to petitioner because petitioner received no consideration for the instruments. The proper question was whether petitioner used the instruments within the meaning of MCL 205.92(b), not MCL 205.95a.

We conclude that the Tax Tribunal reached the correct result for the wrong reason. See *Forest Hills Coop v Ann Arbor*, 305 Mich App 572, 615; 854 NW2d 172 (2014) ("This Court will not reverse a trial court's order of summary disposition when the right result was reached for the wrong reason."). Petitioner argues that it did not use the property because it did not exercise a right or power over the instruments, since it relinquished control of them to a common carrier. This Court will not reverse or vacate a trial court's order unless doing so appears to this Court to be inconsistent with substantial justice. MCR 2.613(A). See also *Kern v Pontiac Twp*, 93 Mich App 612, 623; 287 NW2d 603 (1979). The record demonstrates that petitioner was not a mere distributor because it in fact retained control over the instruments while they were in Michigan.

Merely distributing property in Michigan does not fall within the statutory definition of use because distribution does not qualify as giving or transferring property. *Sharper Image Corp v Dep't of Treasury*, 216 Mich App 698, 702; 550 NW2d 596 (1996). Distribution occurs when a party loses total control of the property when it is delivered to a common carrier. *Ameritech Publishing, Inc v Dep't of Treasury*, 281 Mich App 132, 134-135; 761 NW2d 470 (2008). When a petitioner places requirements on the property when it is in Michigan, the petitioner has not ceded all control over the property. *Id*. at 144. In order for use tax to be inapplicable, the owner must have relinquished "total control" over the property outside of the state. *NACG Leasing v Dep't of Treasury*, 495 Mich 26, 30; 843 NW2d 891 (2014). See also *WPGP1, Inc v Dep't of Treasury*, 240 Mich App 414, 419; 612 NW2d 432 (2000).

In this case, petitioner retained ownership of the instruments and required its customers to reimburse petitioner for any loss or damage of the instruments. Petitioner argues that the sole purpose of the requirement was to ensure that petitioner could replace the instruments. However, a petitioner's reasons are irrelevant. See *Podmajersky*, 302 Mich App at 165. This Court's cases hinge on whether the petitioner exercised control in Michigan or totally relinquished control outside of Michigan, not whether petitioner had a good reason for imposing requirements on the property while it was in Michigan. Petitioner transferred possession of its personal property to Michigan hospitals, but petitioner did not relinquish total control of the property because it imposed at least one requirement on the hospitals regarding the property. Because petitioner did not totally relinquish control of the property when it shipped it into Michigan, the property was subject to use tax.[1]

Affirmed.

/s/ Patrick M. Meter
/s/ Jane M. Beckering
/s/ Colleen A. O'Brien

[1] Because we affirm the Tax Tribunal's order granting summary disposition in favor of respondent, we need not address respondent's arguments concerning use by storage as an alternative ground to affirm.