STATE OF MICHIGAN

COURT OF APPEALS

KELLY SERVICES, INC., Petitioner-Appellee,	FOR PUBLICATION April 19, 2012 9:05 a.m.
v	No. 303736 Tax Tribunal
DEPARTMENT OF TREASURY, Respondent-Appellant.	LC No. 00-319360

KELLY PROPERTIES, INC., Petitioner-Appellee,	
v	No. 303737 Tax Tribunal
DEPARTMENT OF TREASURY, Respondent-Appellant.	LC No. 00-319361

Before: FORT HOOD, P.J., and CAVANAGH and K. F. KELLY, JJ.

PER CURIAM.

Respondent, the Department of Treasury, appeals as of right from an order of the Tax Tribunal, which granted summary disposition in favor of petitioners, Kelly Services, Inc. and Kelly Properties, Inc., and denied respondent's motion for summary disposition. We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Petitioners are an affiliated group of companies. Kelly Services, Inc. ("Kelly Services") is a Delaware corporation in the business of providing temporary staffing services. Kelly Properties, Inc. ("Kelly Properties") is a Michigan corporation managing the assets used in the business operations of petitioner Kelly Services and affiliated companies. Petitioners have developed trademarks, trade names, and know-how to create a common corporate identity and common business procedures. These are shared by licensure between Kelly Properties and Kelly Services, and by licensure between Kelly Services and foreign affiliated companies. Petitioners receive royalty income from the licensing of these trademarks, trade names, and know-how.

For the tax years 1997 through 2000, petitioners were subject to the Single Business Tax Act (SBTA), MCL 208.1 *et seq*.[1] In order to calculate their tax liability under the SBTA, petitioners were required to calculate their "sales factor" and "gross receipts." MCL 208.51. "Sales factor" was defined, in relevant part, as "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. "Sales" were defined as follows:

> (1) "Sale" or "sales" means the gross receipts arising from a transaction or transactions in which gross receipts constitute consideration: (a) for 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, or (b) for the performance of services, which constitute business activities other than those included in (a), or from any combination of (a) or (b). [MCL 208.7(1)(a).]

"Gross receipts" were defined, in relevant part, as the sum of "sales" and "rental or lease" receipts. MCL 208.7(3). For the tax years at issue, petitioners excluded their royalty income from their total sales and gross receipts calculations.

Respondent audited petitioners for the tax years at issue, and issued Kelly Services a Bill of Taxes Due in the amount of $290,675, plus interest in the amount of $68,681.05, alleging that their royalty income should have been included in their sales factor and gross receipts calculations. Respondent also issued Kelly Properties a Bill of Taxes Due in the amount of $49,727, plus interest in the amount of $21,966.80, alleging that their royalty income should have been included in their calculation of gross receipts.

After the conclusion of the informal conference in respondent's hearings division, the hearing referee concluded that respondent's position with regard to petitioners' royalty income was incorrect, and that the Intents to Assess issued by respondent should be cancelled. Respondent, however, rejected the recommendation affirmed the assessments originally issued. Petitioners appealed to the Tax Tribunal, and petitioners' actions were consolidated.

In the Tax Tribunal, petitioners filed a motion for summary disposition pursuant to MCR 2.116(C)(10) (no genuine issue of material fact), and respondent filed a motion for summary disposition pursuant to MCR 2.116(I)(2) (judgment for opposing party). The Tax Tribunal granted summary disposition to petitioners, finding that royalty income does not qualify as sales, lease, or rent receipts, and therefore should not be included in the calculation of a taxpayer's sales factor or gross receipts.

[1] Repealed by 2006 PA 325.

Following the Tax Tribunal's opinion, respondent moved for reconsideration, citing a conflicting Tax Tribunal case decided after post-hearing briefs had been filed in the instant case. The Tax Tribunal denied respondent's motion.

Respondent now appeals as of right.

II. STANDARD OF REVIEW

Absent an allegation of fraud, this Court reviews a Tax Tribunal decision for misapplication of the law or adoption of a wrong legal principle. *Briggs Tax Serv, LLC v Detroit Pub Schools*, 485 Mich 69, 75; 780 NW2d 753 (2010). "But when statutory interpretation is involved, this Court reviews the Tax Tribunal's decision de novo." *Id.* While agency interpretations of statutes are entitled to respectful consideration and should not be overruled without cogent reasons, they are not binding on this court and cannot conflict with the legislature's intent as expressed in the language of the statute. *In re Rovas Complaint*, 482 Mich 90, 103, 108-109; 754 NW2d 259 (2008). The overriding goal of statutory interpretation is the determination of legislative intent and the implementation of that intent once discerned. *AFSCME Council 25 v State Employees Retirement* Sys, 294 Mich App 1, ___; ___ NW2d ___ (2011), slip op p 5. When tax statutes are construed, any ambiguities are resolved in favor of the taxpayer. *Int'l Business Machines v Dep't of Treasury*, 220 Mich App 83; 86; 558 NW2d 456 (1996).

III. ANALYSIS

Respondent argues that the Tax Tribunal erred as a matter of law when it concluded that royalties for the licensing of trademarks and trade names were not included in "sales" and "gross receipts" under the SBTA prior to 2001. We disagree.

In *PM One Ltd v Dep't of Treasury*, 240 Mich App 255, 261-262; 611 NW2d 318 (2000), this Court held that the proper way to analyze what constitutes a "sale" is as follows:

> (1) "gross receipts"
>
> (2) arising from a "transaction" in which gross receipts constitute "consideration" for one of the following described in (a), (b), or (c):
>
> (a) transfer of title to, or possession of, property that is:
>
> (*i*) stock in trade; or
>
> (*ii*) Other property of a kind that would be properly included in the inventory of the taxpayer; or
>
> (*iii*) property held by the taxpayer primarily for sale to customers in the ordinary course of its trade or business;
>
> (b) "performance" of "services," that constitute "business activities" other that those listed in (a);

(c) any combination of (a) or (b).

In this case, it is undisputed that the royalty income in question derives from the licensing of trademarks and trade names, and not the performance of services. As such, (b) and (c) in the *PM One* analysis are irrelevant. After the exclusion of those factors, resolving the instant case requires this Court to resolve three questions. First, whether the royalty income in question constitutes gross receipts; second, whether royalty income arises from the transfer of title or possession; and third, whether the trademarks and trade names in this case are applicable forms of property under the SBTA. These three questions will be analyzed in turn.

A. GROSS RECEIPTS

Because the definition of gross receipts relies on the definition of sales, and the definition of sales relies on the definition of gross receipts, this Court has noted that the definitions are "somewhat circular," and that resolution of the "sales" prong of gross receipts requires analyzing the remaining elements of a sale under the SBTA. *PM One*, 240 Mich App at 260. As such, the sales portion of this analysis will be undertaken later in this opinion.

The second prong of gross receipts is "rental or lease receipts." In the past, however, this Court has distinguished between royalties and rent for SBTA purposes, and indicated the two categories were mutually exclusive due to their differing natures and treatment under the SBTA. *Columbia Assocs, LP v Dep't of Treasury*, 250 Mich App 656; 649 NW2d 760 (2002); *Field Enterprises v Dep't of Treasury*, 184 Mich App 151; 457 NW2d 133 (1990). Therefore, because royalty income does not constitute rental or lease receipts, whether or not royalty income should be considered as gross receipts depends on the conclusion of the sales analysis below.

B. TRANSFER OF TITLE OR POSSESSION

In order to be properly classified as sales receipts under the SBTA during the years at issue, royalty income must arise from a transaction where the royalty income was consideration for the transfer of title to, or possession of, property. MCL 208.7(1)(a), (b). Therefore, if no transfer of title or possession is involved in the transaction giving rise to the royalty income, then no further analysis is needed and the royalty income cannot be classified as sales receipts. There is no dispute that no transfer of title occurred in this case, so the only question here is whether or not royalties arise from the transfer of possession of property.

The term "royalties" was not defined under the SBTA, but was defined by our Supreme Court in *Mobil Oil Corp v Dep't of Treasury*, 422 Mich 473, 475; 373 NW2d 730 (1985), a case involving "the taxation of oil and gas royalties under Michigan's Single Business Tax Act." The *Mobil Oil* Court looked to both *The Random House College Dictionary* (rev ed) and Black's Law Dictionary (5th ed) definitions of the word "royalty" and determined that "the common understanding of royalties" is that they are compensation paid to the owner of certain types of property, such as intangible property or natural resources, for the use of that property. *Id*. at 484-485. Under this common definition, then, royalty income derives from the transfer of *the right to use property*, not from the transfer of *possession of property*. Moreover, ownership of the intangible property in this case was not transferred to the licensee, but remains with the licensor. As such, royalty income does not appear to have arisen out of a qualifying transaction.

Respondent, however, challenges this understanding of royalty transactions, citing *SBC Teleholdings Inc v Dep't of Treasury*, 17 MTTR 645 (Docket No 320440, March 17 2010), a conflicting Tax Tribunal case decided after post-hearing briefs had been filed in the instant case. In *SBC Teleholdings*, the Tax Tribunal concluded that the retention of title by a licensor of intangible property does not preclude the licensor from transferring possession of the intangible property to another. *Id*. at 5.

This interpretation, however, is at odds with the common understanding of possession. When a term is undefined, a court may establish the meaning of a term through a dictionary definition. *Citizens Ins Co v Pro–Seal Serv Group, Inc*, 477 Mich 75, 84; 730 NW2d 682 (2007). Black's law Dictionary (9th ed) defines possession as "[t]he fact of having or holding property in one's power . . . [t]he right under which one may exercise control over something to the exclusion of all others . . . [s]omething that a person owns or controls." While the licensees in the instant case have the right to use the intangible property licensed to them, they do not own or control that intangible property; such ownership and control remains with petitioners. See *Detroit Lions, Inc v Dep't of Treasury*, 157 Mich App 207; 403 NW2d 812 (1986). Given the fact that royalty payments are made for the use of a right, the fact that the licensor retains ownership and control of the intangible property that is generating the royalty payments, and this Court's instruction that transfers of possession involve the transfer of absolute ownership, it is clear that royalty income does not arise from a transaction involving the transfer of possession of property. As such, it was rightly excluded from calculation of sales factor and gross receipts for the tax years at issue.

C. APPLICABLE FORMS OF PROPERTY

However, even if this Court deems royalty income to arise from the transfer of possession of property, the requirements for a sale are still not met unless the property is of a type identified under the SBTA. The first of these types of applicable property is "stock in trade," a term that is undefined in the SBTA. MCL 208.7(1)(a)(*i*). Black's Law Dictionary (9th ed) defines "stock in trade" as follows:

> The inventory carried by a retail business for sale in the ordinary course of business. 2. The tools and equipment owned and used by a person engaged in a trade. 3. The equipment and other items needed to run a business.

The property in question in this case, trademarks and trade names, cannot be considered inventory, tools, or equipment.

The second form of applicable property is "property of a kind that would be properly included in the inventory of the taxpayer." MCL 208.7(1)(a)(*ii*). In this case, petitioners presented evidence in the form of an affidavit stating that the intangible property at issue was not included in petitioners' inventory, and respondent did not submit evidence alleging that it properly should have been included in petitioners' inventory.

The third and final form of applicable property is "property held by the taxpayer primarily for sale to customers in the ordinary course of trade or business." MCL 208.7(1)(a)(*iii*). In this case, it is undisputed that the intangible property at issue was licensed

only to affiliated parties, not "customers" or other unaffiliated third parties. Moreover, the intangible property at issue in this case was developed, held, and licensed for the purposes of establishing a common corporate identity and common business procedures amongst affiliated entities.

Therefore, because the royalty income in this case did not arise from the transfer of possession of an enumerated type of property, it does not constitute sales receipts under the SBTA for the tax years at issue. Further, because royalty income does not constitute sales, rental or lease receipts, it also does not constitute gross receipts under the SBTA for the tax years at issue. As such, the Tax Tribunal did not err in concluding that royalty income should not be included in petitioners' sales factor and gross receipts calculations for the tax years at issue.

Respondent also argues that the fact that the SBTA definition of sales was amended to exclude royalties in the year 2000, and the fact that that amendment took effect prospectively, establishes that the Legislature did not intend royalties to be excluded prior to the issuance of that amendment. Respondent recognizes that statutory amendments can be "intended to clarify the meaning of a provision rather than change it," but argues that "[i]t would be illogical for the Legislature to adopt language intended to clarify the previous language and make the clarification prospective only." This argument is without merit. There is nothing inherently inconsistent between clarifying a statute's meaning and making an amendment prospective. Indeed, where no appellate court has rendered a decision contrary to the amended language, this would seem to be an obvious legislative procedure.

Moreover, the legislative bill analysis clearly indicates the clarifying nature of the amendment of the definition of sales in the SBTA. Although our Supreme Court has eschewed reliance of bill analyses in determining legislative intent, *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 587; 624 NW2d 180 (2001), legislative bill analyses do have probative value in certain, limited circumstances, *Kinder Morgan Mich, LLC v City of Jackson*, 277 Mich App 159, 170; 744 NW2d 184 (2007). Here, we find some persuasive value in considering the following in 200 PA 477:

> [R]epresentatives of the treasury department and the business sector have been working for several months to provide a clearer, less circular definition of the term "gross receipts" in the SBT act and to alter the act to make it conform to a recent Michigan Court of Appeals decision, *PM One, Limited v Department of Treasury*." [House Legislative Analysis, SB 1300, November 29, 2000.]

In light of our analysis in *PM One Ltd*, and the language of the statute, we reject respondent's contention that the amendment took effect only prospectively.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly