STATE OF MICHIGAN

COURT OF APPEALS

JRS DISTRIBUTION COMPANY, Plaintiff-Appellee, v DEPARTMENT OF TREASURY, Defendant-Appellant.	UNPUBLISHED December 11, 2012 No. 302441 Court of Claims LC No. 09-000107-MT
PUBLICATIONS INTERNATIONAL, LTD., Plaintiff-Appellee, v DEPARTMENT OF TREASURY, Defendant-Appellant.	No. 307350 Court of Claims LC No. 09-000108-MT

Before: O'CONNELL, P.J., and CAVANAGH and DONOFRIO, JJ.

PER CURIAM.

In these consolidated cases, defendant appeals as of right the Court of Claims orders granting summary disposition to plaintiffs pursuant to MCR 2.116(C)(10). Because defendant's tax assessment against plaintiffs was based on an improper method of calculation, we affirm.

JRS Distribution Company ("JRS") is an Illinois Corporation with its principal place of business in Wisconsin. Publications International, Ltd. ("PIL") is an Illinois corporation with its principal place of business in Illinois. During the disputed tax years, June 1993 through May 2003, JRS and PIL were involved in a joint venture to sell books in Michigan. Pursuant to their agency and sales agreements, PIL was responsible for the creative development and publication of various books, which were then purchased by JRS and later sold to Michigan customers. Under the agreement, PIL held title to all unsold books and title transferred to JRS after purchase. JRS stored the purchased books at its warehouse in Wisconsin until they were shipped to a Michigan buyer.

Under the sales agreement, JRS hired PIL to act as its commissioned sales agent in Michigan. Specifically, PIL agreed to solicit orders from Michigan residents to sell JRS's books. PIL was paid a 25-percent commission on all book sales to Michigan residents. Once books were purchased by Michigan customers, JRS was solely responsible for the delivery and transportation of the books from its Wisconsin warehouse to Michigan customers. PIL primarily solicited sales from Michigan residents through telephone solicitations conducted at PIL's out-of-state offices. PIL admitted that it had occasionally sent sales representatives to Michigan to solicit sales from larger customers, but asserted that that had occurred on few occasions and did not comprise the majority of its Michigan business activities.

Because neither plaintiff filed tax returns during the disputed tax years, defendant audited both plaintiffs and assessed additional taxes against them under the Single Business Tax Act (SBTA), MCL 208.1 *et seq.*[1] Defendant contended that both plaintiffs were responsible for selling tangible personal property in Michigan and assessed taxes, interest, and penalties against them in the amounts of $29,978.32 against JRS and $190,952.33 against PIL.

Although JRS or PIL, or both, provided defendant with documentation regarding the sales of books to Michigan customers, during the audit process, defendant requested that both plaintiffs submit additional information, including a 50-state sales breakdown detailing their book sales in each state. Because JRS did not submit a 50-state breakdown, defendant permitted JRS to submit alternative verification documentation of its sales runs. In a 2006 letter, defendant specifically requested "[i]nvoices, bills of lading, and other shipping documents for six (6) identified invoices from the sales runs [] provided for the 2003 sales factor," and warned that it would issue a formal assessment within 30 days based on the best information available unless the information was promptly provided. Defendant required PIL to submit the 50-state sales breakdown as well as a 50-state breakdown of its costs of performing sales solicitation services across the country. Jim Margner, the tax representative for both plaintiffs, admitted that he possessed the requested information but refused to deliver it to defendant. Because both plaintiffs failed to comply with the audit, defendant assessed SBT liability based on what it deemed the "best information available."

Both plaintiffs paid the amounts assessed under protest and filed suit against defendant to contest their respective tax liabilities. JRS moved for partial summary disposition, arguing in relevant part that it was entitled to a refund in the amount of $20,430.07 because defendant improperly calculated its "sales factor" in violation of the unambiguous language of the SBTA. JRS argued that the SBTA clearly required that its tax obligation be apportioned based on its "sales factor," which is calculated by dividing plaintiff's Michigan sales (the numerator) by its total national sales (the denominator). JRS maintained that defendant improperly used a population formula (Michigan's population divided by the national population) to determine its sales factor. JRS asserted that if defendant had used the proper calculation, its total tax obligation would have been $9,707.22. With respect to defendant's request that JRS provide a 50-state sales breakdown to verify its sales figures, JRS argued that it: (1) did not possess the

[1] MCL 208.1 *et seq.*, was repealed by 2006 PA 325, effective January 1, 2008.

document; (2) had not created such a document in its ordinary course of business; (3) was not required by law to create such a document; (4) had no legal obligation to provide defendant with the requested figures; and (5) would be extremely burdened by being forced to create the document. In its motion for summary disposition, PIL raised the same argument and also asserted that it had no tax liability under the SBTA because neither of its sources of revenue, i.e., book development services and sales solicitation services, were properly sourced to Michigan since its costs of performance were primarily incurred outside the state. Accordingly, PIL sought a full refund of its taxes paid.

In response, defendant argued that it was entitled to adopt an alternative method of calculation because plaintiffs refused to comply with the audit and provide the requested information. Noting plaintiffs' repeated refusal to disclose the requested information, defendant asserted that it had the legal authority to assess taxes based on the best information available, which was the population ratio that it utilized. During these proceedings, JRS provided defendant with the six invoices that it requested in its 2006 letter. PIL, however, did not provide defendant with the requested 50-state sales or costs breakdowns. Defendant also argued that disputed factual issues existed regarding the ownership of the books sold in Michigan and whether PIL's costs of performing its sales solicitation services were primarily incurred in Michigan.

The Court of Claims granted both plaintiffs' motions for summary disposition. In JRS's case, the court found that JRS eventually disclosed the requested information, which established that JRS's SBT liability was only $9,707.22. The court determined that defendant had failed to show any legal justification for requiring JRS to create a 50-state sales breakdown to comply with defendant's audit and for using the population formula to determine JRS's sales factor. The court granted JRS's motion and ordered defendant to refund $20,430.07 plus interest. In PIL's case, the lower court also determined that defendant's population method of calculating PIL's SBT liability was erroneous. Finding no disputed issue of material fact regarding the ownership of the books or the locus of PIL's sales solicitation activities, the court determined that PIL had no SBT liability because its sales factor was zero. Accordingly, the court ordered defendant to refund PIL the full amount of $190,952.33.

We review de novo a lower court's decision on a motion for summary disposition. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). A motion for summary disposition under MCR 2.116(C)(10) is properly granted if there is no "genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of law." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 424-425; 751 NW2d 8 (2008) (quotation marks, citation, and brackets omitted). A genuine issue of material fact exists if "reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Id*. at 425. Further, statutory interpretation involves a question of law that we also review de novo on appeal. *JW Hobbs Corp v Dep't of Treasury*, 268 Mich App 38, 43; 706 NW2d 460 (2005). Courts should accord clear and unambiguous statutory language its plain meaning and enforce such language as written. *Signature Villas, LLC v Ann Arbor*, 269 Mich App 694, 699; 714 NW2d 392 (2006).

"'The single business tax is a form of value added tax . . . [or] a tax upon business activity.'" *Midwest Bus Corp v Dep't of Treasury*, 288 Mich App 334, 338-339; 793 NW2d 246

(2010), quoting *Trinova Corp v Dep't of Treasury*, 433 Mich 141, 149; 445 NW2d 428 (1989). The tax is calculated by first determining a taxpayer's tax base, which is the taxpayer's contribution to the economy, also described as "business income, before apportionment." MCL 208.9(1); *Midwest Bus Corp*, 288 Mich App at 338. When the taxpayer's business activities occur in multiple states, "only a certain part of its tax base is allocated to Michigan because a state may not tax value earned outside of its borders." *Id.*; see also MCL 208.41. A tax base is apportioned between two or more states by considering three factors: sales, payroll, and property. *Midwest Bus Corp*, 288 Mich App at 338; see also MCL 208.45; MCL 208.45a.

Here, the only relevant factor is the sales factor because neither JRS nor PIL owned property in Michigan or employed a resident agent operating within the state. As it pertains to JRS and PIL, 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 in the United States during the tax year." MCL 208.51(2). A "sale" includes the transfer of property, as well as "[t]he performance of services, which constitute business activities . . . ." MCL 208.7(a)(*i*) and (*ii*). Sales occurring in Michigan include "[s]ales of tangible personal property" when it is shipped to a buyer "within this state regardless of the free on board point or other conditions of the sales." MCL 208.52(a) and (b). Michigan sales also include sales "other than sales of tangible personal property" 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) and (b).]

Defendant contends that the SBTA allowed it to bypass the above statutory directives and utilize an unauthorized method of calculating plaintiffs' tax liability because plaintiffs' noncompliance with the audit allowed defendant to assess taxes based on the best available information. MCL 205.3(a) permitted defendant to examine a taxpayer's books and records to verify the taxpayer's tax obligations, and MCL 205.28(3) required taxpayers to "keep accurate and complete records necessary for the proper determination of tax liability . . . ." In addition, defendant issued a rule pursuant to MCL 205.3(b), requiring taxpayers to "maintain all records that are necessary for the proper determination of the taxpayer's tax liability." 2011 AC, R 205.4103(1). In *Vomvolakis v Dep't of Treasury*, 145 Mich App 238, 245; 377 NW2d 309 (1985), this Court held that "[defendant] is to make assessments only when it has reason to believe that a return does not supply sufficient or accurate information or when proper records are not maintained by a taxpayer." This Court also noted that defendant may assess taxes based on the best information available when a taxpayer fails to comply with its record-keeping requirements. *Id.* at 244-245. When read in context, *Vomvolakis* permits defendant to assess taxes using the "best information available" by basing the assessment on information received from the taxpayer's suppliers. The Court did not sanction defendant's utilization of an alternative method of calculation to determine a taxpayer's tax obligation.

Based on the unambiguous language in the SBTA, the Court of Claims properly granted JRS's motion for summary disposition. Notwithstanding JRS's noncompliance with the audits,

defendant was not statutorily authorized to craft its own calculation method to determine JRS's sales factor. MCL 208.51 explicitly stated that the sales factor was to be calculated by dividing the taxpayer's Michigan sales (numerator) by its national sales (denominator). Defendant's sole basis for claiming a right to use the population method to calculate JRS's sales factor was that it was the "best information available" when JRS failed to meet its reporting requirements. Although *Vomvolakis* permits defendant to consider the best information available to calculate a taxpayer's tax obligation, it does not permit defendant to arbitrarily create its own tax calculation method. *Vomvolakis*, 145 Mich App at 245. Further, defendant's calculation method was entirely speculative and was completely unrelated to JRS's actual sales within Michigan. As the Court of Claims noted, the best information available to calculate the sales factor was the Michigan sales figures and the total nationwide sales figures.

JRS presented uncontroverted evidence that its tax obligation, based on the documentation submitted and the calculation method set forth in the SBTA, was $9,707.22. Because defendant fails to offer any legal support for the proposition that it had the authority to utilize the alternative calculation method or any factual support contesting JRS's evidence, JRS was entitled to judgment as a matter of law.

For the same reason, defendant's tax assessment of PIL, also based on the population method, was erroneous. With respect to PIL, defendant also argues that a factual dispute exists regarding the ownership of the books sold to Michigan customers because PIL's sales agreement, agency agreement, and affidavits do not establish that title to the books transferred from PIL to JRS upon publication. Notwithstanding that the agency and sales agreements unequivocally establish that JRS had title to all books that it purchased from PIL, this issue, i.e., whether PIL or JRS held title to the books, is irrelevant to determining whether PIL owed SBT liability for selling tangible personal property in Michigan. Under the unambiguous language of MCL 208.52, a sale of tangible personal property qualifies as a Michigan sale if the books were shipped or delivered to a purchaser in Michigan. In *Uniloy Milacron USA, Inc v Dep't of Treasury*, 296 Mich App 93, 99; 815 NW2d 811 (2012), this Court held that a sale of tangible personal property becomes "sourced" to Michigan, such that it should be included in the numerator of the taxpayer's sales factor, at the point that the product is "carried and turned over, handed over, surrendered, sent away, or transported to a customer within Michigan." (Quotation marks and citation omitted.) Therefore, the party responsible under the SBTA is the one who transports the property to Michigan customers. Because it is undisputed that JRS, not PIL, shipped and delivered the books to Michigan customers, PIL does not owe taxes based on JRS's sales of tangible personal property.

Defendant also argues that there exists a disputed issue of material fact regarding whether the costs of performance were primarily incurred in Michigan. In *Ammex, Inc v Dep't of Treasury*, 273 Mich App 623, 655-656; 732 NW2d 116 (2007), this Court held that the performance of services are sourced to Michigan under MCL 208.53(b) "if the greater proportion of the business activity is performed *inside* Michigan . . . ." (Emphasis in original.) It further held that "if a greater proportion of the business activity is performed outside this state," the activity does not qualify as Michigan sales under MCL 208.53(b). *Id.* at 656.

To meet the burden of production in a dispositive motion pursuant to MCR 2.116(C)(10), the moving party must support the motion with affidavits, depositions, admissions, or

documentary evidence, and must specifically identify the undisputed factual issues demonstrating the party's entitlement to judgment as a matter of law. MCR 2.116(G)(3) and (4); *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 376-377; 775 NW2d 618 (2009). Once the moving party proffers sufficient supporting evidence for the motion, the burden of production shifts to the nonmoving party. *Id*. at 377. "[T]he adverse party 'may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, *set forth specific facts* showing that there is a genuine issue for trial.'" *Id.*, quoting MCR 2.116(G)(4) (emphasis in original). If the nonmoving party fails to respond with such evidence, the moving party is entitled to judgment as a matter of law. MCR 2.116(G)(4). Because this determination is based on the evidence actually offered by the nonmoving party to establish a genuine factual dispute, the nonmoving party cannot satisfy its burden by merely promising to provide evidence at a later date. *In re Handelsman*, 266 Mich App 433, 436; 702 NW2d 641 (2005). Nor may the nonmoving party satisfy this burden through speculation or conjecture, *Karbel v Comerica Bank*, 247 Mich App 90, 97-98; 635 NW2d 69 (2001), or by offering unsworn statements, unsupported opinions, or conclusory denials, *Marlo Beauty Supply, Inc v Farmers Ins Group of Cos*, 227 Mich App 309, 321; 575 NW2d 324 (1998), mod on other grounds *Harts v Farmers Ins Exch*, 461 Mich 1, 10; 597 NW2d 47 (1999).

PIL presented several affidavits averring that the majority of its costs of performance with respect to its sales solicitation services were incurred outside Michigan given that PIL primarily engaged in telephone solicitations through its employees at its local offices. PIL averred that it did not have any Michigan employees or a Michigan office and only occasionally sent sales representatives to Michigan. PIL further averred that none of its book production services occurred in Michigan. Thus, PIL presented evidence establishing that the greater proportion of its service costs from both business activities occurred outside of Michigan. Because services could only have been sourced to Michigan if the majority of PIL's costs were incurred in Michigan, PIL met its burden of production in support of its dispositive motion.

In response, defendant claimed that PIL's affidavits were self-serving and invalid because they were generated in anticipation of litigation. Defendant also speculated that PIL may have had additional customers, argued that PIL failed to provide supporting documentation during the audit, claimed that additional evidence would be forthcoming, and essentially argued that PIL and JRS were not forthcoming regarding the true nature of their business relationship.[2] Defendant's assertions, however, lacked any legal analysis or factual support, and were predicated on speculative future evidence. By failing to present any contrary evidence tending to show that a greater proportion of PIL's costs of performance were incurred in Michigan, defendant failed to meet its burden of production. Accordingly, the lower court did not err by determining that PIL owed no Michigan taxes under the SBTA because its sales solicitation and

[2] Defendant posits that, based on the nature of plaintiffs' business relationship, a genuine issue of material fact exists regarding whether JRS and PIL are so closely related that they should be treated as a single entity for tax purposes. Defendant has abandoned appellate review of this contention, however, by failing to present any supporting argument or legal authority. See *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998).

book production services could not be sourced to Michigan. Further, to the extent that defendant maintains that plaintiffs' self-serving affidavits are an insufficient proxy for transactional documentation to meet their burden of production, defendant has abandoned appellate review of that issue by failing to present any meaningful argument or legal analysis in support of its position. See *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959) ("It is not sufficient for a party 'simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.'").

Affirmed. Plaintiffs, being the prevailing parties, may tax costs pursuant to MCR 7.219.

/s/ Peter D. O'Connell
/s/ Mark J. Cavanagh
/s/ Pat M. Donofrio