STATE OF MICHIGAN

COURT OF APPEALS

MIDWEST ENERGY COOPERATIVE, Plaintiff-Appellant,	UNPUBLISHED December 11, 2012
v	No. 307867 Court of Claims
DEPARTMENT OF TREASURY, Defendant-Appellee	LC No. 11-000011-MT

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

PER CURIAM.

Plaintiff appeals as of right the Court of Claims order denying its motion for summary disposition under MCL 2.116(C)(10) and granting summary disposition in defendant's favor under MCR 2.116(I)(2). Because the lower court correctly determined, albeit for the wrong reason, that energy optimization charges are subject to sales tax under the General Sales Tax Act ("GSTA"), MCL 205.51 *et seq*., we affirm.

Plaintiff is a "regulated electric cooperative" that sells electricity to residential and commercial customers. In accordance with 2008 PA 295, plaintiff implemented an energy optimization plan ("EO plan") and assessed an energy optimization charge ("EO charge") on its customer's billing statements to cover the costs of the EO plan. Plaintiff pays sales taxes on its retail sales of electricity as required by law. See MCL 205.52(1); MCL 205.51a(q). During the time period at issue, plaintiff also paid, under protest, sales taxes on the EO charges. Plaintiff filed this action against defendant seeking a refund of $10,434.20, the full amount that it paid under protest. The lower court determined that the EO charges were subject to sales tax because the EO plan was an "incidental service" to the retail sale of electricity. Accordingly, the court denied plaintiff's motion for summary disposition and granted summary disposition for defendant.

We review de novo a lower court's ruling on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). The interpretation and application of a tax statute presents a question of law that we also review de novo. *Ford Motor Co v Woodhaven*, 475 Mich 425, 438; 716 NW2d 247 (2006).

"The GSTA provides for a tax on the gross proceeds of sales at retail of tangible personal property." *Ameritech Publishing, Inc v Dep't of Treasury*, 281 Mich App 132, 145; 761 NW2d 470 (2008); see also MCL 205.52(1). The GSTA generally does not apply to sales of services.

Ameritech Publishing, Inc, 281 Mich App at 145. Pursuant to MCL 205.51a(q), "tangible personal property" includes electricity. See also MCL 205.52(2)(a).

The Clean, Renewable, and Efficient Energy Act (CREEA), MCL 460.1001 *et seq*., was enacted "to promote the development of clean energy, renewable energy, and energy optimization[.]" MCL 460.1001(2). MCL 460.1071 of the CREEA requires energy providers to create an "energy optimization plan" "to reduce the future costs of provider service to customers." MCL 460.1071(1) and (2). Pursuant to MCL 460.1091, however, an energy provider may elect to pay a specified percentage of "total utility sales revenues" in lieu of implementing an EO plan. Under MCL 460.1089(1), an energy provider may "recover the actual costs of implementing its approved energy optimization plan." MCL 460.1089(2) provides that the "costs shall be recovered from all natural gas customers and from residential electric customers by volumetric charges, from all other metered electric customers by per-meter charges, and from unmetered electric customers by an appropriate charge, applied to utility bills as an itemized charge." An "eligible electric customer" may be exempt from such charges if it "files with its electric provider and implements a self-directed energy optimization plan." MCL 460.1093.

Plaintiff argues that the Court of Claims erroneously applied the "incidental to services" test set forth in *Catalina Marketing Sales Corp v Dep't of Treasury*, 470 Mich 13; 678 NW2d 619 (2004), when it determined that the EO charges at issue were subject to sales tax. In *Catalina Marketing Sales Corp*, the petitioners contracted with various manufacturers to deliver a coupon or advertisement to grocery-store shoppers on the basis of their purchases. For example, if the petitioners' client was Campbell's Soup, Campbell's Soup could contract to have a $1 coupon printed at checkout whenever a shopper purchases a can of Campbell's Soup. *Id*. at 15. Defendant assessed sales taxes on the petitioners' contracts on the basis that the taxable transaction was the transfer of coupons and advertisements, or tangible personal property. *Id*. at 19-20. The petitioners, on the other hand, argued that the contracts involved sales of services. *Id*. In deciding the matter, our Supreme Court adopted the "incidental to service test." *Id*. at 24. The Court explained:

> Under this test, "sales tax will not apply to transactions where the rendering of a service is the object of the transaction, even though tangible personal property is exchanged incidentally." 85 CJS 2d, Taxation, § 2018, p 976. The "incidental to service" test looks objectively at the entire transaction to determine whether the transaction is principally a transfer of tangible personal property or a provision of a service. The sales tax is a tax on sellers for the privilege of engaging in the business of retail sales. If the consideration paid in a transaction is not paid for the transfer of the tangible property, but for the service provided, and the transfer of the tangible property is only incidental to the service provided, the transaction is not a sale at retail under MCL 205.51(1)(b). [*Id*. at 24-25 (footnote omitted).]

The Court then set forth the "*Catalina* factors" to determine whether a transaction should be categorized as a retail sale or a sale of services:

> In determining whether the transfer of tangible property was incidental to the rendering of personal or professional services, a court should examine what the buyer sought as the object of the transaction, what the seller or service provider is in the business of doing, whether the goods were provided as a retail enterprise with a profit-making motive, whether the tangible goods were available for sale without the service, the extent to which intangible services have contributed to the value of the physical item that is transferred, and any other factors relevant to the particular transaction. [*Id*. at 26.]

In this case, the *Catalina* factors are inapplicable. The factors are relevant to "whether the transfer of tangible property was incidental to the rendering of . . . services[.]" *Id*. The issue presented here is whether the EO charge was incidental to the sale of electricity, or tangible personal property. Simply put, the *Catalina* factors pertain to the concept of "incidental to service," not "incidental to tangible personal property." Thus, the lower court erred by applying the *Catalina* factors in this case.

Defendant alternatively relies on MCL 205.51(1)(d) of the GSTA, which it argues requires plaintiff to pay sales taxes on charges for services necessary to complete its retail sale of electricity. Although defendant did not raise this alternative argument below, we will address it because "it presents a question of law and all the facts necessary for resolution of the question are before the Court." *Rudolph Steiner Sch of Ann Arbor v Ann Arbor Twp*, 237 Mich App 721, 740; 605 NW2d 18 (1999).

Pursuant to MCL 205.52(1), the sales tax applies to the "gross proceeds" of a business. MCL 205.51(1)(c) defines "[g]ross proceeds" as "sales price." MCL 205.51(1)(d) defines "[s]ales price," in relevant part, as:

> [T]he total amount of consideration, including cash, credit, property, and services, for which tangible personal property or services are sold, leased, or rented, valued in money, whether received in money or otherwise, and applies to the measure subject to sales tax. Sales price includes the following subparagraphs (*i*) through (vii) and excludes subparagraphs (viii) through (x):
>
> (*i*) Seller's cost of the property sold.
>
> (*ii*) Cost of materials used, labor or service cost, interest, losses, costs of transportation to the seller, taxes imposed on the seller other than taxes imposed by this act, and any other expense of the seller.
>
> (*iii*) Charges by the seller for any services necessary to complete the sale . . . . [Emphasis added.]

Here, the EO charge is properly categorized under MCL 205.51(1)(d)(*iii*) as a "[c]harge[] by the seller for any services necessary to complete the sale[.]" The EO plan is a service that an electricity retailer must provide a customer to engage in sales of electricity. See MCL 460.1071. Further, pursuant to MCL 460.1089(1) an energy provider *shall* be allowed to recover its actual costs of implementing its EO plan. Thus, the EO plan is a "service[] necessary to complete the sale[.]" MCL 205.51(1)(d)(*iii*). As such, the EO charge is part of the "sales price" of electricity

and is subject to sales tax as "gross proceeds" of the sale of electricity. MCL 205.51(1)(c); MCL 205.52(1). Although plaintiff argues that the EO charge is not part of the "sales price" of electricity because it does not change with the price of electricity, whether the EO charge changes along with the price of electricity is irrelevant. The clear and unambiguous language of the GSTA controls. Accordingly, because the lower court reached the correct result, albeit for the wrong reason, we affirm. *Dybata v Wayne Co*, 287 Mich App 635, 647; 791 NW2d 499 (2010).

Affirmed. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

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