STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM M. DAVIDSON and FRANK W. DAVIDSON a/k/a DETROIT PISTONS BASKETBALL COMPANY, Petitioners-Appellees/Cross Appellants,	UNPUBLISHED December 13, 2012
v	No. 308175 Tax Tribunal
DEPARTMENT OF TREASURY, Respondent-Appellant/Cross Appellee.	LC No. 00-357601

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

PER CURIAM.

Respondent appeals as of right and petitioner cross appeals from the Michigan Tax Tribunal's Final Opinion and Judgment granting petitioner's motion for summary disposition in part and denying respondent's motion for summary disposition in part. We affirm.

Petitioner is a professional basketball team that plays in the National Basketball Association. Petitioner and 28 other basketball teams entered into an Amended and Restated Joint Venture Agreement which described the rights and regulations of the NBA as a joint venture. Under the agreement, the NBA's net income is credited equally to each team. The NBA and national broadcasters entered into a contract pursuant to which the NBA received royalties for allowing the national broadcasters to record and broadcast live games. If a national broadcaster did not cover a game, then a team had the option to negotiate with a local broadcaster for local broadcast. Petitioner entered into an agreement with Fox Sports, LLC, to broadcast games locally; this agreement gave Fox exclusive rights to produce and broadcast games in the local market.

Petitioner received royalties directly from Fox when a game was broadcast locally. Petitioner considered the revenue from both national and local broadcasters as royalties not containing program matter, so it subtracted them from its single business tax base.

Respondent issued assessments to petitioner for the years 2002, 2003, and 2004, asserting that petitioner incorrectly determined its tax base based on the royalties. Petitioner appealed the assessment to the Michigan Tax Tribunal. Both parties moved for summary disposition pursuant

to MCR 2.116(C)(10). The tribunal determined that revenue from the national broadcast should not be included in petitioner's tax base, but that the revenue from Fox broadcasts should be so included. The tribunal adjusted the assessments accordingly.

We review a tribunal's decision to determine "whether the tribunal committed an error of law or applied the wrong legal principles." *AERC of Mich, LLC v Grand Rapids*, 266 Mich App 717, 722; 702 NW2d 692 (2005). The tribunal's factual findings should be upheld if there is competent, material, and substantial evidence to support the findings. *Wexford Med Group v Cadillac*, 474 Mich 192, 201; 713 NW2d 734 (2006).

We review de novo the tribunal's statutory interpretations. *Id*. at 202. We also review de novo a decision on a motion for summary disposition. *Reed v Breton*, 475 Mich 531, 537; 718 NW2d 770 (2006). "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." *Liparoto Const, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 29; 772 NW2d 801 (2009). We review all the admissions, affidavits, depositions, pleadings, and other documentary evidence available at the time of the motion in a light most favorable to the nonmoving party to determine if a genuine issue of material fact exists. *Reed*, 475 Mich at 537. "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." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). If no genuine issue of material fact remains, then the moving party is entitled to judgment as a matter of law. *Reed*, 475 Mich at 437.

Respondent first argues that the tribunal incorrectly determined that petitioner's revenue from the national broadcasting contracts was income attributable to another entity and, therefore, excludable from petitioner's tax base under the Single Business Tax Act. We disagree.

The Single Business Tax Act, MCL 208.1 *et seq.*,[1] imposed a value-added single business tax on all persons with business activity allocated or apportioned to Michigan. MCL 208.31(1). A taxpayer could deduct royalties from its tax base to the extent that the royalties were included in federal taxable income. MCL 208.9(7)(c). The Act also provided that income attributable to another entity could be subtracted from a taxpayer's tax base. MCL 208.9(9).

The parties argue that the question at issue is whether the NBA entered into the national broadcast contracts as a joint venture or as an agent for each NBA team. In *Kay Investment Co, LLC v Brody Realty No 1, LLC*, 273 Mich App 432; 731 NW2d 777 (2006), this Court set out the six elements of a joint venture:

"(a) an agreement indicating an intention to undertake a joint venture;

"(b) a joint undertaking of

"(c) a single project for profit;

[1] The SBTA was repealed by 2006 PA 325, effective December 31, 2007.

"(d) a sharing of profits as well as losses;

"(e) contribution of skills or property by the parties;

"(f) community interest and control over the subject matter of the enterprise." [*Id.* at 437, quoting *Meyers v Robb*, 82 Mich App 549, 557; 267 NW2d 450 (1978).]

The most important consideration for this Court is whether the parties intended a joint venture. *Berger v Mead*, 127 Mich App 209, 215; 338 NW2d 919 (1983). If the NBA was a joint venture, it could be subject to the SBTA. MCL 208.6(1).

We conclude that the NBA was a joint venture and that the income was attributable to the NBA. See *Berger*, 127 Mich App at 215. All 29 member teams entered into an agreement that explicitly states that the teams are joint venturers in a joint venture known as the NBA. The agreement repeatedly states that the NBA is a joint venture with each member sharing in the income or losses. The agreement also states that the purpose of the joint venture is to create a basketball league; this statement indicates a single project. Furthermore, the agreement requires capital contributions from each team. The agreement meets all the requirements of a joint venture, and it is clear based on this agreement that the parties intended to establish a joint venture.

The NBA also owned and controlled all copyrights to the televised games. A copyright owner receives a royalty when it contracts for another to use the copyrighted work. *Columbia Assoc, LP v Dep't of Treasury*, 250 Mich App 656, 675; 649 NW2d 760 (2002). The NBA, as copyright owner, received royalties paid by broadcasters. Pursuant to the joint venture agreement, the NBA's income was divided equally among the 29 NBA teams after the NBA paid its operating expenses. The agreement clearly indicates that the NBA was a joint venture, with royalties attributable as income to the NBA itself.

The tribunal correctly determined that the NBA operates as a joint venture. A taxpayer may "add the loss or subtract the gain from the tax base that is attributable to another entity whose business activities are taxable under this act or would be taxable under this act if the business activities were in this state." MCL 208.9(9). The NBA, as a joint venture, was subject to the SBTA. MCL 208.6(1). Because the royalties were attributable to the NBA and the NBA was subject to the SBTA, petitioner could subtract from its tax base the royalties that were attributable to the NBA. See MCL 208.9(9).

Respondent next argues the tribunal erred when it allowed petitioner to apportion the revenue from its local broadcast contract with Fox based on home and away games. We disagree.

The SBTA required a taxpayer to apportion its tax base on business activity that occurred within the state. MCL 208.41. The apportionment involved three factors, considering both the taxpayer's activity in and out of the state for each factor: (1) property, (2) payroll, and (3) sales. MCL 208.46, MCL 208.49, MCL 208.51. "Sales" includes royalties. MCR 208.7(b). The Act provided that a sale occurred in the state if "[t]he 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(b).

The contract between Fox and petitioner provided for coverage of 37 regular-season games per season, with at least one-half of those being home games. The contract provided a process to choose which games to broadcast, and allowed both petitioner and Fox to select specific games. The contract also explicitly identified specific per-game rights fees, which Fox was required to pay petitioner for each game broadcast.

Consistent with *Detroit Lions, Inc v Dep't of Treasury*, 157 Mich App 207; 403 NW2d 812 (1986), we look to the activity that created the revenue for petitioner to see whether the activity occurred in state or out of state. *Id*. at 226. Here, the revenue was created by the broadcast contract between Fox and petitioner. However, the contract broke the fees down to a per-game basis. If a game was not played, Fox was not required to pay for that game. Petitioner earned its fee by actually playing the individual basketball game.

We must then consider whether a greater portion of the business activity, the individual game, occurred in or out of state based on "costs of performance." MCL 208.53. Home games obviously involve a higher cost of performance in the state; therefore, that business activity occurred in state. The costs of travel, lodging, and food for away games are all costs associated with the business activity, and the majority of activity involving an away game occurred out of state. The business activity for that sale would be out of state and not includable in petitioner's tax base. The tribunal correctly determined that royalties must be apportioned based on home and away games.

On cross appeal, petitioner argues that the tribunal erred in finding that the royalties it received from its contract from Fox were royalties from program matter. We disagree.

The primary purpose of statutory interpretation is to discern the Legislature's intent. *Wexford Med Group*, 474 Mich at 204. If the statutory language is clear and its meaning is plain, then no judicial construction is necessary. *Alliance Obstetrics & Gynecology v Dep't of Treasury*, 285 Mich App 284, 286; 776 NW2d 160 (2009). We must consider all words and phrases in the statute and avoid an interpretation that makes any word or phrase inconsequential or excessive. *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). We may rely on dictionary definitions to define an undefined term. *Id*. Ambiguities in tax statutes should be construed in favor of the taxpayer. *Alliance Obstetrics & Gynecology*, 285 Mich App at 286. However, tax exemptions must be narrowly construed because they "upset the desirable balance achieved by equal taxation[.]" *Wexford Med Group*, 474 Mich at 204.

Under the SBTA, a taxpayer could deduct royalties from its tax base to the extent the royalties were included in its federal taxable income. MCL 208.9(7)(c). This applied to all royalties except for "[r]oyalties, fees, charges or other payments or consideration paid or incurred by radio or television broadcasters for program matter or signals." MCL 208.9(7)(c). The parties stipulated that the payments from Fox to petitioner were royalties but did not stipulate whether they were royalties for program matter.

The term "program matter" is not defined in Michigan statutes or the Internal Revenue Code. "Program" is defined in relevant part as "a radio or television performance or production." *Webster's College Dictionary* (2nd ed, 1997). "Matter" has many different definitions but a helpful selection is "something of an indicated kind or having to do with an

indicated field or situation." *Id*. Based on these definitions, "program matter" could be loosely defined as that which is associated with a radio or television performance or production.

After reviewing the tribunal's decision to determine "whether the tribunal committed an error of law or applied the wrong legal principles," we affirm the tribunal's decision. See *AERC of Mich, LLC*, 266 Mich App at 722. The tribunal's factual findings should be upheld if there is competent, material, and substantial evidence to support them. *Wexford Med Group*, 474 Mich at 201. There is no evidence that the tribunal erred in determining that program matter was everything that was not commercial matter. Petitioner has not produced any evidence, nor has an intensive search produced any evidence, that program matter is to be considered anything otherwise. The tribunal relied on all available resources and concluded that "program matter" was a very basic phrase, meaning all television time that did not consist of advertisements. A live basketball game occurs not only for the fans at the arena, but also for the enjoyment of those who watch it on television or listen to it on the radio. Accordingly, the tribunal's conclusion that a live basketball game was program matter will not be disturbed. Therefore, because petitioner received royalties for its basketball games, it could not deduct the royalties from its tax base.

Affirmed.

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