

STATE OF MICHIGAN
COURT OF APPEALS

PROQUEST INFORMATION AND LEARNING,
LLC,

Plaintiff-Appellee,

v

DEPARTMENT OF TREASURY,

Defendant-Appellant.

UNPUBLISHED
January 15, 2013

No. 307586
Court of Claims
LC No. 10-000102-MT

Before: WHITBECK, P.J., and SAAD and SHAPIRO, JJ.

PER CURIAM.

Defendant Department of Treasury (the Department) appeals as of right the order of the Court of Claims granting summary disposition to plaintiff Proquest Information and Learning, LLC (Proquest) under MCR 2.116(C)(10). The Court of Claims determined that the payments Proquest receives from its clients are royalties under the Michigan Single Business Tax Act (the Act).¹ We affirm.

I. FACTS

Proquest licenses copyrighted content from a wide variety of sources, and then aggregates, organizes, abstracts, and indexes the content in a searchable form. Proquest provides licensed access to the both its proprietary content and sources through electronic databases, primarily to libraries and education markets.

Proquest has two licensing agreement models: (1) a perpetual licensing agreement, under which Proquest grants clients a non-exclusive, non-transferable license to specific databases for a particular fee and term; and (2) a standard licensing agreement, under which clients pay a one-time license fee for a static copy of a particular database. Under either agreement, the licensee's rights are not transferrable and the licensee does not gain any ownership interest in Proquest's product. Proquest protects its proprietary content with trademarks and copyrights.

From 1998 to 2007, Proquest categorized the licensing fees as "royalties" under the Act, which was in effect for the tax years at issue in this appeal. The Department audited Proquest in

¹ Formerly MCL 208.1 *et seq.*, repealed by 2006 PA 325.

2007, and asserted that Proquest owed \$3,551,323 because the payments Proquest received from its clients in exchange for database access were not “royalties” under the Act.

Proquest requested an informal conference, and the conference referee recommended finding in favor of Proquest. The referee found that clients made the payments as consideration for the use of copyrighted material, and that they made the payments out of patron and tuition fees. The Department’s Hearing Division Administrator rejected the referee’s recommendation. The Administrator found that the payments at issue were sales income, not royalties.

Proquest paid the assessment under protest, and then sued for a refund in the Court of Claims. Both parties moved for summary disposition under MCR 2.116(C)(10), and the Court of Claims heard arguments on the motion in November 2011. After hearing the motion, the Court of Claims concluded that the payments were royalties, and granted Proquest’s motion for summary disposition.

II. STANDARD OF REVIEW

This Court reviews de novo a decision of the Court of Claims on a motion for summary disposition.² A party is entitled to summary disposition under MCR 2.116(C)(10) if “there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law.”³ Here, the parties dispute whether Proquest was entitled to judgment as a matter of law.

III. ROYALTIES UNDER THE MICHIGAN SMALL BUSINESS TAX ACT

The Act permitted taxpayers to deduct “[a]ll royalties” from their taxable income.⁴ The Act did not define “royalties.” When considering whether payments made under an oil and gas lease were royalties,⁵ the Michigan Supreme Court defined “royalty” as follows:

[A] compensation or portion of the proceeds *paid* to the owner of a right . . . for the use of it . . . [6]

* * *

Compensation for the use of property, usually copyrighted material or natural resources, expressed as a percentage of receipts from using the property or as an account per unit produced. . . . Royalty is a share of product or profit reserved by

² *ONE’s Travel Ltd v Dep’t of Treasury*, 288 Mich App 48, 54; 791 NW2d 521 (2010).

³ MCR 2.116(C)(10); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

⁴ MCL 208.9(7)(c), repealed by 2006 PA 325.

⁵ *Mobil Oil Corp v Dep’t of Treasury*, 422 Mich 476-477; 373 NW2d 730 (1985).

⁶ *Id.* at 484, quoting *The Random House College Dictionary* (rev ed), p 1150.

owner for permitting another to use the property . . . In mining and oil operations, a share of the product or profit *paid* to the owner of the property.^[7]

The Department argues that the trial court erred when it concluded that the payments Proquest received from its clients were royalties, and asserts that the Court of Claims followed decisions of this Court that misinterpret this definition. The Department argues that the definition of royalties involves a “form requirement” that mandates that the payments be (1) made from proceeds received by the licensee from the transactions involving licensed material, or (2) as a share of the licensed product itself. The Department relies on *Mich United Conservation Clubs v Dep’t of Treasury*, in which this Court stated that royalties are “(1) [are] a payment, (2) in the form of either the product itself or proceeds from the sale of the product, and (3) made in consideration for the use of the property.”⁸ Using this definition, the Department argues that because Proquest’s *clients* produce nothing and receive no revenues from selling a product, they cannot pay Proquest in information or in proceeds received from the clients’ customers.

We conclude that the Court of Claims correctly determined that *Mich United Conservation Club* does not apply to the facts in this case, because this case does not involve a lease of natural resources. As in *Mobil Oil*, this Court in *Mich United Conservation Club* considered whether an interest in proceeds from a natural gas lease was a “royalty.”⁹ As is demonstrated by the language the Michigan Supreme Court adopted in *Mobil Oil*, “[i]n mining and oil operations, a share of the product or profit *paid* to the owner of the property,”¹⁰ is relevant to whether an arrangement involves royalties. But this specific language of the definition applies *only* to mining and oil operations. Indeed, this specific requirement of *Mobil Oil* is the exact basis on which this Court distinguished our decision in *Zenith Data Sys v Dep’t of Treasury*:

These definitions were used in the context of determining whether oil and gas royalties constitute “royalties” for [the Act’s] purposes. They were not used as an all-encompassing definition of royalties for [the Act’s] purposes.^[11]

Thus, because this case does not concern a natural resource lease, we conclude that the additional requirements do not apply to these facts.

We conclude that the Court of Claims correctly determined that our decision in *Zenith Data Sys* applies to the facts presented here. In *Zenith Data Sys*, the petitioners modified, adapted, and re-distributed computer software for use by the “end users,” who were

⁷ *Id.* at 484, quoting Black’s Law Dictionary (5th ed) (emphasis supplied).

⁸ *Mich United Conservation Clubs v Dep’t of Treasury*, 239 Mich App 70, 79; 608 NW2d 141 (1999), *aff’d* 463 Mich 995; 625 NW2d 783 (2001).

⁹ *Id.* at 73.

¹⁰ *Mobil Oil Corp*, 422 Mich at 484.

¹¹ *Zenith Data Systems v Dep’t of Treasury*, 218 Mich App 742, 747; 555 NW2d 264 (1996).

governmental agencies, businesses, and individuals.¹² The petitioners retained rights in connection with their software, and protected their proprietary content under copyright laws.¹³ This Court determined that the clients paid the petitioner for “that portion of the product in which the petitioners have a proprietary interest.”¹⁴ We noted that the petitioners had a proprietary interest in the modifications that they made.¹⁵ This Court held that the transaction was therefore a licensing agreement that produced royalties.¹⁶

Our decision in *Zenith Data Sys* did not misapply *Mobil Oil* because it complied with the parts of the *Mobil Oil* definition that were not, by their language, applicable only to oil and mining concerns. The sublicensing agreements in *Zenith Data Sys* fit within *Mobil Oil*'s definition of royalties because the clients paid the petitioners for the petitioner's permission to use the part of the product in which the petitioners had a proprietary interest.

Here, under Proquest's first model, a customer pays Proquest for a single copy of a database that includes Proquest's proprietary content. The customer's license is nontransferable, the customer may only use the product for personal use, and the customer does not acquire any ownership interest in the content. Under Proquest's second model, Proquest's clients compensate Proquest on the basis of how much of Proquest's content the customer accesses, and how many users the customer authorizes to access the content. Under both models, Proquest acquires the copyrighted materials from other sources, modifies and adapts them, adds content such as abstracts, and then redistributes the product as modified. Proquest's agreements provide that Proquest specifically retains its rights in its proprietary product, and Proquest protects that product under trademarks and copyright laws. As in *Zenith Data Sys*, Proquest's clients pay Proquest for the use of Proquest's proprietary product connected with the copyrighted content that Proquest licenses from sources.

We conclude that Proquest's model of licensing content fits within the Act's definition of “royalties,” as established by the Michigan Supreme Court. Thus, the Court of Claims correctly determined that Proquest's access fees were royalties, and we conclude that the Court of Claims did not err in granting summary disposition to Proquest.

We affirm.

/s/ William C. Whitbeck
/s/ Henry William Saad
/s/ Douglas B. Shapiro

¹² *Id.* at 744.

¹³ *Id.* at 748.

¹⁴ *Id.* at 748.

¹⁵ *Id.* at 746.

¹⁶ *Id.*