# STATE OF MICHIGAN

# COURT OF APPEALS

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| THOMSON REUTERS INC.,<br><br>Plaintiff-Appellant, | UNPUBLISHED<br>May 13, 2014 |
| v | No. 313825<br>Court of Claims |
| DEPARTMENT OF TREASURY,<br><br>Defendant-Appellee. | LC No. 11-000091-MT |

Before: OWENS, P.J., and MURRAY and RIORDAN, JJ.

PER CURIAM.

Plaintiff, Thomson Reuters, Inc., appeals as of right the Court of Claims' order affirming an assessment of a tax deficiency for the use of prewritten computer software in Michigan. We reverse.

## I. FACTUAL BACKGROUND

Plaintiff, a Texas corporation, sold numerous information products during the period in question, including CD-ROM computer software and online-research products and tools. At issue in this case is one such product, *Checkpoint*, which is an online tax and accounting research program that provides subscribers access to a wide collection of information. Subscribers of *Checkpoint* are able to search and retrieve multiple up-to-date sources, browse compiled information regarding a particular topic, and go to links between sources. *Checkpoint* allows a customer to access the information through a web browser.

In 2009, defendant conducted an audit of plaintiff's business for tax years April 2004 through December 2007. Defendant discovered an alleged use tax deficiency of $814,260, including interest, and issued plaintiff a Bill for Taxes due in this amount. The assessment was based on defendant's determination that plaintiff's sale of *Checkpoint* subscriptions constituted the sale of taxable "prewritten computer software."

Plaintiff requested an informal conference, asserting that the sale of subscriptions to *Checkpoint* constituted the sale of a nontaxable information service and, alternatively, it was primarily the sale of a service. The hearing referee disagreed, as did the Hearing Division Administrator. Thus, plaintiff paid the tax under protest and filed a complaint in the Court of Claims and alleged: *Checkpoint* was not taxable prewritten computer software; any such

software was incidental to the sale of a nontaxable information service; and that the final assessment violated the Due Process and Commerce Clauses.

Defendant eventually moved for summary disposition under MCR 2.116(C)(10), arguing that *Checkpoint* was prewritten computer software subject to a tax when plaintiff's Michigan customers used and controlled the computer code that resided on the web browser interface and on the server side. Defendant also contended that the use of tangible personal property was the primary object of the transactions, and that plaintiff failed to adequately support its constitutional claims.

Over plaintiff's objections, the Court of Claims granted defendant's motion for summary disposition. The Court of Claims reasoned that this case involved an evolution of services, and because this product was taxable when it was in book or CD format, it was taxable now. The Court of Claims further concluded that the primary object in selling subscriptions was the sale of tangible personal property because what the customers wanted was the "information," which was "tangible personal property." The court also found that plaintiff was in the business of providing goods for a profit-making motive. Lastly, the Court of Claims dismissed plaintiff's constitutional claims, finding them to be "totally without merit." Plaintiff now appeals.

## II. USE TAX ACT

### A. STANDARD OF REVIEW

We review de novo a Court of Claims' grant of summary disposition. *Guardian Indus Corp v Dep't of Treasury*, 243 Mich App 244, 248; 621 NW2d 450 (2000). A motion for summary disposition "tests the factual support for a claim and should be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *MEEMIC Ins Co v DTE Energy Co*, 292 Mich App 278, 280; 807 NW2d 407 (2011). "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). In reviewing a motion for summary disposition under MCR 2.116(C)(10), a court considers "affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion." *Greene v A P Prods, Ltd*, 475 Mich 502, 507; 717 NW2d 855 (2006) (internal quotations and citations omitted). We consider only "what was properly presented to the trial court before its decision on the motion." *Pena v Ingham Co Rd Comm*, 255 Mich App 299, 310; 660 NW2d 351 (2003).

To the extent that this issue involves construction of the UTA, our review is de novo. *Guardian Indus Corp*, 243 Mich App at 248. When construing statutory language, our role is to give effect to the intent of the Legislature. *Id*. "The first step in ascertaining the Legislature's intent is to examine the written language. If the language is plain and unambiguous, judicial construction is neither necessary nor permitted, and the language must be applied as written." *One's Travel Ltd v Dep't of Treasury*, 288 Mich App 48, 54; 791 NW2d 521 (2010) (citation omitted).

We also reiterate that "the authority to impose a tax must be expressly authorized by law; it will not be inferred. Moreover, ambiguities in the language of a tax statute are to be resolved in favor of the taxpayer." *Michigan Bell Tel Co v Dep't of Treasury*, 445 Mich 470, 477; 518 NW2d 808 (1994). When an issue involves tax interpretation, we remember "that taxing is a practical matter and that the taxing statutes must receive a practical construction. While they will not be extended by implication, . . . neither will the words thereof be so narrowly interpreted as to defeat the purposes of the act." *Id.* at 478 (quotation marks and citation omitted).

## B. ANALYSIS

"[P]ursuant to the Michigan Use Tax Act (UTA), use tax is generally imposed on the privilege of 'using, storing, or consuming tangible personal property.' " *Gen Motors Corp v Dep't of Treasury, Revenue Div*, 466 Mich 231, 237; 644 NW2d 734 (2002), quoting MCL 205.93(1). "The Use Tax Act is complementary to the Michigan General Sales Tax Act, MCL 205.51 *et seq.*, and is designed to cover those transactions not subject to the sales tax." *Fisher & Co, Inc v Dep't of Treasury*, 282 Mich App 207, 209; 769 NW2d 740 (2009). "Sales and use taxes are mutually exclusive but complementary, and are designed to exact an equal tax based on a percentage of the purchase price of the property in question." *Id.* at 210 (quotation marks and citation omitted). Generally, "the use tax applies, by its plain language, to *tangible personal property*. It does not apply to services." *Id.* (emphasis in original).

Relevant to the instant appeal, the UTA defines "tangible personal property" to include "prewritten computer software." MCL 205.92(k). Computer software is "a set of coded instructions designed to cause a computer or automatic data processing equipment to perform a task." MCL 205.92b(c). Further, "prewritten computer software" is defined as follows:

> (o) "Prewritten computer software" means computer software, including prewritten upgrades, that is delivered by any means and that is not designed and developed by the author or other creator to the specifications of a specific purchaser. Prewritten computer software includes all of the following:
>
> > (*i*) Any combination of 2 or more prewritten computer software programs or portions of prewritten computer software programs.
> >
> > (*ii*) Computer software designed and developed by the author or other creator to the specifications of a specific purchaser if it is sold to a person other than that specific purchaser.
> >
> > (*iii*) The modification or enhancement of prewritten computer software or portions of prewritten computer software where the modification or enhancement is designed and developed to the specifications of a specific purchaser unless there is a reasonable, separately stated charge or an invoice or other statement of the price is given to the purchaser for the modification or enhancement. If a person other than the original author or creator modifies or enhances prewritten computer software, that person is considered to be the author or creator of only that person's modifications or enhancements. [MCL 205.92b(o).]

However, when a transaction involves the transfer of both tangible personal property and services, the Michigan Supreme Court has adopted the "incidental to service test," which "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." *Catalina Mktg Sales Corp v Dep't of Treasury*, 470 Mich 13, 24-25; 678 NW2d 619 (2004).[1] The Court directed as follows:

> 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 the instant case, any transfer of tangible personal property was incidental to the service provided.[2] *Checkpoint* subscribers primarily sought access to up-to-date information relevant to their needs. As plaintiff's senior vice president of editorial and content operations testified, plaintiff's job was "to help [the clients] get their tasks accomplished[.]" Customers sought the expert knowledge of *Checkpoint's* content creators in synthesizing, compiling, and organizing the materials, thereby rendering research more efficient. There is no evidence that any *de minimus* amount of software transferred was the object of the transaction, or that customers sought to own or otherwise have responsibility for the prewritten computer software. Further, considering the transaction as a whole, the fact that the license agreement entitles users to access and use the *Checkpoint* program does not establish that users primarily sought the physical software.

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[1] Both experts testified that computer code JavaScript was sent from plaintiff's server to a customer's computer, although plaintiff's expert testified that it constituted less than one percent of the transaction. Prewritten computer software is defined in the statute as a set of coded instructions designed to cause a computer to perform a task, MCL 205.92b(c). This language does not require the code being delivered to be "proprietary," nor does it require a certain amount of code, in proportion to whatever else may be sent, to be delivered in order to constitute a set of coded instructions.

We recognize, as plaintiff and the amici curiae observe, that JavaScript may be a ubiquitous part of the internet, and is not normatively understood as computer software. It also may be true that when this statutory language was enacted in 2004, the Legislature had not anticipated the rapid development of technology, nor imagined that a transaction of this sort was possible. Yet, a plain reading of the statutory definitions listed above could provide otherwise.

In any event, the statutory definitions are not dispositive in the instant case as defendant's claim fails under the *Catalina* test, discussed *infra*. But for the application of the *Catalina* test, such software may indeed be taxable under the UTA.

[2] Neither party disputes that the incidental to service test applies to the UTA.

In regard to plaintiff's business, both parties agree that plaintiff sold taxable print and software products. However, the manner in which *Checkpoint* was marketed indicates that plaintiff also was in the business of selling an information service, distinct from its print and software products. As for whether the goods were provided as a retail enterprise with a profit-making motive, the evidence demonstrates that plaintiff's motive was not to profit from the sale of any prewritten computer software, but to profit from providing a service. Any transfer of prewritten computer software was an insignificant part of the overall transaction aimed at providing a service. Furthermore, it is undisputed that plaintiff did not market and separately sell the software related to the *Checkpoint* platform.

Lastly, the intangible services greatly contributed to the value of the physical item transferred. *Checkpoint* was valuable because of the expert knowledge used to synthesize and compile the content, which rendered research more efficient. Further, the fact that the content would be of no value without the software is immaterial, as the same can be said of the opposite.

We also find the lower court's reasoning for granting defendant's motion for summary disposition unpersuasive. While it may be true that prior versions of this product constituted prewritten computer software subject to the use tax, the critical difference is that plaintiff changed the nature of the product, thereby changing the nature of the transaction. The lower court's reasoning—that because this product evolved from a taxable product it is therefore taxable in its current form—is not a valid basis for granting defendant summary disposition.[3]

## III. CONSTITUTIONAL CLAIMS

Plaintiff also challenges that defendant violated the Due Process Clause and the Commerce Clause in taxing *Checkpoint*. Given our agreement with plaintiff that the tax instituted in this case was improper, these issues are moot. *Michigan Nat'l Bank v St Paul Fire & Marine Ins Co*, 223 Mich App 19, 21; 566 NW2d 7 (1997).

[3] Plaintiff's argument that the UTA must be interpreted consistent with the Streamlined Sales and Use Tax Act (SSUTA) is misguided, as the SSUTA specifically states that it has no effect to the extent that it is inconsistent with "any law of this state" and does not amend, modify or invalidate any law of this state. MCL 205.811. We decline to address plaintiff's argument regarding use, as plaintiff's alternative argument pursuant to *Catalina* is dispositive.

## IV. CONCLUSION

Because the transaction at issue was primarily the provision of a service, not the transfer of tangible personal property, we agree with plaintiff that the use tax was improper, and that summary disposition in favor of plaintiff is warranted. We reverse. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Christopher M. Murray
/s/ Michael J. Riordan