STATE OF MICHIGAN

COURT OF APPEALS

EMERY ELECTRONICS, INC., Plaintiff-Appellant,	UNPUBLISHED February 12, 2019
v	No. 342250 Court of Claims
DEPARTMENT OF TREASURY, Defendant-Appellee.	LC No. 16-000133-MT

Before: SWARTZLE, P.J., and MARKEY and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiff, Emery Electronics, Inc, appeals as of right the Court of Claims decision granting defendant, the Department of Treasury, summary disposition under MCR 2.116(C)(10). Because there is no genuine issue of material fact that Verizon Wireless did not reimburse plaintiff for the purchase of cell phones, but paid plaintiff a commission for sales of Verizon service contracts, we conclude that the trial court properly granted defendant's motion for summary disposition.

I. BACKGROUND

Plaintiff is a Michigan corporation engaged in the business of selling cell-phone service contracts, cell phones, and related equipment. During the period at issue, and pursuant to a Verizon Wireless Exclusive Agent Agreement (the Agreement), and a subsequent amendment (the Amendment), plaintiff sold Verizon cell-phone service contracts exclusively, meaning that plaintiff did not sell service contracts for any other cell-phone service providers. Additionally, plaintiff sold equipment produced by a variety of different manufacturers, including Apple, LG, Motorola, and Samsung, and plaintiff purchased those cell phones from Verizon. Plaintiff did not remit sales tax or use tax on any of the cell phones that it purchased from Verizon for purposes of resale. The issue before the trial court was whether plaintiff subsequently made its own taxable use of the cell phones following its purchase of the equipment from Verizon for purposes of resale, subjecting plaintiff to the requirement that it remit use taxes on the ultimate disposition of that equipment.

The Agreement provided the terms under which Verizon compensated plaintiff for its services as its exclusive agent for the sale of cell-phone service contracts. The Agreement required that Verizon pay plaintiff a fixed commission for new wireless-service activations and extended-service plans sold by plaintiff. In contrast, when an existing Verizon customer merely purchased a cell phone or upgrade that did not involve a new wireless-service activation or an extended-service plan, the Agreement did not entitle plaintiff to receive a commission from Verizon.

Regarding the resale of cell phones that plaintiff purchased from Verizon, the Agreement allowed plaintiff total discretion over the retail price plaintiff charged customers. Specifically, the Agreement provided:

> 4.4 All [Verizon] Equipment sales and/or leases shall be made by or on behalf of [plaintiff] for its own account and not as agent for, or for the account of, [Verizon]. With respect to the sale, lease, warranty service, and maintenance of [Verizon] Equipment, Subscribers shall be customers of [plaintiff], and [Verizon] shall have no responsibility to [plaintiff] or Subscribers with respect to such activities.
>
> 4.5 [PLAINTIFF] SHALL UNILATERALLY ESTABLISH ITS RETAIL SALES PRICES, ADVERTISED PRICES OR OTHER FEES FOR [VERIZON] EQUIPMENT IN ITS SOLE DISCRETION, AND [VERIZON] SHALL HAVE NO CONTROL OVER SUCH PRICES, CHARGES OR FEES. [Emphasis in original.]

Regarding the sale of Apple iPhones specifically, the Addendum controlled pricing, stating as follows:

> Maximum Resale Price. [Plaintiff] is solely responsible for determining the price [plaintiff] charges each Subscriber/potential Subscriber when reselling the [Verizon] iPhone, subject only to the following:
>
> (a) [Plaintiff's] maximum resale price for each [Verizon] iPhone sold with a month to month Postpay Service plan shall be the [Verizon] list price on the [plaintiff] ordering and
>
> (b) [Plaintiff's] maximum resale price for each [Verizon] iPhone sold with a two (2) year Postpay Service plan shall be the [Verizon] list price on the [plaintiff] ordering website, less the [Verizon] iPhone Additional Activation/Upgrade Compensation.

Thus, the resale price that plaintiff charged its customers for the sale of iPhones was (1) the list price, in the absence of a two-year service plan; or (2) the difference between the list price and compensation that plaintiff received from Verizon when the customer purchased a two-year service plan. For the period at issue, and consistent with the terms of the Agreement and the Addendum, plaintiff sold customers new activations and extended-service plans from Verizon

and, as part of the bundle, plaintiff transferred the cell phones that it acquired from Verizon, including iPhones, to its customers for little or no consideration.

In 2013, defendant initiated an audit of plaintiff's use-tax liabilities for the period November 1, 2009 through October 31, 2013. In determining the use tax due, the auditor reviewed plaintiff's sales reports and discovered that plaintiff gave its customers cell phones and accessories for zero consideration.[1] The auditor then used the price that plaintiff paid Verizon for the cell phones to determine plaintiff's tax base. The auditor offered his opinion that, if Verizon had reimbursed plaintiff for the cell phones and if plaintiff had reported a unit cost of zero for each cell phone, plaintiff's tax base would have been zero. In actuality, however, plaintiff reported its unit cost as the dollar amount it paid Verizon for the cell phones. As a result of the audit, defendant issued plaintiff a final assessment for the use-tax deficiency in the amount of $186,441.64 including interest.

Plaintiff challenged the audit by filing a complaint in the Court of Claims, alleging in relevant part that defendant erroneously calculated the use tax due. Plaintiff argued that (1) plaintiff's purchase price for the cell phones was zero because Verizon reimbursed plaintiff for the cost of the cell phones that plaintiff gave away to customers, and (2) the auditor used "unit cost" instead of "purchase price" for the cell phones when plaintiff received consideration from a third party. Defendant moved for summary disposition under MCR 2.116(C)(10), arguing that plaintiff "used" property within the meaning of the Use Tax Act (UTA), MCL 205.91 *et seq*., when it purchased the cell phones for a tax-exempt purpose (resale), but then converted the cell phones to a taxable use by giving the property away. Defendant further pointed out that plaintiff's "purchase price" was what plaintiff paid Verizon for the cell phones and argued that plaintiff's claim that Verizon provided it reimbursement for the cell phones, making its tax base zero, was factually and legally wrong. Defendant argued, further, that the definition of "purchase price" under the UTA does not include reimbursements and that Verizon did not, in fact, reimburse plaintiff but merely provided plaintiff with commissions for the sale of service contracts.

Plaintiff responded that the trial court should deny defendant's motion for summary disposition because a question of fact existed regarding the correct application of the phrase "purchase price." Plaintiff argued that the phrase "purchase price" includes only the "aggregate" price paid by the consumer, which was $0 or, in the case of some iPhones, between $0 and $10. Plaintiff further posited that defendant's argument—that Verizon never reimbursed plaintiff for the cell phones—ignored the substance of plaintiff's complex business transaction in which Verizon provided plaintiff a reimbursement for the purchased equipment, rather than a commission for the sale of service contracts.

The Court of Claims granted defendant's motion. The trial court first found that plaintiff made a taxable use of the cell phones by using them for promotional purposes. Next, the trial

[1] On appeal, plaintiff does not challenge the audit with respect to the accessories plaintiff gave away to customers for no consideration. This opinion, therefore, only addresses the cell phones.

court rejected plaintiff's claim that Verizon reimbursed it for the cell phones and concluded that Verizon paid plaintiff commissions for the sale of service contracts. The trial court reasoned:

> A plain reading of the Agreement between Emery and Verizon reveals that the commission paid to Emery was based solely on the sale of the service contracts and did not represent reimbursement for the purchase of cellphones or accessories. Moreover, rather than Verizon reimbursing Emery for the costs of these products through "offsets" or credits when the commissions were paid, Emery ultimately reimbursed Verizon for amounts it contractually owed for the costs of the cellphones by allowing those amounts to be deducted from its commission revenue.

Plaintiff now appeals the trial court's grant of summary disposition to defendant.

II. ANALYSIS

A. STANDARDS OF REVIEW

This Court reviews de novo a ruling by the Court of Claims on a motion for summary disposition in a case involving the UTA. *Guardian Indus Corp v Dep't of Treasury*, 243 Mich App 244, 248; 621 NW2d 450 (2000). A motion under MCR 2.116(C)(10) tests the factual support for a party's claim. *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 377; 836 NW2d 257 (2013). Under this subrule, judgment is proper when, viewing all pleadings, affidavits, and other documentary evidence in a light most favorable to the party opposing the motion, there is no genuine issue regarding any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. *Id.* at 377. Additionally, questions of statutory interpretation are reviewed de novo, *Andrie Inc v Dep't of Treasury*, 496 Mich 161, 167; 853 NW2d 310 (2014), as are questions of contract interpretation, *Chestonia Twp v Star Twp*, 266 Mich App 423, 429; 702 NW2d 631 (2005). Finally, "[t]ax exemptions are disfavored, and the burden of proving an entitlement to an exemption is on the party claiming the right to the exemption." *Guardian*, 243 Mich App at 249.

B. THE USE TAX ACT

Use tax is a complement to sales tax, and is designed to cover transactions in which sales tax is not collected under the General Sales Tax Act, MCL 205.51, *et seq*. See *Auto-Owners Ins Co v Dep't of Treasury*, 313 Mich App 56, 69; 880 NW2d 337 (2015). The UTA imposes a use tax on the "the privilege of using, storing, or consuming tangible personal property in this state at a total combined rate equal to 6% of the price of the property." MCL 205.93(1). On appeal, the parties do not dispute that plaintiff is subject to the UTA with respect to the cell phones because plaintiff purchased the cell phones for resale with a tax-exempt resale certificate and converted the cell phones to a taxable use by giving them away for no consideration. "A person who acquires tangible personal property or services for any tax-exempt use who subsequently converts the tangible personal property or service to a taxable use, including an interim taxable use, is liable for the tax levied under this act." MCL 205.97(2). Instead, plaintiff argues that defendant erroneously calculated the "purchase price" of the property, leading to an erroneous calculation of the amount of use tax due to defendant.

C. SUMMARY DISPOSITION

Plaintiff argues that the trial court erroneously granted summary disposition to defendant because a question of fact exists regarding whether Verizon reimbursed it for the cost of the cell phones. Plaintiff argues, further, that the definition of the term "purchase price" in the UTA contemplates subtractions for reimbursements and that the reimbursements that it received from Verizon brings the purchase price for the cell phones to zero or nearly zero. We need not reach the question whether the definition of "purchase price" in the UTA contemplates subtractions for reimbursements because there is no genuine issue of material fact that Verizon did not reimburse plaintiff for the cost of the cell phones, but only paid plaintiff commissions for sales of service contracts.

Viewing the record evidence in the light most favorable to plaintiff, there is no genuine issue of material fact that plaintiff paid Verizon for the cell phones and reported to defendant a unit cost reflecting what it paid Verizon for each cell phone. Plaintiff's president and vice-president testified that plaintiff purchased the cell phones for a set price and, subsequently, gave the cell phones away for little or no cost to those customers who signed up for a service contract with Verizon. On some occasions, Verizon extended credit to plaintiff for its acquisition of the cell phones and later subtracted the amounts plaintiff owed on those cell phones from the commissions Verizon paid plaintiff for the sales of service contracts.

Although plaintiff asserts that some of the remuneration it received from Verizon under their Agreement could be characterized as reimbursement, the record does not support this assertion. During discovery, plaintiff and its witnesses characterized the commissions it received from Verizon variously as a subsidy, credit, or reimbursement. Self-serving conclusory assertions, however, are insufficient to create a genuine issue of material fact. See *Hamade v Sunoco, Inc (R & M)*, 271 Mich App 145, 163; 721 NW2d 233 (2006).

Verizon's director of regional sales attested that its Verizon stores were in direct competition with plaintiff, and that Verizon did not reimburse plaintiff on the sale of equipment, because to do so would make no business sense. The Agreement, by its plain terms, provided for commissions based on plaintiff's sales of Verizon wireless-service contracts, the amounts of which were tiered based on the equipment sold in conjunction with the service contracts or, in the case of iPhones, designated at a set price. Sales commissions are not, by definition, reimbursements. Plaintiff's attempt to characterize its commissions otherwise would require this Court to deviate from well-established rules of contract interpretation and look beyond the four corners of the parties' contract. See *Chestonia Twp*, 266 Mich App at 432 (indicating that when a contract is plain and unambiguous, courts are to apply the terms as written).

Plaintiff encourages the Court to do just this, relying on the substance-over-form doctrine articulated in *Frank Lyon Co v United States*, 435 US 561; 98 S Ct 1291; 55 L Ed 2d 550 (1978). In particular, the Court held that where

> there is a genuine multiple-party transaction with economic substance which is compelled or encouraged by business or regulatory realities, is imbued with tax-independent considerations, and is not shaped solely by tax-avoidance features

> that have meaningless labels attached, the Government should honor the allocation of rights and duties effectuated by the parties. [*Id.* at 583-584.]

Frank Lyon involved matters of federal income-tax law and has not recently been applied in a precedentially binding Michigan case. See *Connors & Mack Hamburgers, Inc v Dep't of Treasury*, 129 Mich App 627, 629-630; 341 NW2d 846 (1983). Even assuming that the rule is applicable in the context of Michigan tax disputes, we see no reason to set aside the plain intent expressed by the parties to the Agreement at issue in this case. This is because there is no indication in the record—and no assertion by plaintiff—that the Agreement was "shaped solely by tax-avoidance features" or that the Agreement was anything less than a genuine transaction.

Plaintiff argues that Verizon tightly controlled every aspect of an iPhone transaction, including the advertising plaintiff could use when selling iPhones, the maximum resale price plaintiff could charge customers when selling iPhones, and the compensation plaintiff received from Verizon when it sold an iPhone. Yet, none of these details is relevant to whether (1) Verizon reimbursed plaintiff for the price plaintiff paid Verizon for the cell phone, or (2) Verizon simply paid plaintiff a commission for the sale of service contracts, from which commissions plaintiff paid the cost of acquiring the cell phone from Verizon. Furthermore, the fact that the Agreement granted plaintiff discretion to resell the phones and equipment it purchased at any price point, excepting the sale of an iPhone with a 2-year service plan which could be sold between $0 and $10, is a distraction from the relevant facts: that plaintiff, during the pertinent period, purchased the subject phones and equipment and gave them away for little to no consideration.

Affirmed. Defendant, having prevailed in full, may tax costs under MCR 7.219.

/s/ Brock A. Swartzle
/s/ Jane E. Markey
/s/ Amy Ronayne Krause