

STATE OF MICHIGAN
COURT OF APPEALS

REALTRON CORPORATION & SUBSIDIARIES,

Plaintiff–Appellee,

v

MICHIGAN DEPARTMENT OF TREASURY,

Defendant–Appellant.

UNPUBLISHED

July 12, 1996

No. 184519

MTT No. 173926

Before: Murphy, P.J., and O’Connell and M.J. Matuzak,* JJ.

PER CURIAM.

Defendant appeals from the Michigan Tax Tribunal’s (MTT) finding that plaintiff’s revenue, derived from their on-line real estate information service, is royalty income and therefore, exempt from taxation under the Single Business Tax (SBT), MCL 208.1 *et seq.*; MSA 7.558(1) *et seq.* We hold that the revenue attributable to the use of plaintiff’s software is royalty income exempt from taxation, but that revenue received by plaintiff attributable to its overhead costs and services such as the installation of computer hardware and telephone lines, is taxable under the SBT. We remand to the MTT for a determination of what part of plaintiff’s on-line income is attributable to its software programs and what part is attributable to its services.

Plaintiff provides print and computerized real estate information to local boards of realtors. The revenue associated with the print segment of plaintiff’s business is not the subject of dispute. Defendant maintains that plaintiff’s income derived from its sale of computer information services is not royalty income, and therefore is taxable under the SBT. This Court has held that Michigan courts have adopted the common understanding of the term royalty. In *Field v Dep’t of Treasury*, 184 Mich App 151, 154-155; 457 NW2d 113 (1990), this Court noted that the Supreme Court had adopted the definition of “royalty” found in the *Random House College Dictionary (rev ed)*, p 1150:

[A] compensation or portion of the proceed *paid* to the owner of a
right, as a patent or oil or mineral right, for the use of it . . . an agreed

* Circuit judge, sitting on the Court of Appeals by assignment.

portion of the income from a work paid to its author, composer, etc., usually a percentage of the retail price of each copy sold . . . a royal right, as over minerals, granted by a sovereign to a person or corporation . . . the payment made for such a right. [*Mobil Oil v Dep't of Treasury*, 422 Mich 473, 484; 373 NW2d 730 (1985).]

In this case, plaintiff's computer revenue is derived from the use, by its clients, of plaintiff's computer software programs. Plaintiff is the author of these programs and payments for their use qualifies as royalty income. *Mobil Oil, supra*, 484.

Defendant next argues that auxiliary services provided by plaintiff, such as installing and maintaining computer hardware and telephone lines, were not "intrinsically intertwined" with plaintiff's sale of its software programs and the portion of revenue attributable to these services is not royalty income exempt from tax. Plaintiff's representative testified that the lump sum payments received from plaintiff's customers covered costs associated with the installation and maintenance of computer hardware and telephone lines and, occasionally, costs associated with providing local service representatives or client computer training. Revenue generated for providing such services is not payments for the use of an owner's property and therefore, such revenue is not within the definition of royalty income. *Mobil Oil, supra*, 484. This case should be remanded to the MTT for an evidentiary hearing to determine what percentage of plaintiff's revenue is associated with the use of the software system and what percentage is merely payment for services associated with computer hardware and telephone lines.

Finally, defendant argues that to exclude from taxation the revenue received by plaintiff for the use of its software programs is inconsistent with the underlying theory of the SBT. The Michigan SBT is a value added tax that is levied against all persons who engage in "business activity" within the state. *Trinova Corp v Michigan Dep't of Treasury*, 498 US 358, 367; 111 S Ct 818; 112 L Ed 2d 884 (1991). Under the SBT, royalty revenue is not taxed to the owner of the property, because it is the use of the property by another that creates the business activity. *Field, supra* 184 Mich App 154; *Mobil Oil, supra*, 495. Plaintiff's software programs allow plaintiff's customers, the realtors, to contribute to the business activity of the state. Therefore, it is not inconsistent with the underlying theory of the SBT that plaintiff's customers and not plaintiff should pay tax on the property. The tax tribunal correctly found that plaintiff's software programs qualify as royalties and that this does not undermine the theory of the SBT.

Affirmed in part, reversed in part and remanded to the MTT for a hearing on the percentage of revenue that can be allocated to the use of plaintiff's software program. We do not retain jurisdiction.

/s/ William B. Murphy

/s/ Peter D. O'Connell

/s/ Michael J. Matuzak