STATE OF MICHIGAN

COURT OF APPEALS

GTE DIRECTORIES SERVICE CORPORATION,

Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,

Defendant-Appellee.

UNPUBLISHED
March 13, 1998

No. 190467
Court of Claims
LC No. 93-014893-CM

Before: Gribbs, P.J., and Murphy and Gage, JJ.

PER CURIAM.

Plaintiff appeals by right from a Court of Claims order affirming defendant's assessment of use taxes. We affirm.

Plaintiff entered into contracts with seven Michigan telephone companies to compile and print telephone directories. Between March 1, 1986 and December 31, 1986, plaintiff paid $185,144.14 in use taxes incurred as a result of its business dealings with the telephone companies. On April 10, 1990, plaintiff filed a claim for a refund of these taxes with defendant. That claim was incorporated into defendant's ongoing audit of plaintiff. Eventually, defendant denied plaintiff's request for a refund and issued a deficient tax bill in the amount of $17,762.07. Plaintiff paid that amount, and then appealed both the refund denial and the deficiency to the Court of Claims. The Court of Claims held that plaintiff was subject to use taxation in Michigan as a seller of tangible personal property that would be used, stored or consumed inside Michigan. In so doing, the Court of Claims rejected plaintiff's argument that the imposition of use taxes violated both the due process clause, US Const, Am XIV, § 1, and the commerce clause, US Const, art I, § 8, cl 3, of the United States Constitution.

On appeal, plaintiff argues that the Court of Claims erred when it found that plaintiff was subject to use taxation under MCL 205.99; MSA 7.555(9), as a seller of tangible goods. This case involves a question of law and, after reviewing plaintiff's argument de novo, *Oakland Co v State*, 456 Mich 144, 149; 566 NW2d 616 (1997), we agree with the Court of Claims' well-reasoned analysis of this issue. The contracts between plaintiff and the telephone companies are hybrid contracts, calling for plaintiff to render both goods and services. In reaching its decision, the Court of Claims applied the "predominant

factor test" to the circumstances of the case in order to determine whether the main thrust of the contracts was for services or goods. Under this test, as first articulated in *Bonebrake v Cox*, 499 F2d 951 (CA 8, 1974), and later adopted in Michigan in *Neibarger v Universal Cooperatives*, 439 Mich 512; 486 NW2d 612 (1992), hybrid contracts are scrutinized to determine "whether their predominant factor, their purpose, reasonably stated is the rendition of service, with goods incidentally involved . . . or is a transaction of sale, with labor incidentally involved." *Bonebrake*, *supra*, 499 F2d at 960. In both *Bonebrake* and *Neibarger*, the test was applied in order to determine whether the contracts at issue were governed by provisions of the UCC. *Bonebrake*, *supra* at 960; *Neibarger*, *supra* at 534. However, the test's applicability to questions not involving the UCC is not precluded. Because the focus of the test is on determining the main purpose of a hybrid contract, its usefulness extends beyond the limited confines of UCC jurisprudence.

In this case, the predominant factor test leads us to conclude that the main thrust of the contracts at issue was the procurement of telephone directories. We note that the telephone companies are required by statute to provide customers with a "white pages" directory, MCL 484.2309; MSA 22.1469(309)(1), and that the language of each contract calls for plaintiff to compile and print telephone directories. The fact that the telephone companies have chosen to offset the cost of providing white pages directories by including yellow pages directories is irrelevant to the resolution of this issue. Regardless of the telephone companies' attempt to turn their mandated responsibility into a money making venture, the companies are still required to produce the white pages directory annually. This factor cannot be overlooked when considering the main thrust of the contracts. See *Insul-Mark Midwest v Modern Materials*, 612 NE2d 550, 555 (Ind 1993) (noting that contractual language must be viewed "in light of the situation of the parties and the surrounding circumstances"). Accordingly, we agree with the Court of Claims that the main purpose underlying the contracts at issue was the procurement of telephone directories. Because plaintiff was involved in providing these directories for a price, plaintiff was involved in the sale of tangible goods, and use taxation was appropriate under the statute.

Second, plaintiff argues that because it does not have the required connection or contacts with the State of Michigan, the Court of Claims erred when it found that the imposition of use taxes does not violate both the due process and commerce clauses of the United States Constitution. After reviewing plaintiff's argument de novo, *People v Slocum (On Remand)*, 219 Mich App 695, 697; 558 NW2d 4 (1996), we once again find ourselves in agreement with the Court of Claims' analysis. "The Due Process Clause 'requires some definite link, some *minimum connection*, between a state and the person, property or transaction it seeks to tax.'" *Quill Corp v North Dakota*, 504 US 298, 306; 112 S Ct 1904; 119 L Ed 2d 91 (1992), quoting *Miller Bros Co v Maryland*, 347 US 340, 344-345; 74 S Ct 535; 98 L Ed 2d 744 (1954) (emphasis added). In order to survive a commerce clause challenge, the taxed activity must have "'a *substantial nexus* with the taxing State.'" *Id.* at 311, quoting *Complete Auto Transit, Inc v Brady*, 430 US 274, 279; 97 S Ct 1076, 1079; 51 L Ed 2d 326 (1977) (emphasis added). We find that plaintiff's contacts with Michigan satisfy both of these standards.

Plaintiff "purposefully avail[ed] itself of the benefits of [Michigan's] .. . economic market," *Quill, supra*, 504 US at 307, by directing its commercial activities at Michigan residents. This was enough to establish the minimum connection necessary for due process. In reaching this conclusion, we reject plaintiff's contention that the activity which creates the minimum contacts must also necessarily be the same activity on which the use tax is imposed. See *National Geographic Society v California Bd of Equalization*, 430 US 551; 97 S Ct 1386; 51 L Ed 2d 631 (1977), quoting *Miller Bros, supra* at 344-345. GTE Directory Sales Corporation's solicitation, on behalf of plaintiff, of advertising for telephone directories to be used by Michigan residents established the minimum contacts necessary for the use tax imposed to survive a due process challenge, and was sufficient to create the substantial nexus required under the commerce clause. *Quill, supra* at 308; *Magnetek Controls, Inc v Revenue Division, Dep't of Treasury*, 221 Mich App 400; 562 NW2d 219 (1997); *In Re Orvis Co v Tax Appeals Tribunal of the State of New York*, 654 NE2d 954 (NY, 1995).

Affirmed.

/s/ Roman S. Gribbs
/s/ William B. Murphy
/s/ Hilda R. Gage