

STATE OF MICHIGAN
COURT OF APPEALS

EARL SAMUELS,

Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,

Defendant-Appellee.

UNPUBLISHED
February 18, 2003

No. 230658
Michigan Tax Tribunal
LC No. 00-264765

Before: Bandstra, P.J., and Zahra and Meter, JJ.

PER CURIAM.

Plaintiff Earl Samuels appeals by right from a Tax Tribunal ruling that plaintiff was not an employee for purposes of the Single Business Tax Act (SBTA), that payments made to him from Aetna Life Insurance and Annuity Company (Aetna), the company for which plaintiff sold insurance, were subject to the SBTA, and that plaintiff was liable for a single business tax (SBT) assessment. After defendant assessed \$4,041 in SBT and penalties for tax years 1991 and 1992, plaintiff commenced this action contending that he was not liable under the SBTA because he was Aetna's employee. We affirm.

Michigan imposes the SBT on "the adjusted tax base of every person with business activity in this state." *Schubert v Dep't of Treasury*, 212 Mich App 555, 558; 538 NW2d 447 (1995). "Tax base" is defined under the SBTA as "business income . . . subject to adjustments in this section." MCL 208.9(1). The adjustments under MCL 208.9(1) are designed to reflect business activity by converting income tax into value-added tax. *Jefferson Smurfit Corp v Dep't of Treasury*, 248 Mich App 271, 273; 639 NW2d 269 (2001). One of the adjustments added to business income is compensation paid to employees. See MCL 208.9(5). Therefore, an employer must pay SBT on the wages paid to an employee, but the employee is exempt from SBT on those same wages. See, generally, MCL 208.3(2).

Plaintiff contends that he did not owe SBT because he was Aetna's employee. Our review of Tax Tribunal decisions "is limited to determining whether they are authorized by law and whether the factual findings are supported by competent, material, and substantial evidence on the whole record." *Mid America Management Corp v Dep't of Treasury*, 153 Mich App 446, 460; 395 NW2d 702 (1986). "Substantial evidence" means more than a scintilla of evidence, but it may be less than a preponderance of evidence. *Id.*

Plaintiff is a life insurance salesman for Aetna, and he annually receives a W-2 form from Aetna showing a withholding for both federal social security and Medicare, but not income tax. Plaintiff is classified as a “statutory employee” for purposes of applying certain federal tax provisions, see 26 USC 3121(d)(3) and 26 USC 7701(a)(20), but he is not subject to federal income tax withholding. Plaintiff argues that although a statutory employee is not subject to federal income tax withholding, he or she is still considered an employee for purposes of the SBTA.

Several authorities are useful in determining whether plaintiff was Aetna’s “employee” for purposes of the SBTA. The SBTA states, in part:

(1) “Employee” means an employee as defined in section 3401(c)^[1] of the internal revenue code. A person from whom an employer is required to withhold for federal income tax purposes shall prima facie be deemed an employee.

(2) “Employer” means an employer as defined in section 3401(d)^[2] of the internal revenue code. A person required to withhold for federal income tax purposes shall prima facie be deemed an employer. [MCL 208.5.]

26 USC 3401(c) states:

For purposes of this chapter, the term “employee” includes an officer, employee, or elected official of the United States, a State, or any political subdivision thereof, or the District of Columbia, or any agency or instrumentality of any one or more of the foregoing. The term “employee” also includes an officer of a corporation.

26 USC 3401(d) states:

For purposes of this chapter, the term “employer” means the person for whom an individual performs or performed any service, of whatever nature, as the employee of such person, except that—

(1) if the person for whom the individual performs or performed the services does not have control of the payment of the wages for such services, the term “employer” (except for purposes of subsection (a)) means the person having control of the payment of such wages,^[3] and

¹ 26 USC 3401(c).

² 26 USC 3401(d).

³ In *Mid America, supra* at 462, this Court ruled that this exception contained in 26 USC 3401(d)(1) “has no application to the purpose of the SBTA.”

(2) in the case of a person paying wages on behalf of a nonresident alien individual, foreign partnership, or foreign corporation, not engaged in trade or business within the United States, the term “employer” (except for purposes of subsection (a)) means such person.

Finally, in *Mid America, supra* at 462, this Court stated that “[a]n individual is an employee for federal employment tax purposes if he has the status of an employee under the usual common-law rules applicable in determining the employee-employer relationship.”

In examining the above authorities, it is clear that plaintiff did not enjoy the *presumption* of having an employee-employer relationship with Aetna under MCL 208.5 because he concedes that his wages from Aetna were not subject to federal income tax withholding. Moreover, plaintiff did not demonstrate the existence of such a relationship using “the usual common-law rules applicable in determining the employee-employer relationship.” *Mid America, supra* at 462. As noted by defendant, plaintiff presented no testimony, affidavits, or exhibits sufficiently demonstrating an employee-employer relationship with Aetna.⁴ In light of the emphasis on federal income tax withholding in MCL 208.5 and in light of plaintiff’s failure to present sufficient evidence of an employee-employer relationship with Aetna, we conclude that the Tax Tribunal’s decision to uphold the SBT assessment was authorized by law and “supported by competent, material, and substantial evidence on the whole record.” *Mid America, supra* at 460. Plaintiff’s argument that the wages of a “statutory employee” are automatically exempt from the SBTA is simply without merit.

Plaintiff argues that assessing SBT against his wages from Aetna is not appropriate because Aetna must pay SBT on those same wages. However, if plaintiff is deemed to not be Aetna’s employee under the SBTA, then Aetna would *not* be liable for SBT on his wages.⁵

Affirmed.

/s/ Richard A. Bandstra
/s/ Brian K. Zahra
/s/ Patrick M. Meter

⁴ Plaintiff argued in a motion for rehearing in the Tax Tribunal that schedules C of his federal income tax returns demonstrated his employee-employer relationship with Aetna. Plaintiff does not make this argument on appeal to this Court and has thus abandoned it. At any rate, we disagree that the forms in question sufficiently demonstrated the existence of an employee-employer relationship.

⁵ We note that plaintiff presented no evidence that Aetna actually included plaintiff’s compensation in its tax base under the SBTA.