

STATE OF MICHIGAN  
COURT OF APPEALS

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TIMOTHY W. HERMAN,

Plaintiff-Appellant,

v

BEST BUY STORES, L.P.,

Defendant-Appellee.

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UNPUBLISHED

March 15, 2005

No. 251499

Genesee Circuit Court

LC No. 02-073182-CK

Before: Wilder, P.J., and Fitzgerald and Kelly, JJ.

PER CURIAM.

In this case arising from plaintiff's purchase of a new stove from one of defendant's stores, plaintiff claimed that defendant improperly charged sales tax on the haul away and delivery fees. Plaintiff appeals as of right the trial court's order granting summary disposition in defendant's favor pursuant to MCR 2.116(C)(10). We affirm.

We review a trial court's decision on a motion for summary disposition de novo. A motion brought pursuant to MCR 2.116(C)(10) should be granted when the evidence demonstrates there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001).

Plaintiff first argues that the trial court erred when it found that the delivery and haul away service fees were subject to sales tax. We disagree. During the tax year at issue, 2001, the General Sales Tax Act (GTA) provided that a tax shall be levied and collected "from all persons engaged in the business of making sales at retail, as defined in [MCL 205.51(1)] . . . for the privilege of engaging in that business equal to 6% of the gross proceeds of the business, plus the penalty and interest if applicable as provided by law, less deductions allowed by this act." MCL 205.52(1), amended by 2004 PA 173. The GTA defined "gross proceeds," in relevant part, as:

the amount received in money, credits, subsidies, property, or other money's worth in consideration of a sale at retail within this state, without a deduction for the cost of the property sold, the cost of material used, the cost of labor or service purchased, an amount paid for interest or a discount, a tax paid on cigarettes or tobacco products at the time of purchase, a tax paid on beer or liquor at the time of purchase or other expenses. [MCL 205.51(1)(i), amended by 2004 PA 173; see *General Motors Corporation v Dept of Treasury*, 466 Mich 231, 237; 644 NW2d 734 (2002).]

“Sale at retail” was defined, in relevant part, as “a transaction by which the ownership of tangible personal property is transferred for consideration, if the transfer is made in the ordinary course of the transferor’s business and is made to the transferee for consumption or use, or for any purpose other than for resale[.]” MCL 205.51(b), amended by 2004 PA 173; see *Catalina Marketing Sales Corporation v Dept of Treasury*, 470 Mich 13, 22; 678 NW2d 619 (2004).<sup>1</sup> Although the sales tax is imposed directly on the seller, the seller may pass the tax onto the purchaser and collect it at the point of sale. *World Book, Inc v Dep’t of Treasury*, 459 Mich 403, 408; 590 NW2d 293 (1999).

In *Catalina Marketing*, our Supreme Court clarified that the “incidental to service” test is appropriate for determining whether a transaction involving a transfer of personal property and the provision of services is subject to sales tax. *Id.* at p 24.<sup>2</sup> The test 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.” *Id.* at 24-25. If the rendering of a service is the object of the transaction, then the sales tax will not apply, even though tangible personal property is exchanged incidentally. *Id.* at 24. At the same time, “[w]here the item is the substance of the transaction, and the service or skill provided is merely incidental, the transaction is one for tangible personal property, to which sales tax may be applied.” *Id.* at p 26, quoting 68 Am Jur 2d, Sales and Use Taxes, § 62 pp 51-52. In making this determination, the Supreme Court indicated that a reviewing court should examine the following:

[W]hat 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.*]

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<sup>1</sup> The GTA was most recently amended by 2004 PA 173 effective in June and September 2004. The amendment to § 52(1) modified the reference to “sales at retail” with “by which ownership of tangible personal property is transferred for consideration.” “Gross proceeds” is currently defined as “the total amount of consideration, including cash, credit, property, and services, for which tangible personal property or services are sold, leased, or rented, valued in money, whether received in money or otherwise, and applies to the measure subject to sales tax.” MCL 205.51(1)(c), (d). A “sale at retail” is now concisely defined as “a sale, lease, or rental of tangible personal property for any purpose other than for resale, sublease, or subrent.” MCL 205.51(b).

<sup>2</sup> *Catalina Marketing* was decided after the parties filed their briefs on appeal. In the civil context, the threshold question in determining whether a decision should not have retroactive application is “whether the decision clearly established a new principle of law.” *Pohutski v City of Allen Park*, 465 Mich 675, 696; 641 NW2d 219 (2002). Although *Catalina Marketing* clarified the test for whether a transaction involving property transfer and services is subject to sales tax, it did not clearly establish a new principal of law. Therefore, it is appropriately applied to this case.

In this case, plaintiff does not dispute that the purchase of the new stove was the primary purpose of the transaction, while the delivery and haul away services were merely incidental to obtaining a new stove. Plaintiff visited defendant's store to purchase a new stove. Defendant's principal business is selling tangible personal property, such as stoves. Defendant offers delivery and haul away services solely to customers who purchase its products. Plaintiff was charged a nominal fee for these services compared to the value of the item purchased.<sup>3</sup> The services rendered by defendant did not affect the value of the new stove. Because all the factors articulated in *Catalina Marketing, supra* at 26, indicate that the purchase of the new stove was the substance of the transaction, to which the provision of the delivery services was merely incidental, we conclude that the trial court properly found that the delivery and haul away services were subject to Michigan sales tax. This Court may affirm a trial court's ruling even though it reached the right result on an alternative basis. *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 470; 628 NW2d 577 (2001).

Plaintiff also argues that because defendant "misled plaintiff to believe that service and haul away charges are subject to a 'sales tax,' it goes without saying that a blatant violation of the [Michigan Consumers Protection Act (MCPA)] occurred." But as discussed above, defendant's imposition of sales tax was proper. Therefore, we conclude that trial court did not err in granting defendant's motion for summary disposition of plaintiff's MCPA claim.

Affirmed.

/s/ Kurtis T. Wilder  
/s/ E. Thomas Fitzgerald  
/s/ Kirsten Frank Kelly

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<sup>3</sup> Defendant charged plaintiff \$552 for the new stove, \$34.99 for delivery of the new stove, and \$15 for hauling away the old stove.