

STATE OF MICHIGAN
COURT OF APPEALS

SOUTH LYON APARTMENT, L.L.C.,

Petitioner-Appellee,

v

DEPARTMENT OF TREASURY,

Respondent-Appellant.

UNPUBLISHED

March 13, 2014

No. 313943

Tax Tribunal

LC No. 00-414553

Before: DONOFRIO, P.J., and SAAD and METER, JJ.

PER CURIAM.

Respondent, Michigan Department of Treasury, appeals as of right an order of the Michigan Tax Tribunal granting petitioner's motion for summary disposition under MCR 2.116(C)(10). Because petitioner's asset disposition was a casual transaction under Michigan's Single Business Tax Act (SBTA), MCL 208.1 *et seq.*, the transaction was properly excluded from petitioner's SBTA liability, and we affirm.

This case involves petitioner's tax liability under the SBTA.¹ On August 29, 1980, Paul Sherr and three others formed petitioner's predecessor organization as a Michigan limited partnership called South Lyon Apartment Co. (South Lyon). The certificate of limited partnership stated, "The purpose and character of the business is to operate the Pontrail Apartment development as an investment and for the production of income, and to carry on any and all activities related thereto." South Lyon held a 50 percent interest in Pontrail Apartments. The other 50 percent was held by Dep'n Investment Co. (Dep'n).

In 1994, South Lyon and Dep'n formed Depsly Apartment Co. (Depsly), a Michigan limited partnership, to run Pontrail Apartments. South Lyon and Dep'n each contributed their 50 percent interests in Pontrail Apartments to Depsly. Dep'n was the general partner and South Lyon was a limited partner. From 1994 on, Depsly operated Pontrail Apartments and South Lyon's sole asset was its interest in Depsly.

¹ The SBTA was repealed effective December 31, 2007, by 2006 PA 325. But the year in issue is 2005, so the SBTA applies.

In 2004, South Lyon filed a certificate of conversion and became South Lyon Apartment L.L.C. (petitioner). After the conversion, the 50 percent interest in Depsly continued to be petitioner's sole asset.

Petitioner's accountant, Michael Rice, did not prepare an SBTA tax return for 2005 believing that none was required. On March 6, 2009, respondent wrote to petitioner and requested petitioner state the basis for petitioner's failure to file an SBTA return for 2005. In April 2009, Michael Rice prepared a form certifying that petitioner did not have a responsibility to file an SBTA return for 2005. Respondent disagreed with petitioner and assessed petitioner \$36,777.83 in taxes, interest, and penalties.

Petitioner petitioned the Michigan Tax Tribunal seeking cancelation of the assessment. After a hearing on November 1, 2012, the tribunal granted petitioner's motion for summary disposition under MCR 2.116(C)(10), holding that petitioner's asset disposition was a "casual transaction" and therefore not subject to the SBTA.

Respondent argues that the tribunal erred when it held that petitioner's disposition of its only asset was a "casual transaction," thereby excluding it from taxation under the SBTA.

A trial court's decision to grant or deny a motion for summary disposition under MCR 2.116(C)(10) is a question of law that we review de novo. *Twp of Bingham v RLTD R Corp*, 463 Mich 634, 641; 624 NW2d 725 (2001). This case involves issues of statutory interpretation, which are also reviewed de novo. *Id.* The primary goal of statutory interpretation is to give effect to the intent of the Legislature. *In re MCI Telecom Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999). The intent of the Legislature is discerned from the plain language of the statute. *Id.* If the statute is unambiguous, this Court presumes that the Legislature intended the meaning plainly expressed, and further judicial construction is neither permitted nor required. *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402, 605 NW2d 300 (2000). In general, tax laws are construed against the government. *DeKoning v Dep't of Treasury*, 211 Mich App 359, 361, 536 NW2d 231 (1995).

While it was in effect, the SBTA imposed a tax on "business activity" within the state of Michigan. MCL 208.31. "The SBTA employ[ed] a value-added measure of business activity, but its intended effect [was] to impose a tax on the privilege of conducting business activity within Michigan." *ANR Pipeline Co v Dep't of Treasury*, 266 Mich App 190, 198; 699 NW2d 707 (2005).

Business activity is defined under MCL 208.3(2) as follows:

"Business activity" means a transfer of legal or equitable title to or rental of property, whether real, personal, or mixed, tangible or intangible, or the performance of services, or a combination thereof, made or engaged in, or caused to be made or engaged in, within this state, whether in intrastate, interstate, or foreign commerce, with the object of gain, benefit, or advantage, whether direct or indirect, to the taxpayer or to others, *but shall not include* the services rendered by an employee to his employer, services as a director of a corporation, or a *casual transaction*. [Emphasis added.]

MCL 208.4(1), in turn, defines the term “casual transaction” as

a transaction made or engaged in other than in the ordinary course of repeated and successive transactions of a like character, except that a transaction made or engaged in by a person that is incidental to that person’s regular business activity is a business activity within the meaning of this act.

Petitioner’s asset disposition was a sale of an interest in a partnership with the object of gain, so it meets the definition of a business activity under MCL 208.3(2). The issue is whether petitioner’s asset disposition was a “casual transaction” excluding it from the definition of business activity for SBTA purposes.

This is an issue of statutory interpretation that was directly addressed by this Court in *Manske v Dep’t of Treasury*, 265 Mich App 455; 695 NW2d 92 (2005). In *Manske*, this Court was asked to determine whether a hotel company engaged in a casual transaction when it disposed of its sole asset by deed in lieu of foreclosure to its lender in exchange for debt forgiveness. *Manske*, 265 Mich App at 456-457. This Court held that MCL 208.4(1) provides a two-step analysis. First, the statute requires the court to ask whether the transaction at issue is “in the ordinary course of repeated and successive transactions of a like character.” If the transaction is *not* in the ordinary course of repeated and successive transactions of a like character, then it is a casual transaction. If the transaction meets the definition of casual transaction, the court next considers whether the transaction is “incidental to that person’s regular business activity.” If the transaction is incidental to the taxpayer’s regular business activity, then it is not a casual transaction and is considered business activity for SBTA purposes.

The word “incidental” is not defined in the statute. Applying the principles of statutory construction, the Court in *Manske* interpreted the word “incidental” by consulting a dictionary. The Court stated,

Black’s Law Dictionary (7th ed.) defines “incidental” to mean: “Subordinate to something of greater importance; having a minor role” *The American Heritage Dictionary, Second College Edition* (1982) defines “incidental as follows: “Occurring or likely to occur as an unpredictable or minor concomitant. . . . Of a minor, casual, or subordinate nature. . . . A minor concomitant circumstance, event, item, or expense.” [*Manske*, 265 Mich App at 461.]

The *Manske* Court concluded that, regardless of which dictionary’s definition it applied, the word “incidental” referred to something minor and of little importance. *Id.* The Court then stated, “Transferring plaintiff’s ownership interest was a major event, a significant act in a financial sense that extinguished plaintiff’s business interest in the development in question.” *Id.* It was stipulated in *Manske* that the plaintiff’s sole business activity was the operation of the hotel. *Id.* *Manske*, accordingly, held that granting the deed in lieu of foreclosure was a casual transaction and the income received from it was, therefore, not taxable business activity under the SBTA. *Id.* at 461-462.

The tribunal here correctly applied the analysis in *Manske* to the facts of this case. Comparing the characteristics of petitioner's business activity to the sale of its interest in Depsly, the tribunal stated,

In this case, Petitioner's sole asset was its 50% ownership interest in Depsly. At no time during petitioner's existence did petitioner have any other assets, nor did petitioner sell any other assets. Petitioner was formed exclusively to be a passive, limited investor in Depsly for the operation of Pontrail Apartments. . . . The characteristics of [the asset distribution] were not similar to the activity Petitioner engaged in prior to the sale of its ownership interest.

The tribunal also held that the asset disposition was not incidental to petitioner's regular business activity because, just like in *Manske*, the sale of petitioner's sole asset "'was a major event, a significant act in a financial sense that extinguished [petitioner's] business interest' in Depsly."

Respondent argues that *Manske* is inapplicable because it is factually distinguishable from this case. In *Manske*, it was stipulated that the taxpayer's sole business purpose was the operation of a hotel. *Id.* at 461. Respondent avers that this stipulation limits *Manske* to its facts and that *Manske* does not apply when, as respondent contends, petitioner's stated purpose is investment.

We do not find this distinction to have any practical meaning. *Manske* applied the plain, unambiguous language of the statute and held that courts must compare the transaction at issue with the taxpayers "repeated and successive transactions." *Id.* at 460. The statute does not call for an inquiry into the purpose of the business as stated in its founding documents. Even if respondent were correct that *Manske* is not controlling here, the plain language of the statute is controlling and requires the same result.

Respondent further argues that petitioner's asset disposition is not a casual transaction because the sale of its business interest is "related and consistent with [petitioner's] regular business of ongoing operations and investing." This argument is not supported by the law or the facts. Other than its interest in Depsly, petitioner did not hold any other assets. Petitioner was not engaged in buying and selling business assets for gain. The asset disposition was not related and was not consistent with petitioner's ongoing operations. Similar to the situation in *Manske*, the asset disposition effectively ended petitioner's ongoing operations.

Furthermore, looking past *Manske*, the SBTA's test is whether the transaction at issue is "in the ordinary course of repeated and successive transactions of a like character." MCL 208.4(1). To avoid exclusion from the SBTA, the transaction must be of like character to the taxpayer's repeated and successive transactions. Petitioner's sale of its sole business asset was a one-time transaction, so it cannot be considered in the ordinary course of repeated and successive transactions.

The conclusion that petitioner's asset disposition was a causal transaction is consistent with the purpose of the SBTA, which is to impose a tax on value-adding economic activity and

not on income. *ANR Pipeline*, 266 Mich App at 198. The gain from the sale itself was a capital gain for petitioner, but was not itself value-adding economic activity.

Affirmed.

/s/ Pat M. Donofrio
/s/ Henry William Saad
/s/ Patrick M. Meter