

STATE OF MICHIGAN
COURT OF APPEALS

BNP MEDIA II, LLC,

Plaintiff-Appellee,

v

DEPARTMENT OF TREASURY,

Defendant-Appellant.

UNPUBLISHED

May 20, 2014

No. 314458

Court of Claims

LC No. 11-000052-MT

Before: FITZGERALD, P.J., and SAAD and WHITBECK, JJ.

PER CURIAM.

Defendant, Department of Treasury, appeals as of right the trial court's order granting summary disposition under MCR 2.116(C)(10) in favor of BNP Media II, LLC. The trial court ordered the Department to refund \$219,094.23 on the basis that BNP Media is in the business of selling tangible personal property rather than services, and thus it properly apportioned its sales under the Single Business Tax Act.¹ We affirm.

I. FACTS

A. BACKGROUND FACTS

BNP Media publishes and circulates business-to-business trade journals. BNP Media's trade journals contain articles of interest to members of various industries. BNP Media creates the journals' contents, then digitally transmits them to independent printers, who print them and mail them to BNP Media's subscribers. Many of BNP Media's subscribers and independent printers are located outside Michigan. Less than .02% of BNP Media's subscribers pay for their subscriptions: the vast majority are "qualified customers" who receive free subscriptions. The journals also contain advertisements. Between 2004 and 2007, BNP Media received 95% of its revenue from advertising, and 5% of its revenue from subscriptions.

¹ MCL 208.1 *et seq.*, repealed by 2006 PA 325, effective December 31, 2007. We cite the former version of the Single Business Tax Act throughout this opinion.

BNP Media characterized its revenues as coming from the sale of tangible personal property, and apportioned its revenue on the basis of the destination states of the journals, rather than entirely to Michigan, for the tax years from 2004 to 2007. The Department audited BNP Media and concluded that BNP Media sells services rather than tangible personal property, because its revenues primarily come from advertising. The Department asserted that, as a servicer who conducted the majority of its business activity in Michigan, BNP Media should have apportioned its revenues entirely to Michigan. Accordingly, the Department asserted a deficiency of \$169,643 plus interest of \$49,451.23.

B. PROCEDURAL HISTORY

BNP Media paid the deficiency and later filed suit in the Michigan Court of Claims, seeking a refund. BNP Media asserted that the Department incorrectly concluded that its business activity was selling services, rather than tangible personal property.

During discovery, BNP Media sought production of internal Department memoranda discussing the apportionment of a taxpayer's tax base when the taxpayer produces, publishes, or circulates publications similar to trade journals. The Department refused to comply with BNP Media's request, stating that MCL 205.28(1)(f) and the deliberate process privilege protected the documents that BNP Media sought. The trial court ordered the Department to produce the documents, and it produced some of the documents and a privilege log. After an in camera review of the documents on the Department's privilege log, the trial court ordered the Department to produce six documents. The Department sought leave to appeal the trial court's order regarding four of the documents, asserting that they were protected by the deliberative process privilege.

While the Department's appeal was pending, BNP Media moved for summary disposition under MCR 2.116(C)(10). The trial court concluded that BNP Media's business was selling tangible personal property. The trial court accepted the Department's finding that BNP Media engaged in two activities: sale of advertising space in journals, and the sale of the journals themselves. The trial court concluded that the Michigan Supreme Court's decision in *Catalina Marketing Sales Corp v Department of Treasury*,² addressed the distinction between the transfer of tangible personal property and the provision of services. The trial court reasoned that BNP Media's advertising sales were "inextricably linked" to its circulation of the printed journals. The trial court also reasoned that BNP Media's case required a different outcome than *Catalina* because BNP Media did not provide advertising or marketing services, it created a product, and it did not match advertisers to customers. The trial court granted BNP Media's motion for summary disposition under MCR 2.116(C)(10).

This Court dismissed the Department's pending appeal as moot on the basis that the Department could address its discovery concerns in its appeal of right.³ The Department thus

² *Catalina Mktg Sales Corp v Dep't of Treasury*, 470 Mich 13, 14; 678 NW2d 619 (2004).

³ *BNP Media II LLC v Dep't of Treasury*, unpublished order of the Court of Appeals entered February 4, 2013 (Docket No. 309471).

presents two issues on appeal: the appropriateness of summary disposition, and the application of the deliberative process privilege to certain documents.

II. SALES UNDER THE SINGLE BUSINESS TAX ACT

A. STANDARD OF REVIEW

This Court reviews de novo the trial court's determination on a motion for summary disposition.⁴ A party is entitled to summary disposition under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." A genuine issue of material fact exists if, when viewing the record in the light most favorable to the nonmoving party, reasonable minds could differ on the issue.⁵

B. APPORTIONMENT UNDER THE SINGLE BUSINESS TAX ACT

The Single Business Tax Act taxed businesses for the privilege of conducting business activity in Michigan.⁶ A business with taxable activity both inside and outside Michigan apportioned its tax base under a weighted formula, which considered the business's property, payroll, and sales.⁷ Sales included, among other things, the transfer of tangible personal property or performance of services.⁸

The sales factor taxed a percentage of the taxpayer's total sales *in Michigan* during the tax year.⁹ Whether a sale occurred "in Michigan" depended on whether the sale involved a service or tangible personal property. A sale of tangible personal property occurred in Michigan if the property was "shipped or delivered to a purchaser . . . within this state regardless of the free on board point or other conditions of the sales."¹⁰ A sale of services occurred in Michigan if the taxpayer performed a greater proportion of the services inside Michigan than outside Michigan.¹¹

⁴ *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999); *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008).

⁵ *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

⁶ MCL 208.31; *ANR Pipeline Co v Dep't of Treasury*, 266 Mich App 190, 198; 699 NW2d 707 (2005).

⁷ MCL 208.40.

⁸ MCL 208.7(1)(a).

⁹ MCL 208.51.

¹⁰ MCL 208.52(b).

¹¹ MCL 208.53(b).

C. THE ISSUE: MIXED TANGIBLE PROPERTY AND SERVICE TRANSACTIONS

The parties' briefs on appeal lay out the issues in this case with admirable clarity. The Department asserts that BNP Media obtains the majority of its revenue from advertising and is thus engaged in the business of advertising, which is a service. Under the Department's logic, because BNP Media performs a greater proportion of this business activity in Michigan than outside Michigan, BNP Media should have apportioned its revenues entirely to Michigan. BNP Media responds that it creates content for, and produces, trade journals, and advertising is incidental to its primary purpose. Under BNP's logic, because it sells tangible personal property, it is entitled to apportion its sales on the basis of products shipped to customers in Michigan. Thus, the question in this case comes down to this: does the business of BNP Media, which sells both advertising and tangible trade journals, primarily consist of services or tangible personal property?

D. RESOLVING THE ISSUE

1. BINDING PRECEDENT

In *Midwest Bus Corp v Department of Treasury*, this Court adopted the test in *Catalina* to determine whether a bus refurbishing company was providing a good or a service under the Single Business Tax Act in a mixed service transaction.¹² Accordingly, *Catalina* provides the test to determine whether a mixed tangible property and service transaction is a sale of tangible property or of services under the Single Business Tax Act.

In *Catalina*, the taxpayer challenged the Department's assessment of sales tax under the General Sales Tax Act¹³ for its Checkout Coupon program.¹⁴ The taxpayer provided its consumers with mass marketing strategies, including the Checkout Coupon program.¹⁵ The program collected consumer data and allowed targeted product advertising.¹⁶ The program could do three things: create a redeemable coupon, create an advertisement, or do nothing.¹⁷

The Tax Tribunal applied the "real object" test to conclude that the taxpayer was selling tangible property, not services.¹⁸ The real object test provides that a mixed transaction is a sale of property if, from the perspective of the clients, the desired end product is tangible personal

¹² *Midwest Bus Corp v Dep't of Treas*, 288 Mich App 334, 339; 793 NW2d 246 (2010).

¹³ MCL 205.52 *et seq.*

¹⁴ *Catalina Mktg Sales Corp*, 470 Mich at 14.

¹⁵ *Id.* at 15.

¹⁶ *Id.* at 15-16.

¹⁷ *Id.* at 16-17.

¹⁸ *Id.* at 20-21.

property—such as a coupon.¹⁹ Because the advertiser’s desired end product was a slip of paper, the Tax Tribunal concluded that the taxpayer’s transaction was a sale of the coupon, which is tangible personal property.²⁰

The Michigan Supreme Court rejected the real object test, and instead adopted the “incidental to service” test to categorize “a business relationship that involves both the provision of services and the transfer of tangible personal property as either a service or a tangible personal property transaction”²¹ The Michigan Supreme Court explained that the incidental to service 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.”²² If the client is paying consideration for the service provided, rather than for the tangible end product, any transfer of real property is only incidental to the service.²³ To determine whether the client is paying for a service or tangible personal property, the trial court must consider the totality of the circumstances, including:

whether the tangible personal property serves exclusively as the medium of what 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.^[24]

2. PERSUASIVE AUTHORITIES

Here, the trial court also considered two persuasive authorities. First, it considered *District of Columbia v Evening Star Newspaper Co.*²⁵

In *Evening Star*, the United States Court of Appeals for the District of Columbia sought to determine the taxpayer’s net income from activity in the District.²⁶ The taxpayer was a newspaper incorporated in the district, challenging a tax “for the privilege of carrying on or engaging in any trade or business within the District.”²⁷ The taxpayer received revenue from

¹⁹ *Id.* at 20.

²⁰ *Id.* at 21.

²¹ *Id.* at 14.

²² *Id.* at 24-25.

²³ *Id.* at 25.

²⁴ *Id.* at 26.

²⁵ *District of Columbia v Evening Star Newspaper Co.*, 106 US App DC 360; 273 F2d 95 (1959).

²⁶ *Id.* at 363.

²⁷ *Id.* at 362.

selling the papers, selling advertising space, and receiving rents and dividends.²⁸ The taxpayer contended that it was entitled to apportion its tax base for newspapers outside the district.²⁹

Among other legal issues, the court considered whether the taxpayer's circulation and advertising revenue must be separated for apportionment.³⁰ The court concluded that "separation is neither necessary nor warranted."³¹ The court reasoned that circulation and advertising were so connected that separating them would be "arbitrary and artificial" because the revenues "rest ultimately upon circulation and readership."³² The court reasoned that there would be no advertising if no one bought and read the papers.³³ The court concluded that revenue from circulation and advertising from the sales of tangible personal property must be considered and apportioned as a single revenue.³⁴

Second, the trial court considered the Uniform Division of Income for Tax Purposes Act.³⁵ The Uniform Division Act clearly states that it does not apply to "the reporting or payment of any tax other than an income tax."³⁶ The regulation on which BNP Media seeks to rely is a model regulation, not part of the regulations adopted by our Legislature. This model regulation provides that the taxpayer should apportion its revenues from advertising on the basis of the taxpayer's circulation:

. . . [G]ross receipts derived from advertising and the sale, rental or other use of the taxpayer's customer lists . . . shall be attributed to this state as determined by the taxpayer's "circulation factor" during the tax period. The circulation factor shall be determined for each individual publication by the taxpayer of printed material containing advertising and shall be equal to the ratio that the taxpayer's in-state circulation to purchases and subscribers of its printed materials bears to its total circulation to purchases and subscribers everywhere.^[37]

²⁸ *Id.* at 365.

²⁹ *Id.* at 362, 365.

³⁰ *Id.* at 368.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ MCL 205.581 *et seq.*

³⁶ MCL 205.581(3).

³⁷ Reg.IV.18.(j).(3)(iii)(B)(2). The text of this model regulation is available at the Multistate Tax Commission's website, <http://www.mtc.gov/Uniformity.aspx?id=496> [click "Special Rule: Publishing] (last accessed May 1, 2014).

3. THE PERSUASIVE PRECEDENT IS NOT PERSUASIVE

Because the trial court considered the Uniform Division Act and *Evening Star* in addition to *Catalina*, we will briefly address these authorities. We conclude that neither authority is persuasive. The Uniform Division Act is not persuasive because no language in the model regulation would override the plain language of MCL 205.581(3), which states that the Uniform Division Act applies only to income taxes.

We also conclude that *Evening Star* does not address the question before this Court. Michigan courts may consider analogous federal court decisions for guidance, including decisions of lower federal courts.³⁸ *Evening Star* provides authority from which to conclude that courts may consider circulation and advertising a single form of revenue. But here, the Department is *not* asking us to divide circulation and advertising into different streams of revenue for separate apportionment. The question here is: in this specific instance, is BNP Media providing its clients tangible personal property or a service? In order to answer this question, courts must apply *Catalina*.³⁹ Thus, we conclude that *Evening Star* is not persuasive.

4. APPLYING THE STANDARDS

The Department contends that the trial court erred when it applied *Catalina* but concluded that *Catalina* is factually distinguishable and therefore reached a different result. We disagree.

As an initial matter, we reject BNP Media's contention that the fact that its advertisers are actually paying for physical pieces of paper that contain advertisements on them is determinative in this case. BNP Media's argument is essentially the impermissible "real object" test.⁴⁰ What BNP Media's advertisers sought is only one factor in the entire business transaction. Similarly, we reject the Department's contention that the fact BNP Media received vastly more revenue from advertisements than from subscription sales is determinative. Again, this fact is certainly a factor, but it is only one factor relevant to the whole transaction.

Under *Catalina*, the trial court must consider the totality of the circumstances, including:

what 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

³⁸ *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004).

³⁹ See *Midwest Bus Corp*, 288 Mich App at 339-340.

⁴⁰ See *Catalina Mktg Sales Corp*, 470 Mich at 24.

contributed to the value of the physical item that is transferred, and any other factors relevant to the particular transaction.^[41]

Here, some factors weigh in favor of, and some weigh against, BNP Media's position that its business activity is primarily providing tangible personal property. BNP Media's subscribers seek the trade journals. BNP Media's advertisers seek to distribute advertisements. BNP Media does not target markets or provide other marketing services: advertisers contact BNP Media if they wish to advertise in BNP Media's trade journals. BNP Media is not in the business of creating advertising, it creates articles for its trade journals, which it distributes. BNP Media's circulation is directly tied to its advertising because, if it does not circulate journals, it will not receive advertising revenue. BNP Media's trade journals are not provided without advertising. BNP Media does not charge the majority of its subscribers, but does charge for some subscriptions, and thus receives revenues for distributing the trade journals.

The trial court considered these factors and concluded that BNP Media is engaged in the business of providing tangible personal property. The trial court reasoned that BNP Media's advertising sales were "inextricably linked" to its circulation of the printed journals, that BNP Media did not provide advertising or marketing services, that it creates and distributes a tangible product, and that it does not match advertisers to customers. We conclude that the trial court did not err when, viewing the totality of the circumstances, it concluded that BNP Media's services were incidental and that the production and distribution of trade journals was BNP Media's business activity. Thus, the trial court properly granted summary disposition under MCR 2.116(C)(10).

III. DELIBERATIVE PROCESS PRIVILEGE

The Department contends that the trial court impermissibly ordered the production of documents protected under MCL 205.28(1)(f) and the deliberative process privilege. We conclude that this issue is moot.

Michigan courts exist to decide actual cases and controversies, and thus will not decide moot issues.⁴² A matter is moot if this Court's ruling "cannot for any reason have a practical legal effect on the existing controversy."⁴³

We have concluded that the trial court properly granted BNP Media's motion for summary disposition under MCR 2.116(C)(10). Given our conclusion, resolution of the parties' discovery dispute would have no practical legal effect on this controversy. Therefore, we decline to review this issue.

⁴¹ *Id.* at 26.

⁴² *Federated Publications, Inc v City of Lansing*, 467 Mich 98, 112; 649 NW2d 383 (2002).

⁴³ *General Motors Corp v Dep't of Treasury*, 290 Mich App 355, 386; 803 NW2d 698 (2010); *Federated Publications, Inc*, 467 Mich at 112.

IV. CONCLUSION

We conclude that the trial court properly granted BNP Media's motion for summary disposition under MCR 2.116(C)(10), concluding that advertising was incidental to BNP Media's business activity. We decline to review whether the trial court improperly ordered the Department to produce privileged documents because the issue is moot.

We affirm.

/s/ E. Thomas Fitzgerald
/s/ Henry William Saad
/s/ William C. Whitbeck