STATE OF MICHIGAN

COURT OF APPEALS

MICHIGAN BELL TELEPHONE COMPANY,

Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,

Defendant-Appellee.

UNPUBLISHED
January 29, 2009

No. 279401
Court of Claims
LC No. 06-000033-MT

MICHIGAN BELL TELEPHONE COMPANY,

Plaintiff-Appellee,

v

DEPARTMENT OF TREASURY,

Defendant-Appellant.

No. 279496
Court of Claims
LC No. 06-000033-MT

Before: Saad, C.J., and Fitzgerald and Beckering, JJ.

PER CURIAM.

In docket number 279401, plaintiff Michigan Bell appeals as of right the order partially granting summary disposition pursuant to MCL 2.116(I)(2) in favor of defendant Department of Treasury. In docket number 279496, the treasury department appeals as of right the order partially granting summary disposition pursuant to MCR 2.116(C)(10) in favor of Michigan Bell. We affirm in part and reverse in part.

Facts and Procedural History

The treasury department is responsible for the administration, enforcement, and collection of single business tax owed to the state of Michigan in accordance with the Michigan Single Business Tax Act, MCL 208.1 *et seq*. This dispute arises from Michigan Bell's payment of single business tax for the period of January 1, 1999, to December 31, 2002. Michigan Bell filed its single business tax returns for those years and included monies received from customers as late payment fees[1] in the calculation of both gross receipts and sales.

In 2004, the treasury department conducted an audit of Michigan Bell for tax periods occurring in 1999, 2000, 2001, and 2002. The treasury department presented Michigan Bell with revised audit work papers and an audit determination letter indicating that the department owed Michigan Bell a refund of $301,362.00 in overpaid single business taxes.

According to Michigan Bell's complaint, it thereafter informed the treasury department's auditor that it had erroneously included monies received as "interest" from customers for late payment of their telephone bills in the calculation of gross receipts and sales. Michigan Bell asserted that monies received as late payment fees constitute interest that is not taxable under the SBTA.

The treasury department submitted the audit work papers to the audit division for final approval, but did not issue an intent to assess or final assessment to Michigan Bell. In December 2005, the treasury department issued a refund check to Michigan Bell in the amount of $301,362. Michigan Bell thereafter sought a refund from the treasury department in the amount of $639,973 in taxes and $135,779 in interest, for a total refund of $775,474 for the years in issue, plus statutory interest, costs, and attorney fees.

Michigan Bell filed a motion for summary disposition under MCR 2.116(C)(10), and defendant filed a response seeking summary disposition under MCR 2.116(I)(2). The trial court granted in part and denied in part Michigan Bell's motion and granted partial summary disposition in favor of the treasury department.

The trial court held that late payment fees do not constitute interest and, therefore, the monies received through the imposition of late payment fees is properly includable in Michigan Bell's tax base or gross receipts for purposes of determining single business tax liability for the years in dispute. The court further held that Michigan Bell is entitled to interest on the amount of single business tax refunded to it, and that this interest must be paid from 45 days after the date established by law for the filing of Michigan Bell's 2002 SBT tax return.

Docket No. 279401

[1] The Michigan Public Service Commission has statutory jurisdiction and authority over regulated gas, electric, and telecommunication providers, including Michigan Bell. Michigan Bell operates pursuant to a tariff that includes a description of the company's services, rates, and charges, as well as the governing rules, regulations, and practices relating to those services. During the years in issue, Michigan Bell's tariff provided that any customer that failed to pay their monthly bill by the due date owed a late payment charge basedupon a percentage of the amount outstanding – 1.5% for business customers and 5% for residential customers.

We must determine whether late payment fees collected by Michigan Bell on customers' unpaid telephone bills constitute interest under the SBTA. Questions of statutory interpretation are reviewed de novo. *In re MCI Telecommunications*, 460 Mich 396, 413; 596 NW2d 164 (1999).

Under the SBTA, "interest" received by a single business is excluded from its tax base and, therefore, not subject to tax. The term "interest" is not defined by the SBTA. "Interest is compensation allowed by law or fixed by the respective parties for the use or forbearance of money, 'a charge for the loan or forbearance of money,' or a sum paid for the use of money, or for the delay in payment of money." *Town & Country Dodge v Dep't of Treasury*, 420 Mich 226, 242; 362 NW2d 618 (1984) (citations omitted).

In *Town & Country,* a car dealership entered into a business relationship with a financial institution whereby the financial institution would provide a rebate, or kickback, to the dealership for each vehicle contract that was assigned to the financial institution. The dealership claimed that the rebate was "interest income" from the financial institution. The Court held that although the interest portion of the payment would be considered interest in the hands of the financial institution, the payment from the financial institution to the dealership was not paid for the use or forbearance from use of money. *Id.*

In *Perry Drug Stores, Inc v Dep't of Treasury*, 229 Mich App 453; 582 NW2d 533 (1998), this Court considered whether purchase discounts constituted "interest" under the SBTA. In *Perry Drug*, the plaintiff was a prescription drug retailer that received discounts from the prompt payment of purchases on credit. *Id.* at 454. The retailer purchased goods at the full invoice price, but would receive a rebate on the full invoice price if the retailer submitted payment within ten days. *Id.* at 463. The retailer asserted that the discounts should be considered interest income and not subject to single business tax partly because the rebate involved a time element. *Id.* at 462. This Court disagreed, finding that the purchase discounts taken were more akin to a reduction in the purchase cost of goods than to interest on money invested. *Id.* at 464. This court also noted that there was no contractual forbearance of the use of the plaintiff's money since the plaintiff could elect whether to take the discount. *Id.* at 463.

As in *Town & Country* and *Perry Drug*, the customer late payment fees paid to Michigan Bell are not in the form of interest on money invested, and are not generated by a company in the business of lending money. Further, even though Michigan Bell's tariffs provide for late payment charges, there is no contractual forbearance of the use of Michigan Bell's money. The incidental late payment fees are more in line with a penalty charge than an interest charge related to the use of money. The gross receipts received from the late fees imposed on late-paying customers constitute payment for the telephone services sold as much as do gross receipts derived from rates applicable to timely payments.

Plaintiff argues that the income received as late payment fees meets all of the criteria of "interest" under the SBTA, including those requirements under defendant's guidance of what constitutes interest. Plaintiff noted that defendant issued an internal policy directive, which stated its position that the following four factors must be satisfied before a charge is qualified as "interest:"

1. A debtor-creditor relationship must exist between the parties.

2. The charge must be based on a percentage of an account balance and not a flat fee.

3. It must be a rate fixed pursuant to contract or law.

4. It must reflect the time value of money.

Plaintiff meets the requirements of items two and three listed above, based on the fact that plaintiff charges its customers a percentage of an account balance, and the rate is fixed pursuant to the established tariff. Arguably, there is a debtor-creditor relationship once plaintiff's customers fail to timely pay their bills. However, plaintiff has not established that the late payment fee percentage charged reflects the time value of money.

"The term 'time value of money' is a term of art in the financial community and refers to the concept that a dollar received today is worth more than a dollar to be received in the future." *Perry Drug, supra* at 458 n 4. For example, with a common loan a contract is signed between a bank and a borrower that provides that the bank will give money to the borrower if the borrower repays the money plus interest. The bank determines the borrower's interest payment by looking at the amount the bank could earn, typically through investments, with the money that it is agreeing to lend. The potential bank earnings on the money loaned out allows the bank to generate the daily interest rate in order to recoup the time value of money. Therefore, at the time the contract is signed, the bank is bound to forbear the use of its money, but it will be reimbursed for the cost of the loan with daily interest, correlating to the determined time value of money.

The time value of money is consistent based on the environment in the economic marketplace. Here, plaintiff argues that the late fee payments reflect the time value of money, but this argument fails. By plaintiff's own concession, it charges a different late payment fee based on whether the customer has a residential or business account – one and one-half percent for business accounts and five percent for residential accounts. If these late payment fees were truly reflective of the time value of money, they would be the same for all customers as each dollar can generate an equivalent return. Additionally, if the late payment fee was in place to reflect interest related to the time value of money, the fee would be charged on the full amount due on the bill, as it would be in place to reimburse plaintiff for the late payment. Here, the late payment fee did not apply to federal excise tax charges, and for residential customers in 1999 the fee did not apply to basic local exchange services and interzone calling. This distinction does not harmonize with interest that reflects a repayment based on the time value of money.

To accurately reflect the time value of money, an interest charge would vary depending on the date of the reimbursement. With plaintiff's situation, the customer's late payment fee is assessed on a monthly basis and not in accordance with a daily rate. Therefore, if a customer repays the funds on day one of the following month or day 29, the late payment fee assessed is the same. Although this is sufficient under a legally binding contract, it retracts from plaintiff's argument that the late payment is "interest" that reflects the time value of money.

For the foregoing reasons, we find that monies received as late payment fees are not "interest" under the SBTA, as the fees do not accurately reflect the time value of money.

Michigan Bell next argues that the trial court incorrectly determined that no contract existed between plaintiff and its customers. Because this argument has no bearing on the legal conclusion of this case, we need not consider it. In particular, regardless of the existence of any such contractual relationship, the late payment fees do not constitute interest for SBT purposes.

Michigan Bell finally argues that partial summary disposition in favor of defendant was improper because defendant did not raise the issue of whether the late payment fees are "interest" as an affirmative defense, and did not raise the issue until its responsive pleading to plaintiff's motion for summary disposition, thereby failing to give plaintiff proper notice of the argument. We disagree. We review a lower court's decision on a motion for summary disposition de novo, *Collins v Comerica Bank*, 468 Mich 628, 631; 664 NW2d 713 (2003), and we review de novo whether a particular ground for dismissal is an affirmative defense, *Citizens Ins Co of America v Juno Lighting, Inc*, 247 Mich App 236, 241; 635 NW2d 379 (2001).

Summary disposition under MCR 2.116(I)(2) can be granted for the party opposing a motion for summary disposition "if it appears to the court that the opposing party, rather than the moving party, is entitled to judgment." *Owczarek v State of Michigan*, 276 Mich App 602, 609; 742 NW2d 380 (2007); MCR 2.116(I)(2).

An affirmative defense denies that the plaintiff is entitled to recovery on a claim for a reason not included in plaintiff's pleadings. *Citizens Ins Co*, *supra* at 241. Some examples of affirmative defenses are contributory negligence, assumption of risk, release, satisfaction, discharge, fraud, duress, estoppel, statute of frauds, statute of limitations, immunity, and failure of consideration. *Id*. Because plaintiff's complaint, as well as defendant's audit results provided to plaintiff, outlines the issue of late payment fees not being "interest" under the SBTA, it is unreasonable to conclude that this is a new theory or defense, or an ambush on Michigan Bell.

Michigan Bell was on notice via defendant's audits that the late payments fees that plaintiff claimed were "interest" were being challenged as merely late payment fees occurring in the normal course of business. Thus, Michigan Bell cannot successfully argue that it was ambushed by defendant's theory of recovery raised in response to its motion for summary disposition.

Plaintiff cites *Montgomery Ward & Co, Inc v Dep't of Treasury*, 191 Mich App 674; 478 NW2d 745 (1991), for the proposition that a new theory of liability in a counterclaim is unacceptable unless pled as an affirmative defense. However, this case differs because the theory raised in defendant's response to plaintiff's motion for summary disposition is not a new theory, and is not based on a different set of operative facts or a different amount of tax. Therefore, the Court of Claims did not err in granting summary disposition to defendant pursuant to MCR 2.116(I)(2).

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Defendant argues that it is not required to pay interest on the refund provided to plaintiff for the 2002 year. We agree. We review a lower court's decision on a motion for summary disposition de novo, *Collins*, *supra* at 631, and we review questions of statutory interpretation de novo. *In re MCI Telecommunications*, *supra* at 413.

The goal of statutory interpretation is to give effect to the intent of the Legislature. *Gladych v New Family Homes, Inc*, 468 Mich 594, 597; 64 NW2d 705 (2003). Here, the statute in question pertains to tax credits or refunds and states:

> (1) The department shall credit or refund an overpayment of taxes; taxes, penalties, and interest erroneously assessed and collected; and taxes, penalties, and interest that are found unjustly assessed, excessive in amount, or wrongfully collected with interest at the rate calculated under section 23 for deficiencies in tax payments.
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> (2) A taxpayer who paid a tax that the taxpayer claims is not due may petition the department for refund of the amount paid within the time period specified as the statute of limitations in section 27a. If a tax return reflects an overpayment or credits in excess of the tax, the declaration of that fact on the return constitutes a claim for refund. If the department agrees the claim is valid, the amount of overpayment, penalties, and interest shall be first applied to any known liability as provided in section 30a, and the excess, if any, shall be refunded to the taxpayer or credited, at the taxpayer's request, against any current or subsequent tax liability.
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> (3) The department shall certify a refund to the state disbursing authority who shall pay the amount of the proceeds of the tax in accordance with the accounting laws of the state. Interest at the rate calculated under section 23 for deficiencies in tax payments shall be added to the refund commencing 45 days after the claim is filed or 45 days after the date established by law for the filing of the return, whichever is later. Interest on refunds intercepted and applied as provided in section 30a shall cease as of the date of interception. Refunds for amounts of less than $1.00 shall not be paid. [MCL 205.30 (citations removed).]

Defendant argues that MCL 205.30(2) dictates that defendant is not obliged to pay interest to a taxpayer until a refund is filed, and then interest is only due if the refund payment is not made within 45 days from the date of the claim, or 45 days from the date the return was due, whichever is later. Plaintiff relies on MCL 205.30(1) and argues that defendant is required to refund any overpayment of tax, along with the related interest, for any amount which defendant determines has been overpaid and that interest should accrue from 45 days after the return was due.

Once defendant determines that a taxpayer is entitled to a refund because of an overpayment of taxes, interest will begin to accrue 45 days after the claim is filed. In *Lindsay Anderson Sagar Trust v Dep't of Treasury*, 204 Mich App 128, 131-132; 514 NW2d 514 (1994), the plaintiff filed a claim for a refund based on an overpayment of taxes to the defendant. The defendant argued that interest did not accrue on the plaintiff's original refund claim, but instead would accrue on the date the plaintiff provided additional information the defendant needed to verify that the claim was in fact valid.

This Court held that a claim for a refund is considered filed on the date defendant receives adequate notice of the claim, and not when defendant receives the information sufficient to process the claim. *Lindsay Anderson Sagar Trust, supra* at 132. The Court reasoned that this reading of the statute is consistent with the policy to construe tax statutes in favor of the taxpayer. *Id.*, citing *F M Sibley Lumber Co v Dep't of Revenue*, 311 Mich 654, 660; 19 NW2d 132 (1945).

The Michigan Supreme Court has further addressed what date a document is considered filed for tax purposes where the taxpayer does not make a claim for a refund. In *NSK Corp v Dep't of Treasury*, 481 Mich 884; 748 NW2d 884 (2008), the Court held that where the defendant discovers an overpayment of tax and notifies the taxpayer of such, the claim for a refund is considered filed when the taxpayer responds to that notification. In such a case, interest accrual starts 45 days after the taxpayer responds to the notification from defendant.

As in *NSK*, plaintiff did not file a claim for a refund, but instead defendant discovered the overpayment and notified plaintiff by audit determination letter. However, unlike in *NSK*, plaintiff did not submit a response to the audit determination letter that would establish the beginning of the 45-day window for interest accrual purposes. Nevertheless, using the same line of reasoning used in *NSK*, and considering the earliest date that defendant had notice of plaintiff's overpayment, we conclude that the proper date to use is the date when defendant sent the audit determination to plaintiff in order to determine when the 45-day window began for interest purposes. Using the date defendant sent the audit determination letter, or November 28, 2005, defendant would have been required to send the repayment within 45 days, or by January 12, 2006. Thus, because defendant sent the refund check to plaintiff on December 19, 2005, plaintiff is not entitled to a refund of interest corresponding to its tax overpayment. Therefore, we reverse the decision of the Court of Claims that plaintiff is entitled to an interest payment on the 2002 refund.

We affirm the Court of Claims holding that the disputed late fee income did not constitute interest for single business tax purposes, but we reverse the award of interest on plaintiff's 2002 single business tax refund. We remand this case to the Court of Claims for entry of an order consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ E. Thomas Fitzgerald
/s/ Jane M. Beckering