

STATE OF MICHIGAN
IN THE SUPREME COURT

BETTEN AUTO CENTER, INC.,
~~a Michigan corporation,~~

Plaintiff-Appellee,

v

~~MICHIGAN~~ DEPARTMENT OF TREASURY,

Defendant-Appellant. *OK*

Supreme Court No.

Court of Appeals No. 265976

*apu 8/11/06
Rec 9/15/06*

Court of Claims

Docket No. 04-95-MT

W. Gillette

BETTEN MOTOR SALES, INC.,
~~a Michigan corporation,~~
D/B/A TOYOTA OF GRAND RAPIDS,

Plaintiff-Appellee,

v

~~MICHIGAN~~ DEPARTMENT OF TREASURY,

Defendant-Appellant. *OK*

Supreme Court No.

Court of Appeals No. 265977

Court of Claims

Docket No. 04-96-MT

(consolidated)

BETTEN-FRIENDLY MOTORS COMPANY,
D/B/A FAMILY AUTO CENTER,
~~a Michigan corporation,~~

Plaintiff-Appellee,

v

MICHIGAN DEPARTMENT OF TREASURY,

Defendant-Appellant. *OK*

Supreme Court No.

Court of Appeals No. 265978

Court of Claims

Docket No. 04-97-MT

(consolidated)

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APPLICATION FOR LEAVE TO APPEAL

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QUESTION PRESENTED FOR REVIEW

- I. MCL § 205.97 provides that property that is converted from an exempt use to a taxable use is subject to Michigan's use tax. Betten Auto Center is in the business of retail automotive sales and allows its employees to take vehicles that are listed for sale by Betten home for the employees' personal use outside of work hours. "Consumer" is defined by the Use Tax Act and encompasses Betten's use of the subject vehicles. The Court of Appeals used a dictionary definition of "consumer" when it held that Betten was not a consumer of the vehicles. Did the Court of Appeals err when it held that Betten did not consume the subject vehicles and that the use of the vehicles was exempt from use tax?**

STATEMENT OF ORDER APPEALED FROM, GROUNDS, AND RELIEF SOUGHT

Defendant-Appellant, Michigan Department of Treasury, seeks leave to appeal from the Court of Appeals' August 1, 2006, opinion affirming in part and reversing in part the Court of Claims grant of summary disposition to the Plaintiff-Appellee, Betten Auto Center. The Department seeks to appeal the Court of Appeals' holding that the Plaintiff-Appellee, Betten Auto Center, is entitled to claim the resale exemption from the Michigan Use Tax Act for all vehicles used as demonstrators prior to March 27, 2002. The Court's decision was based on its holding that Betten did not consume the vehicles. The Court used a dictionary definition of "consumer," when the term is defined differently by the Use Tax Act.

The issues presented in the instant application satisfy MCR 7.302(B)(2) because they hold significant public interest and are against the State. Specifically, the Department of Treasury estimates that the Court of Appeals' published decision will cost the State of Michigan hundreds of millions of dollars in revenue that will be lost to existing and future claims by companies of every type for property of every type.

The issues presented in this application also satisfy MCR 7.302(B)(3), because they involve legal principles of major significance to the State's jurisprudence. The Court's decision below is already being argued in and applied to cases involving property other than vehicles as a basis for exempting in a blanket fashion any item of tangible personal property that is eventually resold, regardless of the use to which the item is put, licensing requirements, or any other restrictions. This ignores the plain meaning of MCL § 205.97. It also renders a host of other use and sales tax exemptions superfluous and, thus, meaningless.

The Department believes that the requirements of MCR 7.302(B) are met and requests that this Court grant leave to appeal or, alternatively, peremptorily reverse the Court of Appeals

opinion and hold that Betten Auto Center is not entitled to claim the resale exemption for vehicles converted to non-exempt uses.

STATEMENT OF PROCEEDINGS AND FACTS

The matter in controversy is Treasury's denial of Betten's requests for refund of use taxes allegedly paid. The refund requests consisted of unsupported dollar amounts and cited *Crown Motors of Charlevoix, Ltd v Treasury* an unpublished *per curiam* opinion of the Court of Appeals, as the basis for the refund requests. Additionally, the case raises the issue of whether Betten is liable for use tax on the retail value of certain vehicles that it acquired for sale or whether it is exempt from use tax.

Betten is an entity engaged in the business of selling new and used vehicles at retail. Betten purchased new and used vehicles for its inventory and allowed its employees – i.e., managers, principals, and principals' spouses – to use the vehicles under the terms of demonstrator agreements.¹ The Betten employees may drive the vehicle at their personal leisure for up to 5,000 or 6, 000 miles and may drive the vehicles to and from work, sporting events, family matters, and minor trips without documenting the use.² Betten does not keep any records of the use by its employees.³

The use of the vehicles by Betten employees is a fringe benefit.⁴ Betten employees are charged a fee by Betten for the use of the vehicles. Some employees also have personal individual income attributed to them based on the use.⁵

Due to the number of vehicles sold by Betten each year, it is entitled to exempt 25 vehicles per year from use tax for use as demonstrator vehicles.⁶ This dispute arose over Betten's

¹ Exhibit A, Deposition of Thomas Fuerst ("Exh A"); Exhibit B, Deposition of Amy Medina ("Exh B"); Exhibit C, Deposition of Charles Murdoch ("Exh C");

² Exhibit D, Deposition of Rita Theeuwes ("Exh D"), pp. 31-33; Exh A, pp. 8-10, 14-16, and 19; Exh B, pp. 12-13, 15, and 22; Exh C, pp. 11-16;

³ Exh D, pp. 18-19.

⁴ Exh C, p. 16.

⁵ Exh A, pp. 20-21; Exh B, p. 25; Exh C, pp. 16-17;

⁶ See MCL § 205.94(1)(c).

attempt to exempt as demonstrator vehicles the vehicles used by its employees in excess of the 25 allowed demonstrators. In an attempt to claim a refund, Betten simply wrote a letter to Treasury indicating that it had paid use tax that should be refunded, without providing any supporting documentation.⁷ Betten did not provide Treasury with a complete itemization of those vehicles on which it claims use tax should be refunded at the time of its initial refund request, and still has not provided this complete information as of today's date.

The Michigan Department of Treasury denied Betten's refund request. Betten then filed an action for refund in the Court of Claims. Thereafter, Betten filed a Motion for Summary Disposition pursuant to MCR 2.116(C)(10) on May 18, 2005. Pursuant to a hearing held on the Motion, on August 2, 2005, the Court of Claims entered an Order granting Betten's Motion for Summary Disposition. The Department subsequently appealed the August 2nd Order, but the appeal was dismissed because the August 2nd Order did not state an amount to be refunded. Thus, the Court of Appeals did not consider the August 2nd Order to be a final order. On October 3, 2005, the Court of Claims entered an Amended Final Order. It was from this Amended Final Order that the Department appealed to the Court of Appeals.

The Department timely appealed to the Court of Appeals, where the matter was briefed and argued. On August 1, 2006, the Court of Appeals issued its opinion affirming in part and reversing in part the trial court's award of summary disposition to Betten. Both parties timely filed Motions for Reconsideration, which were both denied by the Court of Appeals Order dated September 15, 2006. The Department now requests leave to appeal to this Court the portion of the Court of Appeals decision that affirmed the trial court's holding.

⁷ See Exhibit E, Refund letters sent by Betten to Treasury ("Exh E").

ARGUMENT

I. The Court of Appeals erred when it held that Betten did not consume the vehicles and that the conversion language of MCL § 205.97 did not apply.

A. Standard of Review.

The Supreme Court reviews *de novo* both a grant of summary disposition and questions of statutory interpretation.⁸

B. Introduction

This case involves an exemption from use tax. Therefore, it is important to understand the nature of tax exemptions. An exemption from tax is not an *exception* from tax. If one is using, storing, or consuming tangible personal property in the State of Michigan, then one owes tax on that use.⁹ The Use Tax Act defines "use" as "the exercise of a right or power over tangible personal property incident to the ownership of that property including transfer of the property in a transaction where possession is given."¹⁰

But in some situations, the Legislature has excused payment of the tax. In other words, the Legislature has established two levels of tax law. On the first level, all uses are subject to tax under MCL § 205.97 – there are no exceptions. But some uses rise to a second level. On this second level, the Legislature has opted to excuse the tax due. This is why courts have held that the burden is on the taxpayer to prove that it is entitled to an exemption – because *all* uses are taxable, and the Legislature has only excused payment on *some* uses. The taxpayer must prove that its use is one of the excused uses. Consequently, the proper question in this case is whether Betten's use rose to and remained on that second level, and was thus excused.

⁸ *Fisher v Foote Memorial Hospital*, 473 Mich 888; 703 NW3d 434 (2005).

⁹ MCL § 205.93(1).

¹⁰ MCL § 205.92(b).

C. The Court of Appeals erred when it held that Betten was not a consumer and not subject to the conversion language of MCL § 205.97.

The Use Tax Act (UTA) contains a legislatively mandated definition of "consumer," which is applicable to all sections of the Act. That definition provides that a consumer is:¹¹

[T]he person who has purchased tangible personal property or services for storage, use, or other consumption in this state and includes a person acquiring tangible personal property if engaged in the business of constructing, altering, repairing, or improving the real estate of others.

MCL § 205.97 states that "[e]ach consumer storing, using or otherwise consuming in this state tangible personal property or services purchased for *or subsequently converted to* such purpose or purposes shall be liable for the tax imposed by this act" ¹² [Emphasis added.] In its August 1, 2006, opinion, the Court held that this language does not apply to the Plaintiffs in this case, because they are not the consumers of the property. But the Court mistakenly applied a dictionary definition of "consumer," when the UTA itself defines the term. The Court's application of the prohibited dictionary definition confuses the plain meaning of the statute and will lead to incorrect application of the statute.

1. Established rules of statutory construction dictate that the Court must apply statutory definitions where available.

It is a well-settled rule of statutory construction that, if a statute defines the subject term, the statutory definition must be applied.¹³ In such a case, the courts may *not* rely on a dictionary

¹¹ MCL § 205.92(g).

¹² MCL § 205.92.

¹³ *WS Butterfield Theatres Inc v Dep't of Revenue*, 353 Mich 345, 349-350; 91 NW2d 269 (1958).

definition.¹⁴ In *WS Butterfield Theatres Inc v Dep't of Revenue*, this Court stated this rule as follows¹⁵:

With a range of meanings so diverse, and shades of meaning so abstruse, varying, indeed, with statutory purpose, as we range fields of law from the criminal to the commercial to the governmental, not surprising is it that we find our statute "supplying its own glossary." We are not left dependent upon dialect, colloquialism, the language of the arts and sciences, or even the common understanding of the man in the street. We have the act itself. We need not, indeed we *must* not, search a field for meanings where the act supplies its own. [Emphasis added.]

Thus, the Court is bound by the statutory definition of "consumer" that the Legislature provided in MCL § 205.92(g).

2. The statutory definition of "consumer" includes Betten.

The Court held that Betten was not a consumer in this case according to the definition of "consumer" provided in Black's Law Dictionary. That definition, as used by the Court of Appeals, provides that a consumer is "[a] person who buys goods or services for personal, family, or household use, with no intention of resale; a natural person who uses products or [sic] personal rather than business purposes."¹⁶

But the UTA provides a definition of "consumer." Consumer is defined by the UTA as follows:¹⁷

As used in this act:

¹⁴ It is an equally well-settled rule of statutory construction that an Act must be considered as a whole. See *Macomb Co Prosecuting Atty v Murphy*, 464 Mich 149, 159-160; 627 NW2d 247 (2001). Section 92 of the UTA defines "consumer."

¹⁵ *WS Butterfield Theatres Inc v Dep't of Revenue*, 353 Mich 345, 349-350; 91 NW2d 269 (1958).

¹⁶ *Betten Auto Center v Dep't of Treasury*, ___ Mich App ___; ___ NW2d ___ (Decided August 1, 2005).

¹⁷ MCL § 205.92(g).

"Consumer" means the person who has purchased tangible personal property or services for storage, use, or other consumption in this state and includes a person acquiring tangible personal property if engaged in the business of constructing, altering, repairing, or improving the real estate of others.

Noticeably absent from this definition is any requirement that the use be a personal use, that there be no intention of resale of the property, or that the use not be a business use. The statutory definition is broad, and encompasses the uses to which the Plaintiffs put the vehicles in this case. For the period during which Betten used the subject vehicles for purposes other than as inventory and customer try-outs, it is clear that the Betten meets the statutory definition of "consumer."

3. Betten's use does not qualify for a limited statutory exemption.

There is no dispute that Betten's payment of use tax was excused under the resale exemption for the time that Betten was holding the vehicles in inventory and using them as try-outs for customers.¹⁸ But the additional uses to which Betten put the vehicles caused them to fall out of that exempt safety zone and back to the taxable first level. This is the conversion of which the Legislature spoke in MCL § 205.97. When the broad statutory definition of consumer is applied in conjunction with the language of MCL § 205.97, it is clear that the Legislature intended the language of MCL § 205.97 to apply in a case such as this. If one inserts the statutory definition of "consumer" into the language of MCL § 205.97, the statute would read as follows:

Each [person who has purchased tangible personal property or services for storage, use, or other consumption in this state,] storing, using or otherwise consuming in this state tangible personal property . . . purchased for *or subsequently converted to* such purpose or purposes shall be liable for the tax imposed by this act. . . . [Emphasis added.]

¹⁸ MCL § 205.94(1)(c).

Thus, the UTA requires that a purchaser of tangible personal property who converts its exempt use of the property to a non-exempt consumption of the property is liable for use tax.

As noted, the statutory definition of "consumer" encompasses an entity such as Betten. The Court of Appeals found that Betten's employees used the vehicles "as demonstrators for business reasons" and that "the employees specifically agreed not to use the vehicles for personal reasons." But the deposition testimony of several Betten employees, as submitted to the Court of Appeals, is contrary to the Court's finding that the vehicles were used only for business reasons.

Betten allowed its employees to use the vehicles as a personal and family vehicle outside of work hours. As a result of this use, miles were put on the vehicle and it was consumed. This use had no correlation to the intent to resell the vehicles that was present at the time Betten purchased them, and on the basis of which payment of the tax had been previously excused. Because Betten used and consumed the vehicles in a manner unrelated to the resale exemption under which it was previously excused from paying use tax, Betten was a consumer who converted the vehicles to a non-exempt use and is liable for use tax.

D. Allowing the Court of Appeals opinion to stand will render other statutory exemptions superfluous.

A cornerstone of statutory construction comes into play in this case to preclude application of the Court of Appeals opinion – that a statute must not be interpreted in such a way as to render parts of the statute nugatory or surplusage.¹⁹ The Court of Appeals opinion conflicts with this canon of construction.

The resale exemption is found at MCL § 205.94(1)(c). That subsection also includes exemptions for "[p]roperty purchased for . . . demonstration purposes, or lending or leasing to a

¹⁹ *Reed v Yackell*, 473 Mich 520, 536-537; 703 NW2d 58 (2005).

public or parochial school offering a course in automobile driving."²⁰ Other sections include exemptions for "[p]roperty sold to a person engaged in a business enterprise and using and consuming the property in the tilling, planting, or caring for, or harvesting of the things of the soil or in the breeding, raising, or caring for livestock, poultry, or products for further growth[,]"²¹ and several different aircraft exemptions.²² The statutory provisions following MCL § 205.94 include even more exemptions. There is no purpose for these exemptions if the resale exemption applies to all property purchased by the user, which is eventually resold. In this situation, each of these exemptions – and others – would be rendered nugatory.

The Court of Appeals opinion held that the resale exemption applies in a blanket fashion to all of the vehicles purchased and used by Betten prior to March 27, 2002. This holding is nonsensical when one considers the other exemptions provided for in the UTA. In fact, such a holding renders many of the other UTA exemptions completely pointless. If the resale exemption is applied in a blanket fashion to any tangible personal property that is eventually resold, then there is no reason for the exemptions for automobiles used in driver education programs, tractors used in agricultural production, or aircraft used in the commercial transport of passengers or cargo. Except in perhaps the most isolated situation conceivable – such as where an automobile catches fire and burns to ash – all of these items of tangible personal property will eventually be resold, even if only to the junkyard. The Court of Appeals opinion would hold all of these items of property to be exempt under the resale exemption. Indeed, this is how the

²⁰ MCL § 205.94(1)(c).

²¹ MCL § 205.94(1)(f).

²² MCL § 205.94(1)(u) and MCL § 205.94(1)(v).

Court of Appeals opinion is already being applied in the lower courts. This renders a host of other UTA provisions nugatory.²³

This Court should grant this application for leave to appeal or issue a peremptory order pursuant to MCR 7.302(G)(1) reversing the Court of Appeals Decision in order to prevent application of the resale exemption in a blanket manner that is wholly inconsistent with the plain language of MCL § 205.97 and the Legislature's intent, as evidenced by its creation of exemptions that would be swallowed up by the Court of Appeals' application of the resale exemption.

²³ See other exemptions included in MCL § 205.94(1)(c), MCL § 205.94(1)(f), MCL § 205.94(1)(u), MCL § 205.94(1)(v), and potentially many other exemptions.

CONCLUSION

It is imperative that this Court grant leave to appeal this issue, in order to give proper weight to the plain meaning of MCL § 205.97. Furthermore, granting leave to appeal will allow this Court to give proper weight to other statutory exemptions that are rendered nugatory by the Court of Appeals opinion.

Therefore, for all of the reasons detailed in this Application for Leave to Appeal, this Court should grant the Department leave to appeal the Court of Appeals decision, or issue a peremptory order pursuant to MCR 7.302(G)(1) reversing the decision of the Court of Appeals.

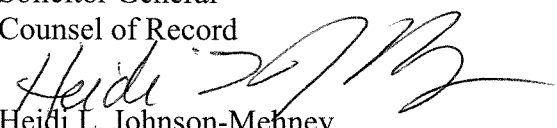
RELIEF SOUGHT

The Defendant-Appellant, Michigan Department of Treasury, requests this Honorable Court grant leave to appeal or, alternatively, peremptorily reverse the Court of Appeals opinion with regard to the effect of MCL § 205.97 on the Plaintiff-Appellee and hold that the Plaintiff-Appellee was a consumer of the subject vehicles and is liable for use tax.

Respectfully submitted,

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