STATE OF MICHIGAN

COURT OF APPEALS

CREDIT SUISSE HOLDINGS (USA), INC. AND SUBSIDIARIES, Plaintiff-Appellant,	UNPUBLISHED May 16, 2024
v	No. 364746 Court of Claims
DEPARTMENT OF TREASURY, Defendant-Appellee.	LC Nos. 20-000186-MT; 22-000013-MT

Before: JANSEN, P.J., and MURRAY and O'BRIEN, JJ.

PER CURIAM.

In this tax case involving whether plaintiff properly claimed business losses, plaintiff appeals as of right the Court of Claims order granting defendant summary disposition under MCR 2.116(C)(6) (duplicative case) and (C)(8) (failure to state a claim) in two consolidated cases. Plaintiff challenges both grants of summary disposition, arguing that it was permitted to claim "carryforwards" for business losses, which defendant disputed. The Court of Claims agreed with defendant in a thorough, concise, and well-written opinion. We affirm.

I. BACKGROUND FACTS AND PROCEDURAL HISTORY

Plaintiff is part of a unitary business group (UBG)[1], and holds residual interests in real estate mortgage investment conduits (REMICs). A REMIC is a special purpose vehicle used to pool mortgage loans and issue mortgage-backed securities. The Internal Revenue Code (IRC), 26 USC 1 *et seq.*, treats income obtained through REMICs in a specialized way. The IRC essentially

[1] "A unitary business group is not a separate and distinct legal entity, like a corporation, limited liability company, or partnership; rather, the group is purely a creation of tax law. In general, a unitary business group is a group of related U.S. persons whose business activities are sufficiently interdependent." *D'Agostini Land Co LLC v Dep't of Treasury*, 322 Mich App 545, 551; 912 NW2d 593 (2018). UBGs are specially treated under the CITA for tax purposes, but this is not in dispute in this appeal.

provides that the income generated from a REMIC, which is called excess inclusion income (EII), cannot be offset from any net operating loss (NOL) for a tax year. Therefore, even if a taxpayer has significant losses in a tax year, it cannot use those losses to completely offset the EII in that year. EII is essentially minimum income that must always be reported as such and taxed. However, although a taxpayer can never use NOLs to completely offset the EII, the taxpayer is permitted by the IRC to carry those losses forward to subsequent years.

This appeal involves two consolidated cases in the Court of Claims involving similar tax issues. The first case ("the 2018 Case") originally involved only plaintiff's 2018 tax return ("the 2018 Return") filed under the Michigan Corporate Income Tax Act (CITA), MCL 206.601 *et seq*. The second case ("the 2015-2017 Case") involved both the 2018 Return and plaintiff's amended corporate income tax (CIT) returns filed for years 2015-2017 ("the CIT Amended Returns" or "the Amended Returns").

The issue raised in the two consolidated cases was how the IRC's treatment of REMICs and EII affects plaintiff's CIT returns. The CITA does not explicitly address REMICs and EII, and defendant has offered no guidance on the topic. Originally, plaintiff presumed the CITA followed the federal rules for REMICs and EII, and followed the IRC and reported its EII on its initial 2015-2017 CIT returns ("the CIT Original Returns") as minimum income while attempting to carry forward significant NOLs incurred in those years. This was incorrect because the CITA does not follow the federal rules for REMICs and EII. When plaintiff attempted to claim carryforward losses on its 2018 Return, approximately $22 million, defendant rejected this because the losses did not appear on the CIT Original Returns. This occurred because of the way plaintiff reported EII on the CIT returns rather than its actual income, which would have showed losses.

Plaintiff filed the 2018 Case and initially claimed that the CITA followed the federal rules for REMICs and EII, which meant the CIT Original Returns were valid and allowed plaintiff to claim carryforward losses on the 2018 Return. Once plaintiff learned through discovery from defendant that the CITA did not follow the federal rules for REMICs and EII, plaintiff filed the CIT Amended Returns for years 2015 to 2017. In those returns, plaintiff did not report minimum EII as required under the IRC for federal returns; instead, plaintiff listed its actual income, which were NOLs for each of those years. Defendant rejected those returns without much explanation. Defendant moved for summary disposition because the CIT Original Returns indisputably did not support the 2018 Return, as evidenced by the recently filed CIT Amended Returns. The Court of Claims agreed and granted the motion in part, but allowed plaintiff the opportunity to amend the complaint for the 2018 case ("the 2018 Case's Original Complaint") to include claims involving the CIT Amended Returns.

Before doing so, however, plaintiff initiated the 2015-2017 Case by filing the 2015-2017 Case's Complaint. This case appealed the rejection of the CIT Amended Returns and also claimed that those returns provided support for the 2018 Return. Plaintiff claimed that the CIT Amended Returns supported the business loss carryforwards listed in the 2018 Return. After initiating that case, plaintiff filed the 2018 Case's Amended Complaint in which plaintiff again challenged defendant's rejection of the CIT Amended Returns and claimed that those returns provided support for the 2018 Return. The cases were consolidated. Defendant moved for summary disposition on both cases, essentially arguing that plaintiff's returns failed as a matter of law and that the 2015-2017 Case was duplicative of the 2018 Case. The Court of Claims agreed and dismissed both

cases. In doing so, the Court of Claims expressed sympathy with plaintiff that there was little to no guidance for how to handle REMICs and EII on CIT returns. Plaintiff moved for reconsideration, and was denied.

The main question presented in this appeal is whether plaintiff properly completed its CIT Amended Returns and the 2018 Return. We believe, as the Court of Claims did, that this central issue is one of law and that there were no material facts in dispute precluding summary disposition. The returns were already filed, and the numbers spoke for themselves; accordingly, no further discovery was needed. According to defendant, plaintiff did not properly complete the returns because key portions of its federal returns did not match the CIT return for each corresponding year. More specifically, defendant originally contended that Line 30 of each federal return, which was entitled "Taxable Income," needed to match Line 12 of each CIT return, which was entitled "federal taxable income" from the federal tax return. Additionally, defendant argues that Line 29a of the 2018 federal return, which was plaintiff's federal NOL deduction, did not match Line 21 of the 2018 Return, which was where plaintiff was supposed to enter its federal NOL deduction. Plaintiff counters that the returns could not match because of various adjustments that needed to be made. Defendant later seemingly acknowledged that the numbers would be subject to certain adjustments; however, defendant contends that one of those adjustments was unauthorized by the CITA, namely an adjustment for the REMICs and EII.

In this adjustment, plaintiff essentially attempted to "reverse" the federal process for REMICs and EII on its CIT Amended Returns. This was supposedly done so that plaintiff could show its actual losses for those years, thereby allowing it to carry them forward. However, defendant argues that plaintiff went beyond what the CITA authorizes. According to defendant, plaintiff did not have the correct "starting point" in its CIT Amended Returns for federal taxable income (FTI) because the FTI did not match across the federal and CIT Amended Returns. This is yet again a reference to Line 30 of the federal returns and Line 12 of the CIT returns. Broadly speaking, the CITA provides definitions for "business income" and "business losses." Business income is essentially defined to be the same as taxable income on a federal tax return, i.e., FTI, and this is why the federal returns—and how they match the CIT returns—are relevant in this appeal. The CITA provides a formula for a taxpayer to use to calculate its business income for purposes of its "corporate income tax base," which is what a taxpayer ultimately pays taxes on. Part of this formula involves various adjustments made to the FTI—the initial "starting point" of the formula. The parties dispute whether plaintiff properly followed this formula.

II. BUSINESS LOSSES

We conclude that the Court of Claims did not err by determining that the CIT Amended Returns did not support the 2018 Return because plaintiff used the incorrect starting point for its FTI.

A. STANDARDS OF REVIEW

"This Court reviews de novo a trial court's decision on a motion for summary disposition, as well as questions of statutory interpretation and the construction and application of court rules." *Dextrom v Wexford Co*, 287 Mich App 406, 416; 789 NW2d 211 (2010). Similarly, this Court reviews constitutional issues de novo. *LeFever v Matthews*, 336 Mich App 651, 661; 971 NW2d

672 (2021). Defendant moved for summary disposition under MCR 2.116(C)(6) and (C)(8). Normally, a motion brought under MCR 2.116(C)(8) involves only the pleadings and whether a party states a claim upon which relief can be granted. *Bailey v Schaaf*, 494 Mich 595, 603; 835 NW2d 413 (2013). When reviewing the motion, the trial court "must accept as true all factual allegations contained in the complaint." *Id*. The trial court must grant the motion "if no factual development could justify the plaintiff's claim for relief." *Id*. (quotation marks and citation omitted).

However, in the present case, the parties presented and relied on evidence outside the pleadings. "[I]f a summary-disposition motion based on MCR 2.116(C)(8) presented the trial court with evidence beyond the pleadings, we treat the motion as having been brought and decided under MCR 2.116(C)(10) because it necessarily involved considering material outside the pleadings." *Cary Investments, LLC v Mount Pleasant*, 342 Mich App 304, 312-313; 994 NW2d 802 (2022) (quotation marks and citation omitted). A motion is properly granted under MCR 2.116(C)(10) when "there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law." *Dextrom*, 287 Mich App at 415. This Court "must examine the documentary evidence presented and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists. A question of fact exists when reasonable minds could differ as to the conclusions to be drawn from the evidence." *Id*. at 415-416.

B. ANALYSIS

As an initial matter, there has been no dispute that the CITA did not follow the federal rules for REMICs and EII. In fact, in the 2018 Case's Amended Complaint, plaintiff explicitly *agreed* with defendant on this point and did not include any allegations, as it did with the 2018 Case's Original Complaint, claiming that CITA followed the federal rules for REMICs and EII. An amended complaint supersedes the original. *Progress Mich v Attorney General*, 506 Mich 74, 95; 954 NW2d 475 (2020). Additionally, "[a] party who waives a right is precluded from seeking appellate review based on a denial of that right because waiver eliminates any error." *LeFever*, 336 Mich App at 670 n 3 (quotation marks and citation omitted). "To allow a party to assign error on appeal to something that he or she deemed proper in the lower court would be to permit that party to harbor error as an appellate parachute." *Id*. To the extent plaintiff now attempts to argue that the CITA may follow the federal rules, this argument is both waived and superseded. The CITA is the controlling authority.

"All matters of statutory interpretation begin with an examination of the language of the statute." *McQueer v Perfect Fence Co*, 502 Mich 276, 286; 971 NW2d 584 (2018). If a statute is unambiguous, it "must be applied as written." *Id*. (quotation marks and citation omitted). This Court may not read something into the statute "that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Id*. (quotation marks and citation omitted). Furthermore, statutory language "cannot be viewed in isolation, but must be construed in accordance with the surrounding text and the statutory scheme." *Id*. (quotation marks and citation omitted). In other words, a statute must be read as a whole. *Bush v Shabahang*, 484 Mich 156, 167; 772 NW2d 272 (2009). "Courts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory." *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002).

Courts "give undefined statutory terms their plain and ordinary meanings." *Id*. "[H]owever, there are special rules with respect to the interpretation of statutes that levy taxes," and, "where a statute that levies a tax is ambiguous, we construe that statute against the taxing unit." *Wyckoff v Detroit*, 233 Mich App 220, 224; 591 NW2d 71 (1998). This Court "will not extend the scope of tax laws by implication or forced construction." *Id*.

Under the CITA, business income is defined to be FTI. MCL 206.603(3). FTI is in turn defined to be in relevant part "taxable income as defined in section 63 of the internal revenue code . . . ." MCL 206.607(1). Section 63 of the IRC provides that "the term 'taxable income' means gross income minus the deductions allowed by this chapter (other than the standard deduction)." 26 USC 63(a), as amended by PL 116-260.[2] The federal rules for REMICs and EII are contained within Chapter 1. See 26 USC 860E. As previously discussed, the parties have never disputed the way in which the federal rules treat REMICs and EII. Under these rules, NOLs cannot outweigh the EII, which means that holders of REMICs must list at a minimum their EII as income on their federal tax returns in Line 30, even if their losses for that year were greater than the EII; however, the losses can be carried forward. See generally 26 USC 860E.

For purposes of this appeal, the critical provision of the CITA is § 623. Relevantly, "every taxpayer with business activity . . . or ownership interest or beneficial interest in a flow-through entity that has business activity" within Michigan is required to pay "corporate income tax" on that taxpayer's "corporate income tax base, after allocation or apportionment to this state, at the rate of 6.0%." MCL 206.623(1), as amended by 2014 PA 13.[3] Former MCL 206.623(2) provided in relevant part:

> (2) The corporate income tax base means a taxpayer's business income *subject* to the following *adjustments*, *before* allocation or apportionment, *and the adjustment* in subsection (4) *after* allocation or apportionment:
>
> * * *
>
> (c) *Add any carryback or carryover of a net operating loss to the extent deducted in arriving at federal taxable income.* [Emphasis added.]

Under former Subsection (4), a taxpayer could "[d]educt any available business loss incurred after December 31, 2011," and a business loss was defined to be "a negative business income taxable amount *after* allocation or apportionment." MCL 206.623(4) (emphasis added), as amended by 2014 PA 13. Such losses were to be "carried forward to the year immediately succeeding the loss year as an offset to the allocated or apportioned corporate income tax base, then successively to

[2] Although § 63 of the IRC was amended in December 2020, it did not change any of the language for taxable income.

[3] Section 623 has since been amended by 2021 PA 135, effective December 21, 2021, which does not appear to have affected any of the relevant language for this case. Given that the CIT returns for this case occurred long before 2021, we use the former version as amended by 2014 PA 13.

the next 9 taxable years following the loss year or until the loss is used up, whichever occurs first." MCL 206.623(4), as amended by 2014 PA 13.

Reading these provisions in harmony, the CITA required plaintiff to pay corporate income tax on its corporate income tax base after allocation or apportionment to this state. MCL 206.623(1), as amended by 2014 PA 13. Under former MCL 206.623(2), the starting point for determining plaintiff's CIT base was plaintiff's business income, i.e., FTI. MCL 206.603(3). FTI is taxable income under the IRC. MCL 206.607(1). Therefore, the starting point for plaintiff's CIT Amended Returns was the FTI from plaintiff's federal return located on Line 30. Former MCL 206.623(2) provided that this federal taxable income starting point on Line 30 was subjected to several explicit adjustments *before* allocation or apportionment to Michigan. These adjustments were described in former MCL 206.623(2)(a) to (h). None of these adjustments include one for REMICs or EII.

The one adjustment that the parties and Court of Claims focused on is that within former MCL 206.623(2)(c), and this is the only adjustment that is arguably applicable. This is an adjustment, *before* allocation and apportionment to Michigan, to "[a]dd any carryback or carryover of *a net operating loss to the extent deducted in arriving at federal taxable income*." MCL 206.623(2)(c), as amended by 2014 PA 13 (emphasis added). Therefore, *if* a NOL was deducted when arriving at plaintiff's FTI, this must be added back. Given that this provision explicitly references FTI rather than business income, this would seemingly be a reference to the taxpayer's federal tax returns. See former MCL 206.623(2) (using the phrase "business income" rather than FTI). Accordingly, this provision appears to apply only if a federal NOL was deducted from the taxpayer's FTI in its federal return, i.e., if a NOL was deducted from the number on Line 30.

There was no dispute from plaintiff that Line 30 of its federal returns for 2015-2017 did *not* include any deduction for federal NOLs because of the way in which the IRC treats REMICs and EII; instead, plaintiff reported the EII on Line 30 *without* any deduction and carried forward the NOLs. The federal returns reflected this. It was not until the 2018 federal return that plaintiff was finally able to subtract a portion of these carryforward NOLs from its income. Accordingly, because the 2015-2017 federal returns did not have any federal NOL deduction in their FTIs, i.e., Line 30, plaintiff could not add these to its CIT Amended Returns. Although plaintiff had federal carrybacks or carryovers for its federal NOLs in years 2015-2017, these were not "deducted in arriving at federal taxable income." MCL 206.623(2)(c), as amended by 2014 PA 13. Rather, they were merely carried forward, which former MCL 206.623(2) does not contemplate. Consequently, on Line 12 of its CIT Amended Returns, which was FTI as reported on the federal returns, plaintiff was required to begin with its business income, which was the FTI number listed on Line 30, or EII. There was no dispute that plaintiff did not do this and, instead, listed the actual federal NOLs for Line 12.

Therefore, the Court of Claims' was correct that, on its face, former MCL 206.623 provides no support for plaintiff to make the adjustments that it did for the REMICs and EII *before* reporting its business income, i.e., prior to the FTI starting point. The Reconciliation Schedules showed the "CS Holdings NOL (REMIC Adjustment – Line 29a)" for each of the CIT Amended Returns. The Reconciliation Schedules reflected that "FTI was . . . *adjusted to reverse the Federal Procedure for REMIC income*." (Emphasis added.) Plaintiff claimed it "reversed the Federal Procedure for its Michigan unitary business group by reporting *its actual NOLs instead of EII*, to provide the

support [defendant] stated was lacking for the business loss carryforward claimed on the 2018 Return."

This REMIC and EII adjustment was meant to reflect the actual losses that plaintiff had incurred. However, this was improperly done *before* getting to the FTI starting point. Although former MCL 206.623(4) allows a taxpayer to deduct business losses, this could not be done until *after* allocation or apportionment, i.e., after the FTI starting point. The intent of our Legislature is clear as evidenced by the plain language of the statute, and this Court may not read language into the statute. See *McQueer*, 502 Mich at 286. The Court of Claims correctly determined that plaintiff's REMICs and EII adjustments were problematic because they were done *before* the FTI starting point. This made the CIT Amended Returns improper and necessitated their rejection by defendant. Moreover, given that the 2018 Return relied on the CIT Amended Returns, it would necessarily need to be rejected as well. In sum, these cases involved questions of law and not disputes of fact. The numbers on the returns spoke for themselves, and the parties disputed only how the CITA applied to those numbers. Therefore, there is no genuine issue of material fact that defendant was entitled to summary disposition regarding the 2018 Case.

This conclusion renders discussion unnecessary of plaintiff's alternative arguments regarding due process and the lack of additional discovery. Given that the Court of Claims resolved the case on the merits of the REMIC and EII issue, which we now affirm, like the Court of Claims, we also need not address the statute of limitations. Lastly, we affirm the trial court's dismissal of plaintiff's claim for a penalty waiver under MCL 205.24 based on our ultimate conclusion to affirm summary disposition in defendant's favor.

III. DUPLICATIVE CLAIMS

We further conclude that the Court of Claims did not err by granting summary disposition in defendant's favor under subrule (C)(6) because the two cases involved substantially similar issues and facts.

A motion is properly granted under MCR 2.116(C)(6) when "[a]nother action has been initiated between the same parties involving the same claim." Courts must consider the pleadings and any documentary evidence submitted by the parties. See MCR 2.116(G)(5). Subrule (C)(6) "does not operate where another suit between the same parties involving the same claims is no longer pending at the time the motion is decided." *Fast Air, Inc v Knight*, 235 Mich App 541, 545; 599 NW2d 489 (1999). The critical inquiry is whether resolution of the action will require examination of the same operative facts as the pending action; if so, the motion is properly granted. See *JD Candler Roofing Co, Inc v Dickson*, 149 Mich App 593, 601; 386 NW2d 605 (1986).[4] However, the claims need not be identical. *Fast Air, Inc*, 235 Mich App at 545 n 1.

[4] Although this Court is "not *strictly required* to follow uncontradicted opinions from this Court decided before November 1, 1990, . . . they are nevertheless considered to be precedent and entitled to significantly greater deference than are unpublished cases." *Woodring v Phoenix Ins Co*, 325 Mich App 108, 114-115; 923 NW2d 607 (2018).

We agree with the Court of Claims that the 2015-2017 Case was substantially similar to the 2018 Case. The 2015-2017 Case's Complaint involved substantially similar claims as the 2018 Case's Amended Complaint. Both involved the CIT Amended Returns and whether these supported the 2018 Return, both involved whether the CIT Amended Returns were properly rejected, and both involved whether defendant's actions toward the CIT Amended Returns implicated due process. Resolution of both actions requires examination of the same operative facts. *JD Candler Roofing Co*, 149 Mich App at 601. As shown in the analysis above, the central issue in this case was whether the CIT Amended Returns complied with the CITA; as they did not, the 2018 Return necessarily failed because it was reliant on the those returns. Based on this conclusion, we need not discuss plaintiff's argument that defendant was judicially estopped from arguing that the two cases were duplicative.

VI. CONCLUSION

We affirm the Court of Claims order granting defendant summary disposition because the CIT Amended Returns did not support the 2018 Return because plaintiff used the incorrect starting point for its FTI, and because the 2015-2017 Case was duplicative to the 2018 Case.

Affirmed.

/s/ Kathleen Jansen
/s/ Christopher M. Murray
/s/ Colleen A. O'Brien