STATE OF MICHIGAN

COURT OF APPEALS

AAA LIFE INSURANCE COMPANY,

Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,

Defendant-Appellee.

FOR PUBLICATION
June 20, 2024
9:00 a.m.

No. 365613
Court of Claims
LC No. 21-000242-MT

Before: M. J. KELLY, P.J., GADOLA, C.J., AND FEENEY, J.

PER CURIAM.

Plaintiff, AAA Life Insurance Company, appeals as of right the trial court order granting summary disposition in favor of defendant, the Department of Treasury. Because the trial court did not err by granting summary disposition, we affirm.

I. BASIC FACTS

In its opinion and order granting defendant summary disposition, the trial court succinctly set forth the following, undisputed facts:

> Plaintiff is a life-insurance company headquartered in Livonia, Michigan. Plaintiff sells three products: (1) direct-term life insurance; (2) member-loyalty travel accident insurance; and (3) guaranteed whole-life insurance. Plaintiff conducts 13 mail advertisement campaigns each year, at a rate of about one campaign every 28 days. The campaigns advertise two products, one of which is always the direct-term life insurance. The advertising package generally consists of a brochure, an application for the life-insurance products, a letter, and a business-reply envelope. Plaintiff distributes somewhere between 160,000,000 and 200,000,000 advertisements (also known as direct-mail packages) through the mail each year.
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> Since 1999, plaintiff has contracted with a Missouri marketing company, American Direct Marketing Resources, LLC (ADMR), to process, print, and deliver the advertisements to the United States Postal Service (USPS) for

distribution. Plaintiff and ADMR have operated under the same contract since 2014.

Section 1 of that contract describes the production and mailing services ADMR will perform "as requested by" plaintiff. Section 4 of the contract states that plaintiff

> reserves the right, in its sole discretion, to determine whether the services provided meet with [plaintiff's] reasonable satisfaction. [ADMR] shall present to [plaintiff] final proofs of all advertising materials for [plaintiff's] approval prior to printing. [Plaintiff's] approval of proofs is authorization to [ADMR] to print as proofed.

Section 6 provides that ADMR "shall own exclusive rights and costs associated to the creation and use of all creative packages developed under this Agreement." It further states that ADMR will provide test packages to plaintiff, and that plaintiff "is under no obligation to purchase or use any packages developed under this Agreement." Section 6 additionally notes that plaintiff will not mail any package developed by ADMR, "the spirit being to protect [ADMR's] creative packages, ideas and concepts from being copied." Section 8 provides as follows:

> The information concerning AAA members and their families disclosed to [ADMR] in the course of any engagement under this Agreement is proprietary and highly confidential. The information disclosed is, and will at all times, remain the sole property of the AAA club involved in the direct mail campaign or [plaintiff]. [ADMR] acknowledges that the information is unique and cannot be readily compiled from materials generally available to the public and recognizes the importance of maintaining the security and confidentially of the information disclosed.

Section 8 also provides that ADMR will not use or keep this information beyond the confines of its work for plaintiff. And, finally, Section 12 states that the contract "contains the entire understanding of the parties related to the subject matter of this agreement."

The following undisputed description of the advertisement-developing process was set forth in the trial court's opinion and order granting summary disposition:

> [T]he process for developing the advertisements begins with a brainstorming session about the topic of the campaign, which usually occurs at plaintiff's office in Livonia. During those meetings, plaintiff and ADMR's representatives discuss new campaigns, new concepts, business objectives, and scheduling. ADMR then develops an advertisement draft after receiving a "creative brief" (or concept brief) outlining the theme of the new advertisement (according to plaintiff, ADMR sometimes prepares the creative brief itself). ADMR creates a base package (or a digital proof) reflecting the concepts outlined in the creative brief. . . .
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> Plaintiff will also review ADMR's work product through an online application . . . . In this stage, plaintiff retains the ability to insist that language appear (or not appear) in the advertisements, but sometimes defers to ADMR's

> expertise. . . . The . . . review also includes a level of compliance, as plaintiff must ensure that any rate charts and other state-insurance information in the package are correct.
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> * * *
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> As this process is happening, plaintiff's data-analytics team (which includes three or four Livonia-based employees) determines the target audience for the campaign. To identify target customers, plaintiff analyzes data that, during the audit period at issue, was provided by a Texas data-hosting company called Wunderman Thompson (plaintiff now uses a different data-hosting company). After Wunderman Thompson "cleansed" and reviewed the data, plaintiff selected the target audience based on a "predictive model score" developed by its data scientists. Wunderman Thompson sent the data to ADMR, and plaintiff never had that data in its possession. Nor did plaintiff have rights to the data Wunderman Thompson hosted.
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> Once plaintiff approves the final proofs for the advertisements, ADMR fulfills the printing through third-party vendors based outside of Michigan. ADMR provides plaintiff with progress reports during the printing stage. Plaintiff concedes that it "may have informational and informal touchpoints" with ADMR during the printing process, which become less frequent over time.
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> * * *
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> When the advertisements are printed, ADMR ships the advertisements through USPS. The postage statement for the advertisements states that plaintiff is both the "Permit Holder" for the advertisements and the individual or organization for which the mailing is prepared. Plaintiff's employees receive copies of the advertisements in the mail to determine whether ADMR mailed the advertisements properly. . . .

The trial court also thoroughgoingly described the procedural history of the tax proceedings at issue in this case, explaining:

> After plaintiff submitted its tax returns for tax years 2016-2018, defendant conducted a use-tax audit and determined that plaintiff owed use tax for the portion of the advertisements allocated to Michigan. In 2020, defendant issued Intents to Assess Nos. VA6KC5R, VA6kC5S, and VA6KC5T. Plaintiff challenged defendant's conclusion and requested an informal conference. During the February 2021 informal conference, plaintiff argued that it had no control over the advertisements in Michigan because it ceded any control before the mail was delivered to the USPS outside of Michigan. Defendant argued, in contrast, that plaintiff continued to exercise control over the advertisements by directing where ADMR sent the mail. While a decision was pending, plaintiff paid the use tax under protest. Following the hearing, the referee . . . concluded that plaintiff exercised no right or control over the advertisements after ADMR transported them to USPS

> locations out of state. Plaintiff had no control over when, how, or even if the mail would be delivered to Michigan residents. So [the referee] recommended that defendant eliminate the use-tax assessment.
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> Defendant, however, reversed that determination, concluding that plaintiff was involved in key aspects of the production and distribution under the terms of its contract with ADMR. Defendant pointed to the language in the contract allowing plaintiff to determine whether it was reasonably satisfied with ADMR's services, and providing that plaintiff's approval of the final proofs served as authorization to begin printing. Defendant found that the key factor was that plaintiff was a Michigan-based company directly engaging and controlling transactions within Michigan. Defendant also found persuasive the fact that information about plaintiff's members and their families remained the sole property of plaintiff or its related AAA clubs. Defendant concluded that plaintiff "retained and exercised sufficient control over the Direct Mail *in Michigan*, as [plaintiff] is headquartered and has it principal place of business in Michigan, so that its actions (e.g., sign-offs and approvals) occurred in Michigan, to constitute a taxable us[e] under the Use Tax Act," [MCL 205.91 *et seq.*] Defendant issued Final Assessments for the 2016-2018 tax years.
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> Plaintiff then sued in [the Court of Claims] and, after some discussion with defendant about a perceived mathematical issue with the Final Assessments, filed a first-amended complaint. In Count I, plaintiff asserts that there was no taxable use of the direct-mail materials during the relevant tax years. Plaintiff alleges that it "ceded all control" over the advertisements to ADMR. In Count II, plaintiff alleges that the direct-mail statutes, such as MCL 205.71a, do not impose a use tax in this circumstance. Both parties have moved for summary disposition. In its motion, defendant emphasizes that plaintiff exercised significant control over the advertisements, which were purchased outside of Michigan but then were distributed in Michigan. Plaintiff argues in its motion that it relinquished control over the advertisements before they became tangible property and before they were disbursed in the state, meaning that plaintiff never had control over tangible personal property. Plaintiff argues that any of its residual activities after the advertisements are distributed do not constitute control over the advertisements.

The trial court ultimately granted defendant's motion for summary disposition and denied plaintiff's motion. The court found it significant that plaintiff was headquartered, developed its campaign, and contracted with ADMR in Michigan. Further, the court identified several ways in which plaintiff exercised control over the production stage in Michigan, including requiring "approval for the final proofs," having "the authority to insist on changes to the message," reviewing "the proofs for compliance with insurance laws and to ensure that they contain accurate rates," and retaining "the final say in whether ADMR mails the advertisements" The court also noted that plaintiff had control in Michigan at the distribution stage because plaintiff (1) provided the recipient list, (2) was the "Permit Holder" on the mail, and (3) had the prerogative to "require ADMR to send a corrected mail package if there is a mistake." The court concluded "that plaintiff retained at least some level of control over the advertisements in Michigan at all relevant phases

of the production and distribution process, rendering its use of the advertisements a taxable use under the UTA." Plaintiff filed a motion for reconsideration, which the trial court denied.

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

Plaintiff argues that the trial court erred by granting summary disposition to defendant. "This Court reviews de novo a trial court's decision on a motion for summary disposition." *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49, 52; 760 NW2d 811 (2008). We also review de novo questions of law, including the interpretation of statutes. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008). "When construing a statute, this Court's primary goal is to give effect to the intent of the Legislature." *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 202; 731 NW2d 41 (2007). "When the language is unambiguous, we give the words their plain meaning and apply the statute as written." *Id*.

B. ANALYSIS

"[T]he authority to impose a tax must be expressly authorized by law; it will not be inferred. Moreover, ambiguities in the language of a tax statute are to be resolved in favor of the taxpayer." *Mich Bell Tel Co v Dep't of Treasury*, 445 Mich 470, 477; 518 NW2d 808 (1994). MCL 205.93(1) provides, in pertinent part, as follows:

> There is levied upon and there shall be collected from every person in this state a specific tax, including both the local community stabilization share and the state share, for the privilege of using, storing, or consuming tangible personal property in this state at a total combined rate equal to 6% of the price of the property or services specified in section 3a or 3b. The tax levied under this act applies to a person who acquires tangible personal property or services that are subject to the tax levied under this act for any tax-exempt use who subsequently converts the tangible personal property or service to a taxable use, including an interim taxable use. If tangible personal property or services are converted to a taxable use, the tax levied under this act shall be imposed without regard to any subsequent tax-exempt use.

MCL 205.92(b), as amended by 2018 PA 1,[1] defined "use" as

[1] MCL 205.92, as amended by 2018 PA 1, was the version of the statute considered by the trial court. MCL 205.92 has been amended twice since the trial court's decision: 2023 PA 21 and 2023 PA 94. The only relevant change is that these definitions are now under subsection (1): therefore, the relevant definitions are found presented as MCL 205.92(1)(b) and MCL 205.92(1)(k). No changes to the definitions themselves were made.

> 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. Converting tangible personal property acquired for a use exempt from the tax levied under this act to a use not exempt from the tax levied under this act is a taxable use.

MCL 205.92(k), as amended by 2018 PA 1,[2] defined "tangible personal property" as "personal property that can be seen, weighed, measured, felt, or touched or that is in any other manner perceptible to the senses and includes electricity, water, gas, steam, and prewritten computer software."

"The UTA is designed to cover transactions that are not covered under the General Sales Tax Act (GSTA), MCL 205.51 *et seq*." *Auto-Owners Ins Co v Dep't of Treasury*, 313 Mich App 56, 69; 880 NW2d 337 (2015). "The UTA does not explain what a right or power incident to ownership of tangible personal property entails. However, this Court has held that the key feature in determining whether a party exercised a right or power over tangible personal property is whether the party had some level of control over that property." *Id*. at 70. In *Auto-Owners*, this Court ruled that a plaintiff exercised a right incident to ownership over print materials when the plaintiff received the print materials from an Internet source, "had possession over them, and was able to use them at will." *Id*. at 73.

In this case, plaintiff concedes that it controlled the design stage in the preparation of the advertisements. However, it argues that, by focusing on this design-stage control, the trial court applied an incorrect test to determine whether a taxable use had occurred. We disagree.

The statute and caselaw have established certain bounds past which a situation is not taxable under the UTA. The statute establishes that "tangible personal property" must be involved, and that the taxpayer "exercise . . . a right or power . . . incident to the ownership of that property." MCL 205.92(b) as amended by 2018 PA 1. This exercise of right or power must occur "in this state." MCL 205.93(1). The taxpayer must therefore have a "level of control over that property." *Auto-Owners Ins Co*, 313 Mich App at 70. If the actualization of right or power occurs out of state, and ends when the property is delivered to an out-of-state postal service, it is not a taxable use. *Sharper Image Corp v Dep't of Treasury*, 216 Mich App 698, 702; 550 NW2d 596 (1996).

Further, even if a business owns property that is operated in Michigan (such as an airplane), no taxable use occurs if the property is totally controlled by another entity pursuant to the terms of a lease that predates the purchase of the property. *WPGP1, Inc v Dep't of Treasury*, 240 Mich App 414, 417-418; 612 NW2d 432 (2000). Once an owner "has ceded total control of the property to a third party," the use of the property is not taxable. *Ameritech Pub, Inc v Dep't of Treasury*, 281 Mich App 132, 140; 761 NW2d 470 (2008).

In order to constitute a taxable use only "some level of control" is needed. *Auto-Owners Ins Co*, 313 Mich App at 70. Again, " 'use' is defined very broadly" and "is not limited to physical

[2] See note 1.

actions performed directly on the property." *Fisher & Co, Inc v Dep't of Treasury*, 282 Mich App 207, 212; 769 NW2d 740 (2009). It "includes any exercise of a right that one has to that property by virtue of having an ownership interest in it. Something need not necessarily be physically present in Michigan for it to be 'used' in Michigan." *Id*. A taxpayer with authority to inform and direct aspects related to distribution of property uses the property in a taxable way, even if it is the distributor that has responsibility for actual distribution. *Ameritech Pub, Inc*, 281 Mich App at 143-144. Finally, executing a lease that cedes possession and control of tangible personal property to a third party is enough to qualify as a use when it is a Michigan corporation and the lease is executed in Michigan. *NACG Leasing v Dep't of Treasury*, 495 Mich 26, 27, 30; 843 NW2d 891 (2014).

Sharper Image Corp, 216 Mich App at 700, and *Ameritech Pub, Inc*, 281 Mich App at 134-135, are the only two binding Michigan cases dealing with use tax in relation to a product produced out-of-state and then distributed in Michigan by another company. This Court did not uphold the application of use tax in *Sharper Image Corp*, 216 Mich App at 705-706, but did in *Ameritech Pub, Inc*, 281 Mich App at 144. These contrasting results can be harmonized by noting the differences between them: in *Sharper Image Corp*, 216 Mich App at 702, the plaintiff had no control at all once "the catalogs were delivered to the postal service in Nebraska," whereas in *Ameritech Pub, Inc*, 281 Mich App at 141-144, this Court described several ways that the plaintiff maintained at least some control after the directories were picked up from the printer.

Here, the trial court analyzed plaintiff's rights as described by its contract with ADMR. Plaintiff objects to this method, arguing that the key aspect to consider was the actual course of conduct during the pertinent tax years. Plaintiff appears to be arguing that even if a contract grants the prerogative to exercise control, some actual evidence showing the exercise of control must be present. A key area where this is relevant is plaintiff's claim that, although it had the right to do so, there is no evidence that it ordered any corrections during the tax years at issue. Therefore, in plaintiff's view, its contractual right to order ADMR to correct is irrelevant. However, in *Ameritech Pub, Inc*, 281 Mich App at 141-143, this Court focused on the rights and responsibilities as enunciated in the contracts as the basis for our ruling. We therefore conclude that it is proper to consider the rights as authorized by the contract between plaintiff and ADMR.

We also conclude that the trial court did not err by considering the fact that plaintiff is headquartered in Michigan and that the relevant work of its employees was being performed in Michigan. The plaintiff in *Sharper Image Corp*, 216 Mich App at 700, was based outside of Michigan. *Ameritech Pub, Inc*, 281 Mich App at 134, did not mention any Michigan headquarters or office, but did describe the out-of-state locations involved. Other UTA cases have also demonstrated the importance of a taxpayer's Michigan headquarters and office locations. See *NACG Leasing*, 495 Mich at 27 (the plaintiff was a Michigan corporation, and use tax ultimately was assessed); *Fisher & Co, Inc*, 282 Mich App at 209-213 (the plaintiff was a Michigan corporation, and use tax ultimately was assessed); *WPGP1, Inc*, 240 Mich App at 419 (the plaintiff had no Michigan office, and use tax was ultimately not assessed).

Here, the control that plaintiff exercised occurred within Michigan (even if ADMR was executing its contractual responsibilities out-of-state). In *Sharper Image Corp* and *Ameritech Pub, Inc* the timing of relevant UTA control depended on where the product physically was located;

because there was no indication that the plaintiffs in those cases were making any decisions in Michigan, control in Michigan could occur only once the product crossed into the state. Here, conversely, the trial court noted that plaintiff's "development of its direct-mail campaign, as well as its purchase of ADMR's services and materials, occurred in this state." The trial court properly took notice of this Michigan connection and its relevance. And the trial court did not err by integrating plaintiff's headquarters and office location into its analysis when it concluded that there was a sufficient level of control to implicate the UTA.

Ultimately, the trial court's determination that plaintiff exercised a sufficient level of control to implicate the UTA was not erroneous. A sufficient level of control exists if the taxpayer exercises "some level of control" over tangible personal property. *Auto-Owners Ins Co*, 313 Mich App at 70. MCL 205.93(1) specifies the use of "tangible personal property in this state." Plaintiff appears to take the position that the advertisements did not become tangible until the final printing, and that plaintiff had relinquished all control before the printing of the advertisements took place. In doing so, plaintiff notes that the statute does not define the term "intangible." As a result, plaintiff suggests that this Court look to dictionary definitions of that term in order to ascertain whether the product, before printing, was intangible. Specifically, plaintiff notes that *Black's Law Dictionary* (11th ed) defines "intangible" as "something that lacks physical form." However, we conclude that it is improper to define "intangible" by reference to a dictionary in this case. Although the statute does not expressly define what constitutes "intangible" property, it broadly defines "tangible" as "personal property that can be seen, weighed, measured, felt, or touched or that is in any other manner perceptible to the senses and includes electricity, water, gas, steam, and prewritten computer software." MCL 205.92(k) as amended by 2018 PA 1. By defining tangible property, the statute implicitly defines "intangible" property as property that does not satisfy that definition. See *Haynes v Neshewat*, 477 Mich 29, 35; 729 NW2d 488 (2007) (stating that statutory definitions control when a statute defines a term).[3]

Here, the record reflects that plaintiff drafted a "creative brief" in Michigan, and ADMR developed an "advertisement draft," which it submitted to plaintiff for review in Michigan. Both of these products, which are early versions of what eventually became the final advertisement, are capable of being seen, measured, or otherwise perceived by the senses (albeit with the aid of an external device, such as a computer). The creative brief drafted by plaintiff in Michigan, for instance, is capable of being seen, measured, or otherwise perceived by the senses (albeit with the aid of an external device, such as a computer). Consequently, we do not agree with plaintiff that it only exercised control over the product while it was in an intangible form.

Overall, the trial court identified several indicia of control by plaintiff over tangible personal property in Michigan that satisfied the UTA. Plaintiff had the power to change the advertisements that were printed and had the power to authorize no printing at all. Plaintiff reviewed the proofs to determine whether they complied with insurance laws and that they contained accurate rates. Additionally, plaintiff contributed to the data that went into deciding the

[3] Plaintiff does not address whether the product, before being printed, satisfies or does not satisfy the statutory definition of "tangible" set forth in MCL 205.92(k) as amended by 2018 PA 1.

customer mailing list. And plaintiff's Michigan-based employees received sample advertisements in order to evaluate how smoothly the process was moving. These were all markers of control over tangible property, with plaintiff's work being done in Michigan and some version of the advertisements being considered and put to use in Michigan. Because only some control need be exercised, we, like, the trial court, conclude that the level of control that plaintiff exercised over the advertisements in Michigan was sufficient to warrant assessment of the use tax in this case.

Finally, plaintiff argues that public-policy does not support the court's consideration of its headquarters' location. It also argues that treating businesses headquartered in Michigan differently than businesses headquartered outside of Michigan violates the Equal-Protection clause of the United States Constitution. Plaintiff did not, however, raise its public-policy or equal-protection arguments in the trial court until its motion for reconsideration. Issues raised for the first time on reconsideration are not properly preserved for appellate review. *Vushaj v Farm Bureau Gen Ins Co of Mich*, 284 Mich App 513, 519; 773 NW2d 758 (2009).[4] The failure to raise an issue in the trial court waives appellate review of that issue. *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008). Although this Court has discretion to overlook the preservation requirements "if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented," *Tolas Oil & Gas Exploration Co v Bach Srv & Mfg, LLC*, ___ Mich App ___, ___; ___ NW3d ___ (2023) (Docket No. 359090); slip op at 3, we decline to do so in this case.

Ultimately, the application of the use tax in this case is supported by the language of the statute and caselaw. An interpretation of tax statutes is not incorrect merely because it has a result that a business would not prefer.

Affirmed.

/s/ Michael J. Kelly
/s/ Michael F. Gadola
/s/ Kathleen A. Feeney

[4] Plaintiff contends that this issue is preserved because its motion for reconsideration was its first opportunity to raise its public-policy and equal-protection arguments. Plaintiff cites no authority in support of that contention, however. "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Moreover, plaintiff does not challenge the trial court's denial of its motion for reconsideration.