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IN THE
INDIANA TAX COURT

WELCH PACKAGING GROUP, INC. and Subsidiaries,	)	
Petitioner,	)	
v.	)	Cause No. 49T10-0503-TA-21
INDIANA DEPARTMENT OF STATE REVENUE,	)	
Respondent.	)	

ORDER ON PARTIES' CROSS-MOTIONS
FOR SUMMARY JUDGMENT

NOT FOR PUBLICATION
November 13, 2007

FISHER, J.

Welch Packaging Group, Inc. and Subsidiaries (Welch) appeals the Indiana Department of State Revenue's (Department) final determination assessing it with additional corporate income tax liability for the 1998, 1999, and 2000 taxable years (the years at issue). The matter, currently before the Court on the parties' cross-motions for summary judgment, presents the following issue for review: whether, in apportioning sales to Indiana for Indiana adjusted gross income tax purposes, the numerator of Welch's sales factor should have included its sales within the state of Michigan.

MATERIAL FACTS

The material facts as they relate to this case are undisputed. Welch, an Indiana corporation with its principal place of business in Elkhart, Indiana, sells packaging materials. During the years at issue, Welch was the parent corporation of two subsidiaries: Elkhart Container, Inc. (ECI) and Barger Packaging Corporation (BPC). ECI and BPC employed salespeople who solicited business in, and delivered products to, the state of Michigan. As a result of their Michigan sales, ECI and BPC were subject to, and paid, the Michigan Single Business Tax (MSBT) during the years at issue.[1]

Welch, ECI, and BPC filed consolidated Indiana adjusted gross income tax returns for the years at issue. To determine their combined tax liability, Welch used the three-factor formula set forth in Indiana Code § 6-3-2-2(b), which apportions income based on a taxpayer's property, payroll and sales. In so doing, Welch excluded the Michigan sales from the numerator of their sales factor. After conducting an audit, however, the Department held that the Michigan sales should have been included in the numerator. As a result, the Department issued proposed assessments against Welch, including interest, totaling $64,612.13.

Welch timely protested the proposed assessments. On January 20, 2004, after conducting a hearing on the matter, the Department issued a letter of findings (LOF) in which it denied Welch's protest on the basis that the Michigan sales were subject to "the throwback rule" set forth in Indiana Code § 6-3-2-2(e).

Welch initiated this original tax appeal on March 11, 2005. On November 14, 2005, Welch filed a motion for summary judgment. The Department filed a cross-motion for

[1] Based on ECI and BPC's sales to Michigan, Welch paid a Michigan Single Business Tax (MSBT) liability in the amount of $131,190 during the years at issue.

summary judgment on February 19, 2006. The Court conducted a hearing on the parties' motions on May 1, 2006. Additional facts will be supplied as necessary.

STANDARD OF REVIEW

This Court reviews the Department's final determinations *de novo.* IND. CODE ANN. § 6-8.1-5-1(h) (West 2007). Accordingly, the Court is not bound by either the evidence presented, or the issues raised, at the administrative level. *See Williams v. Indiana Dep't of State Revenue,* 742 N.E.2d 562, 563 (Ind. Tax Ct. 2001). Summary judgment will be granted if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C). Cross motions for summary judgment do not alter this standard. *Williams,* 742 N.E.2d at 563.

DISCUSSION AND ANALYSIS

Indiana imposes a tax on every corporation's adjusted gross income derived from sources within Indiana. IND. CODE ANN. § 6-3-2-1(b) (West 1998) (amended 2002). Where a corporation derives business income from sources both within and without Indiana, the adjusted gross income derived from sources within the state of Indiana is determined by an apportionment formula. *See* IND. CODE ANN. § 6-3-2-2(b) (West 1998) (amended 2007). Indiana's apportionment formula multiplies the business income derived from sources both within and without Indiana by a fraction, the numerator of which is a property factor plus a payroll factor plus a sales factor, and the denominator of which is three. *Id.* The sales factor, which is at issue in this case, "is a fraction, the numerator of which is the total sales of the taxpayer in [Indiana] during the taxable year, and the denominator of which is the total sales of the taxpayer everywhere during the taxable year." *Id.* at (e).

For purposes of determining a taxpayer's total sales in Indiana, Indiana Code § 6-3-2-2 further instructs that sales of tangible personal property are in Indiana if:

> (1) the property is delivered or shipped to a purchaser, other than the United States government, within this state, regardless of the f.o.b. point or other conditions of the sale; or
>
> (2) the property is shipped from an office, a store, a warehouse, a factory, or other place of storage in this state and:
>
>> (A) the purchaser is the United States government; or
>>
>> (B) the taxpayer is not taxable in the state of the purchaser.

Id. at (e)(1),(2).[2] In turn, a taxpayer is deemed taxable in another state if:

> (1) *in that state the taxpayer is subject to a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business, or a corporate stock tax;* or
>
> (2) that state has jurisdiction to subject the taxpayer to a net income tax regardless of whether, in fact, the state does or does not.

Id. at (n)(1),(2) (emphasis added).

Welch argues that pursuant to the plain language of Indiana Code § 6-3-2-2(n)(1), it was taxable in Michigan – and therefore not required to place the Michigan sales in the numerator of its sales factor – because it was subject to the MSBT. (*See* Pet'r Br. in Support of its Mot. for Summ. J. (hereinafter, Pet'r Br.) at 8-9.) Indeed, Welch argues that,

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[2] Thus, pursuant to Indiana Code § 6-3-2-2(e)(1), income from the sale of tangible personal property is generally attributed to the state to which the goods are shipped ("the destination rule"). *See* IND. CODE ANN. § 6-3-2-2(e)(1) (West 1998) (amended 2002). Indiana Code § 6-3-2-2(e)(2), however, provides an exception to that rule: the sales will be "thrown-back" to Indiana if the purchaser is either the United States' government or the taxpayer who made the sales is not taxable in the state of the purchaser ("the throw-back rule"). *See id.* at (e)(2).

on its face, the MSBT is clearly a franchise tax for the privilege of doing business in Michigan. (*See* Pet'r Br. at 6, 11 (citing MICH. COMP. LAWS § 208.31(3) (1979) (stating that the MSBT "is [imposed] upon the privilege of doing business and not upon income")).)

The Department, on the other hand, argues that Welch's Michigan sales are subject to the throw-back rule because "[while t]he MSBT may be a tax on the privilege of doing business in Michigan, [] it is not a *franchise* tax on the privilege of doing business in Michigan."[3] (Resp't Br. in Support of its Mot. for Summ. J. (hereinafter, Resp't Br.) at 10 (footnote added).) More specifically, the Department asserts that because the MSBT is a value-added tax and not a tax based on income, it cannot be a franchise tax.[4] (*See* Resp't Br. at 6, 10-12 (stating that "[t]he Department believes that a 'franchise tax for the privilege of doing business' *must* be measured by income" (emphasis added)) (footnote added).) The Department's argument, however, is without merit.

A franchise tax is defined as "[a] tax imposed on the privilege of carrying on a business (esp[ecially] as a corporation), usu[ally] measured by the business's income." BLACK'S LAW DICTIONARY 1497 (8th ed. 2004). While this definition indicates that a taxpayer's income is *usually* the measure by which a franchise tax is calculated, the use of other measures to calculate the tax is not prohibited. *See id.*

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[3] Thus, claims the Department, Welch was not taxable in Michigan pursuant to Indiana Code § 6-3-2-2(n)(1).

[4] Indeed, as this Court has previously explained, the MSBT, which is levied against those engaging in business activity in Michigan, is not a tax based on or measured by the taxpayer's income. *First Chicago NBD Corp. v. Indiana Dep't of State Revenue,* 708 N.E.2d 631, 633-34 (Ind. Tax Ct. 1999). Rather, it is a tax on the taxpayer's total business activity within Michigan as measured by the value the taxpayer adds to its goods between the time it purchases them and the time it sells them (i.e., the taxpayer's cost of producing its product). *See id.* at 633 (citations omitted). "In short, measuring the value added is [a] method of measuring the impact [] a business [has] on the economy." *Id.* (citation omitted).

Indiana Code § 6-3-2-2(n)(1) states that a taxpayer is deemed taxable in another state if it is subject to either "a franchise tax measured by net income" or "a franchise tax for the privilege of doing business." A.I.C. § 6-3-2-2(n)(1). Thus, the statute clearly provides that the franchise tax may be measured by either net income or by some other standard. *See id.* To say, as the Department does, that a franchise tax for the privilege of doing business can only be measured by income not only ignores the actual language of Indiana Code § 6-3-2-2(n)(1), but the plain, ordinary meaning of "franchise tax" as well. *See Johnson County Farm Bureau Coop. Ass'n v. Indiana Dep't of State Revenue,* 568 N.E.2d 578, 580-81 (Ind. Tax Ct. 1991) (stating that the best evidence as to what the legislature meant when it enacted a statutory provision is found in the actual language of the statute and that the plain, ordinary, and usual meaning of a statutory word is as defined by the dictionary), *aff'd by* 585 N.E.2d 1336 (Ind. 1992); *Chrysler Fin. Co. v. Indiana Dep't of State Revenue,* 761 N.E.2d 909, 916 (Ind. Tax Ct. 2002) (stating that meaning must be given to each and every word used in a statute, as it will not be presumed that the legislature intended to enact a statutory provision that is superfluous, meaningless, or a nullity), *review denied*; *Uniden Am. Corp. v. Indiana Dep't of State Revenue,* 718 N.E.2d 821, 824 (Ind. Tax Ct. 1999) (stating that words in a statute must be given their plain, ordinary and usual meaning). Consequently, for purposes of Indiana Code § 6-3-2-2(e)(2)'s throw-back rule, the way the franchise tax is measured is of no significance.

The MSBT is a franchise tax on the privilege of doing business in Michigan. *See Trinova Corp. v. Dep't of Treasury,* 445 N.W.2d 428, 431-32 (Mich. 1989) (stating that while the MSBT "employs a value added measure of business activity, [] its intended effect is to impose a tax upon the privilege of conducting business activity in Michigan"), *aff'd by* 498

U.S. 358 (1991). *See also Indiana Dep't of State Revenue v. Fort Wayne Nat'l Corp.,* 649 N.E.2d 109, 112 (Ind. 1995) (stating that "[i]n determining the nature of any state tax, 'the declaration in a statute that the tax is of a particular nature . . . is very important and must be given consideration in construing the statute'"). Accordingly, Welch was not required to include its Michigan sales in the numerator of its sales factor during the years at issue.[5]

CONCLUSION

For the above stated reasons, the Court GRANTS summary judgment in favor of Welch and DENIES summary judgment to the Department.

SO ORDERED this 13th day of November, 2007.

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Thomas G. Fisher, Judge
Indiana Tax Court

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[5] The Department has also argued that the MSBT cannot be a franchise tax because it can also be imposed on individuals doing business in Michigan; "therefore, it is not a franchise tax as that term is commonly understood and used." (Resp't Br. at 12.) Again, the Department's argument ignores the plain, ordinary, and usual meaning of franchise tax. *See* BLACK'S LAW DICTIONARY 1497 (8th ed. 2004) (while the definition indicates that a franchise tax applies *especially* to corporations, it does not foreclose its application to non-corporate entities).