STATE OF MICHIGAN

COURT OF CLAIMS

CARGILL INCORPORATED & SUBSIDIARIES,

Plaintiff,

v Case No. 22-000080-MT

MICHIGAN DEPARTMENT OF TREASURY, Hon. Brock A. Swartzle

Defendant.
_____/

OPINION AND ORDER GRANTING IN PART/DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

This lawsuit involves a challenge to several corporate income tax (CIT) assessments issued by defendant Michigan Department of Treasury (Treasury) against plaintiff Cargill Incorporated and Subsidiaries for the tax period of June 1, 2012 through May 31, 2016 (Tax Years). Treasury seeks summary disposition under MCR 2.116(C)(8). Central to this motion is the question of (1) whether federal law authorized plaintiff to exclude income received by a member of plaintiff's unitary business group (UBG) because the entity that generated the income is a flow-through entity with no operations in Michigan, and (2) whether plaintiff's claims fail as a matter of law because plaintiff failed to request an alternate apportionment.

For the reasons explained below, the Court GRANTS summary disposition in Treasury's favor as to Counts I through VI of the complaint, and DENIES summary disposition as to Count VII.

I. BACKGROUND

Plaintiff is a Delaware corporation with its headquarters in Minnesota. On December 9, 2019, Treasury issued a Final Audit Determination assessing plaintiff almost $3.9 million in unpaid corporate income tax (CIT), plus nearly $800,000 interest. Plaintiff requested an Informal Conference on December 23, 2019, and following the conference proceedings, a Decision and Order of Determination was issued by Treasury on March 7, 2022, upholding the Informal Conference Recommendations. This lawsuit followed.

The first point of contention surrounds Counts I through IV of the complaint, which involve plaintiff's failure to account for certain income received by a wholly-owned subsidiary, NSS Ventures, Inc. (NSSV), in its CIT. Plaintiff identified NSSV as a member of its UBG; however, it did not include the income that NSSV received through its 50% ownership interest in a flow-through entity, North Star BlueScope Steel LLC (NSBS), which has no operations in Michigan. Plaintiff claims income from this entity is exempt under federal law, specifically, PL 86-272, which is codified in 15 USC 381, and reads in pertinent part as follows:

> No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:
>
> (1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and
>
> (2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in [15 USC 381(a)(1)].

Treasury claims that PL 86-272 cannot be applied to exempt income from an entity identified as a member of a UBG with nexus in Michigan. As explained in Revenue

Administrative Bulletin (RAB) 2014-5, the "taxpayer" for purposes of the CIT is the UBG and "as long as one member of a [UBG] has nexus with Michigan and exceeds the protections of PL 86-272, all members of the [UBG]—including those protected by PL 86-272—must be included when calculating the [UBG's] tax base and apportionment formula."

"[A] taxpayer has substantial nexus" to Michigan when "the taxpayer has an ownership interest or a beneficial interest in a flow-through entity, directly, or indirectly through 1 or more other flow-through entities, that has a substantial nexus in this state." MCL 206.621(1). Therefore, the "distributive share of a corporation that has nexus with Michigan that is attributable to (or derived from) its ownership in a flow-through entity whose activities are otherwise protected by PL 86-272 is not itself protected by PL 86-272 and is not excluded from the corporation's [CIT] base." Revenue Adm Bull 2014-5.

Applying this analysis to plaintiff's CIT, Treasury found that NSSV's distributive share of income (including that income received from NSBS) must be included in the CIT because it was "taxed as income to NSSV" and not "at the entity level of NSBS." In Treasury's perspective, "PL 86-272 protection only applies to an exempt entity, not its income."

In its response to Treasury's motion for summary disposition, plaintiff quotes from a United States Supreme Court opinion in which PL 86-272 is described as prohibiting "a State from taxing the income of a corporation whose only business activities within the State consist of 'solicitation of orders' for tangible goods, provided that the orders are sent outside the State for approval and the goods are delivered from out of state." *Wis Dep't of Revenue v William Wrigley, Jr*, 505 US 214, 216; 112 S Ct 2447; 120 L Ed 2d 174 (1992). Plaintiff acknowledges that this case did not involve a UBG. In fact, the Supreme Court's focus was on the definition of "solicitation of orders," which is not at issue here.

A second point of contention relates to the apportionment of various subsidiaries' income. Treasury moves for summary disposition on Counts I, IV-VII on the grounds that plaintiff failed to request an alternative apportionment with respect to certain income received by NSSV, an ownership interest in one-or-more funds that own CVI Global Value Fund Cayman L.P., a Cayman Islands partnership ("Cayman Fund" or, collectively with the two funds holding an ownership interest, referred to herein as "CVI"), and from the sale of Black River Asset Management, LLC (BRAM).

The parties agree that Counts V and VI of the complaint expressly contest Treasury's apportionment of income related to plaintiff's ownership interest in CVI. The Cayman Fund is owned by two funds, in which plaintiff respectively held approximately 45% and .01% ownership interest. According to the complaint, "[o]ver 90% of CVI's income was earned from trading in bonds and marketable securities." The fund in which plaintiff held a 45% ownership interest, however, reported "a minor amount of rental income and gain/loss on properties" during the Tax Years, and Treasury included this rental income in the apportionment percentage of CVI on plaintiff's CIT because Treasury claims that plaintiff did not request an alternative apportionment under MCL 206.667. Counts I and VII of the complaint do not contest apportionment but, rather, allege that the respective income that plaintiff received through NSSV or the sale of BRAM were not unitary to plaintiff's UBG.

Count VII of the complaint alleges that income received as a gain from the sale of BRAM was not part of plaintiff's unitary business and, therefore, was appropriately included as a miscellaneous subtraction. BRAM was the asset manager for a portion of one of plaintiff's non-unitary flow-through entities and, therefore, its business was not part of plaintiff's unitary business. In Count VII, plaintiff requests, among other things, an order authorizing it "to claim the gain from

the sale of BRAM, in the amount of $23,838,320 under misc. subtractions for the tax year ending May 31, 2016."

With respect to CVI, plaintiff claims that it requested an alternative apportionment in a July 18, 2019 email from plaintiff's Tax Manager to Treasury's auditor, which reads in pertinent part as follows:

> Hi [auditor] – [Plaintiff] has issues with how the prelim AWP's calculate allocable income from the CVI funds. Please see the attached K-1s for FYE 05-31-14. The last page of both of these K-1s states that the apportionment info provided only relates to the income reported on line 1 of the K-1. However, the prelim AWP's apportion all of the K-1's income based on this information that only applies to line 1. This seems incorrect.
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> This same situation applies to these same partnerships for FYE 05-31-15. It also applies to the CVI Global Value Fund for FYE 05-31-13, FYE 05-31-14, and FYE 05-31-15. I can send you all of these K-1s too. Please let me know.

In addition, plaintiff claims that it requested alternative apportionment in its December 23, 2019, request for an informal conference. After describing the CVI Global Value Fund, plaintiff disagreed with the auditor's income apportionment, explaining:

> The auditor has included only proceeds from rental activities and the sale of real properties in apportioning the income of CVI, but the vast majority of CVI's income arises from gains on the sale of stocks and bonds. This income should not be apportioned based solely on CVI's income from rental properties—None of the intangible trading was done in Michigan, but was performed at CVI's principle place of business in Minnesota and its other non-Michigan locations. The Taxpayer is in the process of preparing an affidavit confirming these facts and will supplement this request with that affidavit as soon as it is available.

Because the CVI income at issue arose "from transactions involving marketable securities purchased and traded on securities markets where the customer's location cannot be identified," plaintiff maintained that MCL 206.665(10)(b) dictates the conditions upon which these sales could be sourced to Michigan. And, "[b]ecause CVI did not maintain a place of business in Michigan and none of the investment and trading activity occurred in Michigan, none of these receipts can be sourced to Michigan."

With respect to the gain on the sales of BRAM, plaintiff asserted the following objection to the Treasury's audit:

> "Misc Subtractions" was reduced from $23,838,320 to $0. This subtraction consists of the gain on sale of [BRAM]. BRAM was the asset manager for a portion of [plaintiff's] non-unitary flow through entities. The business of BRAM was not part of [plaintiff's] unitary business. We disagree with this adjustment. If the Michigan Business Tax Section agrees with the statements above, then [plaintiff] owes none of the tax, interest, and penalty assessed on the enclosed notice.

II. ANALYSIS

MCR 2.116(C)(8) provides for summary disposition when a party "has failed to state a claim on which relief can be granted." A motion under MCR 2.116(C)(8) "tests the legal sufficiency of the claim on the pleadings alone." *Bailey v Schaaf*, 494 Mich 595, 603; 835 NW2d 413 (2013). See also MCR 2.116(G)(5). In analyzing the claim, this Court must accept as true all factual allegations in the complaint and only grant the motion "when a claim is so clearly unenforceable that no factual development could possibly justify recovery." *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 160; 934 NW2d 665 (2019).

A. PL 86-272 DOES NOT AUTHORIZE EXCLUSION OF NSBS PASS-THROUGH INCOME RECEIVED BY NSSV

The Court agrees with Treasury that PL 86-272 does not authorize exemption of income received by a member of a UBG when the UBG has sufficient nexus with Michigan to be subject to the CIT. And there is no dispute that plaintiff's UBG had such nexus or that NSSV, the entity that received NSBS's income, was identified as a member of the UBG. By its terms, PL 86-272 prohibits Treasury from imposing a net income tax on income derived within Michigan by a "person" if the "only business activities within [Michigan] by or on behalf of such person during such taxable year" are the solicitation of orders sent outside Michigan for "approval or rejection,

and, if approved, are filled by shipment or delivery from a point outside [Michigan]." 15 USC 381(a)(1).

The "person" against whom the CIT is levied is the "taxpayer," which in this case is plaintiff's UBG. This is evident from Section 623 of the CITA, which "levie[s] and impose[s] a corporate income tax on every taxpayer with business activity within this state or ownership interest or beneficial interest in a flow-through entity that has business activity in this state unless prohibited by [PL 86-272]." MCL 206.623. "Taxpayer" is defined as the UBG in the corporate income tax act, MC: 206.623, *et seq.* (CITA), and the UBG must file a combined return that includes each of its members and excludes "all transactions between those [members]" from the "corporate income tax base, the apportionment formulas, and for purposes of determining exemptions, credits, and the filing threshold." MCL 206.611(5), (6); MCL 206.691(1). The pass-through income that NSSV received from its ownership interest in NSBS was not income received between members but, rather, was received by a member, from an entity outside of the UBG. Plaintiff's claim in Count I that this income was not "unitary" is without support in the record or the applicable law.

The federal Supreme Court opinion that plaintiff cites in its brief does not render a contrary result. *Wis Dep't of Revenue v William Wrigley, Jr*, 505 US 214, 216; 112 S Ct 2447; 120 L Ed 2d 174 (1992). The case did not involve a UBG. Rather, the Supreme Court considered whether the plaintiff's activities within Wisconsin constituted nothing more than solicitation of orders such that it would be exempt from state income taxation under PL 86-272. The Supreme Court explained that PL 86-272 "confers immunity from state income taxes on any company whose 'only business activities' in that State consist of 'solicitation of orders' for interstate sales." *Id.* at 223. The Supreme Court held that the replacement, supplying, and storage of product and promotional

materials, as well as the rental space for storage and employee recruitment, training, and evaluating activities, served as an "independent business function quite separate from requesting orders" and, therefore, did not qualify for immunity under PL 86-272. *Id.* at 232-234. Moreover, instead of requiring Wisconsin to separate out these activities and the income generated from them, the Supreme Court held that the activities "constituted a nontrivial additional connection with the State" and, therefore, "[b]ecause [plaintiff's] business activities within Wisconsin were not limited to those specified in [PL 86-272], the prohibition on net-income taxation contained in [PL 86-272] was inapplicable." *Id.* at 235.

In sum, there is no allegation or evidence in the record that plaintiff's UBG lacked sufficient business activity in Michigan so as to fall under the protection of PL 86-272. Having established that the taxpayer has sufficient business activity to be subject to tax, PL 86-272 does not authorize an exemption of any income received outside of that business activity, as plaintiff suggests. Defendant's motion for summary disposition is GRANTED with respect to Counts I, II, III, and IV of the complaint.

B. FAILURE TO REQUEST ALTERNATIVE APPORTIONMENT WARRANTS DISMISSAL OF COUNTS V AND VI

Defendant's motion is likewise GRANTED with respect to Counts V and VI of the complaint, which allege that Treasury inappropriately apportioned CVI's income. The mechanism for requesting an alternate apportionment is set forth in MCL 206.667, and plaintiff failed to comply with this statute.

Under MCL 206.667, when a taxpayer believes the "apportionment provisions of the [CITA] do not fairly represent the extent of the taxpayer's business activity in this state," the taxpayer may petition Treasury for a "[s]eparate accounting," "[t]he inclusion of 1 or more additional or alternative factors that will fairly represent the taxpayer's business activity in this

state," or "[t]he use of any other method to effectuate an equitable allocation and apportionment of the taxpayer's tax base." MCL 206.667(1).

The Legislature is presumed to have intended the meaning it plainly expressed. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). As defendant argues, plaintiff's original return does not satisfy the statutory requirement for a petition for alternative apportionment. See MCL 206.667(4). Neither does the email exchange with Treasury's auditor or the request for an informal conference satisfy this requirement. Both communications notify Treasury that plaintiff disagreed with the audit results and, in the request for an informal conference, dispute that the apportionment method utilized by Treasury for CVI applied. Neither of these communications, however, satisfies the requirements of MCL 206.667. In neither correspondence did plaintiff acknowledge the CITA's default apportionment and request an alternative.

Instead, the record demonstrates that plaintiff filed its tax returns without appropriately apportioning the income and that plaintiff later disagreed with the method that Treasury used during the audit. Plaintiff had no authority to use an alternate apportionment, having not received Treasury's approval, MCL 206.667(2), and its tax returns demonstrating its use of an alternative apportionment do not constitute a petition under MCL 206.667(1). MCL 206.667(4). Having not requested an alternate apportionment under Michigan law, plaintiff cannot contest the constitutionality of the apportionment applied. Defendant's motion for summary disposition under MCR 2.116(C)(8) is GRANTED with respect to Counts V and VI of the complaint.

Finally, with respect to Count VII, the Court finds summary disposition premature. Defendant seeks summary disposition on the basis that plaintiff failed to request apportionment under MCL 206.667. The allegations in the complaint for Count VII, however, do not dispute the

Treasury's apportionment but, rather, allege that the gains from the sale of BRAM should not have been included in the CIT filed by plaintiff's UBG because the income from the sale of BRAM was not "part of Cargill's unitary business." This position is set forth in plaintiff's request for an informal conference as well. Certain transactions are exempt from inclusion in the UBG's CIT, MCL 206.691(1), and the record is insufficient to determine if BRAM qualifies as one of these transactions. Given that this is a motion under MCR 2.116(C)(8), and no discovery has taken place, the Court DENIES defendant's motion.

III. CONCLUSION

For the reasons stated in this opinion and order, defendant's motion for summary disposition under MCR 2.116(C)(8) is GRANTED with respect to Counts I to VI and DENIED with respect to Count VII.

This is not a final order and does not close the case.

Date: Oct. 29, 2025

Hon. Brock A. Swartzle
Chief Judge, Court of Claims