ILLINOIS INDEPENDENT

TAX TRIBUNAL

TODD CHRISTOPHER, as representative, for T. CHRISTOPHER HOLDING COMPANY, Petitioner,	)	
v.	)	19 TT 131
	)	Judge Brian F. Barov
ILLINOIS DEPARTMENT OF REVENUE, Respondent.	)	

ORDER ON SUMMARY JUDGMENT MOTION

The Petitioner, TODD CHRISTOPHER, as representative, for T. CHRISTOPHER HOLDING COMPANY ("Holding Company"), is a Florida corporation formed in 2013 to hold equity interests in Vogue International, LLC ("Operating Company"), a nation-wide developer, distributer and marketer of hair and skin care products. In 2014, the Holding Company sold part of the Operating Company for a gain. After an audit, the Illinois Department of Revenue ("Department") issued a notice of deficiency against the Holding Company for additional Illinois replacement income tax on the gain, pursuant to section 35 ILCS 5/201(c) of the Illinois Income Tax Act ("IITA"), 35 ILCS 5/201(c).

The Holding Company filed a four-count petition in the Tax Tribunal challenging the deficiency assessment for replacement income tax alleging various regulatory, statutory, and constitutional errors. It has now moved for summary judgment on Count I. In Count I, the Holding Company claimed that section 201(c) of the IITA does not apply to the capital gain it earned on the Operating Company's sale as a matter of law.

Background

The Holding Company was incorporated in Florida on August 9, 2013, under Florida law. Mot. For Summary J. at 2. It elected to be taxed as a Subchapter S corporation under the Internal Revenue Code. *Id.* Its president and authorized agent, Todd C. Christopher ("Christopher"), was at all times a Florida resident. *Id.*

In his affidavit accompanying the summary judgment motion, Christopher described the Holding Company as a "passive" entity that served solely to hold his equity interest and the equity interests of various family trusts in the Operating Company, a company that he had founded. Christopher Aff. at ¶¶ 8, 10-11. The Holding Company's purpose was to "facilitate the administration" and sale of his and his family's equity interests in the Operating Company. *Id.* at ¶ 10. It served as the sole representative in the sale to permit easier intrafamily transfers of equity interests without affecting the Operating Company's ownership structure. *Id.* at ¶ 11. These benefits that the Holding Company provided, Christopher declared, were "separate from the business activities of the Operating Company." *Id.* at ¶ 11.

Other than the equity interest in the Operating Company and a Goldman Sachs brokerage account holding cash and various investment vehicles, according to Christopher, the Holding Company had no real property, tangible, or intangible personal property. *Id.* at ¶¶ 8-9. It had no employees or payroll and did not engage in any trade or business. *Id.* at ¶ 8.

Christopher further averred that during the tax years in issue, the Operating Company was first a Florida corporation and then a Delaware limited liability company, taxed as a partnership. *Id.* at ¶ 12. It was headquartered in Florida and all of its "back-office and management operations, including marketing, executive operations, accounting, finance, and sales order processing" took place at the Florida headquarters. *Id.* at ¶ 14. None of the Operating Company's 60-65 employees were employed in Illinois. *Id.* at ¶ 15.

On February 14, 2014, the Holding Company sold a 49% interest in the Operating Company to the Carlyle Group, an unrelated party. *Id.* at ¶ 17. The sale was facilitated by Goldman Sachs in New York and governed by Delaware law. *Id.*

at ¶ 18. After the 2014 sale, the Holding Company retained about a 50% interest in the Operating Company. *Id.* at ¶ 20. In 2016, the Holding Company sold the remaining equity interest in the Operating Company to Johnson & Johnson.[1] *Id.* at ¶ 21. On December 28, 2016, the Holding Company filed articles of dissolution and a notice of corporate dissolution with the Florida Department of State. *Id.* at ¶ 23. Christopher was a transferee of the Holding Company's assets. *Id.* at ¶ 3.

According to the Department auditor, the Operating Company was treated as a partnership for federal and state tax purposes. Dep't Ex. C, Affidavit of Tammara Wadas at ¶ 4. The auditor stated in her affidavit that the Holding Company held a majority interest in the Operating Company and was identified as its managing partner. *Id.* at ¶¶ 4 & 6; Dep't Response to Mot. for Summary J, Ex. B. Further, the K-1-P forms that the Department provided as exhibits to its response to the summary judgment motion reflected that Christopher, individually, held a majority interest in the Holding Company and a related trust held a minority interest. *See* Dep't Response to Mot. for Summary J. at D. The Department's auditor found that the Holding and Operating Company were a unitary business based on this common ownership and the partnership agreement between the Operating Company and the Holding Company. *Id.*, Exs. B & F; *see also* Pet., Ex. B. In response to the summary judgment motion, the Department also submitted one of the Holding Company's interrogatory answers in which Christopher stated that he participated in the negotiation of the Holding Company's sale of its interest in the Operating Company to the Carlyle Group. *Id.*, Ex. G

On July 11, 2019, after an audit of the Holding Company, the Department issued a Notice of Deficiency assessing it additional replacement tax (without penalties or interest) on the gain from the 2014 partial sale of the equity interest in the Operating Company. Pet., Ex. A.

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[1] The Department later issued a Notice of Deficiency assessing replacement tax on the gain from the 2016 sale of the remaining equity interest in the Operating Company, which is the subject of Case No. 20TT54 currently pending in the Tax Tribunal.

Analysis

Summary judgment should be granted when "the pleadings, depositions and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c). The Holding Company first contends that it is entitled to summary judgment because it was not subject to replacement tax under the plain language of section 201(c) of the IITA, 35 ILCS 5/201(c), the provision of the IITA imposing replacement tax. *See* Pet'r Mot. for Summary J. at 7-10. This is a matter of statutory construction, which presents a question of law appropriate for consideration on a summary judgment motion. *See Oswald v. Hamer*, 2018 IL 122203, ¶ 9.

Replacement tax is an income tax. *See* 35 ILCS 5/201(c); *see also Borden Chem. & Plastics, L.P. v. Zehnder*, 312 Ill. App. 3d 35, 37-38 (1st Dist. 2000). It functions as an income tax surcharge on the net income of corporations (including S Corporations), partnerships, and trusts and was imposed after the personal property tax was abolished. 35 ILCS 5/201(c) (stating that replacement tax "shall be in addition to the income tax imposed by subsections (a) and (b) of this Section"); *see also Borden Chem. & Plastics, L.P.*, 312 Ill. App. 3d at 38.

The replacement tax is "measured by net income" and "imposed on the privilege of *earning or receiving income in* or as a resident of *this State*." 35 ILCS 5/201(c) (emphasis added). The language of section 201(c) is identical to the language imposing the general income tax under the IITA "on every individual, corporation, trust and estate . . . *earning or receiving income in* or as a resident of *this State*. 35 ILCS 35 ILCS 5/201(a) (emphasis added). The Holding Company does not dispute that the replacement tax applies to pass-through income it received from the Operating Company. Pet. ¶ 86. It has cited no statutory language or case law analysis holding or suggesting that replacement tax operates any differently than income tax on its attribution of net income to nonresident corporations or partnerships.

Under the IITA, the "business income" that a nonresident taxpayer earns or receives in Illinois may be taxed to its constitutional limit. *See* 35 ILCS 5/1501(a)(1). By contrast, nonbusiness income is "all income other than business income," 35 ILCS 5/1501(a)(13), and is allocated and taxed under special rules, *see* 35 ILCS 5/303. These rules of allocation and apportionment of income and nonbusiness income apply with equal effect to subchapter S corporations. *See* 35 ILCS 5/308(c) ("Base income of a Subchapter S corporation shall be allocated or apportioned to this State pursuant to this Article 3 in the same manner as it is allocated or apportioned for any other nonresident.").

The business income of persons conducting business in Illinois and elsewhere is attributable to Illinois and taxed under the combined apportionment method. *See AT & T Teleholdings, Inc. v. Department of Revenue*, 2012 IL App (1st) 110493, ¶ 15. The combined apportionment method treats multiple affiliated businesses that are engaged in a unitary business group as a single taxpayer, and the unitary group's income is apportioned "to Illinois based on the percentage of sales which took place inside Illinois." *Id.* Likewise, under the Constitution, whether the gain from the sale of a business is apportionable to Illinois turns on the unitary relationship between the seller and asset sold. *See MeadWestvaco Corp. v. Illinois Department of Revenue*, 553 U.S. 16, 29-30 (2008); *see also A.B. Dick Co. v. McGraw*, 287 Ill. App. 3d 230, 231-32 (4th Dist. 1997).

A unitary business group is defined in the IITA as "a group of persons related through common ownership whose business activities are integrated with, dependent upon and contribute to each other." 35 ILCS 5/1501(a)(27). A holding company may be part of an Illinois unitary business group. *See A.B. Dick Co.*, 287 Ill. App. 3d at 232; *Security Life of Denver Ins. Co. v. Illinois Dep't of Revenue*, 14TT89 (Jun. 27, 2016) at 9. The purpose of combined reporting and the unitary business doctrine is to permit states to recapture the "many subtle and largely unquantifiable transfers of value that take place among the components of a single enterprise." *A.B. Dick Co.*, 287 Ill. App. 3d at 239 (internal quotation marks and citations omitted). The definition of a holding company and the manner in which it

is included in a unitary business is also set forth in IITA's definition of unitary business group. *See* 35 ILCS 5/1501(a)(27)(C)).

Contrary to the Petitioner's argument, *see* Reply at fn. 1, the issue of whether the Holding Company can be subject to replacement tax on the gain from the sale of the Operating Company–at least for the current motion–will thus turn on whether the two companies formed a unitary business group. The question of whether the Holding Company and Operating Company comprised a unitary business group is a fact question. *A.B. Dick Co.*, 287 Ill. App. 3d at 236 (citing *Citizens Utilities Co. v. Department of Revenue*, 111 Ill. 2d 32, 47 (1986)). The facts that demonstrate business unity include whether the companies share "authority over such matters as purchasing, financing, tax compliance, product line, personnel, marketing, and capital investment is not left to each member)." 35 ILCS 5/1501(a)(27)(A).

The Holding Company addressed this issue, contending that it was entitled to summary judgment because Christopher's affidavit provided the proof that it and the Operating Company lacked a sufficient unitary connection as a matter of law. In its reply, the Holding Company focused on paragraphs, 8, 10, and 11 of Christopher's affidavit, in which he stated: 1) that the Holding Company "engaged in no trade or business, had no employees or payroll . . . and owned no property other than an equity interest in . . . the Operating Company and the Goldman Sachs brokerage account"; 2) that the Holding Company was "conceived of, and formed solely as a passive holding company to facilitate the administration" and sale of the Operating Company; and 3) that the sale of the Operating Company was negotiated by Christopher and others. Reply Br. at 3, fn. 2-4. Further, the Holding Company's argument is bolstered by Christopher's testimony that the Holding Company was headquartered in Florida and its "back-office and management operations, including marketing, executive operations, accounting, finance, and sales order processing took place" there; Christopher Aff. at ¶ 14; and that none of the Operating Company's 60-65 employees were employed in Illinois, *id.* at ¶ 15

When a considering a motion for summary based on an assertion that the material facts are undisputed, the evidence presented should be construed in favor

of the nonmoving party. *Adams v. Northern Ill. Gas Co.*, 211 Ill. 2d 32, 43 (2004). "A triable issue precluding summary judgment exists where the material facts are disputed, or where, the material facts being undisputed, reasonable persons might draw different inferences from the undisputed facts." *Id.* Summary judgment should not be granted unless the results are "clear and free from doubt." *Id.*

Generally, if a party moving for summary judgment supports the motion with an affidavit or other admissible evidence that would entitle it to summary judgment, the nonmoving party cannot rest on its complaint or answer alone to raise issues of material fact. *See Komater v. Kenton Court Assocs.*, 151 Ill. App. 3d 632, 636 (2d Dist. 1986). Rather, the nonmoving party must provide countervailing affidavits or evidence that raises a legitimate fact question. *See id.* But the burden shifting to the nonmovant occurs only if its facts entitle it to summary judgment in the first instance. *See id.* If the movant's facts do not establish a right summary judgment, "the opposing party may rely upon its complaint or answer to establish triable issues of fact." *See id.*

The evidence provided by Christopher's affidavit does not render the lack of a unitary relationship between the Holding Company and the Operating Company "clear and free from doubt." *Adams*, 211 Ill. 2d at 43. Given that Christopher founded the Operating Company and was its president, authorized representative, and the transferee of its assets, *see* Christopher Aff. ¶¶ 3, 8, the fact that the Holding Company was conceived of and formed as a "passive holding company" to allow a "single representative to negotiate the sale of the Holding Operating," *see id.* at ¶¶ 10-11, does not indicate that no phases of the two business were integrated, *see A.B. Dick Co.*, 287 Ill. App. 3d at 241, nor do these conclusory assertions rule out "the largely unquantifiable transfers of value" indicative of the unitary business relationship. *See id.* at 239.

Discovery has not closed in this case. It is not clear whether written discovery was completed at the time the motion for summary judgment was filed. The Department certainly should have the opportunity to test the scope, accuracy, and veracity of the assertions in Christopher's affidavit.

Moreover, the Department has come forward with evidence disputing the Holding Company's conclusion that it and the Operating Company were not engaged in a unitary business. The auditor's affidavit, the partnership agreement, and the K-1-P forms raise questions as to the extent of the Holding Company's role in the Operating Company and Christopher's role in both companies. Pet., Ex. B; Dep't Response to Mot for Summary J., Exs. B, C, D, F. So too does the Holding Company's interrogatory response stating that Christopher was involved in the negotiations for the partial sale of the Operating Company by the Holding Company to the Carlyle Group. *Id.*, Ex. G.

In sum, the Holding Company has not met its burden for summary judgment in its favor on Count I. The plain language of section 201(c) of the IITA does not preclude the replacement tax's application here and fact questions remain as to whether the Holding Company and the Operating Company were engaged in a unitary business. The nature of the relationship between the Holding Company and Operating Company cannot be decided on this record but requires the development of additional facts.

Conclusion

The Petitioner's motion for summary judgment on Count I of its petition is DENIED. The matter is reset for a telephone status conference on December 10, 2020, at 11:00 a.m.

s/ *Brian Barov*
BRIAN F. BAROV
Administrative Law Judge

Date: November 24, 2020