

STATE OF WISCONSIN
TAX APPEALS COMMISSION

GP TANGIBLE INVESTMENTS, LLC,

DOCKET NO. 12-R-151

Petitioner,

vs.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

LORNA HEMP BOLL, CHAIR:

This case comes before the Commission for decision on cross-motions for Summary Judgment. The Petitioner appears by Attorney Kristina E. Somers of Reinhart Boerner Van Dueren, s.c., Milwaukee, Wisconsin, in this matter. The Respondent in this matter, the Wisconsin Department of Revenue ("the Department"), is represented by Attorney Julie A. Zimmer and Attorney Mark S. Zimmer. Both parties have filed with the Commission briefs and affidavits in support of their respective positions. For the reasons stated below, we find for the Department.

FACTS¹

Despite the lack of a formal stipulation of facts, we find that the facts submitted by each side are essentially the same. The pertinent facts are as follows:

¹ The claims in this case involve the tax years 2007-2009. Although much of this opinion is written in the present tense, the facts are those as they existed during those years and statutes referenced are those which were in effect during the years under appeal; the holding is limited to those years as well.

Jurisdictional Facts

1. On October 19, 2011, the Department issued a Notice of Amount Due, assessing the Petitioner additional partnership tax for tax period beginning January 1, 2007, and ending December 31, 2009, in a total amount of \$53,132.00. (Nelson Aff., Ex. 1.)

2. Petitioner filed a Petition for Redetermination which was considered by the Department and denied in Department's notice dated May 14, 2012. (Nelson Aff., Ex. 2 and Ex. 3.)

3. Petitioner filed a Petition for Review with the Commission on July 16, 2012. (Nelson Aff., Ex. 4.)

4. On November 28, 2012, the Department filed a Motion for Summary Judgment, along with an affidavit with exhibits in support of the motion. Petitioner responded and filed its Cross-Motion for Summary Judgment with supporting documentation on July 8, 2013. (Commission file.)

Material Facts²

5. Petitioner, GP Tangible Investments, LLC ("GPTI"), is a limited liability company treated as a partnership for tax purposes under section 7701 of the Internal Revenue Code. (Nelson Aff., ¶ 2.)

² Although the parties did not submit a stipulation of facts, the facts in this section are essentially the same in the affidavits submitted by both parties.

6. GPTI is a member of GP Operations LLC ("GP Operations"), also a limited liability company treated as a partnership for tax purposes under section 7701 of the Internal Revenue Code. (Nelson Aff. ¶ 3.)

7. During the audit period (2007-2009), GP Operations derived income from business transacted in Wisconsin. (Nelson Aff. ¶ 5.)

8. Pursuant to Wis. Stat. § 77.94, GP Operations paid the Wisconsin Recycling Surcharge on its income derived from business transacted in Wisconsin during the audit period. (Nelson Aff. ¶ 4.)

9. As one of the 37 members of GP Operations, GPTI received pass-through income from GP Operations; that income was derived from business transacted by GP Operations in Wisconsin during the audit period. GPTI had no income other than the income passed through to it by GP Operations. (Nelson Aff. ¶ 5.)

10. For each of the audit years, GPTI reported Wisconsin income on its Form 3 Wisconsin Partnership Returns, which included the income passed through to it by GP Operations, as follows:

2007	\$64,922,884
2008	\$29,783,766
2009	\$41,285,596

(Nelson Aff. ¶ 6.)

11. For each of the audit years, GPTI's gross receipts totaled more than \$4,000,000. (Nelson Aff. ¶ 7.)

12. GPTI did not pay the Recycling Surcharge for the audit years. (Nelson Aff. ¶ 8.)

APPLICABLE LAW

A motion for summary judgment will be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Wis. Stat. § 802.08(2). The parties do not disagree on the materials facts. Thus, we believe this case involves only a question as to how the law applies to the facts and is therefore ripe for summary judgment.

The specific statutes at issue here involve Wisconsin's Recycling Surcharge:

Wis. Stat. § 77.93 Applicability [of Wisconsin Recycling Surcharge] For the privilege of doing business in this state, there is imposed an economic development surcharge on the following entities:

- (1) All corporations required to file a return under subch. IV or V of ch. 71 that have at least \$4,000,000 in gross receipts from all activities for the taxable year except corporations that are exempt from taxation under s. 71.26(1) and that have no unrelated business income reportable under s. 71.24(1m). The surcharge is imposed on the tax-option corporation, not on its shareholders, except that if a tax-option corporation's surcharge is delinquent, its shareholders are jointly and severally liable for it.
- (2) All natural persons, estates and trusts that are required to file a return under subch. I or II of ch. 71 for the taxable year and that . . . file a form indicating a profit or loss from a trade or business for federal income tax purposes for the taxable year. The surcharge is not imposed on net business income of individuals for which the surcharge is imposed on a tax-option corporation of which an individual is a shareholder, partnership of which an

individual is a partner[,] or a limited liability company of which an individual is a member.

- (3) All partnerships, except partnerships that have net business income only from farming, that derive income from business transacted in this state, from property in this state[,] or from services performed in this state for taxable year. The surcharge is imposed on the partnership, not on its partners, except that if a partnership's surcharge is delinquent that partners are jointly and severally liable for it.

- ...
- (5) All natural persons, estates, trusts and partnerships that are engaged in farming. The surcharge is imposed on the partnership, not on its partners, except that if a partnership's or company's surcharge is delinquent the partners are jointly and severally liable for it.

Wis. Stat. § 77.94 Surcharge determination

- (1) Except as provided in sub. (2), for taxable years beginning after December 31, 1999, the surcharge imposed under s. 77.93 is calculated as follows:

- ...
- (b) On an entity under s. 77.93(2), (3) or (5), except an entity that has less than \$4,000,000 of gross receipts, an amount equal to the amount calculated by multiplying net business income as allocated or apportioned to this state by means of the methods under s. 71.04, for the taxable year of the entity by 0.2%, up to a maximum of \$9,800, or \$25, whichever is greater.

Wis. Admin. Code § Tax 2.32.(2)(h) "Gross receipts of partnerships" means the total receipts or sales from all trade or business activities other than farming, reportable by partnerships for federal income tax purposes, before any deduction for returns and allowances or any other business expenses. Gross receipts include the sum of the following:

- ...
2. Gross receipts, other than farm receipts, passed through from other partnerships and fiduciaries and includable in computing the amount on line 4 of federal for 1065.

BACKGROUND

The parties agree to the essential facts of this case. GP Operations is a partnership, and Petitioner GPTI is a partner of GP Operations.³ This case is not about surcharge imposed on first-tier partnership GP Operations. GP Operations had business income in Wisconsin during the audit years, which it reported in Wisconsin. Having derived income in this state and being an entity with gross receipts in excess of \$4 million, GP Operations paid the Wisconsin Recycling Surcharge which is assessed to "all partnerships . . . that derive income from business transacted in this state" under Wis. Stat. § 77.93(3).

The Wisconsin Recycling Surcharge is imposed directly upon partnerships and not their partners.⁴ GPTI is partner of GP Operations. All agree that, by virtue of its status as a partner, GPTI is not subject to the surcharge imposed upon GP Operations.

The situation is complicated by the fact that GPTI is itself a partnership. GP Operations passed Wisconsin income through to its members, one of which was GPTI. GPTI's income consisted solely of pass-through income from GP Operations. GPTI reported the income on its federal and Wisconsin partnership returns for the years in question. GPTI did not pay a Wisconsin Recycling Surcharge on the income it received from GP Operations. This case turns on whether, at this second level, GPTI is subject to a surcharge of its own because of the income passed through to it by GP Operations.

³ The entities involved in this case are limited liability companies which have elected to be treated as partnerships for tax purposes under section 7701 of the Internal Revenue Code. Thus, for simplicity we will refer to the structures as partnerships and members as partners.

⁴ Partners may be held liable for the charge owed by a partnership if the partnership itself fails to pay the surcharge, but there is no such allegation in this case.

GPTI is both partner and partnership. The parties disagree on the applicability of Wis. Stat. § 77.93(3).

Petitioner's Arguments

Petitioner argues that it is not liable for the surcharge because GP Operations has paid the surcharge. Petitioner argues it cannot be liable for surcharges already paid by the first-tier partnership, GP Operations. The statute assesses liability to the underlying members of a partnership only if the partnership is delinquent, which GP Operations is not.

The pass-through income from GP Operations is the only income GPTI had during the audit years. GPTI had no independent income of its own. Petitioner disputes what it characterizes as double taxation. Petitioner further argues that, if in fact GPTI is found to owe a surcharge, the amount owed should be offset by at least 1/37 of the surcharge paid by first-tier partnership, GP Operations, since the amount paid was based upon the same income passed through to GPTI.⁵

Department's Arguments

The Department recognizes that GP Operations did pay the surcharge and is not alleging that GPTI is liable for the surcharge applied to GP Operations. Rather, the Department asserts that GPTI is liable for a second level of surcharge by virtue of its own status as a partnership, arguing that the pass-through income is income "derived from" Wisconsin activities, albeit indirectly through the first-level partnership's activities.

⁵ Petitioner also raises a number of concerns regarding the ramifications of upholding the assessment of the surcharge. As will be noted, it is not the role of this Commission to rewrite legislation to achieve what may be perceived as a more just result; our duty is to interpret the statutory language and apply it to the facts of the case.

Because all partnerships which derive income in Wisconsin must pay this surcharge, GPTI owes the surcharge as well as interest and penalties. The Department further argues against any offset.⁶

ANALYSIS

As clarified above, the issue before us is whether GPTI is subject to its own “second-level” recycling surcharge by virtue of its legal structure as a partnership. The Petitioner clouds the issues somewhat by referring to the statutory language which imposes the surcharge on the partnership and not its partners. All agree that the first-level partnership properly paid the surcharge it was obligated to pay. The surcharge imposed on GPTI in this case is not based on the obligation of GP Operations and GPTI’s status as a partner of GP Operation. Rather, the assessment involves a separate surcharge imposed directly against GPTI as a partnership itself.

Therefore, the relevant question is whether GPTI, as a partnership, is itself obligated to pay the recycling surcharge set forth in Wis. Stat. § 77.93.

Statutory Interpretation Standard

The rules concerning the Commission’s statutory interpretation have been set forth many times. Most pointedly instructive on the issue of statutory interpretation is the Wisconsin Supreme Court’s decision in *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, 271 Wis. 2d 633, 663, 681 N.W.2d 110. Statutory interpretation “begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop

⁶ The Department also argues, and the Petitioner disputes, that GPTI and GP Operations are a single unitary business and thus GPTI itself is “doing business” in Wisconsin. Because we find that the Department properly assessed the Surcharge to GPTI for other reasons, we do not address the unitary business arguments of the parties.

the inquiry.” *Id.* When interpreting a statute, we assume that the legislature's intent is expressed in the statutory language. The *Kalal* court discussed various factors in determining the meaning of a statute in the context of the Wisconsin “statutory meaning” approach (as distinguished from the “legislative intent” approach to statutory interpretation). Quoting the United States Supreme Court decision of *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, the *Kalal* court emphasized, “We have stated time and again that courts must presume that the legislature says in a statute what it means and means in a statute what it says there.” *Kalal* at ¶ 39.

Statutory interpretation focuses primarily on the precise words of the pertinent statute section or subsection. We may also look to the context and to the structure of the statute so that every word has meaning when the statute is read as a whole. *Kalal* at ¶ 46. The *Kalal* court distinguished between intrinsic and extrinsic resources. Intrinsic resources may be considered in ascertaining meaning or ambiguity and may include legislative intent as expressed within the statutory language itself but not extrinsic resources and expressions of legislative intent.⁷ Where statutes are unambiguous, there is no need to consult extrinsic sources of interpretation, such as legislative history. *Id.* “It is the enacted law, not the intent, that is binding on the public . . . [I]t is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated.” *Id.* ¶¶ 44 and 46. Only in the face of a finding of

⁷ “[S]cope, context, and purpose are perfectly relevant to a plain-meaning interpretation of an unambiguous statute as long as the scope, context, and purpose are ascertainable from the text and structure of the statute itself, rather than extrinsic sources, such as legislative history.” *Kalal* at ¶ 48.

ambiguity does the Commission or Court look to extrinsic resources such as legislative histories to resolve such ambiguities.

DECISION

We begin with the statute as written to determine whether the statute is ambiguous. Based upon the following analysis, we find that it is not.

Wis. Stat. § 77.93 imposes a recycling surcharge on various individuals and entities. The statute specifically imposes the surcharge on "all partnerships, except partnerships that have net business income only from farming, that derive income from business transacted in this state" Wis. Stat. § 77.93(3). The related calculation statute sets forth the calculations which apply unless the gross receipts of the taxpayer are under \$4,000,000. Wis. Stat. § 77.94(b).

The parties agree that GPTI is treated as a partnership under the relevant statutes. GPTI in turn is a partner of GP Operations, a partnership which generated income in several states, including Wisconsin. GP Operations attributed a portion of its income to Wisconsin. GPTI received its share of that Wisconsin income when it was passed through from GP Operations. Petitioner reported the income it received from GP Operations on its federal and state partnership returns.

One detail remains problematic. Is receiving pass-through income which is generated in Wisconsin the same thing as "deriving income" from business transacted in Wisconsin? Petitioner points to *Consolidated Freightways Corporation of Delaware v. Dep't of Revenue*, 164 Wis. 764, 477 N.W.2d 44 (1991) which, it argues, stands for the proposition that Wisconsin can only tax income that a taxpayer generates in this state through its in-

state activities, and extrapolates therefrom that GPTI cannot be subject to the surcharge because GPTI did not actively earn the income on which the surcharge is assessed. We do not agree with this conclusion. The focus of *Consolidated Freightways* was on in-state versus out-of-state income; the statutory language indeed limits the state's ability to tax a multi-state taxpayer only on its Wisconsin income, but the Department is not seeking to tax income derived from business outside this state.

For each year at issue, GPTI reported gross receipts on its federal form 1065 and on its Form 3 Wisconsin Partnership Returns. Those gross receipts included and in fact consisted solely of income passed through from the first-tier partnership GP Operations. Pass-through income from a partnership is included in "receipts . . . from business activities," per the Administrative Code's definition of "gross receipts." Thus, Petitioner has income from business activities in Wisconsin. That income is in excess of \$4,000,000; thus, this partnership had sufficient gross receipts to trigger the surcharge.

Looking to the plain language of the statute, the term in question is "derived." While "derived" is not expressly defined in the statutes, the Merriam Webster dictionary definition of the intransitive form of this verb is "to trace the derivation of; to have or take origin; to come as a derivative."⁸ The funds in question originated from the portion of GP Operations business activity which took place in Wisconsin. As the Department correctly points out, the statute says "derived from business activity." The statute does not specify whose activity, and it is not our place to insert limiting language such as "its own" as the Petitioner would suggest.

⁸ <http://www.merriam-webster.com/dictionary/derive>.

As noted above, the measure of whether a partnership is subject to the surcharge is a function of its gross receipts. Petitioner correctly reported the pass-through income in its gross receipts. The Administrative Code defines gross receipts as receipts "from business activity" which expressly includes, among other items, pass-through income. Thus, Petitioner has income derived from business activity.

The Petitioner raises a legitimate concern regarding double-taxation. We are not to presume the intention for double taxation but must find that the language clearly intends that result. *Ramrod, Inc. v. Dep't of Revenue*, 64 Wis. 2d 499, 513, 219 N.W.2d 604 (1974). For the following reasons, we find that the statute in force at the time provided for this consequence.

Statutes relating to the same subject matter must be viewed *in pari material*; that is, they must be read in a manner that harmonizes all pieces so the whole and its parts are each given full force and effect. *Lake City Corp. v. City of Mequon*, 207 Wis. 2d. 155, 165, 558 N.W.2d 100 (1997) n.11; *State v. Jeremiah C.*, 2003 WI App 40, ¶ 17, 260 Wis. 2d 359, 659 N.W.2d 193. This reasoning is in keeping with language of *Kalal* which said that statutes should be read so that every word has meaning when the statute is read as a whole.

Section 77.93(2) of the Wisconsin Statutes contains an exception from the surcharge for *individuals* who are second-tier participants: "The surcharge is not imposed on net business income of individuals for which the surcharge is imposed on a tax-option corporation of which an individual is a shareholder, partnership of which an individual is a partner[,] or a limited liability company of which an individual is a member." Section

77.93(3) relating to partnerships does not include a similar exception for partnerships which are themselves shareholders, partners, or members.

The absence of such language does not give rise to ambiguity. A carve-out is allowed for individuals but not for partnerships which are themselves partners. The legislature could certainly have placed similar language in subsection (3) if it had so intended – there is much repetition among the various subsections, for example, regarding the ultimate liability of the partners if the first-tier partnership fails to pay – or the legislature could simply have included second-tier partnerships in the list of groups to which subsection (2) applies. The legislature did neither, presumably for a reason; instead, the partnership subsection states that the surcharge applies to “all partnerships.”

In the absence of language negating a second level of surcharge, the claim of offset becomes moot. The statute makes no distinction for partnerships which are themselves partners, nor does it provide for a different calculation which includes an offset for a first-tier partnership which pays the surcharge. Simply, all partnerships whose income is generated in this state are subject to the surcharge.

CONCLUSIONS OF LAW

1. By virtue of the pass-through income received from GP Operations, GPTI is a partnership which derives income from business activity in Wisconsin.
2. GPTI's gross receipts for each of the years at issue exceeded \$4,000,000.
3. GPTI is subject to the Wisconsin Recycling Surcharge for the years at issue.

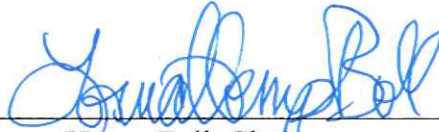
ORDER

There being no issues of material fact, based on the foregoing reasoning and caselaw, it is the order of this Commission that

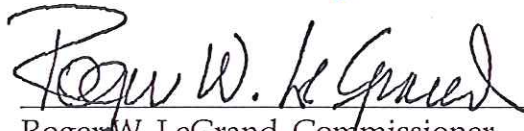
1. The Department's Motion for Summary Judgment is granted and its assessment is upheld;
2. Petitioner's Cross-Motion for Summary Judgment is denied; and
3. There being no issues remaining for consideration, this action is hereby dismissed.

Dated at Madison, Wisconsin, this 13th day of February, 2014.

WISCONSIN TAX APPEALS COMMISSION



Lorna Hemp Boll, Chair



Roger W. LeGrand, Commissioner



David D. Wilmoth, Commissioner

ATTACHMENT: NOTICE OF APPEAL INFORMATION

WISCONSIN TAX APPEALS COMMISSION
5005 University Avenue - Suite 110
Madison, Wisconsin - 53705

NOTICE OF APPEAL INFORMATION

**NOTICE OF RIGHTS FOR REHEARING OR JUDICIAL REVIEW, THE TIMES ALLOWED
FOR EACH, AND THE IDENTIFICATION OF THE PARTY TO BE NAMED AS
RESPONDENT**

A taxpayer has two options after receiving a Commission final decision:

Option 1: PETITION FOR REHEARING BEFORE THE COMMISSION

The taxpayer has a right to petition for a rehearing of a final decision within 20 days of the service of this decision, as provided in Wis. Stat. § 227.49. The 20-day period commences the day after personal service on the taxpayer or on the date the Commission issued its original decision to the taxpayer. The petition for rehearing should be filed with the Tax Appeals Commission and served upon the other party (which usually is the Department of Revenue). The Petition for Rehearing can be served either in-person, by USPS, or by courier; however, the filing must arrive at the Commission within the 20-day timeframe of the order to be accepted. Alternatively, the taxpayer can appeal this decision directly to circuit court through the filing of a petition for judicial review. It is not necessary to petition for a rehearing first.

AND/OR

Option 2: PETITION FOR JUDICIAL REVIEW

Wis. Stat. § 227.53 provides for judicial review of a final decision. Several points about starting a case:

- 1. The petition must be filed in the appropriate county circuit court and served upon the Tax Appeals Commission either in-person, by certified mail, or by courier, and served upon the other party (which usually is the Department of Revenue) within 30 days of this decision if there has been no petition for rehearing, or within 30 days of service of the order that decides a timely petition for rehearing.**
- 2. If a party files a late petition for rehearing, the 30-day period for judicial review starts on the date the Commission issued its original decision to the taxpayer.**
- 3. The 30-day period starts the day after personal service or the day we mail the decision.**
- 4. The petition for judicial review should name the other party (which is usually the Department of Revenue) as the Respondent, but not the Commission, which is not a party.**

For more information about the other requirements for commencing an appeal to the circuit court, you may wish to contact the clerk of the appropriate circuit court or the Wisconsin Statutes. The website for the courts is <http://wicourts.gov>.

This notice is part of the decision and incorporated therein.