COURT OF APPEALS
DECISION
DATED AND FILED

May 5, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP1605 Cir. Ct. No. 2014CV773

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

GP TANGIBLE INVESTMENTS LLC,

PETITIONER-APPELLANT,

V.

WISCONSIN DEPARTMENT OF REVENUE,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dane County: JUAN B. COLÁS, Judge. *Affirmed.*

Before Lundsten, Higginbotham, and Blanchard, JJ.

¶1 BLANCHARD, J. GP Tangible Investments, LLC challenges surcharges imposed by the Wisconsin Department of Revenue under the recycling

surcharge statute, WIS. STAT. § 77.93 (2009-10),[1] for the years 2007-2009. The Wisconsin Tax Appeals Commission upheld the surcharges, and the circuit court affirmed the commission. Tangible argues that the commission erred in determining that Tangible was a partnership "that derived income from business transacted in this state" as defined in § 77.93(3). Tangible also argues that imposing the recycling surcharge on it amounts to impermissible double taxation, because one of its partner entities paid a recycling surcharge on that entity's Wisconsin income during the years at issue and because it violates the due process clause of the federal and Wisconsin constitutions. For the following reasons, we affirm the decision of the commission.

BACKGROUND

¶2 At issue is application of the statute governing the Wisconsin recycling surcharge as it existed during the pertinent time period. This statute imposed a surcharge on various individuals and entities, including, as pertinent here, "[a]ll 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). For purposes of the surcharge statute, "'[p]artnership' has the

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted. Although the 2007-08 version of the recycling surcharge statute was in effect during some of the time period at issue, January 1, 2007–December 31, 2009, the pertinent statutory language was the same throughout this period.

However, the arguments made in this appeal appear unlikely to resurface, because after the years at issue here the recycling surcharge statutes were amended by 2011 WI Act 32, §§ 2184n-2187, and the statutory provisions at issue were subsequently repealed by 2013 WI Act 32, §§ 1501H and 1501I.

The pertinent language of the recycling surcharge statute in effect at all times pertinent here is provided in the Discussion section of this opinion.

meaning given in section 761 (a) of the internal revenue code, ... 'Partnership' also includes an entity treated as a partnership under section 7701 of the Internal Revenue Code." WIS. STAT. § 77.92(4m).

¶3 Turning from the statute at issue to the facts here, the parties do not dispute the following.

¶4 Tangible was a limited liability company treated as a partnership for tax purposes under the Internal Revenue Code. Tangible was, in turn, one of many partners in a partnership called GP Operations. The Operations partnership was also treated as a partnership for tax purposes under the Internal Revenue Code.

¶5 During the years, 2007-2009, Operations derived income from business transacted in Wisconsin. During this same period, Operations "passed through" Wisconsin-generated revenue to its partners, including Tangible.[2]

¶6 For each pertinent year, Operations' status as a partnership meant that it had to pay a recycling surcharge on income earned in Wisconsin. During the same time period, Tangible reported Wisconsin "pass through" income from Operations. However, Tangible did not pay the surcharge on "pass through" income from Operations for this time period.

¶7 In 2011, the Department issued a notice to Tangible imposing the surcharge (together with interest, penalties, and fees) for the amounts unpaid for

[2] The Internal Revenue Code allows for partnerships that do not themselves pay taxes, but instead "pass through items of income and deduction to their shareholders or partners." ***Maines v. Commissioner of Internal Revenue***, 144 T.C. 123, 125 n.3 (2015).

the years 2007-2009. Tangible petitioned the Department for redetermination. The Department denied the petition.

¶8 Tangible filed a petition for review with the Tax Appeals Commission. The Department filed a motion for summary judgment, and Tangible responded with a cross-motion for summary judgment. The commission granted the Department's motion for summary judgment and upheld the surcharge, denied Tangible's cross-motion for summary judgment, and dismissed the petition for review. Tangible petitioned the circuit court for review of the commission's decision granting the Department summary judgment, and the court affirmed the commission's decision. Tangible appeals.

DISCUSSION

¶9 We review the commission's decision, not the circuit court's decision. ***DOR v. A. Gagliano Co.***, 2005 WI App 170, ¶7, 284 Wis. 2d 741, 702 N.W.2d 834. Although we are not bound by the commission's legal conclusions, we apply one of three levels of deference to those conclusions: great weight deference; due weight deference; or no deference. ***DOR v. Caterpillar, Inc.***, 2001 WI App 35, ¶6, 241 Wis. 2d 282, 625 N.W.2d 338. The parties dispute the appropriate level of deference that we should apply here, with Tangible arguing that we should give the commission no deference and the Department arguing for due weight deference. We conclude that the level of deference does not matter here, because we would uphold the commission decision even if we gave it no deference.

¶10 To repeat, Tangible argues that the commission erred in upholding the 2007-2009 surcharges. We now address in turn what we consider to be Tangible's three arguments: (1) the plain language of WIS. STAT. § 77.93[3] unambiguously does not apply to Tangible; (2) imposition of the surcharge on Tangible is impermissible double taxation or double taxation not intended by the legislature; and (3) imposition of the surcharge on Tangible violates the due process clause of the federal and Wisconsin constitutions.[4]

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[3] WISCONSIN STAT. § 77.93 provides, in pertinent part, as follows:

> **Applicability**. For the privilege of doing business in this state, there is imposed a recycling surcharge on the following entities:
>
> ....
>
> **(2)** All natural persons, estates and trusts that are required to file a return .... 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, a 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 the taxable year. The surcharge is imposed on the partnership, not on its partners, except that if a partnership's surcharge is delinquent the partners are jointly and severally liable for it.

[4] The federal due process clause is found in the Fourteenth Amendment to the United States Constitution, and the Wisconsin equivalent is found in Article I, Section 1 of the Wisconsin Constitution. Because the federal and Wisconsin constitutions "provide identical due process protections," ***County of Kenosha v. C&S Management, Inc.***, 223 Wis. 2d 373, 393, 588 N.W.2d 236 (1999) (citations omitted), we will generally refer to the federal and Wisconsin clauses collectively as the "due process clause."

Applicability of WIS. STAT. § 77.93 to Tangible

¶11 Tangible argues that it is not liable for the surcharge under a plain language interpretation of WIS. STAT. § 77.93. More specifically, Tangible argues that it is not liable for the surcharge because it "did not derive any income from business it transacted in this state."

¶12 The parties do not dispute that Tangible is a "partnership" under the definition in the pertinent section of the statute, nor does Tangible assert that it is a farming-only partnership. Thus, there is no dispute that Tangible is an entity potentially subject to the surcharge for the years at issue, so long as it "derive[d] income from business transacted in" Wisconsin during the pertinent time period. *See* WIS. STAT. § 77.93(3). Tangible stakes its argument on the meaning of the phrase "derive[d] income from business transacted in" Wisconsin.

¶13 Tangible does not dispute that 100% of the income at issue came to it from Operations and that Operations earned that income from business transacted in Wisconsin. Instead, Tangible argues that the surcharge is "unambiguously inapplicable" to Tangible under the "clear and express" language of the statute because Tangible is a holding company that itself did not transact business in Wisconsin or otherwise, and thus Tangible did not have any income derived from business transacted in Wisconsin. We reject Tangible's argument because it is contrary to the plain language of the statute.

¶14 Although the term "derive" in WIS. STAT. § 77.93(3) is not defined in the statutes, its ordinary meaning is to "receive ... from a source." *Derive*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1993). As stated above, there is no dispute that the income at issue, reported by Tangible, came from business transacted in Wisconsin by Operations.

¶15 In order for us to accept Tangible's interpretation of the statute, we would have to read into the surcharge statute language that is not there—namely, a requirement that a partnership is subject to the surcharge only on income derived from *its own* business transacted in Wisconsin. We see nothing in the ordinary definition of "derive" or in other language of the statute that requires that the partnership *itself* conduct the income-producing activity. The statute requires only that the income be derived from business transacted in the state.

¶16 Because a plain language interpretation resolves the question, we decline Tangible's request that we consider extrinsic sources, such as legislative history and other evidence of legislative intent, in support of Tangible's interpretation of the statute. *See* ***State ex rel. Kalal v. Circuit Court for Dane County***, 2004 WI 58, ¶51, 271 Wis. 2d 633, 681 N.W.2d 110 (courts should avoid "the use of extrinsic sources of interpretation to vary or contradict the plain meaning of a statute.").

Double Taxation

¶17 Tangible makes unclear assertions in support of the general proposition that imposing the surcharge on both Operations and Tangible is improper, and is "double taxation" of income. At one point, Tangible appears to argue that all double taxation must, in Tangible's words, "be avoided" under Wisconsin case law. At another point, without making clear whether this is an alternative argument, Tangible appears to contend that a form of double taxation is permissible, only if an intent to do so is clearly expressed by the legislature, and that such an intent was not clearly expressed here.

¶18 To the extent that these arguments are rooted in a proportionality due process framework that might be alluded to in case law that Tangible cites, we

address and reject that argument in the subsection of this opinion following this discussion.[5]

¶19 To the extent that Tangible means to argue that the Wisconsin legislature has never allowed any stream of income to be taxed more than once, this argument is easily dispatched. Our supreme court has specified that the state may impose double taxation if the language of the statute at issue clearly indicates that the legislature intends that result. *See* ***Ramrod, Inc. v. Department of Revenue***, 64 Wis. 2d 499, 513, 219 N.W.2d 604 (1974). A common example of such "double taxation" is the tax on income at the corporate level, which is taxed again when it is distributed to individuals in the form of dividends. *See* ***West v. Tax Commission***, 207 Wis. 557, 565, 242 N.W. 165 (1932) (rejecting a taxpayer objection to double taxation, on the ground that "[i]n law the corporation and the stockholders are separate and distinct entities, and their earnings are plainly separate and distinct subjects of an income tax").

¶20 To the extent that Tangible argues more specifically that the Wisconsin legislature did not intend to impose this particular surcharge on what Tangible refers to as "lower-tier" partnerships (such as Tangible itself) that have

[5] Tangible also seems to argue that double taxation is constitutionally impermissible on other grounds. We reject this argument because it is undeveloped. We merely note that the concept that multiple taxation of the same income is unconstitutional per se has long been rejected by the courts, so long as a legislative intent to impose multiple taxation is evident. *See, e.g.*, ***United States v. Hemme***, 476 U.S. 558, 572 (1986) ("[t]here being no ambiguity in the statute, even if one could construe the treatment of [the taxpayer] as double taxation, the Constitution would not stand in its way."); ***Curry v. McCanless***, 307 U.S. 357, 367-68 (1939) ("it is undeniable that the state of domicile is not deprived, by the taxpayer's activities elsewhere, of its constitutional jurisdiction to tax, and consequently that there are many circumstances in which more than one state may have jurisdiction to impose a tax and measure it by some or all of the taxpayer's intangibles."); ***Hemme***, 476 U.S. at 572 (citing ***Patton v. Brady***, 184 U.S. 608, 621 (1902)) ("the Constitution would not be offended [by double taxation] as long as congress had clearly expressed its intention to occasion the result.").

received income that has already been subjected to the surcharge at an "upper tier," this argument is defeated by the plain meaning of the surcharge statute.

¶21 Looking to WIS. STAT. § 77.93(3) itself, as discussed above, the statute subjects to the surcharge "[a]ll partnerships ... that derive income from business transacted in [Wisconsin]." The statute provides no exception that might apply based on the "lower-tier" status of a partnership or on the fact that a partnership receives the income from another partnership subject to the surcharge.

¶22 In addition to examining the language of WIS. STAT. § 77.93(3) itself, we may look to subsections within the surcharge statute other than subsec. (3) to determine whether the legislature intended to subject a "pass-through" partnership such as Tangible to the surcharge. *See* ***Milwaukee Branch of NAACP v. Walker***, 2014 WI 98, ¶66, 357 Wis. 2d 469, 851 N.W.2d 262, *reconsideration dismissed*, 2014 WI 117, 856 N.W.2d 177 (citation omitted).

¶23 The surcharge statute contains an exception from the surcharge for individuals who are shareholders, partners, or members of a business entity that is also subject to the surcharge:

> 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, a partnership of which an individual is a partner or a limited liability company of which an individual is a member.

WIS. STAT. § 77.93(2). Thus, in subsec. (2), the legislature expressly created the sort of exception that Tangible asserts we should read into subsection (3). The inclusion of the exception in subsec. (2) and the omission of a similar exception in subsec. (3) strongly suggest that the legislature was aware of the double taxation issue and chose not to exempt partnerships like Tangible.

Due Process Clause

¶24 Tangible argues that imposing the surcharge on it violates the due process clause of the federal and Wisconsin constitutions because "the 'income attributed to' Wisconsin" for purposes of imposing the surcharge is disproportionate to the total income that Tangible earns from aggregate business it transacts in Wisconsin. As we understand it, Tangible's due process argument is that the amount of the surcharge imposed on Tangible is disproportionate to its total Wisconsin-derived income. We reject this argument as being directly undermined by the undisputed facts.

¶25 "The Due Process Clause 'requires ... some minimum connection between a state and the person, property[,] or transaction [that the state] seeks to tax,' and that the 'income attributed to the [s]tate for tax purposes must be rationally related"' to income generated by activities conducted within the state. ***Quill Corp. v. North Dakota***, 504 U.S. 298, 306 (1992) (quoted sources omitted). Tangible does not appear to be arguing that it does not have at least the minimum connection to Wisconsin that is required for the state to impose surcharges on it. Instead, relying on federal and state precedent, Tangible seems to take issue with the second requirement, namely, that there be a "rational relationship" between its Wisconsin-derived income and the surcharge. Specifically, Tangible argues that the surcharge imposed on it is "'out of all appropriate proportions'" to the business that Tangible transacted in Wisconsin. *See, e.g.*, ***Norfolk & W. Ry. v. Missouri State Tax Comm'n***, 390 U.S. 317 (1968); ***AT&T v. Wisconsin Dep't of Revenue***, 143 Wis. 2d 533, 545, 422 N.W.2d 629 (Ct. App. 1988) (quoted source omitted). Relying on ***Norfolk*** and ***AT&T***, Tangible argues that the due process clause "requires that the Recycling Surcharge assessment cannot be enforced."

Tangible's reliance on these cases is misplaced, however, because the facts from those cases are distinguishable from the undisputed facts here.

¶26 Not including interest, penalties, and fees, the recycling surcharge imposed on Tangible by the Department was $9,800 per year for each of the three years at issue. Tangible apportioned 3.5218% of its total income to Wisconsin in 2007, 2.1654% in 2008, and 2.0105% in 2009, resulting in Tangible's reported net income apportioned to Wisconsin in the amounts of $64,922,884 for 2007, $29,783,766 for 2008, and $41,285,596 for 2009. Imposing a $9,800 recycling surcharge on a company with tens of millions of dollars in self-reported Wisconsin income does not resemble the "163% differential found to be excessive" in ***Norfolk***, nor is there any indication that imposing the surcharge on Tangible taxes "value earned outside the borders of Wisconsin" as in the ***AT&T*** case. ***AT&T***, 143 Wis. 2d at 551. Tangible fails to explain why imposing a tax that amounts to .03% of income in its lowest income year is even arguably disproportionate.

CONCLUSION

¶27 For the reasons set forth above, we affirm the commission's decision upholding the Department's imposition of the 2007, 2008, and 2009 recycling surcharges against Tangible.

By the Court.—Judgment affirmed.

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