COURT OF APPEALS
DECISION
DATED AND FILED

May 13, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1708

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

DELCO ELECTRONICS CORPORATION,

PETITIONER-RESPONDENT,

v.

WISCONSIN DEPARTMENT OF REVENUE,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: RICHARD J. CALLAWAY, Judge. *Reversed.*

Before Eich, Roggensack and Deininger, JJ.

ROGGENSACK, J. The Wisconsin Department of Revenue (DOR) appeals from an order of the circuit court reversing the Tax Appeals Commission (TAC) and concluding that Delco Electronics Corporation (Delco) was entitled to deduct the Michigan Single Business Tax (MSBT) from the calculation of its Wisconsin franchise taxes. We conclude that given the TAC's specific experience

in interpreting the franchise tax law and general experience in interpreting exemption statutes, its decision should be accorded due weight deference. We further conclude the TAC's interpretation of § 71.04(3), STATS., 1985-86, and § 71.26(3)(g), STATS., 1987-88, that the MSBT is a tax "on or measured by all or a portion of" gross receipts is no less reasonable than Delco's interpretation. Accordingly, we reverse the decision of the circuit court, thereby affirming the decision of the TAC.

BACKGROUND

Delco, a subsidiary of General Motors, is an automotive electronics manufacturer that has plants in Wisconsin, Michigan, and Indiana and engages in business in those and other states. During the years under review, 1986 through 1989, Delco incurred liability for the MSBT due to its business activities conducted in Michigan. From 1986 through 1989, Delco deducted the MSBT on its federal corporate income tax returns. Delco also filed Wisconsin franchise tax returns in which it either claimed or did not "add back"[1] the MSBT deduction claimed on its federal returns. DOR denied the deduction for the MSBT. Delco petitioned for review by the TAC, which upheld DOR's rejection of the MSBT deduction on the grounds that the MSBT is a tax "on or measured by all or a portion of" either Delco's net income or its gross receipts. *See* § 71.04(3), STATS., 1985-86; § 71.26(3)(g), STATS., 1987-88.

[1] When the provisions of § 71.04(3), STATS., were placed in § 71.26(3)(g), STATS., taxable income, as shown on a corporation's federal tax returns, became the base and various deductions taken in determining federal taxable income were required to be added back, prior to computing the franchise tax.

On review, the circuit court concluded that the TAC's decision was entitled to due weight deference, but that its decision was unreasonable because the MSBT is a value-added tax which is not a tax "on or measured by all or a portion of" either net income or gross receipts. This appeal followed.

DISCUSSION

Standard of Review.

1. Wisconsin Statutes.

This court reviews the decision of an agency, not the decision of the circuit court. ***Stafford Trucking, Inc. v. DILHR***, 102 Wis.2d 256, 260, 306 N.W.2d 79, 82 (Ct. App. 1981). An agency's factual findings must be accepted if there is substantial evidence to support them. *See* ***Princess House, Inc. v. DILHR***, 111 Wis.2d 46, 54-55, 330 N.W.2d 169, 173-74 (1983). We are not bound by an agency's conclusions of law in the same manner as we are by its factual findings. ***West Bend Educ. Ass'n v. WERC***, 121 Wis.2d 1, 11, 357 N.W.2d 534, 539 (1984). We review the TAC's conclusions of law under one of three standards of review: (1) great weight deference, (2) due weight deference or (3) *de novo* review. ***UFE, Inc. v. LIRC***, 201 Wis.2d 274, 284-86, 548 N.W.2d 57, 61-62 (1996).

DOR contends that the TAC's interpretation of § 71.04(3), STATS., 1985-86, and § 71.26(3)(g), STATS., 1987-88, should be accorded the most deferential level of review, great weight deference. That standard is not applicable unless all four of the following requirements are met:

> (1) the agency was charged by the legislature with the duty of administering the statute; (2) that the interpretation of the agency is one of long-standing; (3) that the agency

> employed its expertise or specialized knowledge in forming the interpretation; and (4) that the agency's interpretation will provide uniformity and consistency in the application of the statute.

UFE, 201 Wis.2d at 284, 548 N.W.2d at 61-62 (citing ***Harnischfeger Corp. v. LIRC***, 196 Wis.2d 650, 660, 539 N.W.2d 98, 102 (1995)). Although the TAC is charged with the duty of administering the tax laws, *see* § 73.01(4)(a), STATS., and it has experience in applying the franchise tax and deductions and exemptions under that statutory scheme, *see* ***Savings League v. DOR***, 141 Wis.2d 918, 921, 416 N.W.2d 650, 651 (Ct. App. 1987); ***Mobil Oil Corp. v. Ley***, 142 Wis.2d 108, 114-15, 416 N.W.2d 680, 682-83 (Ct. App. 1987); ***NCR Corp. v. DOR***, 128 Wis.2d 442, 447-48, 384 N.W.2d 355, 358-59 (Ct. App. 1986), the TAC has never interpreted value-added taxes, generally, or the MSBT, specifically. Because the TAC has no expertise with respect to the application of the MSBT, or other value-added taxes, to §§ 71.04(3) and 71.26(3)(g), great weight deference is not the appropriate standard of review.

Delco, on the other hand, argues that we should conduct a *de novo* review, granting the TAC no deference. *De novo* review is appropriate when the legal issue before the agency is clearly one of first impression, ***Kelly Co. v. Marquardt***, 172 Wis.2d 234, 244-45, 493 N.W.2d 68, 73 (1992), or when an agency's position has been so inconsistent on the legal conclusion under scrutiny that it provides no real guidance. ***Marten Transport, Ltd. v. DILHR***, 176 Wis.2d 1012, 1018-19, 501 N.W.2d 391, 394 (1993). While the TAC has never interpreted the Wisconsin franchise tax statutes in relation to the MSBT, the TAC has consistently interpreted statutory language similar to that which is at issue in this case. *See* ***Cedarburg Mut. Ins. Co. v. DOR***, Wis. St. Tax Rep. ¶ 202-616 (Nov. 1, 1985); ***Cumis Ins. Soc'y, Inc. v. DOR***, Wis. St. Tax Rep. ¶ 202-908

(September 30, 1987). Moreover, an agency's decisions are entitled to deference when the agency has experience and expertise in interpreting a particular statutory scheme, although not on the precise, or even substantially similar, facts. ***Barron Elec. Coop. v. Public Serv. Comm'n***, 212 Wis.2d 752, 763, 569 N.W.2d 726, 732 (Ct. App. 1997); ***Susie Q Fish Co., Inc. v. DOR***, 148 Wis.2d 862, 868, 436 N.W.2d 914, 917 (Ct. App. 1989). As such, it would be inappropriate to apply a *de novo* standard of review to the TAC's interpretation of the Wisconsin statutes at issue in this case.

We apply a mid-level of scrutiny, due weight deference, and assent to an agency's interpretation of a Wisconsin statute that we conclude is reasonable, even though there may be another interpretation which is also reasonable, when an agency has some experience in making the legal conclusion under scrutiny, but it has not developed the level of expertise necessary to place it in a better position to make judgments regarding the interpretation of the statute than a court. ***UFE,*** 201 Wis.2d at 286, 548 N.W.2d at 62. Although it has not developed the expertise and specialized knowledge necessary to be accorded great weight deference, this case is not the first time that the TAC has interpreted the Wisconsin statute at issue. The TAC's particular experience in interpreting the franchise tax law and its general experience in interpreting exemption statutes are significant in applying the statutory concept to the fact situation presented by this case. Therefore, we grant the TAC's interpretation of § 71.04(3), STATS., 1985-86, and § 71.26(3)(g), STATS., 1987-88, due weight deference and we uphold its interpretation if it is reasonable, unless there is a more reasonable interpretation. ***UFE***, 201 Wis.2d at 288, 548 N.W.2d at 63.

2. The MSBT.

The TAC has no experience interpreting the MSBT. Therefore, we review *de novo* its interpretation of how the MSBT is calculated. *See* ***UFE***, 201 Wis.2d at 285, 548 N.W.2d at 62.

Wisconsin Franchise Tax.

The Wisconsin franchise tax imposes a tax on most corporations for the privilege of exercising a franchise or doing business in Wisconsin. Section 71.01(2), STATS., 1985-86; § 71.23(2), STATS., 1987-88. Under the law as it existed during the period under review, such a corporation was required to pay a tax "according to or measured by its entire Wisconsin net income" for the taxable year, as calculated after making certain adjustments to gross income, including the deduction of some, but not all, taxes. Section 71.01(2), STATS., 1985-86; § 71.23(2), STATS., 1987-88.

In 1986, § 71.04(3), STATS., 1985-86, addressed franchise tax deductions:

> **Deductions from gross income of corporations.** Every corporation, joint stock company or association shall be allowed to make from its gross income the following deductions:
>
> ***
>
> **(3)** Taxes other than special improvement taxes paid during the year upon the business or property from which the income taxed is derived, including therein taxes imposed by this state as income taxes, and taxes on all real property which is owned and held for business purposes whether income producing or not.… Taxes imposed by this or any other state or the District of Columbia *on or measured by all or a portion of net income, gross income, gross receipts, or capital stock are not deductible*. (emphasis added).

In 1987, the legislature federalized[2] the corporate tax structure, rewriting ch. 71, STATS., and creating § 71.26(3)(g), STATS., 1987-88, which applied to the returns Delco filed for 1987, 1988 and 1989. It stated in relevant part:

> **(3)** MODIFICATIONS. The income of a corporation shall be computed under the internal revenue code … as modified in the following ways:
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> ***
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> (g) Section 164(a)(3)[3] is modified so that state taxes and taxes of the District of Columbia *on or measured by all or a portion of net income, gross income, gross receipts or capital stock are not deductible*. (emphasis added).

The threshold question when construing a statute is whether the statutory language is ambiguous. ***State v. Williquette***, 129 Wis.2d 239, 248, 385

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[2] After federalization of the corporate tax structure, the legislature gave a clear directive that the Internal Revenue Code is modified for corporations such that "state taxes … on or measured by all or a portion of net income, gross income, gross receipts or capital stock are not deductible." Section 71.26(3)(g), STATS., 1987-88. Because the phrase "on or measured by all or a portion of" appears in both § 71.04(3), STATS., 1985-86, and § 71.26(3)(g), the interpretation of the relevant language in the predecessor statute applies to the subsequent statute.

[3] Section 164(a)(3) of the Internal Revenue Code reads as follows:

> Except as otherwise provided in this section, the following taxes shall be allowed as a deduction for the taxable year within which paid or accrued:
>
> ***
>
> (3) State and local, and foreign, income, war profits, and excess profits taxes.
>
> ***
>
> In addition, there shall be allowed as a deduction State and local, and foreign, taxes not described in the preceding sentence which are paid or accrued within the taxable year in carrying on a trade or business or an activity described in section 212.

N.W.2d 145, 149 (1986). Statutory language is deemed ambiguous if reasonable persons could disagree as to its meaning. ***Id.***

A tax "on" something taxes the specified thing. For example, the corporate income tax is a tax "on all Wisconsin net income." Section 71.23(1), STATS., 1987-88. In contrast, a tax "measured by" something, taxes a certain privilege as calculated by some scale of economic activity. For example, the franchise tax is imposed on a corporation for the privilege of exercising franchise or doing business in Wisconsin, but it is "measured by its entire Wisconsin net income." Section 71.23(2), STATS., 1987-88.

While the phrase "on or measured by" is defined in the franchise tax statute, the phrase "all or a portion of" is not. Based on the plain language of § 71.04(3), STATS., 1985-86, and § 71.26(3)(g), STATS., 1987-88, it is unclear whether the phrase "all or a portion of" refers to taxes which are based on gross receipts[4], which do not constitute the taxpayer's total gross receipts,[5] or whether the phrase refers to taxes measured by a calculation involving total gross receipts[6] plus or minus some other element or elements, or both. Therefore, the relevant statutory language is ambiguous, and we will overturn the TAC's decision only if there is a more reasonable statutory interpretation. ***Harnischfeger***, 196 Wis.2d at 662, 539 N.W.2d at 103. To determine whether the TAC's interpretation is more reasonable than that put forth by Delco, we examine the nature of the MSBT.

[4] The statute also pertains to net income, gross income, and capital stock.

[5] The statute also pertains to net income, gross income, and capital stock.

[6] The statute also pertains to net income, gross income, and capital stock.

Michigan Single Business Tax.

The MSBT is a value-added tax levied upon entities having business activity in Michigan. ***Trinova Corp. v. Michigan Dep't of Treasury***, 498 U.S. 358, 362 (1991). A value-added tax is assessed on the increase in the value of goods and services brought about by whatever a business does to them between the time of the purchase of the materials and the time of sale. ***Id.*** (citation omitted). Stated another way, "The value a business adds to a single product is 'the difference between the value of the product at sale and the cost of goods purchased from other businesses that went into the product.'" ***Id.*** (citation omitted). "It follows that the sale price of a product is the total of all value added by each step of the production process to that point." ***Id.***

There are two methods for calculating value added which are both derived from the equation for determining a business's revenues. ***Id.*** at 364. Revenues, i.e. gross receipts, are based on the following equation: Revenues = Cost of Labor + Cost of Materials + Depreciation + Interest + Profit. ***Id.*** Because value added is defined as the difference between the price paid for the products on sale (revenues) and the cost of materials going into the products, value added can be calculated by the following subtraction method: Value added = Revenues - Cost of Materials. ***Id.*** The same result may be reached by the subtraction of the cost of materials from each side of the first equation above: Revenues - Cost of Materials = Cost of Labor + Depreciation + Interest + Profit. ***Id.*** at 365. Therefore, value added can also be calculated using an addition method: Value added = Cost of Labor + Depreciation + Interest + Profit. ***Id.*** Michigan calculates the MSBT using the addition method, ***id.*** at 367; however, the addition and subtraction methods provide identical measurements of the value added by a

taxpayer. ***Id.*** at 365. Once value added is determined, the MSBT is assessed as a percentage of the value added for the relevant fiscal period. ***Id.***

The Exemption.

It has long been the law in the state of Wisconsin that tax exemptions are strictly construed against the taxpayer. ***Comet Co. v. Dep't of Taxation***, 243 Wis. 117, 123, 9 N.W.2d 620, 623 (1943). Additionally, the burden of proof to show that the agency's interpretation is less reasonable than that of the taxpayer is on the party seeking to overturn the agency's determination. *See* ***Harnischfeger***, 196 Wis.2d at 660, 539 N.W.2d at 102.

After a full review at Delco's request, the TAC unanimously concluded that the MSBT is a tax "on or measured by all or a portion of" gross receipts and is, therefore, not deductible from gross income under § 71.04(3), STATS., 1985-86, and § 71.26(3)(g), STATS., 1987-88. The TAC reasoned that because the addition of profits, cost of labor, depreciation and interest is equal to gross receipts less cost of materials, either calculation method produces a tax base that is a portion of a business's gross receipts.

In ***Trinova***, 498 U.S. at 363-64, the Supreme Court noted that the MSBT differs from an income tax because the MSBT is not based on ability to pay; rather, it measures a business's total business activity. However, the calculation of the MSBT is always based on a portion of gross receipts because gross receipts are integral to the calculation of value added and the percentage of value added attributable to Michigan is integral to the ultimate MSBT due. For example, even if a business is unprofitable, under normal circumstances, it still adds value to its products and, as a consequence, will owe some value-added tax.

Id. at 364. Therefore, although the MSBT is not necessarily based on profits,[7] under the equations used in calculating the MSBT, a corporation's gross receipts are always employed as part of the calculation.

The TAC's conclusion that the MSBT is a tax "on or measured by all or a portion of" gross receipts is also supported by the legislative history surrounding the amendment which added the "all or a portion of" language to § 71.04(3), STATS., 1985-86, which language was retained in § 71.26(3)(g), STATS., 1987-88. Prior to 1986, the corporate franchise tax exception to the deduction of the out-of-state taxes contained no "all or a portion of" modifying language relative to gross receipts in regard to the taxes that could not be deducted. The statute refused the deduction to out-of-state taxes "on or measured by net income, gross income, gross receipts or capital stock." On February 7, 1986, the legislature added the "all or a portion of" language. *See* 1985 Wis. Act 120, § 156d. As explained in ***Cumis***, Wis. St. Tax Rep. ¶ 202-908 at 13,592, this change was in direct response to DOR's request that the legislature prevent the TAC from reaching the same conclusion on similar taxes, as it had reached in ***Cedarburg***, Wis. St. Tax Rep. ¶ 202-616 at 12,702.

In ***Cedarburg***, the TAC interpreted § 71.01(4)(a)6., STATS., 1983-84, to determine whether fire insurance dues are taxes "on or measured by net income, gross income, gross receipts or capital stock," requiring insurers to add-back, for Wisconsin franchise tax purposes, fire insurance dues deducted on its federal income tax returns. The insurance company in ***Cedarburg*** sold five types

[7] We discuss net income only in comparison to gross receipts. Because we conclude that the TAC reasonably determined that the MSBT is a tax "on or measured by all or a portion of" gross receipts, we do not decide whether the MSBT is a tax "on or measured by all or a portion of" net income.

of insurance, one of which was fire insurance. DOR denied a deduction for fire insurance dues measured by the gross receipts of fire insurance premiums less dividends. The TAC reversed, concluding that the deduction was proper because the terms "gross income" and "gross receipts," employed in § 71.01(4)(a)6., required the use of the total income and receipts of the insurer. That is, the fire insurance dues were calculated by the use of only the "*net direct fire insurance premiums less dividends* and not [the insurer's] total gross receipts or gross income." "Clearly fire insurance premiums were but a component portion of [the insurer's] business." ***Cedarburg***, Wis. St. Tax Rep. ¶ 202-616 at 12,702 (emphasis in original). In essence, the TAC in ***Cedarburg*** added the word, "total" to the statute.

In ***Cumis***, Wis. St. Tax Rep. ¶ 202-908 at 13,590, the TAC again upheld an insurer's deduction of out-of-state taxes based on premiums. Reasoning that ***Cedarburg*** was dispositive on the issue, the TAC concluded that DOR could not deny the deduction because the insurer had other sources of gross receipts so that the tax deducted was not based on the total gross receipts required by the statute. ***Cumis***, Wis. St. Tax Rep. ¶ 202-908 at 13,592. It noted that although the DOR had

> caused legislation to be introduced in the Wisconsin legislature amending Section 71.01(4)(a)6. (Assembly substitute Amendment 1, to Senate Bill 1-January 1986 Legislative Special Session) [and s]aid proposed legislation would, in effect, have conformed this section to the respondent's view as it was expressed in the Cedarburg case[, s]aid proposed legislation passed both houses of the legislature but was vetoed by Governor Anthony S. Earl and did not become law.

Id. However, the provisions affecting Delco's obligation for franchise taxes were also part of 1985 Wis. Act 120 and they were not vetoed.

It is unclear whether the 1986 amendment intended to extend non-deductibility to taxes which were measured by gross receipts, even if the taxpayer's total gross receipts were not used, or whether the amendment intended to preclude deducting taxes measured by the subtraction of some other element from the taxpayer's total gross receipts and then applying some factor to that as the MSBT does. Delco contends that there was no indication that the TAC's decision in ***Cedarburg*** rested on the fact that the fire insurance dues tax involved the subtraction of dividends from the fire insurance premiums; rather, Delco argues that the TAC's conclusion was driven by the fire insurance premiums being only a portion of the insurer's total gross receipts. Although Delco's interpretation of the "all or a portion of" language is reasonable, it is not more reasonable than the TAC's,[8] which is supported by the Supreme Court's opinion in ***Trinova***, which we have examined in detail above.

Furthermore, the legislative history surrounding the amendment which included "value-added taxes" and "single business taxes" within the categories of nondeductible out-of-state taxes in § 71.26(3)(g), STATS., 1993-94, does not contradict the TAC's interpretation of the pre-amendment statutes. *See* 1993 Wis. Act 437, § 134. The Legislative Reference Bureau analysis which accompanied the original bill characterized the bill as one which, "expands that modification to specify that state-imposed value-added taxes or single business taxes are not deductible in determining net income for Wisconsin purposes." However, equally compelling is the fiscal estimate attached to the bill which states that the bill has no fiscal effect because the added language "clarif[ies] that no

[8] We note that we do not analyze the position taken by Delco to determine whether it would also result in the denial of the deduction because we are reviewing the legal conclusion of the TAC, not conducting a *de novo* review.

corporate income and franchise tax deduction is allowed for state value-added taxes and single business taxes." 1993 A.B. 1234. Therefore, the TAC's conclusion that the 1994 amendment to § 71.26(3)(g) was intended to provide clarification that value-added taxes are taxes "on or measured by all or a portion of" gross receipts was no less reasonable than Delco's interpretation of the statute.

Based on the nature of the MSBT, as described in ***Trinova*** and the legislative history surrounding § 71.04(3), STATS., 1985-86, and § 71.26(3)(g), STATS., 1987-88, the TAC's interpretation that the MSBT is a tax "on or measured by all or a portion of" gross receipts[9] is as reasonable as Delco's interpretation of the statute; therefore, we affirm the TAC's decision denying Delco's deduction of the MSBT from its Wisconsin franchise tax.

CONCLUSION

Given the TAC's experience in interpreting the franchise tax laws and exemption statutes, we accord the TAC's decision due weight deference, and conclude that the TAC's determination, that the MSBT is a tax "on or measured by all or a portion of" gross receipts, is not less reasonable than Delco's interpretation. Accordingly, we reverse the decision of the circuit court, thereby affirming the TAC.

By the Court.—Order reversed.

Not recommended for publication in the official reports.

[9] Because we conclude that the TAC's decision concerning gross receipts was the more reasonable interpretation of the statutes at issue, we do not decide whether its decisions concerning net income and gross income were reasonable.