COURT OF APPEALS DECISION DATED AND FILED

August 12, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 98-2377

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

MADISON GAS AND ELECTRIC COMPANY,

PETITIONER-RESPONDENT,

V.

DEPARTMENT OF REVENUE,

RESPONDENT-APPELLANT.

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

Before Eich, Roggensack and Deininger, JJ.

ROGGENSACK, J. Madison Gas and Electric deducted losses in 1975, 1976 and 1977 due to a 1975 transmission line collapse. The Department of Revenue permitted only fifteen percent of the losses to be taken in those years and allowed the major portion of the loss in 1978 when MG&E received a settlement for the loss in a lawsuit it instituted. DOR charged twelve percent interest on the amount of taxes that resulted because MG&E deducted the loss in 1975, 1976 and 1977, and DOR applied interest at nine percent on the refund it owed to MG&E for the large loss that DOR maintained should have been taken in 1978. The Tax Appeals Commission agreed with DOR and the circuit court reversed. Because we conclude that under § 71.04(7), STATS., 1975-76, MG&E properly deducted losses in 1975, 1976 and 1977 that occurred from the 1975 collapse of its transmission line, we affirm the decision of the circuit court in regard to the timing of the loss deduction. Therefore, we do not reach the question of netting overpayments of taxes against underpayments of taxes and interest accrued to the date of the overpayment, which would have resulted if MG&E's timing of the deduction had been incorrect.

BACKGROUND

On January 11, 1975, MG&E's sixty-three mile transmission line between Madison and the south Fond du Lac substation collapsed and was totally destroyed. MG&E had no insurance for the loss. MG&E sued the consulting engineers who designed the line and supporting structures, the manufacturer of the supporting tower structures, the builder, and a railroad whose employee had cut a conductor after part of the line had fallen, causing the rest of the line to collapse.

Because of the collapse of the line, MG&E deducted $2,665,247 on its income tax returns in 1975, $20,982 in 1976 and $222,646 in 1977. In 1978, the defendants in MG&E's lawsuit agreed to a $3,500,000 payment as settlement. Also in 1978, MG&E declared the settlement amount as income on its income tax return.

Subsequent to receiving notice of MG&E's recovery, the Wisconsin Department of Revenue issued an assessment of additional taxes due because it permitted MG&E to deduct only fifteen percent of the transmission line losses for 1975 through 1977.[1] DOR did permit a deduction of $2,537,648 for losses relating to the line collapse in 1978, the year in which MG&E received the settlement proceeds. Because DOR permitted transmission line losses in 1978, which MG&E had already taken in 1975, 1976 and 1977, according to DOR's calculations, MG&E significantly overpaid its taxes for 1978 and significantly underpaid its taxes for 1976 and 1977.[2]

Because DOR made its determination that additional taxes were due for the years 1976 and 1977, and that a refund was due for 1978 in 1983, it calculated interest at twelve percent on the 1976 and 1977 taxes from the date the returns were due until the 1978 overpayment was received. MG&E does not object to this calculation. However, DOR continued to calculate interest on the 1976 and 1977 taxes at twelve percent, without first applying the 1978 overpayment to the taxes and interest accrued prior to the overpayment. Instead DOR applied a nine percent interest rate to the refund it owed MG&E and continued to accrue twelve percent interest on the additional taxes it assessed against MG&E. MG&E contends that DOR should have credited the 1978 overpayment, as of the date paid, against the 1976 and 1977 underpayments and interest accrued to the date of that overpayment, and then calculated twelve percent interest on only the net amount of taxes remaining.

DISCUSSION

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[1] DOR represents that it permitted these limited deductions due to MG&E's representations that they were permitted for the costs of removing the line in the federal appeal relating to these same loss deductions on MG&E's federal returns.

[2] Apparently due to other adjustments on the 1975 return, additional taxes were not assessed for that year.

Standard of Review.

We review the decision of the TAC, not that of the circuit court. *See* ***Advance Pipe & Supply Co., Inc. v. DOR***, 128 Wis.2d 431, 434, 383 N.W.2d 502, 503 (Ct. App. 1986). Statutory construction and the application of a statute to undisputed facts are questions of law. *See* ***Truttschel v. Martin***, 208 Wis.2d 361, 364-65, 560 N.W.2d 315, 317 (Ct. App. 1997). On review of an administrative agency's decision, we are not bound by the agency's conclusions of law. *See* ***Currie v. DILHR***, 210 Wis.2d 380, 387, 565 N.W.2d 253, 257 (Ct. App. 1997). However, we may defer to the TAC's legal conclusions. *See* ***id.***

The supreme court has established when deference to an agency's legal conclusion is warranted and how much deference reviewing courts should give. *See* ***UFE, Inc. v. LIRC***, 201 Wis.2d 274, 284, 548 N.W.2d 57, 61 (1996) (citation omitted). An agency's interpretation or application of a statute may be accorded great weight deference, due weight deference or *de novo* review. *See* ***id.*** We will accord great weight deference only when all four of the following requirements are met: (1) the agency was charged by the legislature with the duty of administering the statute; (2) the interpretation of the agency is one of long standing; (3) the agency employed its expertise or specialized knowledge in forming the interpretation; and (4) the agency's interpretation will provide uniformity and consistency in the application of the statute. *See* ***id.*** (citing ***Harnischfeger Corp. v. LIRC***, 196 Wis.2d 650, 660, 539 N.W.2d 98, 102 (1995)). Under the great weight standard, "a court will uphold an agency's reasonable interpretation that is not contrary to the clear meaning of the statute, even if the court feels that an alternative interpretation is more reasonable." ***UFE***, 201 Wis.2d at 287, 548 N.W.2d at 62.

We will accord due weight deference when "the agency has some experience in an area, but has not developed the expertise which necessarily places it in a better position to make judgments regarding the interpretation of the statute than a court." ***Id.*** at 286, 548 N.W.2d at 62. The deference allowed an administrative agency under due weight review is accorded largely because the legislature has charged the agency with the enforcement of the statute in question. *See* ***id.*** Under this standard, we will not overturn a reasonable agency decision that furthers the purpose of the statute, unless we determine that there is a more reasonable interpretation under the applicable facts than that made by the agency. *See* ***id.*** at 286-87, 548 N.W.2d at 62.

And finally, we will employ *de novo* review to the legal conclusion made by an agency if any one of the following is true: (1) the legal issue presented to the agency is one of first impression; (2) there is no evidence of any special agency experience or expertise in deciding the legal issue; or (3) when the agency's position on the legal issue has been so inconsistent as to provide no real guidance. *See* ***Coutts v. Wisconsin Retirement Bd.***, 209 Wis.2d 655, 664, 562 N.W.2d 917, 921 (1997) (citations omitted).

Our review persuades us that the TAC's determination of the timing of the deduction allowed under § 71.04(7), STATS., 1975-76, must be reviewed *de novo*. While it is true that the agency has been charged by the legislature with the duty of administering the tax code, its interpretation of this section is not one of long standing which was determined through its specialized knowledge or expertise. This is evidenced by the TAC's reasoning that the plain meaning of the statute precluded the deduction and DOR's position that the deduction should be disallowed because MG&E had a reasonable prospect of recovery, citing 26 C.F.R. § 1.165-1 (1975-76).

Loss Deduction Timing.

The timing of the deduction for the transmission line loss claimed by MG&E is controlled by the meaning of § 71.04(7), STATS., 1975-76, which provided in relevant part:

> **Deductions from gross income of corporations.** Every corporation … shall be allowed to make from its gross income the following deductions: …
>
> **(7)** Losses actually sustained within the year and not compensated by insurance or otherwise ….

As we address the concerns of the parties, we note that the purpose of statutory construction is to ascertain and to give effect to the intent of the legislature. *See* ***County of Columbia v. Bylewski***, 94 Wis.2d 153, 164, 288 N.W.2d 129, 135 (1980). In determining legislative intent, our first resort must be to the plain meaning of the statutory language the legislature chose to use. *See* ***Truttschel***, 208 Wis.2d at 365, 560 N.W.2d at 317 (citation omitted). If the language of the statute clearly and unambiguously sets forth legislative intent, our inquiry ends, and this court must apply that language to the facts of this case. *See* ***id.*** However, if the statute can be understood to have more than one meaning by persons who are reasonably well informed, it is ambiguous. *See* ***Coutts***, 209 Wis.2d at 666-67, 562 N.W.2d at 922 (citation omitted).[3] When a statute is ambiguous, we determine legislative intent from the words of the statute in relation to its context, subject matter, scope, history and the object which the legislature intended to accomplish. *See* ***Truttschel***, 208 Wis.2d at 365-66, 560 N.W.2d at 317 (citation omitted).

[3] A statute is not ambiguous merely because the parties disagree about its meaning. *See* ***Wagner Mobile, Inc. v. City of Madison***, 190 Wis.2d 585, 592, 527 N.W.2d 301, 303 (1995).

We conclude that § 71.04(7), STATS., 1975-76, is ambiguous[4] because "actually sustained" could reasonably be understood to refer to losses for which there was never any prospect of recovery, losses for which there is no reasonable prospect of recovery, losses that result from an identifiable event within the period for which the loss is claimed and there was no recovery during that period, or a determination unrelated to the timing of the loss.[5]

The parties agree that the line collapsed in 1975; that it was a total loss; and that additional expenses relating to the collapse of the line occurred in 1976 and 1977. Furthermore, DOR agrees that the loss was uncompensated for by insurance and that MG&E had a legal right to take a loss deduction for the line's collapse. The dispute centers on whether it should have been taken in 1975-77 as MG&E did or in 1978, when MG&E's lawsuit was settled. The answer to the timing of the loss requires us to attempt to determine legislative intent.

The TAC concluded that the "plain language of the statute" required disallowance of the deductions in 1975, 1976 and 1977. However, DOR applies different reasoning and urges us to interpret the phrase "actually sustained" in § 71.04(7), STATS., 1975-76, to include only those losses for which there is no reasonable prospect of recovery. It argues that a similar provision of the federal tax code would require no "reasonable prospect of recovery" before a loss would be deductible and that Wisconsin's tax code should follow the federal rule.

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[4] Both DOR and MG&E, by their arguments before this court, concede that the statute is ambiguous.

[5] In ***Ludington v. McCaughn***, 1 F.2d 689, 692 (3[d] Cir. 1924), *rev'd sub nom. on other grounds*, ***McCaughn v. Ludington***, 268 U.S. 106, 107 (1925), the issue presented by the words "actually sustained" was the calculation of the amount of the loss, not the timing of the loss.

MG&E disagrees with both positions and contends that in 1975 through 1977 the federal statutes did not have the modifier, "actually," which was then present in the Wisconsin statute; and therefore, federal law provides no guidance. It asserts that each year must be examined as a closed unit in considering when it was appropriate to take the losses. As an alternate argument, MG&E asserts that in the years in which it took the deductions, there was no "reasonable prospect of recovery," because the $3.5 million settlement it received in 1978 was the result of the 1978 Wisconsin Supreme Court decision in ***May v. Skelley Oil Co.***, 83 Wis.2d 30, 264 N.W.2d 574 (1978), which indicated that the law of comparative negligence might be changed in a way that would have made MG&E's recovery against the multiple defendants named in its lawsuit more likely. Therefore, argues MG&E, recovery was not a "reasonable prospect" in 1975, 1976 and 1977, even if we were to interpret § 71.04(7), STATS., 1975-76, consistent with federal loss deduction provisions.

As an initial matter, we conclude that the legislative intent underlying § 71.04(7), STATS., 1975-76, does not require interpretation of its loss provisions consistent with current federal law regulating loss deductions. For example, the loss deduction set out in § 71.04(7), 1975-76, was created in 1911. Laws of 1911, ch. 658. The federal tax code did not create a section on loss deductions until 1913; however, it did have a provision, since approximately 1894, that permitted a deduction for "losses actually sustained during the year … and not compensated for by insurance or otherwise." 28 Stat. 349 (1895). By 1918, the federal tax code had removed the modifier, "actually," from its loss deduction provisions,[6] but it remained a part of Wisconsin law for the years under review in this appeal. Furthermore, the only federal cases we could find that parsed the word, "actually," used it as a guide to the correct method by which to calculate the amount of the loss, not the timing of the loss. *See* ***Ludington v. McCaughn***, 1 F.2d 689, 692 (3[d] Cir. 1924), *rev'd sub nom. on other grounds,* ***McCaughn v. Ludington***, 268 U.S.106, 107 (1925).[7]

Additionally, for years beginning in 1987, Wisconsin "federalized" its income/franchise tax laws so that, with a few exceptions not at issue here, a corporate taxpayer's federal gross income would become the starting point for determining its Wisconsin net income. *See* 1987 Wis. Act 27. The legislature recognized that federalization had the potential to cause some taxpayers to gain or lose deductions which had been allowed previously. *See* ***Lincoln Sav. Bank v. DOR***, 215 Wis.2d 430, 439, 573 N.W.2d 522, 526 (1998). However, the legislature was attempting to ease compliance and auditing burdens and to increase corporate income tax collections by making most provisions of Wisconsin's tax code the same as comparable federal tax provisions. *See* ***id.*** at 438, 573 N.W.2d at 526; *see also* Wisconsin Legislative Fiscal Bureau Report on the 1987-89 State Budget, Comparative Summary of Governor's and Joint Committee on Finance's Budget Recommendations, 42-43 (1987). Therefore, we conclude we are not bound by the interpretation of federal tax provisions in our interpretation of § 71.04(7), STATS., 1975-76.

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[6] *See* ***Pugh v. Commissioner***, 49 F.2d 76, 77 (5[th] Cir. 1931), *cert. denied*, 284 U.S. 642 (1931) (quoting § 214(a) of Revenue Act of 1918, which no longer contained the modifier, "actually").

[7] Neither MG&E nor DOR cited either case or their alternate interpretations of the word "actually," so we do not address that alternate meaning either.

However, even if we were to adopt DOR's argument, we do not agree that the recovery MG&E made in 1978 was a bar to the deductions it took earlier. Hindsight is always 20/20 vision, but the mere filing of a lawsuit, in and of itself, is insufficient to preclude a loss deduction, even under federal law. *See* ***Parmelee Transp. Co. v. United States***, 351 F.2d 619, 628 (Ct. Cl. 1965). MG&E contends that it was only the supreme court's decision in ***Skelley Oil*** which prompted the recovery it made, and without the discussion in ***Skelley Oil*** about a potential change in the law of comparative negligence, no recovery would have been forthcoming. DOR does not dispute this position. We note that its reply brief does not respond to MG&E's argument or to its use of the decision in ***Skelley Oil***. Arguments to which no response is made may be deemed conceded for purposes of appeal. *See* ***Schlieper v. DNR***, 188 Wis.2d 318, 322, 525 N.W.2d 99, 101 (Ct. App. 1994). Therefore, we agree that the prospects for recovery in MG&E's lawsuit were minimal at best, until 1978 when the supreme court decided ***Skelley Oil***.[8] DOR has provided no other argument, aside from the existence of MG&E's lawsuit, which would require a delay in deducting the losses relating to the line's collapse, even under its interpretation of § 71.04(7), STATS, 1975-76.

Therefore, we conclude MG&E properly deducted the loss in 1975, 1976 and 1977. The loss did occur in 1975-77; it did not occur in 1978. What occurred in 1978 was the decision in ***Skelley Oil*** which caused the potential tortfeasors in MG&E's lawsuit to discover that their conduct may have given them

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[8] While the determination of whether there was a reasonable prospect of recovery is normally a question of fact for the fact-finding tribunal, *see* ***Bissell v. Wisconsin Tax Commission***, 234 Wis. 421, 426, 291 N.W. 325, 327 (1940), we note that the affidavit of David Mebane is uncontroverted in regard to this fact.

exposure in regard to paying for that loss. The collapse of the line was the identifiable event which fixed the worthlessness of the line. *See* ***Wisconsin Elec. Power Co. v. Wisconsin Dep't of Taxation***, 251 Wis. 346, 353, 29 N.W.2d 711, 714 (1947). Additionally, because the supreme court had not decided ***Skelley Oil*** in 1975, 1976 and 1977, there was no reasonable prospect of recovery when MG&E took the losses. Therefore, we affirm the decision of the circuit court in regard to the timing of the loss deduction.

Because of our decision in regard to the timing of the deduction, we do not address the issue of offsetting payments and refunds of taxes. This issue would have been necessary for us to decide only if MG&E had taken the loss deductions in years in which they were not warranted.

CONCLUSION

Because we conclude that under § 71.04(7), STATS., 1975-76, MG&E properly deducted losses in 1975, 1976 and 1977 that actually occurred from the 1975 collapse of its transmission line, we affirm the decision of the circuit court in regard to the timing of the loss deduction. Therefore, we do not reach the question of netting overpayments of taxes against underpayments of taxes and interest accrued to the date of the overpayment, which would have resulted if MG&E's timing of the deduction had been incorrect under the statutes then regulating loss deductions.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

No. 98-2377(D)

DEININGER, J. *(dissenting)*. The Wisconsin Supreme Court, Tax Appeals Commission, and Department of Revenue have historically applied the federal income tax approach to loss-timing issues. I conclude that our interpretation of § 71.04(7), STATS., 1975-76, should also follow federal interpretations of Internal Revenue Code § 165, after which the Wisconsin statute is patterned. Thus, I dissent. I would reverse the trial court judgment and remand to the commission for a determination of whether MG&E had a reasonable prospect of recovering its losses from the 1975 transmission line collapse during the period 1975-77, when it deducted those losses from income.

In February 1975, the month after the line collapsed, MG&E sued four entities from whom it apparently believed it could recover some or all of its losses stemming from the collapse of the transmission line. That litigation was pending throughout the years it deducted its losses from income on its state and federal income tax returns. Closure did not occur until 1978 when MG&E obtained a $3.5 million settlement on its claims. The Wisconsin Supreme Court has noted that, when determining the timing of loss deductions for Wisconsin state income tax purposes, "it must be recognized that deductible losses under the statutes regulating tax on incomes must be established by closed transactions." ***Bissell v. Tax Comm'n***, 234 Wis. 421, 426, 291 N.W. 325, 327 (1940). And, relying on federal cases interpreting the parallel provision of the Internal Revenue Code, the court acknowledged the relevant inquiry to be: "Was there any possibility of recoupment of any part of this loss after the close of the year [for which the taxpayer claims the deduction]?" ***Id.***

The department asserts that it and the commission have consistently applied the federal approach to the timing of loss deductions, as discussed in ***Bissell***, to the question of when loss deductions may be claimed on Wisconsin income tax returns. Past decisions of the commission, and its predecessor, the Board of Tax Appeals, support this contention. For example:

> Both losses and abandonments resulting in losses must be evidenced by closed and completed transactions and fixed by identifiable events. They may not be saved up and taken when convenient. Neither may anticipated or contingent losses be deducted. Law of Federal Income Taxation, *Mertens*, Vol. 5, par. 28.15, page 120.

Robert A. Hess v. Wisconsin Dep't of Taxation, 3 WBTA 132, 138 (1947) (citation omitted). The commission has expressly cited the Internal Revenue Code, a federal regulation interpreting the code, and the ***Bissell*** case in concluding that a taxpayer had met "its burden under Internal Revenue Code 165 and section 71.04(7) of the Wisconsin statutes" in establishing identifiable events during the tax year in question (1974) which demonstrated that "[t]here was no reasonable hope and expectation that [certain stock] will become valuable at some future time." ***Allen-Bradley Co. v. Wisconsin Dep't of Revenue***, 11 WTAC 430, 433 (1983).

In this case, the commission concluded that there was no issue of material fact and that, as a matter of statutory construction, MG&E's recovery for its loss in 1978 rendered the loss nondeductible in 1975. It also applied, as "additional support" for its conclusion, the test discussed in ***Bissell*** and determined that "the possibility of recoupment existed until June of 1978 because [MG&E] maintained its lawsuit during this period." However, a paragraph later in its analysis, the commission acknowledged that MG&E "arguably had little prospect of any significant recovery" for its loss until a 1978 Wisconsin Supreme Court decision signaled a possible change in the law of comparative negligence. And, even though it had cited ***Bissell*** (where the court relied on federal loss-timing interpretations), the commission expressly declined to evaluate the present facts under federal loss-timing interpretations, which, as we have noted, it had freely consulted in past cases.

The department concedes in this appeal that the commission "incorrectly construed the statutory language concerning the timing of loss deductions …." Nonetheless, it asks us to affirm the commission's result, which the department asserts to be correct in spite of the commission's erroneous statutory interpretation. I would not do so. One of the reasons a reviewing court will often give some measure of deference to an agency's interpretation and application of the laws it administers is "that through interpretation and application of the statute, the agency can provide uniformity and consistency in the field of its specialized knowledge." *See* ***Lisney v. LIRC***, 171 Wis.2d 499, 505, 493 N.W.2d 14, 16 (1992). The ruling presently under review does not foster uniformity and consistency in deciding income tax loss-timing questions in Wisconsin; it represents a departure from past commission interpretations and applications of the statute. I thus agree with the majority that the commission's interpretation is not entitled to our deference.

Rather than concluding de novo, however, that MG&E should prevail, as the majority does, I would permit the commission to make the loss-timing determination under the proper legal standard. Section 227.57(5), STATS., provides that if a reviewing court "finds that the agency has erroneously interpreted a provision of law," and a "correct interpretation" does not compel a particular action, the court is to "remand the case to the agency for further action under a correct interpretation of the provision of law." For me, that is the proper disposition of this appeal. The case should be remanded to the commission for its determination of the following question: Under the traditional analysis of loss-timing questions for Wisconsin income tax purposes, which parallels federal interpretations of the Internal Revenue Code, was MG&E entitled to deduct its loss in 1975-1977, as it did, or not until 1978 as the department maintains?

The relevant federal regulations concerning loss-timing under the Internal Revenue Code require that, in order for a taxpayer to claim a loss in a given year, it must be "evidenced by closed and completed transactions and as fixed by identifiable events…." 26 C.F.R. § 1.165-1(d) (1975-78). In circumstances such as are present in this case, where a casualty occurs but a claim for reimbursement is pending at the close of the tax year, "with respect to which there is a reasonable prospect of recovery, no portion of the loss with respect to which reimbursement may be received is sustained … until it can be ascertained with reasonable certainty whether or not such reimbursement will be received." ***Id***. at § 1.165-2(i). The fact that litigation was pending against parties allegedly liable for MG&E's loss is evidence that the loss transaction may not have been closed and completed, and that a reasonable prospect for recovery may have existed, during the years at issue. *See* ***Dawn v. Commissioner of Internal Revenue***, 675 F.2d 1077, 1078-79 (9th Cir. 1982). The existence of the litigation alone, however, does not conclusively demonstrate that MG&E had a reasonable prospect of recovery during 1975-77. *See* ***Parmelee Transp. Co. v. United States***, 351 F.2d 619, 628-29 (Ct. Cl. 1965).

The commission, if the case were remanded, might conclude that it could make the necessary determination on the present record, or it could conduct further proceedings on the matter, including an evidentiary hearing if deemed appropriate. Even though the administrative review process in this case misfired (in that the commission did not apply what appears to have been its traditional analysis to the loss-timing question presented), I would give the commission a second shot at it, especially since evidentiary proceedings might be needed. *See* ***Dawn***, 675 F.2d at 1078 ("Determining whether taxpayers had a claim for reimbursement that provided a reasonable prospect for recovery is an objective inquiry requiring an examination of the facts and circumstances surrounding the deduction."). Like the majority, however, I would not reach the issue of whether it was proper for the department to refuse to offset MG&E's 1978 overpayment against its underpayments for 1976 and 1977 before computing interest on the net underpayment. The resolution of that issue should await the commission's determination of whether any underpayments or overpayments actually occurred.[9]

[9] Neither the parties nor the commission should presume, however, that either I or the majority have concluded that the commission's original treatment of the interest issue was correct. The majority did not consider the question because its disposition makes the interest issue moot; the disposition I would order renders it premature.