COURT OF APPEALS DECISION DATED AND FILED

May 15, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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No. 00-1372

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

EDMUND R. GILSON,

PETITIONER-APPELLANT,

V.

WISCONSIN DEPARTMENT OF REVENUE,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Outagamie County: JOHN DES JARDINS, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Edmund Gilson appeals a judgment affirming a decision of the Tax Appeals Commission requiring Edmund to pay taxes on distributions he received from the estate of his late wife, Margaret. The commission determined that the distributions carried with them distributable net income subject to the Wisconsin personal income tax. Edmund contends that under the "separate share rule"[1] he should have to pay taxes only on 25% of the distributable net income because that is the percentage of the distributions from Margaret's trust that he would have received if the trust had been funded. The commission concluded that the separate share rule did not apply because, under the terms of a settlement agreement, the distributions passed directly from the estate to Edmund without going through the trust.

¶2 Edmund argues that: (1) the commission erroneously interpreted Margaret Gilson's will when it concluded that ¶4.2.E allowed the personal representatives to bypass the trust because that paragraph is merely an administrative provision; (2) even if ¶4.2.E gives the personal representatives that authority under some circumstances, the prerequisites were not met; (3) the separate share rule should apply because the payment from the estate discharged a legal obligation of the trust; and (4) if it did not discharge the trust's obligation, payment was not proper under the will. We reject these arguments and affirm the commission's ruling and the trial court's judgment.

¶3 Margaret's will named her daughters, Judith and Cynthia and Valley Trust Company as personal representatives of her estate. After disposing of some specific items, the will provides that the residue would go to a trust that was

[1] The separate share rule set forth in IRC § 663(c) provides: "For the sole purpose of determining the amount of distributable net income in the application of sections 661 and 662, in the case of a single trust having more than one beneficiary, substantially separate and independent shares of different beneficiaries in the trust shall be treated as separate trusts." The purpose of the rule is to prevent a beneficiary from being taxed on a distribution that represents a corpus distribution as to that beneficiary, but that would be treated as a taxable distribution because trust income is being accumulated for another beneficiary. The separate share rule at the time of this action applied only to distributions from trusts.

simultaneously created by another instrument. Judith, Cynthia and Valley Trust were also named trustees. The disputed portion of the will, ¶4.2.E provides:

> My Personal Representatives may distribute tangible personal property or bequests set out in the Revocable Trust directly to the recipient or beneficiary without transferring such asset to the Revocable Trust if my Personal Representatives receive specific written direction to do so from the Trustee of the Revocable Trust. The receipt of the Personal Representative shall suffice as a receipt to the Trustee.

¶4 After Margaret's death, a dispute arose between her daughters and her husband regarding the dollar values to be inserted into the formula created by the trust documents to determine Edmund's share. The parties eventually entered into a settlement agreement that, as amended, required the estate to distribute to Edmund specific property and cash totaling $6,244,114. The agreement did not contain any provision characterizing the tax attributes of any of the payments. The estate's tax returns showed that its distribution to Edmund carried out the distributable net income, but Edmund's tax returns did not conform with the estate's position. The commission agreed with the estate's position and assessed the tax against Edmund.

¶5 The parties disagree on the standard of review. There are no disputed evidentiary facts, although the inferences to be drawn from conceded facts are in dispute. Edmund correctly notes that findings of ultimate fact are treated like conclusions of law. He fails to recognize, however, that this court affords deference to an agency's conclusions of law under some circumstances. Those circumstances apply here.

¶6 Four factors are relevant in determining the degree of deference to be accorded the commission's legal conclusions: (1) whether the commission was charged by the legislature with the duty of administering the statute; (2) whether the interpretation is long standing; (3) whether the commission employed its specialized knowledge or expertise in forming the interpretation; and (4) whether its interpretation will provide consistency and uniformity. *See* ***Tannler v. DHSS***, 211 Wis. 2d 179, 184, 564 N.W.2d 735 (1997). The first factor is satisfied because the commission is the final authority for hearing and determining all questions of law and fact arising under the tax laws. *See* WIS. STAT. § 73.01(4)(a). The absence of the second factor does not preclude according some deference to the commission's conclusions. Rather, we accord "due weight" to the commission's decision if it is "very nearly" one of first impression. ***William Wrigley, Jr., Co. v. DOR***, 176 Wis. 2d 795, 801, 500 N.W.2d 667 (1993). The third factor is satisfied because the commission employed its specialized knowledge and expertise in making this decision.[2] The fourth factor is satisfied because the commission's legal conclusions provide consistency and uniformity in the application of tax laws by making conclusions that are binding on the Department of Revenue. This uniformity fosters certainty in tax planning and in structuring financial affairs. *See* ***McDonald Lumber Co. v. DOR***, 117 Wis. 2d 446, 447, 344 N.W.2d 210 (Ct. App. 1984).

[2] The commission's expertise does not have to be exercised on the precise or even a substantially similar set of facts in order to be entitled to judicial deference. *See* ***Barron Elec. Coop. v. PSC***, 212 Wis. 2d 752, 764, 569 N.W.2d 726 (Ct. App. 1997). The commission is frequently called upon to construe wills, trusts and settlement agreements to determine the tax implications of private transactions. It is not necessary, as Edmund argues, for the commission to have experience in construing ¶4.2.E.

¶7 Because the commission's decision satisfies three of the four relevant factors and its ultimate findings are intertwined with value and policy determinations inherent in the role the legislature has assigned it, we accord its conclusions of law "due deference." *See* ***Transp. Dept. v. Transp. Com'r***, 135 Wis. 2d 195, 199, 400 N.W.2d 15 (Ct. App. 1986). This means that its findings of ultimate fact and conclusions of law will be sustained if they are reasonable, even if another interpretation is equally reasonable. *See* ***Roehl Transport v. Wisconsin Division of Hearings & Appeals***, 213 Wis. 2d 452, 459, 570 N.W.2d 864 (Ct. App. 1997).

¶8 The commission reasonably concluded that ¶4.2.E allowed the personal representatives to bypass the trust and distribute the estate directly to the ultimate recipients. The will unequivocally allows the personal representatives to distribute property or bequests set out in the trust "directly to the recipient or beneficiary without transferring such assets to the Revocable Trust …." This option allows the personal representatives to maximize benefits or convenience for themselves if they perceive any advantage in direct transfer. Edmund argues that the will should not be interpreted to confer power to the personal representatives to choose who will receive the residue. That argument overstates the personal representatives' powers. The personal representatives are not free to choose a different ultimate recipient. They are merely free to distribute the property directly to that recipient according to the percentages set out in the trust document. Margaret decided who would receive what property, and gave the personal representatives, at the direction of the trustees, the power to decide how that distribution would occur.

¶9 Edmund argues that the last sentence of ¶4.2.E which provides that the receipt of the personal representative shall suffice as a receipt to the trustee, demonstrates Margaret's intent to have all of the residue transferred through the trust. While the last sentence can be viewed as merely an administrative provision, the first sentence gives the personal representatives additional authority. If the personal representatives decided to transfer any property through the trust, the last sentence of ¶4.2.E would merely alleviate some of the paper work. The last sentence does not imply that the trustees have a duty to report under all circumstances, suggesting that Margaret intended to have all transactions go through the trust. The trustees could have chosen to partially fund the trust and make other distributions directly to the recipient. Under that circumstance, the trustees would have a duty to account for the distributions and the last sentence would facilitate their duties.

¶10 Edmund argues that the context of ¶4.2.E demonstrates that it should be construed as only an administrative provision. He notes that ¶3.1 leaves the residue to the trust and ¶4 merely lists the personal representatives' administrative powers. We see nothing unnatural about placing the extraordinary powers of the personal representative in ¶4. If Margaret intended to allow her personal representatives to maximize their interests by bypassing the trust, that provision would be found in ¶4.

¶11 Edmund argues that the commission's construction of the will creates a conflict of interest because the daughters, as trustees, have a duty to other beneficiaries that prohibits them from maximizing their benefits or convenience when acting in their capacity as personal representatives. No conflict of interest occurred because the trustees had no duties until the trust was funded. A trustee's duty to acquire the trust's property only applies if there is property to be acquired.

Because the personal representatives chose not to fund the trust, the trustees never acquired any duty. There can be no conflict of interest between the duties of the personal representatives and the duties of the trustees if the trust is never funded.

¶12 Edmund argues that even if the will allowed the personal representatives to bypass the trust, that is only allowed if the trustees directed the personal representatives to do so in writing. The commission properly recognized the settlement agreement as a writing authorizing the direct transfer. The settlement agreement contains two paragraphs that specifically consent to distribution of property directly from the estate to Edmund. The daughters and the trust company signed the consent agreement as personal representatives and as trustees. Under these circumstances, the settlement agreement constitutes specific written authorization to bypass the trust.

¶13 Edmund argues that the distributions should be viewed as constructive transfers through the trust because they discharged the trust's legal obligations. The commission reasonably determined that the distributions did not discharge the trust's legal obligations because the trust had no legal obligations. The trust's legal obligations would exist only if the trust were funded.[3]

¶14 Finally, Edmund argues that if the distributions did not discharge the trust's obligations, the payments were improper under the will, meaning that they were not deductible to the estate nor taxable to Edmund. This argument depends on Edmund's earlier arguments that the will did not allow direct distribution bypassing the trust or failure to fund the trust. Because we conclude that the

[3] The commission also ruled that, when determining whether a distribution satisfies a "legal obligation," only an obligation was imposed by law rather than private contract or other written instruments is considered. We need not review that alternative conclusion.

commission reasonably construed the will to allow the personal representatives to bypass the trust, direct payment to Edmund was not improper under the will.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.