REL: September 14, 2018

ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2018

2170550

Alabama Department of Revenue and Vernon Barnett, in his official capacity as commissioner of the Alabama Department of Revenue

v.

Bryant Bank

2170555

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Appeals from Tuscaloosa Circuit Court (CV-17-900699)

MOORE, Judge.

The Alabama Department of Revenue ("the department") and Vernon Barnett, in his official capacity as commissioner of the department ("the commissioner"), appeal from a summary judgment entered by the Tuscaloosa Circuit Court ("the circuit court") determining the amount of a tax credit due Bryant Bank. Bryant Bank cross-appeals from that same judgment, asserting that it is entitled to a greater credit. As to the department and the commissioner's appeal, we reverse the circuit court's judgment; we dismiss Bryant Bank's cross-appeal as moot.

Facts and Procedural History

Section 40-16-4, Ala. Code 1975, imposes a six and one-half percent tax, known as the financial-institution excise tax ("FIET"), on the net income of every financial institution engaging in, among other things, banking within this state. Financial institutions subject to the FIET are required to file annual FIET returns and remit the FIET to the department. § 40-16-6(a), Ala. Code 1975. The department, in turn, remits the FIET proceeds to the State treasury to be credited to the Financial Institution Excise Fund. Pursuant to § 40-16-6(c),

after deduction of administrative charges payable to the department, the FIET proceeds are to be distributed as follows: to each county "in which the financial institutions [that paid the FIET] are located ... an amount equal to one fourth of the tax received from the institutions located in that county"; "to each of the municipalities in which the financial institutions [that paid the FIET] are located ... an amount equal to one half of the tax received from the institutions located in those municipalities; and the amount remaining to the General Fund of the State of Alabama.

The Alabama New Markets Development Act, § 41-9-216 et seq., Ala. Code 1975, establishes that taxpayers who make certain investments in designated areas of the state are eligible for a credit known as a "New Markets Tax Credit" against their FIET tax liability. Specifically, § 41-9-218(10), Ala. Code 1975, defines "tax credit" as "[a] credit against the state-distributed portion of the tax otherwise due under [§§] 27-4A-3, 27-3-29, 40-16-4, 40-18-5, or 40-18-31. ..." (Emphasis added.)

In 2014, Bryant Bank filed an FIET tax return, claiming a New Markets Tax Credit in the amount of $708,000 against its

FIET tax liability. The department initially denied the credit, but, upon further review through an administrative appeal requested by Bryant Bank, the department allowed Bryant Bank a New Markets Tax Credit in the amount of $262,669. The department notified Bryant Bank of its final assessment, which included interest and penalties.

On June 7, 2017, Bryant Bank filed a notice of appeal of the final assessment in the circuit court. See § 40-2A-7(b)(5)b., Ala. Code 1975. In the proceedings before the circuit court, both the department and the commissioner and Bryant Bank filed a motion for a summary judgment. The department and the commissioner argued that § 41-9-218(10) authorizes a New Markets Tax Credit only up to the amount of the FIET proceeds distributed to the State General Fund. Bryant Bank argued that § 41-9-218(10) authorizes a New Markets Tax Credit against FIET proceeds distributed not only to the State General Fund, but also against the proceeds distributed to counties and municipalities. The circuit court conducted a hearing on the competing motions and subsequently entered a summary judgment determining the amount of the tax credit due Bryant Bank. Based on its analysis, the circuit

court determined that § 41-9-218(10) authorizes a New Markets Tax Credit only against that portion of the FIET proceeds distributed to the counties and municipalities and not to that portion of the FIET proceeds distributed to the State General Fund, and it entered a judgment declaring the FIET amounts due from Bryant Bank based on its determination.

The department and the commissioner filed a timely notice of appeal to this court; that appeal was assigned appeal number 2170550. Bryant Bank filed a timely cross-appeal; that appeal was assigned appeal number 2170555. The Alabama League of Municipalities has filed an amicus curiae brief in support of the department and the commissioner.

Standard of Review

On appeal, the parties agree that the essential question for appellate review involves the meaning of § 41-9-218(10) to the extent that it provides a credit against FIET liability for "the state-distributed portion of the tax otherwise due ...." The parties argue that the circuit court erred in construing that phrase when entering its summary judgment, and each side advocates that this court should adopt its respective interpretation of the statute.

This court reviews a summary judgment de novo. Chancellor v. White, 34 So. 3d 1270, 1273-74 (Ala. Civ. App. 2008). "We also apply a de novo review to the determination of the meaning and interpretation of tax statutes." State Dep't of Revenue v. AAA Cooper Transp. & Action Truck Ctr., Inc., 160 So. 3d 286, 290 (Ala. Civ. App. 2014). Accordingly, this court will consider anew the meaning of § 41-9-218(10) and how it applies to Bryant Bank's claim for the New Markets Tax Credit without any presumption of correctness or regard for the determination made by the circuit court. See Burnett v. Burnett, 88 So. 3d 887, 888 (Ala. Civ. App. 2011).

Analysis

Section 41-9-218(10) provides that a taxpayer subject to FIET liability shall be entitled to "[a] credit against the state-distributed portion of the tax otherwise due ...." We conclude that the phrasing used by the legislature is ambiguous when viewed in the context used. As explained above, pursuant to § 40-16-6(c), FIET proceeds are initially collected by the department and then later distributed by the state to the respective counties and municipalities in which the financial institutions are located as well as to the state

itself. Because of the tax-distribution scheme adopted by the legislature in § 40-16-6(c), the term "state-distributed portion of the tax" found in § 41-9-218(10) becomes susceptible to the multiple meanings assigned by Bryant Bank, the department and the commissioner, and the circuit court, all of which could be considered reasonable interpretations of the language employed.

Bryant Bank has consistently maintained that, according to the rules of English grammar, the compound adjective "state-distributed" modifies the word "portion" to mean that the New Markets Tax Credit applies to that part of the FIET distributed by the state to the counties, municipalities, and the state itself, leaving only the administrative expenses collected by the department unaffected by the New Markets Tax Credit. On the other hand, the department and the commissioner have consistently contended that, when considered in the context of the FIET distribution scheme adopted by the legislature, the phrase "state-distributed portion" refers to that part of the FIET proceeds distributed to the state so that the New Markets Tax Credit reduces the FIET tax liability only to the extent of the proceeds payable to the State

General Fund. The circuit court rejected both positions and determined that the phrase "state-distributed portion" refers to the FIET proceeds distributed by the state solely to the counties and municipalities.

> "We have said that a statute is ambiguous when it is of doubtful meaning. Ex parte Alabama Public Service Commission, 268 Ala. 322, 106 So. 2d 158 (1959). Ambiguity in this sense has been defined as whether 'A statute or portion thereof is ambiguous when it is capable of being understood by reasonably well-informed persons in either of two or more senses. ...' State ex rel. Neelen v. Lucas, 24 Wis. 2d 262, 267, 128 N.W.2d 425, 428 (1964)."

S & S Distrib. Co. v. Town of New Hope, 334 So. 2d 905, 907 (Ala. 1976). We consider Bryant Bank, the department and the commissioner, and the circuit court to all be reasonably well informed, and the fact that they reached differing conclusions as to the meaning of the statute reflects its ambiguity.

That said, the various constructions of § 41-9-218(10) do not stand on equal footing before this court. Because of its expertise in matters of taxation, the department's interpretation of a taxing statute is entitled to deference. State v. Pettaway, 794 So. 2d 1153, 1157 (Ala. Civ. App. 2001).

> "'[I]t is well established that in interpreting a statute, a court accepts an administrative

> interpretation of the statute by the agency charged with its administration, if that interpretation is reasonable. Ex parte State Dep't of Revenue, [683 So. 2d 980 (Ala. 1996)] (citing Alabama Metallurgical Corp. v. Alabama Pub. Serv. Comm'n, 441 So. 2d 565 (Ala. 1983)). Absent a compelling reason not to do so, a court will give great weight to an agency's interpretations of a statute and will consider them persuasive. Ex parte State Dep't of Revenue, supra (citing Moody v. Ingram, 361 So. 2d 513 (Ala. 1978))."

Surtees v. VFJ Ventures, Inc., 8 So. 3d 950, 968 (Ala. Civ. App.) (quoting Pettaway, 794 So. 2d at 1157), aff'd, Ex parte VFJ Ventures, Inc., 8 So. 3d 983 (Ala. 2008). In this case, although the department did not promulgate a rule or regulation directly interpreting the New Markets Tax Credit before the onset of this litigation,[1] the department applied the same interpretation of § 41-9-218(10) in calculating the New Markets Tax Credit to be credited to Bryant Bank on its internal paperwork in making its final assessment against Bryant Bank that its counsel later advocated to the circuit court and now advocates to this court. The department did not take a position regarding the New Markets Tax Credit and only

[1]We note that the legislature enacted § 41-9-218(10) as part of the Alabama New Markets Development Act in 2012, and the Act became effective on August 1, 2012. See Ala. Acts 2012, Act No. 2012-483.

later adopt a legal argument to justify that position. Cf. Gonzalez v. Reno, 212 F.3d 1338, 1350 (11th Cir. 2000) (interpreted by Bryant Bank as holding that "[m]ere litigation positions advanced by the department through its lawyers in tax appeals are not entitled to any deference").

The department and the commissioner narrowly construe § 41-9-218(10) to limit the New Markets Tax Credit to only that portion of the FIET proceeds distributed into the State General Fund. That construction comports with the general rule that, when the legislature grants an exception to a taxation statute, that exception should be strictly construed against a taxpayer and in favor of the taxing authority.[2] See White v. Kimberly-Clark Corp., 503 So. 2d 296, 298 (Ala. Civ. App. 1986). The strict construction of § 41-9-218(10) advocated by the department and the commissioner in this case would not render the statute ineffective or meaningless

[2]The Alabama League of Municipalities also points out in its amicus brief that the legislative history behind the language eventually used in § 41-9-218(10) also supports the construction adopted by the department and the commissioner. However, that legislative history was not included in the record on appeal, and this court has not been asked to take judicial notice of it. Hence, we do not base our decision in any respect on the legislative-history argument made by the amicus.

because it still provides for a credit of approximately one-fourth of the FIET liability of Bryant Bank, leaving intact an incentive for financial institutions to invest in new-market development despite Bryant Bank's argument to the contrary.

The department and the commissioner have provided a reasonable interpretation of the ambiguous phrase "state-distributed portion of the tax otherwise due" contained in § 41-9-218(10). This court defers to that interpretation and construes the statute to mean that the New Markets Tax Credit applies to reduce the FIET liability by only the amount of the FIET proceeds distributed to the State General Fund, and not to the amount of the FIET proceeds distributed to the counties and municipalities in which the financial institution is located. Accordingly, we conclude that the circuit court erred in construing the statute otherwise. Because the circuit court should have granted the motion for a summary judgment filed by the department and the commissioner and denied the motion for a summary judgment filed by Bryant Bank, we reverse the circuit court's judgment and remand the cause

with instructions to the circuit court to issue a judgment consistent with this opinion.

2170550 -- REVERSED AND REMANDED.

2170555 -- CROSS-APPEAL DISMISSED AS MOOT.

Thompson, P.J., and Pittman, J., concur.

Thomas and Donaldson, JJ., recuse themselves.