STATE OF MICHIGAN

COURT OF APPEALS

DANSE CORPORATION,

Petitioner-Appellant,

v

CITY OF MADISON HEIGHTS,

Respondent-Appellee.

UNPUBLISHED
March 23, 2001

No. 215486
Tax Tribunal
LC No. 230939

Before: Sawyer, P.J., and Murphy and Fitzgerald, JJ.

SAWYER, P.J. *(dissenting).*

I respectfully dissent.

In its reply brief, petitioner argues that those factors are not determinative because they are not contained within the administrative rule promulgated by the tax commission. I agree.

It is well settled in Michigan law that, for an administrative rule to be valid, the rule must be promulgated in accordance with the requirements of the Administrative Procedures Act, MCL 24.201 *et seq.*; MSA 3.560(101) *et seq.* *Detroit Base Coalition for the Human Rights of the Handicapped v Dept of Social Services*, 431 Mich 172, 183; 428 NW2d 335 (1988). Administrative agencies may publish additional guidelines without following the rule-making requirements of the APA, but those guidelines are merely explanatory and do not have the force and effect of law. MCL 24.207(h); MSA 3.560(107)(h); *Coalition for Human Rights*, *supra* at 184.

In the case at bar, while it is not disputed that Rule 21 was properly promulgated, there is no indication that the *Assessor's Manual* was itself promulgated as an administrative rule. Therefore, while the *Assessor's Manual* may be looked to as being explanatory of Rule 21, the *Assessor's Manual* does not itself have legal authority under Michigan law. *Coalition for Human Rights, supra* at 190. That is, the *Assessor's Manual* cannot impose additional requirements to meet the definition of "special tools" beyond that contained in Rule 21. Therefore, if the molds at issue in this case meet the definition of "special tools" established in Rule 21, petitioner is entitled to the special tool exemption even if one or more factors set forth in the *Assessor's Manual* are not met.

The amicus curiae looks to MCL 211.10e; MSA 7.10(5), which provides as follows:

> All assessing officials, whose duty it is to assess real or personal property on which real or personal property taxes are levied by any taxing unit of the state, shall use only the official assessor's manual or any manual approved by the state tax commission, consistent with the official assessor's manual, with their latest supplements, as prepared or approved by the state tax commission *as a guide* in preparing assessments. Beginning with the tax assessing year 1978, all assessing officials shall maintain records relevant to the assessments, including appraisal record cards, personal property records, historical assessment data, tax maps, and land value maps consistent with standards set forth in the assessor's manual published by the state tax commission. [Emphasis added.]

I do not read this statute as exempting the *Assessor's Manual* from the requirements of the APA in terms of rule making. That is, the above statute does not provide the state tax commission with a means of creating a rule without following the rule-making requirements of the APA merely by inserting the "rule" into the *Assessor's Manual*. Rather, the manual is merely a guide, as MCL 211.10e; MSA 7.10(5) expressly recognizes. As discussed above, MCL 24.207(h); MSA 3.560(107)(h) authorizes administrative agencies to publish guidelines, which lack the force of law. All that MCL 211.10e; MSA 7.10(5) does is direct assessors to use the manual as their sole guidelines; it does not elevate the manual to the status of a "super rule" that may be promulgated without compliance with the APA and still have the force of law.

The amicus curiae also directs our attention to an opinion of the Attorney General which the amicus argues supports its position on this issue. In 1981 OAG 5909, the Attorney General opined that the *Assessor's Manual* is not a rule subject to the promulgation requirements of the APA. 1981 OAG 5909, p 207. First, I note that opinions of the Attorney General are not binding on this Court as precedent. *Frey v Dep't of Management and Budget*, 429 Mich 315, 338; 414 NW2d 873 (1987). Therefore, even if the Attorney General's opinion stands for the proposition the amicus curiae purports that it does, I would have to conclude that the Attorney General's opinion is incorrect. Second, I am not persuaded that the Attorney General's opinion stands for the proposition that the amicus curiae argues that it does. Rather, the Attorney General also recognizes that the *Assessor's Manual* is a guideline that local assessor's must use:

> The use of the Assessor's Manual *as a guide* in preparing assessments is mandated by 1962 PA 122, § 1, *supra*, in the commanding language of "shall" directed to public officers. Thus, there is a duty on the part of local assessors to observe the Assessor's Manual *as a guide* in preparing assessments. [1981 OAG 5909, p 207.]

I see nothing in the opinion of the Attorney General which is inconsistent with our analysis above. Rather, it is consistent with my conclusion that the *Assessor's Manual* is merely a guideline, albeit the only guidelines that local assessors are authorized to use. That, however, does not elevate the *Assessor's Manual* to the level of having the force of law. Rather, it has the status of a guideline to explain the tax code and the administrative rules promulgated by the state tax commission under the tax code. As discussed above, such guidelines do not have the force of law.

In sum, I conclude that the *Assessor's Manual* cannot, with force of law, impose requirements, restrictions or limitations on taxpayers which are different from, or in addition to, the requirements, restrictions or limitations imposed by administrative rule. That is, the material placed in the *Assessor's Manual* by the state tax commission may serve to explain, or assist in applying, the provisions of the tax code or administrative rule, but it may not serve to create provisions in addition to those found in the tax code or administrative rule. In order for such provisions to have the force of law, the state tax commission must place those provisions into the administrative rule, not just into the *Assessor's Manual*.

For the above reasons, I would further conclude that we must look to the provisions of Rule 21 for the definition of "special tools" and not to any additional requirements set forth in the *Assessor's Manual*.

Turning to the case at bar, to determine whether the molds in this case come within the definition of "special tools" under Rule 21, I read that rule as establishing two requirements:

(1) That the "special tool" is used or being prepared for use in the manufacture of products or models (as opposed to being held as inventory for sale to another);

(2) That the usefulness of the "special tool" cease with the discontinuance of the product or model manufactured from the "special tool" (i.e., the "special tool" cannot be put to some other use).

It is not disputed that the first requirement is met: petitioner used the molds in the case at bar for the manufacture of roof vents, it did not manufacture the molds for sale to others.

With respect to the second requirement, respondent argues that it is not met because the molds do not have a limited useful life. That is, respondent argues, in various ways, that to meet the definition, a "special tool" must "have a shortened useful life caused by planned obsolescence." *Respondent's Brief on Appeal*, p 21. While respondent's position is supported by various factors in the *Assessor's Manual*, it is not, in my opinion, supported by the language of Rule 21. While I recognize that exemption statutes must be strictly construed in favor of the taxing unit, *Ladies Literary Club v Grand Rapids*, 409 Mich 748, 753; 298 NW2d 422 (1980), nothing in the language of Rule 21 establishes, or even suggests, a requirement of a limited useful life or planned obsolescence. Rather, Rule 21 merely states that the utility of the "special tool" must "cease with the discontinuance of such products or models." Nothing in Rule 21 distinguishes between products or models that will be discontinued after two years and those that will be discontinued after twenty years. That is, Rule 21 is silent on the issue of how long a product or model will be in production; it speaks only to whether the tool at issue will have a usefulness after the product or model is eventually discontinued. If, in fact, the tool will not be useful once the product or model is discontinued, then it is a "special tool" entitled to the exemption.

Next, respondent and the amicus curiae direct our attention to this Court's decision in *University Microfilms v Scio Twp*, 76 Mich App 616; 257 NW2d 265 (1977). First, I note that respondent's suggestion that *University Microfilms* is binding precedent is incorrect. Because it was decided before November 1, 1990, we are not obligated to follow that decision. MCR

7.215(H). *University Microfilms* considered whether master microfilm negatives used to produce additional copies constitute a "special tool." This Court agreed with the Tax Tribunal that they do not. The following language from the opinion is generally supportive of respondents position in the case at bar:

> In its opinion, the tax tribunal found that plaintiff's master negatives do not wear out or become obsolete in a short time and therefore do not come within the definition of "special tool". Plaintiff argues that master negatives are used as a pattern to reproduce an image and are therefore similar to molds, dies and the like. Additionally, plaintiff submits that there is no requirement that the tool be short lived in order to qualify as a "special tool", and to the extent that the tax commission's definition contains that requirement it is erroneous.
>
> . . . The tax commission has defined these items. We agree with the tax tribunal that plaintiff's master negatives do not meet the definition. [*University Microfilms, supra* at 621-622.]

It is not at all clear what this Court looked to in deciding *University Microfilms* and apparently establishing a "short life" requirement. The opinion merely refers to the Tax Tribunal's opinion regarding the tool's life expectancy. Further, it is not even clear if ultimately the Court relied on the life-expectancy issue. The opinion merely states that film negatives do not meet the definition of special tool, without clearly stating what part of the definition is not met. In any event, as discussed above, we must look to Rule 21 for a definition of "special tools" and that rule contains no element of life-expectancy. Therefore, to the extent that *University Microfilms* adopted a definition of "special tools" not found in Rule 21, I would overrule that holding.[1]

For the above reasons, I conclude that a tool is a "special tool," as defined by Rule 21, if its usefulness ends upon the discontinuance of the product the tool is used to manufacture without regard to the actual or intended product life of the item being manufactured by the tool. Because respondent points to no evidence that the molds at issue in this case would have any usefulness after the discontinuance of the roof vents they are used to manufacture, those molds come within the definition of "special tools" under Rule 21 and, therefore, petitioner was entitled to the statutory exemption.

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[1] The amicus curiae also directs our attention to three Michigan Supreme Court cases which have relied upon the *Assessor's Manual*. However, upon closer inspection, none of those three opinions supports the conclusion that the *Assessor's Manual* has the force of law or supersedes a properly promulgated regulation. In *Antisdale v Galesburg*, 420 Mich 265, 276 n 1; 362 NW2d 632 (1985), the Court relied upon the manual to provide a definition of the three valuation methods. In *Edward Rose Building Co v Independence Twp*, 436 Mich 620, 636-637; 462 NW2d 325 (1990), the Court quoted from *Antisdale* in a discussion of the definition of "market value." Finally, in *Ford Motor Co v State Tax Commission*, 400 Mich 499, 523 n 7; 255 NW2d 608 (1977) (Williams, J., dissenting), there is a "see also" citation to the manual in a footnote in a dissenting opinion. I find such "reliance" by the Supreme Court to be less than persuasive on the topic of whether the manual should be afforded the same status as a properly promulgated administrative rule.

Therefore, I would reverse and remand to the Tax Tribunal with instructions to enter judgment in favor of petitioner based upon the application of the "special tools" exemption.[2]

/s/ David H. Sawyer

[2] I do agree with the majority's analysis of the valuation issues, if I were to review those issues. However, the valuation issues would be moot under my analysis of the "special tool" issue.