IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2003 Term

No. 31377

FILED
December 3, 2003
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

BLUESTONE PAVING, INC.,
A CORPORATION,
Petitioner Below, Appellee,

V.

TAX COMMISSIONER OF
THE STATE OF WEST VIRGINIA,
Respondent Below, Appellant.

Appeal from the Circuit Court of Mercer County
Honorable John R. Frazier, Judge
Civil Action No. 02-C-97-F

REVERSED

Submitted: November 5, 2003
Filed: December 3, 2003

Darrell V. McGraw, Jr., Esq.
Attorney General
Stephen Stockton, Esq.
Senior Assistant Attorney General
Charleston, West Virginia
Attorneys for the Appellant

Shawn R. Romano, Esq.
Daniels Law Firm, P.L.L.C.
Charleston, West Virginia
Attorney for the Appellee

JUSTICE DAVIS delivered the Opinion of the Court.

JUSTICE MAYNARD concurs and reserves the right to file a concurring opinion.

JUSTICES MCGRAW and ALBRIGHT dissent and reserve the right to file dissenting opinions.

SYLLABUS BY THE COURT

1. "In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review." Syllabus point 2, *Walker v. West Virginia Ethics Commission*, 201 W. Va. 108, 492 S.E.2d 167 (1997).

2. "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syllabus point 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995).

3. "Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." Syllabus point 2, *State v. Elder*, 152 W. Va. 571, 165 S.E.2d 108 (1968).

4. "In the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used."

Syllabus point 1, *Miners in General Group v. Hix*, 123 W. Va. 637, 17 S.E.2d 810 (1941), *overruled on other grounds by Lee-Norse Co. v. Rutledge*, 170 W. Va. 162, 291 S.E.2d 477 (1982).

5. "Where a particular construction of a statute would result in an absurdity, some other reasonable construction, which will not produce such absurdity, will be made." Syllabus point 2, *Newhart v. Pennybacker*, 120 W. Va. 774, 200 S.E. 350 (1938).

6. Pursuant to the plain language of W. Va. Code § 11-15A-10a(a) (1986) (Repl. Vol. 2002), "[a] person is entitled to a credit against the tax imposed . . . on the use of a particular item of tangible personal property equal to the amount, if any, of sales tax lawfully paid to another state for the acquisition of that property," where the sales tax paid and the use tax credit sought both pertain to the same, identical item of tangible personal property.

Davis, Justice:

The appellant herein and respondent below, the Tax Commissioner of the State of West Virginia [hereinafter referred to as "Tax Commissioner"], appeals from an order entered July 24, 2002, by the Circuit Court of Mercer County. In that order, the circuit court determined that the appellee herein and petitioner below, Bluestone Paving, Inc. [hereinafter referred to as "Bluestone"], was entitled to receive a use tax refund pursuant to W. Va. Code § 11-15A-10a(a)[1] (1986) (Repl. Vol. 2002).[2] On appeal to this Court, the Tax Commissioner states that the circuit court erroneously applied the governing statute to the facts at issue in this case. Upon a review of the parties' arguments, the pertinent authorities, and the record submitted for appellate consideration, we reverse the decision of the Mercer County Circuit Court.

---

[1]For the pertinent statutory language, see *infra* Section III.

[2]Since the time of the events at issue in the instant appeal, the Legislature has amended this statute; such amendments, however, do not affect the statutory language at issue herein. *Compare* W. Va. Code § 11-15A-10a(a) (2003) (Supp. 2003) *with* W. Va. Code § 11-15A-10a(a) (1986) (Repl. Vol. 2002).

I.

FACTUAL AND PROCEDURAL HISTORY

Bluestone Paving, Inc., is a West Virginia corporation and paving contractor located in Princeton[3] whose primary function is to manufacture asphalt and to use this asphalt to pave roads for the West Virginia Department of Transportation, Division of Highways [hereinafter referred to as "DOH"]. In order to manufacture the asphalt needed for its paving operations, Bluestone was required to purchase gravel from a quarry in Virginia because, pursuant to DOH guidelines, there was not a sufficient amount of gravel available in West Virginia to guarantee the level of quality dictated by the DOH. Upon purchasing gravel at the quarry located in Pounding Mills, Virginia, Bluestone was required to pay a Virginia sales tax equivalent to 4 ½% of the gravel's purchase price.[4] The total amount of sales tax Bluestone paid to Virginia on the purchase of gravel at issue

[3]In 2000, Bluestone Paving, Inc., ceased operations.

[4]From the record, it appears that the 4 ½% sales tax was actually comprised of two different taxes: a 3 ½% sales tax payable to the Commonwealth of Virginia and a 1% sales tax payable to the City of Bluefield, Virginia, where the Pounding Mills quarry is located. In response to Bluestone's initial claim for credit, the Tax Commissioner rejected Bluestone's claim in its entirety finding W. Va. Code § 11-15A-10a(a) permits only credits for taxes paid to other states rather than for taxes paid to local governments within other states. At the administrative level, however, the fact that Bluestone had, in fact, paid taxes not just to the City of Bluefield, Virginia, but also to the Commonwealth of Virginia was clarified. Following this corrective statement in the administrative law judge's order, however, it appears that the parties have since abandoned their dispute as *to whom* Bluestone paid the allegedly refundable taxes and that their focus is now *for what* Bluestone paid such taxes.

herein is $52,288.28.[5]

Following the purchase of the gravel, Bluestone transported it back to Princeton where it was used to manufacture asphalt. This asphalt was then used to pave roads pursuant to Bluestone's paving contracts with the DOH. Upon the use of the asphalt, Bluestone was required to pay a use tax to the State of West Virginia in the amount of 6% of the total value of the asphalt.[6] The total amount of use tax Bluestone paid to West Virginia on the asphalt at issue herein is $69,777.99.

In 2001, Bluestone filed a claim for a tax refund, pursuant to W. Va. Code § 11-15A-10a(a), seeking to recoup the amount of the sales tax it had paid to Virginia when it purchased gravel from the Pounding Mills quarry. The Tax Commissioner denied Bluestone's claim, whereupon Bluestone filed a petition for said refund. By decision rendered January 17, 2002, the administrative law judge [hereinafter referred to as "ALJ"] determined that Bluestone was not entitled to its requested refund. In reaching this decision, the ALJ concluded that W. Va. Code § 11-15A-10a(a)[7]

---

[5]This 4 ½% sales tax figure was based upon the total purchase price of gravel Bluestone purchased from the Pounding Mills quarry, *i.e.*, $1,161,961.91.

[6]This value takes into consideration the costs of the asphalt's various aggregates (raw materials), *e.g.*, gravel, sand, and petroleum products, as well as the value resulting from the asphalt manufacturing process, itself.

[7]See *infra* Section III for the pertinent statutory language.

> allows for a credit against the use tax of a particular item if sales tax on that **same** property has been paid to another state. In other words, in order to get credit for the sales tax paid to Virginia, the West Virginia use tax must be the Virginia sales tax's "mirror image." The Petitioner in this case [Bluestone] may not claim this credit and subsequent refund because the West Virginia purchasers' use tax on asphalt **is not** the mirror image of the Virginia sales tax on aggregate [gravel]. By the Petitioner's own admission, the Petitioner takes aggregate and uses it to manufacture asphalt. The manufacturing of asphalt at its Princeton manufacturing facility changes the character of the product, the aggregate, for which sales tax has been paid to Virginia. The asphalt on which the Petitioner has paid the six percent (6%) purchasers' use tax to West Virginia is a separate product, which is made from the aggregate for which sales tax was paid. These are two separate taxable transactions that at first appear similar only because one product is used to manufacture another. However, it is this manufacturing (manipulating the product in an activity beyond common use) of a **new and more valuable** product that creates a separate taxable transaction and prevents W. Va. Code § 11-15A-10a from applying to this situation.

(Emphasis in original).

Bluestone then appealed this ruling to the Circuit Court of Mercer County. By order entered July 24, 2002, the circuit court reversed the ALJ's decision and found Bluestone to be entitled to the requested refund. In rendering its ruling, the circuit court determined that

> the intent of West Virginia Code § 11-15A-10a is to prevent the imposition of double taxation of tangible personal property brought into the State of West Virginia, through the imposition of West Virginia's Use Tax, when tax has been levied by another state.

. . . .

> The Administrative Law Judge erred in determining that in order to obtain a credit "the West Virginia Use Tax must be the Virginia Sales Tax's 'mirror image.'"
>
> This Court finds that West Virginia Code § 11-15A-10a makes no such requirement. West Virginia Code § 11-15A-10a only requires that the tangible personal property upon which Use Tax is imposed be the tangible personal property upon which sales tax had been paid.
>
> The Court finds that it is the aggregates [gravel] upon which sales taxes were paid in Virginia, incorporated into asphalt and used by the same taxpayer in a contracting activity upon which Use Taxes were levied by the State of West Virginia. . . .

From this adverse ruling, the Tax Commissioner now appeals to this Court.

II.

STANDARD OF REVIEW

On appeal to this Court, the Tax Commissioner questions the circuit court's interpretation of W. Va. Code § 11-15A-10a(a) and its application thereof to the facts of this case. We previously have held that

> [i]n reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review.

Syl. pt. 2, *Walker v. West Virginia Ethics Comm'n*, 201 W. Va. 108, 492 S.E.2d 167 (1997).

Of specific relevance to the instant proceeding is the method by which we review a circuit court's interpretation of a statutory provision. In this regard, we have held "[w]here the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syl. pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995). *See also* Syl. pt. 1, *Appalachian Power Co. v. State Tax Dep't of West Virginia*, 195 W. Va. 573, 466 S.E.2d 424 (1995) ("Interpreting a statute or an administrative rule or regulation presents a purely legal question subject to *de novo* review."). With these standards in mind, we proceed to consider the parties' arguments.

III.

DISCUSSION

The sole issue presented for resolution in the instant appeal is whether Bluestone's payment of a 6% use tax in West Virginia for asphalt used to pave roads in West Virginia entitles it to a refund of the 4 ½% sales tax it paid to Virginia for the gravel it used to make the asphalt. Integral to a resolution of this matter is W. Va. Code § 11-15A-10a(a) (1986) (Repl. Vol. 2002),[8] which provides that

> [a] person is entitled to a credit against the tax imposed by this article on the use of a particular item of tangible personal property equal to the amount, if any, of sales tax lawfully paid to another state for the acquisition of that

[8]*See supra* note 2.

> property: Provided, That the amount of credit allowed shall not exceed the amount of use tax imposed on the use of the property in this state.

Applying this statutory language to the instant controversy, the circuit court reversed the decision of the administrative law judge and found that Bluestone was, in fact, entitled to the aforementioned credit and resultant refund.

On appeal to this Court, the Tax Commissioner disputes the circuit court's ruling and argues that the facts of this case do not entitle Bluestone to a tax credit as contemplated by W. Va. Code § 11-15A-10a(a). In this regard, the Commissioner contends that gravel and asphalt are not the same thing because gravel is an aggregate used to make asphalt and is an entirely different substance from asphalt, *i.e.*, the resultant final product, with entirely different uses and purposes. *Citing Central Paving Co., Inc. v. Idaho Tax Comm'n*, 126 Idaho 174, 879 P.2d 1107 (1994); *Buckley v. Northeastern Paving Corp.*, 161 Me. 330, 211 A.2d 889 (1965); *Bituminous Roadways, Inc. v. Commissioner of Revenue*, 324 N.W.2d 799 (Minn. 1982); *Blevins Asphalt Constr. Co. v. Director of Revenue*, 938 S.W.2d 899 (Mo. 1997) (en banc); *People ex rel. Eastern Bermudez Asphalt Paving Co. v. Morgan*, 61 A.D. 373, 70 N.Y.S. 516 (1901); *Fritchie Asphalt & Paving Co. v. Bowers*, 173 Ohio St. 111, 18 Ohio Op. 2d 359, 180 N.E.2d 154 (1962) (per curiam); *Union Paving Co. v. Commonwealth*, 148 Pa. Commw. 358, 611 A.2d 360 (1992). Thus, the Commissioner states that the taxes Bluestone paid were for two different items and constituted two separate transactions: the first transaction was Bluestone's purchase of

gravel, which was subject to sales tax in Virginia, and the second transaction was Bluestone's use of asphalt, which was subject to use tax in West Virginia. Because two separate items were involved in the two separate transactions, Bluestone is not entitled to the refund it seeks.

By contrast, Bluestone asserts that the circuit court correctly found it to be entitled to a refund in accordance with W. Va. Code § 11-15A-10a(a). In support of its argument, Bluestone contends that it has satisfied the statutory criteria enumerated in W. Va. Code § 11-15A-10a(a), and, therefore, it is entitled to the refund which it seeks. Bluestone also rejects the Tax Commissioner's characterization of gravel and asphalt as two distinct items involved in two separate transactions arguing that the asphalt it used to pave roads in West Virginia was "hot mix asphalt," the definition of which specifically recognizes that it is a mix of various aggregates, such as gravel.

At issue in this case is the manner in which W. Va. Code § 11-15A-10a(a) should be interpreted and applied to the facts presently before us. When deciding a case of statutory interpretation, it is first necessary to examine the language employed by the Legislature. "We look first to the statute's language. If the text, given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed." *Appalachian Power Co. v. State Tax Dep't*, 195 W. Va. at 587, 466 S.E.2d at 438. Thus, "[w]here the language of a statute is clear and without ambiguity the plain

meaning is to be accepted without resorting to the rules of interpretation." Syl. pt. 2, *State v. Elder*, 152 W. Va. 571, 165 S.E.2d 108 (1968). *Accord* Syl. pt. 1, *State v. Jarvis*, 199 W. Va. 635, 487 S.E.2d 293 (1997) ("'A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect.' Syl. Pt. 2, *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (1951)."). *See also Sizemore v. State Farm Gen. Ins. Co.*, 202 W. Va. 591, 596, 505 S.E.2d 654, 659 (1998) ("'A statute is open to construction only where the language used requires interpretation because of ambiguity which renders it susceptible of two or more constructions or of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning.'" (quoting *Hereford v. Meek*, 132 W. Va. 373, 386, 52 S.E.2d 740, 747 (1949))).

On occasion, however, such as the case *sub judice*, the language used by the Legislature may be plain but it may have neglected to define a certain word or words used therein. "In the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used." Syl. pt. 1, *Miners in Gen. Group v. Hix*, 123 W. Va. 637, 17 S.E.2d 810 (1941), *overruled on other grounds by Lee-Norse Co. v. Rutledge*, 170 W. Va. 162, 291 S.E.2d 477 (1982). *Accord* Syl. pt. 6, in part, *State ex rel. Cohen v. Manchin*, 175 W. Va. 525, 336 S.E.2d 171 (1984) ("Undefined words and terms used in a legislative enactment will be given their

common, ordinary and accepted meaning."); Syl. pt. 4, *State v. General Daniel Morgan Post No. 548, V.F.W.*, 144 W. Va. 137, 107 S.E.2d 353 (1959) ("Generally the words of a statute are to be given their ordinary and familiar significance and meaning, and regard is to be had for their general and proper use.").

However, when assigning a meaning to an undefined term, we will not embrace a definition that would produce absurd, inconsistent, or incongruous results. "It is the 'duty of this Court to avoid whenever possible a construction of a statute which leads to absurd, inconsistent, unjust or unreasonable results.'" *Expedited Transp. Sys., Inc. v. Vieweg*, 207 W. Va. 90, 98, 529 S.E.2d 110, 118 (2000) (quoting *State v. Kerns*, 183 W. Va. 130, 135, 394 S.E.2d 532, 537 (1990)) (emphasis omitted). Thus, "[w]here a particular construction of a statute would result in an absurdity, some other reasonable construction, which will not produce such absurdity, will be made." Syl. pt. 2, *Newhart v. Pennybacker*, 120 W. Va. 774, 200 S.E. 350 (1938). *Accord* Syl. pt. 2, *Conseco Fin. Serv'g Corp. v. Myers*, 211 W. Va. 631, 567 S.E.2d 641 (2002) ("'It is the duty of a court to construe a statute according to its true intent, and give to it such construction as will uphold the law and further justice. It is as well the duty of a court to disregard a construction, though apparently warranted by the literal sense of the words in a statute, when such construction would lead to injustice and absurdity.' Syllabus Point 2, *Click v. Click*, 98 W. Va. 419, 127 S.E. 194 (1925).").

Upon a review of W. Va. Code § 11-15A-10a(a), it appears that the crux of the parties' dispute herein is the meaning of the word "that" as it appears in this statute. In pertinent part, § 11-15A-10a(a) provides "[a] person is entitled to a credit against the tax imposed by this article on the use of a particular item of tangible personal property equal to the amount, if any, of sales tax lawfully paid to another state for the acquisition of *that* property[.]" (Emphasis added). The Tax Commissioner construes this portion as meaning that the use tax credit is allowed if the use tax is levied on exactly the same property upon which the taxpayer has previously paid sales tax to another state. On the other hand, Bluestone understands the phrase as permitting the credit if the previously taxed property can be identified as comprising a part or component of another type of property.

Based upon our determination of the commonly accepted meaning of the word "that," we agree with the Tax Commissioner's construction of this term. In its most simplistic and basic form, "that" is defined as "'[t]he same.'" XI The Oxford English Dictionary 252 (1970). "That" also has been more broadly construed "to indicate a person, place, thing, or degree as indicated, mentioned before, present, or as well-known or characteristic." Random House Webster's Unabridged Dictionary 1965 (2d ed. 1998). *Accord* XI The Oxford English Dictionary 252 (defining adjective "that" as meaning "a thing . . . either as being actually pointed out or present, or as having just been mentioned and being thus mentally pointed out"); Webster's Ninth New Collegiate Dictionary 1221

(1983) (recognizing adjective form of "that" signifies "being the person, thing, or idea specified, mentioned, or understood"). Thus, it is clear that the word "that," as employed by W. Va. Code § 11-15A-10a(a) to modify the property upon which the taxpayer paid a sales tax to another state, refers to the exact same, or identical, item of personal property upon which the taxpayer would otherwise be required to pay a use tax to West Virginia. *Cf. City of Dallas v. Cornerstone Bank, N.A.*, 879 S.W.2d 264, 271 (Tex. Ct. App. 1994) (interpreting "that property" in Tex. Tax Code Ann. § 32.01 (Vernon Supp. 1994) as collectively referencing "the category of property taxed rather than each individual item of property" for tax lien purposes). To construe this term otherwise would result in an inconsistent meaning in contravention of our prior holding in Syllabus point 2 of *Newhart v. Pennybacker*, 120 W. Va. 774, 200 S.E. 350, and its progeny which specifically counsel against such a result.

Accordingly, we hold that, pursuant to the plain language of W. Va. Code § 11-15A-10a(a) (1986) (Repl. Vol. 2002), "[a] person is entitled to a credit against the tax imposed . . . on the use of a particular item of tangible personal property equal to the amount, if any, of sales tax lawfully paid to another state for the acquisition of that property," where the sales tax paid and the use tax credit sought both pertain to the same, identical item of tangible personal property. Applying this decision to the facts of the instant proceeding, we conclude that Bluestone was not entitled to the use tax credit provided by W. Va. Code § 11-15A-10a(a) because the item of property upon which it

paid sales tax to the Commonwealth of Virginia, *i.e.*, gravel, was not precisely the same item of property upon which it was required to pay use tax to this State, *i.e.*, asphalt. Therefore, we reverse the contrary decision of the Circuit Court of Mercer County.

IV.

CONCLUSION

For the foregoing reasons, we reverse the July 24, 2002, order of the Mercer County Circuit Court.

Reversed.