IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

SUN LIFE ASSURANCE COMPANY OF CANADA (U.S.), a Delaware domestic life insurance company,	)	
Appellant,	)	
v.	)	C.A. No. 08A-12-005 WCC
THE INSURANCE COMMISSIONER OF THE STATE OF DELAWARE,	)	
Appellee.	)	

Submitted: April 27, 2010
Decided: July 26, 2010

MEMORANDUM OPINION

Appeal from Insurance Commissioner Decision. REVERSED.

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Julie M. Donoghue, Esquire; Delaware Department of Insurance, 841 Silver Lake Boulevard, Dover, DE 19904. Attorney for Appellee.

CARPENTER, J.

Introduction

Before this Court is an appeal by Sun Life Assurance Company of Canada ("Sun Life") from an administrative decision issued by the Insurance Commissioner for the State of Delaware (the "Commissioner") denying Sun Life's request for refunds of gross premium taxes paid on employer- and trust-owned life insurance policies issued pursuant to private placements for tax years 2001 to 2003. For the reasons set forth below, this Court hereby reverses the decision of the Commissioner and finds in favor of Sun Life.

Facts

Sun Life Assurance Company of Canada is an insurance company incorporated in Delaware and is a wholly-owned subsidiary of Sun Life Financial, Inc.[1] As part of its services, Sun Life offers corporate-owned life insurance policies ("COLI") which includes employer-, trust-, and bank-owned life insurance which is insurance a corporation can purchase to cover one or more employees. Through COLI, employers are able to help finance the cost of broad-based welfare benefit plans such as health and pension plans for their employees and retirees.

Recognizing that employer- and trust-owned life insurance policies represented a large source of potential tax revenue for Delaware,[2] in 1994, the Delaware General

[1] Stipulation of Facts ¶ 1.
[2] *See* H.B. 615, 137th Gen. Assem., (1994).

Assembly modified the general premium taxing statute relating to insurance[3] by creating a graduated tax schedule for such policies.[4] By adopting this graduated tax rate schedule, companies would be rewarded for increased volume of such policies and the Legislature hoped to secure a greater share of this tax revenue stream over other states. The tax rate was calculated on the basis of net premiums received per "case" in each calendar year, and the tax rate schedule has not changed since the passage of House Bill 615 in 1994. In February of 1998, House Bill 426 was passed by the Legislature amending 18 *Del. C.* § 702(c)(2)b and altered the definition of the term "case" in three ways – (1) all uses of the word "single" were deleted, (2) additional uses of the word "all" added, and (3) the definition itself was expanded.

The original 1994 definition of "case" in relevant part provides:

> For purposes of this section, a "case" is all contract issued to a single employer or trust established by a single employer or individual (or group of employers or individuals that participate in a single private placement under federal securities laws).[5]

[3] 18 *Del. C.* § 702.

[4] The declining tax rate structure set forth by 18 *Del. C.* §702(c) is as follows:

Net Premiums Per Case	Premium Tax Rate
First $10 million	2.0%
$10 million - less than $25 million	1.5%
$25 million - less than $100 million	1.25%
$100 million and over	1.0%

[5] 18 *Del. C.* §702 (c)(2)b (1994).

The 1998 definition of "case" in relevant part provides:

> For purposes of this section, a "case" is (i) all contracts issued to an employer, a trust established by an employer, or an individual, as appropriate; or (ii) all contracts issued to all employers or trusts that participate in a private placement under federal securities laws and/or purchase with respect to at least 25 lives policies covered by registrations under such laws.[6]

After the 1998 amendment, Sun Life issued a series of seven (7) COLI policies to seven separate banks on separate dates, with separate beneficiaries, separate policy numbers, and separate case names through separate private non-federally registered securities placements.[7] Neither party disputes that each of the policies were separately issued under its own private placement nor that none of the policies are part of the same private placement.[8] These seven policies are at issue in this dispute.[9]

After the 1998 amendments, the Delaware Department of Insurance ("Department") took the position that the term "case" continued to include only those policies issued to participants in a single private placement. For tax years 2001 to 2003, Sun Life reported each policy separately as a "case" and computed the premium tax separately for each policy, consistent with the Department's position.[10] However,

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[6] 18 *Del. C.* §702 (c)(2)b (1998).
[7] Final Findings of Fact, Conclusions of Law and Order, R at 000013.
[8] *Id.*
[9] *See* Appellee's Br. at 16 (listing all seven policies in dispute).
[10] Final Findings of Fact, Conclusions of Law and Order, R at 000012-13.

believing the Department was misreading the 1998 amendments, Sun Life subsequently amended their returns and reported all of the separate policies as one "case" and computed the tax accordingly.[11] This would have resulted in a refund that the Department has declined to issue.

Procedural History

As a result of the Department's denial of the refund, on November 24, 2004, Sun Life submitted a request for review to the Department of Insurance with respect to 18 *Del. C.* §702 and their request for refunds of premium taxes on the grounds that the meaning of the terms "case" and "private placement" as used in 18 *Del. C.* 702(c)(2)b allowed each of Sun Life's private placements of life insurance contracts to be treated and taxed together for premium tax calculation purposes.[12]

An administrative hearing was held on July 26, 2005 to address Sun Life's request. Prior to the hearing, both parties agreed to a briefing schedule and also agreed that the decision of the Hearing Officer would be the Commissioner's final decision and order for purposes of appeal pursuant to 18 *Del. C.* §328.[13] In addition, the parties submitted a Stipulation of Facts[14] and a Joint Exhibit List[15] to the Hearing Officer for his consideration.

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[11] *Id.*
[12] Appellant's Br. at 1-2.
[13] R at 000074.
[14] R at 000069-74.
[15] R at 00069-77.

On November 25, 2008, the Hearing Officer issued his Final Findings of Fact, Conclusions of Law and Order in favor of the Department's reading of 18 *Del. C.* §702(c)(2)b. The Hearing Officer denied Sun Life's request and application for a net refund of $850,429 of gross premium taxes allegedly overpaid for tax years 2001 to 2003 for employer- and trust-owned life insurance contracts issued pursuant to private placements.[16]

Sun Life filed a timely petition for review and notice of appeal with this Court. On appeal, Sun Life asserts that the Hearing Officer erred as a matter of law interpreting 18 *Del. C.* §702(c)(2)b as requiring that all of Sun Life's policies/contracts at issue be characterized as separate "cases" and taxed as such. After reviewing the briefs filed by the parties, the Court requested that they respond to a series of questions to clarify the record and what had procedurally occurred before the Hearing Officer. After those responses were received and because of the unique issue of first impression in the Court, it held oral argument.

Standard of Review

In most cases, administrative appeals to the Superior Court receive clearly erroneous standard of review.[17] However, where there is a question of statutory construction and application of that statute, the Court's review is plenary and is not

[16] Appellant's Br. at 5-6.
[17] *Stoltz Mgmt. Co., Inc. v. Consumer Affairs Bd.,* 616 A.2d 1205, 1208 (Del. 1992).

bound by the agency's conclusion.[18] Thus, the Court's review is *de novo* and the court may accord due weight, but need not defer to the agency's interpretation of the statute.[19]

Discussion

The issue before the Court is whether separate employer- and trust-owned life insurance policies which were issued pursuant to separate private placements may be aggregated or are required to be separated within the meaning of "case" under Title 18 Delaware Code §702(c)(2)b. Sun Life contends that the term "case" as amended in 1998 allows the aggregation of all policies issued pursuant to a(ny) private placement. However, the Department contends that each policy issued pursuant to a private placement is a separate "case" within the statute.

It is important for the Court to first emphasize that it is not the place of the Court to decide the wisdom of the legislative action that has caused this dispute or even whether it was in the best interest of the State to pass this legislation. That is within the provision of the General Assembly, and this Court will not invade into their Constitutional responsibility. However, it does take this opportunity to plead with the members of the House and Senate that the creation of a clear legislative history and the articulation through hearings, comments on the floor of their

[18] *Id.* (citing *E.I. du Pont de Nemours Co., Inc. v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985)).
[19] *Public Water Supply Co. v. DiPasquale*, 735 A.2d 378, 381-82 (Del. 1999).

chambers, or through related writings are critical to ensure their intent can be determined and the purpose behind the legislation enforced. This is particularly critical when the legislation involves a complex and technical issue such as the one now before the Court.

When the Court inquired of counsel why no testimony was presented to the Hearing Officer regarding the legislative history of the 1994 and 1998 legislation the following response was provided by the State:

> The reason that the Insurance Commissioner presented no testimony to the hearing officer during the administrative proceeding in 2005 regarding why 18 *Del. C.* § 702(c)(2)b was proposed and the purpose of the amendment is that there appears to be no definitive legislative history for the initial legislation or the amendments to § 702, other than the synopses from the two bills...In my preparation of the Answering Brief in this matter, I obtained and reviewed from Bernard Brady, the Secretary of the Senate, an audio CD containing the House and Senate session recordings for the 1998 legislation (H.B. 426, as amended by House Amendments Nos. 1 and 2), during which this bill was considered and voted on by both Houses. However, I did not hear any relevant discussion by any member of the General Assembly or any witnesses regarding the underlying purpose for the proposed amendment as it relates this matter.[20]

When a similar question was asked of counsel for Sun Life, they responded:

> In that respect, in briefing this issue for the Insurance Commissioner and again for the Court, we exhaustively

[20] Letter from Julie M. Donoghue, Deputy Attorney Gen., Counsel for Del. Ins. Comm'r (Oct. 5, 2009).

> researched the 1998 revisions to the original 1994 enactment, but were unable to locate specific evidence respecting the identity of who drafted the 1998 revisions specifically at issue here, or any clear evidence of the motivation behind the changes.[21]

When the Court advised counsel that it appeared that the legislation was the result of a legislative task force created to review this area, counsel for the Department of Insurance stated:

> In response to your Honor's reference to a task force, efforts were made to identify task force members and to locate a task force report related to the 1994 legislation, but those efforts have been unsuccessful. To the best of my knowledge, no task force report was ever produced, despite the formal creation of the "Insurance Industry Economic Development Task Force" pursuant to House Joint Resolution No. 4 (as amended by Senate Amendment No. 1 on June 30, 1993), which was passed by the 137th General Assembly on June 28, 1993, and signed by the Governor the following month.[22]

Unfortunately as a result of the lack of legislative record, instead of clearly knowing the intent of the General Assembly, the Court, in interpreting this statute, must revert to court created rules of construction that all would agree are not a very satisfactory substitute. Hopefully these comments will help future members of the General Assembly appreciate the importance of clearly articulating the purpose of

[21] Letter from Frances Gauthier, Counsel of Record for Sun Life Assurance Co. of Can. (Oct. 5, 2009).

[22] Letter from Julie M. Donoghue, Deputy Attorney Gen., Counsel for Del. Ins. Comm'r (Oct. 5, 2009).

their legislation and of creating a legislative history to ensure that purpose is not misconstrued by the Court.

Under the circumstances where there is a lack of clear information regarding the intent of the legislature in passing a particular piece of legislation, courts must apply well established rules of construction in an effort to interpret the statute. The goal of statutory construction is to attempt to determine and give effect as intended by the legislature.[23] At times legislative intent can be gleaned from the statute itself and its underlying purpose.[24] Furthermore, the Delaware Code indicates that "[w]ords and phrases shall be read with their context and shall be construed according to the common and approved usage…"[25] When reviewing material where there are changes in the language of a statute, the legislature can neither be assumed to have regarded such changes as without significance, nor to have committed an oversight that the change was enacted inadvertently.[26] The party who avers that no change was intended in a law by a legislative amendment has the burden of establishing that intent.[27]

[23] *Levan v. Independence Mall, Inc.*, 940 A.2d 929, 932 (Del. 2007).
[24] *Fassett v. Christiana Care Health Serv., Inc.*, 2010 WL 2433183, at *2 (Del. Super. June 17, 2010) (citing *Cole v. Del. League for Planned Parenthood, Inc.*, 530 A.2d 1119 (Del. 1987)).
[25] 1 *Del. C.* §303.
[26] 73 AM. JUR. 2D *Statutes* § 132 (2001).
[27] *Stiftel v. Malarkey,* 384 A.2d 9, 13 (Del. 1977).

It is also well established that in reviewing taxing statutes, any doubt regarding the breadth of the statute must be construed against the taxing authority and in favor of the taxpayer.[28] "The general principle is well settled that revenue laws are not to be so construed as to extend their provisions beyond the clear import of the language used, or to enlarge their operation so as to embrace matters not specifically pointed out, although standing in close analogy."[29]

Using the above as its guide, when the Court compares the 1994 to 1998 amendments, it is clear that material changes were made to 18 *Del. C.* §702(c)(2)b. In particular, there are three major differences in the 1998 amended definition of "case." First, the Legislature deleted all uses of the word "single." Second, additional uses of the word "all" were added, and lastly, the definition of "case" itself was expanded. Most importantly "case" is not an insignificant word or concept in this statute. It is the underlying basis for the determination of the very tax structure the Legislature intended to use for the creation of additional revenue. Therefore, the Court finds that such changes in the legislation were material, and as such, the rule of statutory construction presumes that a change in meaning was intended.[30]

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[28] *Consolidated Fisheries Co. v. Marshall*, 32 A.2d 426, 429 (Del. Super. 1943), *aff'd*, 39 A.2d 413 (Del. 1944).
[29] *Id.*
[30] *Giuricich v. Emtrol Corp.*, 449 A.2d 232, 238 (Del. 1982); *see also C & T Assoc. v. Gov't of New Castle*, 408 A.2d 27, 29 (Del. Ch. 1979).

By using the word "single" in the definition of "case" in the 1994 enactment, the statute was clear on its face that policies were only to be associated with one specific private placement. However, in the 1998 amendment, the deletion of "single" was never replaced with a synonymous word which would describe a "single" or "one" private placement. The deletion of "single" has also led to multiple interpretations of "case" and has given rise to an ambiguity in the statute. Both sides concede that such ambiguity is present in the 1998 amendment.

When a statute is ambiguous, the Court should attempt to determine the Legislature's intent in making the statutory amendments.[31] Both Sun Life and the Commissioner have presented plausible suggestions as to the legislative intent derived from the sparse legislative history available. Sun Life submits that a reading of the 1998 amendment in their favor furthers the purpose of the legislative synopsis of the original legislation adopted in 1994 which allowed Delaware to reap additional premium tax revenues. In particular, by recognizing that COLI policies represented a source of potential tax revenue for the State, the Legislature intended to secure a greater share of that nationwide revenue by offering insurers a competitive edge – the declining tax structure. They assert this goal was carried forward in the amendment by allowing the aggregation of these policies which would result in a tax benefit to

[31] *Metrodev Newark, LLC v. Justice of Peace Court No. 13*, 2010 WL 939800, at *4 (Del. Super. Feb. 18, 2010) (citing *Snyder v. Andrews*, 708 A.2d 237, 241 (Del. 1988)).

companies with the hope of increasing the volume of policies written under our laws, thus generating more revenue for the State.

The Commissioner submits that while the original legislation was intended to allow Delaware to economically benefit from this insurance business, the legislative synopsis of House Bill 426 reflects that was not the Legislature's intent as to the 1998 amendment. The legislative synopsis set forth in House Bill 426 states: "This Bill makes technical and position changes to House Bill No. 615, of the 137th General Assembly pertaining to corporate owned life insurance. The primary purpose of this legislation is to allow for transactions in accordance with Internal Revenue Code Section 1035, policy exchanges between carriers." Thus, the Commissioner believes that 18 *Del. C.* §702(c)(2)(b) must be read in accordance with Internal Revenue Code Section 1035 and when reading the statutes together, Sun Life's interpretation of "case" is invalidated. Unfortunately this argument is undermined by the fact that the amendment to § 702 to facilitate like kind exchanges consistent with the IRS code occurred in a different subsection of the statute having no logical connection to the definition change to the word "case." Therefore the Department's argument here is simply that the 1998 amendment created no substantial change to the definition of "case" and the tax structure still only applies to a single private placement.

The Court recognizes that the parties' suggested interpretations of the statute and the legislative intent are reasonable and equally plausible. The Court's own review of the statute reflects that it is also likely and reasonable that the 1998 change is simply a rewrite of the section of the 1994 legislation that is in parenthesis that defined the word "case."[32] In fact, this scenario seems to the Court to be the most likely rationale for why the amendment was made as it gave clarity to what appears in the earlier definition to be an afterthought to an important concept, that is, the ability of small companies to group together in a single placement and reap the same benefits available to larger corporations. Unfortunately this alternative explanation simply highlights the ambiguity of this statute and how it is subject to a multitude of possible interpretations as to the intent of the Legislature in passing the amendment.

Under these circumstances, the Court believes its only prudent alternative is to rely upon well-settled Delaware law that issues regarding the breadth of a taxing statute must be construed against the taxing authority and in favor of the taxpayer.[33] As with the case here, both sides have agreed that the statute is ambiguous and that there are many reasonable interpretations as to the intent behind the amendments that were made in 1998. Therefore, based on previous cases dealing with statutory

[32] The definition in parenthesis stated "or group of employers or individuals that participate in a single private placement under federal security laws."

[33] *Acadia Brandywine Town Ctr., LLC v. New Castle County*, 879 A.2d 923, 928 (Del. 2005) (citing *Arbern v. Wilmington, Inc. v. Dir. Of Revenue*, 596 A.2d 1385, 1388 (Del. 1991)).

interpretation regarding tax statutes, the Court finds that it must hold in favor of the taxpayer.

The remedy for the Department, if they believe their position is correct, is to seek a legislative fix that will remove this ambiguity and hopefully clearly articulate the reason the definition of "case" in this statute is again being amended. This is the only way the taxpayer will be on reasonable notice of what will be expected and thus allow them to make rational business decisions on the benefits of writing these policies under the laws of this State or elsewhere.

Conclusion

For the foregoing reasons, the Court hereby reverses the Hearing Officer's decision below and finds in favor of Sun Life.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.