STATE OF MICHIGAN

COURT OF APPEALS

NATIONWIDE AGRIBUSINESS INSURANCE COMPANY,

Petitioner-Appellant,

v

DEPARTMENT OF TREASURY,

Respondent-Appellee.

FOR PUBLICATION
June 20, 2024
9:10 a.m.

No. 364790
Tax Tribunal
LC No. 21-000039

Before: O'BRIEN, P.J., and M. J. KELLY and FEENEY, JJ.

FEENEY, J.

This tax dispute involves a Unitary Business Group (UBG) of insurance companies and its dispute with the Department of Treasury regarding the treatment of the premiums tax imposed under MCL 206.635, the so-called retaliatory tax imposed under MCL 500.476a, and the calculation of the Michigan automobile insurance placement facility (MAIPF) credit under MCL 206.637(1)(c). Fortunately, this dispute is more a war of words than of numbers. That is, at least for purposes of this appeal, both sides seem to agree that the other correctly calculates the amount owed under their interpretation of the relevant statutes, with the disagreement being over the correct interpretation of the statutes. And in this respect, we agree with petitioner's interpretation and we reverse the Tax Tribunal's ruling in favor of respondent and remand the matter to the Tribunal for entry of summary disposition in favor of petitioner.

The history of this case is largely irrelevant to the resolution of the dispute. Briefly, petitioner initially filed separate returns but later filed amended combined returns with the other members of the UBG, seeking to aggregate their tax liability. Respondent initially accepted these amended returns, issued refunds, but later rejected them and ordered the return of those refunds. Respondent assessed penalties along with interest. Petitioner is an insurance company with "principal offices" in Ohio. Petitioner is "affiliated with Nationwide Mutual Insurance Company" located in Ohio. Petitioner is part of a UBG comprised of other insurance companies. Petitioner's

UBG status is undisputed. The tax years in dispute appear to be 2014 and 2015.[1] For those two years, petitioner and each of the UBG members initially filed separate corporate income tax (CIT) returns in which they calculated their tax liability on an individual basis. The UBG group collectively paid approximately $4.5 million in taxes for 2014 and 2015.

In November 2018, petitioner and the UBG members filed "amended returns for the tax years at issue, reporting its gross premiums, subtractions, and credits as a unitary group." The exact numbers and specifics of the returns are not material or in dispute for purposes of this appeal. When they filed their amended returns, they included a "[s]chedule" ("the Schedule") "show[ing] that premiums taxes and tax attributes were being calculated and applied at the unitary business group level . . . ." The Schedule was used because there was "no form available to file a combined tax return," and the Schedule "computed the tax liability of the unitary business group and then allocated taxes and tax attributes to separate tax forms in a manner that could be interpreted as though tax attributes were being shared among the members of the group." The Schedule "aggregate[d] the taxable premiums, credits, and other tax attributes from each component member of the Nationwide Group [i.e., the UBG], and . . . appl[ied] the Nationwide Group's tax credits against the same group's aggregate Michigan corporate income tax *(i.e.,* premiums tax) liability." Moreover, the Schedule "calculate[d] the Nationwide Group's Michigan tax liability, after credits, in a manner that is consistent with other unitary business group combined filings."

Initially, respondent accepted the amended returns and issued a refund of approximately $3.3 million to the UBG for the 2014 and 2015 tax years, but respondent did not issue all of the claimed refunds. Moreover, respondent subsequently issued a variety of assessments and notices seeking to recover the refunds already paid. Petitioner and the UBG filed appeals to contest this effort. Respondent appears to have treated the group members as though they were separate filers, with some group members being issued their claimed refunds while others were denied.

In short, respondent rejected petitioner's attempts to file combined returns and calculate certain credits and taxes on a group-wide basis; instead, respondent treated each insurance company separately despite their UBG status. Respondent issued bills for taxes it was due from individual members. In the information conference recommendation in the "Hearings Division," the referee stated that "[t]he crux of the [respondent]'s contention is that the premium and retaliatory taxes are only levied upon 'each insurance company.' " The referee agreed with respondent's position that the premiums tax and retaliatory tax cannot be calculated on a group-wide basis for a UBG of insurance companies. An administrator of the Hearings Division agreed with the referee's determination "that groupwide computation and the sharing of credits is not

[1] The amended petition and bill for taxes due suggested that the disputed tax years were only 2015 and 2016, but petitioner's motion for summary disposition as well as Kyle Shaner's affidavit provided that the disputed tax years were 2014 and 2015, and involved the amended returns for those years. Confusingly, respondent listed the disputed tax years as being 2014 through 2016. On appeal, petitioner continues to list the disputed tax years as being 2014 and 2015, while respondent continues to list the disputed tax years as being 2014 through 2016. Ultimately, this discrepancy has no bearing on the outcome of the appeal because only legal issues are raised and do not touch on the exact tax years.

available to members of a unitary group that are insurance companies," and respondent denied petitioner's claim for a refund.

Plaintiff then filed its petition with the Tax Tribunal. The parties filed cross-motions for summary disposition under MCR 2.116(C)(10). Without any oral arguments, the Administrative Law Judge (ALJ) issued a proposed opinion and judgment (POJ) ordering that summary disposition be granted in favor of respondent and denied as it related to petitioner. The ALJ concluded that "[t]he relevant statutes are clear that Petitioners are not permitted to file as a UBG for premium and retaliatory taxes and reap the benefits of claiming MAIPF tax credits. Therefore, the assessments issued by Respondent must be upheld." At the outset, the ALJ stated that there was "no question" that petitioner met the elements for a UBG. It also framed the issue as being "whether the more general provisions of the CIT Act that Petitioners cite control the ability of insurance companies to file combined returns for premiums and retaliatory taxes, or whether the more specific provisions of Chapter 12 of the CIT Act preclude the ability of insurance companies to file combined returns for premiums and retaliatory taxes."

The ALJ interpreted MCL 206.611(5) to mean "that the entity being taxed depends on the type of tax being assessed." This meant that "an entity may be taxed as a UBG if the provision for which the tax is assessed allows for it. However, if a provision does not allow for UBGs to file jointly, then an entity must file individually." The ALJ interpreted MCL 206.691 to apply to "general corporate income taxes, and not every subcategory of taxes." The ALJ determined that, if our Legislature intended for the provision to apply to all taxes, it could have done so. Accordingly, the ALJ concluded that, "although MCL 206.691 requires UBGs to file combined returns for taxpayers subject to a corporate income tax base, it does not require UBGs to file combined returns for premiums and retaliatory taxes."

The ALJ determined that, because MCL 206.635(1) and MCL 206.637 did not include UBGs but only insurance companies, this was "presumed to be intentional" by our Legislature, which meant our "Legislature did not intend to have premiums tax calculated on a group wide basis." The ALJ acknowledged that MCL 8.3(b) allowed for the singular form of "insurance company" to be changed to its plural form. The ALJ was unwilling to extend this to mean that "insurance company" could be changed to "UBGs" because the two were "totally different."

The Tax Tribunal issued a final order adopting the POJ as its own.

"Absent fraud, our review of Tribunal decisions is limited to determining whether [the Tribunal] erred in applying the law or adopted a wrong legal principle."[2] On the other hand, if this Court's "review requires the interpretation and application of a statute, that review is de novo."[3] In this case, the Tax Tribunal erred in its interpretation of the relevant statutes.

[2] *Power v Dep't of Treasury*, 301 Mich App 226, 229-230; 835 NW2d 662 (2013) (quotation marks and citation omitted; alteration in original).

[3] *Id*. at 230.

This Court summarized the applicable principles of statutory construction in *D'Agostini Land Co LLC v Dept of Treasury*:[4]

> With respect to statutory interpretation, this Court is required to give effect to the Legislature's intent. *Van Buren Co Ed Ass'n v Decatur Pub Sch*, 309 Mich App 630, 643; 872 NW2d 710 (2015). The Legislature is presumed to intend the meaning clearly expressed, and this Court must give effect to the plain, ordinary, or generally accepted meaning of the Legislature's terms. *Lorencz v Ford Motor Co*, 439 Mich 370, 376; 483 NW2d 844 (1992). "A statutory provision is ambiguous only if it irreconcilably conflicts with another provision, or when it is equally susceptible to more than a single meaning." *People v Fawaz*, 299 Mich App 55, 63; 829 NW2d 259 (2012) (quotation marks and citation omitted). Only when ambiguity exists does the Court turn to common canons of construction for aid in construing a statute's meaning. *People v Borchard-Ruhland*, 460 Mich 278, 284-285; 597 NW2d 1 (1999).

As this Court explained in *D'Agostini*,[5] not only does the tax code define what a UBG is, it also requires that a UBG file a unitary tax return:

> A unitary business group is not a separate and distinct legal entity, like a corporation, limited liability company, or partnership; rather, the group is purely a creation of tax law. In general, a unitary business group is a group of related US persons whose business activities are sufficiently interdependent. MCL 206.611(6) (CIT); MCL 208.1117(6) (MBT). To qualify as a unitary business group, one member of the proposed group must own or control more than 50% of the other members and there must be a sufficient connection between the members to meet one of two relationship tests. MCL 206.611(6) (CIT); MCL 208.1117(6) (MBT). *If a group of businesses qualifies as a unitary business group in a particular tax year, then the group must file a unitary tax return for that year*. MCL 206.691(1) (CIT); MCL 208.1511 (MBT). *Michigan, like several other states, has adopted the unitary-business-group concept in an effort to measure more accurately the related group's taxable activities in the state.*
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> Unitary business groups were not taxed as such under the SBT [Single Business Tax Act]. When it enacted the MBT, the Legislature added "unitary business group" to the list of persons who qualify as a "taxpayer" under state law. MCL 208.1117(5). Membership in a unitary business group was open to individuals as well as a wide range of legal entities, including corporations, limited liability companies, and partnerships. MCL 208.1117(6) and (7). With the CIT, the Legislature retained the concept of a "unitary business group" in the definition of a

[4] 322 Mich App 545, 554-555; 912 NW2d 593 (2018).

[5] 322 Mich App at 551-552.

> "taxpayer," but it restricted membership in such a group to corporations, *insurance companies*, and financial institutions. MCL 206.611(6). [Emphasis added.]

Moreover, as this Court observed in *Soave v Dept of Treasury*,[6] "a taxpayer can be either an individual or a UBG but not both. . . . This leads to the conclusion that once an entity is considered to be part of a UBG, that single entity ceases to be a separate taxpayer."

These cases lead to two inescapable conclusions that control this case. First, whether a petitioner is a UBG or a group of separate taxpayers is not a matter of choice by petitioner or grace by respondent. And the parties do not dispute that petitioners meets the statutory definition of a UBG. This, in turn, leads to the second inescapable conclusion: that the separate entities within the UBG (in this case, the various insurance companies) cease to be separate taxpayers and we are left with a single taxpayer, the UBG itself.

The ALJ interpreted MCL 206.611(5) to mean "that the entity being taxed depends on the type of tax being assessed." That subsection reads as follows:

> (5) "Taxpayer" means a corporation, insurance company, financial institution, or unitary business group, whichever is applicable under each chapter, that is liable for a tax, interest, or penalty under this part. For purposes of chapters 11 and 14, taxpayer does not include an insurance company or a financial institution. For purposes of chapter 12, unless specifically included in the section, taxpayer does not include a corporation or a financial institution. For purposes of chapter 13, taxpayer does not include a corporation or an insurance company.

That is to say, an insurance company is exempt from the provisions of chapters 11, 13, and 14. Rather, the taxing of insurance companies is covered by chapter 12. The ALJ interpreted this to mean that "an entity may be taxed as a UBG if the provision for which the tax is assessed allows for it. However, if a provision does not allow for UBGs to file jointly, then an entity must file individually."

This conclusion is in direct contradiction to this Court's holdings in *D'Agostini* and *Soave*. As discussed above, both cases make it clear that when a group of companies qualify as a UBG, the UBG, and not the individual companies within the UBG, is the taxpayer and the UBG is required to file a unitary tax return. As we observed in *Soave*,[7] where there is a UBG, "a single return for the UBG should have been filed and no returns for the individual entities should [be] filed and are nullities . . . ." That is, where there is a UBG, tax returns by individual entities within the UBG have "no meaningful existence."[8] The ALJ's opinion cites *SBC Health Midwest, Inc v Kentwood*,[9] a case which does not involve a UBG or the corporate income tax, for the ALJ's proposition that the "Legislature intended for this provision to concern general corporate income

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[6] ___ Mich App ___; ___ NW2d ___ (2024), slip op at 4-5.

[7] Slip op at 5.

[8] *Id*.

[9] 500 Mich 65, 73; 894 NW2d 535 (2017).

taxes, and not every subcategory of taxes. If the Legislature intended for this provision to apply to all taxes, it would have said so in this provision." But, as already discussed, the Legislature enacted MCL 206.691(1) which states that "a unitary business group shall file a combined return that includes each United States person that is included in the unitary business group." The only exception listed in the statute is that provided under MCL 206.680(3), which deals with members of a UBG that are entitled to certificated credits under the prior Michigan business tax act (MBT), which is not involved here.

Indeed, this provision demonstrates that the ALJ had it exactly backwards; the question is not whether the Legislature intended to include every subcategory of tax, but whether the Legislature intended to exempt any particular subcategory, which it did with the MBT credits. Moreover, the definition of "taxpayer" in MCL 206.611(5) sets forth which entities are excluded from the definition of "taxpayer" under particular chapters of the tax code.

As respondent points out in its brief, the income tax act imposes three separate taxes, depending on the nature of the entity involved. These are found in Part 2 of the act.[10] Chapter 11[11] imposes a tax on general corporations, Chapter 12[12] imposes a tax on insurance companies, and Chapter 13[13] imposes a tax on financial institutions. Respondent points to the language of MCL 206.635 that refers to "each insurance company," as well as other references to "an" insurance company. We reject the argument that this requires each individual insurance company within the UBG to separately calculate the tax under Chapter 12.

First, such an approach would defeat the purpose of including insurance companies within the definition of a UBG. It would be illogical to include insurance companies within a UBG's definition yet then exclude UBGs from the provisions of Chapter 12—the only chapter that imposes a tax on insurance companies. Second, it would be contrary to the UBG's primary purpose. As pointed out in *D'Agostini*,[14] "Michigan, like several other states, has adopted the unitary-business-group concept in an effort to measure more accurately the related group's taxable activities in the state." And, third, it ignores the statutory-construction rule in MCL 8.3b that "[e]very word importing the singular number only may extend to and embrace the plural number, and every word importing the plural number may be applied and limited to the singular number."

In addition to the premiums tax under Chapter 12, MCL 206.641(1)(c) provides for a credit for payments made to the MAIPF. It logically follows that if a tax return under Chapter 12 involving a UBG must be a unitary return, including the calculation of the premiums tax on a

[10] MCL 206.601 through MCL 206.699.

[11] MCL 206.621 *et seq*.

[12] MCL 206.635 *et seq*.

[13] MCL 206.651 *et seq.*

[14] 322 Mich App at 551.

unitary basis, then the calculation and application of the MAIPF credit must also be done on a unitary basis.

In sum, to exclude a UBG of insurance companies from the provisions of Chapter 12 of the tax act would contradict the Legislature's inclusion of insurance companies within the definition of a UBG. Indeed, it would render the insurance companies' inclusion within the definition of UBGs as unnecessary.[15] Accordingly, we agree with respondent that the Tax Tribunal erred in concluding that a UBG of insurance companies do not file a unitary return for calculation of the premiums tax and related credits under Chapter 12 of the tax act.

There remains the issue of the retaliatory tax under MCL 500.476a. Our Supreme Court explained the purpose and application of the tax in *TIG Ins Co, Inc v Dep't of Treasury*:[16]

> This case involves the retaliatory tax that Michigan imposes on foreign insurers doing business in Michigan. Under the retaliatory tax, when an insurer's state of incorporation imposes a larger aggregate tax burden on a Michigan insurer doing business in that state than Michigan imposes on a company from that state doing business in Michigan, the foreign insurer must pay Michigan a tax equal to the difference in the aggregate tax burdens. See MCL § 500.476a. Thus, to compute the retaliatory tax due from a foreign insurer, if any, Michigan tallies all the taxes, fines, penalties, and other burdens it otherwise imposes on the foreign insurer doing business in Michigan. Michigan then tallies the burden a hypothetical Michigan insurer would pay to that insurer's home state were the hypothetical Michigan insurer doing the same amount of business there. If the other state's total burden on the hypothetical Michigan insurer doing the same amount of business in that state would be larger than the burden Michigan imposed on the foreign insurer, the actual burden Michigan imposes is subtracted from the other state's burden on the hypothetical insurer, and the difference is the retaliatory tax the foreign insurer owes Michigan. These taxes have been common in insurance taxation since the nineteenth century, see *Western & Southern Life Ins Co v State Bd of Equalization*, 451 US 648, 668; 101 S Ct 2070; 68 L Ed 2d 514 (1981), and Michigan has had a form of a retaliatory tax since 1871. See 1871 PA 80, § 4 (adding what was then § 28 to the insurance code).

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[15] We are not entirely unsympathetic to the policy arguments raised by respondent at oral argument in this case. But they are just that—policy arguments. And as such they need to be addressed by the Legislature and not this Court. Respondent raises important questions regarding the inclusion of insurance companies in the UBG scheme and whether there needs to be some adjustment to the treatment of provisions such as the MAIPF credits and the retaliatory tax. But those are questions in need of thoughtful consideration by the Legislature, not resolution by litigation before a Court that must apply a statute that clearly includes insurance companies within the UBG scheme without explicit exception or modification.

[16] 464 Mich 548, 551-552; 629 NW2d 402 (2001).

The distinction with the retaliatory tax is that it is not imposed under the tax act, but rather under the insurance code. But we find this to be a distinction without a difference. With apologies to Gertrude Stein,[17] a tax is a tax is a tax. And, as petitioner points out, while the retaliatory tax is created in the insurance code, it is incorporated into Chapter 12 of the tax code in MCL 206.643(1). Accordingly, we reach the same conclusion as with the premiums tax and the MAIPF credit: the retaliatory tax is part of the tax code's requirement that a UBG file a unitary return and, therefore, is calculated and imposed at the UBG level.

In sum, we conclude that the Tax Tribunal erred in granting summary disposition to respondent and denying summary disposition to petitioner. Rather, summary disposition should have been granted in petitioner's favor. In light of our conclusions on the above issues, we need not consider petitioner's alternative arguments raised on appeal.

Reversed and remanded for entry of judgment in favor of petitioner. We do not retain jurisdiction. Petitioner may tax costs.

/s/ Kathleen A. Feeney
/s/ Colleen A. O'Brien
/s/ Michael J. Kelly

[17] See Stein, "Sacred Emily," *Geography and Plays* (1922).