

NO. CV 00 0505420S : SUPERIOR COURT

LOMBARDO'S RAVIOLI : TAX SESSION
KITCHEN, INC.

v. : NEW BRITAIN

MARC RYAN, SECRETARY OF THE OFFICE
OF POLICY AND MANAGEMENT, ET AL. : OCTOBER 17, 2002

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MEMORANDUM OF DECISION ON MOTIONS FOR SUMMARY JUDGMENT

These actions are appeals by the plaintiff, Lombardo's Ravioli Kitchen, Inc., from decisions by the defendant, Marc Ryan, Secretary of the Office of Policy and Management (OPM), denying the plaintiff's claim for an exemption from the payment of personal property tax to the City of New Britain on machinery and equipment it purchased from Lombardo's Ravioli, Inc. on August 19, 1996. Docket number CV 00 0505420 is the plaintiff's appeal of OPM's denial of the exemption for the 1997 assessment year, and docket number CV 00 0505595 is the plaintiff's appeal of OPM's denial of the exemption for the 1998 assessment year. The defendant has filed motions for summary judgment in both cases, claiming that no material issue of fact remains and that the defendant properly denied the plaintiff's exemption claims for the 1997 and 1998 assessment years.

General Statutes § 12-81 (72) grants an exemption from a municipality's personal property tax for newly acquired machinery and equipment by a taxpayer on or after July 1, 1992 for five full assessment years following the assessment year in which the machinery and equipment is acquired.

Section 12-81 (72) (B) sets out the process for a taxpayer to obtain such an exemption. The taxpayer holding title to the machinery and equipment located in a municipality, must file with the assessor for the municipality a written application claiming an exemption on a form prescribed by OPM with supporting documents showing entitlement to the exemption. Section 12-81 (72) (B) further provides that "[m]achinery or equipment shall not be eligible for exemption upon transfer to a business organization related to or affiliated with the seller."

General Statutes § 12-94b provides for a review of the claimed exemption by the secretary of OPM. Section 12-94b requires the assessor or assessors of each municipality

to certify to the secretary of OPM, on a form provided by OPM, a list of claimed exemptions granted pursuant to § 12-81(72). Section 12-94b requires the secretary to notify the municipality of the acceptance or modification of the claimed exemptions “not later than the November first next succeeding the deadline for the receipt of such claims.” Under § 12-94b(b), the person who files the written application for exemption may appeal the denial of the exemption by first seeking a hearing before the secretary of OPM and, if unsuccessful, appeal to the superior court within one month of receiving notice of a denial of the appeal by the secretary.

The material facts in this case are not in dispute. Lombardo’s Ravioli, Inc., a New Jersey corporation, originally owned the machinery and equipment at issue in this case. Frank Scoleri owned one hundred percent of the stock of the New Jersey corporation. On August 19, 1996, the plaintiff was formed as a Connecticut corporation. Frank Scoleri owned fifty-five percent of the shares of stock of the plaintiff. Ten percent of the plaintiff’s stock was owned by family members of Frank Scoleri. The remaining stock of the plaintiff was owned by John, Fred and Glen Moreschi. When the plaintiff purchased the machinery and equipment at issue from Lombardo’s Ravioli, Inc., the New Jersey corporation, on August 19, 1996, the plaintiff claimed an exemption from the payment of personal property taxes for newly acquired equipment. The New Britain assessor granted, and the plaintiff received, an exemption from personal property taxes for the 1996 assessment year. In separate letters in 2000, the undersecretary of OPM notified the plaintiff that OPM had modified and adjusted the plaintiff’s 1997 and 1998 List M-65 Claims For Exemption made pursuant to General Statutes § 12-81(72) to deny the plaintiff’s claims to the exemption on the basis that the machinery and equipment at issue did not qualify for the exemption because there was a common ownership of the

New Jersey and Connecticut corporations. The plaintiff corporation disagreed with the decision of OPM and, pursuant to § 12-94b(b)(2), sought and was granted a hearing on the denial for the 1997 assessment year. The undersecretary of OPM, acting as hearing officer, upheld the decision to deny the exemption on the basis that the plaintiff's personal property was not newly acquired, in that the machinery and equipment had been 'transferr[ed] to a business organization related to or affiliated with the seller' pursuant to § 12-81(72)(B). The undersecretary denied the plaintiff's request for a hearing on the 1998 list exemption on the basis that he had already conducted a hearing on the 1997 list exemption, and denied the 1998 list exemption claim based upon his conclusion that the assets were not newly acquired.

In the motions for summary judgment, the defendant claims that, as a matter of law, the secretary of OPM is entitled to a judgment in his favor in each case because the plaintiff is related to or affiliated with Lombardo's Ravioli, Inc., the New Jersey corporation. In opposition, the plaintiff argues that OPM has not promulgated any regulations defining what is meant by a 'business organization related to or affiliated with the seller,' as required by the Uniform Administrative Procedure Act, General Statutes § 4-166, et seq. (UAPA), and, by not providing a legal standard by which a business organization would be considered a 'related' or an 'affiliated' entity, the plaintiff could not 'know what level of common stock ownership will permit a corporation to qualify for the exemption upon acquisition of machinery and equipment from another company.' (Plaintiff's Complaint, ¶ 15.) By creating a standard only as to it, the plaintiff argues that OPM has adopted a substantive rule, or regulation, contrary to the requirements of the UAPA, § 4-166, et seq. The plaintiff further claims that OPM is estopped to deny the plaintiff's exemption since OPM did not oppose the plaintiff's exemption on the list of

October 1, 1996 and the plaintiff was led to believe that the property would qualify for the exemption because at no time did anyone from the New Britain assessor's office or any state agency inform the plaintiff that the property would not qualify for the exemption. (Plaintiff's Complaint, ¶8.)

"The criteria that determine whether administrative action is a 'regulation' are neither linguistic nor formalistic. . . . The test is, rather, whether 'a rule has a substantial impact on the rights and obligations of parties who may appear before the agency in the future.'" Salmon Brook Convalescent Home, Inc. [v. Commission on Hospitals & Health Care], 177 Conn. 356, 362, 417 A.2d 358 (1979)].' (Citations omitted.) Maloney v. Pac., 183 Conn. 313, 325-26, 439 A.2d 349 (1981). 'This does not mean . . . that every administrative decision which may have precedential significance beyond the facts and party before it becomes ipso facto a regulation.' Eagle Hill Corp. v. Commission on Hospitals & Health Care, 2 Conn. App. 68, 76, 477 A.2d 660 (1984). Instead, 'administrative agencies must necessarily interpret statutes which are made for their guidance,' and they may do so without reference to regulations. Connecticut Life & Health Ins. Guaranty Assn. v. Jackson, 173 Conn. 352, 356, 377 A.2d 1099 (1977). 'To rule otherwise would be to ignore the subtle and intricate interaction of law and fact. It is inherent in our judicial system of dispute resolution that the interpretation of statutes, like the development of the common law, grows out of the filtering of a set of facts through the law, as seen by the administrator or judge. The result of this application is a hybrid, composed in part of fact, in part of law, which by its existence contributes to the interpretation of a statute.' *Id.*, 356-57.'" Sweetman v. State Elections Enforcement Commission, 249 Conn. 296, 317, 732 A.2d 144 (1999). In this case, the undisputed facts show that the hearing officer designated by the secretary of OPM was merely

performing his duty of interpreting the statute and applying the law to the facts of this case. The hearing officer applied the statute to the facts of this case and determined that the plaintiff was ‘related’ to or ‘affiliated’ with Lombardo’s Ravioli, Inc., the New Jersey corporation, under § 12-81(72)(B), which would preclude it from receiving a tax exemption for the purchase of machinery and equipment. The hearing officer’s application of the statutory criteria for an exemption to the plaintiff’s situation was not the unauthorized promulgation of a regulation.

The exemption provisions at issue here provide for the secretary of OPM to be a ‘watchtower’ over the decisions of the assessor in granting a taxpayer’s request for an exemption. Section 12-94(a) requires the secretary to annually review taxpayers’ exemption applications and to disqualify an exemption if the secretary deems that the taxpayer has not met the conditions provided for in § 12-81(72). Whereas our appellate courts have recognized the right of assessors in each municipality to have a ‘watchtower’ role in the administration of a fair and equitable taxing system, we also see a similar clear legislative mandate to grant to the secretary of OPM a continuous duty to act as a ‘watchtower’ in order to achieve a fair and equitable process in granting exemptions from taxation. See Matzul v. Montville, 70 Conn. App. 442, 447, 798 A.2d 1002 (2002); 84 Century Ltd. Partnership v. Board of Tax Review, 207 Conn. 250, 262, 541 A.2d 478 (1988).

Since we construe § 12-94b as authorizing the secretary of OPM to act as a ‘watchtower,’ estoppel would be inapplicable here because by invoking the doctrine of estoppel, it would prevent the secretary from fulfilling his function, which is to take action to exclude property from a tax exemption when ‘in his judgment, it does not qualify pursuant to subdivision (72) or (74) of § 12-81.’ [A]s a general rule, estoppel may not be

invoked against a public agency in the exercise of its governmental functions.” Kimberly-Clark Corp. v. Dubno, 204 Conn. 137, 146, 527 A.2d 679 (1987). The plaintiff has not raised any disputed material issue of fact which, if proven, would meet the plaintiff’s heavy burden of establishing estoppel against the secretary of OPM.

We now turn to the merits of the plaintiff’s appeals, which is whether the plaintiff was entitled to the exemption from the payment of personal property tax pursuant to General Statutes § 12-81(72) for newly acquired machinery and equipment.

In construing a statute that creates a tax exemption it is well settled that such a statute must be strictly construed against the party claiming the exemption, and the burden of proving entitlement rests on this same party. H.O.R.S.E. of Connecticut, Inc., v. Town of Washington, 258 Conn. 553, 560, 783 A.2d 993 (2001). As the defendant points out, in the construction of statutes, “words and phrases are to be construed according to the commonly approved usage of the language; and technical words and phrases, and such as have acquired a peculiar and appropriate meaning in the law, shall be construed and understood accordingly.” General Statutes § 1-1(a). We agree with the defendant that in the absence of a statutory definition of the meaning of “related to” or “affiliated with,” it is appropriate to seek the common understanding of the meaning of these words and their dictionary meaning. See Ziperstein v. Tax Commissioner, 178 Conn. 493, 500, 423 A.2d 129 (1979).

“Affiliate” has been defined as . . . a company effectively controlled by another or associated with others under common ownership or control.” Muha v. United Oil Co. 180 Conn. 720, 727, n. 3, 433 A.2d 1009 (citing Webster, Third New International Dictionary.) Black’s Law Dictionary defines “affiliate” as “[a] corporation that is related to another corporation by shareholdings or other means of control; a subsidiary, parent, or

sibling corporation.” Black’s Law Dictionary (7th Ed. 1999) p. 59. We can discern by these definitions, the essence of the terms “affiliate” and “related,” as they apply to corporations, is control. Persons having a majority of shares of a corporation have been recognized in Yanow v. Teal Industries, Inc. 178 Conn. 262, 283, 422 A.2. 311 (1979) as having the right to control a corporation. The obvious legislative reason to exclude transfers to affiliated or related parties under § 12-81(72) is to prevent self dealing in the creation of an exemption by the transfer of machinery and equipment for the purpose of tax avoidance.

Effective July 1, 2001, the legislature amended General Statutes § 12-81(72)(B) to change the reference to a transfer from a “business organization related to or affiliated with the seller” to a transfer from “a seller to a related business.” In the amendment, the legislature defined, for purposes of § 12-81(72)(B), the meaning of “related business.” Public Acts, Spec. Sess., June, 2001, No. 01-6, § 83. Spec. Sess. P. A. 01-6, § 83 provides in relevant part as follows:

Machinery and equipment shall not be eligible for exemption upon transfer from a seller to a related business. . . . For the purposes of this subdivision, “related business” means: (i) A corporation, limited liability company, partnership, association or trust controlled by the taxpayer; (ii) an individual, corporation, limited liability company, partnership, association or trust that is in control of the taxpayer; (iii) a corporation, limited liability company, partnership, association or trust controlled by an individual, corporation, limited liability company, partnership, association or trust that is in control of the taxpayer; or (iv) a member of the same controlled group as the taxpayer. For purposes of this subdivision, “control”, with respect to a corporation, means ownership directly or indirectly, of stock possessing fifty per cent or more of the total combined voting power of all classes of the stock of such corporation entitled to vote. “Control”, with respect to a trust, means ownership, directly or indirectly, of fifty per cent or more of the beneficial interest in the principal or income of such trust. The ownership of stock in a corporation, of a capital or profits interest in a partnership or association or of a

beneficial interest in a trust shall be determined in accordance with the rules for constructive ownership of stock provided in Section 267(c) of the Internal Revenue Code of 1986, or any subsequent corresponding internal revenue code of the United States, as from time to time amended, other than paragraph (3) of said Section 267(c).

The plaintiff looks upon this amendment as new legislation that has no retroactive effect because the statute is substantive in nature. We disagree. Whether the amendment to § 12-81(72)(B) is to be given retroactive or prospective effect “depends on the legislature’s intent in enacting the statute.” Andersen Consulting, LLP v. Gavin, 255 Conn. 498, 521, 767 A.2d 692 (2001). We see no substantive change in § 12-81(72) with the enactment of the amendment because the amendment merely clarifies the meaning of ‘related business.’ The amendment to § 12-81(72) focuses on what our Supreme Court has previously concluded in Yanow v. Teal Industries, Inc., supra, 178 Conn. 262, that control of a corporation exists when one holds a majority of the shares of the corporation. This Public Act does not effect a substantive change in the qualifications of businesses entitled to an exemption for transfers of machinery and equipment, but rather clarifies the terms ‘affiliated’ or ‘related’ as expressed in the previous version of § 12-81(72) by changing the wording to ‘related business’ and defining the term ‘related business.’ The enactment by the legislature in 2001 of Spec. Sess. P. A. 01-6, §83 clarifying the meaning of ‘related’ in § 12-81(72)(B) supports the defendant’s prior interpretation of §12-81(72)(B) and application of that provision to the facts and circumstances of the plaintiff’s case. The plaintiff does not qualify for the exemption under General Statutes § 12-81(72)(B) as it was worded at the time of the transfer or after it was amended by Spec. Sess. P. A. 01-6, § 83.

We further see the legislative intent to clarify § 12-81(72) rather than make substantive changes to it by reference in Spec. Sess. P. A. 01-6, § 83 to § 267(c) of the Internal Revenue Code of 1986, as from time to time amended. 26 U.S.C. § 267(a) disallows losses with respect to transactions between related taxpayers. Subsection (b) provides, in part: “The persons referred to in subsection (a) are: (1) Members of a family, as defined in subsection (c)(4) [brothers and sisters, spouse, ancestors and lineal descendants]; (2) An individual and a corporation more than 50 percent in value of the outstanding stock of which is owned, directly or indirectly, by or for such individual.” 26 U.S.C. § 267(c) provides, for purposes of determining the ownership of stock in applying subsection (b), in pertinent part: “(1) Stock owned, directly or indirectly, by or for a corporation . . . shall be considered as being owned proportionately by or for its shareholders. . . .; (2) An individual shall be considered as owning the stock owned , directly or indirectly, by or for his family.” The undisputed facts in this case clearly show that Frank Scoleri owned and controlled both the New Jersey corporation and the plaintiff corporation. A loss deduction would not be allowed under 26 U.S.C. § 267 because the transaction was between related parties. For the same reason, Frank Scoleri’s majority ownership of the shares of stock of both corporations makes both the plaintiff and Lombardo’s Ravioli, Inc. “affiliated” or “related” to one another, and, therefore, disqualifies the plaintiff from a tax exemption under § 12-81(72).

Accordingly, the defendant’s motions for summary judgment are granted. Judgment may enter in favor of the defendant dismissing both appeals, without costs to either party.

Arnold W. Aronson
Judge Trial Referee

