IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 26, 2016 Session

BRETT R. CARTER v. LARRY B. MARTIN, ET AL.

Appeal from the Chancery Court for Davidson County
No. 15332II Carol L. McCoy, Chancellor

No. M2015-00666-COA-R3-CV – Filed March 3, 2016

Plaintiff filed a public records request for tax study documents. The request was denied, and Plaintiff filed a lawsuit for access to the records. The trial court denied access to the records, and Plaintiff appealed. This Court has determined that the plain language of Tenn. Code Ann. § 67-1-1701(6)'s definition of "tax administration" encompasses the documents in question and that Tenn. Code Ann. § 67-1-1702(a) makes "tax administration information" confidential. The trial court is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

ANDY D. BENNETT, J., delivered the opinion of the Court, in which D. MICHAEL SWINEY, C.J., and W. NEAL MCBRAYER, J., joined.

Brett R. Carter, Nashville, Tennessee, Pro se.

Herbert H. Slatery III, Attorney General and Reporter, Andree S. Blumstein, Solicitor General, and Janet M. Kleinfelter, Deputy Attorney General, Nashville, Tennessee, for the appellee, Tennessee Department of Finance & Administration.

OPINION

FACTUAL AND PROCEDURAL BACKGROUND

Franchise and Excise ("F & E") taxes are a major source of revenue for the State of Tennessee. In fiscal years 2012 and 2013, F & E tax collections reached record levels. However, in fiscal year 2014, F & E tax collections fell by $150 million. This volatility affected the ability of the administration to develop and recommend a budget. Therefore, Governor Haslam requested Commissioner Martin, of the Department of Finance and Administration, and Commissioner Roberts, of the Department of Revenue, to conduct a

review of the state's tax structure, including F & E taxes, identify issues, and provide recommendations to address the issues they identified. These individuals sought the assistance of the University of Tennessee Center for Business and Economic Research and its director, Dr. William F. Fox. Pursuant to Tenn. Code Ann. § 8-6-106, the Governor hired outside counsel to provide legal advice.

After about two months of work, on October 30, 2014, a "Tax Study Meeting" was held with Governor Haslam in order to present the results of the comprehensive review and to discuss various options for Tennessee tax policy. A large number of documents were provided and discussed at this meeting. Proposed legislation arising from the tax study was developed and filed with the General Assembly in early 2015.

On February 13, 2015, Brett Carter mailed a public records request to Commissioner Martin. Commissioner Martin did not receive it. Mr. Carter re-submitted the request by email to a Department of Finance and Administration staff attorney. The public records request asked to inspect and copy the following records associated with the "Tax Analysis Study":

1. The complete contract and the complete contract file related to the commissioning of the Study.
2. All correspondence, emails, and other communications between the State and the author and contributors to the Study.
3. All requests for payment under the contract for the Study.
4. All records reflecting payments issued to the State to the authors and contributors to the Study.
5. All records related to the production of the Study or documents that support the findings in the Study.
6. The Study, and all other reports and other "deliverables" received by the State pursuant to the contractor for the Study whether from the author and contributor, or from any subcontractor.

Mr. Carter later notified the Department of Finance and Administration that the "Tax Study Analysis" was his primary request and the other documents could be made available for inspection in installments.

On March 17, 2015, general counsel for the Department of Finance and Administration indicated that there was not a "Tax Analysis Study" document. Furthermore, general counsel for the department informed Mr. Carter that most of the documents he sought were tax administration information that is confidential by state law.

Mr. Carter filed a petition for access to public records in the Davidson County Chancery Court on March 18, 2015. A show cause hearing was held on March 30, 2015. The trial court conducted an in camera inspection of the records requested and concluded that the records constituted "tax administration information" as defined in Tenn. Code Ann. § 67-1-1701(7) and were therefore confidential under Tenn. Code Ann. § 67-1-1702(a). The trial court dismissed Mr. Carter's petition, and Mr. Carter appealed.

STANDARD OF REVIEW

The trial court's findings of fact are reviewed with a presumption of correctness, unless the preponderance of the evidence is otherwise. TENN. R. APP. P. 13(d). This appeal involves statutory construction. Statutory construction is a question of law that is reviewable de novo with no presumption of correctness. *Gleaves v. Checker Cab Transit Corp.*, 15 S.W.3d 799, 802 (Tenn. 2000).

ANALYSIS

All state records are open to inspection "unless otherwise provided by state law." Tenn. Code Ann. § 10-7-503(a)(2)(A). Tennessee Code Annotated section 67-1-1702(a) makes "tax administration information" confidential. "Tax administration" is statutorily defined as:

> the administration, management, conduct, direction, and supervision of the execution and application of the state tax laws, rules, or related statutes or rules and reciprocity agreements with the several states or federal government to which the state of Tennessee is a party. "Tax administration" also means the development and formulation of state tax policy relating to existing or proposed tax laws, related statutes and reciprocity agreements and includes assessments, collection, enforcement, litigation, publication, and statistical gathering functions under such laws, statutes, rules or reciprocity agreements[.]

Tenn. Code Ann. § 67-1-1701(6). "'Tax administration information' means criteria or standards used or to be used for the selection of returns or persons for audit or examination, or data used or to be used for determining such criteria or standards; audit procedures; and any other information relating to tax administration[.]" Tenn. Code Ann. § 67-1-1701(7).

The trial court found:

> the withheld documents all contain information about Tennessee's existing laws; evaluations of the current state tax structure; and information about, and evaluations of, potential changes to the state tax structure, as well as related policy issues. Accordingly, this Court finds that the documents reflect the

> "development and formulation of state tax policy relating to existing or proposed tax laws" and, therefore constitute tax administration information as defined in Tenn. Code Ann. § 67-1-1701(6) and (7).

The trial court did not apply any canons of statutory construction. Commissioner Martin argues that none are needed. For over 160 years, the courts of Tennessee have held that the words of a statute are to be given their natural and ordinary meanings, without any forced or subtle construction to limit or extend their import. *State v. Clarksville & Russellville Turnpike Co.*, 34 Tenn. (2 Sneed) 88, 92 (Tenn. 1854); *Sirbaugh v. Vanderbilt Univ.*, 469 S.W.3d 46, 50 (Tenn. Ct. App. 2014). "When a statute is clear, we apply the plain meaning without complicating the task." *In re Estate of Tanner*, 295 S.W.3d 610, 614 (Tenn. 2009) (citing *Eastman Chem. Co. v. Johnson*, 151 S.W.3d 503, 507 (Tenn. 2004)). "Judicial construction of a statute will more likely hew to the General Assembly's expressed intent if the court approaches the statutory text believing that the General Assembly chose its words deliberately, and that the General Assembly meant what it said." *State ex rel. Comm'r of Transp. v. Med. Bird Black Bear White Eagle*, 63 S.W.3d 734, 754 (Tenn. Ct. App. 2001) (citations omitted).

Courts resort to the canons of statutory construction when the meaning of a statute is questionable. *State v. Sherman*, 266 S.W.3d 395, 401 (Tenn. 2008). Canons of statutory construction "guide a court's inquiry." *Med. Bird*, 63 S.W.3d at 754. Canons of construction are "helpful." *In re Estate of Tanner*, 295 S.W.3d at 624 n.13. They are often "relevant." *Midwestern Gas Transmission Co. v. Reese*, No. M2005-00805-COA-R3-CV, 2006 WL 468688, at *6 (Tenn. Ct. App. Feb. 24, 2006). But, they are not always "dispositive." *Id.* Judicial construction should not be used to give a statute another meaning when the language is clear. *Limbaugh v. Coffee Med. Ctr.*, 59 S.W.3d 73, 83 (Tenn. 2001).

The definition of "tax administration" is two-fold. The first definition is "the administration, management, conduct, direction, and supervision of the execution and application of the state tax laws, rules, or related statutes or rules and reciprocity agreements with the several states or federal government to which the state of Tennessee is a party." Tenn. Code Ann. § 67-1-1701(6). By its plain language, it is limited to administrative matters. The second definition is "the development and formulation of state tax policy relating to existing or proposed tax laws, related statutes and reciprocity agreements and includes assessments, collection, enforcement, litigation, publication, and statistical gathering functions under such laws, statutes, rules or reciprocity agreements[.]" Tenn. Code Ann. § 67-1-1701(6). It is the meaning of the second definition that is contested.

Mr. Carter argues for the application of the doctrine of *ejusdem generis* to the second definition. The doctrine "means that where general words follow specific words, or specific words follow general words in a statutory enumeration, the general words are construed to embrace only things similar in nature to those enumerated by the specific words." *Cal. Farm*

Bureau Fed'n v. Cal. Wildlife Conservation Bd., 49 Cal. Rptr. 3d 169, 180 (Cal. Ct. App. 2006) (citing 2A Sutherland, STATUTORY CONSTRUCTION (6th ed. 2000) § 47.17, pp. 272-82, footnotes omitted). Specifically, he maintains that "the definition of tax administration limits the character and class of 'development and formulation of tax policy' to activities that are administrative in nature – specifically 'assessments, collection, enforcement, litigation, publication, and statistical gathering.'"

Mr. Carter's position is flawed. First of all, it writes the words "relating to existing or proposed tax laws" out of the statute. Every word in a statute should be given meaning. *In re C.K.G.*, 173 S.W.3d 714, 722 (Tenn. 2005). Second, the doctrine of *ejusdem generis* is merely an aid to ascertaining the legislative intent. *Ailor v. Tillery*, 7 Tenn. App. 679, 684 (Tenn. Ct. App. 1927) (citing 36 Cyc. 1120). It does not control where it is apparent "'from the statute as a whole that no such limitation was intended.'" *Id.* (citation omitted). In the case of the second definition, giving the words their natural and ordinary meaning, we do not believe the limitation advocated by Mr. Carter is intended. The word "includes" is not limiting. To "include" means "to have (someone or something) as part of a group or total: to contain (someone or something) in a group or as a part of something." MERRIAM-WEBSTER ONLINE DICTIONARY, http://www.merriam-webster.com/dictionary/includes (last accessed Feb. 13, 2016). Thus, the "assessments, collection, enforcement, litigation, publication, and statistical gathering" language of Tenn. Code Ann. § 67-1-1701(6) represents a part of the larger whole denoted by "the development and formulation of state tax policy relating to existing or proposed tax laws, related statutes and reciprocity agreements . . . ."

Mr. Carter contends that the trial court's reading of the language of Tenn. Code Ann. § 67-1-1701(6)'s second definition of "tax administration" extends the definition beyond the executive function of administration of tax laws into the legislative function. However, studying current laws and proposing changes is not an inherently legislative activity. Enacting the laws is the legislative function. The legislature decides "what the law shall be." *Dep't of Pub. Welfare v. Nat'l Help "U" Ass'n*, 270 S.W.2d 337, 339 (Tenn. 1954). But it is a common occurrence for an agency to propose that new legislation be enacted. Indeed, the Department of Revenue has specific authority to "formulate and recommend to the governor such legislation as may be deemed expedient to prevent evasion of taxes, to secure just and equitable taxation and to improve the system of taxation in the state." Tenn. Code Ann. § 4-3-1903(b)(4).

Mr. Carter points to two cases which address Tenn. Code Ann. § 67-1-1702 and which he claims support his view of that statute: *Coleman v. Kisber*, 338 S.W.3d 895 (Tenn. Ct. App. 2010) and *Bridgestone Firestone, Inc. v. Chumley*, No. M2007-00813-COA-R9-CV, 2008 WL 2415483 (Tenn. Ct. App. June 11, 2008). Suffice it to say that these cases present issues regarding implementation and enforcement of tax statutes—issues which are not presented in the instant case. We find these cases easily distinguishable and of no application to the matter before this Court.

CONCLUSION

The trial court is affirmed. The costs are taxed to the appellant, Mr. Brett Carter, for which execution may issue if necessary.

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ANDY D. BENNETT, JUDGE