IN THE SUPREME COURT OF THE STATE OF NEVADA

HARLEY-DAVIDSON CREDIT CORPORATION, A NEVADA CORPORATION; EAGLEMARK SAVINGS BANK, A NEVADA THRIFT COMPANY; AND HARLEY-DAVIDSON FINANCIAL SERVICES, INC., A DELAWARE CORPORATION DULY QUALIFIED TO TRANSACT BUSINESS IN NEVADA,
Appellants,
vs.
STATE OF NEVADA, DEPARTMENT OF TAXATION,
Respondent.

No. 45688

FILED

SEP 29 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a petition for judicial review of a taxation matter. First Judicial District Court, Carson City; William A. Maddox, Judge.

Harley-Davidson Financial Services, Inc. (HDFS), Harley-Davidson Credit Corporation (HDCC), and Eaglemark Savings Bank (ESB) (collectively, Harley-Davidson Financial Companies) assign error to the district court's denial of judicial review. In its denial, the district court affirmed the decision of the Nevada Tax Commission (Commission). The Commission's decision affirmed the decision of the Nevada Department of Taxation (Department), which concluded that each of the Harley-Davidson Financial Companies are "financial institutions" under NRS 363A.050

(2003).[1] The district court also affirmed the conclusion that the Harley-Davidson Financial Companies are not excepted from the definition of "financial institution" by NAC 363A.130(1)(b).[2] As financial institutions, the Harley-Davidson Financial Companies are subject to a two-percent payroll tax under NRS 363A.130, rather than the lower payroll tax for non-financial institutions under NRS 363B.110.

We conclude that the district court did not err in denying the petition for judicial review. Because the parties are familiar with the facts of this case, we will not recount them except as necessary for our disposition.

On appeal, as they did below, the Harley-Davidson Financial Companies raise two primary arguments. First, they argue that each of the Harley-Davidson Financial Companies fit under NAC 363A.130(1)(b)'s exception to the definition of "financial institution" for companies that finance goods that they sell. Second, the companies argue that the tax

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[1]The Department's decision came under the 2003 version of NRS 363A.050. In 2005, the legislature significantly amended the statute. For purposes of this order, the 2003 version of the statute will be referred to as NRS 363A.050 (2003), and the current version will be referred to as NRS 363A.050 (2005).

[2]At the time of the Commission's decision, NAC 363A.130 had not been codified, but it was an approved regulation in the Nevada Register as LCB File No. R205-03, Section 14. The language from Section 14 is identical to the codified version in NAC 363A.130. Further, the Commission has since repealed NAC 363A.130, effective February 23, 2006. See LCB File No. R194-05.

scheme under NRS Chapter 363A violates the Commerce Clause of the United States Constitution.[3]

The Harley-Davidson Financial Companies are not excepted from the definition of "financial institution" by NAC 363A.130(1)(b)

The Harley-Davidson Financial Companies do not contest the Department's decision that they fall within the definition of "financial institution" under the plain language of NRS 363A.050 (2003). Instead, they contend that, based on NAC 363A.130(1)(b), they are excepted from the definition of "financial institution" because they only finance goods that they sell. We conclude that the record indicates otherwise; therefore, the companies' argument lacks merit.

In reviewing administrative decisions, we review the evidence presented to the administrative agency to determine whether the agency's decision was arbitrary or capricious and, thus, an abuse of discretion.[4] An administrative agency's decision is an abuse of discretion if it is not

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[3]The Harley-Davidson Financial Companies make a third argument: the Department's failure to apply NAC 363A.130(1)(b) to the companies violates their rights to equal protection under the Fourteenth Amendment of the United States Constitution. We conclude that this argument lacks merit. The Harley-Davidson Financial Companies failed to show that they are similarly situated to other entities that have fallen under the regulation. Without such a showing, their equal-protection argument fails. See Rico v. Rodriguez, 121 Nev. ___, ___, 120 P.3d 812, 817 (2005) (citing Allen v. State, Pub. Emp. Ret. Bd., 100 Nev. 130, 135, 676 P.2d 792, 795 (1984)).

[4]Meridian Gold v. State, Dep't of Taxation, 119 Nev. 630, 633, 81 P.3d 516, 517-18 (2003) (citing Secretary of State v. Tretiak, 117 Nev. 299, 305, 22 P.3d 1134, 1137-38 (2001)).

supported by substantial evidence.[5] "'Substantial evidence is that which "a reasonable mind might accept as adequate to support a conclusion."'"[6] Statutory interpretation is a question of law that this court reviews de novo.[7] Rules of statutory interpretation apply equally to administrative regulations.[8] A regulation clear and unambiguous on its face will be given its plain meaning, and we will not go beyond the regulation's language to consider legislative intent.[9] Additionally, this court gives deference to an agency's interpretation of a statute or regulation that the agency is charged with enforcing.[10]

> NAC 363A.130 provides in relevant part,
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> 1. For the purposes of NRS 363A.050 [the definition of "financial institution"]:
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> . . . .

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[5]Id. at 633, 81 P.3d at 518 (citing Tighe v. Las Vegas Metro. Police Dep't, 110 Nev. 632, 634, 877 P.2d 1032, 1034 (1994)).

[6]Id. (quoting Tighe, 110 Nev. at 634, 877 P.2d at 1034 (quoting State, Emp. Security v. Hilton Hotels, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986))).

[7]Id. (citing California Commercial v. Amedeo Vegas I, 119 Nev. 143, 145, 67 P.3d 328, 330 (2003)).

[8]Id. (citing Miller's Pond Co. v. Rocque, 802 A.2d 184, 190 n.7 (Conn. App. Ct. 2002); U.S. Outdoor Advertising v. D.O.T., 714 N.E.2d 1244, 1256 (Ind. Ct. App. 1999)).

[9]See id.; see also United States v. State Engineer, 117 Nev. 585, 589-90, 27 P.3d 51, 53-54 (2001).

[10]See Meridian Gold, 119 Nev. at 635, 81 P.3d at 519 (citing State, Div. of Insurance v. State Farm, 116 Nev. 290, 293, 995 P.2d 482, 485 (2000)); see also United States, 117 Nev. at 589, 27 P.3d at 53.

> (b) A seller of goods or a provider of services who provides or extends credit, or retains a security interest in the goods he sells, only in connection with the financing of the goods he sells or the services he provides shall not be deemed to be a business entity engaged in the business of lending money, providing credit or securitizing receivables.

The record indicates that the Harley-Davidson Financial Companies primarily finance two types of activities: (1) purchases made by independently-owned Harley-Davidson motorcycle dealerships[11] from Harley-Davidson, Inc. for the dealerships' floor inventory (termed "flooring"); and (2) purchases of motorcycles and related goods made by consumers from the independently-owned dealerships. According to the Harley-Davidson Financial Companies, each activity constitutes the financing of goods that they sell. Although the Harley-Davidson Financial Companies are subsidiaries of Harley-Davidson, Inc., they contend that they should be viewed as a single entity with Harley-Davidson, Inc. for purposes of the regulation. The Harley-Davidson Financial Companies also view financing the sale of motorcycles from independently-owned dealerships to consumers as financing the sale of Harley-Davidson's own goods.

We agree with the Harley-Davidson Financial Companies that, under NAC 363A.130(1)(b), a subsidiary financing the goods sold by a parent company is "financing the goods [it] sells." The plain language of the regulation supports this conclusion. The regulation does not

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[11]According to the record, the dealerships are truly independently owned; that is, none of Harley-Davidson, Inc., HDFS, HDCC, or ESB owns any interest in the dealerships.

distinguish between parent and subsidiary companies. It would be unreasonable to discourage formation of subsidiary companies just so the organization could fall under the regulation. Therefore, the Harley-Davidson Financial Companies' activity of financing the flooring of motorcycles to independently-owned dealerships is Harley-Davidson financing goods that it sells. For that purpose, the Harley-Davidson Financial Companies would be exempt from the definition of "financial institution."

We disagree, however, that the Harley-Davidson Financial Companies' second activity falls under NAC 363A.130(1)(b). The Harley-Davidson Financial Companies maintain that their financing of motorcycles sold from independently-owned dealerships to consumers is the financing of goods the companies sell. This result is not supported by the language of the regulation. As a tax exemption, we strictly construe NAC 363A.130(1)(b) in favor of taxability, and we construe against the taxpayer any reasonable doubt of the regulation's application.[12]

The plain language of NAC 363A.130(1)(b) indicates that the regulation only applies at the time the financing entity is also the selling entity. Nothing in the regulation indicates that it applies to the financing of goods farther down the stream of commerce that are sold by unrelated third parties. Therefore, NAC 363A.130(1)(b) does not cover the Harley-Davidson Financial Companies' financing of motorcycles sold by independently-owned dealerships to consumers.

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[12]See Shetakis Dist. v. State, Dep't Taxation, 108 Nev. 901, 907, 839 P.2d 1315, 1319 (1992) (citing Sierra Pac. Power v. Department of Taxation, 96 Nev. 295, 297, 607 P.2d 1147, 1148 (1980)).

Comments made at the Harley-Davidson Financial Companies' hearing before the Commission further support this conclusion. During the hearing, Commissioner Turner commented, "If these companies' activities in Nevada were solely limited to flooring the sale of their products to dealers in the state of Nevada or elsewhere, that's their sale of product . . . . That's not all they're financing. They're financing sales not by them but by their dealers to consumers . . . ." Additionally, Commissioner Kelesis commented, "I agree with Commissioner Turner. I view this as another GMAC, Ford Motor Credit. You look at the consolidated financial that they attached, it's very clear . . . that this is an entity that finances, because keep in mind, the dealer is an unrelated party." The Commission voted unanimously to uphold the Department's decision. We give deference to the Commission's interpretation of its own regulation.

Another of the Harley-Davidson Financial Companies' activities lends support to the conclusion that they are "financial institutions." In addition to the two financing activities discussed above, both the record and the companies' statements at oral argument indicate that the companies regularly sell their commercial paper to third parties for profit. This activity falls squarely within the language of NRS 363A.050(d) (2003), involving dealers in commercial paper. NAC 363A.130(1)(b) does not provide an exception for this activity.

Notwithstanding the plain language of NRS 363A.050 (2003) and NAC 363A.130, the Harley-Davidson Financial Companies further argue that the amendments to the statute reflected in NRS 363A.050 (2005) and the legislative history surrounding the amendments indicate that the Harley-Davidson Financial Companies are not financial institutions. We disagree.

Although the amendments to NRS 363A.050 (2003) eliminated subsection (d)—one of the subsections under which the Department deemed the companies financial institutions—the Harley-Davidson Financial Companies remain financial institutions under the plain language of NRS 363A.050 (2005). Under NRS 363A.050(1)(a), an entity is a financial institution if it is "[a]n institution licensed, registered or otherwise authorized to do business in this State pursuant to the provisions of title 55 or 56 of NRS or chapter 604A, 645B or 645E of NRS, or a similar institution chartered or licensed pursuant to federal law." The Harley-Davidson Financial Companies fall under Title 56 in that they are engaged in the business of lending pursuant to NRS 675.060(2), which is part of Title 56.[13]

Additionally, the legislative history of NRS 363A.050 (2005) indicates that the amendments came about to effectuate a shift from defining "financial institution" using the North American Industry Classification System to defining the term using licensing and registration

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[13]NRS 675.060(2) states

> (a) Solicits loans in this State or makes loans to persons in this State, unless these are isolated, incidental or occasional transactions; or
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> (b) Is located in this State and solicits loans outside of this State or makes loans to persons located outside of this State, unless these are isolated, incidental or occasional transactions.

Based on the record, each of the Harley-Davidson Financial Companies is engaged in the business of lending under NRS 675.060(2) and such activity is not incidental or occasional.

requirements.[14] In accomplishing this shift, NRS 363A.050 (2005) is meant to keep everyone under the definition of "financial institution" that was previously under that definition in NRS 363A.050 (2003), with the exception of collection agencies and pawnshops.[15] Collection agencies and pawnshops were inadvertently deemed financial institutions under NRS 363A.050 (2003), and the amendments were designed to correct that error. The Harley-Davidson Financial Companies are neither collection agencies nor pawnshops. Therefore, they are not entities that were inadvertently deemed financial institutions under NRS 363A.050 (2003).

Because the Harley-Davidson Financial Companies are financial institutions under NRS 363A.050 (2003) and are not excepted from that definition by NAC 363A.130(1)(b), we conclude that the district court correctly upheld the Department's and the Commission's determinations in denying the petition for judicial review.

The payroll tax imposed by NRS Chapter 363A is permissible under the Commerce Clause of the United States Constitution

Next, the Harley-Davidson Financial Companies argue that the payroll tax imposed by NRS Chapter 363A is unconstitutional. Specifically, the companies contend that the tax is not fairly apportioned and therefore violates the dormant Commerce Clause implied in the United States Constitution.

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[14]See Bulletin No. 05-18, Legislative Committee on Taxation, Public Revenue and Policy, § D (January 2005); see also Minutes of the Senate Committee on Taxation, Senate Bill 391, 73rd Session, p. 3-4 (April 7, 2005) (statement of Russell J. Guindon (Deputy Fiscal Analyst)).

[15]See Minutes of the Senate Committee on Taxation, Senate Bill 391, 73rd Session, p. 4-5 (April 7, 2005).

The Department contends that the tax need not be apportioned because it only taxes intrastate activity. Even if it must be apportioned, the Department further asserts that it is fairly apportioned. We agree with both of the Department's assertions.

A state tax does not unduly burden interstate commerce and will survive a Commerce Clause challenge if the following factors are satisfied: (1) "the tax is applied to an activity with a substantial nexus with the taxing State," (2) the tax "is fairly apportioned," (3) the tax "does not discriminate against interstate commerce," and (4) the tax "is fairly related to the services provided by the State."[16] The Harley-Davidson Financial Companies only take issue with the apportionment factor.

The central purpose of apportionment is to "ensure that each State taxes only its fair share of an interstate transaction."[17] The need for apportionment arises from "the difficulty of identifying the geographic source of the income earned by a multistate enterprise."[18] Apportionment, however, should be employed only when "precise geographic measurement is not feasible."[19]

Apportionment is typically necessary in situations such as an income tax or a value added tax on multistate enterprises. These taxes seek to identify and tax the portion of a multistate enterprise's value

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[16]Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977).

[17]Goldberg v. Sweet, 488 U.S. 252, 261 (1989).

[18]Trinova Corp. v. Michigan Dept. of Treasury, 498 U.S. 358, 373 (1991) (citing Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113, 120-21 (1920)).

[19]Id. at 374.

derived from its operations in the particular state. "In the case of a more-or-less integrated business enterprise operating in more than one State, however, arriving at precise territorial allocations of 'value' is often an elusive goal, both in theory and in practice."[20] Because of the nature of multistate unitary businesses—functional integration, centralization of management, and economies of scale—it is nearly impossible to determine with precision the geographic location from which value is derived.[21] Therefore, states typically employ an apportionment formula to approximate a business's value derived from operations in the taxing state.

Although many different apportionment formulas may comport with the Commerce Clause, most formulas tend to be similar. Commonly used is the "three-factor" formula, which has been upheld by the United States Supreme Court and is used in the Uniform Division of Income for Tax Purposes Act.[22] The "three-factor" formula "is based, in equal parts, on the proportion of a unitary business's total payroll, property, and sales which are located in the taxing State."[23] To calculate the proportion of payroll paid within the taxing state, the business must divide the payroll paid to employees in the taxing state by the business's

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[20]Container Corp. of America v. Franchise Tax Bd., 463 U.S. 159, 164 (1983).

[21]See Trinova Corp., 498 U.S. at 379.

[22]See Container Corp., 463 U.S. at 165.; see also Trinova Corp., 498 U.S. at 380-81.

[23]Container Corp., 463 U.S. at 170.

total payroll paid.[24] Clearly, this calculation requires the business to determine the amount of payroll paid to employees in the taxing state.[25]

Unlike a formula for determining the amount of value a business derives from its activities in Nevada, the payroll tax in NRS 363A.130 is a tax on the amount of wages paid to Nevada employees—an intrastate activity. Put another way, it is a tax on a business's cost of Nevada labor. The payroll tax does not purport to be a proxy for income earned in Nevada or for value added in Nevada to products or services distributed in several states. Multistate businesses, such as the Harley-Davidson Financial Companies, will have little difficulty determining the amount of wages paid to Nevada employees. Because NRS 363A.130 is a tax on an intrastate activity, apportionment is unnecessary.

Alternatively, even if apportionment were necessary, the payroll tax is fairly apportioned because it is both internally and externally consistent.[26] Internal consistency results when the tax is structured so that if every state imposed an identical tax, there would not be multiple taxation.[27] The test of internal consistency focuses on a hypothetical situation where other states have passed a tax statute identical to the one in question.[28] External consistency results when the

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[24]Trinova Corp., 498 U.S. at 367-68.

[25]See id. at 375 ("Doubtless Trinova can identify the location of . . . much of it's compensation.").

[26]See Goldberg, 488 U.S. at 261.

[27]See id.

[28]See id.

tax is only imposed on that portion of revenues from the interstate activity that reasonably reflects the intrastate component of the activity being taxed.[29] The test of external consistency is a practical inquiry in that the tax need only be a reasonable approximation of the intrastate component of the interstate activity.[30]

The Harley-Davidson Financial Companies contend that the payroll tax is not internally consistent because there is a possibility that more than one state could tax the payment of wages to the same employee. We disagree. On its face, the tax in NRS 363A.130, if enacted in multiple states and applied correctly by those states, could only result in one state being able to tax the payment of wages to an employee. NRS 363A.130(1) taxes wages paid by an employer with respect to employment. NRS Chapter 363A defines "employment" by the definitions in NRS 612.065 to 612.145, inclusive.

If, for example, Nevada and California imposed the taxing scheme from NRS Chapter 363A, a state can tax wages paid to an employee whose services are localized in that state.[31] Because localization of services can only be in one state, then only one state can impose the tax. If the employee's services are not localized in a particular state, then the state where the employer's base of operations is located can tax wages paid to the employee so long as some of the employee's services are performed in the taxing state—again resulting in only one state being able

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[29]See id. at 262.

[30]See id. at 264.

[31]See NRS 612.070(1)(a).

to impose the tax because only one state can have the base of operations.[32] If there is no base of operations, then the state from which the employee is directed or controlled can impose the tax so long as some of the services are performed in the taxing state—again resulting in only one state being able to impose the tax.[33] Finally, if none of the above is applicable, then the state in which the employee resides can impose the tax—resulting in only one state being able to tax because residence can only be in one state.[34] Therefore, if each state employing the taxing scheme applies the tax identically, then only one state would be permitted to tax the amount of wages paid by the employer.

The Harley-Davidson Financial Companies' argument requires one of the states to misapply the tax, which could result in multiple taxation. For example, if California determined that the employer's base of operations were in its state, while Nevada determined that the employer's base of operations were in its state, then both states could conceivably tax the same wages paid by the employer. Although internal consistency is a hypothetical inquiry, the inquiry is not merely based on the same tax being imposed by multiple states; rather, it is based on the same tax being applied identically by each state.[35] No matter what

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[32]See NRS 612.070(1)(b)(1).

[33]See id.

[34]See NRS 612.070(1)(b)(2).

[35]Oklahoma Tax Com'n v. Jefferson Lines, Inc., 514 U.S. 175, 185 (1995) ("This test asks nothing about the degree of economic reality reflected by the tax, but simply looks to the structure of the tax at issue to see whether its identical application by every State in the Union would

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the tax might be, any party could conceive of a situation in which one state's misapplication of the tax would result in multiple taxation. If such an argument were accepted, all state taxes could fail the internal consistency test. Because the tax scheme of NRS Chapter 363A does not result in multiple taxation if applied consistently by multiple states, we conclude that the tax is internally consistent.

The Harley-Davidson Financial Companies also contend that the payroll tax is not externally consistent because it is not limited to taxing the Nevada component of the companies' interstate activities. To prevail in their argument, the companies must prove by clear and cogent evidence that the tax base attributed to Nevada is out of all proportion to the business transacted in Nevada.[36] External consistency essentially requires the apportionment method to be a rational proxy for the value a business derives from its activities within the taxing state.[37] The problem with this, as noted above, is that the payroll tax of NRS Chapter 363A does not purport to be a proxy for value earned by an interstate business's Nevada operations.

For their argument, the Harley-Davidson Financial Companies necessarily equate wages paid to Nevada employees with revenues earned from the companies' intrastate activities. Even if wages

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. . . *continued*

place interstate commerce at a disadvantage as compared with commerce intrastate.") (emphasis added).

[36]Trinova Corp., 498 U.S. at 380.

[37]See id.

paid to Nevada employees is viewed as a proxy for value derived from an interstate business's Nevada operations, the Harley-Davidson Financial Companies have not presented clear and cogent evidence that such a measurement is out of all proportion to the companies' business transacted within Nevada. Although the definition of "employment" includes, to some degree, services performed outside Nevada, the tax cannot be imposed on solely non-Nevada services.[38] Finally, as previously discussed, the external consistency test is a practical inquiry, and we conclude that NRS Chapter 363A's payroll tax is a reasonably practical method of taxing wages paid to Nevada employees. We therefore conclude that the district court did not err by determining that the payroll tax comports with the Commerce Clause.

For the reasons set forth above, we ORDER the judgment of the district court AFFIRMED.

Douglas, J.

Becker, J.

Parraguirre, J.

[38]See NRS 612.070 ("'Employment' includes: 1. A person's entire service, performed within or both within and without this State . . . .").

cc: Hon. William A. Maddox, District Judge
Lansford W. Levitt, Settlement Judge
Parsons Behle & Latimer
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