IN THE SUPREME COURT OF THE STATE OF NEVADA

DRIVETIME CAR SALES, INC.,
Appellant,
vs.
NEVADA DEPARTMENT OF TAXATION,
Respondent.

No. 55028

FILED

FEB 24 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a petition for judicial review in a tax action. Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

FACTUAL BACKGROUND

The district court affirmed the Nevada Tax Commission's decision upholding the Nevada Department of Taxation's denial of sales-tax credits to DriveTime Car Sales, Inc. (DriveTime). DriveTime, a registered Nevada retailer, sold motor vehicles in Nevada through various locations. It timely and accurately collected and remitted all applicable sales tax to the State of Nevada for its motor vehicle sales. These sales were financed by DT Acceptance Corp. (Acceptance). Both DriveTime and Acceptance are owned by DriveTime Automotive Group, which is owned by three shareholders in equal percentage.

DriveTime's motor vehicle sales were often conducted with retail sales agreements that allowed each purchaser to pay for the amount financed, including the purchase price and sales tax, through installment payments. At the time of sale, DriveTime immediately assigned these contracts to Acceptance in return for an amount that was usually 73%-74% of the amount financed. The difference between the amount financed

and the amount paid represented estimated losses determined by the customer's credit and credit score and the expected loss based on the actual loss history of the customers within defined credit grades.

The balances due for the installment contracts were kept on an accounting system shared by DriveTime and Acceptance. This system tracked the contracts and payments from the time of origination through pay-off or charge-off. DriveTime and Acceptance jointly collected payments and serviced the accounts. For federal income tax purposes, DriveTime deducted the difference between the amount financed and the amount paid by Acceptance as bad debt pursuant to 26 USC § 166(A). This deduction only includes the bad debt and does not include operational costs or interest. Acceptance also claimed the actual losses for the accounts that became bad debts minus the amount Acceptance did not pay to DriveTime on assignment. DriveTime and Acceptance together charged off the full amount of the bad debt losses on their federal income tax returns.

DriveTime requested sales-tax credits pursuant to NRS 372.365(5) (bad debt statute) for sales tax paid from 1998 through 2001. This was approved by the commission in a decision dated August 4, 2004. In 2005, this court issued State, Department of Taxation v. DaimlerChrysler, 121 Nev. 541, 119 P.3d 135 (2005), which held that a finance company that provided financing for retail motor vehicle purchases could not obtain a refund under the bad debt statute. DriveTime requested sales-tax credits under the bad debt statute for sales tax paid from January 1, 2002 through December 31, 2003. The department audited and then denied the requested bad debt credits based on DaimlerChrysler. DriveTime filed a petition for redetermination in 2006. A department administrative judge affirmed the denial. DriveTime

then filed a notice of appeal with the commission. The commission affirmed.

DriveTime filed a petition for judicial review alleging that DriveTime qualified for the bad debt statute, that DriveTime and Acceptance together qualified as a retailer for purposes of the bad debt statute, and that the department was bound by its prior audit granting the sales-tax credit under the bad debt statute. The district court denied the petition yet found, based on briefs and oral argument, that substantial evidence supported the department's determination that DriveTime had not incurred uncollectible debts under NRS 372.365(5) (2003). The district court also denied DriveTime relief from tax liability pursuant to NRS 360.294 and common law estoppel.

Appellant DriveTime raises three issues on appeal. First, DriveTime contends that the district court erred by holding that DriveTime did not incur a bad debt entitling it to sales tax credits under the bad debt statute for the years 2002 and 2003. Second, DriveTime argues that it and Acceptance together qualified as a retailer for purposes of the bad debt statute. Third, DriveTime contends that the district court erred by holding that respondent Nevada Department of Taxation is not bound by its prior audit granting the sales tax credit for the years 1998 through 2001. We disagree with DriveTime's arguments on appeal and affirm the district court's order denying DriveTime's petition for judicial review. The parties are familiar with the facts, and we do not recount them further except as is necessary for our disposition.

DISCUSSION

Standard of review

"When reviewing a district court's order denying a petition for judicial review of an agency decision, we engage in the same analysis as the district court: we evaluate the agency's decision for clear error or an arbitrary and capricious abuse of discretion." See City of Las Vegas v. Lawson, 126 Nev. ___, ___, ___ P.3d ___, ___ (Adv. Op. No. 52, December 30, 2010) (internal quotation omitted). In addition, we determine whether substantial evidence supports the agency's decision. State, Emp. Security v. Hilton Hotels, 102 Nev. 606, 607-08, 729 P.2d 497, 498 (1986). Pure legal questions may be decided without deference to the agency's determination, but deference is given to legal conclusions closely related to an agency's view of the facts. SIIS v. Khweiss, 108 Nev. 123, 126, 825 P.2d 218, 220 (1992).

The meaning and scope of statutes are questions of law that we review de novo. DaimlerChrysler, 121 Nev. 541, 543, 119 P.3d 135, 136 (2005). If the language is unambiguous, then we apply its ordinary meaning "unless it is clear that this meaning was not intended." Id. A statute is ambiguous if it is susceptible to more than one reasonable interpretation. Attorney General v. Nevada Tax Comm'n, 124 Nev. 232, 240, 181 P.3d 675, 680 (2008). When possible, a court will interpret provisions within a common statutory scheme harmoniously with one another in accordance with the general purpose of those statutes to give effect to the Legislature's intent. See Southern Nev. Homebuilders v. Clark County, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005) (internal quotations omitted).

DriveTime does not qualify for the tax credit provided by the bad debt statute

DriveTime contends that the district court erred in holding that it did not incur a bad debt entitling it to sales tax credits. Specifically, DriveTime argues that it had accounts it could not collect but attempted to collect, that it accepted and posted customer payments at its "buy here, pay here" dealership, that neither DriveTime nor Acceptance were able to collect the sales prices, and that the IRS already determined that the losses were "bad debt." We disagree.

The bad debt statute at issue provides that:

> 5. If a retailer:
>
> (a) [i]s unable to collect all or part of the sales price of a sale, the amount of which was included in the gross receipts reported for a previous reporting period; and
>
> (b) [h]as taken a deduction on his federal income tax return pursuant to 26 U.S.C. § 166(a) for the amount which he is unable to collect,
>
> he is entitled to receive a credit for the amount of sales tax paid on account of that uncollected sales price.[1]

NRS 372.365(5) (2003). Hence, the statute provides a credit or refund for paid sales tax if "(1) the entity requesting the relief is a retailer, (2) the retailer is unable to collect all or part of the sales price, (3) the sale was included in gross receipts, and (4) the retailer has taken a deduction on its federal income tax equal to the uncollectible amount." DaimlerChrysler, 121 Nev. at 544, 119 P.3d at 136.

---

[1]The bad debt statute in effect at the time of this dispute was NRS 372.365(5). See NRS 372.365(5) (2003). The current provision is NRS 372.368.

DriveTime relies on the fact that it took a valid deduction on its federal tax return pursuant to 26 U.S.C. § 166, and argues that it is entitled to the sales tax credit if it qualifies for the federal bad debt credit and reports the sales tax. Yet, this interpretation is contrary to this court's own summary of the statute that set forth four enumerated requirements and used "and" to state that all requirements were necessary to claim the bad-debt credit. See DaimlerChrysler, 121 Nev. at 544, 119 P.3d at 136.

The administrative law judge found that the legislative intent behind the bad debt statute and the plain meaning of the bad debt statute is that the retailer is the entity required to collect the debt. The judge concluded that DriveTime's willingness to accept a discounted price on the original sales price of the vehicle did not equate to an inability to collect debt. DriveTime chose to transfer the credit risk and collections to Acceptance with the reduced sales price intended to cover Acceptance's estimated future losses. Upon transferring the agreements, the purchasers became indebted to Acceptance.

DriveTime asserts that it in fact incurred bad debt through its discount finance agreement with Acceptance and suggests that a taxpayer may claim bad debt under NRS 372.365(5) based on some factoring method and not on a contract-by-contract basis.[2] Specifically, DriveTime

---

[2]We decline to address the argument that a taxpayer may claim bad debt under NRS 372.365(5) based on some factoring method and not on a contract-by-contract basis because these facts are not properly before us. As outlined in the joint stipulation of facts, the discount price on the contracts was not based on actual or historic loss but on estimated losses on the contracts. Because DriveTime stipulated to these facts, DriveTime cannot now request this court to now consider a contractual relationship

continued on next page . . .

argues that DaimlerChrysler allows the issuance of bad debt credits to retailers who sell their retail installment contracts to another company but who end up with the contract if the customer defaults. Yet the joint stipulation of facts does not support the notion that the discount contract price was based on actual, historic bad debt loss, and the administrative law judge specifically found that the discount price was intended to cover the finance company's future losses as estimated by the parties rather than existing bad debts. The administrative law judge also determined that

> there is no proof that the retail installment financing agreements at issue in this case were sold back to [DriveTime]. Additionally [DriveTime] argues that it does take part in the collections actions but the evidence in the record shows that the only losses claimed by [DriveTime] are the original percentages which [DriveTime] chose to forego when it sold the retail installment financing agreements to DT Acceptance. There is no indication what [DriveTime] did to participate in the collections actions but it is clear that DT Acceptance bore all expenses after it purchased the retail installment financing agreements and did not return them to [DriveTime].

We conclude that that the administrative law judge properly interpreted the bad debt statute and did not abuse his discretion in

---

. . . continued

different from the relationship it stipulated to before the administrative law judge. See State, Bd. of Equalization v. Barta, 124 Nev. 612, 621, 188 P.3d 1092, 1098 (2008) (concluding that issues raised for the first time in the district court on a petition for judicial review are waived).

finding that DriveTime did not incur bad debt entitling it to tax credits under the 2003 version of the bad debt statute, NRS 372.365(5).

DriveTime and Acceptance do not collectively qualify as a retailer

DriveTime next contends that it and Acceptance collectively meet the definition of a retailer for purposes of the bad debt statute. DriveTime asserts that it and Acceptance constitute a "group or combination acting as a unit" because they are affiliated entities, have identical shareholders, have common officers and directors, share the same office building, jointly report their income, and are "affiliated entities" and a "controlled group" under federal law. DriveTime argues that it and Acceptance are collectively a retailer because they worked together to originate, service, and collect the loans comprising the bad debt credits. We disagree.

For purposes of the bad debt statute at issue, a "retailer" is defined as "[e]very seller who makes any retail sale or sales of tangible personal property . . ." NRS 372.055(1)(a). A "seller" is "every person engaged in the business of selling tangible personal property of a kind, the gross receipts from the retail sale of which are required to be included in the measure of the sales tax." NRS 372.070. A "person" is "any individual, firm, co-partnership, joint venture, association, social club, fraternal organization, corporation, estate, trust, business trust, receiver, trustee, syndicate, cooperative, assignee, or any other group or combination acting as a unit . . ." NRS 372.040.

Unlike the other terms found in the "person" definition, the phrase "any other group or combination acting as a unit" is ambiguous because it is susceptible to more than one reasonable interpretation. See Nevada Tax Comm'n, 124 Nev. at 240, 181 P.3d at 680. It does not produce a plain meaning or serve as an express indication from the

legislature that two separate entities could jointly qualify for the tax credit. See DaimlerChrysler, 121 Nev. at 546, 119 P.3d at 137. DriveTime's reading of the definition of "person" is also not supported by the other provisions in the statutory scheme. The operative language in the definition of the term "retailer" is "makes any retail sale or sales." The operative language in the definition of the term "seller" is "engaged in the business of selling tangible personal property" that is "included in the measure of the sales tax."

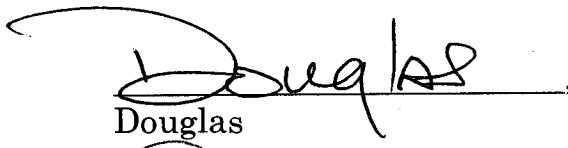
Although DriveTime and Acceptance may work as a unit to make money for their parent company, only DriveTime sells motor vehicles. Acceptance strictly handles the financing agreements. These are separate functions that should not be conflated simply because they are interdependent. We conclude that the administrative law judge did not err by concluding that "group or combination acting as a unit" does not include separate entities, which separate the retail and finance functions between the retail entity liable for the sales tax and the finance entity assigned the finance agreement.

The department was not bound by the 2004 audit

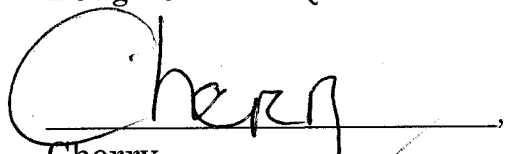
DriveTime contends that the district court erred in holding that the department of taxation was not bound by the audit that approved DriveTime's sales and use tax returns for the years 1998 through 2001. DriveTime contends that these audits constituted written advice for purposes of receiving relief from liability under NRS 360.294 and it relied on the audit's findings and the commission's decision. We disagree.

NRS 360.294(1)(a) grants a waiver of "any tax, penalty and interest owed" as a result of detrimental reliance on written advice from the department, but DriveTime is seeking a credit on taxes paid and does not owe taxes, penalties, or interest. NRS 360.294(2) relieves a taxpayer

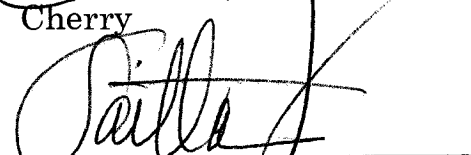
from paying delinquent taxes, penalties, or interest if the taxpayer remitted taxes in reliance on written advice from the department that is later found to be deficient by a subsequent audit. Yet, DriveTime was not found to be delinquent and there is no evidence of detrimental reliance. Without evidence of detrimental reliance, equitable estoppel also does not apply to DriveTime. Accordingly we, ORDER the judgment of the district court AFFIRMED.



_____, C.J.
Douglas

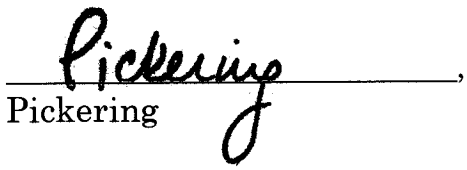


_____, J.
Cherry

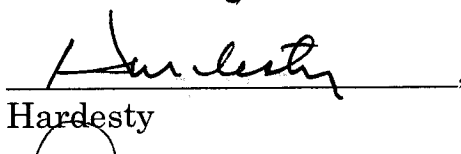


_____, J.
Saitta

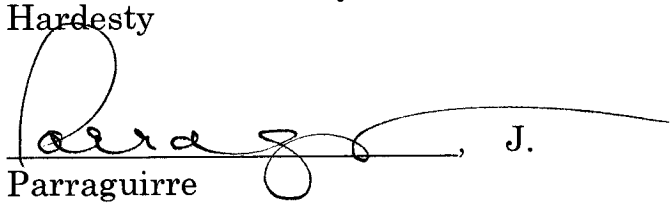
_____, J.
Gibbons



_____, J.
Pickering



_____, J.
Hardesty



_____, J.
Parraguirre

cc: Hon. Kathleen E. Delaney, District Judge
William F. Buchanan, Settlement Judge
Akerman Senterfitt
Attorney General/Carson City
Kolesar & Leatham, Chtd.
Eighth District Court Clerk