TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-19-00864-CV

Appellants, Glenn Hegar, Comptroller of Public Accounts of the State of Texas, and Ken Paxton, Attorney General of the State of Texas //
Cross-Appellant, Health Care Service Corporation, A Mutual Legal Reserve Company, d/b/a Blue Cross and Blue Shield of Texas

v.

Appellee, Health Care Service Corporation, A Mutual Legal Reserve Company, d/b/a Blue Cross and Blue Shield of Texas //
Cross-Appellees, Glenn Hegar, Comptroller of Public Accounts of the State of Texas, and Ken Paxton, Attorney General of the State of Texas

FROM THE 200TH DISTRICT COURT OF TRAVIS COUNTY
NO. D-1-GN-18-003105, THE HONORABLE AMY CLARK MEACHUM, JUDGE PRESIDING

MEMORANDUM OPINION

Appellee and cross-appellant Health Care Service Corporation, A Mutual Legal Reserve Company, d/b/a Blue Cross and Blue Shield of Texas (BCBS), sells "stop-loss" policies to businesses that self-insure, meaning the businesses provide their employees with health insurance by directly funding the employees' healthcare benefits. The stop-loss policies in question here limit the self-insured employer's liability by providing coverage for employee-health-benefit costs that exceed a certain amount. In other words, a stop-loss policy caps the employer's healthcare costs at a set level, insuring the employer against any unusually high healthcare costs in a particular year. Appellant and cross-appellee Glenn Hegar, Comptroller of

Public Accounts of the State of Texas, conducted an audit and determined that BCBS owed $3,005,270.13 in premium taxes and $68,691.89 in maintenance taxes on the stop-loss policies it had sold to self-insured employers in 2012. *See* Tex. Ins. Code §§ 222.002, 257.003.

BCBS paid the taxes under protest and then filed the underlying taxpayer suit against the Comptroller and Ken Paxton, Attorney General of the State of Texas (collectively, the Comptroller). The Comptroller filed a counterclaim arguing that if the stop-loss policies are not health or accident insurance, BCBS was not authorized to write the policies and was thus liable for damages. The parties filed competing motions for summary judgment, the trial court granted BCBS's motion and denied the Comptroller's, and the Comptroller then nonsuited his counterclaim. The question we must decide in this appeal is whether the premiums BCBS collected on its stop-loss policies were from a contract or policy covering risks on individuals or groups and arising from the business of health insurance so as to be subject to premium taxes, *see id*. § 222.002, or from writing health insurance so as to be subject to maintenance taxes, *see id*. § 257.003. Alternatively, the Comptroller argues that if BCBS would otherwise be entitled to a refund, it submitted insufficient evidence to support its asserted refund calculations. In its cross-appeal, BCBS argues that in granting summary judgment, the trial court also granted summary judgment on BCBS's sought amount of refund. We affirm the trial court's order granting BCBS's motion for summary judgment and need not address BCBS's cross-appeal.

STANDARD OF REVIEW

When, as here, both parties move for summary judgment and the court grants one motion and denies the other, we conduct a de novo review, considering the evidence presented, determining all questions presented, and, if we determine that the trial court erred, rendering the

judgment the trial court should have rendered. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). The construction of a statute is an issue we review de novo. *Railroad Comm'n v. Texas Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 624 (Tex. 2011). Our primary objective when construing a statute is to determine and give effect to the Legislature's intent. *Texas Dep't of Ins. v. American Nat'l Ins. Co.*, 410 S.W.3d 843, 853 (Tex. 2012). We begin with the words chosen by the Legislature and, if the statute is clear and unambiguous, apply the common meaning of the statutory language unless a different meaning is apparent from context or the plain meaning leads to absurd results. *See id*. (quoting *First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 631 (Tex. 2008)); *Marks v. St. Luke's Episcopal Hosp.*, 319 S.W.3d 658, 663 (Tex. 2010). If a statute is ambiguous, we consider the construction applied by the administrative agency charged with its enforcement, giving that construction serious consideration, as long as that construction is reasonable and does not contradict the plain statutory language. *American Nat'l Ins.*, 410 S.W.3d at 853 (quoting *Tarrant Appraisal Dist. v. Moore*, 845 S.W.2d 820, 823 (Tex. 1993)).

However, "agency deference does not displace strict construction" when we are asked whether a tax statute applies. *TracFone Wireless, Inc. v. Commission on State Emergency Commc'ns*, 397 S.W.3d 173, 182-83 (Tex. 2013). Instead, we apply "an ancient pro-taxpayer presumption: The reach of an ambiguous tax statute must be construed 'strictly against the taxing authority and liberally for the taxpayer.'" *Id*. at 182 (quoting *Morris v. Houston Indep. Sch. Dist*., 388 S.W.3d 310, 313 (Tex. 2012) (per curiam)). "In other words, a tax must apply unequivocally." *Id*. Ambiguous or imprecise tax statutes "must be interpreted 'most strongly against the government, and in favor of the citizen,'" and "we will not extend the reach of an

ambiguous tax by implication, nor permit tax collectors to stretch the scope of taxation beyond its clear bounds." *Id*. at 183 (quoting *Gould v. Gould*, 245 U.S. 151, 153 (1917)).

DISCUSSION

Section 222.002 provides in relevant part that an annual tax is imposed on "each insurer that receives gross premiums subject to taxation under this section," and that in determining its taxable gross premiums, the insurer shall include all premiums received from "any kind of . . . insurance policy or contract covering risks on individuals or groups located in this state and arising from . . . the business of" health insurance. Tex. Ins. Code § 222.002(a), (b). Section 257.003 imposes maintenance taxes on, as relevant to this case, "gross premiums collected from writing life, health, and accident insurance in this state." *Id.* § 257.003(a). The Comptroller insists that the premiums BCBS collected on its stop-loss policies are subject to premium or maintenance taxes.

BCBS has a certificate of authority, issued by the Texas Department of Insurance (TDI), allowing it to transact "the business of Accident; Health; Reinsurance on all lines authorized to be written on a direct basis; and the authority to transact business as a Health Maintenance Organization offering Basic Health Care Service Plans." The Comptroller argues that the fact that the certificate does not list stop-loss as a separate category, along with BCBS's assertions in its summary judgment evidence that TDI does not offer separate certificates of authority for stop-loss insurance and instead allows for the issuance of such policies "under the category of health insurance," must mean that BCBS's issuance of stop-loss policies falls within "the business of health insurance." The Comptroller further notes that BCBS lists stop-loss insurance and premiums on its Annual Statements under "Health Business" and sought an

exemption from certain insurance-form requirements that apply only to "group and individual accident and/or health policies," arguing that those facts show that BCBS itself considers stop-loss policies to be group policies arising from the business of health insurance. Finally, the Comptroller contends that we "should interpret the premium tax statutes in the Insurance Code to avoid gaps in coverage."

DOES THE PREMIUM TAX APPLY?

We begin by asking whether the premium tax, which is assessed against premiums received from insurance that covers "risks on individuals or groups" and that arise from the business of health insurance, applies to the stop-loss policies in question. *Id.* § 222.002(b).[1] The Comptroller argues that the stop-loss policies (1) should be viewed and treated as health-insurance policies that cover risks on groups, consistent with TDI's treatment of such policies,[2] and (2) arise from the business of health insurance.

Chapter 1701 of the insurance code, titled "Policy Forms," governs the forms that insurers may use in transacting their business, explaining how the forms are approved or disapproved and providing remedies against insurers who use misleading or noncomplying

[1] Stop-loss policies are mentioned in section 222.002 only in a provision explaining that an insurer need not include in its taxable gross premiums amounts it receives for stop-loss policies issued to health maintenance organizations. Tex. Ins. Code § 222.002(d). Such policies are to be "considered reinsurance," and reinsurance premiums are excluded from taxable gross premiums. *Id.* § 222.002(c)(3), (d).

[2] The Comptroller does not argue that "individuals" should be read to encompass companies or corporate entities, and we note that the word "individual" generally refers to a human being, as opposed to "person," which in legal usage often includes corporations or other such entities. *See, e.g., Colorado County v. Staff*, 510 S.W.3d 435, 449 n.59 (Tex. 2017); *First Cash, Ltd. v. JQ-Parkdale, LLC*, 538 S.W.3d 189, 196 (Tex. App.—Corpus Christi–Edinburg Jan. 11 2018, no pet.); *Global Evangelism Educ. Ministries, Inc. v. Caddell*, No. 04-08-00686-CV, 2009 WL 398255, at *1 (Tex. App.—San Antonio Feb. 18, 2009, no pet.) (mem. op.); *City of Corinth v. NuRock Dev., Inc.*, 293 S.W.3d 360, 370 (Tex. App.—Fort Worth 2009, no pet.).

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