

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2011 Term

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 35632

FOUNTAIN PLACE CINEMA 8, LLC,
Respondent,

v.

CHRISTOPHER G. MORRIS, as
STATE TAX COMMISSIONER OF WEST VIRGINIA
Petitioner.

Appeal from the Circuit Court of Logan County
Honorable Roger L. Perry, Judge
Civil Action No. 09-AA-1-P

AFFIRMED

Submitted: February 8, 2011
Filed: February 16, 2011

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JUSTICE KETCHUM delivered the Opinion of the Court.

JUSTICE DAVIS dissents, and reserves the right to file a separate opinion.

SYLLABUS BY THE COURT

1. “Interpreting a statute or an administrative rule or regulation presents a purely legal question subject to *de novo* review.” Syllabus Point 1, *Appalachian Power Co. v. State Tax Dept. of West Virginia*, 195 W.Va. 573, 466 S.E.2d 424 (1995).

2. “In the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used.” Syllabus Point 1, *Miners in General Group v. Hix*, 123 W.Va. 637, 17 S.E.2d 810 (1941).

3. “Each word of a statute should be given some effect and a statute must be construed in accordance with the import of its language. Undefined words and terms used in a legislative enactment will be given their common, ordinary and accepted meaning.” Syllabus Point 6, in part, *State ex rel. Cohen v. Manchin*, 175 W.Va. 525, 336 S.E.2d 171 (1984).

4. A “destination-oriented recreation and tourism” business activity, as the phrase is used in *W.Va. Code*, 11-13Q-19(a)(5) [2002], is a business to which people travel that emphasizes providing some pastime, diversion, entertainment or amusement.

Ketchum, Justice:

In this appeal from the Circuit Court of Logan County, we are asked to consider an appeal by the State Tax Commissioner of West Virginia. The Tax Commissioner asserts that the circuit court incorrectly interpreted *W.Va. Code*, 11-13Q-19(a)(5) [2002], and thereby incorrectly permitted a movie theater to claim an economic opportunity tax credit as a “destination-oriented recreation and tourism” business.

After careful consideration, we find that the circuit court properly gave the statutory phrase “destination-oriented recreation and tourism” its common, ordinary and accepted meaning. As set forth below, we affirm the circuit court’s conclusion that the movie theater was entitled to the tax credit.

I.

Facts and Background

Fountain Place Cinema 8, LLC (“Fountain Place”), owns and operates a 26,000 square-foot, eight-screen movie theater in Logan, West Virginia. The theater was constructed in 2006, and Fountain Place asserts it invested \$3,931,763.00 in the theater. Each year, approximately 200,000 patrons visit the theater. Fountain Place states that about 30% of those patrons are residents of the nearby Commonwealth of Kentucky,¹ and that

¹According to the testimony of a Fountain Place employee, Logan is “about 20 miles”
(continued...)

another 10% of the patrons are non-residents of the Logan area visiting the Hatfield-McCoy Trail System² who, as part of their visit, decide to attend a movie.

On October 15, 2007, Fountain Place applied to the Tax Commissioner for a tax credit under the West Virginia Economic Opportunity Tax Credit Act (“the EOTCA”). *See, W.Va. Code*, 11-13Q-1 to -22. The EOTCA allows a business to take a tax credit for investments in industry or business activities that are, among other things, centered upon “[d]estination-oriented recreation and tourism[.]” *W.Va. Code*, 11-13Q-19(a)(5) [2002]. The tax credit can only be taken for investments in a new or expanded business, and which create new jobs. Fountain Place claimed it was entitled to an EOTCA tax credit because its theater was a new business engaged in the activity of destination-oriented recreation and tourism. Fountain Place noted that for the tax year 2006, it had a “qualified investment” of \$3,931,763.00 and a “new jobs percentage” of 10%, which entitled it to a maximum tax credit of \$39,317.63 each year for the years 2006 through 2015 (a total of \$393,176.30).

In a letter dated November 16, 2007, the Tax Commissioner denied the EOTCA credit sought by Fountain Place. The Tax Commissioner concluded that the

¹(...continued)
from the Kentucky border. The Tax Commissioner asserts, based upon internet research, that the movie theater is 30.19 miles from the border.

²The Hatfield-McCoy Trail System is part of the Hatfield-McCoy Regional Recreation Authority, and is a collection of more than 500 miles of trails for riders of all-terrain vehicles and dirtbikes across southwestern West Virginia.

Fountain Place theater was not a business engaged in “destination-oriented recreation and tourism.”

Fountain Place appealed the Tax Commissioner’s decision to the Office of Tax Appeals. After a hearing, on March 2, 2009, an administrative law judge affirmed the decision of the Tax Commissioner.

Fountain Place then appealed the decision to the Circuit Court of Logan County. In a detailed order on November 13, 2009, the circuit court concluded that Fountain Place was entitled to the tax credit as a destination-oriented recreation and tourism business, and reversed the decision of the Office of Tax Appeals.

In its order, the circuit court made clear that the phrase “destination-oriented recreation and tourism” in *W.Va. Code*, 11-13Q-19(a)(5) was not defined either by the Legislature in a statute or by the Tax Commissioner in a regulation. The circuit court therefore turned to a dictionary for the common, everyday meanings of the words in the phrase. The circuit court concluded (with citations omitted):

28. “Destination” is defined as “the place to which a person or thing is going or sent. . . .”

29. “Recreation” is defined as “refreshment in body or mind, as after work, by some form of play, amusement, or relaxation.”

30. “Tourism” is defined as “tourist travel, especially when regarded as a source of income for a country, business, etc.” “Tourist” includes “one who makes a tour; one who makes a journey for pleasure.” “Travel” is defined as “the act or

process of traveling[,]” with “traveling” relating to “a passing from place to place; the act of performing a journey.”

31. Thus, “destination-oriented recreation and tourism” consists of traveling from one location to another for the purpose of amusement and/or relaxation, when such travel provides a source of income to a business entity.

The circuit court took into account that whether a business qualified for the tax credit was necessarily a fact-based decision which should include consideration of

(1) the economy of the region, (2) the availability of other recreational choices in the area, (3) the cultural significance of the business or activity, (4) the business’s distance from other similar businesses, [and] (5) the amount of patronage from local or nearby customers versus customers from farther away.

Examining the record made before the Office of Tax Appeals, the circuit court determined (in part because each year as many as 60,000 of Fountain Place’s customers traveled from places outside the economically-distressed Logan area for the purpose of watching a movie, and another 20,000 customers traveled to the Logan area to visit the Hatfield-McCoy Trail System) that Fountain Place was entitled to the EOTCA tax credit.

The Tax Commissioner now appeals the circuit court’s November 13, 2009 order.

II. *Standard of Review*

The sole question we are asked to resolve in this appeal is this question of law: may a movie theater qualify for a tax credit as a business engaged in “destination-oriented

recreation and tourism” pursuant to *W.Va. Code*, 11-13Q-19(a)(5)?³ “Interpreting a statute or an administrative rule or regulation presents a purely legal question subject to *de novo* review.” Syllabus Point 1, *Appalachian Power Co. v. State Tax Dept. of West Virginia*, 195 W.Va. 573, 466 S.E.2d 424 (1995).

III. *Discussion*

Fountain Place argues that the circuit court correctly found that the phrase “‘destination-oriented recreation and tourism’ consists of traveling from one location to another for the purpose of amusement and/or relaxation, when such travel provides a source of income to a business entity.”

The Tax Commissioner argues that the circuit court’s proposed definition of the phrase is wrong, because it places too much emphasis on the recreation aspect of the statute while minimizing the significance of the destination aspect. The Tax Commissioner also asserts that the circuit court focused too little on the fact that movie patrons are not

³To put it mildly, *W.Va. Code*, 11-13Q-19(a)(5) is inelegantly crafted. The statute states (in pertinent part):

(a) Notwithstanding any other provision of this article to the contrary, except as provided in section five of this article, no entitlement to the economic opportunity tax credit may result from, and no credit is available to any taxpayer for, investment placed in service or use except for taxpayers engaged in the following industries or business activities: . . .

(5) Destination-oriented recreation and tourism; . . .

engaged in tourism. The Tax Commissioner argues that, to be eligible for the tax credit, a business must be engaged in both “destination-oriented recreation” *and* “destination-oriented tourism.” The Tax Commissioner contends that the only proper reading of the statute is that the destination must be the primary motivating factor for traveling to West Virginia. The Tax Commissioner says this means the statute requires Fountain Place to prove that the “primary motivating factor for its Kentucky customers to travel to Logan was to see a movie at Fountain Place Cinema” and not some other activity, such as shopping or eating.

In enacting the EOTCA, the Legislature did not define the phrase “destination-oriented recreation and tourism,” and the Tax Commissioner has not enacted any regulations interpreting the phrase. Both Fountain Place and the Tax Commissioner agree that the statutory phrase is unclear and is ambiguous. The Office of Tax Appeals and the circuit court reached a similar conclusion. And, at oral argument before this Court, counsel for the Tax Commissioner could not offer a complete definition.

This Court has held that “[a] statute is open to construction only where the language used requires interpretation because of ambiguity which renders it susceptible of two or more constructions or of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning.” *Hereford v. Meek*, 132 W.Va. 373, 386, 52 S.E.2d 740, 747 (1949). A statute is ambiguous when the statute’s language connotes “doubtfulness, doubleness of meaning . . . indistinctness or uncertainty of an expression[.]” *Crockett v. Andrews*, 153 W.Va. 714, 718-19, 172 S.E.2d 384, 387 (1970). The statutory

phrase “destination-oriented recreation and tourism” is an indistinct, vague phrase that is susceptible to differing constructions, and reasonable minds are uncertain and disagree about its meaning. Accordingly, we find that *W.Va. Code*, 11-13Q-19(a)(5) is ambiguous.

“A statute that is ambiguous must be construed before it can be applied.” Syllabus Point 1, *Farley v. Buckalew*, 186 W.Va. 693, 414 S.E.2d 454 (1992). Further, an ambiguous statute must be construed to achieve the Legislature’s intended goals. The Legislature stated that the EOTCA tax credit is intended “to encourage greater capital investment in business in this state and thereby increase economic opportunity in this state[.]” *W.Va. Code*, 11-13Q-2 [2002]. However, the Legislature indicated that the EOTCA must “be reasonably construed” to achieve these intended goals. *W.Va. Code*, 11-13Q-16(b) [2002].

Because the phrase “destination-oriented recreation and tourism” is not defined in the EOTCA, we must construe the phrase and give the words in the phrase their common, ordinary and accepted meanings. As we once stated, “In the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used.” Syllabus Point 1, *Miners in General Group v. Hix*, 123 W.Va. 637, 17 S.E.2d 810 (1941). *In accord*, Syllabus Point 6, in part, *State ex rel. Cohen v. Manchin*, 175 W.Va. 525, 336 S.E.2d 171 (1984) (“Each word of a statute should be given some effect and a statute must be construed in accordance with the import of its language.

Undefined words and terms used in a legislative enactment will be given their common, ordinary and accepted meaning.”). “Plain language should be afforded its plain meaning.” *Crockett v. Andrews*, 153 W.Va. at 719, 172 S.E.2d at 387.

The common, ordinary and accepted dictionary definition of the word “destination” is “the place for which a person or thing is destined; the intended end of a journey or course”⁴ and “the place to which a person . . . travels or is sent.”⁵ The word “oriented” is something “[h]aving an emphasis, bias or interest indicated by a preceding [subject] (usu[ally] joined by a hyphen).”⁶

The word “recreation” means the act of refreshing or enlivening the mind and spirit “by some pleasant occupation, pastime or amusement,”⁷ as well as “a pastime, diversion, exercise, or other resource affording relaxation and enjoyment.”⁸

Finally, it appears that the word “tourism,” in the context of the statute, means “the business or industry of providing information, accommodations,⁹ transportation or other

⁴IV *Oxford English Dictionary* 536 (2nd Ed. 1991).

⁵*Random House Webster’s Unabridged Dictionary* 540 (2nd Ed. 1999).

⁶X *Oxford English Dictionary* 932.

⁷XIII *Oxford English Dictionary* 372.

⁸*Random House Webster’s Unabridged Dictionary*, 1613.

⁹The word “accommodation” means “something supplied for convenience or to satisfy a need” including “lodging, food, and services.” *Webster’s New Collegiate Dictionary* 7 (1979).

services” to a person who is traveling, especially for pleasure.¹⁰ Put another way, “tourism” is “the business of attracting tourists” – people who “travel[] for pleasure or culture” – “and providing for their accommodation and entertainment[.]”¹¹

Assembling these terms, we hold that a “destination-oriented recreation and tourism” business activity, as the phrase is used in *W.Va. Code*, 11-13Q-19(a)(5) [2002], is a business to which people travel that emphasizes providing some pastime, diversion, entertainment or amusement.

In reaching our holding, we wish to make clear that we find no fault in the arguments of the Tax Commissioner, who is struggling to give the statute a narrow reading so as to protect the public fisc. But the Legislature chose to use nebulous, broad and expansive terms without definitions when it created the tax credit contained in *W.Va. Code*, 11-13Q-19(a)(5). Neither this Court nor the Tax Commissioner can insert language by interpretation into a tax statute that widens or narrows the statute’s application; the power of the purse lies solely with the Legislature, and so too does the power to alter the tax statutes.

With this definition resolved, the question then remains whether the circuit court erred in finding that the Fountain Place theater facility was such a business entitled to

¹⁰*Random House Webster’s Unabridged Dictionary*, page 2002.

¹¹XVIII *Oxford English Dictionary* 306

exercise the EOTCA tax credit. After carefully examining the record developed before the Office of Tax Appeals, we find that the circuit court's decision was supported by the evidence.

IV.
Conclusion

The circuit court's November 13, 2009 order is affirmed.

Affirmed.