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TAX - MARYLAND

Ben Porto & Son, Ltd. v. Montgomery County

Appellate Court of Maryland - July 9, 2024 - A.3d - 2024 WL 3338200

Taxpayers, which were companies that owned or operated a quarry, appealed decision of county finance director to affirm decision of county's department of environmental protection to deny taxpayers' applications and appeals for an exemption from or credit against county's stormwater-remediation charge on impervious surfaces on taxpayers' property, against which charge property owners could obtain a credit if they treated their stormwater on-site.

The Tax Court denied taxpayers' request for an exemption but awarded taxpayer a 100% credit against the charge due to taxpayers' on-site treatment of stormwater. The parties then sought judicial review.

After consolidation, the Circuit Court affirmed the Tax Court's decision as it related to exemption and entitlement to credit but remanded the matter to the Tax Court because neither the record nor the Tax Court's order reflected how the credit award was calculated. The parties cross-appealed.

The Appellate Court held that:

- Stormwater-remediation charge was an excise tax within the county's taxing authority, and thus it was not preempted by state and federal regulation of mines;
- Charge was required to comply with statute that required that such a charge be set in an amount that was based on the share of stormwater-management services related to the property and provided by the county;
- County's lack of provision of stormwater-management services to taxpayers' property did not establish that charge failed to comply with that statute;
- Taxpayers' National Pollutant Discharge Elimination System (NPDES) permit did not preclude the charge;
- Neither county code not State regulations required absolute compliance with the Maryland Stormwater Design Manual in order for a taxpayer to be eligible for a credit against the charge;
- Sufficient evidence supported Tax Court's conclusion that stormwater treatment undertaken by taxpayers made them eligible under the county code for a credit against the charge;
- Tax Court lacked an adequate factual basis to support awarding taxpayers a 100% credit; and
- Tax Court is without statutory authority to award attorney fees to prevailing party.

County's stormwater remediation charge was a "tax" rather than a regulatory "fee," as would support finding that it was within taxing authority of county, which was a charter county with home-rule powers, and not preempted by state and federal regulation of mines insofar as it applied to taxpayers' quarry; fee's purpose was to raise revenue and benefit the general public rather than regulate stormwater, and fee did not require a property owner to do anything with their property other than pay the charge.

Stormwater-remediation charge was an "excise tax," rather than a "property tax," within taxing authority of charter county with home-rule powers, and thus charge was not preempted by state and

federal regulation of mines insofar as it applied to taxpayers' quarry; county council labeled the charge as an excise tax, charge was not imposed upon taxpayers solely because they owned land but rather because of taxpayers' use of the land, and fee did not require any assessment of the value or nature of the property being taxed.

Taxpayers, which were companies that owned or operated a quarry, did not preserve for appellate review their argument that county's stormwater-remediation charge was an invalid retroactive tax on a vested right because, so the argument went, it taxed impervious surfaces that were on taxpayers' property before the county imposed the charge; although the record was clear that taxpayers raised a retroactivity challenge to the county in their credit applications and appeals, their filings and arguments before the Tax Court did not clearly demonstrate that they were continuing to challenge the charge on the grounds that it retroactively taxed existing impervious surfaces.

Although it was a valid excise tax, county's stormwater-remediation charge was required to comply with statute that required that such a charge be set in an amount that was based on the share of stormwater-management services related to the property and provided by the county; both county code and state statutes governing such a charge indicated that county still had to comply with state-law requirements for such a charge.

County's lack of provision of stormwater-management services to taxpayers' property, on which a quarry operated, did not establish that county's stormwater-remediation charge, which applied to impervious surfaces on the property, failed to comply with statute requiring a stormwater-remediation charge to be set in an amount that was based on the share of stormwater-management services related to the property and provided by the county; charge operated under the valid assumption that a property's impervious surface related to the stormwater services provided by the county.

Fact that taxpayers, which were companies that owned or operated quarry, had a National Pollutant Discharge Elimination System (NPDES) permit that was covered under State's General 15MM permit did not preclude county from charging them its stormwater-remediation fee for impervious surfaces on the property, despite argument that statute governing when a property owned by the State or a unit of State government could be charged such a fee prohibited a county from charging the fee to property covered by such a permit; statute clearly referred to NPDES Phase I permits, and it seemed clear that the General Assembly's intent with the statute was to provide an exemption for State entities that already held a NPDES permit, not for private entities with a NPDES permit.

Taxpayers, which were companies that owned or operated a quarry, did not show that the Water Management Administration had either found mining to be subject to any State law that regulated stormwater-management runoff or determined that mining would be regulated under specific State laws that provided for managing stormwater runoff, and thus neither county code provision nor state regulation that provided that land-development activity that was subject to such findings was exempt from stormwater-management requirements precluded county from charging stormwater-remediation fee to taxpayer for the impervious surfaces on its property; although taxpayers argued that mines were among the most regulated entities in the State, that did not inherently mean that the Water Management Administration had found the quarry's stormwater to be regulated.

County code did not require absolute compliance with the Maryland Stormwater Design Manual in order for a taxpayer to be eligible for a credit against county's stormwater-remediation charge, which credit was available to taxpayers who treated stormwater on-site; despite code's repeated references to the Manual, the code's provision governing the credit did not provide any requirements that practices eligible for the credit had to conform to that Manual.

State regulations on stormwater management did not require compliance with the Maryland Stormwater Design Manual in order for taxpayers' on-site stormwater treatment to allow them a credit against county's stormwater-remediation charge; the various references to the Manual in the regulations referred to complying with minimum control requirements, not to potential eligibility for credit against a stormwater-remediation charge.

Sufficient evidence supported Tax Court's conclusion that stormwater treatment undertaken by taxpayers, which were companies that owned or operated a quarry, made them eligible under the county code for a credit against county's stormwater-remediation charge on impervious surfaces on their property; based upon uncontroverted testimony of taxpayers' engineering expert, taxpayers demonstrated both onsite treatment of all of property's stormwater and additional treatment of offsite stormwater, and each of taxpayers' applications and appeals to the county for the credit explained the stormwater management and treatment present on the property.

Although sufficient evidence supported Tax Court's conclusion that stormwater treatment undertaken by taxpayers, which were companies that owned or operated a quarry, made them eligible under the county code for a credit against county's stormwater-remediation charge on impervious surfaces on their property, Tax Court lacked an adequate factual basis to support awarding taxpayers a 100% credit; pursuant to county regulation, the credit could only be awarded according to specific calculations and guidance, and Tax Court did not engage in any calculation or demonstration of how it reached the determination that taxpayers were entitled to a 100% credit.

Remand to Tax Court, rather than to county's department of environmental protection, was appropriate following Appellate Court's finding that Tax Court lacked an adequate factual basis to support awarding taxpayers, which were companies that owned or operated a quarry and that had appealed to the Tax Court from county's decisions, a 100% credit against county's stormwater-remediation charge on impervious surfaces on their property, which credit, as provided by the county code, stemmed from taxpayers' own stormwater treatment; the Administrative Procedure Act's judicial-review provisions allowed a final order from the Tax Court to be remanded for further proceedings before the Tax Court.

Tax Court, which, despite its name, is an adjudicatory administrative agency in the executive branch of state government, is without statutory authority to award attorney fees to prevailing party.

Circuit court would not have had authority to award attorney fees itself on judicial review following Tax Court's decision that denied request by taxpayers, which were companies that owned or operated a quarry, for an exemption from county's stormwater-remediation charge on impervious surfaces on taxpayers' property but that awarded taxpayers, pursuant to the county code, a 100% credit against the charge due to taxpayers' treatment of stormwater; such an award of fees was not available for administrative appeals brought pursuant to the Administrative Procedure Act.

Statute providing that a county or municipality may not charge a stormwater remediation fee to property specifically covered by a current National Pollutant Discharge Elimination System (NPDES) Phase I municipal separate storm sewer system permit or industrial stormwater permit held by the State or a unit of State government does not exempt any entity with a NPDES permit from stormwater remediation charges, only State government entities with NPDES permits.

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