

Before the
Administrative Hearing Commission
State of Missouri



GREAT SOUTHERN BANCORP, INC.
& SUBSIDIARIES,

Petitioner,

v.

DIRECTOR OF REVENUE,

Respondent.

No. 21-1768

DECISION

We grant Great Southern Bancorp, Inc. & Subsidiaries' (GSB) motion for summary decision. Real-estate investment trust (REIT) dividends from sources within Missouri are included in Missouri's corporate dividends deduction.

Procedure

On June 16, 2021, GSB filed a complaint appealing the Director of Revenue's (Director) final decision denying GSB's protest of tax assessments.¹ On July 13, 2021, the Director filed an answer. With our leave, GSB filed an amended complaint on May 10, 2022. On June 10, 2022, the Director filed an answer. On May 20, 2022, GSB filed a motion for summary decision, memorandum in support, and a statement of undisputed facts. On June 17, 2022, the Director filed a response in opposition. On June 29, 2022, GSB filed a reply. On July 7, 2022, with our leave, the Director filed a surreply.

¹ GSB argues, in the alternative, that a decision in the Director's favor should apply prospectively only because it was not reasonably foreseeable under § 143.903, RSMo. *See* Amended Comp. ¶¶ 9-14. Today's decision in GSB's favor renders this issue moot.

Statutory references are to RSMo Supp. 2013, unless otherwise noted.

We may decide this case without a hearing if a party establishes facts that no party genuinely disputes that entitle any party to a favorable decision. 1 CSR 15-3.446(6)(A). Facts may be established by stipulation, affidavit, the adverse party's pleading or discovery response, or other admissible evidence. 1 CSR 15-3.446(6)(B). Based on GSB's statement of facts, the Director's response, the amended complaint, and the answer to the amended complaint, we find the following facts to be undisputed.

Findings of Fact

1. Great Southern Bank operates several banking centers in Missouri.
2. At all times since January 1, 2014:
 - a. Great Southern Bancorp, Inc. has been a bank and financial holding company.
 - b. Great Southern Bancorp, Inc. has wholly owned Great Southern Bank.
 - c. Great Southern Bank has wholly owned GSB One, LLC (GSB1).
 - d. GSB1 has owned a controlling interest in GSB Two, LLC (GSB2).
 - e. GSB1 has elected to be treated as a corporation for Missouri and federal tax purposes.
 - f. GSB1 has been included in GSB's federal and Missouri consolidated corporate income tax returns.
 - g. GSB2 has been organized under Missouri law and based in Missouri.
 - h. GSB2 has elected to be treated as a corporation for Missouri and federal tax purposes.
 - i. GSB2 has not been included in GSB's federal and Missouri consolidated corporate income tax returns.

3. GSB2 is a real-estate investment trust; it generates income from mortgages secured by real property.²

4. GSB2 made certain distributions of profits derived from sources within Missouri to GSB1 during 2014 and 2015.

5. GSB1 included the amount of the GSB2 distributions in its federal taxable income for tax years 2014 and 2015, which was included in GSB's federal and Missouri consolidated corporate income tax returns.

6. For each of the 2014 and 2015 tax years, GSB2 reported its distributions to GSB1 as dividends on its Missouri and federal income tax returns.

7. GSB deducted the GSB2 distributions on its 2014 and 2015 Missouri consolidated corporate income tax returns as Missouri dividends, pursuant to § 143.431.2.

8. In tax years prior to 2014, GSB deducted distributions from GSB2 as Missouri dividends under § 143.431.2 on its Missouri consolidated corporate income tax returns.

9. Prior to the 2014 tax year, the Director did not issue a Notice of Deficiency related to distributions paid by GSB2, nor did the Director otherwise deny GSB's deduction of distributions on the ground that they were not Missouri dividends.

10. On April 25, 2018, the Director issued Notices of Deficiency to GSB for Missouri corporate income tax, additions to tax, and interest for the 2014 and 2015 tax periods, resulting from an audit conducted by the Director.

11. As part of the audit of GSB's 2014 and 2015 tax returns, the Director removed the GSB2 distributions from the calculation of the Missouri dividends deduction on GSB's consolidated corporate income tax returns.

² First amen. comp. and answer thereto, ¶¶ 4-5.

12. On June 20, 2018, GSB timely filed a protest of the Director’s tax assessments in the Notices of Deficiency, pursuant to § 143.621.

13. On May 18, 2021, the Director issued a Final Decision denying GSB’s protests as to the exclusion of the GSB2 distributions from the Missouri dividends deduction and the imposition of statutory interest.

14. As a basis for denying GSB’s protests, the Director asserted that “dividends” under the Missouri dividends deduction in § 143.431.2 does not include the GSB2 distributions.

15. In the Final Decision, the Director asserted income tax deficiencies in the amounts of \$1,407,317.71 and \$1,976,054.56 for tax years 2014 and 2015, respectively, including interest.

Conclusions of Law

This Commission has authority over appeals from the Director’s final decisions. Sections 621.050.1 and 144.261. Our duty in a tax case is not merely to review the Director’s decision, but to find the facts and to determine, by the application of existing law to those facts, the taxpayer’s lawful tax liability for the period or transaction at issue. *J.C. Nichols Co. v. Dir. of Revenue*, 796 S.W.2d 16, 20-21 (Mo. banc 1990). We may do whatever the law permits the Director to do, and we are bound to do what the Director must do. *State Bd. of Regis’n for the Healing Arts v. Finch*, 514 S.W.2d 608, 614 (Mo. App. W.D. 1974). Statutes imposing a tax are construed strictly in favor of the taxpayer. Sections 621.050.2 and 136.300.1. Statutes exempting or excluding a tax are “strictly construed against the taxpayer, and any doubt must be resolved in favor of application of the tax[,]” and “[a]n exemption is allowed only upon clear and unequivocal proof.” *Bartlett Int’l, Inc. v. Dir. of Revenue*, 487 S.W.3d 470, 472 (Mo. banc 2016) (internal citations omitted). However, this general rule does not “overcome a construction of the

statute based upon the plain and simple words used therein.” *State ex rel. May Dep’t Stores Co. v. Koupal*, 835 S.W.2d 318, 320 (Mo. banc 1992).

GSB appeals the Director’s final decision denying its protest of Notices of Deficiency issued by the Director for the tax periods January 2014 through December 2014 and January 2015 through December 2015. GSB’s protest concerns the applicability of REIT dividends to Missouri’s corporate-income dividends deduction pursuant to § 143.431.2, which provides:

There shall be added to or subtracted from federal taxable income the modifications to adjusted gross income provided in section 143.121, with the exception of subdivision (5) of subsection 2 of section 143.121, and the applicable modifications to itemized deductions provided in section 143.141. There shall be subtracted the federal income tax deduction provided in section 143.171. *There shall be subtracted, to the extent included in federal taxable income, corporate dividends from sources within Missouri.*

(Emphasis added).

Since 1973, Missouri has allowed corporations to deduct Missouri-source dividends from their adjusted gross income. L.1972, S.B. No. 549, p. 699, § A, eff. Jan. 1, 1973. No Missouri statute has defined the term “dividend” or “corporate dividend,” but Missouri’s income tax code provides:

Any term used in sections 143.011 to 143.996 shall have the same meaning *as when used in a comparable context* in the laws of the United States relating to federal income taxes, *unless a different meaning is clearly required* by the provisions of sections 143.011 to 143.996. Any reference in sections 143.011 to 143.996 to the laws of the United States shall mean the provisions of the Internal Revenue Code of 1986³ and amendments thereto, and other provisions of the laws of the United States relating to federal income taxes, as the same may be or become effective, at any time or from time to time, for the taxable year.

³ 26 U.S.C. § 1 et seq.

Section 143.091 (emphasis added).⁴ No provision of Chapter 143 defines “dividend” or “corporate dividend,” so we look to the Internal Revenue Code to interpret § 143.431.2. Section 143.091; *see also Dow Chem. Co. v. Dir. of Revenue, State of Mo.*, 787 S.W.2d 276, 285 (Mo. banc 1990) (“[T]he Director must accord the term *dividend* in Section 143.431.2 the same meaning that it has in the federal income tax laws.”).

Two federal provisions address these terms. Title 26 U.S.C. § 316, titled “Dividend defined,” provides:

(a) General rule.—For purposes of this subtitle, the term “*dividend*” means any distribution of property made by a corporation to its shareholders—

(1) out of its earnings and profits accumulated after February 28, 1913, or

(2) out of its earnings and profits of the taxable year (computed as of the close of the taxable year without diminution by reason of any distributions made during the taxable year), without regard to the amount of the earnings and profits at the time the distribution was made.

Except as otherwise provided in this subtitle, every distribution is made out of earnings and profits to the extent thereof, and from the most recently accumulated earnings and profits. To the extent that any distribution is, under any provision of this subchapter, treated as a distribution of property to which section 301 applies, such distribution shall be treated as a distribution of property for purposes of this subsection.

(Emphasis added). Title 26 U.S.C. § 243, titled “Dividends received by corporations,” provides:

(a) General rule.—In the case of a corporation, there shall be allowed as a deduction an amount equal to the following percentages of the amount received as dividends from a domestic corporation which is subject to taxation under this chapter:

(1) 50 percent, in the case of dividends other than dividends described in paragraph (2) or (3);

⁴ Except for changes corresponding to the restructuring of the Internal Revenue Code, § 143.091 has remained unchanged since 1973. *See* L.1972, S.B. No. 549, p. 699, § A, eff. Jan. 1, 1973; *amended by* L.1989, H.B. Nos. 35, 500, 516 & 601, § A, eff. Jan. 1, 1990.

(2) 100 percent, in the case of dividends received by a small business investment company operating under the Small Business Investment Act of 1958 (15 U.S.C. 661 and following); and

(3) 100 percent, in the case of qualifying dividends (as defined in subsection (b)(1)).

* * *

(d) Special rules for certain distributions.—*For purposes of subsection (a)—*

(1) Any amount allowed as a deduction under section 591 (relating to deduction for dividends paid by mutual savings banks, etc.) shall not be treated as a dividend.

(2) A dividend received from a regulated investment company shall be subject to the limitations prescribed in section 854.

(3) *Any dividend received from a real estate investment trust which, for the taxable year of the trust in which the dividend is paid, qualifies under part II of subchapter M (section 856 and following) shall not be treated as a dividend.*

(Emphasis added). Title 26 U.S.C. § 316 determines what constitutes a dividend. Title 26 U.S.C. § 243 determines the circumstances under which dividends received by corporations may be deducted from federal income.

The Director argues that 26 U.S.C. § 243 constitutes the federal equivalent of § 143.431's corporate dividend deduction and, therefore, represents the "comparable context" under which we should evaluate the term "corporate dividends" as directed by § 143.091. By contrast, GSB argues that § 143.431 unambiguously allows deductions for "dividends" of all types and that the absence of any qualification in Chapter 143 reflects a legislative intent to allow deductions for dividends of all types. Alternatively, GSB argues that the general definition of "dividend" found in 26 U.S.C. § 316 compels a result in its favor.

We begin our analysis of the comparable federal context by applying 26 U.S.C. § 316. The distributions of GSB2’s profits to its shareholder, GSB1, meet the federal statutory definition of dividends. We reject GSB’s alternative argument that our analysis should end here. This is a dispute over whether certain dividends (specifically, REIT dividends) received by a corporation are deductible under Missouri law. Pursuant to § 143.091, we cannot ignore a federal provision addressing that very question. *See* 26 U.S.C. § 243. Section 143.091 operates as more than a reference to statutes like 26 U.S.C. § 316, which defines terms like a glossary; it further requires that we analyze the context in which a term is used in federal income-tax law to determine how the term should apply under Missouri law. *Dow Chem Co.*, 787 S.W.2d at 284-86.

In *Dow Chem. Co.*, the Missouri Supreme Court applied § 143.091 in analyzing the meaning of “corporate dividends” under § 143.431.2. *Id.* In that case, Dow claimed three types of undistributed income as corporate dividends exempt from tax under § 143.431.2: earnings from a domestic international sales corporation (DISC), Subpart F foreign income, and § 78 gross-up income. *Id.* at 284-85 n.15. The Director argued these types of undistributed income were not exempt because they were not actually dividends under federal law, but merely *treated* as dividends by federal law.⁵ *Id.* at 285. The *Dow* court rejected this reasoning and found it was the *treatment* of the income as dividends that determined whether those sources of income were “dividends” under § 143.431.2. *Id.* at 285-86.

⁵ Regarding DISCs, 26 U.S.C. § 995(b)(1) provides, “[a] shareholder of a DISC *shall be treated* as having received a distribution taxable *as a dividend*.” (Emphasis added). Regarding Subpart F, 26 U.S.C. § 964(d)(1)(B) provides, “any amount directly or indirectly transferred or credited from such branch to one or more other accounts of such controlled foreign corporation *shall be treated as a dividend*.” (Emphasis added). Regarding § 78 gross-up, 26 U.S.C. § 78 provides, “an amount equal to the taxes deemed to be paid by such corporation ... *shall be treated* for purposes of this title ... *as a dividend*.” (Emphasis added).

Accordingly, we look to 26 U.S.C. § 243 as additional, comparable federal context for the treatment of REIT dividends.⁶ Subsection (a) sets forth the general rule that dividends received by a corporation are deductible from federal income at specified percentages. *Id.* at (a). REIT dividends, however, are specifically excluded: “For purposes of subsection (a)-- . . . [a]ny dividend received from a [REIT] shall not be treated as a dividend.” *Id.* at (d)(3). In this context, “treatment” refers to whether a dividend is deductible. *Id.* at (a), (d).⁷ The “treatment” of REIT dividends in 26 U.S.C. § 243(d) is expressly limited to the purposes of 26 U.S.C. § 243(a), and the sole function of 26 U.S.C. § 243(a) is to delineate which dividends received by a corporation are deductible from federal income. This context is distinguishable from the federal context at issue in *Dow Chem. Co.*, *see* fn. 6, wherein “treatment” referred to whether certain types of undistributed income that were not, by definition, dividends should nevertheless be taxed as though they were. 787 S.W.2d at 284-86. In this case, REIT dividends *are* dividends under 26 U.S.C. § 316, and nothing in 26 U.S.C. § 243 transforms them into something else. Therefore, in the comparable federal context of 26 U.S.C. §§ 316 and 243, REIT dividends are corporate dividends that are not deductible.

Section 143.091 requires that we determine whether Chapter 143 clearly requires a different meaning than that used in the federal context. If it does, we use the meaning required by the applicable provision of Chapter 143 instead of the federal context. Section 143.431.2 states: “There shall be subtracted, to the extent included in federal taxable income, corporate dividends from sources within Missouri.” With respect to the comparable federal definition of “dividend,” § 143.431.2 is wholly consistent with 26 U.S.C. § 316; no different meaning is required. With respect to deductibility, however, the Missouri statute departs from 26 U.S.C. § 243(d). The

⁶ *See also* 26 U.S.C. § 857(c)(1), which refers back to 26 U.S.C. § 243.

⁷ The language used in 26 U.S.C. § 857(c)(1), “shall not be *considered* a dividend[.]” is not substantively different. (Emphasis added).

phrase “to the extent included in federal taxable income” applies § 143.431.2 to *corporate dividends that are not deductible under federal law* because corporate dividends to which federal deductions apply are, by operation, not included in federal taxable income. Therefore, the express language of § 143.431.2 requires we treat corporate dividends from sources within Missouri differently than they are treated in the comparable federal context. In other words, any corporate dividend that could not be deducted from federal income is deductible from Missouri income if it came from a Missouri source. This includes REIT dividends because they are corporate dividends pursuant to § 143.091 and 26 U.S.C. § 316.

Summary

We grant summary decision in GSB’s favor. Pursuant to § 143.431.2, REIT dividends from sources within Missouri are deductible from Missouri income.

SO ORDERED on January 26, 2024.

KATIE JO WHEELER
Commissioner