Circuit Court for Baltimore County
Case No. 03-C-18-012418

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 88

September Term, 2020

LAFAYETTE PHARMACEUTICALS INC., ET AL.

v.

COMPTROLLER OF MARYLAND

Berger,
Wells,
Gould,

JJ.

Opinion by Berger, J.

Filed: May 6, 2021

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This case involves an administrative appeal from the Maryland Tax Court ("Tax Court"), relating to a determination by the Tax Court requiring appellants (the "Partners") to use a single-factor method when calculating their Maryland taxes.[1] The Comptroller of Maryland ("Comptroller") issued assessments for the Partners to pay tax, penalties, and interest in the amount of $2,043,435.00.

The Partners responded to the assessments by requesting an informal hearing before the Comptroller's Hearing and Appeals Section. On May 7, 2014, the Partners and the Comptroller participated in an informal conference. On March 8, 2016, a Hearing Officer from the Hearings and Appeals Section issued a Notice of Final Determination to the Partners assessing tax, penalties, and interest in the amount of $2,437,280.00. The Hearing Officer concluded that the Partners were required to use the single sales factor applicable to manufacturing corporations when determining their taxes owed. The Partners filed an appeal on April 27, 2016 and the parties filed cross-motions for summary judgment on April 17, 2017. Following a hearing on June 24, 2017, the Tax Court issued a Memorandum and Order granting Comptroller's motion for summary judgment and denying the Partners' motion for summary judgment. After the Partners voluntarily

[1] The appellants in this case are thirteen related out-of-state corporations comprising of: Lafayette Pharmaceuticals, Inc.; Covidien, Inc.; General Surgical Innovations, Inc.; InnerDyne, Inc.; Liebel-Flarsheim Company; Life Design Systems, Inc.; Ludlow Corporation ("Ludlow"); Ludlow Technical Products Corp.; Mallinckrodt, Inc.; Scandius Biomedical, Inc.; Sherwood Medical Company I; TKC Holding Corp.; and Valleylab Holding Corp. For clarity, we will refer to the corporations collectively as "the Partners."

dismissed the remaining counts of their claim, the Tax Court entered a "Final Order" on November 19, 2018 clarifying that the earlier orders were final.

On December 12, 2018, the Partners filed a petition for judicial review in the Circuit Court for Baltimore County. The circuit court determined that the petition for judicial review was untimely filed. Nevertheless, the circuit court affirmed the decision of the Tax Court finding that the Partners were required to use a single sales factor method for determining their taxes.

The Partners noted a timely appeal to this court presenting two questions for our review, which we have rephrased slightly as follows:

> I. Whether the Partners' petition for judicial review was timely filed with the circuit court pursuant to Maryland Rule 7-203(a).
>
> II. Whether the Tax Court committed legal error in affirming the Comptroller's assessment requiring the Partners to apportion their income using the single sales factor method applicable to manufacturing corporations.

For the reasons stated herein, we shall affirm the judgment of the circuit court.

FACTS AND PROCEEDINGS

The Partners are headquartered in Mansfield, Massachusetts. Each of the Partners is a corporation organized under the laws of either California, Delaware, Massachusetts, or Wisconsin. Each of the Partners has elected to be treated as a corporation for the purposes of federal income taxes.

Each of the Partners is a limited or general partner in Tyco Healthcare Group LP ("THGLP"), a limited partnership. Each of the Partners owns less than a twenty-percent interest in THGLP. THGLP's primary business is that of the design, manufacture, distribution, and sale of medical devices. THGLP does not conduct any manufacturing activities in Maryland. Rather, THGLP distributes and sells medical devices, supplies, and other healthcare-related products to Maryland consumers. Apart from Ludlow, all of the Partners' primary source of income was income stemming from their ownership in THGLP. Ludlow's primary business activity during the years at issue was contract manufacturing outside of Maryland and all of its products are sold to THGLP.

For all of the years at issue, the Partners filed federal corporate income tax returns on Form 1120. On line 10 of their Form 1120s, each Partner reported the income they received from their ownership in THGLP. Additionally, each Partner filed Maryland income tax returns on Form 500 for each of the years at issue. The Partners reported the income they received from their ownership in THGLP consistent with their federal income tax filings. When determining their apportioned Maryland income, the Partners applied the three-factor apportionment formula comprised of property, payroll, and double weighed sales factors.

The Comptroller conducted an audit of the Partners for tax years 2009, 2010, and 2011. On December 17, 2013, the Comptroller issued assessments to the Partners for tax, penalties, and interest in the amount of $2,043,435.00, with interest still accruing. The Comptroller determined this amount using the single sales factor apportionment method

applicable to manufacturing corporations. The Comptroller determined that the Partners were required to use this method as opposed to the three-factor apportionment method. The determinations do not refer to a specific statute or regulation as authority to require the change in formula to be used.

On January 10, 2014, the Partners requested an informal hearing before the Comptroller's Hearings and Appeals Section. On May 7, 2014, the Partners and the Comptroller participated in an informal conference before the Hearings and Appeals Section. On March 8, 2016, the Hearings and Appeals Section Officer issued Notices of Final Determination (the "Notices") to the Partners assessing tax, penalties, and interest totaling $2,437,280.00. The Hearing Officer concluded that the Partners were required to use the single sales factor applicable to manufacturing corporations pursuant to Md. Code (1988, 2016 Repl. Vol.), § 10-402(e) of the Tax-General Article ("Tax-Gen").[2]

On April 27, 2016, the Partners filed petitions of appeal containing five counts. Count I provided:

> WHEREFORE, the Comptroller has no authority to issue the Assessment against Petitioner because Petitioner was not required to use the SSF [Single Sales Factor] Formula for manufacturing corporations.

[2] Throughout the litigation below and in their briefs before this Court, the parties refer to Tax-Gen § 10-402(e) as "§ 10-402(d)." However, the quoted language and substance of the Maryland Code are contained in subsection (e), not (d). Additionally, all other references by the parties to Tax-Gen § 10-402 are incorrect and similarly off by one subsection. Accordingly, we have corrected this error and cite to the appropriate subsections of Tax-Gen § 10-402 where applicable.

Count II alleged that the Partners are entitled to an abatement of the Comptroller's assessment, "because alternative apportionment does not apply."[3] On April 17, 2017, the Partners and the Comptroller filed cross-motions for summary judgment based on a stipulation of facts. On June 14, 2017, a hearing was held on the cross-motions for summary judgment with respect to Count I. On June 23, 2017, the Tax Court issued a Memorandum and Order granting the Comptroller's motion for summary judgment and denying the Partners' motion for summary judgment. On July 19, 2017, the Partners filed a motion for reconsideration of the June 23, 2017 Order, alleging that the Order incorrectly referenced other counts not before the Tax Court. Thereafter, the Tax Court issued an Order dated October 3, 2017 amending the Order of June 23, 2017 to note that the Tax Court's ruling "applies to Count I only of the [Partners'] appeals to this Court."

On August 6, 2018, the Partners filed a Motion for Voluntary Dismissal of Counts II through V with Prejudice. The Comptroller then filed a Motion for Leave to Perpetuate Evidence on August 13, 2018. Thereafter, the Tax Court issued two separate orders on November 7, 2018. First, the Tax Court issued an Order Granting Appellants' Motion for Voluntary Dismissal of Counts II through V with Prejudice. Second, the Tax Court issued an Order denying the Comptroller's Motion for Leave to Perpetuate Evidence.

On November 14, 2018, the Partners' counsel emailed the Clerk of the Tax Court to confirm that the Dismissal Order dated November 7, 2018 constituted a final, appealable

[3] Count III alleged that the assessment violates Maryland's doing business requirement, Count IV alleged that it violates the Commerce Clause, and Count V alleged that it is arbitrary and capricious.

order. On November 19, 2018, the Clerk notified counsel that the Tax Court would be issuing a new order confirming the decisions and "start[ing] the 30-day appeal period as of today." The Tax Court issued an Amended Final Order on November 19, 2018 that noted that the Tax Court's previous orders were "now Final Orders."

On December 12, 2018, the Partners filed a petition for judicial review in the Circuit Court for Baltimore County. In response, the Comptroller filed a motion to dismiss the request as untimely filed. On February 12, 2020, the circuit court granted the Comptroller's motion to dismiss and, in the alternative, affirmed the decision of the Tax Court granting summary judgment in favor of the Comptroller. The Partners filed this appeal on March 12, 2020.

DISCUSSION

Standard of Review

"In an appeal from judicial review of an agency action, we look through the decision of the circuit court and review the agency's decision directly." *W. Montgomery Cnty. Citizens Ass'n v. Montgomery Cnty. Plan. Bd. of the Md.-Nat'l Park & Plan. Comm'n*, 248 Md. App. 314, 332–33 (2020) (citing *Clarksville Residents Against Mortuary Def. Fund, Inc. v. Donaldson Props.*, 453 Md. 516, 532 (2017)). "Decisions of the Tax Court receive the same judicial review as other administrative agencies," because the Maryland Tax Court is "an adjudicatory administrative agency." *Comptroller of the Treasury v. Taylor*, 465 Md. 76, 86, 97 (2019) (internal citations omitted); *Frey v. Comptroller of the Treasury*, 422 Md. 111, 136 (2011) (internal citations omitted). Our review of the Tax Court's

Memorandum Opinion is "limited to determining if there is substantial evidence in the record as a whole to support the [Tax Court's] findings and conclusions, and to determine if the [Tax Court's] decision is premised on an erroneous conclusion of law." *Clarksville Residents, supra*, 453 Md. at 532 (internal citation and quotations omitted). When determining if there is "substantial evidence," we must "decide 'whether a reasoning mind reasonably could have reached the factual conclusion the agency reached.'" *W. Montgomery Cnty. Citizens Ass'n*, *supra*, 248 Md. App. at 333 (quoting *Clarksville Residents, supra*, 453 Md. at 532).

We owe no deference to the Tax Court's conclusions regarding findings of law. *Lillian C. Blentlinger, LLC v. Cleanwater Linganore, Inc.*, 456 Md. 272, 293–94 (2017). Nonetheless, we cannot substitute our judgment for that of the Tax Court when reviewing findings of fact. *Id.* Notably, we "give considerable weight to the agency's interpretation and application of the statute which the agency administers." *Mayor of Rockville v. Pumphrey*, 218 Md. App. 160, 194 (2014) (internal citation and quotations omitted). Additionally, "a reviewing court may not uphold an agency's decision if a record of the facts on which the agency acted or a statement of reasons for its action is lacking." *Becker v. Anne Arundel Cnty.*, 174 Md. App. 114, 138 (2007). The Tax Court's "[f]indings of fact must be meaningful and cannot simply repeat statutory criteria, broad conclusory statements, or boilerplate resolutions." *Id.* at 139 (internal citation omitted). Indeed, on appeal from a dismissal of a request for judicial review, we will review the circuit court's decision to determine whether it was legally correct under a *de novo* standard. *Cochran v.*

Griffith Energy Servs., Inc., 426 Md. 134, 139 (2012); *Napata v. Univ. of Md. Med. Sys. Corp.*, 417 Md. 724, 731 (2011); *Modell v. Waterman Family Ltd. P'ship*, 232 Md. App. 13, 19 (2017).

I. The trial court erred in dismissing the Partner's petition for judicial review as the petition was timely filed within thirty days of the entry of the order of which the Partners' sought review pursuant to Maryland Rule 7-203(a).

Maryland Rule 7-203(a) provides:

> Except as otherwise provided in this Rule or by statute, a petition for judicial review shall be filed within thirty days after the latest of: (1) the date of the order or action of which review is sought; (2) the date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner; or (3) the date the petitioner received notice of the agency's order or action, if notice was required by law to be received by the petitioner.

Accordingly, a party must file a petition for judicial review within thirty days of one of the above-referenced occurrences related to the specific order of which review is sought. *Hercules Inc. v. Comptroller of Treasury*, 351 Md. 101, 108–09 (1998).

Tax-Gen § 13-532 provides: "[a] final order of the Tax Court is subject to judicial review as provided for contested cases in §§ 10-222 and 10-223 of the State Government Article." Pursuant to Md. Code (1984, 2014 Repl. Vol., 2020 Suppl.), § 10-222 of the State Government Article, a petitioner seeks judicial review from a "final decision." Generally, to be final, "the order or decision must dispose of the case by deciding all question of law and fact and leave nothing further for the administrative body to decide." *Willis v. Montgomery Cnty.*, 415 Md. 523, 535 (2010). Indeed, a Tax Court order must leave

nothing further for the Tax Court to do on the assessments to be considered final. *Kim v. Comptroller of Treasury*, 350 Md. 527, 534 (1998).

"[T]he rules governing premature appeals do not apply to the review of decisions by administrative agencies, including the Maryland Tax Court." Judge Kevin F. Arthur, *Finality of Judgments and Other Appellate Trigger Issues* § 14, at 35 (The Maryland State Bar Association ed., 3d ed. 2018). Indeed, "a party does not 'appeal' from the ruling of such an agency; rather, a party files an original action known as a petition for judicial review of the agency's ruling. As an original action, a petition for judicial review does not implicate a court's appellate jurisdiction." *Id.* For example, even if a party petitions for judicial review before an agency has administered a final decision, the court can still entertain the petition. *Kim*, *supra*, 350 Md. at 536.

Here, the Partners filed a petition for judicial review of the Final Order issued by the Tax Court dated November 19, 2018. The Partners filed their petition on December 12, 2018, within thirty days of the date of the Order. *See* Md. Rule 7-203(a). The Comptroller contends that the Order dated November 7, 2018 was actually the Order the Partners are "appealing from" and, therefore, the petition was untimely. The Comptroller argues that for a Tax Court order to be final, the decision must leave nothing further for the Tax Court to do on the tax assessments. *Kim*, *supra*, 350 Md. at 534. Once the Tax Court dismissed the remaining counts, the Comptroller contends there was nothing further to do. *Id.* We disagree.

Critically, a petition for judicial review must be taken from a "final order." Tax-Gen § 13-532. The Partners in the instant case are indeed appealing from a final order dated less than thirty days before they noted their petition. *Willis*, *supra*, 415 Md. at 535. There is no indication that the Partners were required to petition for judicial review from the November 7, 2018 Order. While there is a requirement that an appeal lies only from a final decision, implicit in that the requirement "are the correlative requirements that that the aggrieved party know that the decision has been made and that the decision is final." *Crofton Partners v. Anne Arundel Cnty*, 99 Md. App. 233, 243 (1994) (citing *Clarke v. Greenwell*, 73 Md. App. 446, 452–53 (1988)).

This Court has held that holding that appeal time begins at the point where "all parties are clearly informed of the time running for an appeal" is the "better result." *Clarke*, *supra*, 73 Md. App. at 452–53. The Tax Court issued a Final Order, fully clarifying for all parties involved that it was final and appealable, on November 17, 2018 and the Partners timely filed a petition for judicial review of that order. *See* Md. Rule 7-203(a).[4] The Tax Court was well within its authority to clarify its initial ruling. Therefore, under the circumstances of this case, the November 17, 2018 Order controls the timing for the filing of a notice of appeal.

[4] Although the Court of Appeals only specifically addresses the ability of the Tax Court to withdraw or stay its own order in *Hercules*, *supra*, the opinion provides support that the Tax Court has the ability to effectively revise the appeal-timeline based on its own revision of its orders. *See Hercules*, *supra*, 351 Md. at 109. Here, the Tax Court issued multiple orders before its Final Order. Accordingly, it was authorized to revise or strike such orders to clarify the rights of the parties. *Id.*

II. The Tax Court's determination that the Partners' were required to use a single sales factor apportionment method for tax purposes pursuant to Tax-Gen § 10-402(e) was legally correct, supported by substantial evidence, and is properly before this Court.

Corporations carrying on a trade or business either in or out of Maryland must allocate to Maryland "the part of the corporation's Maryland modified income that is derived from or reasonably attributable to the part of its trade or business carried on in the State." Tax-Gen § 10-402(b)(2). This allocation can be completed through separate accounting or by formulary apportionment. *Id.* § 10-402(c)–(d).

Tax-Gen § 10-402(e) provides in relevant part:

> [t]o reflect clearly the income allocable to Maryland, the Comptroller may alter, if circumstances warrant, the methods under subsections (c) and (d) of this section, including:
>
> * * *
>
> (2) the use of the 3-factor double weighted sales factor formula method or the single sales factor formula method.

"If an apportionment formula does not fairly represent the extent of a corporation's activity in [Maryland], the Comptroller may alter the formula or its components." COMAR 03.04.03.08(F).[5]

[5] The Partners contend that the issue of the Comptroller's selection of an alternative apportionment method under Tax-Gen § 10-402(e) is not properly before this Court on appeal because Count I only related to Tax-Gen § 10-402(d). We disagree. Maryland Regulations direct a hearing officer to issue a final determination and summarize "[a]ny adjustments to the assessment . . . and the reasons for the Comptroller's action." COMAR 03.01.01.04(G). The Comptroller is defined as "any employee of the Comptroller's Office designated as a hearing officer to conduct informal hearings in contested cases." COMAR 03.01.01.04(A)(1). Therefore, the final determination must include a summary of the

Both the statute and the regulation place the analysis of the circumstances that could possibly alter the tax formula firmly in the purview of the Comptroller. Tax-Gen § 10-402(e); COMAR 03.04.03.08(F). There are no limitations provided for these circumstances. *Gore Enter. Holdings Inc. v. Comptroller of Treasury*, 437 Md. 492, 529 (2014).

Although Maryland courts have not yet interpreted the key language of Tax-Gen § 10-402(e),[6] the United States Supreme Court has interpreted similar language in the Internal Revenue Code. 26 U.S.C. § 446 provides the Commissioner with the discretion to alter an accounting method if it does not "clearly reflect income." The Supreme Court has interpreted this language as giving the Internal Revenue Service (the "IRS") "wide discretion" and "broad powers" to select an alternative method. *Thor Power Tool Co. v. Comm'r*, 439 U.S. 522, 532 (1979). Accordingly, the burden on the taxpayer is heavy and

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reasons for the hearing officer's actions. *See id.*; COMAR 03.01.01.04(G). Additionally, the Tax Court is authorized to provide the grounds for an assessment. *Foss NIRSystems, Inc. v. Comptroller of Treasury*, 151 Md. App. 44, 52 (2003) (holding that the Tax Court has wide authority to supply its own grounds for an assessment and a Tax Court order is agency action).

Here, Count I of the appeal to the Tax Court does not provide any specific subsection of Tax-Gen § 10-402 to be considered. Rather, it is ambiguous, and any ambiguities filed in the petitions of appeal should be construed against the party who filed them. *Polek v. J.P. Morgan Chase Bank, N.A.*, 424 Md. 333, 362 (2012). The later Order by the Tax Court on October 3, 2017 simply supplemented the Order dated June 23, 2017. It did not withdraw the earlier order and we, therefore, are entitled to consider the applicability of Tax-Gen § 10-402(e).

[6] The applicable language in Tax-Gen § 10-402(e) reads: "[t]o reflect clearly the income allocable to Maryland, the Comptroller may alter, if circumstances warrant, the methods [used]."

any alteration by the IRS should not be set aside unless plainly arbitrary. *Id.* at 532–33. Such a determination "is entitled to more than the usual presumption of correctness." *Shea Homes, Inc. v. Comm'r*, 142 T.C. 60, 84 (2014), *aff'd*, 834 F.3d 1061 (9th Cir. 2016).

Once the Comptroller has chosen an alternative apportionment method pursuant to Tax-Gen § 10-402(e), the taxpayer now has the burden to show that the method selected is unfair. *Gore Enter. Holdings*, *supra*, 437 Md. at 532–33. If a formula produces a proportionate result and the consequence is that no more than all the taxpayer's business income is taxed, it is fair. *Id.*; *Random House v. Comptroller of the Treasury*, 310 Md. 696, 707 (1987).

Here, the Comptroller provided that its reason for selecting a different apportionment method was due to its belief that the activity of manufacturing, instead of the entity type, should determine the formula. This reasoning, the Comptroller provided, would more clearly reflect income attributable to Maryland. *See* Tax-Gen § 10-402(e).

The Partners argue that because they do not meet the requirements of a "manufacturing corporation" under Tax-Gen § 10-402(d)(1)(i)(1), the single sales factor formula cannot apply. We disagree. Were we to agree with the Partners, subsection (e) of Tax-Gen § 10-402 would be rendered meaningless. To that end, if the only situation in which a tax formula could apply to a corporation is solely when the statutory requirements are met, the Comptroller would never have discretion to select an alternative apportionment method. *See* Tax-Gen § 10-402(e); *Gore Enter. Holdings*, *supra*, 437 Md. at 529. In our view, the Comptroller must be afforded the discretion to choose an alternative method

when the one originally chosen does not "reflect clearly the income allocable to Maryland." *See* Tax-Gen § 10-402(e); *Gore Enter. Holdings*, *supra*, 437 Md. at 529. In this instance, the Comptroller selected a different apportionment method because that method more clearly reflected the attributable income to Maryland. Therefore, we hold that the Tax Court was legally correct in selecting the alternative apportionment method of a single sales factor formula under Tax-Gen § 10-402(e).

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANTS.