STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0309
A08-0310

Northern Border Pipeline Company,
Appellant (A08-309),
Great Lakes Gas Transmission Limited Partnership,
Appellant (A08-310),

vs.

Commissioner of Revenue,
Respondent.

Filed January 27, 2009
Affirmed
Ross, Judge

Ramsey County District Court
File No. 62-C0-06-012758

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Considered and decided by Ross, Presiding Judge; Connolly, Judge; and Bjorkman, Judge.

U N P U B L I S H E D O P I N I O N

ROSS, Judge

These consolidated appeals require us to decide whether transporters of natural gas should be refunded the state use taxes they paid on gas that they diverted from their pipelines to fuel the compressors that keep the remaining transported gas moving through their pipelines. The district court granted summary judgment in favor of the commissioner of revenue against Great Lakes Gas Transmission Limited Partnership and Northern Border Pipeline Company, refusing to order the commissioner to refund approximately $7,500,000 in use taxes that the companies paid on natural gas consumed to fuel their compressors. The district court determined that their compressor-fuel consumption meets the requirements for imposing a use tax under Minnesota Statutes section 297A.63, subdivision 1. Because we conclude that Great Lakes and Northern Border used, purchased, and consumed the compressor fuel in Minnesota, we affirm.

FACTS

Great Lakes Gas Transmission Limited Partnership operates a pipeline that transports natural gas from Canada through Michigan, Wisconsin, and Minnesota. Northern Border Pipeline Company operates a pipeline that transports natural gas from Canada through Montana, North Dakota, South Dakota, Minnesota, Iowa, Illinois, and Indiana. Every 60 to 75 miles along the pipelines, the gas passes through a compressor station. Each station generates pressure necessary to push the gas to the next station and ultimately to its final destination. Great Lakes' pipeline has 14 compressor stations, five of which are in Minnesota. Northern Border's pipeline has 17 compressor stations, with

two in Minnesota. Great Lakes and Northern Border divert a relatively small portion of the transported natural gas from the pipelines to fuel these compressors. The taxability of this diverted gas is the subject of this appeal.

From August 1, 2005, to July 31, 2006, these companies paid a use tax to the State of Minnesota on the diverted gas. Great Lakes paid $5,815,424 in use taxes and Northern Border paid $1,720,525. The companies amended their tax returns, claiming that they were entitled to refunds because their compressor-fuel consumption was not taxable under the operable statutes, and contending that the Commerce Clause, Supremacy Clause, and Equal Protection Clause of the federal Constitution prohibit state taxation. The commissioner of revenue denied the request for refunds.

The companies appealed the commissioner's decision to the Ramsey County District Court, making the same arguments. The parties cross-moved for summary judgment. The district court held that the compressor-fuel consumption satisfied the statutory taxability requirements because the companies "purchased" and "used" the compressor fuel, within the meaning of chapter 297A. The district court also addressed and rejected the companies' constitutional arguments. The companies appeal.

D E C I S I O N

Great Lakes and Northern Border argue that their compressor-fuel consumption should not be subject to the use tax for several reasons. The companies contend they do not "purchase" the compressor fuel "for a consideration in money or by exchange or barter" as required for taxation under Minnesota Statutes section 297A.61, subdivision 3. They also maintain that their customers supply the compressor fuel and that federal

regulations prohibit the companies from purchasing the compressor fuel or receiving anything of value in that exchange. They contend that in purportedly analogous situations, the commissioner of revenue has instructed that the use-tax statute does not apply. Finally, they maintain that the pipeline companies do not "purchase" the compressor fuel under generally accepted accounting principles.

Some ancillary background bears on our opinion. First, the companies operate "transportation only" pipelines—that is, they originally own none of the gas that their pipelines transport. The companies' customers are shippers who purchase gas and make agreements with them to transport gas through the pipelines. These agreements are listed in what the natural gas industry refers to as "tariffs." As part of its federal regulatory duties, the Federal Energy Regulatory Commission (FERC) must approve these tariffs. The companies' FERC-approved tariffs state that the shippers must provide natural gas to fuel the compressors. Great Lakes' tariff refers to this diverted natural gas as "Transporter's Use" gas, and Northern Border's tariff refers to it as "Company Use" gas. To simplify, we refer to the Transporter's Use gas and Company Use gas as "compressor fuel."

Second, the question of taxability of compressor fuel has already been the subject of litigation by one of the companies, as well as clarifying legislative action. In 2000, Great Lakes challenged the use tax as applied to its compressor-fuel consumption in Minnesota tax court. *Great Lakes Gas Transmission L.P. v. Comm'r of Revenue*, No. 7106-R, 2000 WL 1719923 (Minn. Tax Ct. Nov. 16, 2000). In that case, Great Lakes argued that its compressor-fuel consumption was not a taxable event under Minnesota's

use-tax statute based on statutory prerequisites. Great Lakes argued alternatively that it was exempt from tax because of the statutory industrial-production exemption. The tax court concluded that Minnesota's use tax applied to Great Lakes' compressor-fuel consumption because Great Lakes "used" and "purchased" the fuel in Minnesota. But the tax court also concluded that Great Lakes nevertheless was entitled to a use-tax refund because it found that the industrial-production exemption applied to Great Lakes' compressor-fuel consumption.

Additional judicial review addressed both issues, and the legislature also weighed in. The commissioner of revenue obtained review by the Minnesota Supreme Court. *See Great Lakes Gas Transmission L.P. v. Comm'r of Revenue* (*Great Lakes I*), 638 N.W.2d 435 (Minn. 2002). The supreme court affirmed the tax court's decision, concluding that the compressor fuel was used, purchased, and consumed in Minnesota for the purposes of Minnesota's use-tax statute. *Id*. at 438–39. But it went on to hold that Great Lakes' compressor-fuel consumption was exempt from the use tax because the industrial-production exemption also applied. *Id*. at 439–41. After *Great Lakes I*, the Minnesota legislature amended the industrial-production exemption and explicitly excluded transportation of natural gas from industrial production. *See* Minn. Stat. § 297A.68, subd. 2(d)(2) (2006) ("Industrial production does not include: . . . the transportation [or] transmission . . . of . . . natural gas . . . in, by, or through pipes.").

After the statutory amendment, the companies began paying the use tax but requested a refund. When the commissioner of revenue denied their refund requests, the companies began the current litigation in district court. Given the apparent applicability

of *Great Lakes I*, their consolidated appeals to this court require us to decide whether collateral estoppel affects the companies' claims before addressing whether the statute requires the companies to pay the use tax.

I

The companies contend that collateral estoppel does not preclude their argument because Great Lakes prevailed in *Great Lakes I* and, alternatively, because the supreme court's decision that the use tax applied was dictum, wholly unnecessary to its decision. The district court did not decide whether to consider *Great Lakes I* as a matter of collateral estoppel or *stare decisis* because it concluded that "even in the absence of estoppel" the facts support a conclusion that the companies were subject to the use tax. The commissioner asks us to apply collateral estoppel de novo. We will consider collateral estoppel, since whether it applies is a mixed question of law and fact, subject to our de novo review. *Falgren v. State Bd. of Teaching*, 545 N.W.2d 901, 905 (Minn. 1996).

Collateral estoppel precludes parties from relitigating issues that were actually presented and necessarily determined in prior actions. *In re Special Assessment for Water Main Extension in the Village of Byron*, 255 N.W.2d 226, 228 (Minn. 1977). It applies when each of the following elements is satisfied: (1) the issue litigated in the present action is identical to one in a prior adjudication; (2) there was a final judgment on the merits; (3) the allegedly estopped party was a party, or in privity with a party, in the prior action; and (4) the estopped party had a full and fair opportunity to be heard on the issue. *A & H Vending Co. v. Comm'r of Revenue*, 608 N.W.2d 544, 547 (Minn. 2000).

Additionally, collateral estoppel applies only if resolving the disputed issue was a "necessary component" in the original decision. *Transamerica Ins. Group v. Paul*, 267 N.W.2d 180, 182 (Minn. 1978). Collateral estoppel is an affirmative defense, and the party seeking to use the defense bears the burden of proving these elements. *Tarutis v. Comm'r of Revenue*, 393 N.W.2d 667, 669 (Minn. 1986).

We agree with the commissioner that the issue the companies seek to litigate now is identical to an issue litigated and decided in *Great Lakes I*. In *Great Lakes I*, the supreme court stated expressly that it was answering "whether the consumption of compressor fuel constitutes a taxable event for the purposes of the use tax statute." 639 N.W.2d at 438. Great Lakes had argued that the three statutory requirements for imposing the use tax were not satisfied. *Id*. It argued that it did not "purchase" the compressor fuel and therefore could not be subject to the use tax. The supreme court was not convinced, and it held specifically, "[Because] the substance of the transaction clearly falls within the statutory language, we agree with the tax court that the gas was purchased by Great Lakes." *Id*. at 439. This is the identical issue the companies raise here. The first element is satisfied.

It is undisputed that there was a final judgment on the merits in *Great Lakes I* and that Great Lakes was a party to that action. But Northern Border was not a party, and the commissioner concedes that collateral estoppel therefore cannot prevent Northern Border from raising the argument. So although the second and third elements of collateral estoppel are met as to Great Lakes, we hold that collateral estoppel does not preclude Northern Border from litigating the use-tax issue.

The commissioner has also established that Great Lakes had a full and fair opportunity to be heard on whether compressor-fuel consumption was subject to the use tax. Great Lakes argued the use-tax issue twice before the tax court and once before the supreme court. Because the issue was fully briefed and presented to the supreme court, which thoroughly analyzed it, we conclude that Great Lakes had a full and fair opportunity to be heard.

Great Lakes argues that collateral estoppel should not apply in this case because the decision regarding the use tax was not "necessary" to the decision in *Great Lakes I*. Courts do not always include the "necessary" prong as part of the collateral estoppel analysis, but it exists nonetheless. Though some cases analyze collateral estoppel using only the four-element test (*see, e.g.*, *A & H Vending*, 608 N.W.2d at 547; *Tarutis*, 393 N.W.2d at 669), others require that the issue determined must have been a necessary component in the prior judgment. *See, e.g.*, *Falgren*, 545 N.W.2d at 905; *Transamerica*, 267 N.W.2d at 182. The commissioner argues that collateral estoppel precludes Great Lakes' contest because the use-tax issue was a necessary component of the *Great Lakes I* decision.

The commissioner supports his argument that the use-tax issue was necessary to *Great Lakes I*, citing *Custom Ag Service of Montevideo v. Comm'r of Revenue*, 728 N.W.2d 910 (Minn. 2007). In *Custom Ag*, the supreme court explained that "when we analyze a case that implicates the use tax . . . we first apply the three-element *Morton Buildings* test to determine whether [the use tax applies]. . . . If we determine that all three elements of the test are met, we then consult [the exemptions to the use tax], to

determine whether that property, as used by the taxpayer, is tax exempt." *Id*. at 915 (emphasis omitted). We are convinced by the commissioner's common-sense argument that a court naturally determines whether the use tax applies before it determines whether an exemption applies. A thing can be exempted from a tax only if it is initially among the class of taxable things.

The companies attempt to distinguish *Custom Ag* because "it involved a unique situation in which the resolution of the first issue (whether grain bins were 'used' by a contractor that installed them as components of drying systems) effectively resolved the second issue (whether the bins were 'used' (as bins) before their incorporation into the dryer systems)." Although *Custom Ag* analyzed the use tax and the exemptions as applied to farm machinery rather than compressor fuel, we see no reason why the practical steps of analysis should be any different when applying the use tax to compressor-fuel consumption.

The companies also argue that the use-tax issue was unnecessary "because it was contrary to the appellate judgment actually entered and, standing alone, would have produced a result opposed to that judgment." The companies rely on *Byron*, 255 N.W.2d 226, as support. The reliance is misplaced. In *Byron*, the supreme court held that collateral estoppel precluded a landowner from litigating his property's acreage because the court had decided that issue in his prior appeal. *Id.* at 228. The landowner had prevailed in the prior action despite having the nondispositive issue regarding his acreage decided against him.

Similarly, in *Great Lakes I*, the issue of whether the use tax applied to Great Lakes' compressor-fuel consumption was decided against Great Lakes. Merely being nondispositive does not render an issue "unnecessary" to the decision. *See Johnson v. United States*, 520 U.S. 461, 466–69, 117 S. Ct. 1544, 1548–50 (1997) (analyzing first the nondispositive issues of (1) whether there was an error, (2) whether the error was plain, and (3) whether the error affected the appellant's substantial rights; but then deciding whether the error warranted reversal because of the dispositive issue of whether it "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings"). Reduced to its most basic composition, the companies' argument is that a judicial analysis need not follow a logical path; rather, courts should skip immediately to an analysis of whatever issue disposes of the appeal. We reject this argument. We similarly reject the companies' effort to render as unnecessary that part of *Great Lakes I* that holds that the use of compressor fuel is a taxable event; the *Great Lakes I* exemption analysis followed a logical path that first determined the preliminary issue of taxability.

Collateral estoppel precludes Great Lakes from contesting the supreme court's conclusion that its use of compressor fuel is subject to Minnesota's use tax under Minnesota Statutes section 297A.63, subdivision 1. As an alternative basis for our decision to affirm as to Great Lakes, and to address the contentions of Northern Border, we turn to the merits of the companies' contention that they are not subject to the use tax as a matter of law.

II

The commissioner argues that *Great Lakes I* is controlling and requires us to affirm on the merits based on the supreme court's holding that compressor-fuel consumption is subject to the use tax. The argument is convincing.

We are not moved by the companies' urging that we disregard *Great Lakes I* on the merits. Because the supreme court's use-tax-application discussion in *Great Lakes I* was necessary to its decision, we reject the companies' related argument that the decision does not trigger *stare decisis* based on the notion that the analysis was merely dictum. In addition to being "necessary," the *Great Lakes I* analysis also does not meet the ordinary definition of "dictum," since "[d]ictum is a statement concerning an issue without the benefit of adversarial briefing and argument," *State v. Soukup*, 656 N.W.2d 424, 431 (Minn. App. 2003) (quotation omitted), *review denied* (Minn. Apr. 29, 2003), and "[d]icta are generally considered to be expressions in a court's opinion which go beyond the facts before the court and therefore are the individual views of the author of the opinion and not binding in subsequent cases." *State v. Timberlake*, 744 N.W.2d 390, 395 n.7 (Minn. 2008) (quotation omitted).

The use-tax issue was fully briefed and argued in *Great Lakes I*. The supreme court's thorough analysis demonstrates that the court weighed all the relevant facts and relied on its understanding of the law. Its discussion of the use tax did not stray into hypothetical facts and was not offered merely in passing. Its taxability holding was a reasoned step on its path to its exemption holding. We conclude that the supreme court's analysis and determination of the use-tax issue in *Great Lakes I* was not dictum. We are

bound by that decision, which holds that the use of compressor fuel is subject to use tax under Minnesota Statutes section 297A.63, subdivision 1.

We pause briefly to address the companies' unusual argument that we should reject the holding of *Great Lakes I* simply because the supreme court got it wrong. They argue that the supreme court's decision on the use-tax issue "reflected a misunderstanding and misstatement by the Court of Great Lakes' legal position and a failure by the Court to consider controlling administrative authorities bearing upon that issue." Specifically, Great Lakes contends that the supreme court demonstrated its misunderstanding of Great Lakes' position because the supreme court erroneously stated that "Great Lakes acknowledges that it receives compressor fuel from [shippers] as part of the consideration for transportation services." *Great Lakes I*, 638 N.W.2d at 439. Great Lakes now denies having made this acknowledgment and asserts that the supreme court's "misconception of Great Lakes' position formed the basis for the Court's statement that 'the substance of the transaction is an exchange of the compressor-consumed gas for transportation services' and that the transaction is thus a 'purchase.'" The companies' request that we actually overrule the supreme court ignores the fact that our role as an "error correcting court" does not extend to correcting alleged errors in supreme court precedent. *See State v. Ward*, 580 N.W.2d 67, 74 (Minn. App. 1998) (stating that as an intermediate appellate court, this court is "not in [a] position to overturn established supreme court precedent"); *State v. Adkins*, 706 N.W.2d 59, 63 (Minn. App. 2005) (noting this court's role as "an error-correcting court").

We add that even if Great Lakes did not acknowledge that it received the compressor fuel as consideration, the undisputed elements of the transaction remain the same and support the supreme court's conclusion. Shippers furnish the compressor fuel and convey money to the companies in exchange for the companies transporting the gas through the pipelines. This is consideration, and the supreme court's conclusion that Great Lakes "purchased" the compressor fuel did not depend on Great Lakes' acknowledgment.

Great Lakes also ascribes error to the supreme court because the court allegedly failed to discuss several administrative rulings in *Great Lakes I*. According to Great Lakes, the omission means that the supreme court failed to consider those authorities. We should either reverse the supreme court's decision or ignore it, argues Great Lakes, because it was wrong as a matter of law. At oral argument, the companies' attorney acknowledged expressly that to reverse the district court's summary judgment decision, "we would have to not only reach the conclusion that the supreme court made a mistake on the facts regarding what was and [what] was not acknowledged, but also on the law in disregarding the standard that [the companies are] saying we ought to apply, and [that] the supreme court should have applied, but didn't." Again, we lack authority to reverse the supreme court.

Great Lakes referred to three administrative decisions in briefing to the supreme court in *Great Lakes I*—and the companies cite the same three decisions in this appeal. They contend that the decisions have the force of law and support their argument that no "purchase" occurred. Because the supreme court did not explicitly address the

administrative decisions in *Great Lakes I*, the companies contend that the supreme court mistakenly ignored this binding authority, rendering its reasoning flawed. We conclude that even if we could reverse the supreme court, the companies give no reason to do so. The cited revenue notices are not only off-point, they also are not binding on the supreme court and they are not binding on this court. "Revenue notices do not have the force and effect of law and have no precedential effect." Minn. Stat. § 270C.07, subd. 2 (2008). The companies' argument that the regulations have the "force of law" and are "controlling" is inaccurate.

Even without the force of *Great Lakes I*, the undisputed facts support the district court's conclusion that the use tax applies to the companies' compressor-fuel consumption. This court reviews a district court's conclusions of law, construction of statutes, and application of the law de novo. *See A & H Vending*, 608 N.W.2d at 546–47 (Minn. 2000) (reviewing grant of summary judgment by tax court).

Minnesota Statutes section 297A.63, subdivision 1, imposes a use tax on "the privilege of using, storing, distributing, or consuming in Minnesota tangible personal property or taxable services purchased for use, storage, distribution, or consumption in this state." Tangible personal property includes natural gas. Minn. Stat. § 297A.61, subd. 10(a) (2006). Taxpayers are liable for use taxes on tangible personal property if the property is used, stored, or consumed in Minnesota; the property is purchased; and the purchase was made for use, storage, or consumption in Minnesota. *Custom Ag*, 728 N.W.2d at 914; *Great Lakes I*, 638 N.W.2d at 438. The companies' compressor-fuel consumption satisfies all three elements.

First, the companies do not contest whether they "use" the compressor fuel in Minnesota. "Use" is broadly defined for tax purposes as "the exercise of a right or power incident to the ownership of any interest in tangible personal property." Minn. Stat. § 297A.61, subd. 6(a) (2006). The supreme court has explained that "our reluctance to narrow the definition of 'use' is consistent with the general goal of the . . . use tax statute[], namely, to establish a complementary scheme whereby everything is presumed taxable unless specifically exempted." *Great Lakes I*, 638 N.W.2d at 438 (quotation omitted). The companies consume, and thereby "use," the compressor fuel in their Minnesota compressors.

Second, the fuel is "purchased." A "purchase" includes (but is not limited to) any "transfer of title or possession, or both, of tangible personal property . . . for a consideration in money or by exchange or barter." Minn. Stat. § 297A.61, subd. 3(b)(1). The companies concede that the shippers transfer possession of the compressor fuel to them. The district court determined that the compressor fuel is consideration for their transportation services because the companies require the shippers to "provide the gas, one way or the other, if they want to use the transportation services."

The companies appropriately focus us on the definition of consideration. Consideration is "[s]omething . . . bargained for and received by a promisor from a promisee." *Black's Law Dictionary* 324 (8th ed. 2004). "Consideration may consist of either a benefit accruing to a party or a detriment suffered by another party." *C & D Invs. v. Beaudoin*, 364 N.W.2d 850, 853 (Minn. App. 1985), *review denied* (Minn. June 14, 1985). Consideration exists when "something of value [is] given in return for

performance or promise of performance." *Brooksbank v. Anderson*, 586 N.W.2d 789, 794 (Minn. App. 1998), *review denied* (Minn. Jan. 27, 1999).

The compressor fuel is valuable to the companies, since they require it to provide their service. Most relevant, they require it of the shippers as necessary to move the shippers' natural gas through the pipelines. Whether this obligation exists in a tariff or in some other form does not alter the nature of the exchange. One of the commissioner's experts observed reasonably that, "[n]atural gas used for fuel [of the compression engines] . . . is part of the [companies'] cost of service and is different from other elements of the cost of service only in that it is furnished by the shippers in-kind." Given the companies' transportation apparatus, without some provision for compressor fuel the companies would need to secure the gas or some alternative fuel through other means, at some cost, which they would either incur as a loss or offset through their transportation rates. In other states, electricity fuels some of Northern Border's compressors, and its pipeline rates cover the cost. Because the compressor fuel is "something of value" given in exchange for the companies' service, the compressor-fuel transfer from the shippers to the companies meets the definition of a "transfer . . . for a consideration . . . or by exchange or barter."

Alternatively, even if the compressor-fuel transfer did not meet the definition of "consideration," it meets the statutory definition of "purchase." "Purchase" includes the "transfer of . . . possession . . . of . . . property . . . by exchange or barter." Minn. Stat. § 297A.61, subd. 3(b)(1). As the supreme court declared in *Great Lakes I*, "the substance of the transaction is an *exchange* of the compressor-consumed gas for transportation

services." 638 N.W.2d at 439 (emphasis added). Because the transaction is an in-kind exchange or barter of compressor fuel for transportation services, acquisition of the compressor fuel meets the statutory definition of a "purchase."

And finally, the third prong of the use-tax statute is met without dispute. It requires that the property be used or consumed in Minnesota. All of the companies' compressors at issue operate in Minnesota. The challenged taxes arise from use of fuel in those compressors particularly. The purchase of compressor fuel was for use or consumption in Minnesota.

Because the companies' compressor-fuel consumption meets all three requirements under Minnesota's use-tax statute, we hold that the use tax applies to their compressor-fuel consumption.

Affirmed.