

2015 IL App (2d) 140741
No. 2-14-0741
Order filed June 5, 2015

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

BRANDENBURG INDUSTRIAL SERVICE COMPANY,)	Appeal from the Circuit Court of Du Page County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 13-MR-1292
)	
BRIAN HAMER, in his official capacity as Director of the Illinois Department of Revenue,)	
THE ILLINOIS DEPARTMENT OF REVENUE, and DAN RUTHERFORD, in his official capacity as Treasurer of the State of Illinois,)	
)	Honorable Bonnie M. Wheaton,
Defendants-Appellants.)	Judge, Presiding.

PRESIDING JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Jorgensen and Birkett concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred in granting the plaintiff's motion for partial summary judgment.

¶ 2 Brandenburg Industrial Service Company (Brandenburg) filed a six-count complaint pursuant to the State Officers and Employees Money Disposition Act (Protest Monies Act) (30 ILCS 230/1 *et seq.* (West 2010)), seeking, in relevant part, a declaratory judgment that it was

entitled to a manufacturing exemption from use tax on certain equipment that it had purchased (count II). The action was brought against the Illinois Department of Revenue (Department); Brian Hamer, as director of the Department; and Dan Rutherford, in his capacity as treasurer of the state of Illinois. Brandenburg filed a motion for partial summary judgment as to count II, pursuant to section 2-1005 of the Code of Civil Procedure (735 ILCS 5/2-1005 (West 2012)), and the trial court granted that motion. Pursuant to stipulation of the parties, the trial court entered judgment in favor of Brandenburg on the remaining counts of the complaint. The Department appeals from the trial court's order granting partial summary judgment on count II in favor of Brandenburg. We reverse and remand for additional proceedings.

¶ 3

I. BACKGROUND

¶ 4 In late 2010, the Department audited the use and sales tax returns filed by Brandenburg for the period July 1, 2007, to June 30, 2010, and determined that Brandenburg was not entitled to the manufacturing process exemption (MPE) under the Use Tax Act (35 ILCS 105/3-5(18) (West 2010)). Specifically, Brandenburg owed use tax on items of tangible personal property (manufacturing equipment) that it purchased to produce its products. On March 6, 2012, the Department issued a tax liability notice to Brandenburg, assessing \$340,238 in use tax, \$53,457 in interest, and a penalty of \$79,331, for a total deficiency of \$473,026. Thereafter, Brandenburg requested review before the Informal Conference Board. Brandenburg's position was that the equipment at issue was used in its seven-step manufacturing process and was thus entitled to the MPE.

¶ 5 On May 14, 2013, following review before the Informal Conference Board, the Department issued its audit results and assessed use taxes against Brandenburg in the amount of \$220,691, interest of \$53,073, and a penalty of \$54,930, for a total deficiency of \$328,694. On

June 7, 2013, the Department issued a revised tax liability notice assessing Brandenburg use tax of \$220,691, interest of \$53,519, and a penalty of \$73,240, for a total deficiency of \$347,450. On August 1, 2013, Brandenburg paid the tax liability under protest pursuant to section 2a.1 of the Protest Monies Act (30 ILCS 230/2a.1 (West 2012)).

¶ 6 Attached to one of Brandenburg's pleadings related to its motion for partial summary judgment was an auditor's report, dated May 15, 2013. In that report, the auditor stated that Brandenburg was a structural demolition contractor and sold different types of materials retrieved during demolition of buildings, such as metal, brick, and wood. Per the auditor's request, Brandenburg supplied four sample contracts of jobs it had performed. The auditor found that the contracts did not detail the type of equipment being used or the amount of time assigned to each specific job within the contract. Subsequently, Brandenburg provided a summary sheet for each contract, listing the equipment and the amount of time each piece of equipment was used on the job at issue. The auditor requested additional information as to the types of attachments used with various pieces of equipment (*i.e.*, shear, grapple, hammer, bucket, etc.) and the amount of time the attachments were used during a given project.

¶ 7 The auditor's report revealed that Brandenburg, in response to the above and in trying to establish that the subject equipment was used more than 50% in manufacturing, did time studies of work done at three locations: Flint, Michigan; Massena, New York; and Spring City, Tennessee. Photographs at these job sites were taken every 12 minutes for eight hours on several different days. Brandenburg contended that the data indicated that its machinery was used in an exempt manner in excess of 50% of the time. The auditor found that some photos were unclear as to the type of machine used and the manner in which it was used. Additionally, the auditor noted that the analysis took place outside of Illinois and outside the subject audit period. The

auditor thus found the evidence insufficient to establish that the subject equipment was used 50% of the time in manufacturing. However, of Brandenburg's alleged seven-step manufacturing process, the auditor agreed that three of the steps—decontamination (step 3), cutting (step 4), and sorting (step 5)—were manufacturing.

¶ 8 On August 16, 2013, Brandenburg filed a verified complaint for preliminary and permanent injunction, declaratory judgment, and a refund of monies paid under protest. More specifically, Brandenburg sought: a preliminary injunction enjoining the treasurer from transferring the protested tax payment to another fund in the state treasury (count I); a declaratory judgment that it qualified for the MPE (35 ILCS 105/3-5(18) (West 2010)) (count II); a declaratory judgment that it qualified for a manufacturer's purchase credit (MPC) (35 ILCS 105/3-85 (West 2010)) (count III); a refund of the protested tax payment plus accrued interest (count IV); and, should Brandenburg not prevail, a declaratory judgment that the Department may not impose interest at twice the statutory rate (count V) or impose late payment penalties (count VI). On August 23, 2013, the trial court entered an unopposed preliminary injunction enjoining the Department from transferring Brandenburg's protest payment out of the protest fund.

¶ 9 On February 11, 2014, Brandenburg filed a motion for partial summary judgment on count II. Brandenburg argued that there were no genuine issues of material fact and that it was entitled, as a matter of law, to the MPE. Brandenburg argued that it was a manufacturer engaged in a manufacturing process. It argued that by changing the form and use of obsolete metal, it changed worthless debris into defined grades of metal for use by other manufacturers. In support of its motion for partial summary judgment, Brandenburg submitted the affidavits of Jack Jasinowski and George William Knack.

¶ 10 In his affidavit, Jasinowski stated that he was Brandenburg's vice president involved in executive and project management for 19 years. Brandenburg was in the business of selling processed and recovered metals. It obtained the metal it processed through its related businesses of demolition, environmental remediation, and site preparation. There were seven steps to obtaining and processing the metals Brandenburg sold: (1) identifying the metal in a particular structure; (2) removing the metal; (3) removing contaminants from the metal; (4) cutting the metal into appropriate sized pieces for sale; (5) sorting the materials by weight and alloy content; (6) preparing the metal to meet customer specifications as to size, thickness, and alloy content; and (7) staging, which means placing the products in specific locations for loading and transporting to customers. Brandenburg used the following types of equipment during these steps: alloy analyzers, hydraulic excavators (backhoe), wheel and track loaders, skid steers (bobcats), liquid oxygen trailers, generators, buckets, burn carts, pulverizing jaws, cutting units, processors, shears, grapples, magnets, picks, and sticks. Brandenburg's manufacturing process was the same before, during, and after the audit period at issue. Brandenburg had used the same manufacturing process since Jasinowski joined the company in 1993.

¶ 11 Jasinowski attested that Brandenburg was certified by the International Organization for Standardization (ISO) and the Institute of Scrap Recycling Industries, Inc. (ISRI). To become ISO-certified, Brandenburg was required to document its manufacturing process and to follow that documented process in producing its end product. Since its initial certification in 1995, Brandenburg had consistently remained certified. ISO certification indicated that Brandenburg's manufacturing process was standardized and repeatable. ISRI certification indicated that Brandenburg's end products meet industry-wide standards for alloy content, size, thickness, and cleanliness.

¶ 12 Jasinowski testified that the Department assessed tax liability on certain equipment that was purchased by Brandenburg to be used in its manufacturing process. All the equipment on which the Department placed a use tax was used in Brandenburg's seven-step manufacturing process. Based on his 20 years of experience, Jasinowski opined that Brandenburg used its equipment more than 50% of the time in its manufacturing process. Specifically, Jasinowski opined that Brandenburg's equipment was used 70% to 90% of the time in its manufacturing process. To the extent the auditor found that identifying (step 1), removing (step 2), or staging (step 7) were not part of the manufacturing process, Jasinowski opined that Brandenburg's equipment was still used over 50% of the time in manufacturing. In a March 10, 2014, discovery deposition, Jasinowski acknowledged that these opinions were based on his experience and knowledge, and he did not rely on any documents in coming up with these numbers.

¶ 13 Jasinowski further opined that, based on revenue studies and his review of operations for the years 2007 to 2010, Brandenburg derived in excess of 50% of its revenue from manufacturing. He analyzed each project in that time period and categorized the revenue as derived either: (1) without equipment usage; (2) from manufacturing; or (3) from non-manufacturing. His review was based on 5000 invoices issued during the subject years. The invoices were attached to his affidavit. Invoices based on the sale of metal products were considered manufacturing, while invoices for services such as remediation or site preparation were non-manufacturing. Invoices for labor or other Brandenburg businesses were placed in the "derived without equipment" category. For the years 2007 through 2010, Jasinowski calculated that over 85% of Brandenburg's revenue was derived from manufacturing.

¶ 14 Finally, Jasinowski testified that Brandenburg claimed the Illinois Replacement Tax Income Credit (RTIC) on its income tax returns for the years 2009 and 2010. The RTIC is

available only to taxpayers who are primarily engaged in manufacturing, retailing, coal mining, or fluorite mining. 35 ILCS 5/201(e)(2)(D) (West 2012); 86 Ill. Adm. Code § 100.2101(a) (2013). “Primarily” is defined as being more than 50% of the company’s gross profits earned from manufacturing. See 86 Ill. Adm. Code § 100.2101(f) (2013). As such, the RTIC is a tax credit that is available to companies that earn more than 50% of their gross receipts from manufacturing. The Department allowed Brandenburg \$178,091 of RTIC for 2009 and \$185,518 of RTIC for 2010. Brandenburg argues that, by finding that Brandenburg was entitled to the RTIC, the Department necessarily found that over 50% of Brandenburg’s gross receipts were from manufacturing.

¶ 15 Jasinowski’s affidavit indicates that the purchase of the following equipment, as used in the stated steps, is at issue: two hydraulic breakers (step 3); two aluminum wound magnets (steps 3, 5, 7); two Hubbell magnet controllers (steps 3, 5, 7); two 25 KW generators (steps 3, 5, 7); a straight brick pick (step 3); three hydraulic track excavators with a “demo cab” (steps 2 through 7); three hydraulic track excavators (steps 2 through 7); a grab bucket (steps 3, 5, 7); a grapple (steps 2, 3, 5 and 7); a processor cradle (steps 2, 3, 4, and 6); a rock bucket (steps 3, 5, 7); three skeleton buckets (steps 3, 5, 7); two excavator buckets (steps 3, 5, 7); two excavator sticks (steps 2 through 7); an alloy analyzer (step 1); and three liquid oxygen trailers (steps 2, 4, 6).

¶ 16 Also in support of its motion for partial summary judgment, Brandenburg noted that the Department had previously denied Brandenburg the MPE for the tax years July 1, 2000, to November 30, 2004, and December 1, 2004, to June 30, 2007. Brandenburg contested that denial in the circuit court of Cook County. After a trial, the Cook County Circuit Court found that Brandenburg was entitled to the MPE. Brandenburg argued that it had presented the same evidence in this case and that the Cook County decision was instructive in this case.

Brandenburg attached a copy of the December 10, 2013, order of the circuit court of Cook County, allegedly involving the same issues. The Cook County circuit court found that Brandenburg used its equipment in manufacturing more than 50% of the time. This determination was based on the testimony of Jasinowski and another “expert” witness, both of whom had reviewed time-study photos taken at different locations. It was also based on Jasinowski’s 20 years of experience, and was corroborated by “video evidence.” Additionally, the trial court found that Brandenburg had earned over 50% of its profits from manufacturing. This finding was based on Jasinowski’s testimony, and corroborated by income tax audits conducted by the Department allowing Brandenburg a replacement tax investment credit (RTIC).

¶ 17 Besides Jasinowski’s affidavit, Brandenburg supported its motion for summary judgment on count II with the affidavit of George William Knack. Knack averred that he was employed at a major steel company from 1969 to 2003 and thus had extensive knowledge of steel manufacturing. He remained in the steel manufacturing industry until his retirement in 2007. The predominant raw material in steel manufacturing was scrap steel and iron, which must meet ISRI specifications in order to be further manufactured into specific products. While employed at the steel company, he regularly purchased steel scrap from Brandenburg on behalf of his employer. Brandenburg was a consistent supplier of quality products.

¶ 18 On April 21, 2014, the Department filed a response to Brandenburg’s motion for partial summary judgment. The Department noted that the only evidence about Brandenburg’s alleged manufacturing process was Jasinowski’s testimony. The Department argued that testimony alone, in the absence of any documentary support, was insufficient to establish that it was entitled to the MPE. Specifically, the Department argued that Jasinowski’s affidavit was insufficient to establish the amount of time each asset was used in manufacturing because his

opinion was not based on any documents, books, or records. The Department also argued that Jasinowski's revenue study was insufficient because it failed to identify whether a specific asset was used primarily in an exempt manner. The Department further argued that Brandenburg's eligibility for the RTIC was not dispositive because it was entirely possible to derive more than 50% of gross receipts from manufacturing yet not use a specific asset within the meaning of the MPE. Finally, the Department argued that the Cook County decision was irrelevant because Brandenburg had not demonstrated that the same assets were at issue or that the alleged use of the equipment was the same in both tax periods.

¶ 19 On May 22, 2014, a hearing was held on the motion for partial summary judgment. Following argument, the trial court granted Brandenburg's motion for partial summary judgment. The trial court found the Cook County circuit court's decision persuasive. The trial court also found that the affidavits of Jasinowski and Knack were sufficient to shift the burden of proof back to the Department. It noted that there was no regulation that required Brandenburg to keep time records of how each individual piece of machinery was used. The trial court stated that the Department was asking for something that was impossible for Brandenburg to produce. The trial court found that because the Department had not filed any counter-affidavits, Brandenburg was entitled to partial summary judgment on count II.

¶ 20 Thereafter, the parties entered a stipulation regarding the remaining counts of the complaint. On June 26, 2014, the trial court entered a final judgment finding in favor of Brandenburg on the remaining counts of the complaint. The Department filed a timely notice of appeal.

¶ 21

II. ANALYSIS

¶ 22 On appeal, the Department argues that the trial court erred in granting partial summary judgment in favor of Brandenburg on count II of Brandenburg's complaint. Specifically, the Department argues that Jasinowski's affidavit is insufficient as a matter of law to rebut its *prima facie* case of tax liability. It contends that Jasinowski's opinion that the equipment at issue is used more than 50% of the time in manufacturing is not supported by any documents or records. The Department further contends that Jasinowski's revenue studies were not sufficient because they failed to explain any of the work done on any of the projects. The invoices did not specify what work was performed or what equipment was used. The Department argues that it was therefore not possible to determine whether the money earned was from manufacturing or with use of the subject equipment.

¶ 23 Summary judgment is proper only when the pleadings, depositions, and admissions on record, together with any affidavits, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005 (West 2014); *Gaylor v. Village of Ringwood*, 363 Ill. App. 3d 543, 546 (2006). "In determining whether a genuine issue as to any material fact exists, a court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent." *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 43 (2004). A triable issue precluding summary judgment exists where material facts are disputed or where the material facts are undisputed but reasonable persons might draw different inferences from the undisputed facts. *Id.* We review the grant of summary judgment *de novo*. *Ioerger v. Halverson Construction Co., Inc.*, 232 Ill. 2d 196, 201 (2008).

¶ 24 Illinois imposes a tax on the privilege of using in this state tangible personal property purchased at retail. 35 ILCS 105/3 (West 2014). Purchases of equipment used in a

manufacturing process are exempt from use taxes if (1) the end product is tangible personal property; (2) the manufacturing process employs a procedure that changes the form, use, or name of the tangible item; and (3) the exempt equipment is used “primarily” in the manufacturing process. See 35 ILCS 105/3-5(18) (West 2010); *Van’s Material Co., Inc. v. Department of Revenue*, 131 Ill. 2d 196, 203 (1989). A manufacturing process is defined as “the production of an article of tangible personal property, whether the article is a finished product or an article for use in the process of manufacturing,” and includes “any procedure commonly regarded as manufacturing, processing, fabricating or refining.” 35 ILCS 105/3-50(1) (West 2010).

¶ 25 Regulations applicable to the Retailer’s Occupation Tax Act (Sales Tax Act) (35 ILCS 105/1, *et seq.* (West 2010)) are also applicable to the Use Tax Act. See 86 Ill. Adm. Code § 150.1320. Section 130.330(d) of the Code, which pertains to the Sales Tax Act, states that machinery that is used partially in an exempt manner and partially in a non-exempt manner may qualify for the MPE. 86 Ill. Adm. Code § 130.330(d). That section further states that “the purchaser must be able to establish through adequate records that the machinery or equipment is used over 50 percent in an exempt manner in order to claim the deduction.” *Id.*

¶ 26 Statutes granting tax exemptions are to be construed strictly in favor of the taxing body and against exemption, and the party claiming an exemption bears the burden of clearly proving that it comes within the statutory exemption. *Medcat Leasing Co. v. Whitley*, 253 Ill. App. 3d 801, 803 (1993). In a tax protest case, the Department has the initial burden and is required to issue an assessment that meets a reasonableness requirement to establish its *prima facie* case. *Elkay Manufacturing Co. v. Sweet*, 202 Ill. App. 3d 466, 470 (1990). When the Department issues a corrected return, it is generally deemed to be *prima facie* evidence of the correctness of the tax amount due. *Id.*; 35 ILCS 105/20 (West 2012). The burden then shifts to the taxpayer.

Elkay, 202 Ill. App. 3d at 472. Where the taxpayer’s proof “cannot be said to be so inconsistent or improbable, in itself, as to be unworthy of belief,” the *prima facie* case is overcome. *Goldfarb v. Department of Revenue*, 411 Ill. 573, 581 (1952). If the *prima facie* case is overcome, the burden then shifts back to the Department, which must prove its case by a preponderance of competent evidence. *Id.* at 580. Exemptions are to be strictly construed and any doubts about their application should be resolved in favor of taxation. *Van’s Material Co.*, 131 Ill. 2d at 216.

¶ 27 In the present case, the trial court erred in granting Brandenburg’s motion for partial summary judgment. While the trial court found the Cook County decision persuasive, there was no indication that the same equipment was at issue or that it was used in the same manner as the equipment at issue here. Furthermore, there was a trial in that case and the record indicates that more evidence was presented at that trial than currently presented here by Brandenburg in support of its motion for summary judgment.

¶ 28 Additionally, the trial court found that Jasinowski’s affidavit was sufficient as a matter of law to rebut the Department’s *prima facie* case. We disagree. With respect to the amount of time the subject equipment is used in manufacturing, Jasinowski admitted that his opinions were based on his experience and knowledge, and that he did not rely on any documents. In general, however, “[t]o overcome the Department’s *prima facie* case, a taxpayer must present more than its testimony denying the accuracy of the assessments, but must present sufficient documentary support for its assertions.” *Elkay*, 202 Ill. App. 3d at 472. Thus, Jasinowski’s opinions alone were insufficient to rebut the Department’s *prima facie* case.

¶ 29 We note that documentary support for Brandenburg’s position appears to exist. The auditor’s report indicated that, in support of its entitlement to the MPE, Brandenburg submitted four contracts and a summary sheet listing the equipment number along with a description and

number of hours allocated to each piece of machinery. The auditor then asked for more information as to attachments for various pieces of equipment and the amount of time that those attachments were used. In response, Brandenburg conducted time studies by photographing jobs in various locations to show that its equipment was used more than 50% of the time in the manufacturing process. However, despite the fact that there was documentary support for the assertion that the subject equipment was primarily used in manufacturing as a matter of time, Brandenburg failed to submit any of that evidence in support of its motion for summary judgment.

¶ 30 Moreover, there are questions of fact as to whether the subject equipment is used primarily in manufacturing. While Jasinowski opined that the manufacturing process was seven steps, the auditor found that only steps three, four and five of Brandenburg's process constituted manufacturing. Further, Jasinowski's affidavit indicated that most of the equipment at issue is used in more than one step of the manufacturing process. Of the subject equipment that is used both in manufacturing and non-manufacturing steps, it is unclear whether the primary use is in manufacturing.

¶ 31 Finally, Jasinowski's revenue studies are not sufficient to rebut the Department's *prima facie* case. In support of the revenue studies, Brandenburg submitted invoices. However, the invoices are not descriptive and do not explicitly indicate what work was performed or what product was sold. Furthermore, the revenue studies include jobs performed outside the relevant audit period. While Jasinowski's affidavit with respect to the revenue studies does not entitle Brandenburg to judgment as a matter of law, it is sufficient to raise a question of fact as to whether Brandenburg's equipment was primarily used to generate revenue from manufacturing.

Accordingly, because the record before us raises questions of fact as to whether Brandenburg was entitled to the MPE, summary judgment was improper. *Gaylord*, 363 Ill. App. 3d at 546.

¶ 32

CONCLUSION

¶ 33 For the foregoing reasons, the judgment of the circuit court of Du Page County is reversed and the case is remanded for additional proceedings consistent with this order.

¶ 34 Reversed and remanded.