2012 IL App (1st) 102964-U

THIRD DIVISION
March 30, 2012

1-10-2964



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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| PIONEER COACH LINES, INC.<br><br>Plaintiff-Appellant,<br><br>v.<br><br>THE CITY OF CHICAGO, a municipal corporation; SCOTT V. BRUNER, Director of the Department of Administrative Hearings; THE CITY OF CHICAGO DEPARTMENT OF ADMINISTRATIVE HEARINGS; BEA REYNA-HICKEY, Director of the Chicago Department of Revenue; and THE CITY OF CHICAGO DEPARTMENT OF REVENUE,<br><br>Defendants-Appellees. | ) | Appeal from the Circuit Court of Cook County<br><br>No. 2009 L 51460<br><br>Honorable Sanjay T. Tailor, Judge Presiding. |

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JUSTICE SALONE delivered the judgment of the court.
Justices Neville and Murphy concurred in the judgment.

**ORDER**

***Held:*** Plaintiff's forfeited claim of federal preemption was without merit and the decision of the administrative law judge was not against the manifest weight of the evidence. We affirm.

¶ 1 Plaintiff, Pioneer Coach Lines, Incorporated, (Pioneer) appeals from a circuit court order affirming the administrative decision of the administrative law judge denying its protest petition against the tax and penalty assessment made by the City of Chicago (Chicago) following a hearing with Chicago's Department of Revenue , and finding it liable for non-payment of the Chicago Ground Transportation tax and for non-payment of the Metropolitan Pier and Exposition Authority (MPEA) Airport Departure tax. For the following reasons, we affirm.

¶ 2 BACKGROUND

¶ 3 Plaintiff operates a for profit charter bus company based in Mount Prospect, Illinois. Plaintiff's services include interstate and intrastate travel on its coach buses. Part of plaintiff's services include transportation to and from O'Hare Airport in Chicago. The City of Chicago, under authority of an inter-governmental agreement with the MPEA, collects taxes on behalf of the MPEA on "all persons *** engaged in the business of providing ground transportation for hire to passengers in the metropolitan area at a rate of *** $27 per bus or van with a capacity of over 24 passengers, and for each departure with passengers for hire from a commercial service airport in the metropolitan area ***" (70 ILCS 210/13 (f) (West 2008)). Chicago also imposes a ground transportation tax in the amount of $9 per day on persons engaged in the occupation of providing ground transportation in the city using vehicles with a seating capacity of more than 24 passengers. Municipal Code of Chicago, Ill. § 3-46-30(B)(1)(d).

¶ 4 In May 2004, Chicago entered into an agreement with Pioneer and another company

governing its payment of taxes which Chicago claimed were accrued from 1992 through 2004. Thereafter, Chicago released Pioneer from liability from January 2000 through June 30, 2002. In August 2004, Chicago and Pioneer entered into a payment agreement for taxes which accrued between July 1, 2002 and June 30, 2004. The agreement stated that payments were to be allocated, first toward interest owed, then to principal, then to any penalties incurred. The agreement further stated that no portion of the agreement was a release of tax liability owed by Pioneer to Chicago, and that Chicago was not prohibited from auditing Pioneer and assessing additional taxes due, based on that audit. Chicago subsequently audited Pioneer in December 2005 and April 2008. Arturo Rodriguez and Brian Devereux of the City of Chicago's Department of Revenue performed the audits.

¶ 5 According to Chicago's records, Pioneer made late payments between July 2004 and January 2005, and failed to make any payments between February and June 2005. In October 2005, Chicago provided notice that it intended to request documentation from Pioneer regarding its tax payments and liabilities. In December 2005, the documents that were requested were not made available and Chicago assessed a tax liability against Pioneer of $955,589.35. The assessment was based on Ground Tax liability from January 1, 2000 through June 30, 2005, and MPEA tax liability from July 1, 2003 through June 30, 2005. Pioneer claimed that the assessment was erroneous because it included the previously released time period of January 2000 through June 30, 2002. Thereafter, Pioneer filed a tax protest claiming that the 2005 audit was erroneous and seeking relief from the claimed liability.

¶ 6 In April 2008, Chicago performed a subsequent audit of Pioneer. In this assessment, Chicago reviewed records kept by Pioneer, which it had not done previously. Thereafter, Chicago issued a new assessment limited to the period of July 1, 2002 through June 30, 2005. Pioneer then filed an amended protest, and an administrative hearing was held in 2009.

¶ 7 Both Rodriguez and Devereux testified at the hearing. Rodriguez stated that he was responsible for performing the field audit of Pioneer's records in April 2008. The audit was conducted by choosing five 'test months' wherein he reviewed annual tax returns, daily vehicle activity sheets, access permit records, payment records and other forms which Pioneer recorded to determine which trips were taxable. After determining the number of taxable trips Pioneer had undertaken, Rodriguez compared Pioneer's reported tax returns for the Ground Transportation tax and MPEA tax with the number of trips that he found taxable. That comparison revealed an underpayment of taxes, from which Rodriguez created an "error ratio," which he then applied to the remaining months of the audit to determine the tax liability Pioneer accrued.

¶ 8 Devereux determined the amount of the tax assessment by reviewing the tax liability calculation and comparing it to the payments made by Pioneer for the same time period. Devereux explained that the payments made by Pioneer were applied first to outstanding interest on taxes owed, then to principle, then to penalties assessed. Chicago alleged that Pioneer accrued $54,311.76 in unpaid Ground Transportation Tax liability and $9,120.33 in unpaid MPEA airport departure tax liability.

¶ 9 Pioneer called, Filomena Natalino, its employee who was responsible for payment of taxes from 2006 through 2009. She testified that she was not Pioneer's accountant, nor was she employed by or responsible for the records kept during the period of the audit. She also testified as to the identities of certain clients denoted in Pioneer's records as not-for-profit. Her testimony contradicted some of Pioneer's documentary evidence regarding which clients were not-for-profit organizations.

¶ 10 Following the presentation of evidence, the administrative law judge (ALJ) found the testimony of Devereux and Rodriguez to be credible and their methodologies to be fair and reliable. The ALJ also noted several deficiencies in Pioneer's presentation of evidence. Specifically, Pioneer failed to meet its burden of establishing tax exemptions and the errors in Rodriguez' reporting did not render his methods or results unreliable. The ALJ found Pioneer liable for non-payment of the Ground Transportation tax and the MPEA airport departure tax. The ALJ further found that the assessment of penalties was appropriate where Pioneer failed to make its payments in a timely fashion for years leading up to the 2008 audit. The ALJ denied Pioneer's petition and found Pioneer liable for non-payment of Ground Transportation tax in the amount of $57,660.48, through April 2, 2009. This assessment included taxes due in the amount of $31,731.18, interest accrued totaling $13,066.32, a late penalty of $4,930.19, and a negligence penalty of $7,932.79, with interest continuing to accrue on unpaid taxes. The ALJ then found Pioneer liable for non-payment of the MPEA Airport Departure tax in the amount of $9,682.75, through April 2, 2009. This amount included taxes due of $4,240.68, interest

accrued of $1,116.94, a late penalty of $3, 264.97, and a negligence penalty of $1,060.17, with interest continuing to accrue on unpaid taxes. The total debt for the Ground Transportation and MPEA Airport Departure taxes was $67,343.23.

¶ 11 Pioneer's appeal of this order to the circuit court of Cook County was denied. Pioneer now appeals the circuit court's order.

¶ 12 ANALYSIS

¶ 13 On appeal Pioneer raises several issues. First, that it is not subject to the Ground Transportation and MPEA Airport Departure taxes because they are preempted by federal law. Second, that Chicago lacks the authority to collect the MPEA Airport Departure tax. Lastly, that the ALJ's findings are against the manifest weight of the evidence. Chicago responds that Pioneer's first two claims of error have been forfeited because they were not raised during the administrative hearing and that the ALJ's findings are supported by the record. We address each of these claims in turn.

¶ 14 *A. Federal Preemption*

¶ 15 Initially, we address Chicago's argument that Pioneer's preemption claim is forfeited. The record is clear that Pioneer did not raise this argument in its administrative hearing. However, Pioneer contends that preemption in this instance raises a question of subject matter jurisdiction which cannot be forfeited.

¶ 16 It is axiomatic that arguments not raised during the course of an administrative hearing are deemed forfeited for the purposes of review. *Cook County Board of Review v. Property Tax Appeal Board*, 395 Ill. App. 3d 776, 786 (2009). Where Congress

designates a forum for the resolution of disputes over an area in which it has enacted substantive provisions, the issue of preemption is jurisdictional. *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 539 (1996). Alternatively, where Congress creates a substantive rule of law without vesting the exclusive jurisdiction over those controversies in another body, the issue of preemption is not jurisdictional, but instead more in the nature of an affirmative defense which can be forfeited. *Id.*

¶ 17 Here, Pioneer contends that the Interstate Commerce Commission Terminal Act of 1995 (ICCTA), 49 U.S.C. § 14501 *et seq.*, (2008), prohibits the imposition of local taxes on interstate motor carriers. Chicago contends, and we agree, that the section of the statute relied upon by Pioneer is inapplicable. Specifically, Pioneer quotes section 14501 © entitled "Motor Carriers of Property." Pioneer goes on to cite federal case law which deals specifically with that section of the statute. Even if we were to agree with Pioneer that the section cited was appropriate for analysis, Congress did not create a specific federal forum for disposing of claims under the ICCTA. Under these circumstances, challenges based on federal preemption are not jurisdictional, but more of the nature of an affirmative defense because Congress did not "confide primary interpretation and application of its rules to a specific and specially constituted tribunal." *Haudrich*, 169 Ill. 2d at 539.

¶ 18 We find Pioneer's reliance on this section disingenuous at best. The ICCTA has separate provisions for "Motor Carriers of Passengers" in section 14501 (a), which Pioneer fails to acknowledge in its argument. Indeed Pioneer's entire argument hinges on a prohibition in

section 14501 (c) which is not present in section 14501 (a). Moreover, the case law cited clearly deals with motor carriers of property and not passengers. Illinois jurisprudence has disposed of this same argument with regards to the appropriate section of the ICCTA, wherein this court held that the imposition of the MPEA Airport Departure and Ground Transportation taxes were not preempted by the ICCTA. *Tri-State Coach Lines, Inc., v. Metropolitan Pier and Exposition Authority*, 315 Ill. App. 3d 179, 197-98 (2000). Under either circumstance, Pioneer's claim of federal preemption fails. *Id.*

¶ 19 We now turn to Pioneer's claim that Chicago lacks the authority to collect the MPEA Airport Departure tax. Specifically, Pioneer argues that because the inter-governmental agreement which granted Chicago authority to collect the tax was created in 1992 and the MPEA was amended in 2000 without an amendment to the inter-governmental agreement, Chicago lost its authority to collect the tax with the amendment. Chicago responds, contending, first that this argument is also forfeited and that to the extent that it is not forfeited, the 2000 amendment did not invalidate the 1992 agreement.

¶ 20 We recognize that a legislative amendment to a statute is presumed to change the law. *Chicago Teachers Union, Local No. 1 v. Board of Education of the City of Chicago* 2012 IL 112566, ¶21. However, it is presumed that the General Assembly acts with the knowledge of existing common law and previous enactments. *Mutual Management Services, Inc., v. Swalve*, 2011 IL App (2d) 100778, ¶8. We further presume that the legislature will not enact a law that completely contradicts another statute or is internally inconsistent. *Id.*

¶ 21 Here, the legislature amended section 13(f) of the MPEA ordinance. 70 ILCS 210/13(f) (West 2008). The amendments make no reference to the inter-governmental agreement, which was in effect at the time of the amendments. *Id.* Pioneer contends that the absence of an updated agreement renders the 1992 agreement invalidated. However, as indicated above, this is the opposite form of statutory construction required under Illinois law. *Swalve*, 2011 IL App (2d) 100778 at ¶8. To the contrary, the legislature is presumed to have known that the agreement was in effect when it amended the statute. *Id.* Its decision not to make any changes to the section at issue, does not invalidate the prior agreement but, instead it remains unchanged. That is to say, it remains in effect, as it has been since 1992. Moreover, no portion of the intergovernmental agreement itself has been changed, nor does Pioneer claim that any of the conditions of termination therein have occurred. Thus, we find, consistent with Illinois jurisprudence governing statutory interpretation, that the agreement and statute remain in effect. *Id.*

¶ 22 Lastly, Pioneer contends that the findings of the ALJ are against the manifest weight of the evidence. Pioneer argues that the penalty assessed for its non-cooperation should have been abated because they had reason to do so, based on Chicago's erroneous prior audit. Pioneer further argues that there was no evidence provided to establish that it failed to comply once the audit period was corrected to exclude the dates covered in the release. We disagree.

¶ 23 Section 3-110 of the Administrative Review Law provides: "The findings and conclusions of the administrative agency on questions of fact shall be held to be prima

facie true and correct." 735 ILCS 5/3-110 (West 2008). We will not reverse findings of fact, following an administrative hearing unless they are against the manifest weight of the evidence. *Faith Builders Church, Inc., v. Department of Revenue*, 378 Ill. App. 3d 1037, 1042 (2008). Findings of fact are against the manifest weight of the evidence where they are arbitrary, unreasonable, unsupported by the record, or where the records clearly requires the opposite finding. *Id.*

¶ 24 The record before us, and Pioneer's own brief establishes that they did not respond or comply with sending requested documentation after receiving notice that they would be audited. Moreover, both Devereux and Rodriguez testified that Pioneer provided incomplete records and that the records which were supplied were sometimes coded or incomprehensible. We are not persuaded by Pioneer's contention that they were justified in not providing their records because of Chicago's error in selecting dates to be covered in the initial audit. Instead, we find that Pioneer's silent non-compliance, along with its late payments could have reasonably been found by a trier of fact to be negligence, thereby incurring a penalty.

¶ 25 Pioneer next contends that the findings as to their actual tax liability for the Ground Transportation tax should be less because the ALJ included trips in the calculation that were tax exempt. In Illinois, the burden to prove a tax exemption lies with the taxpayer and we construe any ambiguity in favor of taxation. *Faith Builders Church*, 378 Ill. App 3d at 1042. The Ground Transportation tax, in section 3-46-060, allows for an exemption where a vehicle is provided to a not-for-profit organization or governmental body and

"(1) the vehicle is used solely for the purposes for which the organization is dedicated or for governmental purposes, and (2) the applicable consideration is billed to and paid directly by the not-for-profit organization or the governmental body and not by any of the passengers."

¶ 26 Pioneer contends that it provided evidence that many of its trips were for not-for-profit entities. It should be noted that the ALJ expressed doubt as to the credibility of the testimony of Pioneer's witness regarding the identity of several of the not-for-profit clients, particularly because Pioneer's tax returns for the relevant time period claimed zero tax exempt trips. Even if we were to conclude that the clients were not-for-profit entities within the meaning of the ordinance, that alone would be insufficient to establish tax exemption. The ordinance is clear that in addition to the entity being a not-for-profit organization, the trip must also be billed to and paid directly by the organization, in order to receive tax exempt status. The record is devoid of any payment records whatsoever. Thus, even if Pioneer established the identity of the clients for the trips, absent proof of how the not-for-profit organizations were billed and paid, Pioneer failed to establish the tax exempt status for the trips. Absent such evidence, the default position in Illinois is in favor of taxation. *Balmoral Racing Club, Inc., v. Topinka*, 334 Ill. App. 3d 454, 457 (2002). Accordingly, we find that the findings of the ALJ regarding the purported tax-exempt trips were not against the manifest weight of the evidence.

¶ 27 Pioneer also asserts that the ALJ's findings were against the manifest weight of the evidence because Chicago failed to credit payments and inappropriately applied their

payments, thereby leading to an erroneous calculation of its tax liability. However, Pioneer failed to provide any documentary evidence in support of its claim that payments were not credited. Chicago, through its auditors, did provide evidence that each payment received was credited to Pioneer's tax liability. The ALJ noted one error in the auditor's work, in which the auditor credited a full payment on Pioneer's behalf and transposed the interest payment and principal payment numbers. The effect of that error was to decrease the principle owed more than should have been done, per the agreement. The ALJ found, and we agree, that this error benefitted Pioneer because it decreased its future interest liability, which is calculated based on the principle owed. Aside from this error, the ALJ did not find, nor does our review reveal any additional miscalculations in Pioneer's tax liability. Thus, because the record supports the basis for the calculations, we hold that the ALJ's findings regarding Pioneer's tax liability were not against the manifest weight of the evidence,.

¶ 28 CONCLUSION

¶ 29 For the aforementioned reasons, we affirm the circuit court of Cook County in denying Pioneer's appeal from the City of Chicago Department of Revenue.

¶ 30 Affirmed.