2013 IL App (4th) 120973-U

NO. 4-12-0973

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
September 5, 2013
Carla Bender
4th District Appellate
Court, IL

ILMO PRODUCTS COMPANY, an Illinois Corporation, Plaintiff-Appellee, v. THE DEPARTMENT OF REVENUE; BRIAN HAMER, Director of Revenue; and ALEXI GIANNOULIAS, Treasurer of the State of Illinois, Defendants-Appellants.	)	Appeal from Circuit Court of Sangamon County No. 08MR49 Honorable John Schmidt Judge Presiding

PRESIDING JUSTICE STEIGMANN delivered the judgment of the court.
Justices Appleton and Holder White concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed the trial court's summary-judgment determination, concluding that the "HAZMAT" fees the plaintiff imposed on its high-pressure gas cylinders were not subject to the retailers' occupation tax because they concerned a nontaxable rental and the plaintiff's cryogenic systems were exempt from the use tax as manufacturing machinery.

¶ 2 In February 2008, plaintiff, ILMO Products Company (ILMO), sued defendants, the Illinois Department of Revenue (Revenue), Brian Hamer, and Alexi Giannoulias, seeking a declaratory judgment that the "retailers' occupation tax" and "use tax"—which Revenue had levied on ILMO's high-pressure gas cylinders and cryogenic gas systems—were improper. In July 2012, ILMO filed a motion for summary judgment based on the parties' stipulated facts, positing that (1) the "HAZMAT" fees ILMO imposed on its high-pressure gas cylinders were not subject to the retailers' occupation tax because they concerned a nontaxable rental, rather than a

taxable sale, and (2) the cryogenic systems were exempt from the use tax as manufacturing machinery. In September 2012, the trial court granted summary judgment in favor of ILMO.

¶ 3 Defendants appeal, arguing that the trial court erred by granting ILMO's motion for summary judgment. We disagree and affirm.

¶ 4 I. BACKGROUND

¶ 5 A. The Audit

¶ 6 In January 2008, Revenue, after conducting a tax audit of ILMO—an Illinois corporation whose business included, among other things, (1) renting high-pressure gas cylinders and (2) purchasing and renting to customers cryogenic systems that store liquid gases and convert them to gaseous gases—found that ILMO owed retailers' occupation and use taxes, penalties, and interest. Shortly thereafter, ILMO paid $140,761.51 in taxes, penalties, and interest under protest. That same day, ILMO sued defendants, seeking a declaratory judgment that the retailers' occupation tax and use tax—which Revenue had levied on ILMO's high-pressure gas cylinders and cryogenic gas systems, respectively—were improper.

¶ 7 B. The Parties' Stipulated Facts

¶ 8 The parties thereafter agreed to the following stipulated facts:

¶ 9 ILMO sells gases to its customers and in so doing charges a "HAZMAT" fee "related to ILMO's compliance with hazardous materials laws and regulations for the sale of industrial, medical[,] and specialty gases." ILMO collects a retailers' occupation tax on both the sale and the fee.

¶ 10 ILMO also rents high-pressure gas cylinders to its customers. ILMO does not collect retailers' occupation tax on the rental fees because the rental does not involve the sale of

property. However, ILMO does collect a separately stated "HAZMAT" fee related to ILMO's "compliance with hazardous materials laws and regulations." The retailers' occupation tax that Revenue claims is due represents taxes on the "HAZMAT" fee on the cylinder rentals.

¶ 11 ILMO additionally owns and leases to its customers cryogenic systems that (1) store liquid gases supplied by ILMO's supplier and delivered in a bulk truck and (2) convert the liquid gases to gaseous gases. ILMO's cryogenic-systems customers use the systems as intended. Once converted, those customers either use the gases (1) in their manufacturing process, *e.g.,* welding, laser cutting, injection into plastics, or (2) for delivery of gases to medical patients.

¶ 12 C. The Procedural History

¶ 13 In February 2008, ILMO sued defendants, seeking a declaratory judgment that the retailers' occupation tax and use tax were improper. In July 2012, ILMO filed a motion for summary judgment based on the parties' previously outlined stipulated facts, positing that (1) the "HAZMAT" fees ILMO imposed on its high-pressure gas cylinders were not subject to the retailers' occupation tax because they concerned a nontaxable rental, rather than a taxable sale (see 35 ILCS 120/2 (West 2008) (the retailers' occupation tax is a tax "imposed upon persons in the business of *selling* at retail tangible personal property" (emphasis added)), and (2) the cryogenic systems were exempt from the use tax as manufacturing machinery because it uses those systems to convert bulk liquid gases into gaseous gases for sale to its customers (see 35 ILCS 105/3-5(18) (West 2008) (exempting from the use tax "[m]anufacturing and assembling machinery and equipment *used primarily in the process of manufacturing or assembling* tangible personal property for wholesale or retail sail or lease" (emphasis added)). (ILMO also argued that the imposition of the use tax on the cryogenic systems was improper because its customers

used the those systems to convert—or, "manufacture"—the gases as well.)

¶ 14 Revenue responded that summary judgment was improper for two reasons. First, ILMO failed to prove that no question of material fact existed regarding ILMO's "HAZMAT" fees on the cylinder rentals being subject to the retailers' occupation tax because it presented no evidence (1) that a customer could rent a cylinder without purchasing gas from ILMO or (2) how it calculates its "HAZMAT" fees, indicating that the fee was merely an attempt to evade the retailers' occupation tax by charging a fee on tax-exempt cylinder rental that, in fact, related to the sale of gas. Second, ILMO failed to prove that its cryogenic systems were not subject to the use tax because the stipulated facts did not show that (1) those systems were primarily used for manufacturing rather than storage or (2) the conversion of liquid gas to gaseous gas constituted "manufacturing."

¶ 15 In September 2012, the trial court granted summary judgment in favor of ILMO, ordering the State Treasurer to refund the taxes ILMO paid under protest.

¶ 16 This appeal followed.

¶ 17 II. ANALYSIS

¶ 18 Defendants argue that the trial court erred by granting ILMO's motion for summary judgment. Specifically, defendants contend that a question of fact exists as to whether (1) ILMO's "HAZMAT" fees on its high-pressure cylinder rentals were taxable under the retailer's occupation tax, and (2) the cryogenic systems are taxable under the use tax because the facts actually show that they were primarily used for storage rather than manufacturing. We address defendants' contentions in turn.

¶ 19 A. Summary Judgment and the Standard of Review

¶ 20 " 'Summary judgment is appropriate where the pleadings, affidavits, depositions, and admissions on file, when viewed in the light most favorable to the nonmoving party, demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.' " *Edens v. Godinez*, 2013 IL App (4th) 120297 ¶ 13 (quoting *West Bend Mutual Insurance v. Norton*, 406 Ill. App. 3d 741, 744, 940 N.E.2d 1176 (2010)). We review *de novo* a trial court's order granting summary judgment. *Howle v. Aqua Illinois, Inc.,* 2012 IL App (4th) 120207 ¶ 41, 978 N.E.2d 1132.

¶ 21 B. Defendants' Claim That ILMO's "HAZMAT" Fee Is Taxable

¶ 22 Defendants first contend that the trial court erred by granting summary judgment in favor of ILMO because a question of fact exists as to whether ILMO's "HAZMAT" fees on its high-pressure cylinder rentals were taxable. Specifically, defendants assert that it is unclear "whether the [']HAZMAT[']fees that ILMO charges on its cylinders are taxable *** because the facts do not show whether the underlying regulatory costs that ILMO recoups with its [']HAZMAT[']fees are incurred on gas sales (making the fees taxable) or on cylinder rentals [(rendering the fees tax-exempt)]." Because defendants stipulated that the "HAZMAT" fee was a fee on a rental collected to pay fees related to compliance with hazardous materials laws and regulations, summary judgment was appropriate on this issue.

¶ 23 When a party enters into a stipulation, that stipulation will be enforced unless the party demonstrates that the stipulation is unreasonable, a violation of public policy, or the result of fraud. *Myoda Computer Center, Inc. v. American Family Mutual Insurance Co.,* 389 Ill. App. 3d 419*,* 423, 909 N.E.2d 214 (2009); *Steward ex rel. Schluter v. Schluter*, 352 Ill. App. 3d 1196,

1200, 819 N.E.2d 1 (2004); *Fitzpatrick v. Human Rights Comm'n*, 267 Ill. App. 3d 386, 390, 642 N.E.2d 486 (1994); *In re Marriage of Sanborn*, 78 Ill. App. 3d 146, 149, 396 N.E.2d 1192 (1979). Significantly, defendants do not claim that their stipulation was not enforceable. Instead, defendants claim that although they stipulated that ILMO collects a "HAZMAT" fee related to ILMO's "compliance with hazardous materials laws and regulations," a genuine issue of material fact exists because ILMO presented no evidence showing that those fees actually relate to such compliance. In other words, defendants claim that although they made a stipulation, that stipulation cannot be used against them because ILMO failed to produce evidence to prove what they stipulated. We are not impressed.

¶ 24 Defendants agreed in the parties' March 2012 "Stipulation of Facts" that "[w]ith the *rental* of the high pressure *gas cylinders*, ILMO includes a separately-stated [']HAZMAT[']fee related to ILMO's compliance with hazardous materials laws and regulations." (Emphases added.) In short, defendants agreed that the "HAZMAT" fee was collected as part of the rental of the gas cylinders and used to comply with hazardous materials laws and regulations. As defendants have conceded, the fees ILMO imposed on its gas cylinders were not subject to the retailers' occupation tax because they concerned a non-taxable *rental*, rather than a taxable *sale*. See 35 ILCS 120/2 (West 2008) (the retailers' occupation tax is a tax "imposed upon persons in the business of *selling* at retail tangible personal property") (Emphasis added.) Accordingly, we reject defendant's contention that the trial court erred by granting summary judgment in favor of ILMO because, in light of the parties' stipulation, we conclude that no question of fact exists as to whether ILMO's "HAZMAT" fees on its high-pressure cylinder rentals were tax-exempt.

¶ 25 C. Defendants' Claim That ILMO's Cryogenic Systems Are Taxable

¶ 26 Defendants next contend that the trial court erred by granting ILMO's motion for summary judgment because a question of fact exists as to whether the cryogenic systems are taxable under Illinois's use tax, given that the facts show that they were primarily used for storage rather than manufacturing. ILMO responds that because its cryogenic systems "use mixers, vaporizers and pressure-building devices to convert the cryogenic liquid from its liquid state to a gaseous state usable by [its] customers," the cryogenic systems are tax-exempt as manufacturing machinery and equipment. We agree with ILMO.

¶ 27 1. *The Illinois Use Tax and the Applicable Exemption*

¶ 28 Section 3 of the Use Tax Act (Act), imposes a tax on tangible personal property used in Illinois, as follows: "A tax is imposed upon *the privilege of using in this State tangible personal property* purchased at retail from a retailer[.]" (Emphasis added.) 35 ILCS 105/3 (West 2008). Section 3-5 of the Act exempts certain property from the use tax, including personal property used in the manufacturing process, as follows:

> "Manufacturing and assembling machinery and equipment *used primarily in the process of manufacturing* or assembling tangible personal property for wholesale or retail sale or lease, whether that sale or lease is made directly by the manufacturer or by some other person, whether the materials used in the process are owned by the manufacturer or some other person[.]" (Emphasis added.) 35 ILCS 105/3-5(18) (West 2008).

Section 3-50 of the Act further defines "manufacturing process" under the manufacturing-and-

assembly exemption, as follows:

> " 'Manufacturing process means 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* or assembling a different article of tangible personal property, by a procedure commonly regarded as manufacturing, processing, fabricating, or refining that changes some existing material into a material with a different form, use, or name." (Emphasis added.) 35 ILCS 105/3-50(1) (West 2008).

¶ 29 2. *Application of the Illinois Use Tax in This Case*

¶ 30 Here, the parties stipulated that ILMO's cryogenic systems "convert[] the cryogenic liquid from [a] liquid state to a gaseous state" for its customers' use "through mixers, vaporizers, and high-pressure-building devices." For the reasons previously explained, defendants were bound by that stipulation. Thus, defendants' claim is that this conversion process is not "manufacturing" under the Act because the cryogenic systems are more akin to containers used primarily for transportation (because the system merely "reconverts" the liquid back to gas)—which are taxable under the Act—than items used primarily to manufacture—which, of course, are nontaxable under the Act. We disagree.

¶ 31 Although the parties cite a number of cases in support of their respective positions (see, *e.g.*, *Keystone Consolidated Industries, Inc. v. Allphin*, 45 Ill. App. 3d 714, 359 N.E.2d 1202 (1977) (concluding that the use tax applied to fees on a gas-extraction facility)), we view as particularly persuasive the First District's decision in *Zenith Electronics Corp. v. Department of*

Revenue, 293 Ill. App. 3d 651, 688 N.E.2d 747 (1997). In *Zenith*, Revenue claimed that the tray sets that Zenith used to transport its color cathode ray tubes (CRTs) were subject to the use tax because the primary function of those tray sets was transportation, rather than "manufacturing" under the Act. The appellate court rejected Revenue's argument, concluding as follows:

> "After consideration of the parties' arguments, *** we conclude, as the trial court did, that the tray sets were primarily used in an exempt manner. *** [A] majority of the CRTs produced at the Melrose plant were sent to Springfield during the audit period. The *** primary purpose of the tray sets was to 'protect' the CRTs, as they are extremely fragile and have a tendency to implode. Ten to twelve truckloads of CRTs were sent to Springfield daily during the audit period. Those CRTs then became part of television sets, which [Revenue] does not dispute are tangible personal property. According to the relevant statute, use tax does not apply to equipment used primarily in the process of manufacturing or assembling tangible personal property. 35 ILCS 105/3-50 (West 1992). Also according to the statute, 'the manufacturing process commences with the first operation or stage of production in the series and does not end until the completion of the final product in the last operation or stage of production in the series.' 35 ILCS 105/3-50 (West 1992). Applying this language to the factual situation before us, we can only conclude, as the trial court did,

that the trays were primarily used in a manufacturing or assembling process." *Zenith*, 293 Ill. App. 3d at 657-58, 688 N.E.2d at 747.

¶ 32 Defendants' attempt to distinguish *Zenith* by pointing out that (1) the primary purpose of converting the liquid to gas here is not to physically protect or preserve it during interim stages of the manufacturing process, as it was with the trays in *Zenith*, but only to make bulk transportation and storage more economical, and (2) *Zenith* involved an integrated manufacturing process that necessitated transportation between separate plants for manufacturing, which is not at issue in this case. We are not persuaded.

¶ 33 First, defendants' claim that the primary purpose of converting the liquid to gas in this case is not to physically protect or preserve it during interim stages of the manufacturing, "but *only* to make bulk transportation and storage more economical" is not compelling, given that the reason Zenith used the tray sets in the manufacturing process was to keep the CRTs from breaking during transport. See *Zenith*, 293 Ill. App. 3d at 657, 688 N.E.2d at 747 ("the *** primary purpose of the tray sets was to 'protect' the CRTs, as they are extremely fragile and have a tendency to implode"). In other words, the *primary* reason Zenith used the tray sets during its transportation-manufacturing process was to make the process *more economical*. As defendants acknowledge, that is precisely what ILMO was doing here; ILMO was using the cylinders to make conversion of its product more economical by using them to store and protect its product until the conversion took place.

¶ 34 Defendants' second distinction is equally uncompelling. Defendants' claim that this case is distinguishable from *Zenith* because that case involved an "integrated manufacturing process that necessitated transportation" between separate plants for manufacturing, which is not

at issue in this case, is inaccurate. As the parties' stipulation outlines, the cryogenic systems are integral to ILMO's manufacturing process—that is, the process of converting liquid gas to gaseous gas—because those systems are the delivery, or "conversion," system for that product. On this point, the parties' stipulation agreement states as follows:

> "As another part of its business, ILMO owns and leases cryogenic systems which are installed and located at the customer's facility. The customers pay ILMO a monthly Facilities Fee for the use of the cryogenic systems. Through ILMO's suppliers, ILMO delivers cryogenic liquids to the customer's facility in a bulk truck, and the cryogenic liquids are placed in the cryogenic system. The cryogenic system through mixers, vaporizers, and pressure-building devices converts the cryogenic liquid from its liquid state to a gaseous state for use by the customers."

¶ 35 Defendants look to *Airco Industrial Gas Div. The BOC Group, Inc., v. Illinois Department of Revenue,* 223 Ill. App. 3d 386, 584 N.E.2d 1017 (1991), and *Liquid Air Corp. v. Johnson*, 240 Ill. App. 3d 722, 608 N.E.2d 558 (1992), to support their position that the cryogenic systems in this case, like the cryogenic systems in those cases, are taxable because the customers were not required to rent the cryogenic systems and, thus, no inseparable link existed between the sale of the gas and the furnishing of those storage facilities. Those cases, however, dealt with the retailers' occupation tax—specifically, whether "facility fees" the plaintiff charged for the rental of those cryogenic storage systems were subject to the retailers' occupation tax. Both courts held that it was subject to the tax because no "inseparable link" existed between the

sale of the gas and the furnishing of the storage facilities, given that the parties' contract did not require a rental. *Airco* and *Liquid Air Corp.* offer defendants no support, however, given that neither case involved (1) the Illinois use tax (the tax at issue here) or (2) the manufacturing exemption under the Act.

¶ 36 Instead, our review of the case law, appropriate statutes, and the parties' stipulation leads us to conclude that the cryogenic systems in this case, like the tray sets used to transport the CRTs in *Zenith*, were primarily used in a tax-exempt manner. According to the parties' stipulation, ILMO leased the cryogenic systems to its customers so that its customers could complete the process of converting them—that is, manufacturing them—into a gas. That gas became the end product of that process, which defendants do not dispute is tangible personal property. Under the Act, the use tax does not apply to equipment used primarily in the process of manufacturing or assembling tangible personal property. 35 ILCS 105/3-50(1) (West 2008). That manufacturing process, as the Act outlines, commences at the first stage of production in the series and does not end until the completion of the final product in the last stage of production in the series. 35 ILCS 105/3-50(1) (West 2008). Applying this standard, we conclude that the cryogenic systems in this case, although not used exclusively in the manufacturing process, were *primarily* used in the process of manufacturing or the assembling process.

¶ 37 III. CONCLUSION

¶ 38 For the reasons stated, we affirm the trial court's decision to grant summary judgment in favor of ILMO.

¶ 39 Affirmed.