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2014 IL App (1st) 132646-U

FIRST DIVISION
August 4, 2014

Nos. 1-13-2646, 1-13-2654, 1-13-3350, 1-13-3352 (cons.)

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| REED SMITH LLP,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>ZAHRA ALI, in her official capacity as Director of the Cook County Department of Revenue, and THE COOK COUNTY DEPARTMENT OF REVENUE,<br><br>Defendants-Appellants. | Appeal from the Circuit Court of Cook County. |
| HORWOOD MARCUS & BERK, CHTD.<br><br>Plaintiff-Appellee,<br><br>v.<br><br>THE COOK COUNTY DEPARTMENT OF REVENUE, and ZAHRA ALI, in her official capacity as Director of the Cook County Department of Revenue,<br><br>Defendants-Appellants. | Nos. 13 L 50470<br>13 L 50454<br><br>Honorable Robert Lopez Cepero,<br>Judge Presiding. |

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JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Connors and Justice Cunningham concurred in the judgment.

**ORDER**

¶ 1 ***Held:*** Defendants' interlocutory appeals from the granting of preliminary injunctions are dismissed as moot, where the preliminary injunctions terminated upon entry of the permanent injunctions. The Cook County Use of Non-Titled Personal Property Tax Ordinance is invalid as it violates section 5-1009 of the Counties Code. One of the plaintiffs had standing to challenge the taxing statute at issue since it was subject to direct injury if the ordinance were enforced. The trial court's decision is therefore affirmed.

¶ 2 This appeal involves challenges to the "Cook County Use of Non-Titled Personal Property Tax Ordinance" (the Ordinance). Cook County Code § 74-650 *et seq.* (enacted by Cook County Ordinance No. 12-O-63 (approved Nov. 9, 2012)). Plaintiffs, Reed Smith LLP (Reed Smith) and Horwood Marcus & Berk, Chartered (Horwood), filed separate complaints challenging the Ordinance against defendants the Cook County Department of Revenue (the Department) and Zahra Ali, the Department's director (the Director). On cross-motions for summary judgment, the trial court granted plaintiffs' motions and denied defendants' motion, finding the ordinance was invalid. On appeal, defendants contend the trial court erred in finding that: (i) Reed Smith had standing to challenge the Ordinance; (ii) the Ordinance violates section 5-1009 of the Counties Code (55 ILCS 5/5-1009 (West 2012)); and (iii) the Ordinance violates the state and federal constitutions. For the following reasons, we affirm the judgment of the trial court.

¶ 3 BACKGROUND

¶ 4 On November 9, 2012, the Cook County Board of Commissioners enacted the Ordinance, which became effective the following April 1. The preamble to the Ordinance states in pertinent part that, "there has appeared a widening tax loophole through which persons in Cook County are in a position to purposely avoid the sales tax associated with the acquisition of non-titled

personal property for use within Cook County; and *** it is in the interest of Cook County to *** close tax loopholes ***." Cook County Ordinance No. 12-O-63 (approved Nov. 9, 2012).

¶ 5 Section 74-652 of the Cook County Code imposes a tax on the "value" of nontitled personal property that was purchased outside of Cook County (the County) when that property is "first subject to use" in the County. Cook County Code § 74-652 (added by Cook County Ordinance No. 12-O-63 (approved Nov. 9, 2012)). Section 74-651 defines "value" as "an accurate assessment or evaluation of a non-titled personal property's worth when first subject to use in the county," and "use" is defined in that section in relevant part as "the exercise of any right to, or power over, personal property incident to ownership of that property." *Id.* § 74-651. With respect to the term "first use," "[e]vidence that the purchaser resides or that property was delivered to a location in the county shall be *prima facie* evidence that the property is *** first used in the county on the date of delivery." *Id.* § 74-652. The Ordinance further provides that every person who acquires such property in the ordinary course of business must register with the Department. *Id.* § 74-653. Although there is an annual tax credit on the first $3,500 worth of property, once a taxpayer exceeds that amount, the taxpayer must file a monthly return and remit the tax. *Id.* § 74-654. The failure to file a return (or even to register) is a violation of the Ordinance, subjecting the taxpayer to penalties and interest not only in the Ordinance, but also in the County's "Uniform Penalties, Interest and Procedures Ordinance" (the Penalties Ordinance) (Cook County Code § 34-60 *et seq.* (amended by Cook County Ordinance No. 11-O-23 (approved February 16, 2011))). Cook County Code § 74-659 (added Nov. 9, 2012).

¶ 6 Under the Penalties Ordinance, the Director may determine and assess the amount of any tax due and unpaid, together with applicable interest and penalties. Cook County Code § 34-65 (amended February 16, 2011). In addition, an interest charge of 1.25% per month (*Id.* § 34-67),

and various penalties may be imposed, including a late filing penalty of 10% of the total tax due (*Id.* § 34-68), a 25% penalty "if the taxpayer or tax collector negligently or knowingly failed to pay or remit the tax" (*Id.* § 34-70), and a $1,000 fine for the first offense ($2,000 for subsequent) offenses (*Id.* § 34-85). Finally, section 34-88 provides that the County will have a lien on the personal and real property of any taxpayer for unpaid taxes, interest, and penalties, and allows the County to foreclose on the lien "to the same extent and in the same manner as in the enforcement of other liens." *Id.* § 34-88.

¶ 7 On May 8, 2013, plaintiff Reed Smith filed its complaint seeking a declaratory judgment that the Ordinance violated section 5-1009 of the Counties Code as well as the state and federal constitutions. Reed Smith's complaint further sought a preliminary injunction against the County, prohibiting it from enforcing the Ordinance. On May 14, 2013, plaintiff Horwood filed a separate complaint also seeking declaratory relief (on the same grounds as Reed Smith's complaint), a preliminary injunction, and a temporary restraining order (TRO).[1] These cases were later consolidated.

¶ 8 Each plaintiff filed a motion for a preliminary injunction. In its motion, Reed Smith admitted that it had received a "Notice of Duty to Register" under the Ordinance, but that it had not registered. In addition, Reed Smith also admitted that it had purchased more than $3,500 worth of goods outside of the County, but that it did not pay the tax that had been due the prior May 20, 2013.

¶ 9 On August 1, 2013, the trial court granted the plaintiffs' motions for preliminary injunction. Defendants filed a motion to stay, but before the trial court could rule on that motion, defendants filed a notice of interlocutory appeal (docketed as appellate numbers 1-13-2646 and

[1] The trial court later denied Horwood's request for a TRO. This denial is not before us on appeal.

1-13-2654). This court later granted defendants' motion to stay enforcement of the preliminary injunction.

¶ 10 Plaintiffs then filed motions for summary judgment in the trial court, seeking permanent injunctive relief and again alleging that the Ordinance violated section 5-1009 of the Counties Code as well as the state and federal constitutions. Defendants filed a cross-motion for summary judgment, agreeing that the facts were not in dispute and arguing that the Ordinance did not violate section 5-1009 of the Counties Code nor the state and federal constitutions, thus entitling defendants to judgment in their favor as a matter of law. Following a hearing, the trial court granted plaintiffs' motion and denied defendants' motion. The trial court subsequently denied defendants' motion to stay enforcement of the permanent injunction, and defendants filed notices of appeal with respect to the trial court's granting of the summary judgment motions of Reed Smith (docketed in this court as 1-13-3350) and Horwood (docketed here as 1-13-3352). We consolidated all four appeals and now resolve them together.

¶ 11 ANALYSIS

¶ 12 Defendants' Interlocutory Appeals

¶ 13 At the outset, we must consider whether defendants' interlocutory appeals (1-13-2646 and 1-13-2654) are moot. Reviewing courts do not decide moot or abstract questions, nor do we render advisory opinions. *R.L. Polk & Co. v. Ryan*, 296 Ill. App. 3d 132, 136 (1998). An injunction that has expired can no longer be dissolved because the court cannot dissolve that which no longer exists. *Id.* A preliminary injunction terminates when a permanent injunction is entered. *Id.* In this case, the preliminary injunctions entered in favor of plaintiffs, which formed the basis for the two interlocutory appeals, terminated upon the trial court's granting of a permanent injunction in favor of plaintiffs. Therefore, even assuming, *arguendo*, that

defendants' interlocutory appeals were meritorious, we could not order the dissolution of the preliminary injunctions since they ceased to exist upon the granting of the permanent injunctions. *Id.* Accordingly, defendants' interlocutory appeals (1-13-2646 and 1-13-2654) are moot. We now turn to defendants' contentions with respect to the trial court's decision regarding the cross-motions for summary judgment (1-13-3350 and 1-13-3352).

¶ 14 Reed Smith's Standing

¶ 15 As a preliminary matter, defendants contend that plaintiff Reed Smith lacks standing to challenge the Ordinance because it failed to register or pay any tax due under the Ordinance. Defendants, however, do not raise any such contention with respect to the other plaintiff, HMB, which did pay the tax under protest. We therefore address only whether Reed Smith has standing, since defendants forfeited any issue with respect to Horwood's standing. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) ("Points not argued are waived ***.").

¶ 16 "The doctrine of standing [ensures] that issues are raised only by those parties with a real interest in the outcome of the controversy." *Carr v. Koch*, 2012 IL 113414, ¶ 28 (citing *Wexler v. Wirtz Corp.*, 211 Ill. 2d 18, 23 (2004)). To have standing to challenge the legality of a statute, a party must have sustained, or be in immediate danger of sustaining, a direct injury as a result of the enforcement of the challenged statute. *Id.* The injury must be: (1) distinct and palpable; (2) fairly traceable to the defendant's actions; and (3) substantially likely to be prevented or redressed if the requested relief were granted. *Id.*

¶ 17 In this case, the trial court properly rejected defendants' claim that Reed Smith lacked standing. The Ordinance plainly provides that the mere failure to register is a violation of the Ordinance, and Reed Smith admitted in its pleadings that it failed to register or file the first tax return by the deadline date of May 20, 2013. Reed Smith is thus subject to penalties and interest

in the Penalties Ordinance, which includes the Director's assessment of Reed Smith's tax due, as well as interest and numerous penalties thereon. See Cook County Code §§ 34-65 (amended February 16, 2011). Moreover, these assessments would constitute a lien on Reed Smith's real and personal property, empowering the County to foreclose upon that lien. *Id.* § 34-88. Under these circumstances, Reed Smith's injury is hardly theoretical. We must therefore reject defendants' contention of error on this point.

¶ 18 Nonetheless, defendants point to *Wexler v. Wirtz*, 211 Ill. 2d 18 (2004), in support of their claim. In *Wexler,* our supreme court held that the plaintiff, an individual consumer, lacked standing to challenge a liquor tax imposed on a distributor of alcoholic beverages. *Id.* at 32. Defendants' reliance upon *Wexler* is problematic for several reasons. Unlike here, the plaintiff in *Wexler* paid the tax voluntarily. *Id.* at 23-24. *Wexler* also failed to comply with the requirements of the State Officers and Employees Money Disposition Act (30 ILCS 230/1 *et seq.* (West 2000)), which he claimed provided him with authorization to seek a refund of the taxes he paid. *Id.* at 25-28. Here, Reed Smith did not pay the tax voluntarily, and the State Officers and Employees Money Disposition Act is unavailable to it for relief. 30 ILCS 230/1 (West 2012).

¶ 19 The *Wexler* court also observed that, although there was some evidence to indicate that the distributor had raised prices to offset the tax increase, which may have passed on the tax increase to consumers, including the plaintiff, that fact alone did not alter the "legal status of the parties." *Id.* at 27. The court specifically held that, even if consumers such as the plaintiff paid a higher price due the liquor tax, the consumers could not legally be considered the payers of the challenged tax because it was the distributor who alone had the "legal obligation to remit the tax to the state, and it was the only entity that actually paid the tax." *Id.* Thus, in *Wexler*, the plaintiff lacked standing not solely because it failed to pay the tax; rather, it lacked standing

primarily because it was not the party that was legally obligated to collect and remit the tax to the state. Here, Reed Smith (and not the buyers of its services) is the entity required to pay the tax. Although it did not actually pay the tax, we reject defendants' assertion that it must first pay an improper tax prior to challenging it. *Wexler* is therefore unavailing.

¶ 20 Finally, defendants assert that the voluntary payment doctrine bars Reed Smith's claim. Under this common law doctrine, a taxpayer may not recover taxes voluntarily paid, even if the taxes paid were illegally imposed. *Geary v. Dominick's Finer Foods, Inc.*, 129 Ill. 2d 389, 393 (1989). Instead, the party must show that the claim asserted was unlawful and the payment was not voluntary (*i.e.*, there was some necessity amounting to compulsion, and the payment was made under the influence of that compulsion). *King v. First Capital Financial Services Corp.*, 215 Ill. 2d 1, 28 (2005). Since it is indisputable that Reed Smith did not pay any taxes due, the voluntary payment doctrine is inapplicable. Defendants' contention is therefore meritless.

¶ 21 Plaintiffs' Summary Judgment Motions

¶ 22 Defendants next contend that the trial court erred in granting plaintiffs' motions for summary judgment. With certain exceptions not relevant here, section 5-1009 of the Counties Code provides in part that, "no home rule county has the authority to impose, pursuant to its home rule authority, a *** use tax based on *** the selling or purchase price of said tangible personal property." 55 ILCS 5/5-1009 (West 2012).[2] This section concludes, "This Section is a limitation, pursuant to subsection (g) of Section 6 of Article VII of the Illinois Constitution, on the power of home rule units to tax." 55 ILCS 5/5-1009 (West 2012). Defendants argue that the Ordinance did not violate section 5-1009 because it did not impose a use tax on the sales price of

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[2] Cook county is a home rule county. Ill. Const. 1970, Art. VII, § 6(a); see also Ann M. Lousin, The Illinois State Constitution: A Reference Guide 176 (Praeger 2010) ("Cook [county], which was the paradigm for county home rule at the [1970 Illinois constitutional] convention, was the only county to achieve home rule status automatically and remains the sole home rule county.").

the nontitled personal property. Defendants further argue that the Ordinance does not violate the state or federal constitutions. We turn first to plaintiffs' statutory challenge.

¶ 23 Because the parties filed cross-motions for summary judgment, they conceded that no material questions of fact exist and that only a question of law is involved that the court may decide based on the record. *Pielet v. Pielet*, 2012 IL 112064, ¶ 28. The mere filing of cross-motions for summary judgment, however, does not establish that there is no issue of material fact, nor is a trial court obligated to render summary judgment for either party. *Id.* We review the trial court's decision as to cross-motions for summary judgment *de novo*. *Id.* ¶ 30.

¶ 24 Resolution of this issue turns on the interpretation of the Ordinance. Municipal ordinances are interpreted using the same general rules of statutory interpretation. *Landis v. Marc Realty, L.L.C.*, 235 Ill. 2d 1, 7 (2009). When construing a statute, our goal is to "ascertain and give effect to the intent of the legislature." *Kean v. Wal-Mart Stores, Inc.*, 235 Ill. 2d 351, 361 (2009). This inquiry begins with the language of the statute, "the best indicator of legislative intent." *Id.* Where the language in the statute is clear and unambiguous, we apply the statute as written without resort to extrinsic aids of statutory construction. *Landis*, 235 Ill. 2d at 6-7. It is appropriate to employ a dictionary to ascertain the meaning of an otherwise undefined word or phrase. *Id.* at 8 (citing *People v. Beachem*, 229 Ill. 2d 237, 244-45 (2008)).

¶ 25 On the other hand, a statute is ambiguous if it can be understood by reasonably well-informed persons in two or more different senses. *Beachem*, 229 Ill. 2d at 246. In that instance, the court may look beyond the language employed and consider the purpose behind the law and the evils the law was designed to remedy, as well as other sources such as legislative history. *Home Star Bank & Financial Services v. Emergency Care & Health Organization, Ltd.*, 2014 IL 115526, ¶ 24. We may not, however, depart from the statute's plain language by "reading into it

exceptions, limitations, or conditions that conflict with the clearly expressed legislative intent." *Metropolitan Life Insurance Co. v. Hamer*, 2013 IL 114234, ¶ 18. Since all provisions of a statutory enactment are viewed as a whole, we do not construe words and phrases in isolation; instead, they are interpreted in light of other relevant portions of the statute. *Carver v. Sheriff of La Salle County*, 203 Ill. 2d 497, 507-08 (2003). We further presume that the General Assembly did not intend absurdity, inconvenience or injustice. *Id.* at 508. Finally, statutes imposing a tax are to be strictly construed against the government and in favor of the taxpayer. *In re Consolidated Objections to Tax Levies of School District No. 205*, 193 Ill. 2d 490, 496 (2000). In other words, if there is any doubt, taxing statutes are construed "most strongly against the government and in favor of the taxpayer." *Van's Material Co. v. Department of Revenue*, 131 Ill. 2d 196, 202 (1989) (quoting *Mahon v. Nudelman*, 377 Ill. 331, 335 (1941)).

¶ 26 In this case, the Ordinance imposes a use tax on the "value" of nontitled personal property. The Ordinance defines "value" in pertinent part as "worth" but does not define "worth." A dictionary definition of "worth," however, leads us back to "value." See Black's Law Dictionary 1639 (8th ed. 1999) (defining "worth" as "the monetary value of a thing"). As a result, the term "value" is arguably ambiguous, and we look to legislative intent to construe it. *Home Star Bank & Financial Services*, 2014 IL 115526, ¶ 24.

¶ 27 The preamble to the Ordinance acknowledges an increasing "loophole" by which Cook county citizens can avoid the County's "sales tax" on nontitled personal property that is subsequently used in the County, and the Ordinance reflects the County's interest in closing this loophole. This loophole refers to the sales taxes on titled personal property that are allowed under section 5-1008 of the Counties Code, but that section imposes the tax based upon the "selling price" of the titled personal property. 55 ILCS 5/5-1008 (West 2012). In addition,

"use" is defined as the exercise of any right to or power over personal property incident to the ownership of it. Finally, if either the property was delivered to a location in the County or the purchaser merely resides in the County, then the property is *prima facie* "first subject to use" in the County on the delivery date.

¶ 28 So viewed, the unmistakable conclusion is that this purposed "use" tax is in reality a sales tax upon the purchase of the property. The Board's expressed intent in enacting the Ordinance was to close a loophole with respect to County sales tax avoidance on property purchased outside of the County (without regard to any adjusted value of the property), and the definitions in the Ordinance establish that mere residency in the County (or delivery of the property to the County) establishes the date of "first use," which would effectively eliminate any meaningful difference between the purchase date and the date of first use.

¶ 29 Although the County argues that it has provided a "Guideline" document explaining that there are four acceptable methods of determining value, the County's argument is unavailing. Two of those methods involve using the purchase price of the nontitled personal property and then reducing that amount based upon "depreciation." Depreciation is an allocation of an asset's cost over its useful life and is normally measured in *years*. See generally, Henry Lunt, Fundamentals of Accounting, 143-50 (Elsevier 2009) (Depreciation is applied against a noncurrent asset, *i.e.*, an asset that is used to earn revenue "for a long period of time."); see also, *e.g.*, 26 U.S.C.A. § 167(f)(1)(A) (West) (36-month useful life for computer software); 26 U.S.C.A. § 168(c) (West) (useful life for depreciable assets ranging from 3 to 50 years). 26 U.S.C.A. § 168(g)(2) (West) (12-year life for personal property with no "class life" if alternative depreciation method is elected). Calculating the depreciation of a piece of office equipment, software, or any other asset between the purchase date and the time when the asset would be first

used in the County (here, a few days later upon delivery) would be *de minimis*, resulting in the "value" of the property equaling the purchase price. To hold as defendants suggest, that an unauthorized use tax on the purchase price is transformed into an authorized tax on "value" based upon a trivial reduction from the purchase price, would render section 5-1009 an absurdity, which we may not do. See *Carver*, 203 Ill. 2d at 508.

¶ 30 The other methods the Guideline suggests are to use either an appraised value or the "fair market value." In the rare instances those two methods meaningfully differ, the cost borne to obtain these estimates--for the purchase of personal property that is not significant enough to warrant titling--would be excessive. We cannot presume that the legislature, in enacting section 5-1009, intended either the unjust and inconvenient necessity of a time-consuming and costly appraisal or a blind estimate of the "fair market value" of the property. See *id.* Construing the Ordinance, a taxing statute, most strongly against the County and in favor of the taxpayer, as we must (see *Van's Material Co.*, 131 Ill. 2d at 202), we agree with the trial court that the Ordinance is an improper use tax on the selling or purchase price of personal property that is prohibited by section 5-1009 of the Counties Code. Accordingly, the trial court did not err in granting plaintiffs' motions for summary judgment and denying defendants' motion.

¶ 31 Finally, although the parties also dispute whether the Ordinance violates either the provision of the Illinois constitution abolishing *ad valorem* taxes on personal property (see Ill. Const. 1970, art. IX, § 5) or the dormant Commerce Clause of the federal constitution (see U.S. Const., Art. I, § 8, cl. 3), we need not address these contentions. This court addresses constitutional issues "only as a last resort, relying whenever possible on nonconstitutional grounds to decide cases." *Mulay v. Mulay*, 225 Ill. 2d 601, 607 (2007). Since we have held that

the Ordinance is plainly prohibited by section 5-1009 of the Counties Code, we decline to address these additional arguments.

¶ 32 CONCLUSION

¶ 33 The trial court did not err in granting summary judgment in favor of plaintiffs and against defendants. Accordingly, we affirm the judgment of the Circuit Court of Cook County.

¶ 34 Nos. 1-13-2646 and 1-13-2654, Appeals dismissed.

¶ 35 Nos. 1-13-3350 and 1-13-3352, Affirmed.