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Court of Appeals of Arizona,
Division 1, Department T.

SAFEWAY INC., a corporation, Plaintiff–Appellee,
v.
MARICOPA COUNTY, Defendant–Appellant.

No. 1 CA–TX 07–0004.
|
Aug. 13, 2009.

West KeySummary

1 **Taxation**
Classification of property

A county erroneously collected double taxes for walk-in coolers in a supermarket chain's stores. The coolers were taxed both as real and as personal property based upon the chain's misreporting of the property. The county challenged the chain's assertion that it was double taxed but failed to produce evidence that the cooler values were removed from the relevant parcels and alleged that it could not determine whether the coolers were listed on the tax roll because they were not itemized on the data collection form. It was the county's burden to produce evidence in response to the chain's claims because it was the only party which had or should have had knowledge of the basis for the reduction in value during the appeal. A.R.S. § 42–16251(3)(d).

Cases that cite this headnote

Appeal from the Arizona Tax Court; Cause No. TX 2002–000132; The Honorable Thomas Dunevant, III, Judge, The Honorable Mark W. Armstrong, Judge. AFFIRMED.

Attorneys and Law Firms

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MEMORANDUM DECISION

KESSLER, Judge.

*1 ¶ 1 This is a property tax case. Maricopa County (the "County") challenges the tax court's grant of summary judgment to Safeway, Inc. ("Taxpayer" or "Safeway") holding that the County erroneously collected double taxes for Taxpayer's supermarket walk-in coolers for the 2000 tax year. Finding no genuine issue of material fact or legal error, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

I. The Valuation Process

¶ 2 Taxpayer is a corporation operating Safeway stores throughout Maricopa County. The Maricopa County Assessor ("Assessor") identified and measured the improvements on Taxpayer's properties and listed these components and the real property on the real property tax roll. The Assessor lists the information on a data collection form.

¶ 3 The cost listed on the real property tax roll included "the cost of built-in refrigerators, cold rooms and ancillary cooling equipment in the interior component 'HA'." [1] The listing enabled the appraiser to identify the appropriate "model number" for a particular property. A property's model number —in this case Model 112 for supermarkets—affects its value. Once the Assessor lists a property as a "Model 112" property on the tax rolls, he or she is in essence listing real property containing walk-in coolers even though the words "walk-in coolers" do not appear on the assessor's collection form. The Assessor issued a notice of value, based upon the cost approach and including the cost of the walk-in coolers. [2]

¶ 4 For tax year 2000, Taxpayer reported the cost of walk-in cooler components—including prefabricated panels, compressors, and coils—on the business personal property renditions it submitted to the Assessor. It paid personal and

real property taxes assessed against stores where the walk-in coolers were located, including both owned and leased stores.

II. Valuation Law, Policy, And Procedures For Walk-in Coolers

¶ 5 Taxpayers have a statutory duty to accurately report personal property. *See* Arizona Revised Statutes ("A.R.S.") section 42–15053(A), (C) (2006).[3] Once an assessor requests a list of property or a taxpayer voluntarily files a list, there is a duty to correctly report all personal property subject to taxation. *Aleasco, Inc. v. Maricopa County,* 177 Ariz. 291, 295, 867 P.2d 861, 865 (Tax.Ct.1994).

¶ 6 Ronald P. Gibbs ("Gibbs"), who was working for the Arizona Department of Revenue (the "Department"), sent a memo to all county assessors on October 14, 1992, advising them to take "whatever steps are needed" to avoid taxing walk-in coolers as personal property and real property. He told the assessors and their personal property sections to advise taxpayers not to report walk-in coolers on the personal property tax renditions for convenience stores. He testified that the same approach applies to supermarkets like Taxpayer.

¶ 7 In a memo dated March 14, 2000, the Department advised Arizona's county assessors that the "DOR construction Cost System ... includes the cost of built-in refrigerators, cold rooms and ancillary cooling equipment in the interior component 'HA'." Meanwhile, the cost model applied to real property components included a walk-in cooler value which was attributed in valuing the real property. To "correct" this problem, the Marshall and Swift valuation service used by the Department of Revenue issued a new component code in 2000 that excluded the cost of walk-in coolers and refrigerators. Because this new "HANC" value did not take effect until the 2002 tax year, a potential double taxation issue remained for the 1998–2001 tax years.

III. This Litigation

***2** ¶ 8 On July 30, 2001, Taxpayer filed a notice of claim with the County, pursuant to A.R.S. § 42–16254(A) (Supp.2008), alleging improper assessment of personal property taxes at its stores. The County assigned Wayne Mumphrey ("Mumphrey"), an assessor, to research the tax records to determine which tax parcels had been valued using the cost model with the HA component developed by the Department and using figures supplied by Harshall and Swift. Mumphrey assumed that if the valuation did not reflect a cost approach, it was based on an income approach to value.

¶ 9 Mumphrey identified twenty parcels valued by the cost model for the 2000 tax year; the remainder he found to be "income driven" without reliance upon the cost model. In completing the assignment, Mumphrey determined whether the value of a store was significantly lower than the initial cost model value. Based upon Mumphrey's research, the County removed twenty coolers from the personal property tax rolls and granted Taxpayer a corresponding refund. The County declined to remove the walk-in coolers associated with the other parcels from the personal property tax roll.

¶ 10 In accordance with A.R.S. § 42–16254(F), Taxpayer unsuccessfully appealed the County's denial of relief as to the personal property valuation of twenty-three other walk-in coolers to the State Board of Equalization (the "Board"). This denial conflicted with the Board's determination for tax years prior to 2000, in which it held that walk-in coolers should be deducted from personal property tax rolls whether the associated real property had been valued based upon an income or a cost approach.

¶ 11 Taxpayer then appealed to the Arizona Tax Court, under A.R .S. § 42–16254(G), in an effort to correct the contested assessments pursuant to A.R.S. § 42–16251 (2006). The complaint alleges that Taxpayer reported the walk-in coolers "as personal property when [they] should not have been reported at all" and as a result they were "taxed twice, both as real and as personal property."

¶ 12 The parties filed cross-motions for summary judgment. The tax court granted summary judgment to Taxpayer, distinguishing our decision on taxing walk-in coolers in *Basha's v. Maricopa County,* 1 CA–TX 04–0019 (memo dec., Dec. 20, 2005) ("Basha's"). In Basha's, we affirmed the tax court's conclusion that no objectively verifiable error existed as to whether the walk-in coolers were included in the valuation after the reductions on appeal. *Id.* at ¶¶ 28–29, 867 P.2d 861. In *Basha's,* the tax court had explained: "Because the court was not given sufficient information to determine whether the walk-in coolers were included [in the property valuation], the Court finds that it is not objectively verifiable that the coolers were double taxed."[4]

¶ 13 In this case, the tax court explained that Taxpayer had presented facts that were not introduced in *Basha's* and summary judgment for Taxpayer was warranted. Specifically, the tax court stated that Safeway had appealed the initial valuation not knowing of the double taxation issue and that

while the valuation was reduced as part of the administrative appellate process, it was "impossible to know what, if any, method of valuation was used" to lower the valuation. The tax court also stated: "Plaintiff did not administratively appeal on the basis of the coolers, and the coolers were nowhere mentioned in any appellate decision." In ruling on one of the County's motions for reconsideration, the tax court explained that in both this case and *Basha's,* the taxpayers had presented evidence that the initial valuation was cost-based and included the coolers. However, in this case, unlike *Basha's,* there is no evidence that the income driven approach or any other method excluding the valuation of the coolers was employed during the administrative appeal process. Thus, it held that there was no evidence that the Board of Equalization calculated the property valuation on anything but the cost method assessment. The tax court also awarded Taxpayer its costs and attorneys' fees. This appeal followed.

DISCUSSION

The County Failed To Produce Competent Evidence That The Appealed Values Were Not Based Upon The Cost Model, And Did Not Create A Genuine Dispute Of Material Fact.

***3** ¶ 14 Arizona law creates a presumption against double taxation. A.R.S. § 42–11003 (2006). Double taxation occurs when the same taxing authority taxes the same property twice for the same purpose during the same tax period. *Lake Havasu City v. Mohave County,* 138 Ariz. 552, 562, 675 P.2d 1371, 1381 (App.1983) (citation omitted). Taxpayer brought this claim under the error correction statute, A.R.S. § 42–16251(3)(d), based upon its "misreporting ... property if a statutory duty exists to report the property." Alternatively, it claims that the alleged double taxation of its walk-in coolers as both personal and real property is an "objectively verifiable" error demonstrated by "clear and convincing evidence." A.R.S. § 42–16251(3)(e).

¶ 15 We review the grant of summary judgment to Taxpayer *de novo. Wilderness World, Inc. v. Dep't of Revenue,* 182 Ariz. 196, 198, 895 P.2d 108, 110 (1995). Summary judgment is warranted "if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme Sch. v. Reeves,* 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990).

¶ 16 As the party with the burden of proof at trial, Taxpayer was required to produce prima facie evidence in support of its motion for summary judgment. *United Bank of Ariz. v. Allyn,* 167 Ariz. 191, 196, 805 P.2d 1012, 1017 (App.1990). If Taxpayer met the burden, the County then had the burden to produce competent evidence creating a genuine issue of material fact that would warrant a trial, or to at least identify conflicting evidence appearing on the record. *Id.* However, when one party has sole or unique access to information, that party has the burden to come forward with that information. *Healey v. Coury,* 162 Ariz. 349, 354–55, 783 P.2d 795, 800–01 (App.1989) (quoting *G.E.J. Corp. v. Uranium Aire, Inc.,* 311 F.2d 749, 751 (9th Cir.1962) (quoting 9 J. Wigmore, Evidence, § 2486, at 275 (3d ed.1940))).

¶ 17 As in *Basha's,* Taxpayer produced uncontroverted evidence that the new HANC value did not take effect until the 2002 tax year, and that it had reported and paid personal property tax on the walk-in coolers listed on the personal property tax form through the 2000 tax year. The County admitted that it initially valued the appealed parcels using a cost method. This evidence established Taxpayer's prima facie case of double taxation.

¶ 18 The County, however, contends that the Taxpayer did not and could not establish that the final post-appeal values included the walk-in coolers and consequently is not entitled to summary judgment. We disagree. There is nothing in this record to suggest that the walk-in cooler values were removed during the course of the appeal. Rather, as detailed below, the evidence submitted on a store-by-store basis indicates that: (1) Walk-in coolers were considered part of real property as a matter of Department policy; (2) Walk-in coolers were never at issue during the appeals; (3) None of the administrative appeal decisions were based upon walk-in cooler values; and (4) A key County witness could supply no evidence that a valuation based upon income streams would not pick up the cost of walk-in coolers. Indeed, the tax court correctly found that Taxpayer did not even know that a double taxation issue existed at the time of the 1999 and 2000 appeals. Since the County had unique possession of the reasons for any decrease in valuation during the administrative appeal process, it had and failed to carry its burden to demonstrate that a triable issue of fact exists as to the valuation method or the inclusion of the walk-in coolers. *Healey,* 162 Ariz. at 354–55, 783 P.2d at 800–01.

A. Departmental Policy

*4 ¶ 19 The County's position that the income valuation of the parcels eliminated the walk-in coolers is not consistent with the Department's directives. The Department's Personal Property Manual states: "Walk-in coolers or freezers are normally part of the building in which they are located, and are classified as real property." Similarly, Gibbs had directed that taxpayers should be told not to list walk-in cooler values on the personal property renditions because they were already being taxed as part of the real property. It was undisputed that Safeway included the coolers in its personal property reports. Thus, the County's claimed failure to incorporate the walk-in cooler values in evaluating the parcels in the contested cases is inconsistent with the directive to assess walk-in coolers as real property and, absent other evidence, there was double taxation.

B. No Appellate Litigation of Walk-in Cooler Values

¶ 20 The linchpin of the County's argument is that, even if the walk-in coolers were included in the initial valuation, they were not accounted for in the reduced post-appeal process values. This was a critical distinction in *Basha's,* in which the tax court cited the lack of evidence that the walk-in coolers were accounted for after the real property values dropped on appeal.

¶ 21 In contrast, Safeway did not even become aware of a double taxation issue until after the administrative appeals ended. Safeway submitted affidavits of consultants who filed the appeals for it dealing with the value of the supermarkets. One affidavit came from Doug Goodrich ("Goodrich"), who prepared Taxpayer's personal property tax renditions for the Assessor. Goodrich also engaged Deloitte Touche to prepare and file appeals challenging the real property valuations in an effort to reduce the Assessor's determination of full cash value. Goodrich asserted that in none of these appeals did he or Deloitte Touche advocate a reduction based upon the inclusion of walk-in coolers and their components. Nor did Goodrich or Deloitte Touche supply the Assessor or the Board with information concerning the walk-in cooler components during the appeals.

¶ 22 This evidence reflects that the issue of walk-in coolers was not advocated or discussed in the course of the appeals. Thus, there is no demonstrated connection between the reduction of values on appeal and the walk-in cooler issue. The documentary evidence, submitted on a store-by-store basis, likewise corroborates that the affiants did not seek to reduce values based upon the walk-in coolers, they provided no information to the County or Board regarding walk-in coolers, and any reduction in value did not result from removing the walk-in coolers. [5]

¶ 23 Similarly, Neil Wolfe, a property tax consultant and former appraiser for the County Assessor, stated that he did not challenge the valuation for Maricopa County parcel No. 150–09–001L based upon the inclusion of walk-in cooler components, and the Board's decision to reduce the full cash value of this real property "had nothing to do with removing the value of walk-in coolers." Wolfe further affirmed that the same circumstances obtained with respect to parcel no. 304–12–009W.

*5 ¶ 24 Likewise, Joy Gomez, a consultant, challenged the valuation for Maricopa County parcel no. 175–43–001F, a shopping center including a Safeway store. Her affidavit affirms that she did not seek a reduction in the full cash value based upon the walk-in coolers, and did not request such information from Taxpayer. Neither Taxpayer nor the Assessor raised the walk-in cooler issue during the appeal, and the "Board's decision had nothing to do with removing the value of walk-in coolers."

C. No Evidence That Appellate Approach Excluded Walk-in Coolers

¶ 25 In an effort to create a dispute of material fact, the County relied upon Mumphrey's testimony. Mumphrey was assigned to determine if the supermarkets with walk-in coolers were valued on the cost or income approach. If he concluded they were income-driven values, he assumed there was no double taxation. Mumphrey concluded that the values of the appealed parcels could not have been calculated using the cost model because they were simply too low. He assumed that, if the values were not calculated by the cost approach, they must have been determined based upon the income approach to value. In *Basha's,* this Court held Mumphrey had stated that he should be given the opportunity to determine the reason that the County had come up with the values that it did for the parcels. *Basha's* at ¶ 34.

¶ 26 The record reflects that Mumphrey had not determined why the County reduced the Safeway walk-in cooler values in time for this case. He conceded that he did not know the reason for any reductions in the values of the stores. Rather, he simply assumed the reduced value was income-driven even though the "precise reasons for the reduction is [sic] unknown." Mumphrey even admitted that he never reviewed the administrative appeal file or any Board decisions

to determine whether Taxpayer or the County had sought to remove the walk-in coolers from the real property or whether the values were generated based upon the cost approach to value or some other approach. Neither he nor the County ever conducted a study to determine if the walk-in coolers had somehow been removed from the real property parcels. Indeed, Mumphrey conceded that during the valuation appeals the County could have taken the position that walk-in coolers should be valued as part of the real estate. He also conceded that he did not know why, if the value was income-driven, that it would not include the value of the walk-in coolers. As the County conceded in its statement of facts, if Safeway appealed the cost-driven Assessor's value and received a value reduction, the "precise reason for the reduction is unknown, as is the means by which the new, lower value was calculated."

¶ 27 He further contended that a valuation based on the income approach "would not have represented the walk-in coolers." Mumphrey, however, could supply no facts to support his conclusion that the income streams used to value supermarkets do not pick up the value of walk-in coolers. Apart from a memo prepared by a "Mr. Potter," which the County did not produce, Mumphrey could offer no support for the proposition that the real property parcels did not include the walk-in coolers and he had "no knowledge of th[e] research" leading to that conclusion. During his second deposition, Mumphrey testified that he "must have been mistaken" about the memorandum from Mr. Potter because he could find no copy of it.

***6** ¶ 28 Mumphrey further testified that the County decided to leave the walk-in coolers on the real property tax roll until the tax year 2002:

> Q. What was the Assessor's decision on how to deal with walk-in coolers?
>
> A. I believe there was a ... memo that was issued leaving how to deal with the walk-in coolers up to the local Assessor. And I believe our position at that time was that the Assessor's position at that time was to leave the walk-in coolers in the real estate until the year 2002 when the HANC component became available, which was an interior component without the walk-in coolers.

¶ 29 Nevertheless, the County maintains that it cannot determine whether the walk-in coolers were listed on the tax roll because they are not itemized on the data collection form. The data collection form is not intended to identify all the components. The model number provides that information, and indisputably includes the walk-in cooler.

¶ 30 In sum, the County has no evidence that the Assessor removed the walk-in cooler values from the relevant parcels. Its witness is unfamiliar with how the final values were determined. This inability to explain the values is striking because in all settlement cases the Assessor set the value, or the Assessor made a recommendation to the Board and the Board accepted the recommendation without hearing evidence. As Taxpayer points out, the County should not be allowed to hide behind its own valuations and insist that Taxpayer explain how the County arrived at them. Taxpayer has produced all the information it had access to and has filled the evidentiary gap we identified in *Basha's*.

¶ 31 We would normally agree with the County on the burden of proof in summary judgment motions and that Safeway as the movant must first show there is no genuine dispute that the walk-in coolers were still taxed twice after the administrative appeal reductions. However, only the County had information to show what those reductions were based upon. The County, as the only party which had or should have had knowledge of the basis for the reduction in value during the appeal, had the burden to produce that evidence in response to Taxpayer's claims. *Healey*, 162 Ariz. at 354–55, 783 P.2d at 800–01. It failed to do so. Accordingly, under Arizona Rule of Civil Procedure 56, Taxpayer was entitled to judgment as a matter of law on the double taxation issue because the undisputed facts entitle it to a reduction of personal property taxes for walk-in coolers previously identified, valued, and taxed as part of real property. Relief was available based upon the misreporting of property under A.R.S. § 42–16251(3)(d). This decision obviates the need to discuss the parties' arguments concerning collateral estoppel and whether relief was also available under A.R.S. § 42–16251(3)(e).

CONCLUSION

¶ 32 We affirm the grant of summary judgment to Taxpayer. In addition, we award Taxpayer its costs and reasonable attorneys' fees on appeal under A.R.S. § 12–348(B)(1)(2003), subject to its compliance with Rule 21(c) of the Arizona Rules of Civil Appellate Procedure.

CONCURRING: PHILIP HALL, and DANIEL A. BARKER, Judges.

All Citations

Not Reported in P.3d, 2009 WL 2486774

Footnotes

1 A checked "HA" box on a cost card signifies that the improved commercial property has particular interior construction. HA is a code identifying the cost for interior finishings for supermarkets. The construction may be framed, masonry, concrete block, or the like. The HA component also includes the cost to put in partitioning, doors, moldings, and, in the case of supermarkets, the walk-in coolers.

2 At oral argument on the motions for reconsideration, the County's counsel acknowledged that the initial real property valuations included the walk-in coolers:

> THE COURT: Okay. And also that the original values included the walk-in coolers? Do you agree with that?
> MR. FRIES: I believe we have agreed to that on the record, yes.

3 We cite to current versions of statutes unless they have been modified since the underlying events and such changes would affect our resolution of the appeal.

4 The *Basha's* tax court additionally held that it could not find in favor of Basha's because Basha's "reasonably should have discovered the error in sufficient time to assert it through a tax appeal." In this case, however, the County withdrew a similar argument, explaining: "The County is presently unable to establish that Safeway did have knowledge of these 2000 alleged errors ...."

5 Moreover, the County's counsel confirmed during oral argument that the Assessor's recommendations in the appeals to reduce valuations for real property values had nothing to do with the walk-in coolers:

> THE COURT: Let me just ask Mr. Fries. Since the words "undisputed" were used-the word "undisputed" was used probably by both of you, but, I'm referring to Mr. Wright's use of the word right now, do you agree that the Assessor's recommendations on appeal had nothing to do with the removal of walk-in coolers? Is that undisputed?
> MR. FRIES: That our recommend—well, I don't—
> THE COURT: That the Assessor's decision or recommendations on appeal had nothing to do with removal of walk-in coolers?
> MR. FRIES: I don't think they were mentioned, because we were not aware until March of 2000 that they were even involved. So my guess is, when they were administratively heard in 1999, we were unaware of the issue. And so—
> THE COURT: Okay.
> MR. FRIES:—we did not make that affirmative statement, no.

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