Chris DeRose, Clerk of Court
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05/09/2018 8:00 AM

THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN THE ARIZONA TAX COURT

TX 2016-001332 05/02/2018

HONORABLE CHRISTOPHER WHITTEN

CLERK OF THE COURT
T. Cooley
Deputy

C R MEYER AND SONS COMPANY MICHAEL G GALLOWAY

v.

ARIZONA DEPARTMENT OF REVENUE SCOT G TEASDALE

MINUTE ENTRY

Courtroom 201-OCH

9:03 a.m. This is the time set for Oral Argument re: Motion and Cross-Motion for Summary Judgment. Plaintiff is represented by counsel, Michael G. Galloway. Defendant is represented by counsel, Scot G. Teasdale.

A record of the proceedings is made digitally in lieu of a court reporter.

Oral argument is presented.

Based upon matters presented to the Court,

IT IS ORDERED taking this matter under advisement.

9:30 a.m. Matter concludes.

LATER:

The Court has considered Plaintiff's Motion for Summary Judgment, filed August 7, 2017, Defendant's response and Cross-Motion for Summary Judgment, filed September 25,

2017, Plaintiff's reply to the Plaintiff's Motion for Summary Judgment, filed November 13, 2017, Plaintiff's response to the Defendant's Cross Motion for Summary Judgment, filed January 30, 2018, and Defendant's reply, filed March 22, 2018. The Court benefited from oral argument on the competing motions on May 2, 2018.

Plaintiff's argument that what is now A.R.S. § 42-5009(O) was not effective until 2016 cuts both ways. That subsection makes the seller's acceptance of a certificate in good faith a safe harbor and places the burden of proof on the purchaser, but shifts the burden onto a seller who has reason to believe that the certificate is not accurate or complete. The version of A.R.S. § 42-5022 in effect before 2016 provided, "The burden of proving that a sale of tangible personal property was not a sale at retail shall be upon the person who made it, unless such person has taken from the purchaser a certificate signed by and bearing the name and address of the purchaser that the property was purchased for resale in the ordinary course of business and that he has a valid license, with the number thereof, to sell the kind of property purchased." The exclusion for those exempt from the certificate requirement, now found at § 5022(N), did not yet exist. Plaintiff does not dispute the obvious, that it knew Liberty Iron was not a reseller of concrete floors, and the certificate did not claim otherwise. TPT forms, like all tax forms, are signed under penalty of perjury. This acts as a requirement that the taxpayer in good faith believes what he has reported to be true. Since the safe harbor did not go into effect until 2016, Plaintiff remains on the hook.

Liberty Iron planned a car recycling facility that would house machinery such as a metal shredder. Apparently it was deemed undesirable to leave the shredder exposed to the elements, so Liberty hired Plaintiff as prime contractor for a building to house it and other equipment. The question is whether the building is "used directly" in the operation of the machinery. The Court concludes that it is not.

An item is "used directly" if it "function[s] the way machinery or equipment might in an integrated, synchronized system within the industry." Case law has provided several examples. In the production of metal castings, silica sand, chemical binders, exothermic sleeves, mold cores, mold wash, and hot topping were found to be used directly. *State ex rel. Dept. of Revenue v. Capitol Castings, Inc.*, 207 Ariz. 445, 451 ¶ 26 (2004). In the operation of mining equipment, oils and greases were found to be used directly. *Chevron U.S.A. Inc. v. Arizona Dept. of Revenue*, 238 Ariz. 519 ¶ 21 (App. 2015). However, in the castings case, cement and lime used to control pollution were deemed not to be used directly. *Capitol Castings, supra.*

The choice of words is significant. "Synchronized" contains a time element: one thing works (applying the term broadly) to, or is used at, the pace set by another. That is true of the items identified as being "used directly" in *Capitol Castings* and *Chevron U.S.A.* That is not true of the building erected by Plaintiff. It shields the machinery from any meteorological calamity

that might otherwise befall it, and the massiveness of its floor spared Liberty the expense of driving bolts into the bedrock, but it is not in any time-related sense of the word "used" in the operation of the machinery. The roof diverts rain or blocks sun unchangingly; the number of water molecules or photons it repels does not vary with the rate of operation of the machinery. This corresponds with the common-sense understanding of "used." Buildings, for the most part are passive. They serve a purpose, but that purpose is not to function as part of an integrated, synchronized system.

ACCORDINGLY, Plaintiff's Motion for Summary Judgment is denied and Defendant's Cross-Motion for Summary Judgment is granted.