

IN THE OREGON TAX COURT
MAGISTRATE DIVISION
Property Tax

KEITH MFG. CO.,)	
)	
Plaintiff,)	TC-MD 040988C
)	
v.)	
)	
JEFFERSON COUNTY ASSESSOR,)	
)	
Defendant.)	DECISION

Plaintiff seeks an enterprise zone exemption for the 2004-05 tax year for certain real property identified in the Assessor’s records as Account 10-13-35BD 200, site 856. Trial was held April 4, 2005. Plaintiff was represented by Marc K. Sellers, attorney at law. Gary Williams (Williams), Plaintiff’s Controller, testified for Plaintiff. Patsy J. Mault (Mault), Jefferson County Assessor, testified for Defendant.

I. STATEMENT OF FACTS

The appeal involves an addition to one of Plaintiff’s existing structures. The addition is used for the manufacturing of plastic seal through an extrusion process. The seals are integrated into Plaintiff’s “walking floor conveyance systems.” The building addition was a 45-foot extension to an existing building. The addition was necessary because the existing building was not clean enough to maintain a quality product.

Plaintiff began the construction of the addition in 2002. There is disagreement as to when in 2002 construction actually began. Plaintiff contends work commenced in July; Defendant argues construction began with site preparation in March. The parties agree that dirt was moved to the site in March from elsewhere on the property. Plaintiff acted as a general contractor for the project and its employees performed the majority of the work.

On February 2, 2002, Plaintiff applied for a building permit to legally authorize the construction of the addition. That application was approved and a permit issued on June 5, 2002. On June 20, 2002, Plaintiff submitted a precertification application for an enterprise zone exemption. (Def's Ex A.) That form indicated that "action" in the form of "site preparation" would commence on June 24, 2002, and was expected to be completed by December 2003. (*Id.* at 2.) The precertification application was approved June 26, 2002. (Ptf's Ex 1 at 1.)

On March 30, 2004, Plaintiff filed an enterprise zone exemption claim form.¹ (Ptf's Ex 2 at 1.) Plaintiff's exemption claim form states that work on the addition began in March 2002. (*Id.* at 2.) Defendant denied Plaintiff's application by letter dated June 9, 2004. The stated reason for the denial was "that the subject property[,] an addition to an existing building, has not been completed." (Ptf's Ex 3.)

Defendant argues Plaintiff is not entitled to exemption because it began construction before filing for precertification, construction was not completed within two years, and Plaintiff did not add the statutorily required minimum number of additional full-time employees.

II. ANALYSIS

Oregon law provides for a three year, 100 percent property tax exemption for qualifying property of a qualified business firm in a designated enterprise zone. ORS 285C.175(2)(a) and ORS 285C.175(3)(a).² The purpose of the exemption is to "stimulate and protect the economic success" of certain "communities at the center of or outside major metropolitan areas for which geography may act as an economic hindrance." ORS 285C.055. The exemption is intended to encourage "development, growth and expansion of employment, business, industry and

¹ The title of the form is "Oregon Enterprise Zone Exemption Claim." (Ptf's Ex 2.)

² Unless otherwise noted, all references to the Oregon Revised Statutes (ORS) are to 2003. The enterprise zone exemption here at issue was provided in ORS 285B.698 under 2001 law.

commerce” in certain economically depressed areas of the state by “attract[ing] private business investment into these areas and * * * help[ing] resident businesses to reinvest and grow.” *Id.* Both new buildings and additions to existing buildings can qualify for exemption. *See* ORS 285C.180(1)(a) and (b).

The applicable law under both the 2001 and 2003 statutes requires a precertification application and, after construction is completed, an exemption claim form. *See generally* ORS 285C.140 and ORS 285C.220 (*formerly* ORS 285B.719 and ORS 285B.722). Plaintiff filed both applications. The precertification application was approved, but the exemption claim form was denied.

Plaintiff began construction of the addition in 2002. The law in effect at that time required the firm to apply for precertification “before the commencement of construction, modification or installation of qualified property in an enterprise zone, and before the hiring of eligible employees.” ORS 285B.719(1) (2001).³ Plaintiff filed its application for precertification on June 20, 2002. (Def’s Ex A.)

Williams acknowledged at trial that dirt was moved to the site of the addition in March 2002, but testified that “construction” did not begin until early July 2002. That conclusion depends upon how “construction” is defined. Defendant insists Plaintiff began construction in March 2002, as indicated in Plaintiff’s exemption claim form filed in March 2004. (Def’s Ex F at 2, line 11a.) Keith Foster (Foster), President of Keith Manufacturing, filed the March 2004 exemption claim form. Foster also signed the precertification application filed nearly two years earlier, on June 20, 2002. That form (precertification application) indicated that construction was *expected* to begin on June 24, 2002.

³ That requirement continues under 2003 law. *See* ORS 285C.140(1)(a).

There is no explanation for the discrepancy in the dates. Foster did not testify, and Williams could not explain why the different dates were put on the two forms. Williams, who is in charge of Plaintiff's accounting, testified that no charges were taken in its cost accounting or payroll records for any work associated with the newly-constructed addition until July 2002.

The evidence suggests that the construction of the building itself, and perhaps some of the final site preparation, did not commence until sometime in July 2002. However, it is clear to the court that dirt was moved to the site in March 2002 in anticipation of construction. Plaintiff moved the dirt from another location on its property. Williams testified that the company knew that it would be constructing an addition to the building, and it also had a driveway to build up in that area. According to Williams, Plaintiff would have wanted to move any surplus dirt it had to that area.

Does the movement of dirt constitute "commencement of construction," as that term is used in the statute? The statute does not define the term "commencement of construction." However, OAR 123-065-4310(2)(a), the administrative rule governing the precertification application process, requires the submission of an application for precertification before any "physical work" is undertaken. That rule provides that physical work "includes *site preparation* that leads directly to construction * * * *such as fill, grading or leveling on raw land.*" OAR 123-065-4310(3)(a) (emphasis added).⁴ The question then becomes whether the movement of the dirt constituted site preparation. The dirt was apparently used as "fill."

OAR 123-065-4310(3)(a) only prohibits site preparation that leads "directly" to construction. The word "directly" is defined as "immediately after." *Webster's Third New Int'l Dictionary* 641 (unabridged ed 2002). The word "immediately" is defined as "in direct

⁴ Unless noted otherwise, all references to the Oregon Administrative Rules (OAR) are to 2003.

connection or relation” or “without interval of time.” *Id.* at 1129. Movement of the dirt seems to have occurred “in direct connection or relation” to construction of the addition, but there followed an interval of time of approximately four months. Under OAR 123-065-4310(3)(d), “any activity that occurred and stopped prior to six months before the submission of the Application” is excluded from the definition of physical work, and does not constitute the “commencement of construction.” That suggests that any physical work of the type set out in OAR 123-065-4310(3)(a) will be found to have led directly to construction if there is a causal relationship between the physical work (*e.g.*, movement of dirt) and the ensuing construction, unless the work ceased more than six months before the submission of the precertification application. Thus, any work done “in direct connection or relation” to construction before the precertification application is submitted disqualifies the firm for exemption.

The exemption claim form filed March 30, 2004, states that construction began in March 2002. That date corresponds with the date that the dirt was moved. Plaintiff suggests that the form was completed nearly two years after construction actually began in July 2002, and that the passage of time may account for the alleged error on the form. Williams opined that construction did not begin until after July 1, but he did not appear to have any first-hand knowledge of that fact. Foster did not testify, and the court is left with no explanation for the discrepancy in the dates on the two forms. One of the dates corresponds to the date the dirt was moved, and Williams acknowledges that Plaintiff knew fill dirt would be needed for the addition. The dirt was apparently used as part of the site preparation for the building. On the other hand, there is little evidence supporting the assertion that construction did not begin until July 2002. On that point, the evidence presented is equivocal.

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To prevail, Plaintiff must prove its case by a “preponderance” of the evidence. *See* ORS 305.427. A “[p]reponderance of the evidence means the greater weight of evidence, the more convincing evidence.” *Feves v. Dept. of Revenue*, 4 OTR 302, 312 (1971) (citation omitted). “[I]f the evidence is inconclusive or unpersuasive, the taxpayer will have failed to meet his burden of proof.” *Reed v. Dept. of Rev.*, 310 Or 260, 265, 798 P2d 235 (1990). On those facts, the court concludes that physical work, in the form of site preparation leading directly to construction, occurred prior to the filing of the precertification application, in violation of OAR 123-065-4310(3)(a).

Because the court has found that Plaintiff began construction before filing the precertification application, Plaintiff is not entitled to the exemption. Accordingly, the court need not resolve the other issues raised in this matter.

III. CONCLUSION

Plaintiff’s request for reversal of Defendant’s denial of its application for enterprise zone exemption is denied because Plaintiff commenced construction in the form of site preparation prior to submitting its precertification application. Now, therefore,

IT IS THE DECISION OF THIS COURT that Plaintiff’s appeal is denied.

Dated this _____ day of June 2005.

DAN ROBINSON
MAGISTRATE

If you want to appeal this Decision, file a Complaint in the Regular Division of the Oregon Tax Court, by mailing to: 1163 State Street, Salem, OR 97301-2563; or by hand delivery to: Fourth Floor, 1241 State Street, Salem, OR.

Your Complaint must be submitted within 60 days after the date of the Decision or this Decision becomes final and cannot be changed.

This document was signed by Magistrate Dan Robinson June 10, 2005. The Court filed and entered this document June 10, 2005.