COURT OF APPEALS
DECISION
DATED AND FILED

May 12, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1211 **Cir. Ct. No. 2009CV11522**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

GIUFFRE BROS. CRANES, INC.,

PLAINTIFF-RESPONDENT,

V.

CITY OF MILWAUKEE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: WILLIAM SOSNAY, Judge. *Affirmed*.

Before Vergeront, P.J., Lundsten and Blanchard, JJ.

¶1 LUNDSTEN, J. The City of Milwaukee collected personal property tax for certain truck-mounted cranes owned by Giuffre Bros. Cranes, Inc. The cranes were simultaneously held out for sale and for rent by Giuffre. After paying the tax, Giuffre sought reimbursement from the City, arguing that the cranes

qualified for the "merchants' stock-in-trade" exemption to personal property tax found in WIS. STAT. § 70.111(17).[1]

¶2 The circuit court concluded that the "merchants' stock-in-trade" exemption applied to Giuffre's cranes. The court granted summary judgment in favor of Giuffre, and entered a judgment awarding Giuffre a refund. On appeal, the City argues that the circuit court improperly construed WIS. STAT. § 70.111(17). The City contends that, although Giuffre is a "merchant" and although its cranes are "stock-in-trade," Giuffre is not entitled to an exemption because the cranes are also held out for rent. Based on the specific arguments made by the parties, we reject the City's view and affirm the circuit court.

Background

¶3 Giuffre is in the business of selling custom-built truck-mounted cranes.[2] Giuffre typically custom builds cranes for customers, but it also maintains an inventory of cranes that it holds out for sale. To help induce sales from inventory and to encourage custom orders, Giuffre allows "a small number of cranes" from its inventory to be rented for "demonstration purposes." The rental cranes are available for sale at all times, even while being rented.

¶4 In its 2008 personal property tax assessment, the City taxed a portion of Giuffre's cranes. Apparently, the City taxed the cranes that were, as of

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[2] Giuffre's complaint referred to all of the disputed equipment as cranes, and we do the same for purposes of this opinion. We do this while acknowledging that the City contends there are three categories of equipment at issue: "cranes, square shooters (oversized forklifts), and containers." The City does not ask us to address these categories separately.

January 1, both for sale and currently rented out for more than thirty days.[3] The City's assessment valued this portion of Giuffre's crane inventory at about $1,000,000, resulting in a $24,032 tax liability. An affidavit submitted by Giuffre in support of its motion for summary judgment states that ten of its demonstration rental cranes were included in the assessment figure, but, apart from this, the record contains scant information about Giuffre's inventory or the particulars of the assessment. Giuffre paid the tax on the assessed value and then contested it, arguing that the cranes at issue were exempt under WIS. STAT. § 70.111(17), which exempts "merchants' stock-in-trade."

¶5 After the City disallowed Giuffre's refund claim, Giuffre filed this action pursuant to WIS. STAT. § 74.35(3)(d). While this action was pending, the City, for tax year 2009, again levied tax on a portion of Giuffre's crane inventory, apparently using the same method it used in 2008. The parties stipulated that Giuffre could amend its pleadings to include a challenge to the 2009 tax, thus seeking an additional refund of approximately $25,984.

¶6 Giuffre moved for summary judgment, relying on the "merchants' stock-in-trade" exemption. The circuit court agreed that the exemption applied, and granted summary judgment in favor of Giuffre. The court ordered the City to refund Giuffre the challenged amounts for both 2008 and 2009. The City appeals that judgment.

[3] Taxes are levied on property owned by the taxpayer as of January 1. *See* WIS. STAT. § 70.01.

Discussion

A. Introduction

¶7 This case comes to us after the circuit court granted summary judgment in favor of Giuffre. A party is entitled to summary judgment when there are no disputed issues of material fact and that party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). Here, there are no factual disputes that matter, and the parties' arguments are directed solely at a question of law. We review questions of law *de novo*. ***United Rentals, Inc. v. City of Madison***, 2007 WI App 131, ¶11, 302 Wis. 2d 245, 733 N.W.2d 322.

¶8 Personal property is subject to state taxation, but there are numerous exemptions. WISCONSIN STAT. § 70.111 contains twenty-two subsections, each of which lists one or more categories of exempt personal property. The dispute here concerns § 70.111(17), which exempts three categories of personal property: (1) "merchants' stock-in-trade," (2) "manufacturers' materials and finished products," and (3) "livestock." The parties discuss only the first category, "merchants' stock-in-trade."

¶9 Giuffre's argument is straightforward. Giuffre argues that its entire inventory of cranes is exempt under WIS. STAT. § 70.111(17) because the cranes are, in the words of the statute, "merchants' stock-in-trade." More specifically, Giuffre contends that it is a "merchant" because it is "'a buyer and seller of commodities for profit: trader [or] operator of a retail business.'" *See* ***Village of Menomonee Falls v. Falls Rental World***, 135 Wis. 2d 393, 397, 400 N.W.2d 478 (Ct. App. 1986) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1413 (1976)). And, Giuffre asserts, its cranes are "stock-in-trade" because they are "'the goods kept for sale by a shopkeeper.'" *See* ***id.*** (quoting WEBSTER'S, at

2247). Giuffre accurately states that it is undisputed that Giuffre is a "merchant," that its cranes are "stock-in-trade," and that nothing in § 70.111(17) expressly requires that the cranes be exclusively held out for sale. Therefore, Giuffre contends, its entire inventory of cranes is exempt under § 70.111(17).

¶10 Giuffre had the burden of showing that it was entitled to an exemption. *See* ***Deutsches Land, Inc. v. City of Glendale***, 225 Wis. 2d 70, 80, 591 N.W.2d 583 (1999) (the party seeking the exemption bears the burden of proving entitlement). We agree with the circuit court that Giuffre presents a reasonable reading of the statute and a reasonable application of the statute to the undisputed facts. Thus, in the absence of a countervailing argument that defeats Giuffre's argument, we agree with the circuit court that Giuffre has met its burden.

¶11 In sections B and C below, we examine the City's arguments. But, before doing so, we provide additional context.

¶12 First, we note that the City's position has changed with regard to its reliance on WIS. STAT. § 70.111(22). That section provides an exemption when a business is primarily engaged in renting out equipment and when the equipment is rented out for one month or less.[4] The City has acknowledged all along that § 70.111(22) does not *directly* apply because it agrees that Giuffre is a "merchant" under § 70.111(17) and is not primarily engaged in renting. Nonetheless, the City previously argued that § 70.111(22) reveals a legislative intent that all personal property *held for rent for more than one month* is taxable. In effect, the City previously took the position that § 70.111(22) supplied a default rule governing

[4] We provide a more detailed discussion of WIS. STAT. § 70.111(22) in ¶¶17-22, below.

rental property owned by all entities, regardless whether they are primarily in the business of renting.

¶13 In keeping with this view, the City apparently singled out cranes for taxation based on the length of time the cranes were rented out. We say "apparently" because the record does not indicate what method the City used and, at oral argument, the attorney for the City was unsure about the method used. The attorney speculated that the City assessors looked at the status of each crane on January 1, 2008, and January 1, 2009, and applied the following criteria: if the crane was currently being rented out for more than one month, the value of the crane was taxed, but if the crane was on Giuffre's lot or if it was rented out for one month or less, it was not taxed.

¶14 If this was the City's approach, it does not square with the City's current view. At oral argument, the City conceded that we should not rely on WIS. STAT. § 70.111(22) to glean legislative intent that the taxability of Giuffre's cranes depends on the *amount of time* they were rented out. More specifically, the City took the new position that, because Giuffre was not a qualifying business under § 70.111(22), Giuffre would not be entitled to any exemption under § 70.111(22), regardless of rental time periods. Thus, the City is in the odd posture of attempting to defend taxation that was calculated based on an interpretation of an exemption that the City has abandoned.

¶15 Our second observation is that it is unclear whether the City now believes that Giuffre's entire inventory of cranes is taxable. So far as we can tell, the logical extension of the City's current argument is that, if all of the cranes in

Giuffre's inventory are available for rent, regardless of actual rental history, then they are all taxable.[5] Thus, although the City taxed only a portion of Giuffre's inventory, it may be contending that Giuffre's entire inventory is subject to taxation. Or maybe not. At oral argument, the City seemed reluctant to embrace this view, perhaps because it seems harsh to subject Giuffre's entire inventory to taxation when, the City admits, Giuffre is primarily in the business of selling cranes and derives only a small portion of its income from renting. And, we note, the City does not appear to dispute Giuffre's claim that its rental operation is primarily a sales tool. That is, rentals are often essentially trial periods that precede a sale.

¶16 Finally, before moving on to the arguments the City does make, we observe that the City does not argue that Giuffre's cranes fail to qualify as "stock-in-trade" within the meaning of WIS. STAT. § 70.111(17). To the contrary, the City clarified at oral argument that it has admitted "from day one" that Giuffre's cranes are "stock-in-trade." Rather, the City seems to contend that § 70.111(17) has an additional unstated exclusivity requirement. That is, the City seems to contend that, even if a business is a "merchant," as it concedes Giuffre is, and even if the equipment at issue is "stock-in-trade," as it concedes Giuffre's cranes are, § 70.111(17) also requires that the "stock-in-trade" be exclusively held for sale. So far as we can tell, the City's exclusivity argument is grounded in its reliance on § 70.111(22) and ***Falls Rental World***, 135 Wis. 2d 393. We address the City's reliance on these sources in the sections below.

[5] Presumably the City does not take the position that custom-made cranes that are built and then delivered to a customer are taxable. Rather, the cranes in dispute are those in Giuffre's stock not spoken for and available for sale.

B. The Held-For-Rental Exemption In WIS. STAT. § 70.111(22)

¶17 As discussed above, the City has abandoned its direct reliance on WIS. STAT. § 70.111(22). That is, it no longer relies on § 70.111(22) for the proposition that it matters how long Giuffre's cranes were rented out. Nonetheless, the City maintains that § 70.111(22) is at least a limited indication of legislative intent regarding the taxation of rental equipment. We disagree. As explained below, § 70.111(22) contains a specific and limited exemption; it does not provide general guidance.

¶18 The exemption in WIS. STAT. § 70.111(22) is titled "rented personal property." But the exemption is not as broad as the title suggests.[6]

¶19 First, WIS. STAT. § 70.111(22) applies only to personal property owners who meet specific criteria, including being "classified in group number 735, industry number 7359 of the 1987 standard industrial classification manual published by the U.S. office of management and budget." ***Id.*** This cross-

[6] The full text of WIS. STAT. § 70.111(22) reads:

> RENTED PERSONAL PROPERTY. Personal property held for rental for periods of one month or less to multiple users for their temporary use, if the property is not rented with an operator, if the owner is not a subsidiary or affiliate of any other enterprise which is engaged in any business other than personal property rental, if the owner is classified in group number 735, industry number 7359 of the 1987 standard industrial classification manual published by the U.S. office of management and budget and if the property is equipment, including construction equipment but not including automotive and computer-related equipment, television sets, video recorders and players, cameras, photographic equipment, audiovisual equipment, photocopying equipment, sound equipment, public address systems and video tapes; party supplies; appliances; tools; dishes; silverware; tables; or banquet accessories.

reference in the statute to a group and industry number is to the following classification: "Establishments primarily engaged in renting or leasing (except finance leasing) equipment ...." OFFICE OF MANAGEMENT & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, STANDARD INDUSTRIAL CLASSIFICATION MANUAL, at 363-64 (1987).

¶20 Second, WIS. STAT. § 70.111(22) creates an exemption for the seemingly expansive category "equipment," but there is a long list of broadly stated exceptions, such as "computer-related equipment," "appliances," and "tools." Thus, only a subset of equipment is potentially exempt.

¶21 Third, WIS. STAT. § 70.111(22) applies only to equipment held out for rental for periods of one month or less.

¶22 These and other limitations undercut the City's view that we may glean from WIS. STAT. § 70.111(22) the legislature's intent with respect to items held out for rental generally. Most important for our purposes, there is no reason to suppose that the subsection conveys legislative intent with respect to equipment that is held out by a merchant primarily for sale.[7]

[7] In the context of discussing "use" under WIS. STAT. § 70.111(22), the City discusses ***Village of Lannon v. Wood-Land Contractors, Inc.***, 2003 WI 150, 267 Wis. 2d 158, 672 N.W.2d 275. The City asserts that, in that case, the supreme court rejected the "primary purpose" test. We agree that the ***Village of Lannon*** court declined to apply a primary purpose test to the exemption at issue there, an exemption for logging equipment. *See* ***id.***, ¶48. That exemption applies to "'[a]ll equipment used to cut trees, to transport trees in logging areas or to clear land of trees for the commercial use of forest products.'" *See* ***id.***, ¶18 (quoting WIS. STAT. § 70.111(20)). In the face of a statute that focused solely on the *use* of equipment, the supreme court declined to apply a primary-purpose-of-the-business test "here." ***Id.***, ¶40. As the court explained: "Here, the subsection at issue contains [no reference to the type of business]. It is ... [an] exemption with a focus on the use of equipment." ***Id.***, ¶36. The point of the City's reliance on ***Village of Lannon*** is unclear, especially given the City's concessions that Giuffre is a "merchant" and that its cranes are "stock-in-trade" under § 70.111(17).

(continued)

C. ***Village of Menomonee Falls v. Falls Rental World***

¶23 The City relies on ***Village of Menomonee Falls v. Falls Rental World***, 135 Wis. 2d 393, a case that predates the 1989 adoption of the held-for-rental exemption discussed above. According to the City, ***Falls Rental World*** contains a general rule applicable here, namely, that the exemption for "stock-in-trade" found in WIS. STAT. § 70.111(17) does not cover property held out for sale and also held out for rent. We are not persuaded.

¶24 Falls Rental World argued that the stock it held out for rental was exempt "stock-in-trade" under WIS. STAT. § 70.111(17). ***Falls Rental World***, 135 Wis. 2d at 395-96. We disagreed for two reasons. First, Falls Rental World did not meet the definition of a "merchant" in sub. (17) because the company was "in the business of renting … equipment" and was "not in the business of selling these items." ***Id.*** at 398. Second, we explained that "personal property held out for rental is not 'stock-in-trade' as that term is used in the statute." ***Id.*** at 395; *see also* ***id.*** at 398.

¶25 The City's contention—that ***Falls Rental World*** stands for a general rule that property held out both for sale and for rent is not exempt under WIS. STAT. § 70.111(17)—does not withstand scrutiny. ***Falls Rental World*** does not purport to address property that is primarily held out for sale by a "merchant" and,

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Also in the context of its WIS. STAT. § 70.111(22) argument, the City briefly mentions ***United Rentals, Inc. v. City of Madison***, 2007 WI App 131, 302 Wis. 2d 245, 733 N.W.2d 322. The City points to ***United Rentals*** for the proposition that the "stock-in-trade" exemption "does not apply when equipment otherwise held for sale is also rented for a period in excess of one month in a tax year." Because the City conceded at oral argument that it does not make sense to distinguish among Giuffre's cranes based on the length of time they are rented, we are left with no developed argument that relies on ***United Rentals***.

secondarily, that is also available for rent. Indeed, after recounting that some of Falls Rental World's stock is "occasionally removed from the rental group and sold ... because it is no longer usable as rental property or because a rental customer has asked to purchase the property," we went on to note that the circuit court found that Falls Rental World's "primary purpose was to solicit customers to rent its property," and we spoke of the property in black-and-white terms as *rental* property. ***Id.*** at 395; *see* ***id.*** at 398 (characterizing the rental company as "in the business of renting … equipment" and "not in the business of selling these items"). Thus, ***Falls Rental World*** does not purport to set forth a general rule that applies to property that is held out both for sale and for rent.

¶26 In sum, the specific arguments made by the City in support of its proposition that there is an additional unstated exclusivity requirement in WIS. STAT. § 70.111(17) are not persuasive.

Conclusion

¶27 For the reasons stated, we conclude that the circuit court correctly determined that Giuffre met its burden of showing that the taxed cranes were exempt under WIS. STAT. § 70.111(17). We therefore affirm the circuit court.

By the Court.—Judgment affirmed.

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