Agri-Plex Heating & Cooling v. Hegar

Court of Appeals of Texas, Third District, Austin

January 19, 2017, Filed

NO. 03-15-00813-CV

Reporter
2017 Tex. App. LEXIS 386 *

Agri-Plex Heating and Cooling, LLC, Appellant v. Glenn Hegar, Comptroller of Public Accounts of the State of Texas; and Ken Paxton, Attorney General of the State of Texas, Appellees

Prior History: **[*1]** FROM THE DISTRICT COURT OF TRAVIS COUNTY, 201ST JUDICIAL DISTRICT. NO. D-1-GN-12-000545. HONORABLE RHONDA HURLEY, JUDGE PRESIDING.

Disposition: Affirmed.

Judges: Before Justices Puryear, Goodwin, and Field.

Opinion by: Melissa Goodwin

Opinion

MEMORANDUM OPINION

Agri-Plex Heating and Cooling, LLC, (Agri-Plex) appeals from the trial court's summary judgment in favor of Glenn Hegar, Comptroller of Public Accounts of the State of Texas, and Ken Paxton, Attorney General of the State of Texas (jointly, the Comptroller). Agri-Plex filed suit in Travis County seeking a declaration that it does not have a sales tax liability following its purchase of a business. *See* Tex. Tax Code §111.020 (providing for tax collection on sale or termination of business). The parties filed competing motions for summary judgment. The trial court granted the Comptroller's motion, denied Agri-Plex's motion, and rendered judgment that Agri-Plex take nothing. For the reasons that follow, we affirm the trial court's judgment.

BACKGROUND AND STATUTORY FRAMEWORK

On August 24, 2006, Agri-Plex purchased from Kelly Monse and Agriplex Heating & Air, Inc. (jointly, the Seller) all of the assets of a small heating and air conditioning business (the Business) located in Ballinger, Texas. Agri-Plex **[*2]** paid the Seller $34,200 as consideration for the assets, which included the Business's inventory, contracts, furniture, fixtures, equipment, accounts receivable, other contract rights, permits, licenses, and certain accounts and liabilities. Agri-Plex also paid the Seller $19,600 for a non-compete agreement providing that the Seller would not compete with Agri-Plex within a 100-mile radius for ten years. The total purchase price paid by Agri-Plex to the Seller for the Business was $53,800.[1]

When the purchase was made, there was no outstanding sales tax for the Business known by the Seller, Agri-Plex, or the Comptroller. Agri-Plex did not withhold any amount from the purchase price and did not request a receipt for taxes paid or a certificate of no tax due from the Seller. *See id.* § 111.020(a) (providing that on sale of business, successor to seller or seller's assignee shall withhold amount of purchase price sufficient to pay amount due until seller provides receipt from comptroller or certificate that no amount is due). Agri-Plex also did not request a certificate of no tax due or statement of the amount due directly from the Comptroller. *See id.* §111.020(c) (providing that purchaser of business may request **[*3]** that comptroller issue certificate stating that no tax is due or issue statement of amount required to be paid). Section 111.020 of the Tax Code provides that if a purchaser fails to withhold an amount of the purchase price as required by the Tax Code, it is liable for the amount required to be withheld to the extent of the value of the purchase price. *Id.* § 111.020(b). If requested, a certificate of no tax due must be issued by the Comptroller within 60 days after receiving the request, or within 60 days after the day on which the records of the former owner of the business are made available for audit, whichever period expires later, but no later than

[1] Agri-Plex disputes that the $19,600 paid for the non-compete agreement was part of the purchase price of the Business, an argument we reject in our discussion of Agri-Plex's second issue.

90 days after the request. *Id.* § 111.020(c). If this deadline is missed by the Comptroller, the purchaser is released from its obligation to pay the tax. *Id.* § 111.020(d).

On February 5, 2007, the Comptroller began a tax audit of the Seller's books for the period between April 1, 2003 and December 31, 2006. On December 6, 2010, the Comptroller issued to Agri-Plex a Texas Notice of Tax/Fee Due under Texas Tax Code §111.020 in the amount of $64,097.34, which was the Seller's sales tax liability resulting from the Comptroller's audit of the Seller's books. On February 8, 2011, the Comptroller issued to Agri-Plex an amended Texas **[*4]** Notice of Tax/Fee Due, amending the tax liability to $53,800, the value of the purchase price of the Business as reflected in the purchase agreement. *See id.* § 111.020(b).

Agri-Plex contested the assessment and sought a redetermination, which the Comptroller denied after a hearing. *See id.* § 111.009(a) (providing that person with direct interest in determination may petition for redetermination), (c) (providing for hearing on redetermination). Agri-Plex then filed this lawsuit, seeking a declaration that it does not owe $53,800 or, in the alternative, that it owes only $34,200, which is the total amount paid to the Seller minus the consideration for the non-compete agreement. The parties filed competing motions for summary judgment. The trial court granted the Comptroller's motion, denied Agri-Plex's motion, and rendered judgment that Agri-Plex take nothing. This appeal followed.

STANDARD OF REVIEW

Since the parties do not dispute the relevant facts, this is a proper case for summary judgment. *See City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 356 (Tex. 2000). We review a trial court's summary judgment de novo. *Travel Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010). When the trial court does not specify the grounds for granting the motion, we must uphold the judgment if any of the grounds asserted in the motion and preserved **[*5]** for appellate review are meritorious. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 216 (Tex. 2003). When both parties move for summary judgment on the same issues and the trial court grants one motion and denies the other, we consider the summary judgment evidence and questions presented by both sides. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). If we determine that the trial court has erred, we render the judgment the trial court should have rendered. *Id.*

Agri-Plex's issues concern statutory construction, a question of law that we review de novo. *See Railroad Comm'n v. Texas Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 624 (Tex. 2011). Our primary concern in construing a statute is the express statutory language. *See Galbraith Eng'g Consultants, Inc. v. Pochucha*, 290 S.W.3d 863, 867 (Tex. 2009). Words that are not defined are given their ordinary meanings, unless a different meaning is apparent from the context or the plain meaning leads to absurd results. *Marks v. St. Luke's Episcopal Hosp.*, 319 S.W.3d 658, 663 (Tex. 2010). We also "generally avoid construing individual provisions of a statute in isolation from the statute as a whole." *Texas Citizens*, 336 S.W.3d at 628. Specifically, "[t]axing statutes are construed strictly against the taxing authority and liberally for the taxpayer." *Morris v. Houston Indep. Sch. Dist.*, 388 S.W.3d 310, 313 (Tex. 2012) (per curiam). If the statutory language or agency rule is ambiguous, we may defer to an administrative agency's construction of its own statutory authority and rules, as long as the construction is reasonable and does not conflict with the language of the statute or **[*6]** rule. *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 438 (Tex. 2011); *Texas Bd. of Chiropractic Exam'rs v. Texas Med. Ass'n*, 375 S.W.3d 464, 475 (Tex. App.—Austin 2012, pet. denied). However, "agency deference has no place when statutes are unambiguous . . . [, and] agency deference does not displace strict construction when the dispute is not over how much tax is due but, more fundamentally, whether the tax applies at all." *TracFone Wireless, Inc. v. Commission on State Emergency Commc'ns*, 397 S.W.3d 173, 182-83 (Tex. 2013).

DISCUSSION

In its first issue, Agri-Plex argues that the trial court erred in denying its motion for summary judgment and granting that of the Comptroller. Its arguments are premised on the contention that "the amount required to be withheld" under section 111.020 was unknown and unascertainable at the time of closing, releasing Agri-Plex from the Business's tax liability. *See* Tex. Tax Code § 111.020(b). Agri-Plex focuses on the word "amount," which appears multiple times in section 111.020, insisting that it requires specificityand cannot be theoretical or abstract. It argues that "the amount due"—as used in section 111.020(a)—means the amount of fixed liability ascertainable at the time of the purchase, and that to impose strict liability on an innocent purchaser for an amount determined later, the statute would have to use broader language, such as "liability," or "any tax owed by the taxpayer." *See id.* § 111.020(a).

Since the "amount" known by Seller, Agri-Plex, and the Comptroller at the time of closing was $0, **[*7]** Agri-Plex contends that it complied with the statute by withholding from the purchase price the amount required to be withheld: $0. The Comptroller counters that Agri-Plex is liable because "the amount" does not refer to an amount ascertained at the time of purchase, but to the amount of tax liability, which can be determined through the Comptroller's tax audit after the purchase for taxes due up to four years before the purchase. Construing the statute as a whole, we agree with the Comptroller. When "amount" is read in the context of the entire statute, it is apparent that it refers to the amount of tax liability ultimately determined, not to the amount of tax liability known or specified to be due at the time of purchase. *See Texas Citizens*, 336 S.W.3d at 628 (stating that we read statute "as a whole and interpret it to give effect to every part").

Section 111.020(e) provides that "a period of limitation during which the obligation of a purchaser under this section may be enforced begins when the former owner of the business sells the business or stock of goods or when a determination is made against the former owner, whichever event occurs later." Tex. Tax Code § 111.020(e). Under section 111.201, taxes may be assessed for up to four years after they become due and payable. **[*8]** *Id.* § 111.201. Thus, under the plain language of the statute, Agri-Plex was on notice that a tax liability determination could be made after the purchase and that the assessment could include taxes determined to be due up to four years before the purchase. *See Marks*, 319 S.W.3d at 663; *Pochucha*, 290 S.W.3d at 867.

The Tax Code provides options for innocent purchasers to avoid liability for sellers' taxes. Agri-Plex could have asked the Seller to provide a receipt from the Comptroller stating that the amount had been paid or a certificate stating that no amount was due. *See* Tex. Tax Code § 111.020(a). Alternatively, Agri-Plex could have exercised the safe harbor provision in subsection (c) and asked the Comptroller directly for a certificate of no tax due or a statement of the amount required to be paid. *See id.* § 111.020(c). If the Comptroller had not provided the certificate or statement within 90 days, Agri-Plex would have been released from liability. *See id.* § 111.020(d). Having failed to request a receipt or certificate from the seller or exercise its safe harbor option, Agri-Plex cannot escape liability under section 111.020 merely because it did not determine whether any tax was due and the specific amount to withhold. *See id.* § 111.020(b).

Agri-Plex argues that the Comptroller's construction of the statute leads **[*9]** to an absurd result because it requires a purchaser to withhold the entire purchase price at closing when there are no known sales tax liabilities and requires the seller to turn over all assets in exchange for nothing. However, the options in section 111.020(a) and the safe harbor provision of section 111.020(c) allow the parties to determine the existence and amount of any tax liability and avoid such a result. *See id.* § 111.020(a), (c). Agri-Plex also argues that the Comptroller's construction of the statute leads to an absurd result because it would require Agri-Plex to pay "double the original purchase price" for the Business. However, had Agri-Plex taken into consideration the tax liability of the Business, the original purchase price would likely have been different. After the purchase, the Comptroller determined through its tax audit that the "amount due" was $64,097.34. Because subsection (b) states that a successor is liable only up to the value of the purchase price, Agri-Plex was assessed a liability of only $53,800, the purchase price. *See id.* § 111.020(b). Thus, if the worth of the Business was $53,800 without the tax liability, the Business had a negative worth with the tax liability. Because Agri-Plex chose not to exercise the **[*10]** options in section 111.020(a) or the safe harbor provision of section 111.020(c), and assumed the risk in not determining the possible tax liability of the Business it was buying, it is now faced with what it views as an excessive amount of tax liability. To the extent that result is "absurd," it is the result of Agri-Plex's decisions, not the result of the express statutory language. *See Marks*, 319 S.W.3d at 663; *Pochucha*, 290 S.W.3d at 867.

Faced with the representation by the Seller that "all known sales taxes of the Seller had been paid," Agri-Plex decided not to withhold any amount of the purchase price and declined to exercise the options in section 111.020(a) or the safe harbor provision of section 111.020(c). Thus, under the plain language of the Tax Code, construed as a whole, Agri-Plex is liable for the amount required to be withheld to the extent of the value of the purchase price. *See* Tex. Tax Code § 111.020(b); *Texas Citizens*, 336 S.W.3d at 628; *Marks*, 319 S.W.3d at 663; *Pochucha*, 290 S.W.3d at 867. We conclude that the trial court did not err in denying Agri-Plex's motion for summary judgment and granting the Comptroller's motion. We overrule Agri-Plex's first issue.

In its second issue, Agri-Plex argues that if the Court concludes that it is liable for the Business's tax liability, it should be liable for only $34,200, the difference between the total amount paid—$53,800—and the

covenant not to compete **[*11]** price of $19,600. Agri-Plex asserts that the consideration paid for the covenant not to compete was not part of the purchase price that limits liability under §111.020(b) and that no tangible or intangible property or rights were transferred to Agri-Plex in exchange for the Seller's covenant not to compete. *See* Tex. Tax Code § 111.020(b) (purchaser is liable only "to the extent of the value of the purchase price"). However, the purchase agreement stated that the total "cash consideration for the sale of all assets" included "No Compete Agreement, $19,600." Further, the non-compete agreement, attached to the purchase agreement as Exhibit A, expressly provided that the consideration of $19,600 paid for the non-compete agreement "shall be deemed to be a part of the purchase price consideration . . . ." We conclude that the trial court did not err in including the consideration paid for the non-compete agreement in the amount of tax liability and overrule Agri-Plex's second issue.[2]

CONCLUSION

Having overruled Agri-Plex's issues, we affirm the trial court's judgment.

Melissa Goodwin, Justice

Before Justices Puryear, Goodwin, and Field

Affirmed

Filed: January 19, 2017

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[2] Agri-Plex also relies on a Comptroller rule concerning successor liability incurred by the purchase of a business, which provides a list of items that are indicative of a sale of a business or stock of goods. *See* 34 Tex. Admin. Code § 3.7(d) (Comptroller of Public Accounts, Successor Liability: Liability Incurred by Purchase of Business) (1992). However, although Agri-Plex cited this rule in its briefing in the administrative hearing, it did not assert this argument in its motion for summary judgment, and we may not uphold summary judgment on grounds not presented in the motion. *See Yalamanchili v. Mousa*, 316 S.W.3d 33, 40 (Tex. App.—Houston [14th Dist.] 2010, pet. denied). Even if we were able to consider Rule 3.7(d), it would not affect our disposition in light of the express language of the purchase agreement and non-compete agreement.