TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-15-00516-CV

Cantu Enterprises, 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

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 126TH JUDICIAL DISTRICT NO. D-1-GN-13-004369, HONORABLE SCOTT H. JENKINS, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

Appellant Cantu Enterprises, LLC (Cantu) seeks reversal of the trial court's denial of a refund of sales and use tax, interest, and penalty that Cantu paid under protest on the purchase of an aircraft. Cantu asserts that its purchase is an exempt sale for resale under sections 151.006 and 151.302 of the Texas Tax Code (the "sale-for-resale exemption"). Appellees, Glenn Hegar, Comptroller of Public Accounts, and Ken Paxton, Attorney General of the State of Texas (collectively, Comptroller), denied Cantu's refund request, stating that Cantu was not entitled to the sale-for-resale exemption because it did not meet the statutory requirements. Following a bench trial, the trial court ruled in favor of the Comptroller, holding that Cantu was not entitled to a refund for taxes assessed on the purchase of the aircraft. We will affirm.

BACKGROUND

Cantu is a Texas limited liability company owned by Alonzo Cantu and his wife, Yolanda Cantu. In June 2009, Cantu Consulting, LLC (Consulting) was formed as a single-member LLC wholly owned by Cantu. Consulting provided consulting services to various entities in which Mr. Cantu also had an ownership or management interest.

In September 2009, Cantu purchased a 2007 Cessna 560XL jet aircraft ("the aircraft") for $7,200,000, which it subsequently hangared and used in Texas. During the tax period at issue, Cantu leased the aircraft to Consulting, initially under an oral contract and eventually under a written lease agreement, which Mr. Cantu signed on behalf of both parties. While Cantu did not pay sales or use tax on the aircraft at the time of purchase, it collected and remitted sales tax on the lease of the aircraft subsequent to its purchase.

Consulting and Cantu were separate entities, but their operations were intertwined. Neither Cantu nor Consulting had any employees, but instead outsourced their bookkeeping responsibilities to the staff of Cantu Construction, another business owned by Mr. Cantu. Because it was a disregarded entity for tax purposes, Consulting filed federal tax returns on a combined basis with Cantu, rather than separately. Accounting and banking for the two companies were also performed on a combined basis. Cantu invoiced Consulting's clients for services provided by Consulting and accepted payment on Consulting's behalf. Lease payments and expense reimbursements due from Consulting to Cantu for use of the aircraft were accounted for on a consolidated basis as well. The structure of the entities and the lease were set up by an aviation and tax consulting firm for purposes that included diversification and reduction of risk of liability.

Following an audit, the Comptroller assessed use tax on Cantu's purchase of the aircraft, which Cantu paid under protest. The Comptroller denied Cantu's request for a refund because it found that Cantu did not qualify for the exemption asserted. Cantu claims that it purchased the aircraft for the purpose of reselling it to Consulting in the normal course of business and that, therefore, the purchase was exempt from taxation under Texas Tax Code sections 151.006(a)(1) and 151.302, which make up the sale-for-resale exemption. The Comptroller counters that the proper statutory provision under which the analysis should be performed is Tax Code section 151.006(a)(2) and argues that Cantu did not qualify for the exemption thereunder because it did not purchase the aircraft for the sole purpose of leasing it to another person in the normal course of business. The trial court ruled in favor of the Comptroller, denying Cantu's request that the tax on the purchase of the aircraft be refunded but ordering a refund of the sales tax Cantu remitted on the lease of the aircraft since the purchase. Cantu appeals the trial court's decision.

ANALYSIS

On appeal, Cantu asserts that the trial court erred in denying Cantu's requested exemption on the basis that the aircraft purchase did not qualify as a sale for resale, as defined in Tax Code section 151.006. In its first issue, Cantu challenges the trial court's conclusion that the aircraft purchase did not fit the definition of a sale for resale under Section 151.006(a)(1) of the Tax Code. In its second issue, Cantu asserts error in the trial court's conclusion that section 151.006(a)(1) does not apply to Cantu's aircraft purchase because Cantu retained ownership of the aircraft. In its final issue, Cantu challenges the propriety of the trial court's findings regarding the economic substance of the purchase and lease transactions, claiming the analysis improperly imposed extra-statutory

requirements. Our resolution of Cantu's second and third issues informs our resolution of the first. As such, we begin with those.

Standard of Review

The resolution of Cantu's second and third issues depends on statutory construction, which we review de novo. *See State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006). Our primary goal in construing a statute is to give effect to the legislature's intent, as indicated by the plain meaning of the text of the statute. *See id.*; *Lexington Ins. Co. v. Strayhorn*, 209 S.W.3d 83, 85 (Tex. 2006). Texas law recognizes that "an agency's construction of a statute may be taken into consideration by courts when interpreting statutes," and deference to an agency's construction is appropriate when the statutory language is ambiguous. *Southwest Royalties, Inc. v. Hegar*, 500 S.W.3d 400, 405 (Tex. 2016) (citing *Railroad Comm'n v. Texas Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 624 (Tex. 2011)).

Furthermore, as recognized by the Texas Supreme Court, exemptions from tax are strictly construed against the taxpayer because "they undermine equality and uniformity by placing a greater burden on some taxpaying businesses and individuals rather than placing the burden on all taxpayers equally." *North Alamo Water Supply Corp. v. Willacy Cty. Appraisal Dist.*, 804 S.W.2d 894, 899 (Tex. 1991); *Mont Belvieu Caverns, LLC v. Texas Comm'n on Envtl. Quality*, 382 S.W.3d 472, 486 (Tex. App.—Austin 2012, no pet.). Accordingly, the taxpayer carries the burden to establish that it is entitled to a refund. *Texas Student Hous. Auth. v. Brazos Cty. Appraisal Dist.*, 460 S.W.3d 137, 141 (Tex. 2015). Specifically, the taxpayer must clearly show that it meets the requirements for an exemption from tax. *Id.* An exemption must affirmatively appear in the statute,

and all doubts are resolved in favor of the taxing authority. *Id*.; *see Bullock v. National Bancshares Corp.*, 584 S.W.2d 268, 272 (Tex. 1979); *DuPont Photomasks, Inc. v. Strayhorn*, 219 S.W.3d 414, 423 (Tex. App.—Austin 2006, pet. denied).

Statutory Scheme

Section 151.051(a) of the Tax Code imposes a sales tax "on each sale of a taxable item in this state." Tex. Tax Code § 151.051(a). "'Taxable item' means tangible personal property and taxable services." *Id*. § 151.010. It is uncontested that the aircraft at issue here is "tangible personal property," which means "personal property that can be seen, weighed, measured, felt, or touched or that is perceptible to the senses in any other manner." *Id*. § 151.009. Cantu is seeking a refund of use tax under the sale-for-resale exemption of the Tax Code, which states: "[t]he sale for resale of a taxable item is exempt from the taxes imposed by this chapter." *Id*. § 151.302(a). The purpose of the sale-for-resale exemption is to prevent double taxation. *DTWC Corp. v. Combs*, 400 S.W.3d 149, 155 (Tex. App.—Austin 2013, no pet.) (citing *Sharp v. Clearview Cable TV, Inc.*, 960 S.W.2d 424, 426 (Tex. App.—Austin 1998, pet. denied)). A "sale for resale" is statutorily defined as one of six types of sales. Pertinent to our discussion are two:

> (1) tangible personal property or a taxable service to a purchaser who acquires the property or service for the purpose of reselling it . . . in the normal course of business in the form or condition in which it is acquired or as an attachment to or integral part of other tangible personal property or taxable service;
>
> or
>
> (2) tangible personal property to a purchaser for the sole purpose of the purchaser's leasing or renting it . . . in the normal course of

> business to another person, but not if incidental to the leasing or renting of real estate.

Tex. Tax Code § 151.006(a). A "sale" includes a "transfer of title or possession of tangible personal property" or "the exchange, barter, lease, or rental of tangible personal property" that is "done or performed for consideration." *Id*. § 151.005(1)-(2).

Texas Tax Code section 151.006

In its second issue, with which we begin, Cantu claims that the trial court erred in concluding that subsection (a)(1) of Tax Code section 151.006 does not apply to this case because Cantu retained ownership of the aircraft. The crux of this issue is which subsection of the statutory definition of "sale for resale" in section 151.006 applies to Cantu's aircraft purchase. Subsection (a)(1) exempts from taxation a sale of tangible personal property to a purchaser who acquires the property for the purpose of reselling it, whereas subsection (a)(2) does the same for property purchased for the purpose of leasing it. Although it emphasizes that (a)(1) is most applicable, Cantu argues that either subsection could apply here. Cantu relies on the Tax Code's definition of "sale," which includes the "lease[] or rental of tangible personal property." *Id*. § 151.005(2). It reasons that "reselling," as contemplated by subsection (a)(1), is a derivative of "sale," and because "sale" includes lease, "reselling" must therefore include leasing. It follows, Cantu asserts, that a sale for the purpose of leasing ("sale for lease") could qualify for the exemption under either (a)(1) or (a)(2), at the taxpayer's option, and that Cantu qualifies under (a)(1). The Comptroller disagrees, asserting that the legislature did not intend for subsections (a)(1) and (a)(2) to be synonymous. Instead, the Comptroller relies on the common meaning of the words to assert that "reselling" is different than

"leasing." It argues Cantu's interpretation would lead to an absurd result where (a)(1) would collapse and subsume (a)(2). The Comptroller reasons that (a)(2) controls here because it specifically addresses a sale for lease, rather than a sale for resale. The Comptroller further asserts that the trial court did not err because there is no evidence that Cantu ever intended to sell the aircraft and did not, in fact, resell it, so the provision addressing reselling does not apply. Based on the record before us, we agree.

Cantu accurately argues that although the Tax Code does not define "resell," the Texas Supreme Court and this Court have acknowledged that leasing is a type of reselling because the statutory definition of "sale" includes "the exchange, barter, **lease**, or rental of tangible personal property." *Id.* § 151.005(2) (emphasis added); *Combs v. Health Care Servs. Corp.*, 401 S.W.3d 623, 632 (Tex. 2013); *Fitness Int'l, LLC v. Hegar*, No. 03-15-00534-CV, 2016 WL 3391606, at *3 (Tex. App.—Austin June 16, 2016, pet. denied) (mem. op.); *Clearview Cable*, 960 S.W.2d at 425 n.3. However, it does not necessarily follow that both (a)(1) and (a)(2) could apply to Cantu's aircraft purchase. The parties have identified no authority, and we have found none, that addresses whether subsection (a)(1) or (a)(2) controls for purposes of the claimed exemption in this factual situation.

In support of its position that both subsection (a)(1) and (a)(2) could apply to property purchased for the purpose of being leased, Cantu relies on *Matagorda County Appraisal District v. Coastal Liquid Partners, L.P.*, 165 S.W.3d 329 (Tex. 2005), and *Combs v. Newpark Resources, Inc.*, 422 S.W.3d 46 (Tex. App.—Austin 2013, no pet.). Cantu argues that these cases establish that overlap in statutory provisions can be precisely what the legislature intended, but it offers no explanation of what intent is indicated here or how the terms should be interpreted accordingly. We

note that in both *Newpark* and *Matagorda*, the courts acknowledged the overlap of certain statutory provisions and then looked to the plain language, the larger statutory context, and the function of the pertinent provisions to determine the proper interpretation of the overlap. "In order to answer that question, we must determine section 171.1012(i)'s function," and "[t]he function of section 171.1012(i) must be determined within the context of the section 171.1012 generally." *Newpark*, 422 S.W.3d at 54-55; *see Matagorda Cty.*, 165 S.W.3d at 334-35. We employ the same methodology of examining the statute's plain language, statutory scheme, and section 151.006's specific function within that scheme to determine its proper interpretation.

Chapter 151 of the Tax Code imposes a tax "on each sale of a taxable item sold in this state." Tex. Tax Code § 151.051(a). Section 151.302 exempts sales for resale from the tax imposed in section 151.051(a), and section 151.006 defines the scope of the exemption in section 151.302 by defining "sale for resale." The Supreme Court of Texas has acknowledged:

> Taxation is the rule and exemption therefrom the exception; and the claimant of such an exemption must show his right thereto by evidence which leaves the question free from doubt. The claimant for an exemption must show that his demand is within the letter as well as the spirit of the law.

National Bancshares, 584 S.W.2d at 272 n.5 (quoting 3 C. Sands, *Statutes and Statutory Construction* § 66.09, at 207 (1972 & Supp. 1979)). Therefore, the larger statutory scheme is a universal tax on each item sold in Texas, which is a broad and clear mandate. Within that, the sale-for-resale exemption is narrowly defined. The purpose of the sale-for-resale exemption is not

to exclude certain items from sales and use tax entirely, but to prevent those items that are sold twice from being taxed twice. *Clearview Cable*, 960 S.W.2d at 426.

Within this context of the statutory scheme and section 151.006's function therein, we look to the plain language of the statute. In doing so, we must look at the entire statute as a whole rather than examining isolated portions out of context. *Texas Student Housing Auth*., 460 S.W.3d at 141; *Jones v. Fowler*, 969 S.W.2d 429, 432 (Tex. 1998). Furthermore, the various provisions of a statute must be interpreted in harmony with one another if at all possible. *In re Hall*, 286 S.W.3d 925, 928-29 (Tex. 2009). "When determining the meaning of a statute, we must presume that every word in the statute has been deliberately included and that exclusions from the statute were made purposefully." *DuPont Photomasks,* 219 S.W.3d at 423.

The plain language of subsection (a)(1) addresses "reselling" in general, a term that has been interpreted to include leasing, among other things. *See Health Care Servs.*, 401 S.W.3d at 632. It further concerns resale of services as well as property. *See* Tex. Tax Code § 151.006(a)(1). In contrast, subsection (a)(2) specifically addresses leasing of personal property. To qualify as an exempt sale for lease under subsection (a)(2), the ***sole*** purpose of the purchase must be leasing, but a sale for resale under (a)(1) requires only that resale be ***a*** purpose of the purchase. This comports with the purpose of the exemption. The sale-for-resale exemption is intended to prevent double taxation, but not to allow complete evasion of sales and use tax; the Tax Code grants purchasers of taxable goods and services this exemption on the premise that the ultimate purchaser will pay any tax due. *Id*.; *Clearview Cable*, 960 S.W.2d at 426. Unlike wholesale resale, leasing is a partial (generally temporary) transfer of property rights. 34 Tex. Admin. Code § 3.294(a)(2) (2017)

(Comptroller of Public Accounts, Rental and Lease of Tangible Personal Property). By requiring that leasing or renting be the sole purpose of a purchase in order to be exempt, the legislature has ensured that the entirety of the taxes due on the purchase will eventually be paid through taxes on the lease. If a purchase is made for multiple purposes, one of which is to lease the property, an exemption on the purchase could result in evasion of taxes on the part of the purchase used for nontaxable purposes. This result would be contrary to the overall purpose of chapter 151 of the Tax Code, which imposes a tax on each item sold in this state. Thus, the language and purpose of the statute indicate that Cantu's aircraft purchase should be reviewed under Tax Code section 151.006(a)(2) and the trial court did not err in analyzing the requested exemption pursuant to this subsection.[1] Accordingly, we overrule Appellant's second issue.

Economic substance or extra-statutory requirements

In its third issue, Cantu argues that the trial court imposed extra-statutory requirements in its analysis of Cantu's lease transaction that unlawfully restrict the sale-for-resale exemption. More precisely, Cantu argues that the trial court considered factors outside the scope of the statutory language to determine whether its aircraft purchase met the exemption requirements.

---

[1] Cantu did not assert that Tax Code section 151.006 is ambiguous, but even if it had, our reading of the statute's plain language is consistent with canons of statutory construction. Specifically, the general/specific canon of construction requires that where two provisions conflict, the more specific controls over the more general. "If the conflict between the general provision and the special or local provision is irreconcilable, the special or local provision prevails as an exception to the general provision . . . ." Tex. Gov't Code § 311.026(b). Because a lease is one type of sale, subsection (a)(2), addressing leases specifically, is a more specific provision than (a)(1), which addresses all types of resales generally. Accordingly, subsection (a)(2) would still control with respect to Cantu's aircraft.

The Comptroller counters that the trial court properly looked at the substance of the transactions in addition to their form to determine whether they had economic substance. In particular, the Comptroller claims that the economic realities of the transactions in issue are relevant in the determination of statutory requirements in this tax dispute, and that the factors considered by the trial court were within the parameters set by the plain language of the statute. We agree.

Cantu contends that the Texas Supreme Court has rejected incorporation of the economic realities underlying a transaction when conducting an assessment of the sale-for-resale exemption, relying on *Health Care Services Corp.*, 401 S.W.3d 623 (Tex. 2013), and *Combs v. Roark Amusement & Vending L.P.*, 422 S.W.3d 632 (Tex. 2013). However, we read these cases as confirming that consideration of economic realities can be part of the tax exemption analysis but clarifying that the plain language of the statute controls the scope of the analysis.

In *Roark*, the supreme court stated: "We believe that in the area of tax law, like other areas of economic regulation, a plain-meaning determination should not disregard the economic realities underlying the transactions in issue." *Roark*, 422 S.W.3d at 637. "We have similarly recognized, in deciding whether a tax is due, that we should consider the 'essence of the transaction' or 'the true object of [the] transaction' in issue." *Id*. at 637 n.14 (citing *Bullock v. Statistical Tabulating Corp.*, 549 S.W.2d 166, 167-68 (Tex. 1977)). In *Roark*, the court rejected the Comptroller's argument that the sale-for-resale exemption did not apply to toys purchased for use in a coin-operated crane amusement machine. *Id*. at 635. The court determined that the Comptroller's assertion that a toy must actually be conveyed each time the game was played was outside the statute's requirement that care, custody, and control of the purchased property must be

"transferred to the purchaser" in order to constitute a resale. *Id*. at 637-38 (citing Tex. Tax Code § 151.302(b)). Notably, the court looked to the economic realities of the transactions in question to come to its decision in that case. *See id.* at 637-38. It did not reject the consideration of the economic realities, but it did limit the scope of such consideration.

Similarly, in *Health Care Services*, the court declined to read into subsection (a)(1) additional language that would require that the *primary* purpose of a sale be resale, because the statute did not include or intimate that requirement. 401 S.W.3d at 627. The court explained that in *Roark* it did not suggest that "in the guise of considering economic realities or essence of the transaction, courts were authorized to impose an entirely new requirement for a tax exemption that simply is not found in the language of the statutory exemption." *Id*. at 627 n.8. Based on this authority, an analysis of the economic reality or substance of the transaction at issue is not improper and can be warranted within the textual parameters of a requested exemption.

Tax Code section 151.006(a)(2) requires that the sole purpose of the purchase must be to lease the purchased property. *Id*. We examined the "purpose" requirement with respect to the sale-for-resale exemption in *7-Eleven, Inc. v. Combs*, 311 S.W.3d 676 (Tex. App.—Austin 2010, pet. denied). The issue in that case was the taxpayer's entitlement to the sale-for-resale exemption under Tax Code section 151.006(a)(3). Subsection (a)(3) requires that in order to be exempt, the sale must be of property acquired "for the purpose of transferring . . . it as an integral part of a taxable service." Tex. Tax Code § 151.006(a)(3). Holding that this requirement did not prohibit the purchaser of property from benefitting from the purchase, we stated:

> The more reasonable interpretation of the "purpose" requirement is that it exists to prevent parties from obtaining favorable tax treatment premised on a sham arrangement wherein little or no taxable services are actually rendered. This is consistent with the sale-for-resale exemption's purpose being to avoid double taxation, because if there were no performance of significant services subject to sales and use tax, taxing any tangible personal property integral to the performance of those services would not result in double taxation.

7-Eleven, Inc., 311 S.W.3d at 686. In other words, the purpose requirement indicates that some consideration of economic realities may be required in order to carry out the aim of the statute.

Furthermore, in *Health Care Services*, 401 S.W.3d at 627, as discussed above, the Texas Supreme Court refused to read the word "primary" into the (a)(1) purpose requirement. In contrast, the word "purpose" is expressly modified by the word "sole" in (a)(2), creating a statutory requirement with which the facts of the transaction should comply. "Sole" is defined as "being the only one," or "functioning independently and without assistance or interference." *Webster's Third New Int'l Dictionary* 2168 (unabridged ed. 2002). Thus, in subsection (a)(2), the "sole purpose" requirement limits the exemption to purchases with no purpose other than to lease the property. In determining the purpose of the purchase and whether it functioned independently and without interference, the underlying facts, substance, and economic realities of the purchase become pertinent.

Similarly, the statute requires that the subject purchase and lease occur "in the normal course of business." Tex. Tax Code § 151.006(a)(2); *see DTWC Corp.*, 400 S.W.3d at 155 (concluding that purchase and resale must occur in the normal course of taxpayer's business). This requirement also calls for an analysis of substance in addition to form, including an examination of

the economic substance of the transaction, if needed, to effectuate the purpose of the code provision. Transactions that are within the normal course of business are less likely to be motivated entirely by tax avoidance. "[T]here is a material difference between structuring a real transaction in a particular way to provide a tax benefit (which is legitimate), and creating a transaction, without a business purpose, in order to create a tax benefit (which is illegitimate)." *Coltec Indus., Inc. v. United States*, 454 F.3d 1340, 1357 (Fed. Cir. 2006).

Cantu is correct that the "normal course of business" language refers to the purchaser's normal course of business. *See DTWC Corp.*, 400 S.W.3d at 155. Cantu further asserts that performing contracts can be an element of a purchaser's normal course of business, and that Cantu operated in the normal course of its business when it performed under its lease agreement with Consulting. *Strayhorn v. Raytheon E-Sys., Inc.*, 101 S.W.3d 558, 567 (Tex. App.—Austin 2003, pet. denied). If a taxpayer's normal course of business is the performance of contracts, then parties' actions with respect to the underlying contracts are informative and relevant. *See id*. at 566-67 (viewing stipulated facts concerning performance of contracts along with explicit contractual agreements); *W.C. Larock, D.C., P.C. v. Enabnit, D.C.*, 812 S.W.2d 670, 671 (Tex. App.—El Paso 1991, no writ) (finding independent contractor contract to be illusory where performance showed employer–employee relationship). If compliance with the underlying agreement is not sought or even encouraged by either party, the validity of the contract may be questionable. *W.C. Larock,* 812 S.W.2d at 671 ("No contract is formed by the signing of an instrument when the offeree is aware that the offerer does not intend to be bound by the wording of the instrument."). Therefore, it is consistent with both the text and purpose of the statute to examine economic realities of the

transaction underlying a claimed exemption to determine whether the normal-course-of-business requirement has been met.

For the reasons above, we conclude that the trial court did not err in reexamining the purchase, lease, and corporate structure of this transaction. Doing so was not the imposition of extra-statutory requirements, but instead an inquiry consistent with the purpose and plain language of the code sections in question as well as related case law. We overrule Cantu's third issue.

Whether Cantu's aircraft purchase qualifies for the sale-for-resale exemption

We now turn to Cantu's first issue, that the trial court erred in concluding Cantu's aircraft purchase did not qualify for the sale-for-resale exemption. The essence of Cantu's argument on this issue is that the trial court's improper construction of the statute rendered its findings of fact erroneous or immaterial.[2] Having determined that the statute was properly construed, we defer to a trial court's findings of fact if they are supported by legally and factually sufficient evidence. *Titan Transp., LP v. Combs*, 433 S.W.3d 625, 636 (Tex. App.—Austin 2014, pet. denied) (citing *Perry*

---

[2] Cantu's specific challenge to legal and factual sufficiency is a single sentence within its third issue:

> Further, "[a]pplying a proper construction of the statute," and the evidence, it is clear that Findings 12-14, 16-19, 21-71 are based on an erroneous construction of § 151.006(a)(1), are not supported by any evidence, or if supported by evidence are largely immaterial to the actual requirements of § 151.006(a)(1) as properly construed. **Cantu Enterprises challenges the legal and factual sufficiency of those findings.** To the extent evidence supports a contested finding, that finding is immaterial to the requirements of § 151.006(a)(1).

(citations omitted, emphasis added). Nonetheless, its first issue claims that Cantu conclusively established that it qualified for the sale-for-resale exemption. Therefore, we address this issue as a legal- and factual-sufficiency challenge.

Homes v. Cull, 258 S.W.3d 580, 598 (Tex. 2008)). Where, as here, the appellant challenges the legal sufficiency of findings on issues for which the appellant carried the burden, we "first examine the record for evidence that supports the finding, while ignoring all evidence to the contrary." *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001) (citing *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Tex. 1989)). If there is no evidence to support the trial court's finding, we examine the entire record to determine if the contrary position is established as a matter of law. *Id*. We sustain the point of error "only if the contrary proposition is conclusively established." *Id*. (citing *Croucher v. Croucher*, 660 S.W.2d 55, 58 (Tex. 1983)).

A factual-sufficiency challenge of an adverse finding carries a similarly high burden. On an issue on which an appellant had the burden of proof, appellant must demonstrate on appeal that "the adverse finding is against the great weight and preponderance of the evidence." *Id*. at 242. We must consider and weigh all of the evidence and can set aside a finding "only if the evidence is so weak or if the finding is so against the great weight and preponderance of the evidence that it is clearly wrong and unjust." *Id*. (citing *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986)).

Evidence regarding the purpose of Cantu's purchase of the aircraft was inconsistent throughout the pendency of the underlying case. Cantu's witnesses testified at various times during the proceedings below that the aircraft was purchased for the purpose of providing convenience and flexibility to Mr. Cantu personally and to his other businesses. Soon after purchasing the aircraft, Cantu executed a time-share agreement with Mr. Cantu, which Mr. Cantu signed on behalf of both parties. It allowed Mr. Cantu to use the plane for personal reasons, paying only the operating expenses with no rental fee. Mr. Cantu testified that the aircraft was purchased "for convenience"

and so he would "be able to do business quicker." Mr. Cantu further testified that he used the aircraft approximately ten times per year for personal use, and he testified that once it was paid off, he planned to "fly around" and mark off his "bucket list." The record also reflects that Mr. Cantu testified at trial that Cantu's objective in purchasing the aircraft was "strictly business, leasing." And Mr. Cantu and other witnesses testified that the aircraft diversified Mr. Cantu's business interests and the business structure provided protection from risk of liability. Where, as here, the record demonstrates that there was conflicting evidence regarding the purpose for which the aircraft was purchased, we accord deference to the trial court, acting as fact finder, as the sole judge of credibility of the witnesses and weight to be given to their testimony. *Seasha Pools, Inc. v. Hardister*, 391 S.W.3d 635, 639 (Tex. App.—Austin 2012, no pet.); *see also City of Keller v. Wilson*, 168 S.W.3d 802, 819 (Tex. 2005). After considering the evidence below, the trial court found "[t]he Aircraft was purchased to facilitate Mr. Alonzo Cantu's businesses and personal travel - not to lease the Aircraft." Deferring to the trial court, as we must, we find that sufficient evidence supports the trial court's finding that Cantu failed to carry its burden to clearly show that the sole purpose of the purchase was to lease the aircraft.

Cantu also challenges the trial court's finding that Cantu failed to clearly show that the aircraft was intended to be leased "in the normal course of business." The record indicates that the only parties allowed to lease the aircraft were parties having a connection with Mr. Cantu. Additionally, the record demonstrates that Cantu turned down requests from third parties to lease the plane, did not market the plane to be leased by third parties, and did not prioritize or expect profitability in operating its business. A witness for Cantu, Ms. Letisha Bivens, testified that a

$600-per-hour rental rate was less than fair-market value for the aircraft. In addition, although invoices from Cantu to Consulting were produced, the record shows that Consulting made no payments to Cantu under the lease agreement at all, although its use of the aircraft is undisputed. This noncompliance with a material term of the lease could indicate that the agreement was not within the parameters of Cantu's normal course of business. Based on the record before us, this evidence provides sufficient support for the trial court's conclusion that Cantu was not entitled to the sale-for-resale exemption because the lease was not in the normal course of business.[3]

Because Cantu did not clearly establish that it purchased the aircraft for the sole purpose of leasing it in the normal course of business, Cantu is not entitled to the sale-for-resale exemption on the aircraft purchase. We overrule Cantu's remaining issue.

CONCLUSION

Having overruled Cantu's issues presented on appeal, we affirm the judgment of the trial court.

---

[3] Even under an analysis of Tax Code section 151.006(a)(1) (which Cantu asserts is the applicable provision), Cantu's failure to show that the lease occurred in the normal course of business would still have prevented its entitlement to the exemption.

Cindy Olson Bourland, Justice

Before Chief Justice Rose, Justices Pemberton and Bourland
Justice Pemberton concurs in the judgment only.

Affirmed

Filed: July 7, 2017