ATTORNEYS FOR PETITIONER:
**ROBERT A. ROMACK**
**DAN R. DUNBAR**
DUNBAR & ROMACK
Franklin, IN

ATTORNEYS FOR RESPONDENT:
**GREGORY F. ZOELLER**
ATTORNEY GENERAL OF INDIANA
**JESSICA E. REAGAN**
DEPUTY ATTORNEY GENERAL
Indianapolis, IN

# IN THE INDIANA TAX COURT

FILED
Dec 07 2012, 2:55 pm
CLERK
of the supreme court, court of appeals and tax court

| | | |
|---|---|---|
| MILLER PIPELINE CORPORATION, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| v. | ) | Cause No. 49T10-1012-TA-64 |
| | ) | |
| INDIANA DEPARTMENT OF STATE REVENUE, | ) | |
| | ) | |
| Respondent. | ) | |

ORDER ON RESPONDENT'S MOTION TO DISMISS

**NOT FOR PUBLICATION**
**December 7, 2012**

FISHER, Senior Judge

Miller Pipeline Corporation (hereinafter "MPC") appeals the Indiana Department of State Revenue's final determination denying its claim for refund of gross retail (sales) and use tax paid between 2005 and 2007. The matter is currently before the Court on the Department's motion to dismiss, which the Court denies.[1]

[1] The parties have designated certain evidence as confidential; therefore, the Court's order will provide only that information necessary for the reader to understand its disposition of the issues presented. See generally Ind. Administrative Rule 9.

## FACTS AND PROCEDURAL HISTORY

MPC is a contractor engaged in the installation, removal, and repair of underground gas, water, and sewer pipelines. Between June 20, 2008, and July 16, 2008, MPC filed three separate refund claims with the Department. The first claim sought a refund of $3,096.11 in sales/use tax that MPC remitted on purchases of, among other things, pallets, wrapping materials, packaging, repair services, machining services, plating services, and galvanizing services (hereinafter "shipping and service purchases") for the 2005 tax year. (See Pet'r Des'g Evid., Ex. 1.) The second claim sought a refund of $3,382.75 in sales/use tax that MPC remitted on shipping and service purchases for both the 2006 and 2007 tax year. (See Pet'r Des'g Evid., Ex. 2.) The third claim sought a refund of $28,032.19 in sales/use tax remitted on shipping and service purchases as well as on purchases of safety equipment for the 2007 tax year. (See Pet'r Des'g Evid., Ex. 3.)[2]

In the fall of 2008, the Department audited MPC for the 2006 and 2007 tax years. The Department subsequently issued an audit report in which it denied each of the three refund claims in part.[3] (See Resp't Des'g Evid., Ex. B at 1-8 (footnote added).)

---

[2] With respect to its shipping and service purchases, MPC claimed they were exempt from tax pursuant to 45 I.A.C 2.2-5-8(d) and 45 I.A.C. 2.2-5-16. (See Resp't Des'g Evid., Ex. B at 4-8.) See also 45 IND. ADMIN. CODE 2.2-5-8(d) (providing that state gross retail (sales) tax does not apply to pre-production and post-production activities), -16 (2005) (exempting from sales tax the sale of nonreturnable wrapping materials and empty containers used by the purchaser for selling contents, returnable containers containing contents sold in retail and returnable containers sold empty for refilling). With respect to its purchases of safety equipment, MPC claimed they were exempt from tax pursuant to the Department's Information Bulletin #60, which states that "[a] construction contractor's purchase of safety equipment used in the construction and repair of public roads, bridges, highways, and other public infrastructure for a governmental entity is exempt from sales and use tax." (Resp't Des'g Evid., Ex. B at 5.)

[3] More specifically, the Department offset $2,297.03 of MPC's 2005 refund claim and denied $799.08 of MPC's 2005 refund claim, $813.57 of MPC's 2006 refund claim, and $14,531.59 of MPC's 2007 refund claim. (See Resp't Des'g Evid., Ex. B at 1-2.)

The Department also found that MPC owed an additional $89,805.48 in sales/use tax for the 2006 and 2007 tax years on, among other things, purchases of portable toilet rentals, plans and reports, equipment parts and rental, electronic database subscriptions, tools, books, and chemical spraying.[4] (See Resp't Des'g Evid., Ex. B at 2, 66-86 (footnote added).) Accordingly, on September 21, 2009, the Department issued proposed assessments totaling $84,647.96 for the 2006/2007 tax years against MPC.[5] (See Resp't Des'g Evid., Ex. A at 1-2 (footnote added).) MPC paid the proposed assessments in their entirety on October 23, 2009.

On November 30, 2009, MPC filed an original tax appeal (hereinafter "Miller Pipeline 1") challenging the Department's denial of the portion of its 2007 refund claim relating to the purchases of safety equipment.[6] (See Resp't Des'g Evid., Ex. D(b) at 4-5 (footnote added).) On July 22, 2010, this Court dismissed Miller Pipeline 1 with prejudice pursuant to a signed settlement agreement between MPC and the Department. (See Resp't Des'g Evid., Ex. D(a).)

On March 24, 2010, while Miller Pipeline 1 was pending, MPC filed a fourth refund claim with the Department seeking $104,318.39[7] in sales/use tax paid between 2005 and 2007. (See Pet'r Des'g Evid., Ex. 7 (footnote added).) The Department

[4] The Department determined this amount by auditing a statistically based sample of MPC's account payables. (See Resp't Des'g Evid., Ex. B at 2, 9, 88-89.)

[5] This amount appears to be the total of the audit's finding of additional tax, reduced by the portion of the 2006 and 2007 refund claims that were not denied, plus interest. (See Resp't Des'g Evid., Exs. A at 1-2, B at 2.)

[6] The safety equipment that MPC sought exemption for included vests, orange nomex coveralls, "worker ahead" signs, reflective clothing, barricade lights, "slow down" signs, and traffic cones. (See Resp't Des'g Evid.,Exs. B at 51-58, D(b) at 4.)

[7] This amount appears to reflect the additional tax the Department found MPC owed for the 2006 and 2007 tax years plus the portion of the 2006 and 2007 refund claims the Department used to reduce MPC's overall tax liability. (See Resp't Des'g Evid., Ex. B at 2.)

denied this refund claim on September 27, 2010. MPC then filed this original tax appeal (hereinafter "Miller Pipeline 2"). In its petition, MPC stated it was challenging the propriety of the statistical sample used by the Department to generate its proposed assessments. (See Pet'r Pet. at 4-12, Feb. 3, 2011.) On March 15, 2012, the Department moved to dismiss Miller Pipeline 2 pursuant to Trial Rule 12(B)(6) for failure to state a claim upon which relief can be granted, relying on Trial Rule 8(C)'s affirmative defenses of res judicata and accord and satisfaction. On April 18, 2012, the Court conducted a hearing on the Department's motion to dismiss. Additional facts will be supplied as necessary.

**STANDARD OF REVIEW**

A Trial Rule 12(B)(6) motion to dismiss for failure to state a claim upon which relief may be granted tests the legal sufficiency of a claim, not the facts supporting it. See Wireless Advocates, LLC v. Indiana Dep't of State Revenue, 973 N.E.2d 111, 112 (Ind. Tax Ct. 2012) (citation omitted) (order denying motion to dismiss). As such, a complaint will not be dismissed unless it is clear on its face that the complaining party is not entitled to relief. Id. When matters outside the pleadings are presented and not excluded by a court, a 12(B)(6) motion to dismiss shall be treated as a motion for summary judgment, provided all parties are given a reasonable opportunity to present materials pertinent to such a motion.[8] See Ind. Trial Rule (12)(B) (footnote added).

[8] In this case, the Department, through its designation of evidence, presented matters outside the pleadings. Thus, the Department's motion to dismiss shall be treated as one for summary judgment. Given that MPC, in responding to the Department's motion, also designated evidence introducing matters outside the pleadings, it has been given a reasonable opportunity to present materials pertinent to the motion as required by Trial Rule 12(B). See Duran v. Komyatte, 490 N.E.2d 388, 390-91 (Ind. Ct. App. 1986).

Summary judgment is proper only when the designated evidence[9] demonstrates that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C) (footnote added). A genuine issue of material fact exists when facts concerning an issue that would dispose of the case are in dispute or when the undisputed material facts support conflicting inferences as to an issue. See Gaboury v. Ireland Rd. Grace Brethren, Inc., 446 N.E.2d 1310, 1313 (Ind. 1983); Scott Oil Co. v. Indiana Dep't of State Revenue, 584 N.E.2d 1127, 1129 (Ind. Tax Ct. 1992). The Court will construe all properly asserted facts and reasonable inferences drawn therefrom in favor of the nonmoving party. See Scott Oil, 584 N.E.2d at 1128-29 (citation omitted).

## ANALYSIS AND OPINION

In its motion, the Department provides two reasons why this case should be dismissed. First, it asserts that MPC, pursuant to the doctrine of res judicata, is precluded from litigating it. (See Resp't Mem. Supp. Mot. Dismiss ("Resp't Br.") at 4-7.) In the alternative, the Department asserts that the affirmative defense of accord and satisfaction defeats any claims made by MPC in the current case. (See Resp't Br. at 8.)

### I. RES JUDICATA

"The doctrine of res judicata prevents the repetitious litigation of disputes that are essentially the same." Afolabi v. Atlantic Mortg. & Inv. Corp., 849 N.E.2d 1170, 1173 (Ind. Ct. App. 2006) (citation omitted). Res judicata is divided into two branches: claim preclusion and issue preclusion. Id. In moving to dismiss the case, the Department

[9] Trial Rule 56(C) compels parties to specifically identify the relevant portions of any designated evidence upon which they rely. See Filip v. Block, 879 N.E.2d 1076, 1080-81 (Ind. 2008). The designated evidence before the Court failed to comply with this standard; however, this deficiency ultimately had no bearing on the Court's resolution of the motion.

argues that the prior adjudication of Miller Pipeline 1 requires the application of both claim and issue preclusion to Miller Pipeline 2. (Resp't Br. at 4-7.)

**A. CLAIM PRECLUSION**

The Department asserts that this case – Miller Pipeline 2 – must be dismissed because judgment has already been rendered on its merits. (See Resp't Br. at 3-5.) Indeed, the Department contends that this case "regards the same tax years, the same legal issues, the same tax types, and [stems from] the same Audit" as Miller Pipeline 1. (See Resp't Br. at 5; Hr'g Tr. at 20-21.) The Court disagrees.

"Claim preclusion applies where a final judgment on the merits has been rendered and acts as a complete bar to a subsequent action on the same issue or claim between those parties and their privies." Afolabi, 849 N.E.2d at 1173 (citation omitted). "When claim preclusion applies, all matters that were or [that] might have been litigated are deemed conclusively decided by the judgment in the prior action." Id. (citation omitted). In order for claim preclusion to bar a subsequent claim, the following requirements must be satisfied: (1) the former judgment must have been rendered by a court of competent jurisdiction; (2) the matter now in issue was, or could have been, determined in the prior action; (3) the former judgment must have been rendered on the merits;[10] and (4) the controversy adjudicated in the former action must have been between the parties to the present suit. See Foursquare Tabernacle Church of God in Christ v. State Bd. of Tax Comm'rs, 550 N.E.2d 850, 851-52 (Ind. Tax Ct. 1990) (footnote added and citation omitted).

The parties do not dispute that Miller Pipeline 1 satisfies the first, third, and fourth

[10] "[A] dismissal with prejudice constitutes a dismissal on the merits." Richter v. Asbestos Insulating & Roofing, 790 N.E.2d 1000, 1002 (Ind. Ct. App. 2003) (citation omitted).

requirements. (See Hr'g Tr. at 9; Pet'r Mem. Law Supp. Mot. Opp'n Resp't Mot. Dismiss ("Pet'r Br.") at 5-7; Resp't Br. at 5.) The dispute lies then in whether the claim in this case – Miller Pipeline 2 – was, or could have been, determined in Miller Pipeline 1. The Court finds the claim in the current case – the propriety of the statistical sample used by the Department to calculate the proposed assessments – could not have been litigated in Miller Pipeline 1 because, at that time, this Court lacked subject matter jurisdiction over that claim.

Subject matter jurisdiction is the power of a court to hear and determine a particular class of cases. K.S. v. State, 849 N.E.2d 538, 540 (Ind. 2006). The Tax Court has exclusive subject matter jurisdiction over "original tax appeals." IND. CODE §§ 33-26-3-1, -3 (2012). An original tax appeal must meet two statutory requirements: 1) the case must "arise[] under the tax laws of Indiana" and 2) the case must be an initial appeal of a final determination made by the Department with respect to a listed tax. I.C. § 33-26-3-1.

There is no question that the current case arises under Indiana's tax laws; therefore, the question to be answered is whether, at the time Miller Pipeline 1 was filed, the Department had issued a final determination on MPC's fourth claim for refund from which MPC could appeal. There are only two ways in which a taxpayer can receive a final determination from the Department. A taxpayer may either pay the taxes owed, request a refund, and sue in the Tax Court when the refund is denied or protest the tax at the assessment stage and appeal to the Tax Court from a letter of findings denying the protest. See State v. Sproles, 672 N.E.2d 1353, 1357 (Ind. 1996) (citations omitted); Etzler v. Indiana Dep't of State Revenue, 957 N.E.2d 706, 709 (Ind. Tax Ct.

2011) (citation omitted). Moreover, the Tax Court does not have jurisdiction over any appeal of the Department's denial of a claim for refund until a decision is rendered by the Department on the claim or until 180 days have passed from the date the refund claim was filed. See IND. CODE § 6-8.1-9-1(c) (2009) (amended 2011).

As previously indicated, the audit report issued by the Department dealt with two matters. First, it denied, in part, MPC's first three claims for refund. (See Resp't Des'g Evid., Ex. B at 4-8.) Thus, the audit report constituted a final determination with respect to those three refund claims from which MPC could appeal to this Court. See Etzler, 957 N.E.2d at 709 (stating that the denial of a refund claim by the Department is a final determination which can be appealed to the Tax Court); I.C. § 6-8.1-9-1(b)-(c). MPC chose to appeal the Department's denial of its third refund claim only and filed Miller Pipeline 1. See supra at p. 3.

The audit report also determined that MPC owed tax on numerous other purchases and, almost simultaneously, the Department issued proposed assessments relating to that tax liability. (See Resp't Des'g Evid., Exs. A at 1-2, B at 8-13, 65-91.) At that point, MPC had two ways to challenge those proposed assessments: file a written protest with the Department and wait for a letter of findings or pay the assessments and then file a claim for refund with the Department and wait for a denial. See IND. CODE § 6-8.1-5-1(d) (2009); I.C. § 6-8.1-9-1(a). Either way, MPC could not appeal directly to the Tax Court, as proposed assessments are not final determinations that may be appealed to this Court. See Etzler, 957 N.E.2d at 709 (stating that a taxpayer receives a final determination from the Department only after the denial of a refund claim or from a letter of findings denying a tax protest.)

When Miller Pipeline 1 was dismissed on July 22, 2010, the Department had not yet issued a final determination regarding MPC's fourth claim for refund nor had 180 days passed from the date MPC filed it with the Department (March 24, 2010). Thus, Miller Pipeline's fourth claim for refund, and the matters which it encompassed, could not have been adjudicated in Miller Pipeline 1 because of a lack of a final determination. Therefore, claim preclusion will not bar the litigation of this case. See Restatement (Second) of Judgments § 26(1)(c) (1982) (claim preclusion generally does not apply where "[t]he plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy . . . because of the limitations on the subject matter jurisdiction of the courts").

**B. ISSUE PRECLUSION**

Issue preclusion, also referred to as collateral estoppel, bars the subsequent relitigation of a fact or issue that was necessarily adjudicated in a former lawsuit if the same fact or issue is presented in the subsequent lawsuit. See Tofany v. NBS Imaging Sys., Inc., 616 N.E.2d 1034, 1037 (Ind. 1993); Afolabi, 849 N.E.2d at 1173 (citation omitted). "Issue preclusion applies only to matters actually litigated and decided, not all matters that could have been decided." Miller Brewing Co. v. Indiana Dep't of State Revenue, 903 N.E.2d 64, 68 (Ind. 2009) (citations omitted) (emphases added). The primary consideration in the use of issue preclusion is whether the party who would be precluded had a full and fair opportunity to litigate the issue and whether it would be fair to permit the use of issue preclusion against the party. See MicroVote Gen. Corp. v. Indiana Election Comm'n, 924 N.E.2d 184, 197 (Ind. Ct. App. 2010) (citation omitted).

The Department argues that "if claim preclusion does not apply, issue preclusion

bars this matter from being relitigated." (Resp't Br. at 6.) More specifically, the Department argues that

> [t]he same matters and the same tax years are at issue here. The Petition filed in support of this case is virtually identical to the petition filed in support of [Miller Pipeline 1]. Paragraphs 1 through 15 of the Petition set forth the parties to this action and the procedural history using the same words as the previous petition in [Miller Pipeline 1]. Only the words "under Control No. 301846-06" were added to paragraph 10 of the Petition to further identify the Audit. The remainder of the Petition references specific invoices that were at issue in the prior case.

(Resp't Br. at 7.) Consequently, the Department contends that issue preclusion forecloses any new arguments by MPC. (See Resp't Br. at 7.) Again, the Court disagrees.

As previously stated, Miller Pipeline 1 and Miller Pipeline 2 each raise entirely separate and distinct issues: Miller Pipeline 1 concerned the denial of the portion of MPC's third refund claim relating to the purchases of safety equipment, while Miller Pipeline 2 concerns only the propriety of the statistical sample used by the Department in calculating its proposed assessments. Supra at pp. 3-4. Thus, the issue in Miller Pipeline 2 cannot be precluded as it was not actually litigated in Miller Pipeline 1. See Miller Brewing, 903 N.E.2d at 68. Further, when this Court dismissed Miller Pipeline 1, the Department had not yet issued a final determination with respect to MPC's fourth refund claim nor had 180 days passed since MPC filed it with the Department. Supra at pp. 8-9. Consequently, the Tax Court would have lacked subject matter jurisdiction over the issues raised in the fourth claim for refund. See I.C. § 6-8.1-9-1(c); Etzler, 957 N.E.2d at 709. Because MPC could not have made any argument regarding the propriety of the proposed assessments against it until the Department denied its refund claim on September 27, 2010, it did not have a "full and fair opportunity" to litigate that

issue in Miller Pipeline 1. Therefore, issue preclusion does not bar the current action from being litigated.

## II. ACCORD AND SATISFACTION

Alternatively, the Department argues that the affirmative defense of accord and satisfaction defeats MPC's claims in Miller Pipeline 2. Specifically, the Department argues that because both parties signed a contract agreeing to settle Miller Pipeline 1, and that the Department, in good faith, fully complied with that contract's terms, accord and satisfaction has been established and defeats the claims now made by MPC in Miller Pipeline 2. (See Resp't Br. at 8.)

"'Accord and satisfaction is a method of discharging a contract, or settling a cause of action by substituting for such contract or dispute an agreement for satisfaction.'" Mominee v. King, 629 N.E.2d 1280, 1282 (Ind. Ct. App. 1994) (citation omitted). "Accord" denotes an express contract between parties by which the parties agree to settle some dispute on terms other than those originally contemplated and "satisfaction" denotes the performance of the contractual obligations. See Wolfe v. Eagle Ridge Holding Co., LLC, 869 N.E.2d 521, 524 (Ind. Ct. App. 2007). In pleading accord and satisfaction as an affirmative defense, the Department must prove that it and MPC had a meeting of the minds and intended the Miller Pipeline 1 settlement agreement to control in this case. See Mominee, 629 N.E.2d at 1282.

The primary rule when reviewing a contract is to give effect to the parties' mutual intent. See PNC Bank, Nat'l Ass'n v. LA Dev., Inc., 973 N.E.2d 1131, 1135 (Ind. Ct. App. 2012). That intent must be derived from the written expressions within the four corners of the contract. Id. Unambiguous contracts must be enforced as written. Id.

Here, the settlement agreement unambiguously applies to the 2007 tax year only. (See Pet'r Des'g Evid., Ex. 6 at 1.) The agreement applies to "state gross retail/use tax paid on purchases of certain items for the Year at Issue" and "does not bind either Party to any position for any other issue for the Year at Issue, or for any other tax year." (See Pet'r Des'g Evid., Ex. 6 at 2-3 (emphasis added).) The agreement gives the Department the right to audit and assess MPC for any "tax periods, issues and tax types other than the tax periods, issues and tax type for the Year at Issue covered in the [Miller Pipeline 1] Litigation" and MPC the "right to file refund claims for any tax period, issues and tax types other than the tax periods, issues, and tax type for the Year at Issue covered in the [Miller Pipeline 1] Litigation." (See Pet'r Des'g Evid., Ex. 6 at 3.)

This language does not reveal a meeting of the minds between the Department and MPC such that accord and satisfaction would defeat MPC's claims found in Miller Pipeline 2. Indeed, the agreement's language clearly limits its application to the sole issue found in Miller Pipeline 1, whether MPC owed tax on its purchases of safety equipment for the 2007 tax year. (See Pet'r Des'g Evid., Ex. 6 at 1-4 (emphasis added).) The Department has failed to demonstrate a meeting of the minds regarding the settlement's applicability to the issues contained in Miller Pipeline 2, and accord and satisfaction will not bar the current action from being litigated.

## CONCLUSION

For the reasons stated above, the Court DENIES the Department's motion for summary judgment.[11] The Court will schedule this matter for a case management

[11] MPC has requested an award of reasonable attorneys' fees, asserting that the Department's motion was "frivolous, groundless, and unreasonable." (See Hr'g Tr. at 19; Pet'r Mem. Law Supp. Mot. Opp'n Resp't Mot. Dismiss at 15-16.) To the extent MPC still seeks such fees, it must make that request by separate motion.

conference under separate order.

SO ORDERED this __ day of December 2012.

_____
Thomas G. Fisher
Senior Judge, Indiana Tax Court

Distribution:
Robert A. Romack, Dan R. Dunbar, DUNBAR & ROMACK, 1949 Red Oak Drive, Franklin, IN 46131;

Gregory F. Zoeller, Attorney General of Indiana, By: Jessica E. Reagan, Deputy Attorney General, Indiana Government Center South, Fifth Floor, 302 West Washington Street, Indianapolis, IN 46204-2770.