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IN THE
INDIANA TAX COURT

MILLER BREWING COMPANY,

Petitioner,

v.

INDIANA DEPARTMENT OF STATE REVENUE,

Respondent.

Cause No. 49T10-0607-TA-69

ORDER ON PETITIONER'S MOTION FOR SUMMARY JUDGMENT

NOT FOR PUBLICATION
June 8, 2007

FISHER, J.

Miller Brewing Company (Miller) appeals the final determination of the Indiana Department of State Revenue (Department) denying its claims for refund of Indiana adjusted gross income tax and supplemental net income tax (collectively, AGIT) paid during the 1997-1999 tax years (years at issue).[1] The matter is currently before the

[1] Because the imposition of supplemental net income tax during the years at issue was dependent upon adjusted gross income tax computations, the Court's reference to the adjusted gross income tax, in this order, is also considered a reference to the supplemental net income tax. *See* IND. CODE ANN. § 6-3-8-5 (West 1998) (repealed 2002). *See also Indiana Dep't of State Revenue v. Endress & Hauser, Inc.*, 404 N.E.2d 1173, 1175 (Ind. Ct. App. 1980).

Court on Miller's motion for summary judgment. The issue for the Court to decide is whether its decision in *Miller Brewing Company v. Indiana Department of State Revenue*, 831 N.E.2d 859 (Ind. Tax Ct. 2005), *review denied*, constitutes res judicata which precludes the Department from relitigating the issue in that case. For the following reasons, the Court DENIES Miller's motion for summary judgment.

FACTS AND PROCEDURAL HISTORY

The facts in this case are undisputed. Miller is a Wisconsin corporation headquartered in Milwaukee. During the years at issue, Miller sold malt beverage products to customers in various states, including Indiana. More specifically, Miller's customers submitted purchase orders to the Milwaukee headquarters, after which the products were produced and prepared for pick-up at one of Miller's breweries outside of Indiana.

Miller's customers could transfer their products from Miller's breweries to the proper destination in one of three ways: (1) they could pick up the products themselves using their own trucks; (2) they could arrange for a third-party common carrier to pick up the products and transport them; or (3) Miller could arrange for a common carrier to transport the products and the customers would reimburse Miller for the related charges. Regardless, the customers decided how to transport the goods, as possession and title to the products transferred to them at the breweries.

Because Miller derived income from sales to Indiana customers, it filed Indiana corporate income tax returns for the years at issue. For the 1997 tax year, Miller

reported only sales where Miller arranged for a common carrier.[2] For the 1998 and 1999 tax years, Miller did not report any Indiana sales. Miller subsequently filed an amended corporate income tax return for 1997, requesting a refund of $13,391 (plus statutory interest).

After completing an audit, however, the Department issued proposed AGIT assessments to Miller totaling $806,366.23 for the years at issue.[3] In calculating the tax liability, the Department included all Indiana sales shipped by a common carrier (regardless of who arranged for the common carrier) in the numerator of Miller's sales factor and excluded only those sales where customers picked up the products using

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[2] During the years at issue, Indiana imposed a tax on every corporation's adjusted gross income derived from sources within Indiana. IND. CODE ANN. § 6-3-2-1(b) (West 1998) (amended 2002). In turn, a corporation's adjusted gross income derived from sources within Indiana was determined by an apportionment formula. *See* IND. CODE ANN. § 6-3-2-2(b) (West 1998) (amended 2006). This formula multiplied the corporation's business income derived from sources both within and without Indiana by a fraction, the numerator of which was a property factor plus a payroll factor plus a sales factor, and the denominator of which was three. *Id.* At issue in this case is the sales factor of the apportionment formula:

> The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this state during the taxable year, and the denominator of which is the total sales of the taxpayer everywhere during the taxable year. . . . Sales of tangible personal property are in this state if: [] the property is delivered or shipped to a purchaser, other than the United States government, within this state, regardless of the f.o.b. point or other conditions of the sale[.]

A.I.C. § 6-3-2-2(e).

[3] The Department also assessed interest on the tax liability and a penalty for the 1999 tax year. The Department applied refunds due to Miller for the 1994-1996 tax years to the assessments, which satisfied Miller's liability for the years at issue. (*See* Pet'r Pet. at 4, Ex. 1.)

their own trucks. Miller protested the assessment with the Department on November 26, 2001.

On July 27, 2005, while that protest was still pending, this Court issued an opinion regarding Miller's adjusted gross income tax liability for the 1994-1996 tax years. *See Miller Brewing Co. v. Indiana Dep't of State Revenue*, 831 N.E.2d 859 (Ind. Tax Ct. 2005), *review denied.* In *Miller Brewing*, the Court held that, pursuant to the Department's own regulation, Miller's sales of products that were transported by customer-arranged common carriers to Indiana customers were not made in Indiana and, therefore, were not to be included in the numerator of Miller's sales factor of its adjusted gross income tax apportionment formula. On February 21, 2006, the Indiana Supreme Court denied the Department's petition for review in that case. *Miller Brewing Co. v. Indiana Dep't of State Revenue*, 855 N.E.2d 998 (Ind. 2006).

On March 24, 2006, the Department conducted a hearing on Miller's protest for the tax years at issue. During the administrative hearing, Miller sought a total net refund of $1,138,488 (plus statutory interest) for the 1994-1999 tax years based on the decision in *Miller Brewing*. On June 12, 2006, the Department issued its final determination, denying Miller's protest and request for refunds in full.

Miller initiated an original tax appeal on July 24, 2006. In its complaint, Miller alleged that issue preclusion barred the Department from denying Miller a refund for the years at issue with respect to customer-arranged common carrier sales. On December 15, 2006, Miller filed a motion for summary judgment regarding its issue preclusion argument; the Department also filed a motion for summary judgment on the merits of the case (i.e., whether the Department correctly taxed Miller's customer-arranged

common carrier sales). On December 29, 2006, Miller filed a motion to stay proceedings on the Department's motion for summary judgment, pending the outcome of its own motion for summary judgment. In granting Miller's motion to stay on January 8, 2007, the Court instructed the parties to limit their briefs and argument to the applicability of issue preclusion. The Court heard the parties' oral arguments on March 14, 2007. Additional facts will be supplied as necessary.

ANALYSIS AND OPINION

Standard of Review

Summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C).

Discussion

Miller argues that issue preclusion bars the Department from denying it a refund because the issue, law, and facts in this case are identical to those in the previous *Miller Brewing* case. Indeed, Miller claims that the Department has chosen to simply ignore the Court's decision in *Miller Brewing* and issued a final determination in direct conflict with that opinion. (*See* Pet'r Br. in Supp. of its Mot. for Summ. J. (hereinafter, Pet'r Br.) at 15.) Miller argues that to litigate the same issue now offends the very purpose of issue preclusion. (*See* Pet'r Br. at 11-13.) In response, the Department appears to argue that issue preclusion is inapplicable because this case presents a different issue than *Miller Brewing*, namely whether Indiana Code § 6-3-2-2 requires a destination rule

for sourcing sales to Indiana.[4] (*See* Resp't Resp. to Pet'r Mot. for Summ. J. (hereinafter, Resp't Br.) at 14-15 (footnote added).)

The doctrine of *res judicata* prevents the repetitious litigation of disputes that are essentially the same. *Afolabi v. Atlantic Mortgage & Inv. Corp.*, 849 N.E.2d 1170, 1173 (Ind. Ct. App. 2006). Issue preclusion, also referred to as collateral estoppel, is a branch of *res judicata* which bars the subsequent litigation 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. *Id.* at 1175. Where issue preclusion is applicable, the former adjudication will be conclusive in the subsequent action even if the two actions are based on different claims. *Id.* Issue preclusion, however, does not extend to matters that were not actually litigated and determined by the former adjudication. *Id.*

This Court has previously held that "issue preclusion (particularly with respect to questions of law) is not applicable to tax cases in Indiana" because "each tax year stands alone." *Farm Credit Servs. of Mid-America v. Indiana Dep't of State Revenue*, 705 N.E.2d 1089, 1091 (Ind. Tax Ct. 1999), *rev'd on other grounds*, 734 N.E.2d 551 (Ind. 2000). Nevertheless, Miller claims that the doctrine that each tax year stands alone does not impede the application of issue preclusion in this case. (*See* Pet'r Br. at 14-16.) To support its claim, Miller points to this Court's decision in *Lindemann v. Wood*, 799 N.E.2d 1230 (Ind. Tax Ct. 2003). In *Lindemann*, the Court held that issue preclusion barred an assessor from increasing the grade of the taxpayers' improvement

[4] The Court notes that the Department devoted two pages of its seventeen-page brief to addressing the applicability of issue preclusion; the remaining fifteen pages address the merits of the case. (*See generally* Resp't Br.) The Court is frustrated by the Department's failure to follow specific instructions to it limit its brief and arguments to the topic of issue preclusion.

in a property tax assessment prior to the next general reassessment absent a change of circumstances in the improvement because the taxpayers had already successfully appealed their improvement's grade. *See Lindemann v. Wood*, 799 N.E.2d 1230, 1232-34 (Ind. Tax Ct. 2003).

In so holding, the Court stated that its holding "does not conflict with the principle that 'each tax year stands alone, to be assessed separately.'" *Id.* at 1233 n.6. (*See also* Pet'r Br. at 16 (quoting that statement).) Nevertheless, the Court further explained that a conflict did not exist because "a real property tax assessment valuation 'rolls' from year to year unless there is a change to the property justifying an interim reassessment." *Lindemann*, 799 N.E.2d at 1233 n.6. In other words, because a property tax assessment is to remain unchanged from year to year until a general reassessment, once the Lindemanns successfully appealed their property's grade, that adjudication barred the assessor from increasing the grade (until the next general reassessment). *Id.* at 1233 ns.4, 6. The same does not hold true for assessments that change annually (i.e., adjusted gross income tax assessments). Therefore, it stands to reason that while issue preclusion may be appropriate in certain property tax cases, it is generally not applicable in revenue cases. *See Farm Credit*, 705 N.E.2d at 1091, n.4 (explaining that the Department was free to relitigate the issue of the petitioner's immunity from state taxation so long as any such relitigation is done in good faith and

not for purposes of harassment).[5]

CONCLUSION

For the foregoing reasons, the Court now DENIES Miller's motion for summary judgment.

SO ORDERED this 8th day of June, 2007.

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Thomas G. Fisher, Judge
Indiana Tax Court

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[5] Miller states in its brief that "[t]he Department's behavior raises a question about potentially vindictive conduct." (*See* Pet'r Reply in Supp. of its Mot. for Summ. J. at 9.) Nevertheless, Miller has not put forth any facts or evidence indicating harassment or bad faith on the part of the Department rising to the level prohibited in *Farm Credit*. *See Farm Credit Serv. of Mid-America v. Indiana Dep't of State Revenue*, 705 N.E.2d 1089, 1091 (Ind. Tax Ct. 1999), *rev'd on other grounds*, 734 N.E.2d 551 (Ind. 2000). Furthermore, the precedential value of Tax Court decisions is expected to be observed. Thus, if the Court finds that any party takes a position that is clearly and blatantly contrary to existing case law so as to make such a position frivolous or nearly so, the Court will deal with that as needed.