ATTORNEYS FOR PETITIONER:
TIMOTHY D. HERNLEY
RICHARD J. DEAHL
BARNES & THORNBURG LLP
South Bend, IN

ATTORNEYS FOR RESPONDENT:
GREGORY F. ZOELLER
ATTORNEY GENERAL OF INDIANA
NANCY M. HAUPTMAN
JOHN D. SNETHEN
DEPUTY ATTORNEYS GENERAL
Indianapolis, IN

IN THE INDIANA TAX COURT

MIRANT SUGAR CREEK, LLC,

Petitioner,

v.

INDIANA DEPARTMENT OF STATE REVENUE,

Respondent.

Cause No. 71T10-0803-TA-18

ORDER ON RESPONDENT'S MOTION TO STRIKE

NOT FOR PUBLICATION
June 16, 2010

FISHER, J.

On March 5, 2008, Mirant Sugar Creek, LLC (Mirant) initiated an original tax appeal seeking a refund of the approximate $65,000 in Utility Services Use Tax (the USUT) it remitted to the Indiana Department of State Revenue (Department) for the month of July, 2006. On October 31, 2008, the Department filed a motion for summary judgment claiming that Mirant's remittance of the USUT was proper. Mirant subsequently filed a cross-motion for summary judgment and, in support thereof, designated as evidence the affidavit of Jill Houchin, its Senior Tax Analyst, as well as

three pages of e-mails between Ms. Houchin and Jane Berggren, a Tax Analyst with the Department.

On December 19, 2008, the Department moved to strike both the affidavit and the e-mails. Mirant filed its response thereto on January 30, 2009. The Court held a hearing on the parties' multiple motions on April 2, 2009.[1]

ANALYSIS AND ORDER

Standard of Review

This Court acts as a trial court when reviewing the Department's denial of a taxpayer's claim for refund. *See* IND. CODE ANN. § 6-8.1-9-1(d) (West 2010). As a result, the Court is afforded broad discretion in resolving motions to strike. *See, e.g., Vernon v. Kroger Co.*, 712 N.E.2d 976, 982 (Ind. 1999); *Bailey v. Indiana Dep't of State Revenue*, 641 N.E.2d 695, 696 n.1 (Ind. Tax Ct. 1994) (stating that this Court has the same discretion[2] as trial courts when carrying out its trial functions (footnote added)) (citation omitted), *rev'd on other grounds*, 660 N.E.2d 322 (Ind. 1995).

Discussion

Indiana Trial Rule 56(E), in relevant part, states that affidavits in support of, or in opposition to, a motion for summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Ind. Trial Rule 56(E). When a party believes that an affidavit does not satisfy these

[1] Neither party, however, presented any oral argument as to the Department's motion to strike.

[2] Discretion is a privilege afforded to a trial court so that it may act in accord with what is fair and equitable in every case. *Vernon v. Kroger Co.*, 712 N.E.2d 976, 982 (Ind. 1999) (citation omitted).

requirements, it must object and direct the court's attention to the affidavit's alleged deficiencies.[3] *See Doe v. Shults-Lewis Child and Family Servs., Inc.*, 718 N.E.2d 738, 749 (Ind. 1999) (footnote added) (citations omitted).

1. Ms. Houchin's Affidavit

The Department asserts that Ms. Houchin's four-page affidavit should be stricken because it does not satisfy the requirements of Indiana Evidence Rules 402, 602, 704(b), and 802. (*See* Resp't Br. Mot. Strike (hereinafter, "Resp't Br.") at 9-14.) Alternatively, the Department requests that the Court strike the affidavit pursuant to the *Blinn/McCullough* Rule. (*See* Resp't Br. at 8, 13.)

a. Indiana Evidence Rule 402 Objection

Indiana Evidence Rule 402 prohibits the admission of irrelevant evidence. Ind. Evidence Rule 402. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ind. Evidence Rule 401. The Department claims that Ms. Houchin's testimony as to an unidentified "industry source" who opined as to the applicability of the USUT to entities like Mirant is irrelevant because it "is not logically connected with Mirant's payment of [the] USUT[.]" (*See* Resp't Br. at 9 (referring to Pet'r Br. Opp'n Resp't Mot. Summ. J., App. (hereinafter, "Pet'r Des'g Evid.") at 3 ¶ 8).) According to the Department, Houchin's testimony merely confuses the issues because it does not tend prove whether Mirant's remittance of the tax was erroneous. (Resp't Br. at 9.) Mirant, on the other hand, maintains that the

[3] An affidavit's deficiencies "are waived in the absence of a motion to strike or other objection." *Doe v. Shults-Lewis Child and Family Servs., Inc.*, 718 N.E.2d 738, 749 (Ind. 1999) (quoting *Gallatin Group v. Central Life Assurance Co.*, 650 N.E.2d 70, 73 (Ind. Ct. App. 1995)).

testimony is both helpful and relevant: it is directly related to the e-mails between Ms. Houchin and Ms. Berggren which, according to Mirant, culminated in the issuance of a Letter of Findings (LOF). (*See* Pet'r Resp. Opp'n Resp't Mot. Strike (hereinafter, "Pet'r Br.") at 3-4.) The Court agrees with Mirant.

Ms. Houchin's testimony is relevant because it provides background information with respect to the e-mail exchanges between Mirant and the Department. Thus, the testimony is related, albeit tangentially, to one of issues presented in Mirant's cross-motion for summary judgment. *See McFarland v. State*, 390 N.E.2d 989, 993 (Ind. 1979) (explaining that considerable leeway should be afforded for the admission of facts that simply provide "'details which fill in the background of the narrative and give it interest, color, and lifelikeness'") (citation omitted). Consequently, the Court denies the Department's Indiana Evidence Rule 402 objection.

b. Indiana Evidence Rule 602 Objections

Next, the Department claims that Ms. Houchin's affidavit is not based on her personal knowledge. More specifically, the Department argues that because no foundation was laid with respect to the majority of her testimony, the affidavit provides no way of discerning how, or even if, she knew of the business practices of out-of-state vendors and customers. (*See* Resp't Br. at 9-10 (referring to Pet'r Des'g Evid. at 1-2 ¶ 4).)

Initially, the admissibility of Ms. Houchin's testimony is governed by Indiana

Evidence Rule 104(b).[4] 13 ROBERT L. MILLER JR., INDIANA PRACTICE: INDIANA EVIDENCE § 602.101 at 60 (3d ed. 2007) (stating "[t]he trial judge determines admissibility under Rule 104(b)") (footnote added). As such, the Court need not weigh the credibility of Ms. Houchin's testimony; rather, it must determine whether "'a reasonable [trier of fact] could make the requisite factual determination based on the evidence before it.'" *See Cox v. State*, 696 N.E.2d 853, 861 (Ind. 1998) (citation omitted).

In the first paragraph of her affidavit, Ms. Houchin avers that she has personal knowledge of the facts set forth therein and is competent to provide testimony as to those matters. (Pet'r Des'g Evid. at 1 ¶ 1.) In the third paragraph of the affidavit, Ms. Houchin explains that as a senior tax analyst, she resolves tax compliance issues, prepares tax returns and exemption certificates, coordinates audits, researches state and local tax laws, interfaces with state tax administrators, and implements tax compliance policies for Mirant. (Pet'r Des'g Evid. at 1 ¶ 3.) These two paragraphs lead this Court to conclude that Ms. Houchin's testimony concerning out-of state vendors and customers who worked with Mirant is based on her personal knowledge. Accordingly, the Department's Indiana Evidence Rule 602 objections are also denied.

c. Indiana Evidence Rule 704(b) Objections

Indiana Evidence Rule 704(b) provides that "[w]itnesses may not testify to opinions concerning . . . legal conclusions." Ind. Evidence Rule 704(b). The Department, however, contends that through her affidavit, Ms. Houchin offers inadmissible legal conclusions as to: whether the Department issued a binding LOF via

[4] Indiana Evidence Rule 104(b) provides: "When the relevancy of evidence depends upon the fulfillment of a condition of fact, the Court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition." Ind. Evidence Rule 104(b).

e-mail; whether the purported LOF was prepared by one of the Department's tax policy analysts; whether the quotation within the purported LOF was accurate; and whether Mirant's remittance of the USUT was proper. (*See* Resp't Br. at 11 (referring to Pet'r Des'g Evid. at 1-2 ¶ 4, 3 ¶¶ 7-8).)

At the outset, the majority of the averments in paragraphs 4, 7, and 8 of Ms. Houchin's affidavit essentially depicts her rendition of the events giving rise to this cause of action. (*See* Pet'r Des'g Evid. at 1-2 ¶ 4, 3 ¶¶ 7-8.) While she uses the word "ruling" in describing these events, her overall use of the word suggests that Mirant merely sought a response from the Department as to whether generators were subject to the USUT. (*See, e.g.,* Pet'r Des'g Evid. at 3 ¶ 8.) In fact, it was Mirant's counsel - not Ms. Houchin - who claimed that the Department's response was a binding LOF. (*See* Pet'r Br. Opp'n Resp't Mot. Summ. J. at 28-33.) Accordingly, the Court finds Ms. Houchin's averments to be statements of fact and not legal conclusions. Therefore, the Department's Indiana Evidence Rule 704(b) objections are denied.

d. Indiana Evidence Rule 802 Objections

Hearsay, "a statement, other than one made by the declarant while testifying at [] trial or hearing[and] offered in evidence to prove the truth of the matter of the asserted[,]" is generally not admissible. *See* Ind. Evidence Rules 801(c), 802. The Department, for the most part, asserts that Ms. Houchin's testimony regarding the content of the e-mails is hearsay because "[t]he emails are out-of-court statements whose content [Ms.] Houchin is asserting as the truth." (*See* Resp't Br. at 11-12 (referring to Pet'r Des'g Evid. at 2 ¶ 6, 3 ¶ 8).) The Department also claims that her testimony is not admissible as a statement of a party-opponent under Indiana Evidence

Rule 801(d)(2) because it "is not offered by Houchin against [Mirant]." (*See* Resp't Br. at 12 (citing *Schmidt v. State*, 816 N.E.2d 925, 938 n.3 (Ind. Ct. App. 2004), *trans. denied*).) Once again, the Court disagrees with the Department.

Under Indiana Evidence Rule 801(d)(2), a party's own statements do not constitute hearsay when they are offered against that party.[5] *See* Ind. Evidence Rule 801(d)(2) (footnote added). Here, the testimony at issue is derived from several e-mails, which in their simplest form represent the conversations that occurred between Ms. Houchin and two of the Department's employees: an unidentified policy analyst and Ms. Berggren. While the Department repeatedly questions who this "unnamed" policy analyst may be, it never claims that Jane Berggren is not one of its employees. Thus, Ms. Houchin's testimony is admissible under Evidence Rule 801(d)(2): some of the statements are the Department's statements, as they were made by either an agent or representative of the Department (i.e., Ms. Berggren) and are now being offered against the Department. *Contra Schmidt,* 816 N.E.2d at 937-38 n.3 (where defendant's statements to a doctor were not party-opponent statements because the defendant attempted to introduce his own testimony through the doctor (i.e., he attempted to testify without being subject to cross-examination)). Consequently, the Department's 802 objections must also be denied.

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[5] Evidence Rule 801, in relevant part, provides that:

> [a] statement is not hearsay if: . . . [t]he statement is offered against a party and is [] the party's own statement, in either an individual or representative capacity . . . or [is] a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship[.]

Ind. Evidence Rule 801(d)(2).

e. The Blinn/McCullough Rule

Finally, the Department asserts that Ms. Houchin's entire affidavit must be disregarded (even if it satisfies all of the other evidentiary rules) pursuant to the *Blinn/McCullough* Rule. More specifically, the Department argues that her affidavit should be stricken because it "is filled with . . . self-serving testimony" and "evasive" statements. (*See* Resp't Br. at 13.)

The *Blinn/McCullough* Rule militates against the granting of summary judgment when "'a reasonable trier of fact could choose to disbelieve the movant's account of the facts.'" *Insuremax Ins. Co. v. Bice*, 879 N.E.2d 1187, 1190 (Ind. Ct. App. 2008) (quoting *McCullough v. Allen*, 449 N.E.2d 1168, 1172 (Ind. Ct. App. 1983)), *trans. denied*. Specifically, when the evidence before a court raises a genuine issue as to the affiant's credibility, it would be improper to "'base [an entry] of summary judgment solely on a party's self-serving affidavit[.]'" *Id.* (citation omitted). "Inconsistencies and evasive language within the movant's designated evidence may form a basis for denying summary judgment." *Id*. "When the facts are peculiarly in the knowledge of the movant's witnesses, there should be an opportunity to impeach them at trial, and their demeanor may be the most effective impeachment." *Id*. (citing *Blinn v. City of Marion*, 390 N.E.2d 1066, 1069 (Ind. Ct. App. 1979)). This, however, is not a case to which this Rule should be applied.

Indeed, the Department's entire argument as to application of the Rule is as follows:

> [Ms. Houchin's affidavit] carefully avoids identifying the industry source who allegedly received information from the Department regarding the non-taxation of gas purchased and consumed by electric generating stations. There is no mechanism available to

> verify the identity of the industry source. The identity of this third party source is a fact peculiarly within the knowledge of [Ms. Houchin/Mirant]. That knowledge has not been forthcoming. Under the *Blinn/Mcullogh* rule [sic], the Court is entitled to decide that this vague and conflicting affidavit is not admissible testimony. The affidavit should be struck.

(Resp't Br. at 13.) The mere fact that Ms. Houchin's affidavit does not contain all of the information desired by the Department does not necessarily mean that she is being evasive. In fact, her affidavit only makes mention of this "third party industry source" once. (*See* Pet'r Des'g Evid. at 1-4.) In any event, this individual's identity is of minimal relevance, as it would merely provide an additional piece of background information with respect to the e-mail exchanges between Ms. Houchin and the Department's employees.[6] *See* discussion *supra* Part 1(a) (footnote added). Just as importantly, however, is the fact that the remainder of Ms. Houchin's affidavit does not appear to be evasive, inconsistent, or self-serving; rather, it appears to be simply her rendition of the facts that gave rise to this cause of action. Accordingly, the Department's *Blinn/McCullough* objection is denied.

2. The E-mails

The Department also contends that the e-mails between Ms. Houchin and Ms. Berggren are inadmissible because they do not qualify for admittance under the business records exception to the hearsay rule. As previously explained, however, the e-mails need not qualify for an exception to the hearsay rule because they are not

[6] Nevertheless, to the extent the Department believed that the identity of the industry source was vital, the Department – not Mirant – was responsible for getting the information before the Court. The Department could have accomplished this through a variety of discovery tools.

hearsay in the first instance. *See* discussion *supra* Part 1(d).[7]

CONCLUSION

For the above stated reasons, the Court DENIES the Department's motion to strike in its entirety. The Court will address all remaining arguments as to the parties' motions for summary judgment under separate cover.

SO ORDERED this 16th day of June, 2010.

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Thomas G. Fisher, Judge
Indiana Tax Court

DISTRIBUTION:

Timothy D. Hernly, Richard J. Deahl, Barnes & Thornburg LLP, 600 1st Source Bank Center, 100 North Michigan Street, South Bend, IN 46601-1632;

Gregory F. Zoeller, Attorney General of Indiana, By: Nancy M. Hauptman and John D. Snethen, Deputy Attorneys General, Indiana Government Center South, Fifth Floor, 302 West Washington Street, Indianapolis, IN 46204-2770.

[7] On a final note, the Department also contends that the final e-mail exchange between Ms. Houchin and Ms. Berggren is improperly before the Court because it is not a binding LOF. (*See* Resp't Br. at 14-15.) Because this argument directly addresses one of the issues in Mirant's cross-motion for summary judgment, the Court will address it when resolving that motion.