Opinion issued August 13, 2013

In The

Court of Appeals

For The

First District of Texas

NO. 01-12-00052-CV

BAUER-PILECO, INC., Appellant

V.

HARRIS COUNTY APPRAISAL DISTRICT, Appellee

On Appeal from the 125th District Court
Harris County, Texas
Trial Court Case No. 2011-24702

O P I N I O N

In this ad valorem personal property tax case, Bauer-Pileco, Inc. ("Bauer") filed suit against the Harris County Appraisal District ("HCAD"), seeking judicial review of the decision of the Harris County Appraisal Review Board ("the Board")

to deny Bauer's motion to correct the appraisal rolls. Bauer and HCAD both moved for summary judgment, and the trial court rendered judgment in favor of HCAD and dismissed Bauer's claims. On appeal, Bauer contends that (1) the trial court erroneously rendered summary judgment in favor of HCAD because Bauer conclusively established its right to correct the appraisal roll under Texas Tax Code section 25.25(c); (2) the trial court erroneously interpreted section 25.25(c) as requiring Bauer to prove that it had no personal property located in Harris County to be entitled to correction of the appraisal rolls; (3) the trial court erroneously rendered summary judgment on its constitutional claim because HCAD did not move for summary judgment on this claim; and (4) the trial court failed to award attorney's fees to it under Tax Code section 42.29.

We reverse and remand.

Background

Bauer is a Texas corporation with its headquarters in Harris County. Bauer submitted a rendition of its business personal property to HCAD for the 2008 tax year. The purpose of this rendition statement was to inform HCAD of the business personal property that Bauer owned in Harris County as of January 1, 2008. Bauer's rendition form stated that it owned $38,831,203 worth of inventory in Harris County. Based on Bauer's rendition statement, HCAD assessed $989,401.65 in personal property taxes against Bauer. Bauer timely paid these

taxes, and it did not protest the appraised value as allowed by Tax Code Chapter 41.

On January 20, 2011, Bauer filed a motion to correct the appraisal roll pursuant to Tax Code section 25.25(c). Bauer checked the following "correction types" on the motion: (1) "Clerical, Mathematical, Computer, Transcription Error"; (2) "Property not located at address shown on roll"; and (3) "Property does not exist." Bauer attached an explanation for the correction request, in which it informed HCAD that, after rendering its business personal property for the 2008 tax year, it discovered several errors in the rendition process that led it to report that it owned more personal property in Harris County on January 1, 2008, than it actually did. According to Bauer, when it prepared its 2008 rendition, it "added up all of the inventory subaccounts shown on [its] 2007 trial balance and included all of these account balances as a part of taxable inventory for Harris County [ad valorem] tax purposes." Bauer mistakenly included an "inventory in transit" subaccount, which represented inventory that was in the process of being shipped to Bauer but was not yet located in Harris County on January 1, 2008. Bauer also mistakenly included "work in process" subaccounts in its rendition, and these accounts, which represented unbilled receivables, constitute intangible personal property that is not subject to taxation. Finally, Bauer stated that a sister corporation located in California merged with Bauer on December 31, 2007, and

that company's inventory, which was located in California and had never been located in Harris County, was subsequently listed in Bauer's records and was mistakenly included on Bauer's rendition form. Bauer concluded that it had mistakenly included $9,088,250 worth of inventory and intangible personal property in its rendition for the 2008 tax year, and it requested that HCAD change the appraisal roll to reflect that it actually had only $29,742,953 worth of taxable personal property in Harris County on January 1, 2008.

On March 22, 2011, the Board issued an order denying Bauer's correction request. The order stated, "No error exists—no change."

Bauer timely filed a suit seeking judicial review of the Board's determination. Bauer requested that the trial court review the Board's refusal to correct the appraisal rolls on the grounds that property was not located at the address shown on the appraisal roll and that property did not exist. In its original petition, Bauer alleged the same three errors in the rendition statement that it had alleged in its correction motion. Bauer further alleged that the requested corrections would reduce its 2008 personal property taxes from $989,401.65 to $760,041.48, entitling it to a refund of $229,360.17. Bauer requested declaratory and injunctive relief.[1]

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[1] Bauer sought the following declarations: (1) Bauer's 2008 tax records are erroneous and should be corrected; (2) part of the reported inventory was in transit, but not yet delivered to Bauer, and therefore was not located in Harris

Bauer later amended its petition to assert a claim that HCAD had violated Article VIII, Section 1(b) of the Texas Constitution. Bauer alleged:

> The Texas Constitution authorizes the taxation only of "tangible" personal property "in this State," *i.e.*, in Texas. The Texas Constitution also provides that "all property must be equally and uniformly taxed." By taxing Bauer's intangible property and its personal property located outside of Texas, Defendants have violated Bauer's rights under the Texas Constitution.

(Internal citations omitted.)

Bauer moved for summary judgment, arguing that its evidence established, as a matter of law, that it had mistakenly included in its rendition statement personal property that was not subject to taxation in Harris County. Bauer's summary judgment evidence included the affidavit of Thomas Jarboe, Bauer's chief financial officer and secretary. Jarboe averred:

> Based on the personal property rendition which Bauer submitted for 2008, HCAD assessed taxes against Bauer in the amount of $989,401.65. Bauer timely paid these taxes. Bauer subsequently discovered that its personal property rendition was incorrect. Specifically, the amount stated in the "Inventory, Supplies, Raw Materials, Work in Process, and Consigned Goods" section was

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County and not subject to taxation in Harris County; (3) part of the reported inventory was actually located in California and not subject to taxation in Harris County; (4) part of the reported inventory was "work in process" accounts that were intangible personal property and not subject to taxation at all; (5) Harris County is not entitled to tax Bauer on personal property not located in Harris County; (6) Harris County is not entitled to tax Bauer on intangible property; (7) HCAD is ordered to correct Bauer's 2008 personal property records and change the total amount of personal property from $38,831,203 to $29,742,953; (8) Bauer is entitled to a tax refund for overpayment of its 2008 personal property taxes.

overstated because it included property not subject to taxation in Harris County.

Jarboe further averred that Bauer notified HCAD by filing a correction motion when it discovered the errors, and Bauer informed HCAD that

- The inventory reported in the rendition included inventory that was in transit but not yet delivered to Bauer in Harris County as of January 1, 2008, and that was therefore not physically located in Harris County.

- The rendition included inventory that was located in California and therefore not physically located in Harris County.

- The rendition included property that was described as inventory, but which consisted of intangible non-billable receivables for repairs performed for Bauer's customers that were listed on Bauer's books and records as "works in process."

Bauer also attached as summary judgment evidence financial statements and audit reports which described its inventory.

Bauer argued that summary judgment in its favor was proper because its rendition statement "included property which did not exist in the form or at the location described in the appraisal roll," which resulted "in an incorrect valuation in the appraisal rolls." Bauer argued that uncontradicted evidence demonstrated that over $8 million worth of inventory was not located in Texas either on January 1, 2008, or during the preceding year. As a result, that personal property was not subject to taxation by Harris County. Bauer also argued that it established that its rendition statement mistakenly included nearly $700,000 worth of intangible

property, which is not taxable under the Tax Code. Bauer also requested attorney's fees pursuant to Tax Code section 42.29, and it presented the affidavit of its counsel supporting the fee award.

HCAD filed its own motion for summary judgment, and it argued that Bauer's claims failed as a matter of law. HCAD argued that Bauer was not entitled to correction of the appraisal rolls under Tax Code section 25.25(c)(3) because "the subject property did exist in the form and at the location described in the appraisal roll." Citing a case from the Dallas Court of Appeals, HCAD argued that, because Bauer undisputedly had *some* personal property located in Harris County, its complaint was really about the value of the property described in the appraisal roll, not the nonexistence of property, and it could not use a section 25.25(c)(3) correction motion to raise this complaint. HCAD also argued that Bauer's claims for declaratory relief failed because declaratory relief is not available when there is an exclusive remedy for the relief sought, which the Tax Code provides in this case, and because its "request for a declaratory judgment is merely duplicative of the relief already requested in this lawsuit." HCAD argued that Bauer was not entitled to attorney's fees because, among other reasons, its claims failed as a matter of law.

On October 18, 2011, the trial court originally denied both Bauer's and HCAD's motions for summary judgment. The court then reconsidered the

summary judgment motions on January 5, 2012. At the end of a hearing, the court granted HCAD's summary judgment motion and denied Bauer's summary judgment motion.

Standard of Review

When both parties move for summary judgment and the trial court grants one motion and denies the other, we review both parties' summary judgment evidence and determine all questions presented. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005); *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872 (Tex. 2000). Each party bears the burden of establishing that it is entitled to judgment as a matter of law. *City of Santa Fe v. Boudreaux*, 256 S.W.3d 819, 822 (Tex. App.—Houston [14th Dist.] 2008, no pet.); *see also* TEX. R. CIV. P. 166a(c) ("The judgment sought shall be rendered forthwith if . . . there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion or in an answer or any other response."). If we determine that the trial court erred, we render the judgment that the trial court should have rendered. *Dorsett*, 164 S.W.3d at 661; *FM Props.*, 22 S.W.3d at 872. If the trial court's order does not specify the grounds for its summary judgment ruling, we affirm the summary judgment if any of the theories presented to the trial court and preserved for appellate review are

meritorious. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 216 (Tex. 2003).

When construing statutes, as we must in this case, we follow the primary rule of statutory interpretation that we must ascertain and give effect to the intent of the Legislature. *Harris Cnty. Appraisal Dist. v. Tex. Gas Transmission Corp.*, 105 S.W.3d 88, 97 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) (citing *Cont'l Cas. Ins. Co. v. Functional Restoration Assocs.*, 19 S.W.3d 393, 398 (Tex. 2000)). We must consider the plain language of the statute, and we may consider the legislative history and the consequences from alternative constructions. *Id.* We construe tax statutes strictly against the taxing authority and liberally in favor of the taxpayer. *U. Lawrence Boze' & Assocs., P.C. v. Harris Cnty. Appraisal Dist.*, 368 S.W.3d 17, 26 (Tex. App.—Houston [1st Dist.] 2011, no pet.).

Section 25.25(c)(3) Correction Motions

In its first and second issues, Bauer contends that the trial court erroneously determined that because Bauer undisputedly had some business personal property located in Harris County, it could not take advantage of section 25.25(c)(3) to correct the appraisal roll, and, thus, the court erroneously rendered summary judgment in favor of HCAD.

The State of Texas has jurisdiction to tax tangible personal property if the property is located in Texas for longer than a temporary period of time. *See* TEX.

TAX CODE ANN. § 11.01(c)(1) (Vernon 2008); *id.* § 21.02(a)(1) (Vernon Supp. 2012) ("[T]angible personal property is taxable by a taxing unit if it is located in the unit on January 1 for more than a temporary period."); *U. Lawrence Boze'*, 368 S.W.3d at 24. In contrast, intangible personal property, with certain exceptions not applicable here, is not taxable by the State of Texas. *See* TEX. TAX CODE ANN. § 11.02(a) (Vernon 2008); *id.* § 1.04(6) (Vernon 2008) (defining "intangible personal property").

The Tax Code requires taxpayers to render for taxation all tangible personal property used for the production of income that the person owns on January 1 of the relevant tax year. *See* TEX. TAX CODE ANN. § 22.01(a) (Vernon Supp. 2012); *Tex. Gas Transmission Corp.*, 105 S.W.3d at 92. The rendition statement shall contain, among other things, (1) a description of the property by type or category, (2) if the property is inventory, a description of each type of inventory and a general estimate of the quantity of each type of inventory, and (3) the physical location or taxable situs of the property. *See* TEX. TAX CODE ANN. § 22.01(a)(2)–(4).

Property owners are entitled to administratively protest certain actions, such as the inclusion of the owner's property on the appraisal records, to the appraisal review board pursuant to Chapter 41. *See id.* § 41.41(a) (Vernon 2008); *U. Lawrence Boze'*, 368 S.W.3d at 24. To take advantage of this option, generally, a

property owner must file a written notice of protest within thirty days after the owner receives a notice of the appraised value of the property. *See* TEX. TAX CODE ANN. § 41.44(a) (Vernon Supp. 2012); *U. Lawrence Boze'*, 368 S.W.3d at 24. It is undisputed that Bauer did not file a protest of its 2008 personal property taxes pursuant to Chapter 41.

Tax Code section 25.25, however, provides for late correction of the appraisal rolls under certain limited circumstances. *See* TEX. TAX CODE ANN. § 25.25 (Vernon Supp. 2012). Section 25.25(c) states:

> The appraisal review board, on motion of the chief appraiser or of a property owner, may direct by written order changes in the appraisal roll for any of the five preceding years to correct:
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> (1) clerical errors that affect a property owner's liability for a tax imposed in that tax year;
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> (2) multiple appraisals of a property in that tax year;
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> (3) the inclusion of property that does not exist in the form or at the location described in the appraisal roll; or
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> (4) an error in which property is shown as owned by a person who did not own the property on January 1 of that tax year.

Id. § 25.25(c). These circumstances involve "basic factual errors," and, therefore, courts have held that section 25.25(c) was enacted "to allow for a change of approved appraisal records without penalty to the taxpayer only in situations where the decision to make the change is based on an objective, factual determination and

the payment of taxes based on the uncorrected records would be fundamentally unfair." *GE Capital Corp. v. Dallas Cent. Appraisal Dist.*, 971 S.W.2d 591, 593 (Tex. App.—Dallas 1998, no pet.); *see also Kellair Aviation Co. v. Travis Cent. Appraisal Dist.*, 99 S.W.3d 704, 706–07 (Tex. App.—Austin 2003, pet. denied) (stating same); *Anderton v. Rockwall Cent. Appraisal Dist.*, 26 S.W.3d 539, 543 (Tex. App.—Dallas 2000, pet. denied) ("These limited corrections [pursuant to section 25.25(c)] include only objective and ministerial matters such as clerical errors. They do not include the substantive reevaluation of a property's market value.").

The Tax Code does not explain the meaning of the phrase "inclusion of property that does not exist in the form or at the location described in the appraisal roll" in section 25.25(c)(3). *See Titanium Metals Corp. v. Dallas Cnty. Appraisal Dist.*, 3 S.W.3d 63, 66 (Tex. App.—Dallas 1999, no pet.). The Dallas Court of Appeals has defined "form," in the context of a section 25.25(c)(3) motion, to mean "its identification as a type of property listed under section 25.02(a), such as real property, personal property, an improvement to real property, or some other physical description of the property on the appraisal roll, other than its appraised value or its use." *See id.* (quoting *Dallas Cent. Appraisal Dist. v. G.T.E. Directories Corp.*, 905 S.W.2d 318, 321 (Tex. App.—Dallas 1995, writ denied)). In *Titanium Metals*, the Dallas court concluded that section 25.25(c)(3) provides

relief "only when no property exists in the form or at the location described in the appraisal roll." *Id.* It clarified, "correction of the appraisal roll is only allowed when the appraisal roll erroneously reflects that a particular form of property exists at a specified location and, in fact, no such property exists at that location." *Id.*

In *Titanium Metals*, Titanium Metals Corporation moved office locations within the city of Grand Prairie, in Dallas County, on December 30, 1993. *Id.* at 64. At the same time, it transferred its inventory, machinery, and equipment to offices outside Dallas County. *Id.* Several months later, Titanium Metals filed its rendition statement for the 1994 tax year, which reflected the business personal property owned by the company in Dallas County on January 1, 1994. *Id.* This statement mistakenly included the value of the inventory, machinery, and equipment that had been moved out of Dallas County. *Id.* Titanium Metals did not protest the appraised value of its property pursuant to Chapter 41. *Id.* In March 1995, Titanium Metals requested a hearing before the appraisal review board, arguing that correction of the appraisal roll was necessary pursuant to section 25.25(c)(3) because the 1994 appraisal roll "incorrectly included property which did not exist at the location described in the roll." *Id.* at 65. The appraisal review board did not change the appraisal roll to reduce the value of the business personal property present at Titanium Metals' new location. *Id.*

In reviewing the district court's summary judgment in favor of the Dallas County Appraisal District, the Dallas Court of Appeals noted that the "form" of property described in the appraisal roll was "personal property" and that Titanium Metals did not dispute that it maintained some personal property at the location described in the appraisal roll. *See id.* at 66. Instead, Titanium Metals argued that, because it had moved its inventory, machinery, and equipment out of Dallas County prior to January 1, 1994, it did not maintain as much personal property at the described location as was reflected in the appraisal roll. *Id.* The court construed this argument as a "complaint about the *value* of the property described in the appraisal roll, not the existence or nonexistence of certain 'forms' of property at the particular location described." *Id.* (emphasis in original). The court ultimately concluded that because some property did exist in the form—personal property—and at the location described in the appraisal roll, Titanium Metals could not seek correction of the appraisal roll under section 25.25(c)(3). *Id.* at 66–67.

Four years after *Titanium Metals*, this Court addressed whether a taxpayer could use section 25.25(c)(3) to correct the appraisal rolls to take into account interstate allocation for an aircraft which was present within Harris County during the tax year but also made trips out of state. *See Tex. Gas Transmission Corp.*, 105 S.W.3d at 90. In *Texas Gas Transmission*, we held that "[t]he plain meaning of

'property that does not exist at the location described in the appraisal roll' obviously refers to the actual, physical presence of property at the place described in the appraisal roll." *Id.* at 97. We further held,

> Defining the term "location" as meaning actual, physical location restricts section 25.25(c)(3) to those cases in which property did not physically exist at the appraisal roll location at any time during the taxable year. Thus, if there is some existence at the location, section 25.25(c)(3) does not allow a change in the appraisal roll. To hold otherwise would not give effect to the words "does not exist" in section 25.25(c)(3).

Id. We also noted, in analyzing the legislative history of section 25.25(c)(3), that "the section addresses *only* non-existent property." *Id.* (emphasis in original). Personal property that exists but "moves in and out of the state during the tax year," such as the aircraft at issue in *Texas Gas Transmission*, does not "fall under the rubric of non-existent property." *Id.* We held that "the language 'does not exist in the form or location described in the appraisal roll' in section 25.25(c)(3) refers to property that does not have any physical location in Texas throughout the entire taxable year." *Id.* at 98. We therefore concluded that section 25.25(c)(3) could not be used to reflect interstate allocation. *Id.* at 99.

Here, Bauer presented summary judgment evidence, in the form of Thomas Jarboe's affidavit, that Bauer's rendition statement mistakenly included property that was not subject to taxation in Texas, either because it was not located in Texas during the 2008 tax year or because it was intangible personal property and

therefore was not subject to taxation at all under the Tax Code. HCAD did not present any evidence contradicting the contents of Jarboe's affidavit, such as evidence reflecting that the relevant inventory was actually located in Texas during the 2008 tax year or evidence disputing the intangible nature of Bauer's "work in process" inventory accounts.

HCAD contends that, pursuant to *Titanium Metals*, because Bauer, a Texas corporation with its headquarters in Harris County, undisputedly owned *some* personal property in Harris County during the 2008 tax year, it cannot take advantage of section 25.25(c)(3) to change the appraisal rolls. We decline to follow the reasoning of *Titanium Metals* in this case. Tax Code section 11.01(c) provides the situations in which the State of Texas has jurisdiction to tax tangible personal property: (1) if the property is located in Texas for longer than a temporary period; (2) if the property is temporarily located outside Texas and the owner resides in Texas; or (3) if the property is used continually, whether regularly or irregularly, in Texas. *See* TEX. TAX CODE ANN. § 11.01(c). Section 11.02(a) provides that, except in circumstances not applicable here, intangible personal property is not taxable. *Id.* § 11.02(a). Thus, under the Tax Code, taxing authorities in Texas do not have jurisdiction to tax Bauer's inventory in transit, Bauer's inventory located in California, and Bauer's intangible personal property. The taxing authorities cannot do an end-run around the statutory restrictions on

what constitutes taxable property and acquire the ability to tax this property merely because Bauer mistakenly included it on its rendition statement and because Bauer also owns other personal property, which is permissibly subject to ad valorem taxation in Texas, in Harris County. To hold otherwise, and to allow the taxing authorities to collect taxes on property not otherwise subject to taxation in Texas, results in a situation in which "the payment of taxes based on the uncorrected records would be fundamentally unfair." *See Kellair Aviation Co.*, 99 S.W.3d at 707. This is the type of situation that section 25.25(c) was enacted to prevent.[2] *See id.*; *GE Capital Corp.*, 971 S.W.2d at 593.

The summary judgment evidence in this case clearly demonstrates that the property at issue did "not have any physical location in Texas throughout the entire taxable year." *See Tex. Gas Transmission*, 105 S.W.3d at 98. We conclude that Bauer established that the appraisal roll for the 2008 tax year included $9,088,250 worth of property that did not "exist . . . at the location described in the appraisal

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[2] Moreover, section 25.25(c) was intended to address "basic factual errors" in "situations where the decision to make the change is based on an objective, factual determination." *GE Capital Corp. v. Dallas Cent. Appraisal Dist.*, 971 S.W.2d 591, 593 (Tex. App.—Dallas 1998, no pet.). Bauer identified the specific accounts and dollar amounts of inventory that were either not present in Texas or that constituted intangible personal property, and it presented supporting evidence. Changing the appraisal roll in this circumstance is a matter of subtracting the amount of inventory not subject to taxation in Texas. Re-evaluation of the value of Bauer's personal property that is actually located in Harris County is not necessary.

roll." TEX. TAX CODE ANN. § 25.25(c)(3). We hold that the trial court erroneously rendered summary judgment in favor of HCAD.

We sustain Bauer's first and second issues and render judgment that Bauer established the right to remove "inventory in transit," inventory located in California, and intangible "work in process" accounts from the appraisal roll for the 2008 tax year and that the appraisal roll should be corrected to reflect that Bauer owned $29,742,953 worth of taxable personal property. We further render judgment that Bauer is entitled to a tax refund in the amount of $229,360.17.[3]

Attorney's Fees

In its fourth issue, Bauer contends that the trial court erroneously failed to award it attorney's fees pursuant to Tax Code section 42.29. It contends that an award of attorney's fees is mandatory under section 42.29 and that, should it prevail on appeal, this Court should render judgment awarding it attorney's fees.

Tax Code section 42.29 provides that "[a] property owner who prevails in an appeal to the court . . . of a determination of an appraisal review board on a motion filed under Section 25.25 may be awarded reasonable attorney's fees." TEX. TAX CODE ANN. § 42.29(a) (Vernon Supp. 2012). The attorney's fees award may not exceed the greater of (1) $15,000 or (2) twenty percent of the total amount by

[3] Because we hold that the trial court erroneously rendered summary judgment in favor of HCAD and should have rendered summary judgment in favor of Bauer, we need not address Bauer's third issue concerning whether the trial court erroneously rendered summary judgment on its constitutional claim.

which the property owner's tax liability is reduced as a result of the appeal. *Id.* "[S]tatutory provisions for the recovery of attorney's fees must be strictly construed because they are penal in nature and are in derogation of the common law." *Gard v. Bandera Cnty. Appraisal Dist.*, 293 S.W.3d 613, 617 (Tex. App.—San Antonio 2009, no pet.) (citing *Martin v. Harris Cnty. Appraisal Dist.*, 44 S.W.3d 190, 196 (Tex. App.—Houston [14th Dist.] 2001, pet. denied)).

Several of our sister courts have addressed whether the award of attorney's fees under section 42.29 is discretionary or mandatory. In *Tex-Air Helicopters, Inc. v. Appraisal Review Board of Galveston County*, the Fourteenth Court of Appeals noted that "[t]he term 'may' in the statute grants discretion for the trial court to award attorney's fees." 940 S.W.2d 299, 304 (Tex. App.—Houston [14th Dist.] 1997), *aff'd on other grounds*, 970 S.W.2d 530 (Tex. 1998); *see also Tex-Air Helicopters, Inc. v. Harris Cnty. Appraisal Dist.*, 15 S.W.3d 173, 177 (Tex. App.—Texarkana 2000, pet. denied) ("As pointed out in *Tex-Air Helicopters, Inc.*, the trial court's award of attorney's fees is discretionary, even under Section 42.29."). However, the Fourteenth Court determined that because Tex-Air was not a prevailing party in the trial court, the trial court "had no reason to address the attorney's fees issue." *Tex-Air Helicopters*, 940 S.W.2d at 304. The court therefore refused to "address Tex-Air's right to attorney's fees until the trial court has had the opportunity to properly determine whether to grant them." *Id.*

By contrast, the Dallas, Austin, and San Antonio Courts of Appeals have all held that the award of attorney's fees is mandatory under section 42.29. *See Martinez v. Dallas Cent. Appraisal Dist.*, 339 S.W.3d 184, 192 (Tex. App.—Dallas 2011, no pet.); *Aaron Rents, Inc. v. Travis Cent. Appraisal Dist.*, 212 S.W.3d 665, 676 (Tex. App.—Austin 2006, no pet.); *Zapata Cnty. Appraisal Dist. v. Coastal Oil & Gas Corp.*, 90 S.W.3d 847, 854 (Tex. App.—San Antonio 2002, pet. denied).

Each of these cases relies upon the Texas Supreme Court's decision in *Bocquet v. Herring*, 972 S.W.2d 19 (Tex. 1998). In *Bocquet*, the Texas Supreme Court interpreted the Declaratory Judgments Act, which provided that "the court may award costs and reasonable and necessary attorney's fees as are equitable and just." *Id.* at 20. The court held that this language in the Declaratory Judgments Act "affords the trial court a measure of discretion in deciding whether to award attorney fees or not." *Id.* The court also stated that "[t]he same is true of other statutes that provide that a court 'may' award attorney fees." *Id.* The court then stated, however, that "[s]tatutes providing that a party 'may recover,' 'shall be awarded,' or 'is entitled to,' attorney fees are not discretionary." *Id.*

Section 42.29(a) provides that a "property owner who prevails in an appeal . . . may be awarded reasonable attorney's fees." TEX. TAX CODE ANN. § 42.29(a). "May be awarded" is merely the passive tense of "may award,"

language that the Texas Supreme Court clearly stated in *Bocquet* "affords the trial court a measure of discretion in deciding whether to award attorney's fees or not." 972 S.W.2d at 20. "May be awarded" does not have the same meaning as either "may recover" or "shall be awarded," language that the supreme court concluded in *Bocquet* necessitates a mandatory recovery of attorney's fees. *Id.* Rather, under the rules of statutory construction, "'May' creates discretionary authority or grants permission or a power." TEX. GOV'T CODE ANN. § 311.016(1) (Vernon 2013).

We recognize that the Dallas, Austin, and San Antonio courts have all concluded that, under *Bocquet*, the word "may" does not necessarily determine whether the fee award is discretionary or mandatory. *See Martinez*, 339 S.W.3d at 192; *Aaron Rents*, 212 S.W.3d at 673; *Coastal Oil*, 90 S.W.3d at 853. We disagree, however, with their reasoning. These courts rely ultimately upon a decision by the Fort Worth Court of Appeals, *Kimbrough v. Fox*, 631 S.W.2d 606 (Tex. App.—Fort Worth 1982, no writ), cited by the Texas Supreme Court in *Bocquet*, for the proposition that courts must look to the placement of the word "may" and the surrounding language in the statute to answer this question. *See, e.g.*, *Coastal Oil*, 90 S.W.3d at 853.

In *Kimbrough*, the court, construing former article 2226 of the Revised Civil Statutes, framed the question as whether the statute granted the trial court permission to award the attorney's fees or whether it granted the litigant

permission to recover the fees. *See id.* (quoting *Kimbrough*, 631 S.W.2d at 609). The court concluded that if the legislature had intended for the trial court to have discretion in awarding attorney's fees, the statutory language at issue would provide that "the court may award" the fees, but by stating that the "claimant may also recover" attorney's fees, the legislature intended to grant the litigant permission to recover fees, and the fee award was therefore mandatory. *Id.* at 853–54.

The Dallas, Austin, and San Antonio courts overlook the *Kimbrough* court's critical statement that, had the phrase "the court may award" been used in the statute it was construing—rather than the phrase "a party may recover" or "shall be awarded"—it would have found the award of attorney's fees to be discretionary. *See* 631 S.W.2d at 609. Likewise, *Bocquet* itself distinguishes between the phrase "may award" (discretionary) and the phrase "may recover" (mandatory). *See Bocquet*, 972 S.W.2d at 20; *Martinez*, 339 S.W.3d at 190; *Aaron Rents*, 212 S.W.3d at 671; *Coastal Oil*, 90 S.W.3d at 853–54; *cf. Coastal Oil*, 90 S.W.3d at 854 (Marion, J., dissenting). Because section 42.29(a), at issue here, provides that attorney's fees "may be awarded" by the trial court, which is consonant with both *Kimbrough* and *Bocquet*, we decline to follow the construction of section 42.29 adopted by those courts which read this language as mandatory.

Instead, we follow the Fourteenth Court of Appeals in holding that the term "may" in section 42.29 gives the trial court discretion in allowing the recovery of attorney's fees by a prevailing party. *See Tex-Air Helicopters*, 940 S.W.2d at 304. Because Bauer was not a prevailing property owner in the trial court, the trial court had no reason to address whether to award attorney's fees. *See id.* We therefore remand the case to the trial court to determine in the first instance whether to award Bauer attorney's fees. *See id.*; *see also Devon Energy Prod., L.P. v. Hockley Cnty. Appraisal Dist.*, 178 S.W.3d 879, 883 (Tex. App.—Amarillo 2005, pet. denied) (following *Tex-Air Helicopters* and remanding case to trial court for consideration of whether to award attorney's fees to property owner).

We sustain Bauer's fourth issue.

Conclusion

We reverse the judgment of the trial court and render judgment that Bauer established the right to remove "inventory in transit," inventory located in California, and intangible "work in process" accounts from the appraisal roll for the 2008 tax year and that the appraisal roll should be corrected to reflect that Bauer owned $29,742,953 worth of taxable personal property. We further render judgment that Bauer is entitled to a tax refund in the amount of $229,360.17. We remand the case to the trial court to determine whether to award Bauer attorney's fees pursuant to Tax Code section 42.29.

Evelyn V. Keyes
Justice

Panel consists of Justices Keyes, Sharp, and Huddle.