2017 IL App (1st) 161601-U

FIRST DIVISION
September 25, 2017

No. 1-16-1601

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

STATE OF ILLINOIS ex rel., STEPHEN B. DIAMOND, P.C.,	)	Appeal from the Circuit Court of Cook County, Law Division
Relator-Appellant,	)	
v.	)	No. 13 L 9147
LUSH INTERNET, INC.,	)	Honorable Thomas Mulroy, Judge Presiding
Defendant-Appellee.	)	

JUSTICE SIMON delivered the judgment of the court.
Justices Harris and Mikva concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly held that defendant seller did not have a substantial nexus with Illinois pursuant to the Commerce Clause, and that defendant did not act with reckless disregard of its alleged obligation to collect and remit use taxes on internet and telephone sales. The court did not abuse its discretion when admitting certain evidence at trial.

¶ 2 Plaintiff Stephen B. Diamond P.C. ("Relator"), filed a claim against defendant, Lush Internet Inc. for damages and civil penalties pursuant to the Illinois False Claims Act, 740 ILCS 175/1 (West 2014) for failure to collect and remit use tax on Lush Internet's online and catalog

sales to Illinois customers. After a bench trial, the trial court found that Relator failed to prove by a preponderance of the evidence that Lush Internet had an obligation to collect and remit Illinois use tax. On appeal, Relator argues that the trial court erred when: (1) it failed to apply and consider the Mail-Marketing provision contained in the Use Tax Act, 35 ILCS 105/1, *et seq.* (West 2012); (2) it ruled against the manifest weight of the evidence when holding that Lush Internet did not recklessly disregard its tax obligation, and (3) it abused its discretion when admitting certain exhibits into evidence. For the following reasons, we affirm the trial court's judgment.

¶ 3 BACKGROUND

¶ 4 Lush Internet, Inc., a Nevada corporation, has since 1997 sold Lush Fresh Handmade Cosmetic products to Illinois customers via the website www.lushusa.com. Lush Cosmetics NY, LLC ("Lush Cosmetics") is a limited liability company that, since 2004, sells Lush Fresh Handmade Cosmetics through brick-and-mortar retail stores in the eastern part of the United States, including Illinois. Both Lush Cosmetics and Lush Internet license the Lush brand from Lush Licensing Inc. Lush Limited, a private limited company in the United Kingdom operating under the trade name Lush Fresh Handmade Cosmetics, licenses the brand and trade name to Lush Licensing Inc.

¶ 5 Relator filed an Illinois False Claim Act action alleging that Lush Internet violated the Occupation and the Use Tax Act, 35 ILCS 105/1, *et seq*. (West 2012) by failing to collect and remit Illinois use tax on internet and telephone sales to Illinois customers from August 14, 2007, through January 31, 2015, ("FCA Period"). On January 31, 2015, Lush Internet began to collect and remit use tax in Illinois. Relator' s complaint alleged that Lush Internet had an obligation to collect and remit Illinois use tax and that Lush Internet knowingly disregarded its alleged Illinois

use tax obligation. Relator alleged that Lush Internet was a "retailer maintaining a place of business" under two sections of the Illinois Use Tax Act, though only the second one is the subject of this appeal (i.e., the Mail-Marketing provision):

> "1. A retailer having or maintaining within this State, directly or by a subsidiary, *** any agent or any other representative operating within this State under the authority of the retailer or its subsidiary."
>
> ***
>
> "4. A retailer soliciting orders for tangible personal property by mail if the solicitations are substantial and recurring and if the retailer benefits from any *** marketing activities occurring in this State or benefits from the location in this State of authorized installation, servicing, or repair facilities."

35 ILCS 105/2 (West 2014).

¶ 6 The matter proceeded to a bench trial. In relevant part, the following evidence was presented at trial. Mark Wolverton, the president of Lush Internet and sole manager of Lush Cosmetics NY, testified that Lush Internet and Lush Cosmetics were distinct companies with different and separate financial statements, separate balance sheets, and separate income tax returns. He indicated that Lush Cosmetics' policy was to refuse to accept returns of merchandise purchased online. He also stated that Lush Internet produced and distributed a catalog, "Lush Times," that is mailed 3-4 times a year, to certain Illinois customers. The catalogs were also available at Lush Cosmetics stores.

¶ 7 Wolverton testified that, when Lush Cosmetics first opened its Illinois store in 2004, he consulted with David Cohen, Lush Internet's tax advisor at KPMG to discuss whether Lush Internet would have an Illinois use tax obligation on internet and catalog sales. Based on the

information received, Wolverton determined that Lush Internet did not have such an obligation. Wolverton testified that he met with his independent financial auditors on an annual basis as part of the auditors' annual review of Lush Internet's financial statements. Beginning in 2006, PWC became Lush Internet's independent financial auditor. Although both KPMG and PWC advised Wolverton about investigating the sales tax issue in the states where Lush Cosmetics stores were opened, neither KPMG nor PWC required Lush Internet to put up a reserve for use taxes based on any uncertainty in Lush Internet's position that it did not have use tax collection obligations throughout the United States, including Illinois.

¶ 8 Wolverton testified that he reevaluated Lush Internet's national use collection position based on a use tax assessment issued by the New York State Department of Taxation and Finance ("NYSDTF"). NYSDTF audited Lush Cosmetics in 2006, and it assessed a tax on Lush Internet's sales in New York because of Lush Cosmetics' retail store presence in the state. Ultimately, Wolverton engaged Larry Kars, a tax attorney in New York and successfully challenged the New York State tax assessment. Wolverton worked with Larry Kars to challenge the tax assessment. The NYSDTF eliminated the tax assessment on January 4, 2008. Wolverton indicated that he used the New York State audit of Lush Cosmetics and the subsequent legal challenge as a decision point regarding whether Lush Internet had an obligation to collect and remit use tax in other states, including Illinois.

¶ 9 Lush Internet began collecting and remitting use tax throughout the United States, including Illinois, on February 1, 2015. Wolverton indicated that Lush Internet began collecting taxes because of a change in business operations, and to create a better customer experience by, among other things, allowing customers to pick up items purchased online directly from the

stores. Wolverton testified that, at that time, Lush Internet and Lush Cosmetics began consolidating their business operations.

¶ 10 Virginia Stanley, an employee of Lush Cosmetics for over 9 years working as a source of support for sales, testified that during the FCA period, the retail stores did not accept returned products purchased from Lush Internet because a store's system did not recognize the product codes of the items purchased over the website. She stated that store employees did not receive instruction from Lush Internet on the distribution or placement of the catalogs, employees were only trained about merchandise sold in the retail stores, and they were not expected to be knowledgeable about the merchandise sold on line by Lush Internet. Stanley testified that retail store customers could also sign up to receive emails about Lush products sent by Lush Internet. She also stated that Lush Internet was in competition with Lush Cosmetics. She indicated that Lush Cosmetics' employees did not advertise the internet website to customers because the employees received bonuses based on their sale volumes, and any products purchased through Lush Internet website did not count toward an employee's financial bonus. According to Stanley, Lush Cosmetics' store employees were discouraged from directing customers to Lush Internet website. Stanley indicated that if a retail store did not have a certain product in stock, the employee did not refer customers to the website to purchase the product, but would call the customers when its stock was refilled.

¶ 11 Mark Parrott, Lush Internet's e-commerce manager, testified that Lush Internet's marketing and advertising was separate and distinct from that of Lush Cosmetics. Lush Internet never paid Lush Cosmetics for any advertising or marketing in the stores. Instead, Lush Internet limited its advertising on Google "paid or search engine optimization" that ensured Lush Internet website appeared first in the results of an online search. Parrott indicated that the stores

maintained a separate inventory from Lush Internet. Parrott also stated that Lush Internet mailed its catalog "Lush Times," with online orders for compliance purposes as many products did not contain labels and ingredients. Compliance regulations required that Lush Internet include quantitative ingredients with the products that crossed the border from Canada.

¶ 12 At the conclusion of the evidence, the circuit court held that Relator failed to prove by a preponderance of the evidence that Lush Internet had an obligation to collect and remit Illinois use tax for the FCA period. The court determined that Relator failed to establish that Lush Internet had the requisite U.S. Commerce Clause nexus with Illinois. The court also held, as an alternative reason to rule in favor of Lush Internet, that Lush Internet did not act knowingly, in deliberate ignorance or with reckless disregard, when it did not collect and remit taxes during the FCA period. This appeal follows.

¶ 13 ANALYSIS

¶ 14 After a bench trial, our standard of review is whether the order or judgment is against the manifest weight of the evidence. *People ex rel. Schad, Diamond & Shedden, P.C. v. My Pillow, Inc.*, 2017 IL App (1st) 152668, ¶ 31 citing *Reliable Fire Equipment Co. v. Arredondo*, 2011 IL 111871, ¶ 12. A trial court's judgment is against the manifest weight of the evidence "only if the opposite conclusion is clearly evident or if the finding itself is unreasonable, arbitrary, or not based on the evidence presented." *Best v. Best*, 223 Ill. 2d 342 (2006). Under the manifest-weight standard, we give deference to the trial court as the finder of fact because it is in the best position to observe the conduct and demeanor of the parties and witnesses. *Id.* Accordingly, we will not substitute our judgment for that of the trial court. *Id.* at 350-51. Our review of the trial court's interpretation of a statute is *de novo. People ex rel. Beeler, Schad & Diamond, P.C. v. Relax the Back Corp.*, 2016 IL App (1st) 151580, ¶ 18.

¶ 15 Relator filed its claim under the Illinois False Claims Act (Act), formerly known as the Whistleblower Reward and Protection Act, which allows the Attorney General or a private individual to bring a civil action on behalf of the State for false claims. See, *e.g.*, *State ex rel. Pusateri v. Peoples Gas Light & Coke Co.*, 2014 IL 116844, ¶ 16; see also 740 ILCS 175/1, 4 (West 2012). The Act closely mirrors the federal False Claims Act originally enacted in 1863. *Scachitti v. UBS Financial Services*, 215 Ill. 2d 484, 506 (2005); see also 31 U.S.C. §§ 3729 through 3733 (2000). Both acts provide for *qui tam* actions brought by citizens seeking to reveal fraud against the government. *People ex rel. Schad, Diamond & Shedden, P.C. v. QVC, Inc.*, 2015 IL App (1st) 132999, ¶ 30.

¶ 16 This case concerns a unique form of false claim involving the failure to collect and remit use taxes on the sale of merchandise in Illinois under the Retailer's Occupation Tax Act (ROTA) (35 ILCS 120/1 *et seq*. (West 2012)) and the Use Tax Act (35 ILCS 105/1 *et seq*. (West 2012)). Illinois' use tax is imposed "upon the privilege of using in this State tangible personal property purchased at retail from a retailer." 35 ILCS 105/3 (West 1998). The tax functions as a necessary corollary to the Retailers' Occupation Tax Act (35 ILCS 120/1 *et seq.* (West 1998)), the principal means in Illinois for taxing the retail sale of tangible personal property. The use tax is also imposed at the same rate as the retailers' occupation tax. 35 ILCS 105/3-10, 120/2-10 (West 1998). The primary purpose of the use tax is "to prevent avoidance of the [retailers' occupation] tax by people making out-of-State purchases, and to protect Illinois merchants against such diversion of business to retailers outside Illinois." *Klein Town Builders, Inc. v. Department of Revenue,* 36 Ill.2d 301, 303, 222 (1966) "[B]ecause of the impracticality of collecting the tax from individual purchasers, the burden of its collection is imposed upon the out-of-state vendor." *Brown's Furniture, Inc. v. Wagner*, 171 Ill.2d 410 (1996).

¶ 17 The gist of Relator's complaint before the trial court was that Lush Internet was required to collect and remit use taxes to the State but failed to do so. This specimen of false claim is known as a "reverse false claim," in that the defendant is not alleged to have obtained money fraudulently from the government but, rather, to have failed to pay money duly owed. See *People ex rel. Beeler, Schad & Diamond, P.C. v. Relax the Back Corp.*, 2016 IL App (1st) 151580, ¶ 19 (reverse false claim is where material misrepresentation is made to avoid paying money owed to government).

¶ 18 I. Substantial Nexus Requirement

¶ 19 On appeal, Relator argues that the circuit court erred when holding that Lush Internet had no duty to collect and remit use tax on sales made in Illinois. Relator contends that the trial court erroneously focused on the Agent and Representatives Provision contained in the Illinois Use Tax Act. Instead, Relator argues, Lush Internet's duty to pay Illinois sales tax arose under the Mail-Marketing Provision of Illinois Use Tax Act because Lush Internet solicited orders from Illinois customers when mailing its catalog, Lush Times, and benefited from marketing activities conducted by Lush Cosmetics stores. Relator contends that, although Lush Internet did not have the physical presence in Illinois, Lush Cosmetics stores conducted the economic activity on Lush Internet's behalf.

¶ 20 Following a bench trial, the trial court held that Relator failed to satisfy the threshold requirement—that Lush Internet had a substantial nexus with Illinois for the Commerce Clause purposes. The court distinguished "whether Lush Internet maintained a place of business in Illinois for purposes of the Illinois Use Tax Act is an issue of state law and is distinct from the issue of whether Lush Internet had sufficient nexus with Illinois under the Commerce Clause of the United States Constitution." Applying the nexus requirement, the trial court determined that

the Relator did not prove by a preponderance of the evidence that Lush Internet had the required nexus with Illinois as mandated by the Commerce Clause.

¶ 21 The court noted that Lush Internet did not have physical presence in Illinois and then analyzed whether Lush Internet satisfied the nexus requirement under *Brown's Furniture, Inc. v. Wagner*, 171 Ill. 2d 410, 216 (1996). Specifically, the court inquired as to whether Lush Cosmetics acted as an agent for Lush Internet or whether Lush Cosmetics' economic activities in Illinois were performed on behalf of Lush Internet. The court held that Relator did not meet its burden in establishing nexus through agency or through an alternative theory to agency.

¶ 22 We find no error. As is the case with all statutes involving interstate commerce, the Illinois Use Tax Act is constrained by the United States Constitution and must be construed with constitutional limitations in mind. The constitutional limits invoked here are the constraints inherent in the Commerce Clause (U.S. Const., art. I, § 8) and the Fourteenth Amendment due process clause (U.S. Const., amend. XIV, § 1). Under the Commerce Clause, the use tax collection and remittance responsibilities can be constitutionally imposed on an entity only if the entity has some physical presence in the taxing state and its activities have a substantial nexus to the state. *Quill Corp. v. North Dakota,* 504 U.S. 298, 314–18. (1992). Stated differently, any obligation imposed by a state statute must also initially satisfy the "substantial nexus requirement" of United States Constitution's Commerce Clause. In order for the substantial nexus to exist, "taxpayer must substantially avail itself of the privilege of doing business in the taxing state," by having some physical presence there. *Quill Corp. v. North Dakota,* 504 U.S. 298, 306-08.

¶ 23 The physical presence need not be "substantial," but must be more than the "slightest presence."*Brown's Furniture, Inc. v. Wagner,* 171 Ill. 2d 410, 216 (1996). "[T]he crucial factor

governing nexus is whether the activities performed in [the taxing] state on behalf of the [entity required to collect the tax] are significantly associated with the [entity's] ability to establish and maintain a market in the state for the sales." *Tyler Pipe Indus. v. Wash. State Dep't of Revenue,* 483 U.S. 232, 250 (1987) (internal quotation omitted) (finding the physical presence requirement satisfied even though the corporation's only contact with the taxing state was through non-employee sales representatives who resided there because they provided services that were essential to the corporation's ability to make sales in the taxing state).

¶ 24 Here, the court properly determined first and foremost whether Lush Internet had a substantial nexus with Illinois as mandated by the Commerce Clause. Regardless of whether the language of the Use Tax Act would allow for collection of a use tax, under the commerce clause, that tax can only be "applied to an activity with a substantial nexus with the taxing state." *People ex rel. Beeler, Schad & Diamond, P.C. v. Relax the Back Corp.*, 2016 IL App (1st) 151580, ¶ 32 citing *Brown's Furniture,* 171 Ill. 2d at 42.

¶ 25 We agree with the court's determination that Lush Internet lacked the required nexus with Illinois. Lush Internet did not have a physical presence in Illinois, and Lush Cosmetics did not act as an agent or on behalf of Lush Internet. The evidence presented at trial established that Lush Internet and Lush Cosmetics were separate entities, maintained separate merchandise, and employed separate marketing schemes. Instead of acting "on behalf of" Lush Internet, Lush Cosmetics competed with Lush Internet for business. Virginia Stanley testified that Lush Internet was in competition with Lush Cosmetics, and that Lush Cosmetics' employees did not advertise the internet website to customers. Stanley indicated that Lush Cosmetics' store employees received bonuses based on their sale volumes, and any products purchased through Lush Internet's website did not count toward an employee's financial bonus. In addition, Lush

Cosmetics' store employees were discouraged from directing customers to Lush Internet's website.

¶ 26 Mark Wolverton testified that the two companies had different and separate financial statements, separate balance sheets, and separate income tax returns. He indicated that Lush Cosmetics' policy was to refuse to accept returned merchandise purchased online. The court found the testimony of the witnesses credible and held that Relator failed to establish that Lush Cosmetics acted as Lush Internet's agent or on its behalf and Lush Internet, therefore, did not have a substantial nexus to Illinois. Based on the record, we find that the court's determination was amply supported by the evidence at trial.

¶ 27 Relator attacks the court's order arguing that the court improperly failed to consider the Mail-Marketing provisions and that Lush Internet is liable under such provisions. Relator seems to be arguing that, because the court did not list the Mail-Marketing provisions within the block-quoted Use Tax Act in the court's order, the court ignored this provision when analyzing the minimum constitutional contacts with the state's statutory requirements to collect and remit use tax.

¶ 28 Again, "regardless of whether the language of the Use Tax Act would allow for collection of a use tax, under the commerce clause, that tax can only be 'applied to an activity with a substantial nexus with the taxing state.' " *People ex rel. Beeler, Schad & Diamond, P.C. v. Relax the Back Corp.*, 2016 IL App (1st) 151580, ¶ 32. The trial court determined that Relator failed to establish that Lush Internet met the substantial nexus requirement with Illinois. Although the court did not quote that specific part of the statute, the court indicated that it considered the Relator's arguments that Lush internet was a "retailer maintaining a place of business" under the Mail-Marketing provision. The court noted:

> “Relator asserts that Lush Internet satisfied the Illinois Use Tax Act because it maintained a place of business in Illinois by making substantial and recurring solicitations by mail, by benefiting from marketing in Illinois, and by benefiting from servicing facilities in Illinois.”

¶ 29 But even if the catalogs and emails were substantial and recurring, solicitations into a state without establishing that Lush Internet had any physical presence in Illinois, which Relator failed to do, is insufficient. See *Quill Corp. v. North Dakota*, 504 U.S. 298 (explaining that sending mail-order catalogs into a state did not give rise to nexus). Accordingly, even if the Relator’s claim regarding the Mail-Marketing provisions of the Use Tax Act had a proper basis, because Relator failed to establish the substantial nexus requirement with Illinois, its claim fails.

¶ 30 II. The State-of-Mind Requirement

¶ 31 Relator contends next that the trial court erred when holding Lush Internet and Mark Wolverton did not act “knowingly” in disregarding an alleged use tax obligation. Relator contends that Wolverton never evaluated Illinois law, made tax decisions ignoring tax advice, and failed to at least investigate tax law. We will not disturb the trial court’s findings of fact unless they are against the manifest weight of the evidence. *People ex rel. Beeler, Schad & Diamond, P.C. v. Relax the Back Corp.*, 2016 IL App (1st) 151580, ¶ 18.

¶ 32 Section 3(a)(1)(G) of the False Claims Act provides that one is liable for false claims when one “knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the State, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the State.” 740 ILCS 175/3(a)(1)(G) (West 2014).

¶ 33 “Reckless disregard” under section 3 requires more than “ ‘[i]nnocent mistakes or negligence.’ ” *State ex rel. Schad, Diamond & Sheddon, P.C. v. National Business Furniture, LLC*, 2016 IL App (1st) 150526, ¶ 33 (quoting *United States v. King–Vassel*, 728 F. 3d 707, 712 (7th Cir. 2013)). It refers to “the failure ‘ “to make such inquiry as would be reasonable and prudent to conduct under the circumstances,” ’ ” a “ ‘ “limited duty to inquire as opposed to a burdensome obligation.” ’ ” *Id.* (quoting *United States ex rel. Williams v. Renal Care Group*, Inc., 696 F.3d 518, 530 (6th Cir. 2012), quoting S. Rep. No. 99–345, at 20–21 (1986)).

¶ 34 “Reckless disregard” under section 3 has been aptly described as “ ‘the ostrich type situation where an individual has buried his head in the sand and failed to make simple inquiries which would alert him that false claims are being submitted. *Relax the Back Corp.*, 2016 IL App (1st) 151580, ¶ 27 quoting *National Business Furniture*, 2016 IL App (1st) 150526, ¶ 33. “Thus, one acting in reckless disregard ignores ‘obvious warning signs' and ‘refus[es] to learn of information which [it], in the exercise of prudent judgment, should have discovered.’ ” *Id.* (quoting *United States ex rel. Ervin & Associates, Inc. v. Hamilton Securities Group, Inc.*, 370 F. Supp. 2d 18, 42 (D.D.C. 2005)).

¶ 35 Here, the trial court held that Lush Internet sought, received and evaluated tax advice about its Illinois use tax obligation. The court noted that the management properly believed it did not have an obligation to collect and remit use tax because it did not have a constitutional nexus with Illinois, and that Lush Internet carefully structured its companies to ensure its had no constitutional nexus with Illinois.

¶ 36 We find the trial court’s holding amply supported by the record. The evidence here shows that Mark Wolverton consulted with legal and tax professionals, and Lush Internet’s investigation began when Lush Cosmetics opened its first store in 2004. Mark Wolverton

testified that he consulted with David Cohen, Lush Internet's tax advisor at KPMG to discuss whether Lush Internet would have an Illinois use tax obligation. Wolverton indicated that, as part of its annual audits, KPMG regularly reviewed Lush Internet's position that it was not obligated to collect and remit use tax on its internet and call center sales throughout the United States evaluating whether it had the required constitutional nexus with the states. When Lush Internet hired PWC as its new independent financial auditor in 2006, PWC likewise reviewed Lush Internet's obligation based on the Commerce Clause nexus. Wolverton indicated that he relied on the annual review of Lush Internet's use tax collection position provided by its independent financial advisors to confirm that it did not have an Illinois tax obligation.

¶ 37 In addition, Wolverton testified that he also relied and reevaluated a potential tax obligation in Illinois following the New York State audit of Lush Cosmetics beginning in 2006, after the New York State Department of Taxation and Finance assessed a tax on Lush Internet's sales to New York customers. To that effect, Wolverton contacted Lush Internet's outside general counsel, Jeffrey O'Connell. After consulting with a tax partner at his firm, O'Connell advised Wolverton to challenge the assessment of Lush Internet's use tax in New York. Wolverton consulted with several other tax advisors that similarly advised him to challenge the New York State's tax assessment. The tax advisors informed him that, depending on the result of the tax challenge, Lush Internet might have to consider collecting sale taxes on sale transactions nationwide.

¶ 38 After successfully challenging the New York tax assessment based on the Commerce Clause nexus principles, and the elimination of the tax assessment, Lush Internet relied on these results as a confirmation that it lacked the necessary nexus for collecting and remitting Illnois

use tax. See *Relax the Back Corp.*, 2016 IL App (1st) 151580, ¶ 22. ("the positive outcome in the New York audit supported his position that RTB had no duty to collect Illinois use tax").

¶ 39 Wolverton testified to his continuing investigation into Lush Internet's tax liability when he again reviewed its Illinois Use Tax obligation in June 2010 when determining whether Lush Internet would restructure its business. Sarah Cole, Lush Internet's internal tax advisor, informed Wolverton that the State of Illinois would not attribute nexus to Lush Internet based on common ownership between Lush Internet and Lush Cosmetics as long as an agency relationship between the companies did not exist. An important factor contained in the analysis was the fact that the stores did not accept returns for purchases made on the internet.

¶ 40 Finally, Wolverton testified regarding his inquiries into the use tax obligation after Lush Internet began consolidating its business with the stores to provide a better client experience. Lush Internet began streamlining its brand communications and began preparing for in-store pick-up options for merchandise sold online. Based on the changes, Wolverton determined that it had the required nexus and began to collect and remit Illinois Use Tax.

¶ 41 To counter this evidence, Relator points to several excerpts from Wolverton's testimony at trial where he stated, for instance, that he did not read *Brown's Furniture* or the Illinois Use Tax Act in its entirety. Upon our review of the record, when placed into context, Wolverton's comments simply indicated that although he did not recall the specific name of the case, he was apprised of all the relevant cases and statutes involving the issue of use tax and substantial nexus requirement by several tax professionals and attorneys. Moreover, even assuming that there was conflicting evidence regarding these matters, the court resolved those conflicts and found Wolverton's testimony to be credible, in that that he evaluated Illinois law and made tax decisions after consulting with tax professionals. Where the evidence is conflicting or where

conflicting inferences may be reasonably drawn from the evidence the resolution of such conflicts is particularly within the province of the trier of fact. *Bekele v. Ngo*, 236 Ill. App. 3d 330, 331 (1992).

¶ 42 We also note that, just as the trial court acknowledged, the law on what constitutes sufficient physical nexus to justify collection of the use tax is far from clear. *Relax the Back Corp.*, 2016 IL App (1st) 151580, ¶ 22. "Our supreme court in *Brown* recognized that *Quill* did not make clear what constitutes a substantial nexus and that in looking at the evidence in these types of cases, reasonable minds can differ on whether sufficient physical presence has been established." *Id.* at 29. Therefore, the law in this area is open to interpretation depending on the facts of each case. *Id.* Although several experts did indicate that a constant evaluation of Lush Internet's position during the FCA period was necessary, none of the experts informed Wolverton that Lush Internet should have collected and remitted use tax.

¶ 43 Based on the evidence presented, and taking the entire evidence in the light most favorable to Lush Internet, we cannot say that the court's determination that Lush Internet conducted a reasonable and prudent investigation into its Illinois use tax obligation was against the manifest weight of the evidence. We therefore reject Relator's challenge on this issue as well.

¶ 44 III. Admission of Evidence

¶ 45 Relator argues next that the circuit court erred in admitting several exhibits into evidence. Relator made relevance, foundation and hearsay objections before the trial regarding the exhibits, and the court indicated that it would rule on the objections at trial. Ultimately, the trial court admitted the exhibits, and Relator argues that it was substantially prejudiced by their admissions as they formed the basis for the court's ruling that Lush Internet received and evaluated tax advice.

¶ 46 The exclusion or admission of evidence by the circuit court is reviewed under an abuse of discretion an abuse of discretion standard and will not be reversed absent an abuse of that discretion. *Kim v. Mercedes-Benz, U.S.A., Inc.*, 353 Ill. App. 3d 444, 452 (2004). An abuse of discretion may be found only where no reasonable man would take the view adopted by the circuit court. *Id.*

¶ 47 Out of the eight exhibits complained of, five exhibits contained information related to the New York State audit of Lush Cosmetics. The exhibits consisted of: a New York State Sales Tax Assessment, a New York State Conciliation Petition, a New York State Stipulation for Discontinuance, a New York Order of Discontinuance, and a letter from Lush Internet's attorney regarding the New York State Conciliation Conference. In sum, the exhibits indicated that New York sought to asses a use tax on Lush Internet's sales. The documents also indicate that Lush Internet challenged the tax assessment.

¶ 48 Initially, the trial court questioned the relevancy of the exhibits noting that the law in New York might differ from Illinois law. Mark Wolverton testified as to their relevancy and clarified that the New York tax assessment set a precedent for Lush Internet's position on paying use taxes throughout the United States, including Illinois. Following the testimony presented at trial, the court admitted the exhibits as evidence. The exhibits corroborated Mark Wolverton's testimony that he used the New York state position to assess its sale tax obligation throughout the United States, including Illinois. We find the circuit court did not abuse its discretion in admitting these exhibits because they were relevant as they were indicative as to whether Lush Internet had the requisite intent to violate the False Claim Act. See *Relax the Back Corp.*, 2016 IL App (1st) 151580, ¶ 22 (finding evidence outside Illinois relevant to the determination of whether a defendant had the requisite intent under the Illinois False Claim Act).

¶ 49 Relator's challenge to the foundation of the exhibits similarly fails. Relator argued that Mark Wolverton lacked the sufficient knowledge to lay the foundation for the exhibits. But Wolverton did not testify that he personally handled the audit himself. Instead, he testified that he worked with outside counsel to challenge the assessment issued at the conclusion of the audit. He testified as to his understanding of how New York audit would affect Lush Internet's nationwide tax collection position. Therefore, just as the circuit court assessed, Wolverton properly laid a foundation for the admission of the evidence.

¶ 50 Relator also argues that the court abused its discretion when it admitted into evidence three exhibits after its sustained Relator's objections as to their relevance. Two of the exhibits were law review articles forwarded to Wolverton by Lush Internet's general counsel, and one of them was an email and letter attachment from Lush Internet's general counsel regarding "a New York tax matter." In the light of the testimony presented at trial, the court's reconsideration of its previous ruling regarding those documents was not an abuse of discretion. The documents were relevant because they revealed Lush Internet's national nexus position on its use tax collection and remittance obligations. The documents were also indicative of whether Lush Internet had the requisite intent to violate the Illinois False Claim Act and whether Wolverton conducted an investigation into Lush Internet's tax liability. Therefore, the circuit court did not abuse its discretion by admitting the exhibits into evidence.

¶ 51 CONCLUSION

¶ 52 Based on the foregoing, we affirm.

¶ 53 Affirmed.