

SUPREME COURT OF LOUISIANA

NO. 2017-C-0751

**TIM BARFIELD, SECRETARY, DEPARTMENT OF REVENUE,
STATE OF LOUISIANA**

VERSUS

DIAMOND CONSTRUCTION INCORPORATED

**ON WRIT OF CERTIORARI TO THE COURT OF APPEAL,
SECOND CIRCUIT, PARISH OF WEBSTER**

GENOVESE, J., would grant and assigns reasons:

The district court is not allowed to weigh the evidence and make credibility calls when considering a motion for summary judgment. *See Independent Fire Ins. Co. v. Sunbeam Corp.*, 99-2181 (La. 2/29/00), 755 So.2d 226. In this case, though the State by statute, La.R.S. 13:5034, has presented a *prima facie* case, that alone does not warrant summary judgment. A *prima facie* case merely relegates the burden of proof at trial on the merits to the defendant. This was not a trial, it was summary judgment; and, the law relative to summary judgment remains applicable. The mere proof of a *prima facie* case does not *ipso facto* morph a *prima facie* case into a successful summary judgment.

The defendant taxpayer proved by its affidavits that a considerable amount of work done by it was done out of state (approximately fifty percent). The defendant taxpayer presented affidavits sufficient to counter, at least in part, the State's motion for summary judgment and to create genuine issues of material fact as to the exact amount of tax due by defendant. The district court completely disregarded the defendant taxpayer's affidavits in evidence which unquestionably created genuine issues of material fact sufficient to defeat summary judgment.

I would grant the writ, reverse the district court's grant of summary judgment, and remand the matter for further proceedings.