BOARD OF TAX APPEALS
STATE OF LOUISIANA

EASTERN FISHING & RENTAL TOOL, CO., INC.,
Petitioner

VS. **DOCKET NO. ~~10120C~~ 10210C**

KIMBERLY ROBINSON, SECRETARY, DEPARTMENT OF REVENUE, STATE OF LOUISIANA,
Respondent

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JUDGMENT ON PETITIONER'S MOTION FOR PARTIAL SUMMARY JUDGMENT

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On September 10, 2020, this matter came before the Board for hearing on the *Motion for Partial Summary Judgment* filed by Eastern Fishing and Rental Tool, Inc. ("Petitioner"), with Judge Tony Graphia (ret.), Chairman, presiding, and Board Members Cade R. Cole and Francis J. "Jay" Lobrano, present. Present before the Board was Aaron Long, attorney for Kimberly Robinson, Secretary, Department of Revenue, State of Louisiana (the "Department"), and Cloyd Van Hook, attorney for Petitioner. After the hearing, the Board took the matter under advisement. The Board now renders Judgment on Petitioner's *Motion for Partial Summary Judgment* in accordance with the written reasons attached herewith.

IT IS ORDERED, ADJUDGED AND DECREED that the Petitioner's *Motion for Partial Summary Judgment* BE AND IS HEREBY DENIED.

Judgment rendered and signed at Baton Rouge, Louisiana on October 8, 2020

FOR THE BOARD:

Judge Tony Graphia (Ret.), Chairman
Louisiana Board of Tax Appeals

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WRITTEN REASONS FOR JUDGMENT ON PETITIONER'S MOTION FOR PARTIAL SUMMARY JUDGMENT

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On September 10, 2020, this matter came before the Board for hearing on the Motion for Partial Summary Judgment filed by Eastern Fishing and Rental Tool, Inc. ("Petitioner"), with Judge Tony Graphia (ret.), Chairman, presiding, and Board Members Cade R. Cole and Francis J. "Jay" Lobrano, present. Present before the Board was Aaron Long, attorney for Kimberly Robinson, Secretary, Department of Revenue, State of Louisiana (the "Department"), and Cloyd Van Hook, attorney for Petitioner. After the hearing, the Board took the matter under advisement. The Board now renders the attached Judgment on Petitioner's *Motion for Partial Summary Judgment* in accordance with the following written reasons.

This case is an appeal from an assessment under R.S. 47:1565. The Department audited Petitioner for the January 1, 2011 through December 31, 2013 tax periods (the "Tax Periods"). The Department and the Petitioner subsequently entered into an agreement to suspend prescription effective from December 31, 2014 through December 31, 2015. The Department and Petitioner entered into a subsequent agreement to suspend prescription from December 31, 2015 through December 31, 2016. On September 1, 2016, the Department issued to Petitioner a

Notice of Assessment and Right to Appeal to the Louisiana Board of Tax Appeals (the "Assessment") showing tax due of $29,115.21, together with interest, calculated through September 16, 2016, of $6,790.96, and penalties of $11,874.26, for a total amount due of $47,780.43. Petitioner filed this appeal on November 3, 2016.

Petitioner is a Mississippi Corporation headquartered in Laurel, Mississippi. During the Tax Periods, Petitioner had offices in Vidalia, Louisiana. Petitioner rents or leases items of tangible personal property used for servicing oil wells. Petitioner sometimes provides "bare" rentals (without an operator). Petitioner collected and remitted rental or lease tax from its customers on bare rentals. Petitioner sometimes provides its customers with an operator. Petitioner considered its transactions with an operator to be non-taxable services.

The dispute in this case is whether Petitioner owes use tax on the property that it imported into Louisiana for lease, rental, and/or service transactions. This dispute concerns a number of items, which counsel for Petitioner described, in general terms, as tools (collectively the "Tools"). Petitioner purchased the Tools outside Louisiana, mostly or entirely in Mississippi. Petitioner claims to have paid no Mississippi sales tax on its purchases of the Tools.

In its *Motion for Partial Summary Judgment*, Petitioner advanced six different defenses to the use tax. Petitioner stated that it will provide additional facts to support its legal theories after the Board rules on the legal disputes presented. The Department and Petitioner have since resolved or rendered moot three of the six defenses. However, the agreement reached by the parties on these defenses is limited to the specifically identified invoices and Tools that Petitioner pointed to in its motion. The Board will address the defenses still in dispute in accordance with the standard of proof required for a motion for summary judgment.

A motion for summary judgment will be granted if, after an opportunity for adequate discovery, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the mover is entitled to judgment as a matter of law." La. C.C.P. art. 966(A)(3). A material fact is one whose existence or non-existence determines the outcome of a cause of action. *Davis v. Hixson Autoplex of Monroe*, L.L.C., 51,991 (La. App. 2 Cir. 5/23/18), 249 So.3d 177. Any doubt as to a dispute regarding a genuine issue of material fact must be resolved against granting the motion and in favor of a trial on the merits. *Orleans Parish Sch. Bd. v. Lexington Ins. Co.*, 2011-1720 (La. App. 4 Cir. 8/22/12), 99 So.3d 723. However, a properly supported motion will be granted unless the non-moving party produces evidence of a material factual dispute. *Ruel v. Dalesandro*, 18-243, (La. App. 5 Cir. 7/9/19, 7), 276 So.3d 626. Evidence is required; mere allegations of the existence of a material factual dispute will not defeat a well-supported motion for summary judgment. *Rayfield v. Millet Motel*, 15-496 (La. App. 5 Cir. 1/27/16), 185 So.3d 183.

(1) Tools imported for lease or rental

The Petitioner claims that the Tools purchased in Mississippi and imported into the state for rental to consumers are excluded from Louisiana's use tax. La. R.S. 47:301(19)(a) provides that the use tax is not due on tangible personal property "if the sale of such property would have been exempted or excluded from sales tax at the time such property became subject to the taxing jurisdiction of the state." La. R.S. 47:301(10)(a)(iii), provides a sales tax exclusion for: "a sale to a consumer or to any other person for any purpose other than for resale as tangible personal property, or for lease or rental in an arm's length transaction in the form of tangible

personal property." If the Tools were purchased for the purpose of lease or rental in an arm's length transaction in the form of tangible personal property, then the purchase would have been excluded from sales tax, and by extension, the use tax. However, if the Tools were purchased for "any" other purpose, then the exclusion does not apply.

The Department argues that Petitioner purchased the Tools for another purpose: for use in providing services. The Department's regulations state that a rental "does not include providing tangible personal property with an operator who provides some additional service for a fixed or indeterminate period of time when the essence of the transaction is the performance of a service." LAC 61:1.4301(C)(Lease or Rental)(c)(i). There is no dispute that Petitioner sold services when it provided rentals with an operator. The Department's position is that the sale for lease exclusion does not apply to any Tools that were ever used to provide a service.

The Department is correct that any taxable use triggers the use tax, even in the case of Tools that were otherwise provided as bare rentals. La. R.S. 47:301(10)(a)(iii) states that "sales for resale or for lease or rental in an arm's length transaction must be made in strict compliance with the rules and regulations." LAC 61:I.4303(A)(2), though not promulgated directly pursuant to (10)(a)(iii), provides that use tax is imposed "when tangible personal property is used, consumed, distributed, or stored for use or consumption in this state on which, for any reason whatsoever, no Louisiana sales tax has been paid." The use tax applies to all Tools that were not exclusively provided as bare rentals.

Petitioner argues that imposing the use tax would amount to an improper duplication of tax. With respect to the sales and use taxes, La. R.S. 47:302(A)(2) dictates that "there shall be no duplication of the tax." This means that "the

imposition of a use tax where a sales tax has already been paid would constitute a prohibitive duplication of the tax . . . ." Bruce J. Oreck, *Louisiana Sales & Use Taxation*, (2d ed. 1996), § 2.7. The Department provides the following regulatory interpretation:

> If Louisiana sales tax has been paid upon the transfer of title to tangible personal property, then there will be no tax on the use, consumption, distribution, or storage for use or consumption of the item in this state by the purchaser, since R.S. 47:302(A)(2) provides that there shall be no duplication of the tax.

LAC 61:I.4303(A)(1). Petitioner did not pay sales tax on the Tools. Instead, the only tax paid on the Tools was the lease or rental tax. Petitioner's customers, not Petitioner, paid that tax. There is no duplication of tax with respect to Petitioner.

The First Circuit has held that the use tax and the lease tax are separate taxes paid by separate taxpayers. *Wabash Power Equipment Co. v. Lindsey*, 2003-2196, p. 10-11 (La. App. 1 Cir. 9/17/04), 897 So.2d 621, at 628. Double taxation occurs when one person directly contributes twice to the same tax burden. *Id.* Petitioner's use tax obligation arises from its use of the Tools in providing services. Petitioner's customers' lease or rental tax burden arises from their lease or rental of the Tools as tangible personal property. Petitioner is not bearing the same burden twice.

In sum, the sale for lease exclusion does not apply to any Tool utilized in a service transaction. Therefore, Petitioner would need to show that the Tools were exclusively used in bare rental transactions. Petitioner did not make this showing. Further, the prohibited duplication of tax in La. R.S. 47:302(A)(2) applies to Tools for which Petitioner already paid sales tax. Petitioner has not shown that it paid sales tax. The *Motion for Partial Summary Judgment* will be denied as to the first defense.

(2) Credit for taxes paid to other jurisdictions

Petitioner claims a credit for sales and use taxes paid to other states. La. R.S. 47:303(A)(3)(a) provides in part:

> A credit against the use tax imposed by this Chapter shall be granted to taxpayers who have paid a similar tax upon the sale or use of the same tangible personal property in another state. The credit provided herein shall be granted only in the case where the state to which a similar tax has been paid grants a similar credit as provided herein . . . .

Mississippi law apparently grants a similar credit. Miss. Code Ann. §27-67-7. However, the First Circuit has held that the credit is only allowable when the tax was legally owed to the other state (and paid). *J. Ray McDermott, Inc. v. Morrison*, 96-2337 (La. App. 1 Cir. 11/7/97), 705 So.2d 195. Petitioner argues that Mississippi does not differentiate between a rental with or without an operator. Petitioner also claims that its purchases were not taxable in Mississippi. If the Petitioner's purchases were not taxable in Mississippi, then Petitioner cannot claim the credit for taxes paid to another state. The Board's own research suggests that under Mississippi law, "providing tangible personal property furnished with an operator or crew for its operation" is not a lease or rental. 35 Miss. Code R. Pt. IV, R. 5.03 § 202.

To take advantage of the credit in La. R.S. 47:303(A)(3)(a), Petitioner must have paid a similar tax. LAC 61:I.4307(A)(3) states that "the importer must have paid a similar tax upon either the sale or use of the same identical property in another state and the other state must allow a credit similar to this credit." In this case, the importer would be the Petitioner. The summary judgment evidence provided shows that Petitioner's customers paid lease tax on the Tools. The Petitioner cannot claim the credit if its customers are the ones who paid the tax. Because the Petitioner has not shown that it paid tax on the Tools to another state, and that those taxes were

legally owed, the Petitioner is not entitled to summary judgment on the second defense.

3 Occasional Sale

Petitioner specifically identified Asset Nos. V-1810 and V-1554 as purchased from Blaney's Oilfield Specialty, Inc. ("Blaney") through an Asset Purchase and Sale Agreement. Petitioner also alleges that Blaney was not engaged in the business of selling such assets. Petitioner attached a copy of the Asset Purchase and Sale Agreement to its motion. The Department subsequently agreed to remove Asset Nos. V-1810 and V-1554 from the audit schedules. These were the only assets identified for this defense and summary judgment is no longer necessary.

4 Prescription

Petitioner acknowledges that it agreed to waive prescription by agreement. However, Petitioner argues that items present in Louisiana prior to November 30, 2010 are prescribed despite the agreements. The summary judgment evidence shows only one such item: Equipment No. 2493, listed on Invoice No. RN0006338, dated August 31, 2008. The Department agreed to remove that item from the audit schedules. There is no evidence to support Petitioner's prescription argument with respect to any of the other Tools. Absent supporting evidence, there is no basis for granting summary judgment on the prescription defense.

5 Out of state repairs and parts.

Petitioner claims that Browning Invoice #28506, shown on Audit Schedule 3, bearing reference #085848, shows replacement parts and repairs made out of state. The Department has agreed to remove Invoice #28506 from the audit schedules. Petitioner did not assert this defense as to any other specific Tools. Summary judgment is both unnecessary and inappropriate on this defense.

6 Date of Asset Acquisition

Petitioner argues that the Department based its Assessment on inaccurate acquisition dates. The acquisition date matters when calculating the use tax due. Use tax is calculated based on the "cost price" of an item. The cost price of an item is the lesser of the item's actual cost or its reasonable market value at the time it becomes susceptible to use tax. For every Tool, the Department used an acquisition date of June 10, 2010, and depreciated the cost of the items from that date. Petitioner claims that it can show that this method is inaccurate. Petitioner offers the same August 31, 2008 invoice used to support its prescription argument. An invoice to Petitioner's customer does not necessarily indicate when Petitioner acquired the item in question. Petitioner also offers a schedule titled "Book Asset Detail." The Book Asset Detail lists a Date in Service for a number of assets. However, there is no way to connect the items on the Book Asset Detail to the items on the audit schedules. The asset and equipment numbers do not match up. Accordingly, the Board finds no persuasive evidence to support summary judgment on this defense.

Based on the foregoing, the Petitioner has not demonstrated entitlement to summary judgment on any of its six defenses. This does not mean that the items

already removed from the audit schedules should be added back. The Board simply does not pass on those items, as they are no longer in dispute. The parties may continue to exchange documents and narrow down the issues. This ruling does not preclude either party from moving for summary judgment on an issue discussed herein at a later date, if supported by sufficient evidence. However, based on the evidence presently before the Board, the *Motion for Partial Summary Judgment* must be denied.

Baton Rouge, Louisiana OCTOBER 8, 2020

Judge Tony Graphia (Ret.), Chairman
Louisiana Board of Tax Appeals