

**BOARD OF TAX APPEALS
STATE OF LOUISIANA**

**BAMBOO ASIAN GRILLE & SUSHI BAR, L.L.C.
PETITIONER**

VERSUS

DOCKET NO. 8825

**SECRETARY, DEPARTMENT OF REVENUE
RESPONDENT**

JUDGMENT WITH WRITTEN REASONS

A hearing was held before the Board on February 11, 2015 to hear the merits of this case with Judge Tony Graphia (ret.), Chairman, Cade R. Cole and Kernan A. Hand, Jr. present and no board members absent. Present before the Board were: Kenneth C. Fonte, attorney for Bamboo Asian Grille & Sushi Bar, L.L.C. ("Taxpayer"), and Miranda Y. Conner, attorney for the Secretary, Department of Revenue ("Secretary"). After the hearing, the matter was taken under advisement, and the parties were directed to submit post-hearing memoranda.

The Taxpayer has appealed the Secretary's assessment of Louisiana sales tax in the amount of \$190,040.56 plus interest and penalties for the period January 10, 2009 – June 30, 2012.

Taxpayer objects to the assessment for several reasons, one of which is because the assessment is based on an audit done by the City of New Orleans ("City"). The audit done by the City was based on a sampling agreement between Taxpayer and the City. Taxpayer alleges that the Secretary's audit and, therefore, its assessment is invalid because Taxpayer did not agree with the Secretary to use a sampling procedure as a basis for the Secretary's audit findings.

R.S. 47:1541(A) provides that for the purpose of determining the correct amount of the tax due, the Secretary shall make an audit or investigation.

R.S. 47:1541(B) provides that a Taxpayer and the Secretary or his designee may enter into a binding agreement to use a sampling procedure as a basis for projecting audit findings. The Taxpayer in this matter did agree to enter into a sampling procedure with the City of New Orleans in regard to the City's audit. There was no evidence establishing that the City was the designee of the Secretary or that the Taxpayer entered

into a binding agreement with the Secretary to use a sampling procedure as a basis for projecting audit findings on which to base an assessment.

The Taxpayer claims that the Secretary's "audit" is invalid and cannot be the basis for a valid tax assessment against the Taxpayer.

The Secretary relies on R.S. 47:1543 which gives him the authority to examine the records of other entities to identify, clarify or disclose the liability of a taxpayer. The problem is that, although this Taxpayer agreed to use a sampling procedure with the City, it did not agree to use a sampling procedure with the Secretary. As required by R.S. 47:1541, the lack of either an agreement with the Secretary on a sampling procedure or proper notice concerning the use of a sampling procedure by the Secretary makes the City's audit ineligible to be the basis for a valid assessment against this Taxpayer by the Secretary.

For the reasons stated herein the "audit" of the Secretary cannot be the basis for a valid assessment against this Taxpayer.

IT IS ORDERED, AJUDGED AND DECREED that the relief prayed for by the Taxpayer is granted, and that the Secretary's assessment be and is hereby vacated and set aside.

Baton Rouge, Louisiana, this 15 day of Sept, 2015.

FOR THE BOARD:



Judge Tony Graphia, (Ret.), Chairman