BOARD OF TAX APPEALS

STATE OF LOUISIANA

SAMUEL AND JUDITH CAMP,

Petitioner

VERSUS **DOCKET NO. 10609D**

(Consolidated with B.T.A. Docket No. 10725D)

KIMBERLY LEWIS ROBINSON
IN HER CAPACITY AS SECRETARY OF
THE DEPARTMENT OF REVENUE,
STATE OF LOUISIANA

Respondent.

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WRITTEN REASONS

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A hearing on the Motion for Summary Judgment filed by the Samuel and Judith Camp (the "Taxpayers") and the Motion for Summary Judgment filed by Kimberly L. Robinson, in her official capacity as the Secretary of the Department of Revenue of the State of Louisiana (the "Department") was held on May 9, 2018, with Judge Tony Graphia (Ret.) presiding and Board Members Francis J. Lobrano and Cade R. Cole present. Participating in the hearing were Mandy Gagliardi and Robert Rooth for the Taxpayers and Aaron Long for the Department. After the hearing, the motions were taken under advisement. The Board now renders its Judgment for the following written reasons:

Taxpayers claimed an overpayment of Louisiana income tax in the amount $55,000 on their Louisiana income tax return for the calendar year 2015 and

requested a refund for that amount. On March 6, 2017, Taxpayers received correspondence from the Department stating that the requested refund had been denied. Taxpayers subsequently filed a Petition for Determination of Overpayment and Refund of Overpayment of Income Tax pursuant to La. R.S. 47:1431 and 47:1625 with the Board on May 4, 2017. In addition, by letter dated May 9, 2017, the Department issued to Taxpayers a Notice of Assessment, assessing Louisiana income tax due for the 2015 calendar year in the amount of $286,309.00, as well as interest in the amount of $14,113.75, and a late payment penalty in the amount of $12,722.00, less a payment or credit in the amount of $55,000.00. By letter dated June 26, 2017, Taxpayers paid the amount of $258,144.75, plus additional accrued interest, for a total payment of $261,001.25 and notified the Department of their intention to file a petition for a refund in the amount of the total payment plus interest thereon. On June 28, 2017, Taxpayers filed a Petition to Recover Taxes Paid Under Protest with the Board. The petitions were consolidated in this case pursuant to a Joint Motion to Consolidate filed January 22, 2018.

On April 12, 2018, the Taxpayers and the Department filed a Joint Stipulation of Undisputed Material Facts. The facts of this case as stipulated to by the parties are as follows. Taxpayers were at all pertinent times residents of Louisiana and shareholders of Pamlab, Inc. Pamlab, Inc. was a non-publicly traded Nevada corporation with its corporate headquarters and principal operations in Covington, Louisiana. Pamlab, Inc. owned six wholly-owned subsidiaries: 1) Brand Direct Health, L.L.C., 2) Pamlab, LLC, 3) Pamlab Development, L.L.C., 4) Pan American Laboratories, L.L.C., 5) Red River Pharma, L.L.C., and 6) Zerxis Pharma, L.L.C. On February 22, 2013, Pamlab, Inc. entered into an Asset Acquisition Agreement and Plan of Reorganization (the "Acquisition Agreement") with an entity named

NSH Buyer, Inc. (an affiliate of Nestlé S.A., the parent company of the Nestlé food and beverage conglomerate) At the time of the Acquisition Agreement, Pamlab, Inc. and its subsidiaries (collectively the "Sellers") were all non-publicly traded commercially domiciled Louisiana businesses with corporate headquarters and principal operations in Louisiana.

The acquisition was properly treated as a reorganization under Internal Revenue Code Section (IRC) 368(a)(1)(C)[1] for both federal and state income tax purposes. The significance of such tax treatment was that any gain realized on the transfer was deferred for income tax purposes. Specifically, no gain was recognized on the Taxpayer's receipt of the Nestle shares as consideration for substantially all of the assets of Pamlab. and its subsidiaries under IRC 354; however, the basis in the Nestlé shares received by the Taxpayers equaled the basis in the assets transferred under IRC 358. The ultimate effect of the transaction was that the income realized by Pamlab and its subsidiaries on the sale of the assets was "preserved" in the hands of the Taxpayers (shareholders of Pamlab) until such time as the Taxpayers disposed of the Nestlé shares in a taxable transaction.

Following the execution of the Acquisition Agreement, NHS Buyer, Inc. changed its corporate name to Nestlé Health Science – Pamlab, Inc. ("NHS-Pamlab"). On April 1 and 2, 2013, NHS-Pamlab and the Sellers consummated the transactions contemplated by the Acquisition Agreement. A number of shares of stock of Nestlé S.A. (the "Nestlé Shares") constituted consideration for NHS-Pamlab's acquisition of substantially all of the assets of the Sellers. Nestlé S.A. is a publicly traded corporation which is not commercially domiciled in Louisiana.

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[1] In actuality, the transactions may have involved triangular acquisition as provided in IRC 368(a)(2)(C); however, for purposes of the analysis of the issue presented herein, it is immaterial whether the transaction was a reorganization under IRC 368(a)(1)(C) or 368(a)(2)(C).

Through a series of name changes and conversions, Pamlab, Inc. became Alamoth, L.L.C. As a condition of the Acquisition Agreement, the Sellers were required to hold the Nestlé Shares for a one-year period before any shares could be sold or distributed. During the 2015 tax year, Alamoth, L.L.C. distributed certain Nestlé Shares to Taxpayers. Taxpayers, in the same year, sold some of thethose distributed Nestlé Shares, and recognized at least a portion of the gain that had been deferred for federal tax purposes as a result of the reorganization which took place in 2013. Under the authority of La. R.S. 47:293(9)(a)(xvii), the Taxpayers excluded the gain recognized on the sale of the Nestlé shares from their 2015 Louisiana Individual Income Tax Return. The Department disallowed this exclusion.

On December 18, 2017, the Department filed its Motion for Summary Judgment. The Department argues that the transaction giving rise to the net capital gain at issue in this case is the Taxpayers' sale of Nestlé Shares in 2015. There is no dispute that Nestlé S.A. is a publicly traded company that is not commercially domiciled in Louisiana. Therefore, according to the Department, the sale did not qualify for "the deduction in La. R.S. 47:293(9)(a)(xvii)," which requires that the sale or exchange be of an equity interest in, or substantially all of the assets of, a non-publicly traded corporation which is commercially domiciled in Louisiana.

On April 9, 2018, Taxpayers filed a Motion for Summary Judgment. Taxpayers contend that they properly excluded the gain from the sale of the Nestlé Shares in 2015 from their 2015 Louisiana individual income tax return "pursuant to La. R.S. 47:293(9)(a)(xvii), the Net Capital Gain Exclusion statute." Taxpayers urge the Board to view the transactions contemplated by the Acquisition Agreement and the Taxpayers' subsequent sale of the Nestlé Shares in 2015 as interrelated steps of a single transaction. Taxpayers claim that, when so viewed, the gain arose from the

exchange of the Sellers' assets for the Nestlé Shares in 2013. Taxpayers also assert that "the exchange of Pamlab assets for the Nestlé Shares in the manner set out in the Acquisition Agreement met the requirements of a 'C' Reorganization described in IRC § 368(a)(1)(C)." Therefore, according to Taxpayers, they were required by law to recognize and report gain only when they sold a portion of the Acquisition Agreement consideration (the Nestlé Shares) in 2015. Taxpayers further assert that the legislature could have declared corporate reorganizations like the one Taxpayers engaged in to be ineligible for the "Net Capital Gain Exclusion," but did not do so, and that the legislature intended for Louisiana businesses to be free to structure the sale of their business in the most advantageous way possible to accommodate both sellers and buyers.

In order to prevail on a motion for summary judgment, the movant must show that there are no genuine issues of material fact and that he or she "is entitled to judgment as a matter of law." La. C.C.P. art. 966(A)(3); *Duncan v. U.S.A.A. Ins. Co.*, 06-363 (La. 11/29/06), 950 So.2d 544. A fact is material when its existence or nonexistence may be essential to the plaintiff's cause of action. *Smith v. Our Lady of the Lake Hosp., Inc.*, 93-2512 (La. 7/5/94), 639 So.2d 730. A genuine issue of material fact is one as to which reasonable persons could disagree; if reasonable persons could reach only one conclusion, there is no need for trial on that issue and summary judgment is appropriate. *Smitko v. Gulf S. Shrimp, Inc.*, 11-2566 (La. 7/2/12), 94 So.3d 750. Summary judgment is favored by law and provides a vehicle by which the just, speedy, and inexpensive determination of an action may be achieved. La. C.C.P. art. 966(A)(2). The trial court is required to render summary judgment "if the motion, memorandum, and supporting documents show that there is no genuine issue as to material fact and that the mover is entitled to judgment as

a matter of law. La. C.C.P. art. 966(A)(3). The interpretation of a statute is a question of law that may be decided by summary judgment. *Crowe v. Bio-Medical Application of La., LLC*, 2014-0917, p. 15 (La.App. 1 Cir. 6/3/16), 208 So.3d 473, 484, *adhered to on reh'g*, 2014-0917 (La. App. 1 Cir. 2/17/11), *reh'g denied* (Feb. 17, 2017), *and writ denied*, 2017-0502 (La. 5/12/17), 219 So.3d 1106.

The language of the Revised Statute 47:293(9)(a)(xvii) (the "Statute"), described as an exclusion by Taxpayers and as a deduction by the Department, provides that Louisiana Tax Table Income does not include "gains recognized and treated for federal income tax purposes as arising from the sale or exchange of an equity interest in or substantially all of the assets of a nonpublicly traded corporation, partnership, limited liability company, or other business organization commercially domiciled in this state." La. R.S. 47:293(9)(a)(xvii). It is undisputed that the Sellers were nonpublicly traded corporations commercially domiciled in Louisiana, and that substantially all of the Sellers' assets were exchanged for the Nestlé Shares in 2013. The only dispute in this case is whether the gain recognized by Taxpayers in 2015 arose from the exchange of substantially all of the Sellers' assets for the Nestlé Shares in 2013. The issue before the Board, therefore, is one of statutory interpretation.

The starting point in the interpretation of any law is the language of the law itself. *M.J. Farms, Ltd. v. Exxon Mobil Corporation*, 07-2371, p. 13 (La. 7/1/08), 998 So.2d 16, 27; s*ee also Kelly v. State Farm Fire & Casualty Co.*, 14-1921, p. 10 (La. 5/5/15), 169 So.3d 328, 335. In discerning the intent of the legislature, the Board follows Louisiana's canons of statutory construction as set forth in Chapter 2 of the Preliminary Title of the Louisiana Civil Code (La. C.C. arts. 9–13) and Chapter 1 of Title 1 of the Louisiana Revised Statutes of 1950 (R.S. 1:1–1:17). La.

R.S. 24:177(A); *Succession of Harlan*, 2017-1132, p. 3 (La. 5/1/18), 2018 WL 2025816, at *5. When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature. La. C.C. art. 9; *see* La. R.S. 1:4 ("When the wording of a Section is clear and free of ambiguity, the letter of it shall not be disregarded under the pretext of pursuing its spirit."). The Board must construe words and phrases according to their common and approved usage. La. R.S. 1:3. When the language of the law is susceptible of different meanings, it must be interpreted as having the meaning that best conforms to the purpose of the law. La. C.C. art. 10. When the words of a law are ambiguous, their meaning must be sought by examining the context in which they occur and the text of the law as a whole. La. C.C. art. 12.

The Parties have not cited, nor has the Board's own research uncovered, a case applying Louisiana's canons of statutory construction to the particular language at issue here. Nevertheless, our Supreme Court has stated that "[f]or purposes of statutory interpretation, dictionaries are a valuable source for determining the 'common and approved usage of words.'" *Dunn v. City of Kenner*, 2015-1175, p. 9 (La. 1/27/16), 187 So.3d 404, 411. Merriam–Webster defines the word "arise" as: "to begin to occur or to exist : to come into being or to attention . . . to originate from a source . . . ." *Merriam–Webster Online Dictionary - Arise*, Merriam-Webster.com (May 6, 2018), available at https://www.merriam-webster.com/dictionary/arise. Black's Law Dictionary defines "arise" as "[t]o originate; to stem (from) . . . [t]o result (from)." *Black's Law Dictionary* 122 (9th ed. 2009).

If the Board were to view Taxpayers' sale of the Nestlé Shares in 2015 in isolation, the gain recognized thereon could not be said to have arisen from the

exchange of substantially all of the assets of the Sellers. Viewed in isolation, the gain recognized by Taxpayers arose from the immediately originating transaction: the sale of shares in Nestlé S.A., a publicly traded corporation not commercially domiciled in Louisiana. Only if the Board views the entire sequence of transactions together, as the Taxpayers urge the Board to do, could the gain recognized be said to have arisen from the exchange of the Sellers' assets in 2013. Viewed in this manner, the sequence of events culminating in the disposition of some of the Nestlé Shares in 2015 began with the execution of the Acquisition Agreement, which entailed the exchange of the Sellers' assets for the Nestlé Shares. Thus, the Taxpayers' ultimate gain could be said to have originated from the exchange of the Sellers' assets, and would be excluded from Louisiana Tax Table Income under the Statute.

The Statute is ambiguous as to whether it applies to multi-step transactions. The common and approved usage of the language "arising from" does not foreclose or mandate such an application. "[A]rising from" entails an originating cause and an end result. When the meaning of a law cannot be ascertained by the application of the canons of statutory construction, the Board must consider the intent of the legislature. La. R.S. 24:177(A). The occasion and necessity for the law, the circumstances under which it was enacted, concepts of reasonableness, and contemporaneous legislative history may also be considered in determining legislative intent. La. R.S. 24:177(B)(2)(a); *S. Lafourche Levee Dist. v. Jarreau*, 2016-0788, p. 7 (La. 3/31/17), 217 So.3d 298, 304. The legislative history of a statute is a particularly helpful guide in this respect. *La. Pub. Facilities Auth. v. All Taxpayers, Prop. Owners, Citizens of State of La. & Nonresidents Owning Prop. or Subject to Taxation Therein*, 2003-2738, p. 9 (La. App. 1 Cir. 12/23/03), 868 So.2d

124, 130, *writ denied sub nom. La. Pub. Facilities Auth. v. All Taxpayers, Prop. Owners, Citizens of the State of La.*, 2004-0213 (La. 3/11/04), 869 So.2d 801. Louisiana Courts, including our Supreme Court, have repeatedly made use of video records of legislative history in determining legislative intent. *See Fecke v. Bd. of Supervisors of La. State Univ.*, 2015-1806 (La. 9/23/16), 217 So.3d 237, *modified on other grounds on reh'g sub nom. Fecke v. Bd. of Supervisors of La. State Univ. & Agric. & Mech. Coll.*, 2015-1806 (La. 10/19/16), 218 So.3d 1; *State v. Layton,* 22014-1910, p. 5 (La. 3/17/15), 168 So.3d 358, 360–61; *Crowe v. Bio-Medical Application of La., LLC*, 2014-0917, pp. 22-23 (La. App. 1 Cir. 6/3/16), 208 So.3d 473, 488-89 ("Due to the ambiguity created by the differences in the language of the two acts . . . this Court has consulted the archived video recordings of the House Ways and Means Committee . . . ."), *adhered to on reh'g*, 2014-0917 (La. App. 1 Cir. 2/17/11), *reh'g denied* (Feb. 17, 2017), *and writ denied*, 2017-0502 (La. 5/12/17), 219 So.3d 1106.

A review of the archived video records maintained on the Louisiana House of Representatives' website related to the enactment of Revised Statute 47:293(9)(a)(xvii) leads the Board to conclude that the legislature intended to eliminate the net capital gains tax on the sale of closely held Louisiana businesses so as to remove a tax incentive for business owners to relocate to other states. Representative Hunter Greene stated at a meeting of the House Ways and Means Committee that the Statute, then titled HB 106, was focused on the problem of Louisiana business owners potentially moving to other states before selling their businesses to avoid paying Louisiana income tax on the gain arising from the sale. La. 2009 Reg. Session House Ways and Means Committee, Act 457, HB 106 (5/28/09), available at http://house.louisiana.gov/H_Video/VideoArchivePlayer.

aspx?v=house/2009/may/0528_09_WM. Dino Paternostro of GNO Inc. testified before the committee that continuing to impose capital gains tax on the sale of closely held businesses put Louisiana at risk of losing business executives, office locations, payroll tax revenue, and the philanthropy of wealthy citizens. *Id.* Before final passage, Representative Greene spoke in favor of HB 106, stating: "If you have a business, instead of deciding to move to a state that has no taxation, and then selling your business, we want those individuals who have created capital and have sweat equity in the business to stay here when they sell that business, to then turn it back into the economy . . . ." La. 2009 Reg. Session, Act 457, HB 106 (6/4/09), available at http://house.louisiana.gov/H_Video/VideoArchivePlayer.aspx?v=house/2009/jun/ 0604_09_Day25_2009RS_PM.

The legislature intended to remove an incentive for taxpayers to relocate to other states. Permitting Taxpayers to exclude the gain at issue here from their Louisiana Tax Table Income is in accord with that intent. It is undisputed that the Statute would have applied had Taxpayers simply sold the assets of their business for cash in 2013. Instead of selling their business for cash, however, the transaction was structured such that non-recognition treatment was imposed on the transfer under IRC 354. The Board can discern no reason why the structure of the transaction in this manner should result in the revival of the incentive to relocate that the legislature sought to eliminate. Therefore, the Board concludes that the Taxpayers are entitled to claim the net capital gains exclusion for the amount that they would have indisputably been entitled to claim had they simply disposed of their business in a single transaction; *i.e.* the value of the consideration received in the 2013 exchange.

However, at the hearing of this matter, the Taxpayers admitted that a portion of the gain recognized by them in the 2015 sale was the result of appreciation in the value of their Nestlé shares that occurred after the 2013 transaction. As such, that portion of the gain did not "arise from" the sale of substantially all of the assets of the Pamlab, Inc. corporate group. The Taxpayers offered no evidence of the value of the Nestlé shares as of April 2, 2013, the effective date of the 2013 transaction[2]. Clearly, the Taxpayers are not entitled to exclude that portion of the gain attributable to post acquisition appreciation from their 2015 Louisiana income. Therefore, the Board is unable to render summary judgment at this time in favor of the Taxpayers on the basis of the joint stipulation of fact presently submitted by the Taxpayers and the Department.

Baton Rouge, Louisiana this 13 day of June, 2018.

For the Board

Judge Tony Graphia (Ret.) Chairman

[2] The Board notes that Nestlé SA is a publicly traded corporation and the value of the shares as reported on Sweden's SIX Swiss Exchange "Swiss Blue Chip Segment" should be easily determinable.