

**BOARD OF TAX APPEALS  
STATE OF LOUISIANA  
LOCAL DIVISION**

**FMT SHIPYARD & REPAIR, LLC  
PETITIONER**

**VERSUS**

**DOCKET NO. L00229**

**NEWELL NORMAND, SHERIFF  
AND EX-OFFICIO TAX COLLECTOR  
FOR JEFFERSON PARISH, ET AL  
RESPONDENT**

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**ORDER WITH WRITTEN REASONS**

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A hearing on the Petition for Refund of a sales and use tax assessment paid under protest as filed by FMT Shipyard & Repair, LLC (the “Taxpayer”) against Newell D. Normand, in his capacity as Sheriff and Ex-Officio Tax Collector for the Parish of Jefferson (the “Collector”) was held before the Board of Tax Appeals-Local Division on November 16, 2017, Local Tax Judge Cade R. Cole presiding. Present before the Board were: Jason Brown, attorney for Taxpayer, and Kenneth C. Fonte, attorney for the Collector. After the hearing, the case was taken under advisement, and the Board now issues its ruling for the following written reasons:

Taxpayer paid under protest the Collector’s formal assessment of sales and use tax in the amount of \$219,917.01 (together with penalty and interest for a total payment under protest of \$371,750.23). Taxpayer then timely filed a petition with this Board as provided for under La. R.S. 47:337.63.

Taxpayer operated a shipyard in Jefferson Parish. The Taxpayer repaired, refurbished, and retrofitted vessels at its shipyard. Unless otherwise exempt, these repairs would fall within the definition of a taxable service.

The Taxpayer alleges that many of these repairs were exempt pursuant to La. R.S. 47:305.1(B), which exempts “repair services performed upon such ships,

barges, or vessels operating exclusively in foreign or interstate coastwise commerce,” along with the materials and supplies used in those repairs (the “ICC exemption”).

The Collector argues that the failure to obtain contemporaneous exemption certificates moots the application of the ICC exemption. However, there is no statutory requirement for contemporaneous presentment of the form certificate. The Board finds acceptable proof of the exemption for repair of a vessel if an ICC exemption certificate for that vessel was admitted into evidence that bears a date on or before the date of the repair for which the exemption was claimed. Any missing exemption certificates, or exemption certificates that facially bear a date outside the audit period, will not be considered evidence that the vessels was eligible for the ICC exemption on the date of the repair at issue.

The Taxpayer also disputes that tax was due on certain items of equipment, which it claims are subject to the Jefferson Parish Manufacturers’ Machinery and Equipment exclusion (the “MME exclusion”). This exclusion applies to “machinery and equipment used by a manufacturer in a plant facility predominately and directly in the actual manufacturing process...” *Id.* A Manufacturer is defined as “a person whose principal activity is manufacturing.” La. R.S. 47:301(3)(i)(ii)(bb). Manufacturing is itself defined as, “putting raw materials through a series of steps that brings about a change in their composition or physical nature in order to make a new and different item of tangible personal property that will be sold to another.” La. R.S. 47:301(3)(i)(ii)(cc).

The facts in the present case do not support the argument that this Taxpayer’s “principal activity” was manufacturing. The Taxpayer’s principal activity was as a shipyard repair contractor. The Taxpayer is not manufacturing ship parts for sale to

the general public. The Taxpayer fabricates a custom item for use in a custom repair job. These items were billed as part of the overall repair job.

The shipyard contractor is the end user of those custom parts, as part of its repair service, in a similar fashion to how a building contractor is the end user of materials used in providing construction of an item. *Accord, Bill Roberts, Inc. v. McNamara*, 539 So.2d 1226 (La. 1989). The Jefferson Parish MME exclusion only applies if the part “is for ultimate sale to another not for internal use.” JPC 35-71(a).

The Board finds that the facts do not support the Taxpayer’s position that it is a manufacturer, as defined in the applicable law, and finds that it is not entitled to the MME exclusion on its equipment purchases.

Finally, the Taxpayer alleges that the Collector’s ability to collect on certain items had prescribed. Taxpayer argues that the provisions of La. R.S. 47:337.67(B)(5) provide for the interruption of prescription only where the failure to file a return is combined with the intent to defraud. The Taxpayer avers that there was no intent to defraud.

The Collector responds by pointing out that La. R.S. 47:337.67(D)(1) states that “the failure to file any return required by this Chapter shall interrupt the running of prescription, and prescription shall not commence to run again until the subsequent filing of such return.” The Taxpayer argues that you must implicitly include the “intent to defraud” element of Subsection (A)(5) into Subsection D. The Collector argues that they are distinct provisions that operate independently.

The Board finds that Subsection D operates independently from Subsection A, with each having their own restrictions and separate application. For example, Subsection D is limited and cannot apply to returns below \$500 or to periods for which Voluntary Disclosure Agreements were agreed. However, there are no such limitations under Subsection (A)(5), which would allow application of that provision

even in those instances if “the intent to defraud” is established. Conversely, while the fraud element is required under Subsection (A)(5) it is clearly not required under Subsection D. There is no dispute that this taxpayer did not file the requisite returns, therefore prescription was interrupted pursuant to La. R.S. 47:337.67(D) due to the failure to file a return.

The Collector’s reconventional demand for attorney’s fees, pursuant to La. R.S. 47:337.13.1, in the amount of ten percent (10%) of the tax, penalty, and interest awarded to the Collector is granted.

For the foregoing written reasons:

IT IS ORDERED AND DECREED that the Taxpayer’s Petition for Refund of its Payment Under Protest be granted in part and denied in part, as described hereinabove.

IT IS FURTHER ORDERED AND DECREED that the parties shall calculate the refund due, as described hereinabove.

IT IS FURTHER ORDERED AND DECREED that if the parties cannot agree on a form Judgment, then each party may submit its own proposed Judgment with a Memorandum in support thereof and in opposition to the opposing party’s proposed Judgment within 45 days of the date of this Order.

This Order does not constitute a final appealable Judgment as contemplated by La. R.S. 47:1410 and 1434.

Baton Rouge, Louisiana this 11<sup>th</sup> day of January, 2018

FOR THE BOARD:



LOCAL TAX JUDGE CADE R. COLE  
LOUISIANA BOARD OF TAX APPEALS-LOCAL DIVISION