

**BOARD OF TAX APPEALS
STATE OF LOUISIANA**

FRANK'S INTERNATIONAL, LLC

Petitioner

VERSUS

DOCKET NO. 10050D

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

Respondent

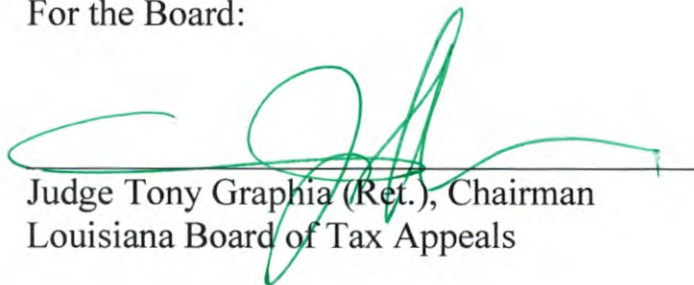
JUDGMENT WITH WRITTEN REASONS

This case came before the Board on November 6, 2018 for hearing on the merits of the Petition of Frank's International, LLC (the "Taxpayer"), with Judge Tony Graphia (Ret.), Chairman, presiding, Board Members Cade R. Cole and Jay Lobrano present, and with no member absent. Participating in the hearing were Nicole Gould Frey, attorney for the Taxpayer, and Miranda Scroggins, attorney for Kimberly Robinson, Secretary, Louisiana Department of Revenue, State of Louisiana (the "Secretary"). After the hearing, the matter was taken under advisement. The Board now unanimously renders Judgment in accordance with the written reasons attached herewith.

**IT IS ORDERED, ADJUDGED AND DECREED that the Taxpayer's
Petition BE AND IS HEREBY GRANTED, and that Judgment be rendered in
favor of the Taxpayer and against the Secretary, and that the Secretary shall
refund to the Taxpayer the amount of \$736,637.13, together with interest as
provided for by law, for use tax for the 2012 tax year.**

Judgment Rendered and Signed at Baton Rouge, Louisiana this 11 day of
December, 2018.

For the Board:

A handwritten signature in green ink, consisting of a large loop followed by several smaller loops and a long horizontal stroke.

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

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WRITTEN REASONS FOR JUDGMENT

This matter came before the Board on November 6, 2018 for hearing on the merits of the Petition of Frank's International, LLC (the "Taxpayer"), with Judge Tony Graphia (Ret.), Chairman, presiding, and Board Members Cade R. Cole and Jay Lobrano present. Participating in the hearing were Nicole Gould Frey, attorney for the Taxpayer, and Miranda Scroggins, attorney for Kimberly Robinson, Secretary, Louisiana Department of Revenue, State of Louisiana (the "Secretary"). After the hearing, the matter was taken under advisement. The Board now issues Judgment for the following written reasons.

The Taxpayer is an oil and gas company with operations throughout the world. The limited portion of the Taxpayer's large business that is relevant to this case is the Taxpayer's fabrication and storage of tools at its facility in Lafayette, Louisiana during 2012. The tools at issue are identified by serial number in Taxpayer Exhibit B-1 (the "Tools"). The Taxpayer claimed a refund of use tax on the Tools in the

amount of \$736,637.13 for the year 2012. The Taxpayer's refund claim is summarized in Taxpayer Exhibit A. The Taxpayer contends that the Tools were not used in Louisiana. Taxpayer Exhibit A contains a summary of the different locations where the Taxpayer claims the Tools were first used, and lists the corresponding amount of refund claimed. The alleged places of first use (and corresponding refund claim amounts) are: Alaska (\$8,460.90), federal waters (\$455,890.63), foreign countries (\$91,075.06), Montana (\$153.96), and "Not Used" (\$181,056.58). The Tools which were not used, have never been used but remain in storage in Lafayette.

These Tools are quite large, and some weigh thousands of pounds. The Taxpayer fabricated or manufactured the Tools at its facility in Lafayette, Louisiana. The Taxpayer created the Tools for use in specific jobs at the request of customers or related entities, or for the Taxpayer's own use via leases in federal waters. Sometimes, the Taxpayer could not create a tool itself, so it had to purchase that particular tool from a third party. Taxpayer Exhibit L-6 contains a chart of third party purchases of over \$15,000. Copies of each third party invoice of over \$15,000 are contained in Taxpayer Exhibit L-7. The majority of the Tools were fabricated or manufactured by the Taxpayer itself. All of the Tools were stored at some point in the Taxpayer's Lafayette facility.

At the hearing, the Taxpayer produced evidence and testimony showing how it identified which tools were stored, but not otherwise "used," in Louisiana. The Taxpayer's Fixed Asset Manager, Chad Raymond, testified that when the Taxpayer receives a purchase order or invoice for a tool, it assigns that tool a serial number. The serial number of each tool is tracked in its Great Plains software. Great Plains functions as the Taxpayer's asset ledger.

Mr. Raymond testified that the Taxpayer uses an Equipment Time Management system (“ETM”) to track the use of its tools. The ETM assigns a delivery ticket to each tool that is removed from storage. Mr. Raymond testified that the size of the Tools prevents them being moved without mechanical assistance, and that the delivery tickets are used to keep track of how the Tools are transported. Because the Tools are very large and heavy, it would not be possible for someone to take one out of storage without a forklift or vehicle, which must be tracked on a delivery ticket. Thus, the Tools could not have been moved out of storage without a delivery ticket. The Taxpayer also generates invoices for its customers from the delivery tickets.

Mr. Raymond explained that Taxpayer Exhibit B-4 shows information received by the Taxpayer’s accounting department about each tool once manufacturing is complete. Taxpayer Exhibit B-4 lists each tool’s serial number, also called a Frank’s Casing Crew (“FCC”) ID number, as well as a Job Number and a Work Number. The Taxpayer’s manufacturing department uses software called Production Traveler Sheet (“PTS”) to follow each tool throughout the manufacturing process. Mr. Raymond further stated that the material costs of manufacturing a tool are summarized in Taxpayer Exhibit B-5, and connected these costs to the amount of the refund claim as shown in Taxpayer Exhibit B-2.

The Department stated in its opening argument that this case presented a purely legal question. However, at the hearing, counsel for the Department questioned Taxpayer’s witness and Manager of Indirect Taxes, Herb Weaver, about how the Taxpayer could prove the cost of materials for each individual tool. Mr. Weaver testified that he received summaries of materials costs for each tool, and that

those costs could be supported by existing invoices. According to Mr. Weaver, the Department never asked for these invoices during the audit or at any other time.

The Department also claimed at the hearing that the Taxpayer should have submitted invoices from its customers to prove that the Tools were intended for use outside the state. Kerya Drummond, a Revenue Tax Auditor Specialist with the Louisiana Department of Revenue, testified that she reviewed materials submitted by the Taxpayer and could not determine that, at the time of purchase or manufacture, any of the Tools were intended for use in Alaska, Montana, foreign countries, or offshore in federal waters. Ms. Drummond stated that she did not receive invoices from the Taxpayer showing the intended use of the Tools. However, on cross examination, Ms. Drummond also testified that she did not request those invoices from the Taxpayer.

Although stated by the Department, there was no evidence of any email communication showing that it requested invoices. In fact, the Taxpayer's Exhibit E and Exhibit F show that when asked to give a reason for denying the refund, the Department never stated that it took issue with the Taxpayer's supporting documentation. Further, the Department never filed a motion to compel the production of any invoices during these proceedings. The denial letter, which was attached to the Taxpayer's Petition, only states that the Taxpayer's refund claim was denied because of its participation in a tax amnesty program.

The Board finds the testimony of the Taxpayer's witnesses to be credible. The Department introduced no evidence that would cast doubt on the accuracy of the Taxpayer's records or the integrity of its meticulous record-keeping practices. The only reason given for denying the refund was because the Taxpayer availed itself of a tax amnesty program.

The Taxpayer claims to have possessed Louisiana Resale Certificates for the periods of January 1, 2012 through July 31, 2012, and August 1, 2012 through August 31, 2015. The Taxpayer offered these certificates as Taxpayer Exhibits C and D, without objection. The certificates list the “Purchaser Legal Name” as “Frank’s Casing Crew & RT Tool I,” and “Purchaser Trade Name” as “Frank’s Casing Crew Inc.” Darren Miles, the Taxpayer’s Chief Accounting and Tax Officer, explained that these entities eventually became a part of the Taxpayer through merger. In addition, it was also stipulated that the Taxpayer possessed a valid offshore exemption certificate during 2012.

The Taxpayer claims that it is entitled to a refund of use tax under La. R.S. 47:302 because the Tools were not stored for use or consumption in this state. Additionally and alternatively, the Taxpayer contends that the Tools are subject to the resale exclusion as set forth in La. R.S. 47:301(10)(a), and the exemption for interstate commerce in La. R.S. 47:305(E). The Taxpayer also claims that some of the Tools were created or purchased for use offshore in federal waters and are exempt from use tax under La. R.S. 47:305.10.

The Department takes the position that the Tools were put to a taxable use when they were stored in Louisiana. The Department argues that its position is correct based on the “taxable moment” analysis articulated in *Word of Life Christian Center v. West*, 2004-1484 (La. 4/17/06), 936 So.2d 1226. The Department also claims that the Taxpayer’s position is based on the holdings of the overruled cases of *The Shaw Group, Inc. v. Kennedy*, 1999-1871 (La. App. 1 Cir. 9/22/00), 767 So.2d 937, and *Tigator Inc. v. West Baton Rouge Police Jury*, 94-1771 (La. App. 1 Cir. 5/5/95), 657 So.2d 221. However, at an earlier phase in these proceedings, the Department advanced a different argument. Specifically, the Department contended

that the Taxpayer had waived its right to claim a refund by participating in Louisiana's tax amnesty program. The Department advanced this argument through exceptions of no cause of action and lack of subject matter jurisdiction. The Board overruled these exceptions in its Judgment with Written Reasons dated July 12, 2017. At the hearing, the Department re-urged its amnesty argument for purposes of appeal. The Board adheres to its earlier decision and hereby incorporates its Judgment with Written Reasons dated July 12, 2017 by reference into its final Judgment.

The Board now turns to the main issue in this case: whether storage of the Tools in Louisiana constituted taxable use under *Word of Life*. In *Word of Life*, a religious organization purchased two airplanes for use by a preacher and his staff in travel throughout the United States. The religious organization initially intended to hangar the first airplane ("Airplane 1") in an airport in Ascension Parish. The religious organization purchased Airplane 1 in June 1997. The purchase contract was signed in Ascension Parish while Airplane 1 was hangared in Tulsa, Oklahoma. The preacher and his wife took delivery of Airplane 1 in Oklahoma in August 1997 and flew to East Baton Rouge Parish. At no time did Airplane 1 ever land in Ascension Parish, because the airport in Ascension Parish was too small. However, Airplane 1 did on one occasion fly over Ascension Parish airspace. On February 2, 1998, Airplane 1 was destroyed by a hurricane while hangared in Miami, Florida.

In April 1998, the religious organization purchased a second airplane ("Airplane 2"). Airplane 2 was purchased in South Carolina and delivered in Texas. Airplane 2 was subsequently imported into Louisiana and hangared in East Baton Rouge Parish. Unlike Airplane 1, Airplane 2 did land in Ascension Parish several

times in-between flights. At no point did the religious organization pay any sales or use tax on either Airplane 1 or Airplane 2.

The Ascension Parish collector assessed use tax on Airplane 1. Litigation ensued, during which the collector assessed use tax on Airplane 2 as well. The religious organization initially prevailed on summary judgment, arguing that both airplanes were purchased for ultimate use in interstate commerce, and therefore were exempt from tax under La. R.S. 47:305(E). On appeal, the First Circuit affirmed. The First Circuit held that, under *Shaw* and *Tigator*, there is no taxable moment with respect to property that is imported into the state for ultimate use in interstate commerce. Our Supreme Court granted certiorari to examine the propriety of the “ultimate use” test for the applicability of the use tax to property imported for use in interstate commerce.

The Court began its analysis with the historical underpinnings of the use tax. Citing *Henneford v. Silas Mason Co., Inc.*, 300 U.S. 577 (1937), the Court found that the purpose of the use tax is to level the playing field between out-of-state and in-state merchants. The use tax does this by removing the consumer’s temptation to prefer vendors in other states who will not collect tax on local sales. The Court then recognized that the lead case in federal Commerce Clause jurisprudence with respect to state taxes was *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). In addition to the *Complete Auto* test, the Court found that Louisiana law embraces the “taxable moment” analysis of *Southern Pacific Co. v. Gallagher*, 306 U.S. 167 (1939). In so doing, the Court explicitly overruled the “ultimate use” test of *Shaw* and *Tigator*.

As explained by the Court, a “taxable moment” occurs when out-of-state purchased goods have reached the end of their interstate transportation into the

taxing jurisdiction, and have not yet begun their subsequent journey in interstate commerce. *Word of life*, 2004-1484, p. 27, 936 So.2d at 1243. The “taxable moment” analysis focuses on three stages of the journey through interstate commerce:

The first stage is the interstate transportation of out-of-state purchased goods into the taxing jurisdiction. The second stage is the end of that interstate transportation, which includes the withdrawal of those goods from interstate commerce, and implies that the goods have come to rest in the taxing jurisdiction and become part of the mass of the property of the state. The principal focus here is the period of time, however slight, that the taxpayer used, stored, or consumed the goods in the taxing jurisdiction. The third stage is the subsequent use, if any, of the goods in interstate commerce.

Word of life, 2004-1484, p.13, 936 So.2d at 1235. The Court found that such a taxable moment occurred when the planes were imported and hangared in East Baton Rouge.

However, the Court also held that the taxable moment concluded when the planes began their subsequent journey in interstate commerce. Airplane 2 did not land in Ascension Parish until after it had resumed its interstate journey; *i.e.* after being removed from storage in East Baton Rouge. The Court rejected the proposition that Airplane 2 came to rest at a later date through temporary stops and maintenance in Ascension Parish. Airplane 1 never landed in Ascension Parish. Consequently, the Court found no taxable moment in Ascension Parish with respect to either airplane. On rehearing, the Court clarified that there is no temporal factor in the determination of use for taxing purposes.

The Court also addressed the separate issue of whether the airplanes were exempt from taxation under La. R.S. 47:305(E). The Court quoted the following portion of La. R.S. 47:305(E):

It is not the intention of any taxing authority to levy a tax upon articles of tangible personal property imported into this state . . . nor is it the intention of any authority to levy a tax on bona fide interstate commerce. It is, however, the intention of the taxing authorities to levy a tax on the sale at retail, the use, the consumption, the distribution, and the storage to be used or consumed in this state, of tangible personal property after it has come to rest in this state and has become a part of the mass of property in this state.

Word of life, 2004-1484, p.1, 936 So.2d at 1228-29 (quoting La. R.S. 47:305(E)) (omissions in original). Construing every word of the statute as having some useful purpose, the Court read the words “bona fide” as limiting the scope of interstate commerce exempt from tax. That limitation was enough for the Court declare that La. R.S. 47:305(E) did not exempt the use of “durable goods (such as airplanes and/or automobiles) for travel across state lines” from taxation.

Under *Word of Life*, the Board may not look to the ultimate use of an item in interstate commerce when determining whether that item is subject to use tax. However, *Word of Life* did not purport to nullify the language of La. R.S. 47:302(A) that imposes the use tax on items stored for use or consumption within this state. A local collector essentially made the argument that *Word of Life* and the similar case of *Firestone Polymers v. Calcasieu Parish School System*, 07-501 (La. App. 3 Cir. 10/31/07), 969 So.2d 748, did just that before the Third Circuit in *Scientific Drilling International, Inc. v. Meche*, 2009-1120 (La. App. 3 Cir. 2/3/10), 29 So.3d 1283, writ denied, 2010-0511 (La. 4/30/10), 34 So.3d 298. In *Scientific Drilling*, the collector sought to tax items imported into and stored in Lafayette Parish on the grounds that mere storage constituted taxable use under *Word of Life* and *Firestone*. The Third Circuit rejected this argument. The Third Circuit read those cases as holding that mere storage *could* constitutionally be treated as a taxable use. However, the Third Circuit held that for the use tax to be so imposed, there would have to be a taxing statute to that effect. The Third Circuit then found that the

Lafayette Parish use tax ordinance did not impose such a tax. The Court based its holding on language in the ordinance that imposed the use tax on property that was “stored for use in the Parish.” Simply put, under the prevailing test identified in *Scientific Drilling* the storage for use or consumption in the taxing jurisdiction is not the same thing as the storage for use or consumption outside the taxing jurisdiction.

La. R.S. 47:302(A) imposes use tax on items stored “for use or consumption in this state.” The use tax does not apply to items stored for use or consumption outside this state. Similarly, La. R.S. 47:301(15) defines storage as “any keeping or retention in the taxing jurisdiction of tangible personal property for use or consumption within the taxing jurisdiction or for any purpose other than for sale at retail in the regular course of business.” The language “for use or consumption within the taxing jurisdiction” is not superfluous. The Tools were not stored for use or consumption in this state, and therefore are not subject to use tax under La. R.S. 47:302(A).

There was also no reason for the Court in *Word of Life* to consider the portion of La. R.S. 47:305(E) that declares that the state does not intend to tax articles of tangible personal property “produced or manufactured in this state, for export.” Unlike the airplanes in *Word of Life*, the majority of the Tools in this case were not purchased in a completed form and then brought into the state. Most of the Tools first came into existence already within the state when they were manufactured by the Taxpayer. The Tools were created for specific jobs in Montana, Alaska, federal waters, and foreign countries. Therefore, in addition to being outside the scope of the use tax, the Tools fabricated by the Taxpayer would also be exempt from taxation under La. R.S. 47:305(E), because they were “produced or manufactured in this state, for export.”

The Tools which were not manufactured by the Taxpayer were purchased from third parties for resale or lease. La. R.S. 47:301(10)(a)(i) provides that a sale at retail means a sale for any purpose other than for resale as tangible personal property. The Tools purchased by the Taxpayer from third parties were purchased for resale or lease to the Taxpayer's customers. The Taxpayer proved that it possessed the required resale certificates throughout 2012. La. R.S. 47:301(19)(a) provides that use tax does not apply to property would have been exempted or excluded from sales tax at the time such property became subject to the taxing jurisdiction of the state. The Tools purchased by the Taxpayer for resale would be excluded from sales tax under the resale exclusion and therefore also would be excluded from use tax.

The Taxpayer argues that the Tools which it identified for use offshore in federal waters are exempt from tax under La. R.S. 47:305.10. La. R.S. 47:305.10(C) provides an exemption for tangible personal property purchased within or imported into Louisiana that is first used offshore beyond the territorial limits of any state. A taxpayer seeking to avail itself of this exemption must either: determine the location of the first use of the exempt property at the time of its purchase, and notify the vendor of that location; or obtain an offshore registration number from the Secretary. The parties stipulated that the Taxpayer had a valid offshore exemption certificate during 2012. The Taxpayer further demonstrated that none of the Tools that were identified for use offshore in federal waters were used in Louisiana. Accordingly, the Tools identified for use offshore in federal waters would be exempt from tax under La. R.S. 47:305.10(C).

Based on the foregoing, the Taxpayer is entitled to judgment in its favor. The Tools were not stored in Louisiana for use or consumption in this state, and therefore

do not fall within the scope of the use tax imposed by La. R.S. 47:302(A). Because of this, none of the Tools are subject to use tax and the Taxpayer is entitled to the entire amount of the refund claimed. There are also additional and alternative grounds for finding that the Taxpayer is entitled to a refund. The Tools manufactured by the Taxpayer for export out of Louisiana would be exempt under La. R.S. 47:305(E). In addition, the Tools that were purchased for resale or lease to the Taxpayer's customers would be excluded from tax under La. R.S. 47:301(10)(a)(i). Tools identified by the Taxpayer as first used offshore in federal waters would be exempt from tax under La. R.S. 47:305.10(C). Accordingly, the Taxpayer is entitled to a refund of use tax in the amount of \$736,637.13, plus interest as provided for by law.

Baton Rouge, Louisiana this 11 day of December, 2018.

For the Board:



Vice Chairman Cade R. Cole

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