

**BOARD OF TAX APPEALS
STATE OF LOUISIANA**

LERNER NEW YORK, INC.

Petitioner

VERSUS

DOCKET NO. L00393

**NEWELL D. NORMAND, SHERIFF AND
EX-OFFICIO TAX COLLECTOR FOR
JEFFERSON PARISH; JEFFERSON
PARISH SHERIFF'S OFFICE, BUREAU
OF REVENUE AND TAXATION,
SALES AND USE TAX DIVISION,**

Respondents.

JUDGMENT

On August 16, 2018, this matter came before the Board of Tax Appeals, Local Tax Judge Cade R. Cole, presiding, for hearing on the merits. Participating in the hearing were Andre B. Burvant, Matthew A. Mantle, and John F. Fletcher on behalf of Petitioner Lerner New York, Inc. (the "Petitioner"), and Kenneth Fonte on behalf of Joseph P. Lopinto, III, Sheriff and Ex-Officio Tax Collector for Jefferson Parish and successor to Newell D. Normand, and the Jefferson Parish Sheriff's Office, Bureau of Revenue and Taxation, Sales and Use Tax Division (the "Collector"). After the hearing, the matter was taken under advisement. The Board now issues Judgment for the written reasons issued herewith.

IT IS ORDERED, ADJUDGED AND DECREED that Petitioner is not entitled to a credit under La. R.S. 47:337.86(A)(1).

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Petitioner is liable to the Collector for Jefferson Parish sales tax collected from Petitioner's online sales into Jefferson Parish and improperly remitted to the Department via Direct Marketer Returns for tax periods January 1, 2010 through April 30, 2017.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Petitioner is entitled to a credit under La. R.S. 47:337.86(E)(1) in the amount of \$45,191.14 for the tax periods July 1, 2010 through March 31, 2017.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Petitioner is liable for penalties and interest as provided for by law for the tax periods in dispute.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be Judgment in favor of the Collector and against the Petitioner for the amount of tax, interest, penalties, and attorney's fees (at 10%) due on the taxes owed (after application of the credit referenced above); and that there be Judgment in favor of the Petitioner for refund of the amounts paid associated with the credit (plus any applicable interest as provided by law).

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the parties shall within 15 days submit a proposed money judgment following calculations that are reflective of this Judgment, and that this Judgment shall therefore not be final nor appealable.

JUDGMENT RENDERED AND SIGNED AT Baton Rouge, Louisiana this
8th day of January, 2018.

FOR THE BOARD:

A handwritten signature in blue ink, appearing to read "Cade R. Cole", with a long horizontal flourish extending to the right.

LOCAL TAX JUDGE CADE R. COLE

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WRITTEN REASONS FOR JUDGMENT

On August 16, 2018, this matter came before the Board of Tax Appeals, Local Tax Judge Cade R. Cole, presiding, for hearing on the merits. Participating in the hearing were Andre B. Burvant, Matthew A. Mantle, and John F. Fletcher on behalf of Petitioner Lerner New York, Inc. (the “Petitioner”), and Kenneth Fonte on behalf of Joseph P. Lopinto, III, Sheriff and Ex-Officio Tax Collector for Jefferson Parish and successor to Newell D. Normand, and the Jefferson Parish Sheriff’s Office, Bureau of Revenue and Taxation, Sales and Use Tax Division (the “Collector”). After the hearing, the matter was taken under advisement. The Board now issues Judgment for the following written reasons.

From January 1, 2010 through April 30, 2017 (collectively, the “Sales Tax Periods”), Petitioner engaged in retail sales of tangible personal property in the form of clothing apparel and accessories. Until January 2014, Petitioner maintained three physical stores in Jefferson Parish, located at 197 Westbank Expressway, Gretna, Louisiana, at 1401 Esplanade Ave., Kenner, Louisiana, and at 3301 Veterans Highway, Metairie, Louisiana. In January 2014, Petitioner closed its Veterans Highway location. Petitioner also sold its goods over the internet on its website. Petitioner filed monthly Jefferson Parish sales tax returns for all of its sales from its brick-and-mortar stores in Jefferson Parish. However, Petitioner remitted all taxes collected from sales made on its website to customers in Jefferson Parish during the Sales Tax Periods (the “Online Sales”) to the State of Louisiana Department of Revenue (the “Department”) on Direct Marketer Returns, Form R-1031 (“DMR’s”).

Petitioner collected tax on the Online Sales at a total rate of 8.5% of the purchase price, broken up on Petitioner’s E-Commerce¹ records into 4% state sales tax and 4.5% parish sales tax. Petitioner’s records show that it collected parish sales tax at a rate 4.5% on every Online Sale. Petitioner’s Senior Tax Accountant, Lisa Raspanti, testified at trial that Petitioner remitted all amounts collected to the Department via the DMR’s. However, the DMR rate during the Sales Tax Periods was 8% until April 2016, and 9% thereafter. Petitioner’s witness Andria Siciliano, who is a Director at EisnerAmper and who reviewed Petitioner’s returns, explained the apparent difference in the amount collected and the amount remitted by stating that Petitioner reported more taxable sales on the DMR’s than those recorded on its

¹ E-Commerce is the software Petitioner uses to calculate sales tax on its online sales.

ledger. Reporting a higher amount of sales compensated for the difference in tax rates.

The Collector initiated an audit of Petitioner's sales tax returns in September 2016 (the "Parish Audit"). On May 8, 2017, the Collector filed a Rule for Taxes against Petitioner in the Twenty-Fourth Judicial District Court for the Parish of Jefferson. On June 14, 2017, Petitioner remitted \$147,967.00 to the Collector under protest and gave notice of its intent to file suit. On June 22, 2017, Petitioner then filed the instant Petition to Recover Sales Tax Paid Under Protest with this Board as authorized by La. R.S. 47:337.63.

Petitioner claims that it correctly remitted Jefferson Parish sales tax to the Department on the DMR's. Petitioner argues in the alternative that it is entitled to a credit for taxes paid and not subject to penalties or interest. The Collector takes the position that Petitioner was obligated to remit Jefferson Parish sales tax collected from the Online Sales to the Collector via a Jefferson Parish sales tax return. The Collector also denies that Petitioner is entitled to a credit or shielded from penalties and interest.

The first issue is whether Petitioner could properly remit Jefferson Parish taxes on the DMR. The DMR is used to remit the Direct Marketer Tax. The Direct Marketer Tax is found in R.S. 47:302(K)(5), and applies only to "vendors who qualify as a 'dealer'" in Louisiana "solely" by:

[E]ngaging in regular or systematic solicitation of a consumer market in this state by the distribution of catalogs, periodicals, advertising fliers, or other advertising, or by means of print, radio, or television media, including but not limited to television shopping channels, by mail, telegraphy, telephone, computer database, cable, optic, microwave, or other communication system.

La. R.S. 47:301(4)(h) defines "Dealer" as:

Any person engaging in business in the taxing jurisdiction. “Engaging in business in the taxing jurisdiction” means and includes any of the following methods of transacting business: maintaining directly, indirectly, or through a subsidiary, an office, distribution house, sales house, warehouse, or other place of business or by having an agent, salesman, or solicitor operating within the taxing jurisdiction under the authority of the seller or its subsidiary irrespective of whether such place of business, agent, salesman, or solicitor is located in such taxing jurisdiction permanently or temporarily or whether such seller or subsidiary is qualified to do business in such taxing jurisdiction, or any person who makes deliveries of tangible personal property into the taxing jurisdiction other than by a common or contract carrier.

By Act 22 of the First Extraordinary Session of 2016 (“Act 22”), effective March 14, 2016, the legislature added a second sentence to R.S. 47:302(K)(5), which now additionally provides:

A vendor who qualifies as a dealer in this state as provided in R.S. 47:301(4) is prohibited from collecting the tax imposed under this Subsection in lieu of collecting the sales and use tax imposed by a political subdivision of this state which tax is remitted directly to the political subdivision.

The Petitioner argues that Act 22 is evidence that La. R.S. 47:302(K)(5) is ambiguous as to the scope of the Direct Marketer Tax. The Board disagrees. La. R.S. 47:302(K)(5), both before and after the passage of Act 22, states that the Direct Marketer Tax is imposed only on vendors who qualify as a dealer “solely” through activities virtually identical to those enumerated in R.S. 47:301(4)(l). The statute states that if a vendor qualifies as a dealer by another means, the Direct Marketer Tax is inapplicable.

It is beyond any dispute that Petitioner qualified as a “dealer” under R.S. 47:301(4)(h). Petitioner engaged in business in Jefferson Parish by maintaining employees and multiple retail locations in the jurisdiction. Petitioner did not qualify as a dealer “solely” by virtue of the activities enumerated in La. R.S. 47:302(K)(5). Therefore, Petitioner was not subject to the Direct Marketer Tax, and could not avail itself of the DMR.

For the preceding reasons, the Board agrees with the Collector that the Petitioner was not subject to the Direct Marketer Tax. The Petitioner should have remitted Jefferson Parish sales taxes to the Collector on a Jefferson Parish Sales Tax return. Further, the Board perceives no reason to revisit its prior decision, rendered at the summary judgment phase, as to the proper prescriptive period in this case.² The Board will continue to apply the prescription of ten years under the long established doctrine of *Sabine Pipe & Supply Co. v. McNamara*, 411 So.2d 1167 (La. Ct. App. 1982).

Petitioner claims that it is entitled to a credit under La. R.S. 47:337.86(E) and/or La. R.S. 47:337.86(A)(1) for taxes paid to the wrong taxing authority. La R.S. 47:337.86(E) provides in pertinent part:

E. (1) Notwithstanding any other law to the contrary, no person shall be taxed with respect to a particular event more than once, provided that the person collecting and remitting taxes can produce to the collector documentary evidence to show a good faith effort to recover taxes paid to the incorrect taxing authority. Such documentary evidence shall consist of the following:

(a) A formal request for refund by certified mail which includes all evidence supporting such claim to the taxing authority paid in error.

(b) A second request for refund by certified mail if no response was received within sixty days of the first refund request.

(c) Either the response approving or denying the first or second refund request, whichever may be applicable, or an affidavit from the person stating that no response was received within sixty days of the second refund request. . . .

(2) . . . (b) **For the purposes of this Section, a “similar taxing authority” means a political subdivision having and performing the same governmental functions as the political subdivision seeking to impose the sales or use tax.**

² Petitioner maintained its position on the issue of prescription and offered its Jefferson Parish sales tax returns for its physical locations as evidence at the hearing.

La. R.S. 47:337.86 was enacted by Act 73 of the 2003 Regular Session.

Sections 4 and 5 of Act 73 states:

Section 4. A. It is not intended, and this Act shall not be interpreted, so as to require or enable the state in any way to assume collection of the sales and use taxes of any political subdivision without the consent of a political subdivision.

B. The amount of penalty, interest, or attorney fees due on the sales and use tax of a political subdivision shall be limited as provided by law, including relevant jurisprudence, until such statute or jurisprudence is changed.

Section 5. This Act shall apply to the sales and use tax of any political subdivision of the state which is not a state-wide political subdivision, and any interest, penalty, and other charges related to such tax, which become due on and after July 1, 2003.

Petitioner is not entitled to a credit under La. R.S. 47:337.86(A)(1). La. R.S. 47:337.86(A)(1) requires a “similar tax” paid to a “similar taxing authority.” A “similar taxing authority” is statutorily defined as “a political subdivision having and performing the same governmental functions as the political subdivision seeking to impose the sales or use tax.” R.S. 47:337.86(E)(2)(b). The Department is not a political subdivision of the state. *See* La. Const. art. VI, Sec. 44. In addition, Act 73 provides that La. R.S. 47:337.86 applies to the sales and use tax of a political subdivision of the state which is not a state-wide political subdivision. Act 73’s uncodified text requires that La. R.S. 47:337.86 distinguish between the state Department and the political subdivisions serving as collectors in each parish with explicit authority under the Louisiana Constitution. Consequently, Petitioner is not entitled to a credit under La. R.S. 47:337.86(A)(1).

However, La. R.S. 47:337.86(E)(1), unlike R.S. 47:337.86(A)(1), applies when taxes are paid to an “incorrect” authority. It also follows an imperative that “Notwithstanding any other law to the contrary...” which is generally used for emphasis to give explicit effect to the provisions as written. Although it is awkward

drafting considering the defining of the term appears in a later subparagraph of the same subsection, the Legislature could have chosen to employ its explicitly defined term “similar taxing authority” in Paragraph 1, but it did not do so. The Board must assume that the legislature acted deliberately. *See Billeaudeau v. Opelousas Gen. Hosp. Auth.*, 2017-735 (La. App. 3 Cir. 2/7/18), 239 So.3d 306, 313, *writ denied*, 2018-0388 (La. 5/25/18), 243 So.3d 565.

To claim the credit under La. R.S. 47:337.86(E)(1), the Petitioner must provide the evidence of a good faith effort to recover taxes paid to the incorrect authority. For this purpose, Petitioner must show that it has made a formal attempt to recover the tax and has been denied, or made two formal requests and received no response. Petitioner produced evidence of its formal written requests and the Department’s subsequent denial. Petitioner has therefore satisfied the requirements of R.S. 47:337.86(E)(1).

On February 9, 2018, Petitioner requested a refund from the Department for parish-level taxes remitted on the DMR’s. Petitioner claims that it received no response within sixty days, and on April 13, 2018, submitted a second refund request. On August 7, 2018 the Department denied the second refund request by letter. Petitioner introduced both requests and the denial letter into evidence at the hearing. According to the denial letter, Petitioner’s claim to a refund for the periods of January 2010 through November 2014 have prescribed. In addition, the Department denied the refund request for the periods of December 2014 through December 2017, allegedly due to a lack of supporting documentation showing that the parish taxes were properly remitted and paid to the proper taxing authority.

It is the Petitioner’s responsibility to establish the proper amount of credit allowable under R.S. 47:337.86(E)(1). Any ambiguity in the application or amount

of a credit statute must be strictly construed against the taxpayer. *Ethyl Corporation v. Collector of Revenue*, 351 So.2d 1290 (La. App. 1st Cir.1977), writ denied, 353 So.2d 1035 (La.1978).

The Board therefore cannot agree that the credit should be equal to the entire amount of tax remitted on the DMR's. Allowing a credit in that amount would cancel out all liability and effectively permit a taxpayer to pay its parish taxes to the Department via the DMR. This is exactly the outcome prohibited by Section 4 of Act 73. Furthermore, while the Board finds it equitable to provide a credit in the amount that the Collector actually received via DMR remittances, it does not see fit to extend a credit for the amount of Jefferson Parish tax erroneously remitted elsewhere. The Petitioner is free to seek a refund from the Department for any such overpayments.

La. R.S. 47:302(K)(7)(a)(ii) requires that a portion of the tax collected on DMR's be distributed at certain intervals to parish governments. Petitioner called Michelle Galland, an Assistant Director for the Department, and former Director of Tax Administration, to testify as to how the Department distributes DMR funds in this manner. Ms. Galland stated that she was responsible for review and approval of the Department's records of DMR distributions. Ms. Galland explained that DMR collections are pooled together with collections from Individual Income Tax Returns and Consumer Use Tax Returns (the "Total Consumer Use Tax Collected"). A portion of Total Consumer Use Tax Collected is then set aside for distribution to the Parishes (the "Parish Portion"). Before distribution, certain statutorily mandated amounts are deducted from the Parish Portion and set aside for the Board or the Department (the "Statutory Deductions"). Afterwards, the remainder of the Parish Portion is distributed to the parishes based on population.

The records identified by Ms. Galland do not specifically itemize the amounts distributed for the periods of January 2010 to June 2010, or for the period of April 2017. The Petitioner bears the burden of establishing its entitlement to a credit. Without this information, the Board is unable to determine what amounts Jefferson Parish actually received. Therefore, with respect to these periods, the Board finds that Petitioner has not carried its burden of establishing the amount of allowable credit.

For the rest of the Sales Tax Periods, the amount actually received by Jefferson Parish due to the Petitioner's remittances can be determined. The Board has performed its own calculations based on Ms. Galland's testimony, Petitioner's DMR's, and the Department's records of distributions. The Board concludes that for the periods of July 2010 through March 2017, Petitioner is entitled to a total credit in the amount of \$45,191.14.

To determine the amount of credit, the Board first adds together the total amount of tax remitted by the Petitioner on its DMR's for each of the Department's distribution reporting periods. The Board then multiplies this sum by the ratio of the Parish Portion over Total Consumer Use Collections.³ This is the Petitioner's share of the Parish Portion. The Board multiplies the amount of the Statutory Deductions by the ratio of the Petitioner's share of the Parish Portion over the total Parish Portion. The resulting product is then subtracted from the Petitioner's share of the Parish Portion. Finally, the remaining amount is multiplied by the Jefferson Parish Percentage. This figure represents Petitioner's DMR remittances that were actually distributed to Jefferson Parish.

³ The Parish Portion ratio was 0.5 for the periods of July 2010 through March 2016. From April 2016 through March 2017, the Parish Portion ratio was 0.444444.

The parties dispute whether the Collector is prohibited from assessing penalties and interest by La. R.S. 47:337.86(E)(2)(a), which provides:

The collector shall not impose penalties or interest on taxes erroneously paid or remitted to another taxing authority⁴ unless the erroneous payment or remittance was the result of gross negligence or due to intentional conduct of bad faith on the part of the dealer that collected and remitted the taxes or on the part of the taxpayer that paid the taxes. In instances where a legitimate disagreement exists as to which taxing authority is owed, the involved taxing authorities shall resolve the dispute among themselves through any legal means provided by law, including the filing of a rule or petition against the other taxing authority in the manner provided for in R.S. 47:337.101.

As quoted above, the very next provision, La. R.S. 47:337.86(E)(2)(b), defines the term “similar taxing authority.” However, La. R.S. 47:337.86(E)(2)(a) does not on its face apply only to taxes paid to a “similar taxing authority.” Rather, the provision applies when taxes are paid to “another” taxing authority. This less than stellar drafting results in ambiguity.

The Board is compelled to follow the longstanding rule that statutes which have the result of the imposition of a penalty should be narrowly construed against imposing the penalty. *See e.g.* *Bridges v. Lyondell Chemical Co.* 2005-CA-1535 (La. App. 1st Cir. 2006), 938 So.2d 786; *Colonial Pipeline Co. v. Traigle*, 353 So.2d 728 (La. App. 1st Cir. 1978) (*overruled on other grounds*).

The Board must also consider the context of these provisions, the clear expression of intent in Act 77’s uncodified sections, and the fact that “similar taxing authority” is defined in the exact same paragraph of the same Subsection. Therefore, the Board finds that the probable intent of the Legislature was to provide penalty

⁴ The reading advanced by the Collector could be accomplished if the statutory text used the defined term, “Similar Taxing Authority,” in place of “another taxing authority” or “incorrect taxing authority.”

relief only for taxes erroneously paid to another similar taxing authority. This context forecloses application of the penalty relief section to the Petitioner.

The Board has already found that La. R.S. 47:302(K)(5) as in effect prior to 2016 unambiguously precluded Petitioner from remitting Jefferson Parish sales taxes on the DMR. And, regardless of any advice Petitioner received, the statute became even more abundantly clear when Act 22's amendment went into effect on March 14, 2016. Petitioner is presumed to know the law, however there was no specific evidence of ill intent or bad faith in the Petitioner's early filings.⁵ However, in September 2016, the Collector commenced an audit of Petitioner's website sales, and notified the Petitioner of its erroneous processes.

Given the complete clarity in the law, and the fact that Petitioner was notified of the issue via audit and continues to refuse to correct it, the Board finds that this Petitioner could not have continued to remit Jefferson Parish sales taxes on the DMR's after September 2016 absent gross negligence or bad faith. Therefore, even if §337.86(E)(2) applied to this case, Petitioner would be subject to penalties and interest for any taxes improperly remitted via the DMR on and after September 30, 2016.

For the foregoing reasons, the Petitioner is entitled to a credit in the amount of \$45,191.14 for the tax periods of July 2010 through March 2017. Petitioner is not relieved of penalties or interest on the remaining balances due. Furthermore, with

⁵ Louisiana courts have frequently addressed the concept of gross negligence. Gross negligence has been defined as the "want of even slight care and diligence" and the "want of that diligence which even careless men are accustomed to exercise." *State v. Vinzant*, 200 La. 301, 7 So.2d 917 (La.1942). Gross negligence has also been termed the "entire absence of care" and the "utter disregard of the dictates of prudence, amounting to complete neglect of the rights of others." *Hendry Corp. v. Aircraft Rescue Vessels*, 113 F.Supp. 198 (E.D.La.1953) (applying Louisiana law). "There is often no clear distinction between such [willful, wanton, or reckless] conduct and 'gross' negligence, and the two have tended to merge and take on the same meaning." *Falkowski v. Maurus*, 637 So.2d 522 (La.App. 1st Cir.), writ denied, 629 So.2d 1176 (La.1993) (quoting *Prosser & Keeton*, supra, at 214). Gross negligence, therefore, has a well-defined legal meaning distinctly separate, and different, from ordinary negligence.

respect to the tax periods of January 2010 through June 2010, and April 2017, Petitioner is not entitled to a credit, due to a factual finding of a lack of record evidence sufficiently establishing amounts paid to the Department.

Baton Rouge, Louisiana this 8TH day of January, 2018.

FOR THE BOARD:



LOCAL TAX JUDGE CADE R. COLE