

**BOARD OF TAX APPEALS
STATE OF LOUISIANA**

**METALS USA PLATES & SHAPES SOUTHEAST, INC.
PETITIONER**

VERSUS

DOCKET NO. 9342D

**LOUISIANA DEPARTMENT OF
REVENUE, STATE OF LOUISIANA
RESPONDENT**

c/w

**O'NEAL STEEL LOUISIANA LLC
PETITIONER**

VERSUS

DOCKET NO. 9250

**LOUISIANA DEPARTMENT OF
REVENUE, STATE OF LOUISIANA
RESPONDENT**

WRITTEN REASONS FOR JUDGMENT

Before this Board are Petitioners, Metals USA Plates & Shapes, Inc. and O'Neal Steel Louisiana, LLC (the "Petitioners") who seek a refund of sales and use taxes from the Secretary, Louisiana Department of Revenue and Taxation (the "Secretary"). This Board heard a trial on the merits on March 7, 2017. Participating in the trial were: Nicole Gould Frey, attorney for Petitioners, and Aaron Long, attorney for the Secretary. After the hearing, the case was taken under advisement.

Petitioners are engaged in the business of welding and metals fabrication. Petitioners purchased and paid sales tax on welding gases which are used as shielding gases in the welding process. Petitioners filed a refund claim for various sales taxes (including sales taxes paid on gases) for periods beginning January 2011 through February 2014 claiming various exemptions relating the Manufacturing, Machinery and Equipment exemption. The Secretary partially allowed certain of the refunds, but denied the claims for sales taxes paid on the purchase of the welding

gases. Petitioners and the Secretary entered into a Joint Stipulation filed with this Board March 2, 2017 stipulating to the amounts of tax refunded to the Petitioners prior to trial, and the amounts remaining in dispute.

At the hearing, Petitioners submitted uncontroverted evidence that the sales taxes that are the subject of this case were in fact paid on Petitioners' purchases of various welding gases. The Secretary concedes these facts. Thus, the sole issue presented to this Board is a legal one: whether the Petitioners' purchases of welding gases are exempt from sales tax under La. R.S. 47:301(10)(x).

For the reasons that follow, we find that they were not exempt. La. R.S. 47:301(10)(x) (in effect for the tax years at issue) as reported by the Louisiana State Law Institute ("Institute") and as generally published provided:

(x) For purposes of the sales and use tax imposed by the state or any political subdivision whose boundaries are coterminous with those of the state, the terms "retail sale" or "sale at retail" shall not include the following:

(i) The sale or purchase by a person of any fuel or gas, including but not limited to butane and propane.

(ii) Beginning July 1, 2008, the sale or purchase by any person of butane and propane.

However, at the trial of this matter, the Secretary argued and submitted evidence that La. R.S. 47:301(10)(x) was separately amended by two different Acts of the Legislature during its 2008 Second Extraordinary Session. Specifically, prior to 2008, La. R.S. 47:301(10)(x) read as follows:

(x) For purposes of the sales and use tax imposed by the state or any political subdivision whose boundaries are coterminous with those of the state, the terms "retail sale" or "sale at retail" shall not include the sale or purchase by a consumer of any fuel or gas, including but not limited to butane and propane for residential use by the customer.

The first act, House Bill 1, amended the above version of La. R.S. 47:301(10)(x) as follows (strikeout words being deletions and bolded underlined

words being additions):

(x) For purposes of the sales and use tax imposed by the state or any political subdivision whose boundaries are coterminous with those of the state, the terms "retail sale" or "sale at retail" shall not include the sale or purchase by a ~~consumer~~ **person** of any fuel or gas, including but not limited to butane and propane ~~for residential use by the customer~~.

The legislative history of House Bill 1 as reported in the Legislative Calendar of the 2008 Second Extraordinary Session reflects that (1) the Bill was pre-filed March 7, 2008; (2) the House of Representatives voted on and passed the bill on March 12, 2008; (3) the Senate voted on and passed the bill on March 14, 2008; and (4) the governor signed House Bill 1 on March 24, 2008, at which point it was designated as Act 1 of the 2008 Second Extraordinary Session of the Louisiana Legislature ("Act 1").

However, Senate Bill 7 of the 2008 Second Extraordinary Session also amended La. R.S. 47:10(x). Specifically, Senate Bill 7 provided (strikeout words being deletions and bolded underlined words being additions):

(x) For purposes of the sales and use tax imposed by the state or any political subdivision whose boundaries are coterminous with those of the state, the terms "retail sale" or "sale at retail" shall not include **the following:**

(i) The sale or purchase by a consumer of any fuel or gas, including but not limited to butane and propane for residential use by the consumer.

(ii) Beginning July 1, 2008, the sale or purchase by any person of butane and propane.

The legislative history of Senate Bill 7 as reported in the Legislative Calendar of the 2008 Second Extraordinary Session reflects that (1) the Bill was pre-filed March 7, 2008; (2) the House of Representatives voted on and passed the bill on March 14, 2008; (3) the Senate voted on and passed the bill on March 14, 2008; and (4) the governor signed Senate Bill 7 on March 24, 2008, at which point it was designated as Act 9 of the 2008 Second Extraordinary Session of the Louisiana

Legislature (“Act 9”).

The version of La. R.S. 47:301(10)(x) submitted by the Institute for publication pursuant to its authority under La. R.S. 24:251, *et seq.*, did not reproduce either Act 1 or Act 9. Instead, the Institute attempted to reconcile the two Acts. Specifically, the Institute’s version of La. R.S. 47:301(10)(x) used the term “person” (Act 1) rather than “consumer” (Act 9) and more importantly, **it also deleted entirely the reference to “residential use by the consumer” found in Act 9.** On its face, the Institute’s version of La. R.S. 47:301(10)(x) makes La. R.S. 37:301(10)(x)(ii) (exempting the purchase of propane and butane by any person after July 1, 2008) superfluous and unnecessary since La. R.S. 47:301(10)(x)(I) exempts such purchase by a “consumer” in any event.

Turning to the facts of the instant case, under the language of either Act 1 or the Institute’s version of La. R.S. 47:301(10)(x), the Petitioners would be entitled to their refund claims as they would be a “person” who has purchased “any fuel or gas.”

However, under the language of Act 9, the Petitioners would **not** be entitled to their refund claim as it is undisputed that (1) the Petitioners did not purchase the gases for residential use; and (2) that none of the gases purchased by Petitioners were either propane or butane.

Petitioners argue that Act 1 and Act 9 are not in conflict, and therefore it is not necessary to determine whether either Act 1 or Act 9 repealed the other, making relevant their order of enactment. The Secretary argues that the distinction between “residential” use (as referenced in Act 9) and all uses (whether residential or commercial) (as implied by Act 1) constitutes a real conflict between the two Acts.

The Board agrees with the Secretary and finds that there exists a conflict between Act 1 and Act 9. The clear wording in Act 1 would render the Petitioners’

purchases of welding gases non-taxable as a purchase of “any fuel **or gas**” [emphasis added] by a “person.” Contrary to Act 1, the clear wording in Act 9 would render the Petitioners’ purchases of welding gases taxable since the exemption applicable to the purchase of “any fuel or gas” applies only to such purchases for “residential use by the consumer” and no other exemption or exclusion for the purchase of welding gases is applicable to the facts of this case. This dichotomy of tax treatment resulting from the separate application of Acts 1 and 9 to the facts of this case *ipso facto* creates a conflict between these two acts.¹

Having determined that Acts 1 and 9 are in conflict, we must now determine how to resolve that conflict. It is well established that in the case of conflict between two acts of the legislature, it is the last expression of legislative will that controls. *State v. St. Julian*, 61 So. 2d 464 (La. 1952); *In Re Davies*, 55 So. 3d 918 (La. Ct. App. 1st Cir. 2011) at fn7; *Dickerson v. Hennen*, 249 So. 2d 251 (La. Ct. App. 2d Cir, 1971). There is no other reasonable rule that could be applied to conflicting statutes passed at the same session of the legislature than to hold that the later expression of the legislative will must govern. *State v. St. Julian*, supra at 466.

In the instant matter, before this Board is the unprecedented situation where both HB 1 and SB 7 were voted on and passed by the Senate on the same date - March 24, 2008. The Department put on evidence that SB 7 was voted on and passed by the Louisiana Senate during the afternoon of March 24, 2008, while HB 1 was voted on and passed by the Louisiana Senate during the morning of that same day. Both bills had been voted on and approved by the Louisiana House of Representatives prior to the Senate vote.

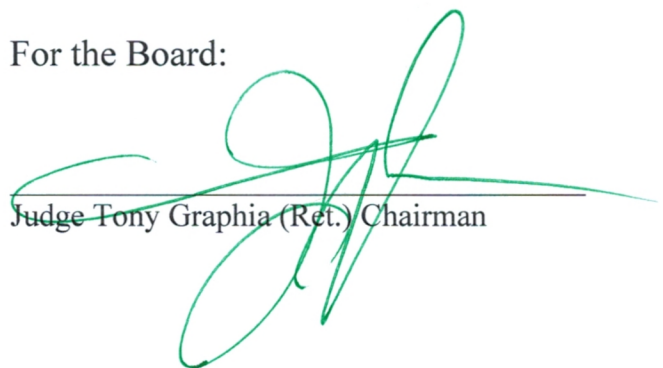
¹ The text limiting the broader exemption to residential uses by a consumer (which was deleted by Act 1) was explicitly retained in the re-enactment of Act 9; this also creates a direct textual conflict that can only be resolved by ascertaining the last expression of legislative will.

Yolanda Dixon, First Assistant Secretary of the Senate, testified at the trial of this matter that she had reviewed the Legislative Calendar of the State of Louisiana and the Official Journal of the Senate (both of which were accepted into evidence without objection) and explained that the sequencing of the reporting in the Legislative Calendar and the Official Journal of the Senate established that SB 7 was voted on and approved by the Senate in the afternoon of March 14, 2008, whereas HB 1 was voted on and approved by the Senate in the morning of March 14, 2008. Further, the Petitioners failed to put on any evidence as to the timing of the voting by the Senate of either of these two bills. Not only have the Petitioners failed to carry their burden of proof on this issue, the Secretary has established by a preponderance of the evidence that SB 7 is the last expression of legislative will, and therefore Act 9 controls. Act 9 is also the later enactment of law concerning the matter (being signed into law after Act 1).

For the reasons set forth above, and having established that Act 9 was the law in effect during the tax periods at issue, the refund claims of Metals USA Plates & Shapes, Inc. and O'Neal Steel Louisiana, LLC are denied.

Baton Rouge, Louisiana, this 10 day of May, 2017.

For the Board:



Judge Tony Graphia (Ret.) Chairman