

2016 WL 8853681 (La.Bd.Tax.App.)

Board of Tax Appeals

State of Louisiana

NEWMAN HOLDINGS, LLC AND DANNY E. NEWMAN, PETITIONERS

v.

LOUISIANA DEPARTMENT OF REVENUE, STATE OF LOUISIANA, RESPONDENT

Docket No. 7578

October 11, 2016

ADDITIONAL WRITTEN REASONS FOR JUDGMENT

A hearing on the Secretary, Department of Revenue's (the "Secretary") Motion for Summary Judgment was heard by the Board on August 10, 2016 with Judge Tony Graphia (Ret.), Chairman; Board Members Cade R. Cole and Francis J. "Jay" Lobrano present, and no member absent. Participating in the hearing were: Dan E. Newman, representing himself and Newman Holdings, LLC, and Russell J. Stutes, attorney for the Secretary. After the hearing, the case was taken under advisement, and Judgment was unanimously rendered on this date for the following written reasons:

The Assessed taxpayers are Dan E. Newman, individually ("Newman") and Newman Holdings LLC ("LLC"). Both Taxpayers appeal the Secretary's assessment of sales tax on the purchase of three large motor homes/coaches.

The evidence presented at the trial on the Secretary's Motion for Summary Judgment revealed the following. Newman wanted to acquire motor homes for his personal business operations. Newman had a Montana LLC, Newman Holdings, LLC, created solely to purchase the motor homes. On November 17, 2004 the LLC purchased from Marathon Coach, Inc. of Oregon a 2002 Marathon Prevost motor home (the 2002 Motor Home). The bill of sale listed the LLC's address as 135 W Main Street, Missoula, Montana. That address is the office of Bennett Law Office. There was no evidence that the 2002 Motor Home was ever in Missoula, Montana.

On October 26, 2005, the LLC purchased from Marathon Coach, Inc. of Oregon a 2006 Marathon Prevost motor home (the 2006 Motor Home). The bill of sale listed the LLC's address as 135 W Main Street, Missoula, Montana. That address is also the office of Bennett Law Office. There was no evidence that the 2006 Motor Home was ever in Missoula, Montana.

On July 17, 2007 the LLC purchased from Marathon Coach, Inc. of Oregon a 2008 Marathon Prevost motor home (the 2008 Motor Home). The bill of sale listed the LLC's address as 135 W Main Street, Missoula, Montana. That address too is the office of Bennett Law Office. There was no evidence that the 2008 Motor Home was ever in Missoula, Montana.

After the issuance of the original Assessments, the Secretary gave credit for trade-ins of both the 2002 and 2006 Motor Homes.

All three of the motor homes were in the possession of Mr. Newman and were used and garaged in Louisiana. Both Dan Newman and Newman Holdings, LLC have been assessed sales taxes on the purchase of the three motor homes. Mr. Newman admitted that the only purpose of the LLC was to purchase the three motor homes and to avoid paying Louisiana use tax on the Motor homes. The LLC conducted no business whatsoever, and its only activity was to own the motor homes. The Secretary reduced the amounts of the assessments on the 2006 and 2008 motor homes to reflect the trade-ins on the cost price of those two motor homes.

Importantly, the Department served upon Newman Holdings, LLC and Mr. Dan Newman personally a set of 25 Requests for Admissions. Neither the Company nor Mr. Newman ever responded to these requests. Under La. Code Civ. Pro. art. 1467(A), “each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within thirty days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney.” Further, under La. Code Civ. Pro. art. 1468, “[A]ny matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission.”

An analysis of the Requests for Admissions and the deemed admissions set forth facts that establish that the transaction was entered into by Newman Holdings, LLC and Mr. Dan Newman for the sole purpose of evading Louisiana taxes. For example, Request for Admission No. 1 established that Mr. Newman “formed Newman Holdings, LLC for the sole purpose of evading sales taxes.” Request for Admission No. 11 established that Mr. Newman’s “formation of Newman Holdings, LLC never had any genuine business purpose.” Request for Admission No. 12 established that Mr. Newman’s “formation of Newman Holdings, LLC never had any economic substance, at its formation and throughout its existence.”

The Board will first discuss the liability of Newman Holdings, LLC for the sales tax on its RV purchases. The LLC is the owner stated on the bills of sales of each of the three motor homes.

La. R.S. 47:302 A. states in part:

“There is hereby levied a tax upon the...use, the consumption...and the storage for use or consumption in this state of each item or article of tangible personal property...”. (emphasis supplied)

The evidence clearly establishes that the LLC has “used” and “stored” the three motor homes in this state as contemplated by the statute and is liable for the assessments. This fact was established as per the deemed admission of Mr. Newman and Newman Holdings, LLC that “the RV’s you purchased that are the subject of this litigation have been used and garaged in Louisiana numerous times for extended periods.”

Considering the deemed admissions and undisputed facts established by the Department in this case, Newman Holdings, LLC is liable for the state sales and use tax on the purchase of the three recreational vehicles.

The Board will next discuss the personal liability of Dan E. Newman for the taxes assessed. The evidence shows that Newman created the LLC for the sole purpose of acquiring motor homes to avoid paying Louisiana sale/use tax. The LLC had no other purpose than to avoid paying taxes. It conducted no business whatsoever. It appears that it owned no other assets, had no employees, bank account, no telephone, no place of business. The LLC was involuntarily dissolved on December 1, 2014 for failure to file annual reports with the Montana Secretary of State.

The jurisprudence of this state has addressed situations such as the one under consideration.

In *Chemtech Royalty Associates, L.P., by Dow Europe, S.A., as Tax Matters Partner v. United States of America* (CA No. 0944-BAJ-DLD, NO. 06-258-BAJ-DLD, NO. 07-405-BAJ-DLD-USDC MDLA-2013), in the context of a federal tax question, the court considered whether a partnership should be disregarded as a sham. The theory of that case can be applied to the one under consideration. A legal entity can be disregarded if it is a “sham”. A legal entity should be respected if its creation was for the purpose of carrying on a business. The question turns on the fair, objective characterization of the LLC. The question is whether the LLC was created in good faith with a business purpose in mind. If there is not a legitimate business purpose for the creation of the LLC, it will not be respected for tax purposes.

It is also well settled that in matters of taxation, the substance controls over form. *Collector of Revenue v. Maison Blanche Corporation* 126 So.2d 704 (La.App. 4 Cir. 1/23/1961) and cases cited therein. The substance of an agreement is controlling for the determination of tax liability for sales/use or lease/rental purposes. *McNamara v. Electrode Corporation*, 418 So. 2d 652 (La. App. 1st Cir.) *writ denied*, 420 So. 2d 986 (La. 1982). Under both the sham transaction doctrine and the substance over form doctrine, this Board can ignore the existence of an LLC and look to its sole member as being liable for taxes for which the LLC is responsible. *See also Monsanto v. St. Charles Parish School Bd.* 650 So.2d at 757 (La. 1995).

Under the jurisprudential doctrines cited and explained above, this Board finds that Newman Holdings, LLC had no business purpose and that the sole reason for creating the Company was to avoid the payment of Louisiana sales tax and therefore the Company should be disregarded for tax purposes. Mr. Newman is therefore individually liable for the sales tax.

Finally, in *Thomas v. Bridges*, 144 So. 3d 338 (2014) (considering the imposition of sales tax in a similar situation), the Court expressly declined to consider the doctrines of “substance over form” and “economic substance” as these issues were not raised at the trial and the Court would not consider the issues raised only for the first time on appeal. Unlike *Thomas*, *supra*, the Department properly raised these issues in their Motion for Summary Judgment and memoranda in support thereof before this Board.

In *Thomas* the Department failed to properly assess the business entity, a defect that it did not repeat in the present case. A final and important distinguishing factor in the present case is the fact that this Board had before it 25 deemed admissions of fact constituting “undisputed issues of material fact” for purposes of La. Code. Civ. Pro. art. 1966. These undisputed facts clearly support the position of the Secretary and therefore the instant matter is distinguishable from *Thomas*, *supra*.¹

For the reasons set forth above, Newman Holdings, LLC and Danny E. Newman a/k/a Dan Newman are liable *in solido* for Louisiana sales and use taxes on the purchase of the three recreational vehicles.

Baton Rouge, Louisiana, this 11 day of October, 2016.

For the Board:

Judge Tony Graphia (Ret.)
Chairman

Footnotes

- 1 Although the Board applied the then existing law, and the decision in *Thomas*, *supra* to the present case, it takes note of the fact that Act No. 107 of 2015 prospectively changed the law enacting La. R.S. 47:303(B)(8) to address the result in *Thomas*.
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