BOARD OF TAX APPEALS
STATE OF LOUISIANA

NORTHEAST LOUISIANA CANCER INSTITUTE, LLC
Petitioners

VERSUS

DOCKET NO. 9241

DEPARTMENT OF REVENUE,
STATE OF LOUISIANA
Respondent

VERSUS

VARIAN MEDICAL SYSTEMS, INC.
Respondent

****

JUDGMENT

****

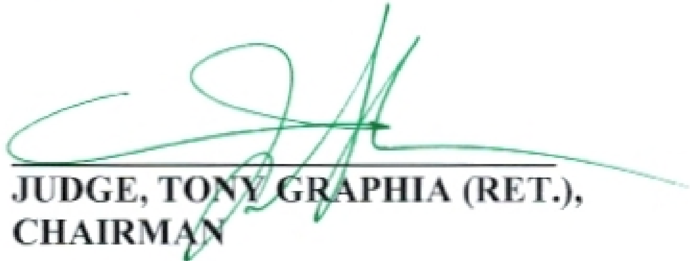
A hearing on the motions for summary judgment filed by Northeast Louisiana Cancer Institute, LLC ("NLCI") and Varian Medical Systems, Inc. ("Varian"), respectively, were heard by the Board on August 8, 2017 with Judge Tony Graphia (Ret.), Chairman, and Board Members Cade R. Cole a Jay Lobrano present, and no member absent. Participating in the hearing were: Miranda Y. Conner, attorney for Secretary of Revenue for the state of Louisiana (the "Secretary"); Caroline D. LaFourcade and Doug Sigel, attorneys for NLCI, and Douglas L. Salzer, attorney for Varian. After the hearing, the case was taken under advisement, and the Board now unanimously renders its Judgment for the written reasons issued herewith.

IT IS ORDERED, ADJUDGED AND DECREED that the motion for Summary Judgment of NLCI BE AND IS HEREBY DENIED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Varian's Motion for Summary Judgment BE AND IS HEREBY DENIED.

Judgment Rendered and Signed at Baton Rouge, Louisiana this 7th day of February, 2018.

FOR THE BOARD:



JUDGE, TONY GRAPHIA (RET.),
CHAIRMAN

BOARD OF TAX APPEALS
STATE OF LOUISIANA

NORTHEAST LOUISIANA CANCER INSTITUTE, LLC
Petitioners

VERSUS

DOCKET NO. 9241

DEPARTMENT OF REVENUE,
STATE OF LOUISIANA
Respondent

VERSUS

VARIAN MEDICAL SYSTEMS, INC.
Respondent

****

WRITTEN REASONS FOR JUDGMENT

****

A hearing on the motions for summary judgment filed by Northeast Louisiana Cancer Institute, LLC ("NLCI") and Varian Medical Systems, Inc. ("Varian"), respectively, were heard by the Board on August 8, 2017 with Judge Tony Graphia (Ret.), Chairman, and Board Members Cade R. Cole a Jay Lobrano present, and no member absent. Participating in the hearing were: Miranda Y. Conner, attorney for Secretary of Revenue for the state of Louisiana (the "Secretary"); Caroline D. LaFourcade and Doug Sigel, attorneys for NLCI, and Douglas L. Salzer and Bradley Driscoll, attorneys for Varian.

NLCI is a cancer treatment hospital with locations in Monroe and West Monroe, Louisiana. Varian is a manufacturer of linear accelerators located in Palo Alto, California. A linear accelerator is a large and complex machine used to treat cancer patients. In this matter, NLCI and Varian entered into a contract wherein NLCI agreed to purchase a linear accelerator from Varian to be used by NLCI to treat patients at NLCI's hospitals.

Varian sent two invoices to NLCI for the purchase price of the linear accelerator. ($2,267,992.00 and $213,066.95 [which included sales tax]). NLCI

prays that the Secretary refund $85,226.78 of the taxes it paid under protest to Varian and NLCI has filed a petition with this Board against the Secretary to recover the taxes that it avers it did not owe. The Secretary filed a demand against Varian in this proceeding pursuant to La. R.S. 47:1407(5), claiming that Varian owes contractor use tax in the event that NLCI did not owe sales tax.

NLCI takes the position that the linear accelerator to be installed by Varian in NLCI's hospital was in fact the purchase of an immovable. Louisiana's sales tax is not applied to the purchase of immovable or their component parts. Varian argues that it sold NLCI a movable and that it properly collected the tax for the Secretary on the sale of that movable (tangible personal property).

Introduced into evidence with a Stipulated Protective Order is the Affidavit of Jim Rutherford. Attached to that affidavit as Exhibit A is a Quotation from Varian to NCLI dated August 28, 2012. The Quotation states the terms of the agreement between Varian and NLCI. The Quotation states: "FOB Point: US1 FOB: Origin Inc." Attached to the Quotation is a document entitled: "Terms and Conditions of Sale." Part of the Terms and Condition of Sale; is a section referred to as "Hardware Section", paragraph 1 of which states: "1. Transportation and Risk of Loss" which states: "All shipments are per the Incoterms (Incoterms 2010) set forth in the Quotation with Varian selecting the transportation company. Title shall pass at the same time that the risk of loss shifts."

As stated in the Quotation, the shipment is FOB Origin. Although NLCI mad arguments concerning inspections during the warranty period, the Board finds that title and risk of loss transferred as described on the face of the contract. When Varian

delivered the linear accelerator to the shipping company, and title transferred, the product was still in multiple boxes and clearly a movable.[1]

NLCI's position is that the sale was installed a component part of an immovable. The third paragraph of Louisiana Civil Code Article 466 provides that a thing is a component part of a building or other construction if so attached that the thing "cannot be removed without substantial damage to themselves or to the building or other construction." La. Civ. Code art. 466. This is known as the Substantial Damage Test.

Whether or not removal of a thing would cause substantial damage is an issue of fact, which cannot be resolved on summary judgment if subject to a genuine dispute. *Lapalco Village Joint Venture v. Pierce*, 16-731 (La. App. 5th Cir. 6/15/17), 223 So.3d 692. Our courts have recognized that unscrewing or unbolting objects from the walls of a building causes merely superficial damage that is not substantial. *Prytania Park Hotel, Ltd. V. Gen. Star Indem. Co.*, 179 F.3d 169 (U.S. 5th Cir. 1999). Disconnecting an item from a building's electrical wiring, plumbing, and special flooring has been held to not constitute substantial damage. *City of New Orleans' Dept. of Finance v. Touro Infirmary*, 2004-0835 (La. App. 4th Cir. 4/27/05), 905 So.2d 314.

The *Touro* Court found the item to be a movable even though the tomography equipment was wired into the electrical system of the hospital, was incorporated into the building's water system for chilling the equipment, required special flooring, and the removal would cause "some damage" to the floor to which the equipment was bolted. *Id.* at 326.

[1] In PLR 06-10, the Secretary has opined that a Vendor is liable for use tax if it brings tangible personal property into the State to fulfill its contract in Louisiana. A corollary would be that bringing the movable property into the state by its owner could trigger a use tax obligation irrespective of the sales tax consequence.

In *Willis-Knighton Medical Center v. Caddo-Shreveport Sales and Use Tax Commission*, 2004-0473 (La.4/1/05), 903 So.2d 1071, the removal of an MRI machine was held not to cause substantial damage to either the machine or the building to which it was attached. Although the code article was amended in other respects, this remains the seminal case in explaining the scope of the substantial damage test. In *Willis-Knighton*, testimony at trial established that the MRI was installed in a room, the floor of which had to be specially prepared due to the machine's weight. *Id.* at 1090. The MRI was placed on an epoxy foundation and bolted to the floor, and also hard wired to the hospital's electrical system. *Id.* The MRI could be removed by unbolting it, disconnecting the electrical wiring, which would have necessitated minor repairs to the sheetrock and the floor tile. *Id.*

Based on the summary judgment evidence, the removal of the LAS itself would not cause substantial damage to the hospital building. The removal of the base/frame, which was cemented into the ground would cause substantial damage to the hospital building. However, the base is flush with the floor and there is nothing to suggest it is required to be removed to remove and resell the LAS machine.

NLCI argues that you must consider the removal of the LAS as an entire unit, machine and base, while Varian argues that you should consider them separately as it customarily removes and resells the machines and leaves the base.

Based on the summary judgment evidence, the Board agrees that the base is a component part of the immovable due to the substantial damage that would occur if it were removed, but does not agree that this alone equates to the entire LAS machine becoming a component part. However, the Board finds that based on the summary judgment evidence that the LAS machine itself can be removed without substantial damage to the building.

The parties are also in disagreement over whether removal would cause substantial damage to the LAS machine itself. The Varian Affidavit is confident that it is not substantially harmed. The NLCI Affidavit states that disassembly would damage component parts of the LAS such as internal plumbing and electrical power connections. The fact that it can be resold supports the Varian position that any damage would not be substantial. However, NLCI's affidavit concerning needed repairs gives rise to a disputed issue of material fact since it is unclear whether these repairs are to repair minor damage or 'substantial damage' to the machine.

The NLCI motion for summary judgment asks that a refund be ordered in its favor. The Varian motion for summary judgment asks that the Secretary's third party demand be dismissed on the grounds that it cannot owe the tax under these facts. The Secretary did **not** file her own motion for summary judgment arguing that the tax is due and asking that the NLCI refund petition be dismissed.

The Board finds that both motions should be overruled, and that this matter should be referred to a trial on the merits for a resolution of any issues not resolved herein. The Board's finding based on the summary judgment evidence is that the LAS base is a component part of an immovable, but that the LAS machine itself can be removed without causing substantial harm to the building. The Board reserves Judgment on the issue of whether the LAS machine itself would be substantially harmed by removal—which would also make it a component part of the immovable. The relief prayed for by Varian is a complete finding that it is not liable for any tax, therefore its motion is denied.

Baton Rouge, Louisiana this 7th day of February, 2018.

FOR THE BOARD:

JUDGE, TONY GRAPHIA (RET.), CHAIRMAN

NOTICE OF JUDGMENT AND APPEAL RIGHTS

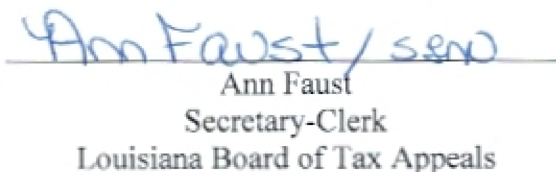
ENCLOSED IS A CERTIFIED COPY OF THE JUDGMENT RENDERED ON THE 7th DAY OF FEBRUARY, 2018:

A Judgment of the Board of Tax Appeals may be appealed to the proper Court of Appeals "**within thirty days of the signing of a decision or judgment of the Board**" in the manner specified in R.S. 47:1434-38.

Costs for appeal are described in the promulgated rules of the Board (codified pursuant to R.S. 47:1413, found in Louisiana Administrative Code Title 69).

In matters where the Board found that tax was due, the appellant is required to post a security in the amount of **one and one-half (1 ½) times** the tax, interest and penalty found to be due, prior to filing the *Motion for Review.* (R.S. 47:1434)

I hereby certify that the above and forgoing notice was mailed with the judgment by me, postage prepaid, to counsel of record for all parties and to those who were not represented by counsel, directed to their last known address, on this 7th day of February, 2018.



Ann Faust
Secretary-Clerk
Louisiana Board of Tax Appeals