

**BOARD OF TAX APPEALS
STATE OF LOUISIANA**

**ODEBRECHT CONSTRUCTION INC.
PETITIONER**

VERSUS

DOCKET NO. 9058

**TIM BARFIELD, SECRETARY,
DEPARTMENT OF REVENUE,
STATE OF LOUISIANA**

RESPONDENT

**ORDER WITH WRITTEN REASONS
ON TAXPAYER'S MOTION
FOR SUMMARY JUDGMENT AND COLLECTOR'S
MOTION FOR SUMMARY JUDGMENT**

A hearing on the Cross Motions for Summary Judgment filed by Odebrecht Construction, Inc. (the "Taxpayer") and Kimberly Robinson, in her capacity as Secretary of the Louisiana Department of Revenue (the "Collector") was held before the Board of Tax Appeals on February 7, 2017, with Judge Tony Graphia (ret.), Chairman, and Board Members Cade R. Cole and Jay Lobrano present, and no member absent. Present before the Board were: Cheryl M. Kornick and Robert S. Angelico, attorneys for Taxpayer, and Christopher Jones, attorney for the Collector. After the hearing, the case was taken under advisement.

Taxpayer appeals the Collector's denial of a refund of Louisiana state sales taxes in the amount of \$827,491.40.

Taxpayer entered into a contract (the Contract) with United States Army Corps of Engineers (COE) to build a project called: LPV 9.2 Lake Pontchartrain Pump Stations, Jefferson Parish, LA. (Project). The Contract and the Project were quite involved. In general, the Project calls for materials and work to construct the

Project. Taxpayer purchased various materials for the project and paid its vendors the state sales tax.

Taxpayer now contends that the sales taxes were not owed and Taxpayer wants the sales taxes refunded to it. Taxpayer's position is founded on La. R.S. 47:301(10)(g) which paragraph states:

“(g) The term ‘retail sale’ does not include a sale of corporeal movable property which is intended for future sale to the United States government or its agencies, when title to such property is transferred to the United States government or its agencies prior to the incorporation of that property into a final product.” (emphasis supplied)

It is the contention of Taxpayer that, in fulfilling its obligations under the Contract, it should not have paid Louisiana state sales taxes to its vendors on purchases of certain materials that were to be used in the Project. The Taxpayer contends that the materials on which it paid the sales taxes were “for future sale to the United States government or its agencies” and therefore the purchase of the material was not a “retail sale.”

The Collector's position is that, as a matter of law, the purchase of such materials was not “for future sale to the United States government or its agencies.” The position of the Collector is based on the principle that when a contractor purchases materials for use in a building contract, the contractor is itself liable for the sales tax because the contractor is the consumer of the materials, i.e. that the materials are purchased for use and not resale. This position is generally consistent with longstanding jurisprudence. In the case of *Claiborne Sales Company, Inc. v. Collector of Revenue*, 233 La. 1061 (La. 1957) it was stated:

“A contractor who buys building materials is not one who buys and sells--a trader. He is not a 'dealer,' [233 La. 1067] or one who habitually and constantly, as a business, deals in and sells any given commodity. He does not sell lime and cement and nails and lumber. His undertaking is to deliver to his obligee some work or edifice or structure, the construction of which requires the application of skill and labor to these

materials so that, when he finishes his task, the materials purchased are no longer to be distinguished, but something different has been wrought from their use and union. The contractor has not resold but has consumed the materials. Sales to contractors are sales to consumers.”

See also: *State v. J. Watts Kearny & Sons*, 181 La. 554, 160 So.77, and *Bill Roberts, Inc. v. McNamara*, 539 So.2d 1226 (La. 1989).

The Board has previously ruled on the application of La. R.S. 47: 301(10)(g) in a Corps construction contract. The First Circuit decision upholding the Board’s Judgments in *Odebrecht Construction, Inc. v. Louisiana Department of Revenue*, can be found at 182 So.3d 132 (La. App. 1st Cir. 2015) (hereinafter referred to as “*Odebrecht I*”).

§ 301(10) involves the definition of a retail sale, and paragraph (g) specifically defines a category of transactions that are not to ever be included within the definition of a “sale at retail.” This paragraph operates as exclusion from tax. *Odebrecht I* made clear that even when the contractor would normally owe tax for the materials it used, the provisions of the La. R.S. 47:301 (10)(g) exclusion can operate remove a transaction from the reach of the sales and use tax.

The present case involves construction with myriad materials and payment mechanisms, while *Odebrecht I* involved the construction of a levee and only dirt purchases were truly in dispute. In *Odebrecht I* there was evidence that the title to the clay used actually passed to the government upon delivery to the site, that the clay was separately bid, that the clay was reimbursed under the contract separately as a distinct unit cost, and that the Corps bore all risk of loss for the material through the conclusion of the project. The present case involves a more complex set of transactions.

To organize the present case, the Taxpayer’s suggested segregating the materials purchases into Categories:

Category I involves those transactions where Odebrecht bid a separate line item for procurement of a material and that was distinct from the line item for installation. Title to those items passed to the government upon delivery irrespective of payment under FAR 52.245(e)(3)(i). This provision providing that title passes to the U.S. on delivery only applies in fixed price contracts (like this one) when “this contract contains a provision directing the Contractor to purchase material for which the Government will reimburse the Contractor as a direct item of cost” (hereinafter referred to as “Direct Cost Reimbursable Line Items”). This includes the H piles and the Steel Pipe.

Category II involves those transactions where Odebrecht bid the procurement and installation of the materials together as one line item. However, in issuing progress payments, the Corps and the Taxpayer handled these items by splitting payment between procurement and installation. Odebrecht argues that the Affidavit of Mr. Silveria supports its litigation position that FAR 52.245(e)(3)(i) would also apply to these Category II transactions. However, the text of FAR 52.245(e)(3)(ii) and FAR 52.232-5 both make clear that title to such materials would only pass to the government upon its payment for those materials.

Category III involves another subset where the procurement and installation of the materials were billed together. The Taxpayer has conceded that the tax is due on these transactions.

There is a dispute over whether this contract included Direct Cost Reimbursable Line Items. 48 CFR 2.101 defines a direct cost as: “(A)ny cost that is identified specifically with a particular final cost objective....Costs identified specifically with a contract are direct costs of that contract.”

48 CFR 3.302 defined line item as, “an item of supply or service, specified in a solicitation, that the offeror must separately price.”

The Board finds that under the evidence presented that Category I items that were separately bid do qualify as Direct Cost Reimbursable Line Items, therefore title did pass to the U.S. upon delivery to the site. The Board also finds that Category II items, while voluntarily handled similarly for payment terms, do not qualify since they were not required to be separately priced in the solicitation.

Assuming *arguendo* that the “future sale to the United States” component is satisfied, the Taxpayer must also prove that title passed to the material prior to incorporation into the Project. For Category I items that element is established under the applicable FAR based on title passing at delivery (as in *Odebrecht I*), and the granting of summary judgment on those items is appropriate if the other elements of the exclusion are also satisfied.

However, for the Category II items the Taxpayer bears the burden to prove that payment was actually made for that item prior to its inclusion. While Taxpayer cited to an example payment app where this was the case, there Collector correctly points out that in the vast majority of instances the payment would occur after the item is used (installation and procurement showing up together on many payment apps and the measurement mechanism for payment often requiring installation). This would normally produce a question of fact for trial, but we must also analyze whether Category II items can fulfill the other elements of the exclusion.

The Collector argues that there was no sale to the United States, that the Taxpayer was the contractor user of the materials and that the only consideration was the amount paid for his work as contractor in its entirety.

In addition to the consistent civil code definition, La. R.S. 47:301(12) provides that: "Sale" means any transfer of title or possession, or both...., in any manner or by any means whatsoever, of tangible personal property, for a consideration....”

The Supreme Court has directed that “Tax exemptions are strictly construed in favor of the Department and “must be clearly and unequivocally and affirmatively established” by the taxpayer. Exclusions, on the other hand, are construed liberally in favor of the taxpayers and against the taxing authority. *Harrah's Bossier City Inv. Co., LLC v. Bridges*, 2009–1916, p. 10 (La.5/11/10), 41 So.3d 438, 446. In *Odebrecht I*, the Board and the First Circuit both held that §10(g) is an exclusion and that any ambiguity in its provisions must be construed in favor of the taxpayer.

Collector’s insistence on payment before use is misplaced. The fact that the consideration is paid after delivery does not itself preclude the Category I items from being considered sold. As stated above, the transfer of possession is sufficient to trigger a sale, and for Category I items that possession (through legal title) transferred immediately upon delivery and prior to use.

Furthermore, we are constrained to give liberal effect to this exclusion statute that merely provides that the property be “intended for future sale to the United States.” The statute does not require that sale to take place prior to incorporation, it only requires that title pass prior to incorporation. As to the Category I items, this element of the exclusion is also established and summary judgment should be granted.

The Category II items are more problematic for the Taxpayer. In bidding, there was no separation of the materials from the installation, and one unit price for the completed project was included in what is a fixed price construction contract. These items were used in fulfilling the contract prior to any purported sale to the United States. Considering the structure of the bids, the handling of payments, the provisions on passage of title, and all of their relation to the timing of incorporation into the final product, the Board finds that the Category II items were not Direct Cost

Reimbursable Line Items nor were they “intended for future sale to the United States” under the exclusion.

In contrast to *Odebrecht I*, the requirements of the present contract required the Taxpayer to acquire many different materials, perform numerous services and produce several structures. For Category I items there is sufficient summary judgment evidence to find that title to the materials used in the contract passed to the Corps upon delivery, but that is not established for Category II items. The overall evidence also supports a finding that the Category I items were intended for future sale to the U.S., and supports a converse finding for Category II items.

For the written reasons stated hereinabove:

IT IS ORDERED AND DECREED that the Collector’s Motion for Summary Judgment be GRANTED IN PART AND DENIED IN PART.

IT IS FURTHER ORDERED AND DECREED that the Taxpayer’s Motion for Summary Judgment be GRANTED IN PART AND DENIED IN PART.

IT IS FURTHER ORDERED AND DECREED that the parties shall calculate the refund due on the Category I items in accordance with these Written Reasons and shall submit a Judgment in accordance therewith within 30 days of the date of this Order.

IT IS FURTHER ORDERED AND DECREED that if the parties cannot agree on a form Judgment, then each party may submit its own proposed Judgment with a Memorandum in support thereof and in opposition to the opposing party’s proposed Judgment within 45 days of the date of this Order.

This Order does not constitute a final appealable Judgment as contemplated by La. R.S. 47:1410 and 1434.

Baton Rouge, Louisiana this 11th day of April, 2016.

FOR THE BOARD:

A handwritten signature in green ink, consisting of a large, stylized initial 'T' followed by a series of loops and a long horizontal stroke extending to the right.

JUDGE TONY GRAPHIA, RET.
CHAIRMAN, LOUISIANA BOARD OF TAX APPEALS