BOARD OF TAX APPEALS
STATE OF LOUISIANA

ODEBRECHT CONSTRUCTION, INC.
Petitioner

VERSUS **DOCKET N0. 7404**

SECRETARY, DEPARTMENT OF REVENUE, and
STATE OF LOUISIANA
Respondent

****

JUDGMENT

****

A hearing was held before the Board on May 14, 2013 on Odebrecht Construction, Inc.'s ("Taxpayer") Petition For Determination Of Overpayment And Alternatively As A Claim Against The State, and on the Secretary of the Department of Revenue's ("Secretary") Exception Of Lack Of Subject Matter Jurisdiction and Motion to Set Aside Order Approving Penalty Waiver. Present before the Board were: Cheryl M. Kornick and Robert S. Angelico, attorneys for Taxpayer, and Johnette L. Martin, attorney for the Secretary. After the presentation of evidence and argument of counsel, the case was taken under advisement.

Taxpayer seeks a refund of $465,774.09 in sales taxes that it paid to the Secretary. Taxpayer entered into a contract with the United States Army Corp of Engineers (COE) to build levees. Taxpayer, in furtherance of the contract with the COE, entered into a contract with a company named River Birch Incorporated. The contract with River Birch provided that Taxpayer could mine (dig up) clay from River Birch's premises and store and dry the mined clay on River Birch's premises. *Taxpayer's Exhibit 7.* Taxpayer's contract with River Birch specifically stated that the purchased clay was for its project with the COE, and that it was "made conditional upon the approval of River Birch by the US Army Corps of Engineers." *Id.* at p. 4. The contract with River Birch further provided that the "stored clay will become the property of OCI [Taxpayer] after it is removed from River Birch's premises." *Id.* at p. 2.

The contract between Taxpayer and COE provided in paragraph 52.245-2(c)(4)(i):

> "Title to material purchased from a vendor shall pass to and vest in the Government upon delivery of such material."

There was also undisputed testimony that the COE accepted the risk of loss prior to completion of construction. The witness testified that some of the dirt was washed away in the middle of construction by a hurricane, and the COE actually paid the Taxpayer for that material anyway

because title had already passed to the US Government immediately upon the clay's arrival on the work site.

La. R.S. 47:302, imposes the sales tax on a "sale at retail." The transaction that the Secretary seeks to tax is the sale of the clay from River Birch to the Taxpayer.

Taxpayer's petition originally asserted a variety of different theories on why they did not owe this tax, but most of these arguments were successfully refuted by the Secretary. At the hearing, the Taxpayer only argued that it is entitled to a refund of the taxes and interest paid because of the exclusion found in La. R.S. 47:301 (10)(g). That paragraph provides:

> "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 the 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."

If the provisions of La. R.S.47:301(10)(g) apply to the sale from River Birch to Taxpayer, then it was a transaction that was excluded from Louisiana sales tax. There is no doubt that the sale was one for corporeal movable property, and that legal title passed to the United States prior to incorporation of the clay into the levee. However, the Secretary's counsel argued that the levee was not a final product because the "final product" can only mean a movable (the levee that was ultimately constructed here is an immovable).

The contract between the Taxpayer and the COE, recited above, clearly states that the title to the clay vests in the COE upon its arrival at the construction site—while it is still a movable. There was no credible evidence presented at the hearing to support the Secretary's position that "final product," as used in §§10(g), can only mean a movable. In enacting the exclusion, the Legislature knew what movable property was, it actually uses that term in the definition. The Legislature could have used similar language concerning the incorporation into a final product is that was what it intended.

§301(10) involves the definition of a retail sale, and paragraph (g) specifically defines a category of transactions that are <u>not</u> included within the definition of "sale at retail." This paragraph operates as exclusion not as a tax exemption. Since the subsection at issue is an 'exclusion' and not a tax exemption, therefore any question about the applicability of the exclusion must be resolved in favor of the Taxpayer.

The Board disagrees with the Secretary and finds that La. R.S. 47:301(10)(g) excludes the disputed transaction from taxation, and that the Taxpayer is therefore entitled to a refund of the tax it overpaid.

The Secretary also argues that the holdings of three cases would make the transactions at issue subject to sales tax. Two of those cases are: (1) *Claiborne Sales Company, Inc. v. Collector or Revenue* 99 So.2d 345, (La. 1957) and (2) *State v. J. Watts Kearney and Sons,* 160 So. 77 (La. 1935). Both of those cases dealt with "what is a sale at retail?". We agree that absent a statutory exclusion that this would have been a sale at retail. However, the Board has ruled that La. R.S. 47:301(10)(g) applies to this transaction, therefore it was not a retail sale due to the applicable exclusion under the law.

The third case cited by the Secretary is *McNAMARA v. The ELECTRODE CORPORATION*, 418 So.2d 652 (La. App. 1st Cir. 1982). That case held, in relevant part, that, in the facts of that case, "the substance of a contract, not the wording of it, nor the splitting or dividing up by the contracting parties, is controlling. The taxpayer cannot defeat the Department's collection of taxes by either the wording, form or label of a contract."

The contention of the Secretary appears to be that the provision in the contract between the Taxpayer and the COE (whereby the COE takes title to the clay upon delivery) is only present in the contract to make the transaction between the contracting parties defeat collection. The Board rejects this argument as nonsensical. The United States is exempt from payment of Louisiana sales and use tax under U.S. Const. art. VI, §2. An exempt party may designate a contractor as its agent so as to exempt direct purchases of materials. *See e.g., F. Miller & Sons, Inc. v. Calcasieu Parish School Bd.*, 838 So.2d 1269 (La. 2/25/03). The US government did not make this contractor its agent, but that has nothing to do with the contractor's own rights under §§10(g). The underlying facts support the Taxpayer's position that there were independent reasons for the relevant contract language, and that it was not wording to defeat sales tax.

The Exception of Lack of Subject Matter Jurisdiction is overruled.

The Secretary's exception of lack of subject matter jurisdiction was overruled by the Board at its hearing on this matter. Jurisdiction over the subject matter is the legal power and authority to hear and determine a particular class of actions or proceedings. *Smith v. Gretna Mach. and Iron Works*, 617 So.2d 144, 145 (La. App. 5 Cir. 1993). As with all exceptions, the movant bears the burden of proving the lack of jurisdiction. *Id.*

The Supreme Court has recognized that "the Board acts as a trial court in finding facts and applying the law." *St. Martin v. State*, 09-935, p. 6 (La. 12/1/09) 25 So.3d 736, 740. The Supreme Court also concluded that "jurisdiction to resolve tax related disputes is constitutionally

and statutorily granted to the Board which is authorized to hear and decide disputes and render judgments." *Id.* at. p. 8, 25 So.3d at 741.

Following the Secretary's denial of a refund claim, the Board has subject matter jurisdiction over "all matters relating to appeals...for the determination of overpayments." La. R.S. 47:1407, 1431, and 1625. The question of whether a provision of the law precludes a refund in a particular case is clearly a question that the Board has subject matter jurisdiction to decide when adjudicating the case on the merits.

The Taxpayer's Refund is Granted.

Part of the Taxpayer's request for refund of sales taxes included $900 for aerial photographs. The Taxpayer has conceded that it owed the tax on the photographs.

It is therefore adjudged that the Taxpayer is entitled to a refund of the taxes that it paid to the Secretary for which it seeks a refund, together with the interest allowed by law, less the amount of taxes that it paid for the aerial photographs.

The Secretary's Motion concerning the penalty waivers is Moot.

The Secretary has filed a pleading entitled Department of Revenue's Motion To Set Aside Order Approving Penalty Waiver. The Secretary had granted to the Taxpayer a waiver of penalties on January 11, 2011 which, on the recommendation of the Secretary, was approved by the Board. The Secretary now wants "an order to set aside the 'order' approving the penalty waiver previously granted". Because the Board has now ruled that the Taxpayer did not owe the taxes at issue, no penalties were due. The Secretary's motion is now dismissed as moot.

Each of the parties is liable for their own cost of these proceedings.

JUDGMENT RENDERED at Baton Rouge, Louisiana this 20th day of June, 2013.

JUDGE TONY GRAPHIA, (Ret.)
CHAIRMAN

BOARD OF TAX APPEALS
STATE OF LOUISIANA

ODEBRECHT CONSTRUCTION, INC.
Petitioner

VERSUS **DOCKET N0. 7404**

SECRETARY, DEPARTMENT OF REVENUE, and
STATE OF LOUISIANA
Respondent

****

ADDITIONAL WRITTEN REASONS
CONCURRING IN THE
JUDGMENT OF THE BOARD

****

Board Member Cole, concurring, assigns additional reasons.

I have contributed to and agree with the Judgment of the Board, but I write separately to highlight my view that the basis for this exclusion rests on the unique facts present in this case.

I recognize that generally, "the contractor as the purchaser and consumer of the building materials used in construction of the immovable owes a sales tax on the purchase." *Bill Roberts, Inc. v. McNamara*, 539 So.2d 1226, 1229 (La. 1989). I also agree with the Secretary that, "the substance of a contract, not the wording of it…is controlling." *Electrode, supra.* However, in the present case there was specific evidence that the reality on the ground matched the language of the contract.

There was undisputed testimony that the US Army Corps of Engineers actually accepted the risk of loss prior to completion of construction. The witness testified that some of the dirt was washed away in the middle of construction by a hurricane, and the COE actually paid the Taxpayer for that material anyway. This comports with the language of the contract which provides that title passed to the US Government immediately upon the clay's arrival at the work site.

In *Harrah's Bossier City Inv. Co., LLC v. Bridges,* 41 So.3d 438, 446 (La. 5/11/10), the Supreme Court restated the longstanding rule that although "[t]ax exemptions are strictly construed in favor of the State.... Exclusions, on the other hand, are "construed liberally in favor of the taxpayers and against the taxing authority." (emphasis provided).

It is clear that La. R.S. 47:301(10)(g) is an exclusion, "[a]n exclusion removes a certain transaction from the scope of the tax, *ab initio*." *Id.* at 448. The ambiguity over whether the

"final product" under that subsection is required to be a movable must be resolved in light of the jurisprudential maxim that we must liberally construe exclusions in favor of the taxpayer.

The §§(10)(g) exclusion applies to corporeal movable property that was "intended for future sale to the U.S." if title passes before "incorporation of that property into the final product." The Secretary argues that the passing of title to the U.S. government did not equate to a sale to the United States, and that a sale to the government was not actually intended. The believe that the contractor Taxpayer only really intended to use the clay themselves.

However, the Taxpayer's contract with River Birch clearly delineated that this purchase was for the COE and that the COE would itself have to approve River Birch. Taxpayer's contract with the COE clearly stated that title to the clay passed to the government before it was used in the construction of the levee. The evidence in the record also establishes that the COE took action consistent with actual acceptance of the risk of loss concomitant with that ownership, therefore the "substance" of this contract actually comported with its "wording" in this case.

Therefore, I respectfully concur in the Judgment of the Board.

THUS DONE AND SIGNED at Baton Rouge, Louisiana, this 20th day of June, 2013.

CADE R. COLE, MEMBER
BOARD OF TAX APPEALS