

**STATE OF LOUISIANA
BOARD OF TAX APPEALS
LOCAL TAX DIVISION**

**OFFSHORE RENTAL, LTD.,
d/b/a TIGER OFFSHORE,
Petitioner**

VERSUS

DOCKET NO. L00223

**LAFOURCHE PARISH SCHOOL BOARD,
SALES TAX COLLECTOR
FOR THE PARISH OF LAFOURCHE,
Respondent.**

JUDGMENT WITH WRITTEN REASONS

This matter came before the Board of Tax Appeals – Local Tax Division (the “Board”) for a hearing on the *Defendant’s Motion for Summary Judgment* filed by Respondent, Lafourche Parish School Board, Sales Tax Collector for the Parish of Lafourche (the “Collector”) on September 7, 2018 with Local Tax Judge Cade R. Cole presiding. Participating in the hearing were Patrick M. Amedee for the Collector and Ashley E. Menou for Offshore Rental, Ltd. D/B/A Tiger Offshore (the “Taxpayer”). After the hearing, the motion was taken under advisement. The Local Division of the Board now issues judgment in accordance with the written reasons attached herewith.

IT IS ORDERED, ADJUDGED AND DECREED that the Collector’s Motion for Summary Judgment BE AND IS HEREBY DENIED.

Judgment Rendered and Signed at Baton Rouge, Louisiana this 12 day of December, 2018.

FOR THE BOARD:



LOCAL TAX JUDGE CADE R. COLE

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WRITTEN REASONS FOR JUDGMENT

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The Taxpayer in this case appeals from the Collector’s denial of a refund claim for local sales and use taxes. After an audit, the Collector issued to the Taxpayer a “Notice of Intent to Assess sales and use taxes” dated May 5, 2014 (the “Proposed Assessment”). While the Proposed Assessment itself was not offered into evidence, the fact that it was transmitted to the taxpayer is not in dispute, and was admitted by the Taxpayer in the Answers to Requests for Admissions submitted by the Collector along with its motion and supporting memorandum. There is also no dispute that in the Proposed Assessment, the Collector proposed to assess sales and

use taxes against the Taxpayer in the amount of \$149,065.45 for the periods of January 1, 2010 through December 31, 2012. Taxpayer subsequently paid to the Collector the exact amount shown on the Proposed Assessment (\$149,065.45) by check. According to the affidavit submitted by the Collector,¹ the Taxpayer neither paid this amount under protest, nor requested an administrative hearing to dispute the taxability of the underlying transactions.

Some time later,² the Taxpayer requested a refund of sales and use taxes paid on some, but not all, of the transactions identified in the Proposed Assessment. In relevant part, the Taxpayer requested a refund of \$53,578.66 in sales and use taxes on the grounds that certain transactions were not taxable under La. R.S. 47:301(10)(a)(ii) (the “Refund Request”). The Taxpayer submitted a copy of the Refund Request with its opposition memorandum. The Refund Request states that the during the audit, the Taxpayer was “misinformed about replacement parts being taxable as they are purchased and stored in the equipment sops [sic] for use when damaged or worn out and need to be replaced on the rental equipment.” This portion of the Taxpayer’s refund request was denied by letter dated October 26, 2015 (the “Refund Denial”). The Refund Denial, also submitted along with the Taxpayer’s opposition memorandum, states only that the audit is considered closed, and that the Taxpayer had failed to assert available remedies at the time of the assessment process.

¹ The Collector submitted the affidavit of Amanda Granier, Sales Tax Collector for the Parish of Lafourche along with its motion and supporting memorandum.

² The Collector asserts at different times in its pleadings that the Taxpayer’s refund request was filed on February 2, 2016 and February 3, 2016. In its response to the Collector’s Requests for Admissions, the Taxpayer asserts that it filed its refund request on January 27, 2016. Neither of these dates correspond to the dates shown on the face of the Refund Request, which is December 26, 2014. However, the Board does not find it necessary to determine the exact date for purposes of deciding this motion.

On February 3, 2016, Taxpayer appealed from the Collector's denial of the refund request by filing the instant petition. The Collector now moves for summary judgment. The Collector argues that the Taxpayer's refund claim was improper and untimely because the Taxpayer did not avail itself of its administrative remedies under R.S. 47:337.48, 47:337.49, and 47:337.51.1. The Collector also asserts that the Taxpayer was required to pay the tax under protest and file suit to recover under R.S. 47:337.63. According to the Collector, the Taxpayer's failure to pursue one or all of these remedies is a bar to the Taxpayer's claim for a refund of an overpayment under R.S. 47:337.77.

A motion for summary judgment will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the mover is entitled to judgment as a matter of law." La. C.C.P. art. 966(A)(3). A material fact is one whose existence or non-existence determines the outcome of a cause of action. *Davis v. Hixson Autoplex of Monroe, L.L.C.*, 51,991, p.5 (La. App. 2 Cir. 5/23/18), 249 So.3d 177, 181. Any doubt as to a dispute regarding a genuine issue of material fact must be resolved against granting the motion and in favor of a trial on the merits. *Orleans Parish Sch. Bd. v. Lexington Ins. Co.*, 2011-1720, p.9 (La. App. 4 Cir. 8/22/12), 99 So.3d 723, 729. However, once the motion for summary judgment has been properly supported by the moving party, the non-moving party must produce evidence of a material factual dispute or the motion will be granted. *Arceneaux v. Lafayette Gen. Med. Ctr.*, 2017-516, p.5 (La. App. 3 Cir. 7/26/17), 248 So.3d 342, 346.

This matter presents a question of statutory interpretation. The starting point in the interpretation of any law is the language of the law itself. *M.J. Farms, Ltd. v.*

Exxon Mobil Corp., 07-2371, p. 13 (La. 7/1/08), 998 So.2d 16, 27; *see also Kelly v. State Farm Fire & Cas. Co.*, 14-1921, p. 10 (La. 5/5/15), 169 So.3d 328, 335. Moreover, “when a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature.” La C.C. art. 9; La. R.S. 24:177. The legislature’s choice to use, or not use, certain language in drafting statutes is presumed to be deliberate. *Malus v. Adair Asset Mgmt., LLC*, 2016-0610, p.5 (La. App. 1 Cir. 12/22/16), 209 So.3d 1055, 1060. Whenever possible, the Board must construe statutes on the same subject matter so as to avoid creating a conflict. *M.J. Farms*, 998 So.2d at 27.

The Collector does not dispute that R.S. 47:337.51.1 was repealed by Acts 2014, No. 640, effective June 12, 2014. Prior to repeal, R.S. 47:337.51.1 provided:

Any taxpayer who receives an assessment in accordance with R.S. 47:337.48(B) resulting from an audit or whose request for a refund of such tax, penalty, and/or interest has been denied by a collector, may, in lieu of other remedies provided to him in this Chapter, timely initiate a mandatory arbitration proceeding in accordance with the provisions of this Section by mailing to the collector who is attempting to collect the tax, penalty, and/or interest a written request for mandatory arbitration.

The statute states that a taxpayer “may” initiate arbitration in response to a notice of proposed assessment. Similarly, R.S. 47:337.49 provides that a taxpayer “may” request an administrative hearing over its protest to a notice of proposed assessment. The administrative remedies available under R.S. 47:337.49 and former 47:337.51.1 were an option to the taxpayers but were not a required step to utilize other procedural remedies.

The refund overpayment procedure in the Uniform Local Sales Tax Code (the “ULSTC”) is found in R.S. 47:337.77, which requires a local collector to issue a

refund if the collector determines that an “overpayment” of tax has occurred as a result of certain statutorily enumerated circumstances set forth in R.S. 47:337.77(B). In addition, notwithstanding R.S. 47:337.77(B), a collector is further required to issue a refund “where it is determined that there is clear and convincing evidence that an overpayment has been made.” La. R.S. 47:337.77(C).

The parties agree that the underlying transactions were not properly taxable. The affidavit of Amanda Granier, offered in support of the Collector’s motion, does state that the Collector reviewed an audit schedule, also attached to the Collector’s motion, and determined that taxes were due based upon the Collector’s interpretation of the law. However, at the hearing, counsel for the Collector did not dispute that the underlying transactions were determined to be taxable because of a misunderstanding during the audit. It appears the Taxpayer may have represented to the Collector during the audit that certain items were taxable because of the Taxpayer’s own misunderstanding of the facts and/or law.

The Collector insists that the Proposed Assessment evidences a legal “determination” that entails a disputed issue of law. If the Proposed Assessment or other contemporaneous communication identifies a legal issue and takes a legal position, then the Collector’s argument would have a reasonable basis. However, a Proposed Assessment with just a number and no analysis/statement of position cannot be characterized as taking a legal position, the underlying tax proposed to be assessed could be calculated based on factual or mathematical error. The Board sees no reason to extend the protection of R.S. 47:337.77(F) to every instance where a proposed assessment is issued. Accepting this contention would lead to unintended negative consequences for all taxpayers. For example, La. R.S. 47:337.77(B)(3) requires a collector to issue a refund of an overpayment resulting from the collector’s

own factually erroneous determination of tax liability. If the Collector's argument were to be accepted, however, a collector could nullify R.S. 47:337.77(B)(3) simply by memorializing its own erroneous determination in the form of a notice of proposed assessment.

The Board's conclusion in this case is consistent with the Board's previous holding in *Phylway Construction, LLC v. Barfield*, Docket No. 9324D (La. Bd. Tax App. 9/13/16) 2016 WL8853741, writ denied 2016-CW-1322 (La. App. 1st Cir. 2/6/17) 2017 WL 476752. In *Phylway*, the Board held that a taxpayer could seek a refund of an overpayment of state sales tax when the taxpayer had paid a formal assessment without protest or appeal. In that case, the taxpayer received a state proposed assessment, styled a "Notice of Proposed Tax Due," pursuant to an audit. Without protest, the taxpayer paid the proposed tax and interest, but not the penalties that were also listed in the proposed assessment. The Secretary subsequently issued a "Notice of Assessment and Notice of Right to Appeal to the Louisiana Board of Tax Appeals," which effectively assessed the amount of unpaid penalties. The taxpayer paid this amount without protest as well. Thereafter, the taxpayer sought a refund of a portion of the amounts paid, which was constructively denied by inaction. The taxpayer then appealed the denial to the Board. The Secretary responded with exceptions of lack of subject matter jurisdiction and failure to state a cause of action.³

After finding that it had jurisdiction, the Board considered whether the taxpayer's failure to appeal from the formal assessment effectively barred its claim for a refund. The Board noted that the taxpayer's appeal of a refund denial was a

³ The Secretary also argued that the refund claim and claims against the state were barred by prescription. However, the Board ultimately found that only the R.S. 47:1481 claims against the state had prescribed.

distinct statutory remedy apart from an appeal of a formal assessment. The Board went on to note that the formal assessment informed the taxpayer that distraint could be avoided by paying the assessed tax (among other remedies), which the taxpayer did. An assessment specifically states that one of the optional remedies is to pay it. The notice language in a formal assessment is statutory, and contains no warning that paying the assessment would serve to extinguish the taxpayer's separate statutory rights to any refund.

The same concern is implicated in this case. Like the taxpayer in *Phylway*, the Taxpayer in this case would not have known that by paying the Proposed Assessment, it was waiving its right to later claim a refund.

The Collector's position is irreconcilable with *Phylway*. A notice of proposed assessment, like the Proposed Assessment in this case, informs a taxpayer of a collector's determination of tax liability and intent to issue a formal assessment. The Board has already held that a formal assessment does not foreclose the possibility of a refund claim. However, the Collector would have the Board now hold that the mere *proposal* to issue a formal assessment does foreclose such a remedy

Finally, the Collector urges the Board to consider the interests of local collectors in the finality of tax collections. The Collector argues that if the Taxpayer is allowed to claim a refund (of that that it never owed) after paying the Proposed Assessment without protest, then local taxing authorities will face uncertainty in using future collections in their budgets.

Generally, pool of refunds will always be based on individual errors, and would logically not generally be widespread enough to cause a noticeable effect. If the legislature intended for the payment of a notice of proposed assessment to

foreclose refund claims otherwise available to taxpayers, it could have said so. The Board is constrained to apply the law as written. The Collector's policy concerns in this regard are more properly directed to the legislature.

In sum, the Board finds no statutory requirement that the Taxpayer pursue administrative remedies under R.S. 47:337.49, and 47:337.51.1 before seeking a refund of an overpayment under R.S. 47:337.77. The Board also finds that the Taxpayer's refund request is not barred by the failure to pay under protest under R.S. 47:337.63. La. R.S. 47:337.77(F) does not apply to this case because there is no legal dispute on the collector's construction as to the taxability of the underlying transactions. The Board cannot accept the argument that the mere issuance of a notice of proposed assessment under R.S. 47:337.48 creates such a legal dispute. Accordingly, the Taxpayer in this case is not barred from seeking a refund under R.S. 47:337.77.

Baton Rouge, Louisiana this 11th day of December, 2018.

FOR THE BOARD:



LOCAL TAX JUDGE