

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

**ST. CHARLES PARISH SCHOOL BOARD, EX-OFFICIO SALES & USE
TAX COLLECTOR FOR ST. CHARLES PARISH,
Petitioner**

VERSUS

DOCKET NO. L00437

**N.P. STEIN, AS CEO OF ASSURED COMPLIANCE, INC., AS AGENT FOR
ST. JOHN THE BAPTIST PARISH SCHOOL BOARD, EX-OFFICIO SALES
AND USE TAX COLLECTOR FOR ST. JOHN THE BAPTIST PARISH,
Respondent**

JUDGMENT

This matter came before the Board of Tax Appeals – Local Tax Division (the “Board”) for a hearing on the *Motion for Summary Judgment* filed by St. Charles Parish School Board, Ex-Officio Sales & Use Tax Collector for St. Charles Parish (“St. Charles”) on October 2, 2019, with Local Tax Judge Cade R. Cole presiding. Participating in the hearing were Christian N. Weiler, attorney for St. Charles and Newton Thophile Savoie, attorney for N.P. Stein, as CEO of Assured Compliance, Inc., as Agent for St. John the Baptist Parish School Board, Ex-Officio Sales and Use Tax Collector for St. John the Baptist Parish (“SJB”). After the hearing, the motion was taken under advisement. The Board now issues Judgment in accordance the written reasons attached hereto.

IT IS ORDERED, ADJUDGED AND DECREED that Petitioner St. Charles’ *Motion for Summary Judgment* BE AND IS HEREBY GRANTED IN PART.

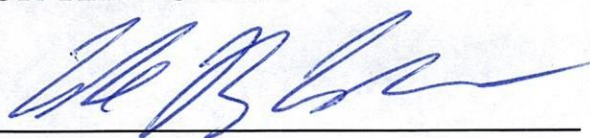
IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that there be Judgment in favor of petitioner, St. Charles, and against respondent, SJB, finding that the \$114,954.20 remitted is the entire amount that SJB is entitled to for use tax

on items that Valero worked on in the Lay Down Yard that were actually installed in St. Charles.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Petitioner St. Charles' *Motion for Summary Judgment* BE AND IS HEREBY DENIED as to the other issues raised by Petitioner.

Judgment Rendered and Signed at Baton Rouge, Louisiana this 4th day of December, 2019.

FOR THE BOARD:



LOCAL TAX JUDGE CADE R. COLE

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WRITTEN REASONS FOR JUDGMENT

This matter came before the Board of Tax Appeals – Local Tax Division (the “Board”) for a hearing on the *Motion for Summary Judgment* filed by St. Charles Parish School Board, Ex-Officio Sales & Use Tax Collector for St. Charles Parish (“St. Charles”) on October 2, 2019, with Local Tax Judge Cade R. Cole presiding. Participating in the hearing were Christian N. Weiler, attorney for St. Charles and Newton Thophile Savoie, attorney for N.P. Stein, as CEO of Assured Compliance, Inc., as Agent for St. John the Baptist Parish School Board, Ex-Officio Sales and Use Tax Collector for St. John the Baptist Parish (“SJB”). After the hearing, the motion was taken under advisement. The Board now issues the attached Judgment for the following reasons.

St. Charles’ filed its *Petition for Uniformity of Interpretation of Local Sales Tax Law Pursuant to La. R.S. 47:337.101* against SJB on September 25, 2017. St. Charles’ Petition follows another case, *Valero Refining New Orleans, LLC v. St. John the Baptist Sales and Use Tax Office*, Docket No. L00018 (La. Bd. Tax App. 11/11/17); 2017 WL 11219326 (“*Valero v. SJB*”). In *Valero v. SJB*, Valero Refining New Orleans, LLC (“Valero”) sought to recover taxes paid to SJB on items

earmarked for use in construction of a Hydrocracker facility in St. Charles Parish (the "Hydrocracker"). Valero temporarily stored parts and equipment destined for the Hydrocracker in a Lay Down Yard in SJB Parish (the "Lay Down Yard"). Valero paid use tax to St. Charles on these items. SJB audited Valero and assessed sales and/or use tax on items stored in the Lay Down Yard. Valero paid the assessment under protest and filed suit to recover.

Valero also filed written refund requests with St. Charles for the taxes assessed by SJB. St. Charles denied the refund requests. St. Charles took the position that SJB was incorrect and that Valero properly paid use tax to St. Charles on items used in the Hydrocracker project. Caught between two collectors, Valero argued to the Board that it was entitled to a credit for taxes already paid to St. Charles. Valero accordingly filed a motion for summary judgment.

The Board found that Valero had fulfilled the statutory requirements of good faith necessary to claim a credit under R.S. 47:337.86(E). Accordingly, the Board held that Valero was entitled to a credit for taxes already paid to St. Charles. Initially, however, the Board could not determine whether Valero had actually paid tax on all the items at issue. After an opportunity for discovery, Valero renewed its motion for summary judgment with proof that it had paid tax to St. Charles on all the items identified SJB's assessment. Accordingly, the Board rendered final judgment in Valero's favor ordering SJB to return Valero's payment under protest. The credit statute directs the collectors to resolve the matter between themselves, and specifically references this type of proceeding as a vehicle for that resolution.

The question in this case is which collector is entitled to Valero's tax payments. St. Charles claims this question can be resolved on summary judgment. A motion for summary judgment will be granted if, after an opportunity for adequate discovery, "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, a properly supported motion will be granted unless the non-moving party produces evidence of a material factual dispute. *Ruel v. Dalesandro*, 18-243, p. 7 (La. App. 5 Cir. 7/9/19, 7); 276 So.3d 626, 631-32. Evidence is required; mere allegations of the existence of a material factual dispute will not defeat a well-supported motion for summary judgment. *Rayfield v. Millet Motel*, 15-496, p. 6 (La. App. 5 Cir. 1/27/16); 185 So.3d 183, 187.

St. Charles argues that Valero’s Direct Pay (“DP”) Number determines the correct taxing authority for the transactions at issue. La. R.S. 47:303.1(A) provides: “state and local sales and use tax due on the purchase, importation, or lease of tangible personal property or taxable services by taxpayers who have obtained a Direct Payment Number . . . shall be remitted directly to the state and appropriate political subdivision by such taxpayer.” [emphasis added]. La. R.S. 47:303.1 does not authorize a taxpayer to remit tax to an incorrect taxing authority.

Similarly, La. R.S. 47:337.15(G) of the Uniform Local Sales Tax Code states that a taxpayer who obtains a DP Number shall remit sales and use tax “directly to the state and local taxing authorities to whom the sales and use taxes are due.” [emphasis added]. La. R.S. 47:337.15(G) does not authorize a taxpayer to remit tax

to St. Charles if that tax was due to SJB. Therefore, the Board does not agree with St. Charles' suggested construction of the statutes governing DP Numbers.

At the hearing, St. Charles urged the Board to view the DP Permit as an exemption from tax. The function of an exemption is to render an otherwise taxable transaction non-taxable. *Bridges v. Nelson Indus. Steam Co.*, 2015-1439, p. 5 (La. 5/3/16); 190 So.3d 276, 280 (citing Bruce J. Oreck, *Louisiana Sales & Use Taxation* (2d ed. 1996), § 3.1).

La. R.S. 47:303.1 provides a means for a purchaser to collect and remit tax instead without payment to the seller. The DP Number effectively shifts the burden of "collection" of a tax, moving the burden to remit directly to the taxpayer. The Purchaser is still the true taxpayer. *See CHL Enterprises, LLC v. State, Dep't of Revenue*, 2009-487, p. 11 (La. App. 3 Cir. 11/4/09); 23 So.3d 1000, 1007, *writ denied*, 2009-2613 (La. 2/12/10); 27 So.3d 848. Consequently, the Board is not persuaded that the DP Permit creates an "exemption." Regardless of the language used in the permit, only the law can relieve a party from a duly imposed tax. La. Const. art. VI, Sec. 29(D). Valero's DP Permit from the Department of Revenue accurately reflects this reality when it states that it "cannot be used to exempt the purchaser from local sales tax."

St. Charles also claims that SJB knowingly acquiesced to Valero's remittance of tax via the DP Number. St. Charles asserts that SJB could have tried to revoke Valero's DP Number under La. R.S. 47:303.1(F). La. R.S. 47:303.1(F) provides that a local tax collection agency may send written notice of revocation of a taxpayer's DP Number to the Secretary of Revenue. To revoke a taxpayer's DP Number, the local tax collection agency must be one that previously approved the taxpayer's DP Number application pursuant to La. R.S. 47:303.1(D). La. R.S. 47:303.1(D) requires

a prospective DP Number applicant to obtain approval from the local tax collection agencies for the parishes in which the taxpayer has manufacturing establishments.

Valero does not have a manufacturing establishment in SJB Parish, all of these disputes stem from a 'lay down yard' not a manufacturing establishment. Valero does have a manufacturing establishment in St. Charles Parish (the Hydrocracker). Valero obtained approval from St. Charles. Valero did not need to obtain SJB's approval. Nor did SJB grant any such approval. There is nothing for SJB to revoke. St. Charles' argument that SJB acquiesced in Valero's DP remittances by not issuing written revocation to the Secretary is not supported by the statutory regime governing DP Permits.

La. R.S. 47:303.1 does not authorize a taxpayer to remit tax to an improper taxing authority. The DP Permit is not an exemption from tax. La. R.S. 47:303.1(D) and (F) do not require SJB to attempt to revoke Valero's DP Number.

St. Charles "further requests that the Court find that no sales or use taxes are due to St. John the Baptist Parish." St. Charles argues that SJB's use tax does not apply to property stored in SJB Parish for use in another parish under *Scientific Drilling International, Inc. v. Meche*, 2009-1120 (La. App. 3 Cir. 2/3/10); 29 So.3d 1283, writ denied, 2010-0511 (La. 4/30/10); 34 So.3d 298. In *Scientific Drilling*, the Third Circuit held that a parish ordinance that imposed use tax on property "stored for use or consumption in the Parish" did not tax property stored for use outside the parish. *Id.* at p. 4-5, 1286-87. Every word in a law is presumably intended to serve some useful purpose. *Caldwell Parish Sch. Bd. v. Louisiana Mach. Co., L.L.C.*, 2012-1383, p. 6 (La. 1/29/13); 110 So.3d 993, 997. Accordingly, the Board has previously held that the state use tax on storage "for use or consumption in the state" applies only to storage for use or consumption within the state and not storage

for use outside the state. *See Frank's International, LLC, v. Robinson*, Docket No. 10050D (La. Bd. Tax App. 12/11/18) 2018 WL 7501667, at *6.

SJB Parish's sales and use tax ordinance states:

[A] tax is hereby levied upon the sale at retail, the use, the lease or rental, the consumption, and the storage for use or consumption, of tangible personal property, and upon the lease or rental of tangible personal property and on the sales of services in the parish (the tax), as defined by law.

St. John the Baptist Parish, La., Code of Ordinances Ch., 38, Art. I, § 38-1(a) (1988).

The quoted ordinance imposes use tax on the storage of tangible personal property for use or consumption "in the parish." The operative language in the SJB ordinance is virtually the same as the operative language in the ordinance in *Scientific Drilling*. The Board will therefore give effect to that language. The Board finds that the SJB Parish use tax ordinance does not tax the storage of tangible personal property for use or consumption of those corporeal movables outside SJB Parish. St. Charles' interpretation of the law is entirely correct in this respect.

St. Charles claims that all of the property at issue was stored in the Lay Down Yard for use or consumption in St. Charles Parish. As the party requesting summary judgment, St. Charles must show that this fact is not genuinely disputed. St. Charles offers a copy of a letter from Paula Jeansonne, General Counsel for St. Charles Parish Public Schools to Nathan Stein dated July 20, 2017 (the "Jeansonne Letter"). The Jeansonne Letter is attached to the affidavit of Reese F. Williams (the "Reese Affidavit"), which is itself attached as an exhibit to St. Charles' *Motion for Summary Judgment*.

The Jeansonne Letter details St. Charles' factual findings following the Board's initial ruling in *Valero v. SJB, supra*. In its initial ruling, the Board instructed the parties determine if there were any items for which tax had not been paid to St. Charles. If tax had not been paid, the Board saw two possible scenarios

where taxable use might have first occurred in SJB Parish. First, there could have been taxable usage of items theoretically earmarked for the Hydrocracker but never actually removed from the Lay Down Yard. Second, Valero could have performed sufficient work on items in the Lay Down Yard so as to use them there, before later using them in the Hydrocracker project.

Ms. Jeansonne stated that St. Charles reviewed SJB's audit of Valero. According to Ms. Jeansonne, St. Charles confirmed that Valero paid tax to St. Charles on all items identified in SJB audit. On its own, this fact filled the final gap needed for summary judgment in Valero's favor in that prior case. Because all items were covered by the credit, it did not matter whether taxable use had actually first occurred in SJB Parish. Accordingly, the Board rendered summary judgment in Valero's favor, any liability was covered by the statutory credit.

Ms. Jeansonne stated that St. Charles identified \$116,177.122 in taxes paid on items that Valero first worked on in SJB Parish. St. Charles accordingly remitted a check to SJB for \$114,954.20. This amount represented the taxes paid to St. Charles on the items that Valero performed fabrications on minus \$1,222.92 for vendor's compensation.¹ It is undisputed that St. Charles remitted this amount to SJB.

The Jeansonne letters suggests that \$114,954.20 is the entire amount owed to SJB for taxable work on the items at issue. In opposition, SJB argues that there may be other undiscovered instances of taxable work on items in the Lay Down Yard. To resist a well-supported motion for summary judgment, however, SJB must present evidence of a genuine dispute. There has been considerable opportunity for discovery in this case, and extensive discovery was done against Valero in the prior case by SJB. Unknown conjecture cannot be utilized to defeat summary judgment.

¹ SJB allegedly cashed the check but attempted to return the funds.

Accordingly, the Board finds that St. Charles has no disputed liability to SJB in excess of \$114,954.20 for work performed by Valero in the Lay Down Yard on the items at issue that were actually later installed at the Hydrocracker in St. Charles

Ms. Jeansonne claimed that St. Charles could not identify any taxes paid to St. Charles that were due to SJB on items that still remained in the Lay Down Yard and for which taxes were not properly paid. La. Admin. Code 72:I.503(A) provides that transactions involving specific pieces of property imported by the purchaser into the taxing jurisdiction, which have written documentation such as invoices, purchase orders, etc., that are clearly earmarked for exclusive use outside the taxing jurisdiction for transshipment outside the taxing jurisdiction at the time of importation, are excluded from the use tax.

The regulation further provides that property may be stored in the taxing jurisdiction indefinitely. *Id.* However, any disposition of the property for a purpose contrary to that originally earmarked would immediately subject the transaction to the use tax in the jurisdiction where stored. *Id.*

The question for the Board in this case is whether taxable use occurred in the Lay Down Yard. The fact that Valero paid tax on all the items at issue does not answer that question. Valero could have paid tax to St. Charles on property that it actually used in SJB Parish, and that money would still be owed to SJB pursuant to R.S. 47:337.86.

The deposition testimony of Michael Kreider, Valero's Major Project Director for the Hydrocracker construction project, muddies the waters. Mr. Kreider testified at deposition on November 6, 2015 that some items in the Lay Down Yard were sold as scrap. If Valero sold items in the Lay Down Yard for scrap during January 1, 2010 through September 30, 2012, those items could be subject to SJB Parish sales

or use tax. This leaves a disputed issue of fact on the issue of scrap sales during the audit period.

In addition, the Board cannot determine whether SJB is owed sales tax on the items at issue. St. Charles raised the issue of sales tax in the first paragraph of its Petition when it asked the Board for “uniformity of interpretation of local sales and use tax law.” [emphasis added]. St. Charles again raised the sales tax issue in its *Motion for Summary Judgment* when it requested that the Board “find that no sales or use taxes are due to St. John the Baptist Parish.” [emphasis added]. The Board cannot dispose of the all issues in this case without resolving whether any sales tax are owed to SJB.

As distinct from use tax, in the sales tax context, a “sale” is any transfer of title and/or possession, exchange, or barter of tangible personal property, for consideration. La. R.S. 47:301(12). The Reese Affidavit attaches a copy of a sample Purchase Order from Valero to Fabricated Steel Products, Inc. bearing PO Number 4502305266 (the “Purchase Order”). The freight terms indicated on the Purchase Order are “FOB Jobsite, FA.” The ship to address listed is the address of the Lay Down Yard in SJB Parish. The Purchase Order also lists “WORK LOCATION” as “Valero St Charles Refinery, SWS.” However, there is another ship to address that is described as “Valero St. Charles Refinery” with the street address of the Lay Down Yard.

The terms of the Purchase Order suggest that the risk of loss transferred at the “jobsite.” See La. Civ. Code Art. 2616; UCC § 2-319 (1977). The transfer of risk of loss signals the transfer of title or possession for sales tax purposes. See *Lowe’s Home Ctr., Inc. v. Kennedy*, 32,443, p. 3 (La. App. 2 Cir. 10/27/99); 744 So.2d 711, 713. However, the Purchase Order does not clearly specify whether the jobsite was the Lay Down Yard (in SJB) or the Hydrocracker (in St. Charles). Based on this

evidence, the Board cannot determine where title or possession transferred. This is a disputed issue of fact that precludes summary judgment on this issue.

In summary, SJB may be owed sales tax if taxable sales of the items at issue occurred in SJB Parish. SJB may also still be owed use tax on property earmarked for, but never actually used in, the Hydrocracker project if there was any disposition of the property for a purpose contrary to that originally earmarked. La. Admin. Code 72:I.503(A) While the Board does not agree with St. Charles' argument as to Valero's DP Number, St. Charles is legally correct, however, in asserting that items stored in the Lay Down Yard for actual use in the Hydrocracker project are not subject to SJB Parish use tax (unless first subject to some other taxable use in SJB Parish). In addition, the Board finds it undisputed that \$114,954.20 is the entire amount that SJB is entitled to for use tax on items that Valero worked on in the Lay Down Yard. Determination of whether any other taxable use, or taxable sales, of the items at issue occurred in SJB Parish must await trial on the merits.

Baton Rouge, Louisiana this 4th day of December, 2019

FOR THE BOARD:



LOCAL TAX JUDGE CADE R. COLE