

2019 WL 2487890 (La.Bd.Tax.App.)

Board of Tax Appeals

State of Louisiana

TORTUGA CHARTERS, LLC, PETITIONER

v.

TAX COLLECTOR, PARISH OF ST. TAMMANY, RESPONDENT

Docket No. L00637

April 15, 2019

JUDGMENT

*1 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 Tortuga Charters, LLC (the “Taxpayer”) on March 21, 2019, with Local Tax Judge Cade R. Cole presiding. Participating in the hearing were Matthew A. Treuting, attorney for the Taxpayer and Margaret H. Kern, attorney for Randy Smith, Sheriff and Ex- Officio Tax Collector for the Parish of St. Tammany (the “Collector”). After the hearing, the motion was taken under advisement. The Board now renders its Judgment for the written reasons attached hereto.

IT IS ORDERED, ADJUDGED AND DECREED that the Taxpayer's *Motion for Summary Judgment* BE AND IS HEREBY DENIED.

Judgment Rendered and Signed at Baton Rouge, Louisiana this 15 day of April, 2019.

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 Tortuga Charters, LLC (the “Taxpayer”) on March 21, 2019, with Local Tax Judge Cade R. Cole presiding. Participating in the hearing were Matthew A. Treuting, attorney for the Taxpayer and Margaret H. Kern, attorney for Randy Smith, Sheriff and Ex- Officio Tax Collector for the Parish of St. Tammany (the “Collector”). After the hearing, the motion was taken under advisement. The Board now issues the attached Judgment for the following written reasons.

By Notice of Assessment dated July 31, 2018 the Collector assessed the Taxpayer with \$64,125.00 in sales and/or use tax, plus interest in the amount \$7,214.06, plus penalties in the amount of \$16,031.25, and costs in the amount of \$3,206.25, for a total amount of \$90,576.56 (the “Assessment”). The Assessment indicates that the tax relates to a vessel described as “2016 Hatteras 45 Express - Hull #HATHS310A616” (the “Vessel”). The Taxpayer subsequently paid the amount shown on the Assessment under protest to the Collector on August 21, 2018. The Taxpayer then filed this Petition to recover the amount paid under protest with the Board on September 4, 2018.

In its *Motion for Summary Judgment*, filed February 8, 2019, the Taxpayer argues that the Vessel was purchased in a non-taxable occasional or isolated sale under La. R.S. 47:301 (10)(c)(ii)(bb) (the “Occasional Sale Exclusion”).¹ In support of its contention, the Taxpayer offers the affidavit of Harold Simmons, the Chief Financial Officer of Manti Resources, Inc., the Taxpayer's parent company. Mr. Simmons acted as the Taxpayer's representative in relation to the purchase of the Vessel. According to Mr. Simmons, the Vessel was purchased by Tortuga Charters, LLC from Hatteras 45, EX, LLC (“Hatteras 45”) with the aid of MarineMax East, Inc. (“MarineMax”), a broker in the business of facilitating vessel sales. The terms of the sale were evidenced by a Brokerage Purchase and Sale Agreement dated May 12, 2017 (the “Agreement”). A copy of the Agreement

is attached as an exhibit to Mr. Simmons' affidavit. According to the Agreement, an entity named Hatteras Latin America was the listing broker for the sale of the Vessel.

*2 On May 30, 2017, James P. Magee, Executive Vice President of Tortuga Charters, LLC, executed an "Addendum" to the Agreement (the "Addendum"). In the Addendum, one Igor Sivokozov, individually and as sole member/manager of the seller, warranted that Hatteras 45 "is not a dealer in used vessels, and that the sale of the Vessel constitute"] an 'occasional sale of used equipment' as defined in the Louisiana tax code, and is consequently excluded from sales tax." However, the Taxpayer did not produce any affidavit by Mr. Sivokozov to provide further detail or to corroborate the statements in the Addendum.²

According to his affidavit, Mr. Simmons' claims are based in part on first-hand knowledge acquired in negotiating the sale of the Vessel. Mr. Simmons claims that Mr. Sivokozov never held himself out, or held Hatteras 45 out, as being in the business of selling marine vessels. Mr. Simmons also bases his statements on certain documents attached to his affidavit: a Certificate of Title relating to the Vessel; a Bill of Sale supposedly executed by Mr. Sivokozov; and a printout from the Florida Secretary of State's website. These documents were introduced at the hearing by the Taxpayer without objection from the Collector, except as to their relevance to the issue presented.

According to the Certificate of Title, Hatteras 45 purchased the Vessel new from the manufacturer and used it for approximately one year and three months prior to selling it to the Taxpayer. The Bill of Sale supposedly demonstrates that the Vessel was transferred directly from Hatteras 45 to the Taxpayer. The printout from the Florida Secretary of State is offered as proof that Mr. Sivokozov was the sole member/manager of Hatteras 45 .

In opposing the Motion, the Collector offers the affidavit of an attorney named Matthew J. Crain. Mr. Crain claims that he researched Mr. Sivokozov on the internet and on Westlaw. The results of his Westlaw research are purported to be public records showing that Mr. Sivokozov currently owns five boats in Florida. Mr. Crain's research apparently turned up an article in which Mr. Sivokozov is mentioned in connection with a series of real estate transactions and certain other dealings. None of these activities apparently have anything to do with the market for used boats. At the hearing, the Taxpayer agreed not to object to Mr. Crain's affidavit or attachments being offered into evidence, provided that the Collector did not object to the Taxpayer's evidence.

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. *Arceneawc v. Lafayette Gen. Med. Ctr.*, 2017-516, p.5 (La. App. 3 Cir. 7/26/17), 248 So.3d 342, 346.

*3 The Occasional Sale Exclusion is found in La. R.S. 47:301(10)(c)(ii)(bb). That provision states that: "The term 'sale at retail' does not include an isolated or occasional sale of tangible personal property by a person not engaged in such business." The Collector's position is that MarineMax and/or Hatteras Latin America, Inc. are persons "engaged in the business" of selling boats within the meaning of the statute. Consequently, the Collector argues that their involvement renders the Occasional Sale Exclusion inapplicable to the sale as a matter of law.

The question presented is whether the definition of an occasional sale in *La. R.S. 47:301(10)(c)(ii)(bb)*, as a matter of law, exclude sales in which a broker is involved. The starting point in this inquiry, as with the interpretation of any statute, 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. 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*. In addition, legal ambiguity in taxing statutes, including statutory provisions which exclude certain transactions from taxation *ah initio*, is construed in favor of the Taxpayer. See *Bridges v. Nelson Indus. Steam Co.*, 2015- 1439 (La. 5/3/16), 190 So.3d 276,281.

On its face, the *La. R.S. 47:301(10)(c)(ii)(bb)* does not state that a broker can never be involved in an occasional sale. Furthermore, the Collector has not offered, and the Board's own research has not unearthed, any case law in support this notion. When the question was presented to the Department in Revenue Ruling 15-001, it came the opposite conclusion. Of course, a mere Revenue Ruling (not adopted as a formal regulatory rule) is not binding on the Collector. However, it is at least illustrative of the contrary construction to the Collector's position.

The Board does not base its decision on Revenue Ruling 15-001. Instead, the Board finds the determinative legal principle in this case to be the rule of strict statutory construction applicable to tax exclusion statutes. See *Harrah's Bossier City Inv. Co., LLC v. Bridges*, 2009-1916 (La. 5/11/10, 13), 41 So.3d438,448. The Occasional Sale Exclusion restricts the scope of what a "sale at retail" is. Generally, a transaction must meet the definition of a "taxable sale" to be subject to tax. Consequently, the Board views the Occasional Sale Exclusion as an exclusionary provision. As such, any ambiguity in *La. R.S. 47:301(10)(c)(ii)(bb)* must be interpreted in the taxpayer's favor. See *id.* So interpreted, the statute cannot be stretched to include the restriction urged by the Collector, which is not apparent from the law's plain language.

*4 Nevertheless, the Board cannot grant summary judgment on this record. The record does not make clear that the seller of the Vessel was not in the business of selling boats. In fact, the Board has very little idea of what the seller's business was at all. The record is not as developed as the record in Taxpayer's cited case, *Marmac Corp. v. McNamara*, 546 So.2d 585, 586 (La. Ct. App. 1989). In that case, a barge operating company, Marmac, maintained a fleet of 750 barges over the course of 40 years. Marmac's practice during that time was to sell off defunct barges for scrap at the end of their useful life, which was estimated to be about 30 years. An audit of Marmac's business revealed that Marmac had, in fact, sold 59 barges for scrap over a 36-month period. The First Circuit held that it was not in the business of selling barges. The First Circuit was apparently persuaded by the fact that the sales at issue demonstrated that Marmac had sold only 0.25% of its fleet. The Court also observed that such, a relatively small number of sales was "hardly the amount of sales volume which would be characteristic of a business of selling barges." *Id.* At 587-88.

However, it is not simply the number of sales that determine whether a seller is in a particular business. The conclusory statements made in the Addendum do not supply comparable detail to a three-year-long audit in *Marmac*. Nor can the gaps in the record be filled by Mr. Simmons' statements of his second-hand understanding of what Mr. Sivokozov represented about his business.

Accordingly, the *Motion for Summary Judgment* should be denied.

Baton Rouge, Louisiana this 15 day of April, 2019.

FOR THE BOARD:

Cade R. Cole
Local Tax Judge

Footnotes

- 1 The Occasional Sale Exclusion is incorporated into the St. Tammany Parish (the "Parish") sales and use tax regime by St. Tammany Parish Code Section 22-310.
- 2 In fact, the Taxpayer claims that it has been unable to obtain such an affidavit despite its best efforts. The Taxpayer speculates that Mr. Sivokozov may be a Russian citizen and not subject to the Board's jurisdiction.

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