BOARD OF TAX APPEALS
STATE OF LOUISIANA

THE JOINT ON POLAND, LLC,
Petitioner,

VERSUS **DOCKET NO. 10812C**

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

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JUDGMENT

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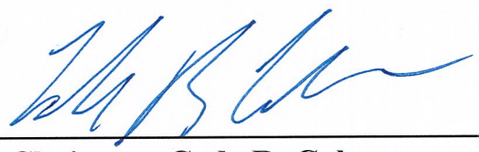
This case came before the Board for hearing on July 10, 2019 on the merits of the Petition of The Joint on Poland, LLC (the "Taxpayer") with Vice-Chairman Cade R. Cole presiding, and Board Member Jay Lobrano present, and with Judge Tony Graphia (ret.), Chairman, absaent. Participating in the hearing were Ernest G. Foundas and Kathleen E. Jordan, for the Taxpayer and Adrienne Quillen, attorney for Tim Barfield, Secretary, Department of Revenue, the State of Louisiana (the "Department"). After the hearing, the matter was taken under advisement. A majority of the Board now renders Judgment in accordance with the written reasons attached herewith.

IT IS ORDERED, ADJUDGED AND DECREED that the Taxpayer's prayer for relief BE AND IS HEREBY GRANTED and that Judgment be rendered in favor of the Taxpayer, The Joint on Poland, LLC and against the Secretary of the Department of Revenue, and that the Department's assessment against The Joint on Poland, LLC BE AND IS HEREBY VACATED.

Judgment Rendered and Signed at Baton Rouge, Louisiana this 14 day of August, 2019.

For the Board:



Vice-Chairman Cade R. Cole
Louisiana Board of Tax Appeals

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WRITTEN REASONS FOR JUDGMENT

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This case came before the Board for hearing on July 10, 2019 on the merits of the Petition of The Joint on Poland, LLC (the "Taxpayer") with Vice Chairman Cade R. Cole presiding, and Board Member Jay Lobrano present. Participating in the hearing were Ernest G. Foundas and Kathleen E. Jordan, for the Taxpayer and Adrienne Quillen, attorney for Tim Barfield, Secretary, Department of Revenue, the State of Louisiana (the "Department"). After the hearing, the matter was taken under advisement. A majority of the Board now renders Judgment in accordance with the following written reasons.

This case is an appeal from a Notice of Assessment of New Orleans Exhibition Hall Authority Tax ("NOEHAT") dated June 6, 2017 (the "Assessment"). The Assessment purports to hold the Taxpayer liable for tax in the amount of $26,518.00, interest in the amount of $2,853.78 (calculated through June 21, 2017), late payment penalties in the amount of $6,629.50 and understatement penalties in the amount of $3,977.70, for a total of $39,978.98. The tax periods identified in the Assessment are January 31, 2014 through September 30, 2016 (the "Tax Periods"). The Taxpayer timely filed the instant Petition on August 4, 2017. In the Petition, the Taxpayer claims that the Department is estopped from issuing the Assessment under

the doctrine of detrimental reliance as set forth in *Showboat Star Partnership v. Slaughter*, 200-1227 (La. 4/3/01); 789 So.2d 554.

The Taxpayer is a barbecue restaurant located in New Orleans that has operated in the Bywater neighborhood since 2004. On December 14, 2012, the Taxpayer received a letter from the Department stating:

> As a food service establishment in Orleans parish, you are required to collect a tax on food and beverage sales for the New Orleans Exhibition Hall Authority. The rate of tax to be collected is based on your reported sales of food and beverages sold through your business in the current year. According to our records, the taxable food and beverage sales that you have reported this year indicate that your total taxable sales will be less than $200,000. As a result, your business will not be required to collect the NOEHA food and beverage tax for the coming year.
>
> However, you must continue to report your total taxable food and beverage sales on form R-1325, "New Orleans Exhibition Hall Authority Additional Hotel Room Occupancy Tax and Food and Food and Beverage Tax Return." The rate to be used in completing the return should be zero.
>
> Should your total sales of taxable food and beverages exceed $200,000 during the coming year, you will be required to collect the NOEHA tax on those sales beginning in January of the following year. The Department will inform you of your NOEHA tax rate prior to the January collection period.

The Taxpayer's corporate officer subsequently contacted the Department for an explanation of the letter and information about the NOEHAT. According to the Taxpayer, the Department representative reviewed the Taxpayer's file and advised that no NOEHAT was due. The Department's notes reflect that the representative further instructed the Taxpayer to file "zero returns" in the future. The Taxpayer thereafter filed a NOEHAT return on which it reported no taxable sales. The Taxpayer continued to file NOEHAT returns showing zero taxable sales for the duration of the Tax Periods. However, during the Tax Periods, the Taxpayer also filed sales tax returns on which it reported its taxable transactions.

The Taxpayer received additional letters from the Department in December 2013, January 2015 and December 2015. These letters, like the first, explicitly advised the Taxpayer that it did not owe NOEHAT. The letters also differed from the original letter in that they contained instructions for electronic filing. These instructions stated:

> This return must be filed electronically as mandated by Louisiana R.S. 47:1520(A)(1)(d) and LAC 61:III.1519 using the Department's Louisiana Taxpayer Access Point (LaTap) system on our website (www.rev.state.la.us). Failure to comply with this mandate will result in a penalty of $100.00 or five percent of the tax, whichever is greater, as provided by R.S. 47:1520(B).

At the hearing, the Taxpayer's Co-owner and Co-Founder, Peter Breen, testified that the he believed that the only way to file a zero return on the LaTap webpage was to enter zeros in the fields for reporting taxable transactions.

In 2016, the Department began auditing the Taxpayer for NOEHAT. At the hearing, the Taxpayer called Kevin Johnson, a state auditor and revenue agent, to testify. Mr. Johnson stated that he commenced the audit after comparing the Taxpayer's sales tax and NOEHAT returns. Despite the opening of the audit, the Taxpayer received yet another letter from the Department, dated December 8, 2016, that again advised the Taxpayer that it did not owe NOEHAT.

Mr. Breen told Mr. Johnson that an employee of the Department had advised him that he did not owe NOEHAT and he had to file "zero returns." Mr. Johnson reviewed notes in Department's system and concluded that the representative Mr. Breen had spoken to was one Iris Williams. Ms. Williams did not testify at the hearing. However, Mr. Johnson recorded his findings about the conversation between Ms. Williams and Mr. Breen in a Phone Conference Call Memorandum, which the Taxpayer introduced into evidence at the hearing. Mr. Johnson further testified that instructions to file "zero returns" could be understood to mean that the

Taxpayer was supposed to file NOEHAT returns showing zero taxable sales. Despite having access to the Taxpayer's sales tax returns, the Department continued to send the Taxpayer letters stating that it did not owe NOEHAT over the course of several years.

Under *Showboat Star*, the four elements of a detrimental reliance claim against a government agency are: (1) Unequivocal advice from an unusually authoritative source; (2) Reasonable reliance on that advice by an individual; (3) Extreme harm resulting from the reliance; and (4) Gross injustice in the absence of judicial estoppel. 2000-1227 at p. 13; 789 So.2d at 562.

This case is in a unique procedural posture, in the Department's pre-trial memorandum it explicitly concedes the first two prongs. During trial, the Department attempted to walk back that concession and argued that the letters, if unequivocal, instructed the Taxpayer to report its taxable food & beverage sales on its NOEHAT returns. The Department and the Taxpayer further disagree as to whether the facts of this case demonstrate an "extreme harm" or a "gross injustice" that satisfies the third and fourth prongs of the test.

Given the abundance of obviously confusing advice from the Department, the Department's concession in its memoranda, and the totality of the underlying evidence, the Board agrees that in this case the first two prongs have been satisfied. The Department argues that under *Showboat Star*, there is no extreme harm or gross injustice in compelling a taxpayer to pay a tax that is legitimately owed under the proper interpretation of the law. In *Showboat Star*, the dispute was over whether the purchasers of gaming equipment were liable for tax on their own purchases. The taxpayers in that case had purchased the gaming equipment for riverboat gaming vessels without paying sales tax. They had done so in reliance on the Department's erroneous advice. The Department was only attempting to force them to pay a tax

that they would have been responsible for anyway. The Louisiana Supreme Court held that paying such a tax did not constitute an extreme harm or gross injustice. The addition of non-punitive interest to the taxpayers' liability did not change the majority's opinion. *Showboat Star, supra.*

However, the Third Circuit has held that compelling a taxpayer to pay *someone else's* taxes does constitute an extreme harm and gross injustice. *CHL Enterprises v. Department of Revenue*, 2009-487 (La. App. 3 Cir. 11/4/09); 23 So.3d 1000; *writ denied*, 2009–2613 (La. 2/12/10), 27 So.3d 848. The plaintiff in *CHL Enterprises* was a dealer of farm equipment who had relied upon the Department's exemption certificates. The certificates erroneously stated that "other equipment used in agricultural production of food and fiber" was exempt from tax. Accordingly, the plaintiff sold farm equipment without collecting sales tax from its customers. Later, the Department sought to hold the seller responsible for the uncollected tax. By operation of law, a dealer who fails to collect the state sales tax becomes responsible for the tax. The Court also noted that the dealer has no remedy against the true taxpayer if the tax is not collected at the point of sale.

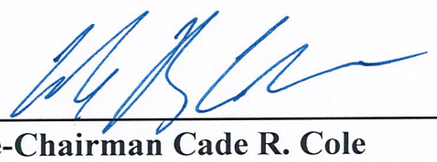
As a practical matter, the dealer in *CHL Enterprises* would not even have been able to find its former customers, who were largely small enterprises and no longer in business. Under those circumstances, the Court held the third and fourth *Showboat Star* prongs met because "a business is clearly harmed . . . when it is required to pay someone else's taxes." *Id.* at 1007.

The harm and injustice in the present case are not distinguishable from the circumstances in *CHL Enterprises*. The Taxpayer here is a dealer. Had it not relied on the Department's advice, it would have been able to collect the tax from the true taxpayers: its customers. Absent estoppel, this Taxpayer would become liable for someone else's taxes. Under *CHL Enterprises*, this would constitute extreme harm

and gross injustice. Consequently, the Board finds that this Taxpayer has satisfied the third and fourth prongs of the *Showboat Star* test. All four prongs of the test being satisfied, the Department is estopped from collecting upon its Assessment.

Baton Rouge, Louisiana this 14 day of August, 2019.

For the Board:



Vice-Chairman Cade R. Cole
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