BOARD OF TAX APPEALS
STATE OF LOUISIANA
LOCAL TAX DIVISION

WORLD WAR II THEATRE, INC.

Petitioner

versus DOCKET NO. L01363

NORMAN WHITE CHIEF FINANCIAL OFFICER
AND DIRECTOR OF FINANCE,
CITY OF NEW ORLEANS;
ERROLL G. WILLIAMS, ASSESSOR, ORLEANS PARISH;
AND LAWRENCE E. CHEHARDY,
CHAIRMAN, LOUISIANA TAX COMMISSION

Respondents

****

JUDGMENT ON CROSS MOTIONS FOR SUMMARY JUDGMENT
AND REASONS FOR JUDGMENT

****

On December 8, 2022, this matter came before the Board for hearing on Cross-Motions for Summary Judgment. Presiding at the hearing was Local Tax Judge Cade R. Cole. Present before the Board were Cheryl M. Kornick and Tyler D. Trew, attorneys for World War II Theatre, Inc. (the "WWII Theatre"), and Reese F. Williamson, attorney for Erroll G. Williams, Assessor, Orleans Parish (the "Assessor"). At the conclusion of the hearing, the Board took the matter under advisement. In accordance with the attached Reasons for Judgment, the Board now rules as follows:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that WWII Theatre's Motion for Summary Judgment is DENIED.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Assessor's Motion for Summary Judgment is DENIED.

JUDGMENT RENDERED AND SIGNED AT BATON ROUGE, LOUISIANA, THIS 8 DAY OF MARCH, 2023.

FOR THE BOARD:

LOCAL TAX JUDGE CADE R. COLE

BOARD OF TAX APPEALS
STATE OF LOUISIANA
LOCAL TAX DIVISION

WORLD WAR II THEATRE, INC.

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REASONS FOR JUDGMENT
ON CROSS MOTIONS FOR SUMMARY JUDGMENT

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Background:

In its Petition, WWII Theatre challenges 2022 Personal Property Tax Bill No. 102102511P in the amount of $183,596.99 and 2022 Real Property Tax Bill No. 102103307 in the amount of $370,425.44 (collectively the "Assessments"), WWII Theatre is a 501(c)(3) corporation and it claims that the Hotel is exempt under La. Const. art. VII, Section 21(B) ("Section 21(B)"). The Assessments are for The Higgins Hotel & Conference Center, located at 1000 Magazine Street in the City of New Orleans (the "Hotel"). WWII Theatre constructed, owns, and operates the Hotel. The Hotel is situated across the street from the National World War II Museum (the

"Museum"). The relationship, or lack thereof, between the Hotel and the Museum is at the center of the dispute in this case.

Assessor's Objections

La. C.C.P. art. 966(D)(2) Objection to Documents not filed in support of or opposition to the Assessor's Motion for Summary Judgment

WWII Theatre attached one exhibit to its opposition to the Assessor's Motion for Summary Judgment. All other exhibits that WWII Theatre identified as evidence in opposition to the assessor's motion were incorporated by reference to WWII Theatre's own Motion For summary Judgment. The assessor objects to use of the referenced exhibits in deciding his Motion.

Under La. C.C.P. art. 966(D)(2), the Board may only consider "documents filed in support of or in opposition to the motion for summary judgment." Comment (k) to Article 966 states that recent amendments are a departure from the the federal rule. The federal rule allows a court to consider materials in the record. Since the effective date of the 2015 amendments, however, Louisiana's Code allows a court to consider only those documents filed in support of or in opposition to the motion.

The Court in *Huggins v. Amtrust Ins. Co. of Kansas, Inc.*, 2020-0516 (La. App. 1 Cir. 12/30/20), 319 So.3d 362 applied the 2015 amendments to La. C.C.P. art. 966(D)(2) strictly in accordance with the revision comment. In that case, plaintiffs suing their insurer did not attach copies of their insurance policies to their cross-motion for summary judgment. Instead, the plaintiffs referenced the policies already in the record as attachments to the insurer's cross-motion. *Id.* at 366-67.

The Court held that the policies could not be considered in ruling on the plaintiff's cross-motion, stating:

> We recognize the duplicative nature of requiring the Hugginses to include their own copies of the USAA and Technology policies in the record, when the very same policies already appear in the record, albeit, attached to their opponent's cross motion for summary judgment. Under prior summary judgment law, in a case where cross motions for summary judgment were filed, the district court was able to consider

> each party's motion as an opposition to the other party's motion and to consider all evidence offered on the cross motions. *See Bouquet v. Williams*, 15-0134 (La. App. 1 Cir. 10/28/16), 206 So.3d 232, 236-37; *also see Smart v. Calhoun*, 49,943 (La. App. 2 Cir. 7/29/15), 174 So.3d 168, 172-73 (finding that former La. C.C.P. Art. 966F(2) did not require a separate opposition pleading when the parties filed cross motions for summary judgment on the same issue). However, under current La. C.C.P. Art. 966D(2), in reviewing the grant of summary judgment to the Hugginses, we may consider only those documents specifically filed in support of or in opposition to the Hugginses' motion for summary judgment.[1]

In *Washington v. Gallo Mech. Contractors*, LLC, 2016-1251, (La. App. 4 Cir. 5/17/17), 221 So.3d 116, the Court held that even though testimony from a prior hearing in a case is part of the record, the testimony is still not admissible for purposes of summary judgment if it is not properly attached to a motion or to an opposition. In that case, the plaintiff attached a copy of the transcript from the hearing to an opposition memorandum that was stricken as untimely. The judge also refused to take judicial notice of the testimony in the record. Like the First Circuit, the Fourth Circuit strictly applied article 966(D)(2), and affirmed the refusal to take judicial notice. *Id.* at 118-21. The Fourth Circuit also reversed the granting of a motion for summary judgment that merely referenced evidence from an earlier phase of a bifurcated trial. *Forstall v. City of New Orleans*, 2017-0414, (La. App. 4 Cir. 1/17/18), 238 So.3d 465. An appeal from the Board's decision in this case would lie with the Fourth Circuit. La. R.S. 47:1436. Accordingly, the Assessor's objection will be sustained. The board does not consider exhibits referenced in, but not attached to, WWII Theatre's Opposition in deciding whether to grant or deny the Assessor's Motion for Summary Judgment. The only exhibits actually attached to WWII Theatre's Opposition are the Affidavit of Peter Crean and Exhibit 1 thereto.[2]

Objections to Affidavit of Stephen Watson

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1 *Huggins*, 2020-0516 at *5-*6, 319 So.3d at 367.

2 As noted on the record of the Hearing, however, the Board sustained the Assessor's objection to the Crean Affidavit as attached to WWII Theatre's Motion for Summary Judgment. That objection was based on the absence of the affiant's signature and attestation.

The Assessor objects to the Affidavit of Stephen Watson based on a lack of personal knowledge and familiarity with the facts asserted. Mr. Watson is the President and CEO of the Museum, and the Museum is the sole Corporate Shareholder of WWII Theatre. He is also the Chairman of the WWII Theatre Board of Directors. His signature is on the 2021 Articles of Amendment to Articles of Incorporation that recite WWII Theatre's foundational and continuing purpose. His testimony concerns the development, operations, and objectives of the Hotel.

Affidavits offered in support of or in opposition to a motion for summary judgment shall be made on personal knowledge and shall show affirmatively that the affiant is competent to testify to the matters stated therein. *See* La. Code Civ. Pro. art. 967(A). An executive is generally competent to testify as to basic information concerning a company, particularly if there is no contradictory evidence. *Schexnaildre v. State Farm Mut Auto. Ins. Co.*, 2015-0272, p. 16 (La. App. 1 Cir. 11/9/15), 184 So.3d 108, 117. An executive may testify as to a company's business records with which they are familiar, without having personally prepared the records themselves. *See Regions Bank v. Louisiana Pipe & Steel Fabricators, LLC*, 2011-0839, p. 5 (La. App. 1 Cir. 12/21/11), 80 So.3d 1209, 1213.

However, in *Benoit v. Burger Chef Systems of Lafayette, Inc.*, 257 So.2d 439, 441 (La. Ct. App. 1972), the affidavits of a president, vice-president and secretary-treasurer were insufficient to prove that the company had neither personnel nor vehicles in the vicinity of U.S. Highway 90 East in St. Mary Parish on a specific date. Nevertheless, an officer should be familiar enough to testify as to matters within the scope of their management responsibilities. *See Jones v. Foster*, 41,619, p. 6 (La. App. 2 Cir. 12/13/06), 945 So.2d 262, 266 (holding regional manager could testify that employees would not be working on Saturdays).

Mr. Watson's positions as CEO and as Chairman of the Board, and his status as signatory on the Articles of Amendment, demonstrate his familiarity with the formation, amendment, and charitable purpose of the Hotel. Further, in his

Deposition, Mr. Watson testified that the Board of Directors provides some oversight to the "day-to-day operations, the financials, all of the different aspects of the management of the hotel."[3] Operation of the Hotel is within the scope of his managerial experience. However, Mr. Watson's statements in Paragraph 11 of his Affidavit assert facts concerning where the Hotel's guests come from and how many hotel rooms they use per night in New Orleans. These are not facts within the scope of his managerial oversight. Statements in Paragraph 13 concerning guests' purpose in visiting the Hotel or the Museum are not matters within his personal knowledge. Those statements are stricken and are not considered. In all other respects, Mr. Watson has sufficient familiarity with the matters in his Affidavit and this objection will be overruled.

Objections to Website Printouts

The Assessor objects to printouts of the Hotel's website that were attached as Exhibit C to Mr. Watson's Affidavit as hearsay. A computer printout from a website is generally inadmissible unless certified, authenticated, or supported by personal knowledge of the contents. *Sierra Frac Sand, LLC v. Whittington*, 54,734, p. 9 (La. App. 2 Cir. 9/21/22); 349 So.3d 1029, 1034. In his Affidavit, Mr. Watson swears: "These pages accurately reflect the Higgins Hotel, its purpose, its Museum/World War II theme, and the way it advertises itself to the public." Mr. Watson's familiarity with the Hotel is sufficient for him to authenticate the printouts as genuine representations of the Hotel's website. This objection is overruled.

Objections to Discovery Responses from the matter of *World War II Theatre, Inc. v. Norman White, et al.*, No. 2021-01222, Civil District Court for the Parish of Orleans

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[3] Watson Dep. 22:7-11.

Mr. Watson attached a copy of WWII Theatre's responses to discovery in the matter referenced above as Exhibit E to his Affidavit. The Assessor objects to Exhibit E and the attachments thereto as being unauthenticated and not specifically identified. Mr. Watson swears: "Exhibit E is a true and correct copy of responses to discovery provided to the Assessor in conjunction with litigation from the prior tax year. Those responses are true and accurate." Mr. Watson does not state that he reviewed the responses or that he was involved in preparing the responses. He is not automatically familiar with responses to discovery simply by his status as an executive. The Board finds that the Watson Affidavit does not provide a sufficient basis for establishing the affiant's personal knowledge of Exhibit E. This objection is sustained and the Board does not consider Exhibit E or the attachments thereto in ruling on WWII Theatre's Motion for Summary Judgment.

WWII Theatre's Objections to Evidence

WWII Theatre objects to the Affidavits of Thomas L. Sandoz and Andree' C. Reese because their familiarity and personal knowledge is based on a tour of the Hotel, and because certain statements in their Affidavits are allegedly incorrect. This objection goes to the credibility of the witnesses and to the weight of their testimony and is overruled.

WWII Theatre objects to Statement 18 in the Affidavit of Erroll G. Williams in that it purports to identify what portions of the 1974 Constitutional Convention Transcripts are relevant. This objection is sustained to the extent that the Board gives no weight to the legal conclusions and opinions of a witness. In all other respects this objection is overruled.

WWII Theatre objects to the Affidavits of Charles J. Neyrey and Haitham Eid, Ph.D. For the oral reasons assigned on the record during the hearing, the Board sustains these objections and does not consider these exhibits.

Discussion:

La. Const. art. VII, Section 21(B)(1) provides:

> (B)(1) Property owned by a nonprofit corporation or association organized and operated exclusively for religious, dedicated places of burial, charitable, health, welfare, fraternal, or educational purposes, no part of the net earnings of which inure to the benefit of any private shareholder or member thereof and which is declared to be exempt from federal or state income tax;
>
> None of the property listed in paragraph (B) shall be exempt if owned, operated, leased, or used for commercial purposes unrelated to the exempt purposes of the corporation or association.

The quoted provision takes the Exemption away from property operated for a commercial purpose unrelated to the taxpayer's charitable purposes. Thus, the question presented is whether the commercial operation of the Hotel is "unrelated" to the Taxpayer's charitable purposes.

The Fourth Circuit explained the legal principles underpinning Article 21(B) in *Hotel Dieu v. Williams*, 403 So.2d 1255 (La. Ct. App. 1981). The Fourth Circuit relied on transcripts from the 1974 Constitutional Convention. The drafters of 21(B)(1) for the 1974 Constitution made the Exemption applicable based on the charitable character of the owner of the property. *Id.* at 1258-59. In doing so, the drafters decoupled the Exemption from the property's devotion to a charitable use, as had been the case under the 1921 Constitution.[4] Under the 1921 Constitution, "even vacant, unused land given to an exempt hospital would have been taxable because" it was not "devoted" to a charitable undertaking. *Id.* The 1974 Constitution ties the Exemption to the charitable purpose of the owner entity and denies the Exemption only if the property is used for "commercial purposes unrelated to the exempt purposes" of the nonprofit owner entity. *Id.* at 1259 (internal quotations omitted).

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[4] *Id.* at 1258.

Louisiana Jurisprudence Interpreting 21(B):

In *Hotel Dieu*, a non-profit hospital was able to claim the Exemption on an office building and parking lot because the properties facilitated the accomplishment of the hospital's charitable purpose. The properties, located adjacent to the hospital, provided convenient access to office space, a pharmacy, a snack bar, and parking for hospital staff and doctors. The properties were open for rental to the general public, but the evidence showed that they were, in fact, used for the convenience of the staff. One hundred and eighty-one of two hundred and eighty-one parking spaces were contracted to physicians and other employees at the hospital and office building.[5] Most doctors at the office building were on the hospital's medical staff. All of the doctors at the office building admitted a substantial portion of their patients to the hospital, with 90% of the doctors doing this for all of their patients. Space in the office building was leased exclusively for medical purposes.[6]

The Fourth Circuit looked to the transcripts of the 1974 Constitutional Convention for guidance. The Court stated:

> The 1974 Constitutional Convention showed its understanding of "unrelated" purposes: a parking garage "downtown five blocks away" from the hospital that owned it would constitute an unrelated use, therefore taxable, while a parking facility on the hospital grounds, intended to facilitate patients, staff and visitors, would not be "unrelated." Some food-serving facility (what hospital save the smallest has none?) available to staff and visitors at a hospital was also recognized as a related purpose exempt from taxation.[7]

The Court further noted an exchange between delegates:

> [Justice] Dennis: . . . . Hospitals have to run some things that people make money out of in their hospitals, such as: X-ray labs, pathology labs, pharmacies and . . . refreshment stands . . . . If one of these purposes were to be classified as commercial, it would make the whole hospital be subject to taxes even though it is related to the operation of a hospital. So, that's the reason for that last line in there. . . .

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5 *Hotel Dieu v. Williams*, 410 So.2d 1111 (La. 1982) (holding that the Court of Appeal's judgment was supported by the record evidence).

6 *Id.*

7 *Id.* at 1259.

> Mr. Lowe: . . . [T]he second concern was . . . tax-exempt organization[s] . . . competing with free enterprise .... [T]he federal government ... took care of that particular problem by saying that any unrelated business income a hospital is organized for the purpose of carrying on medical treatment . . . . Now, if that hospital that is tax-exempt has a parking lot downtown five blocks away then they are in an unrelated business activity. That parking lot downtown has nothing to do with the activities, the exempt purpose for which that organization was organized and received its exempt status. So then, that unrelated business income is taxable; it's also, according to this amendment, taxable for ad valorem tax purposes."[8]

As *Hotel Dieu* illustrates, one way a commercial activity can be related to a nonprofit's charitable purpose is by facilitating the accomplishment of that purpose. The close proximity of the office space and parking lot to the hospital made its facilities more convenient for hospital employees and doctors. The parking lot eased hospital staff and doctors' commute. The office space was convenient for the hospital's doctors and facilitated the hospitalization of their patients.

Each case is evaluated on its own facts and circumstances. *Willis-Knighton Medical Center v. Edmiston*, 39,374 (La. App. 2 Cir. 4/6/05), 899 So.2d 736, like *Hotel Dieu*, involved a hospital and an adjacent medical office building. A portion of the office building was leased to private physicians who were members of the hospital's medical staff and who used the offices to treat patients. Another portion of the office was sold as condominiums to private physicians. In addition, the hospital and the medical office building were connected by a common atrium. However, when compared to *Hotel Dieu*, a lower percentage of the doctors in *Willis-Knighton I* referred patients to the exempt hospital. However, the Court declined to declare a certain percentage of referrals as the minimum requirement for the Exemption. The fact that the taxpayer's doctors used the office space to treat patients was sufficient evidence of the relationship between commercial activity and charitable purpose.

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[8] *Id.* at n. 4 [substitutions in original and added].

Three years later, the same parties came before the Court with essentially the same dispute in *Willis Knighton Medical Center v. Edmiston*, 43,106 (La. App. 2 Cir. 3/19/08), 979 So.2d 656 ("*Willis-Knighton II*"). The facts of *Willis-Knighton II* were almost identical to the facts of *Willis-Knighton I*, with the only difference being that the office building in *Willis-Knighton II* was not physically joined to the hospital by a shared atrium. This did not change the result. The Court held that application of the Exemption was not dependent solely on proximity, rather, location was merely one factor to consider. *Id.* at 662.

There is a genuine dispute as to whether the commercial operation of the Hotel benefits the exempt purpose of the Museum. The Hotel is right across the street from the Museum and the facilities at the Hotel are convenient for the Museum to use. The Hotel offers services to the Museum at a discount. WWII Theatre produced photographic documentation of the art and artifacts that are displayed at the Hotel. All of these facts help WWII Theatre's case, but the Board cannot ignore the warning in the case law that there is no quantifiable bright-line rule that establishes the exempt relationship as a matter of law. Furthermore, there is contradictory testimony in the record suggesting that the Hotel was intended to enhance the Museum's endowment. The Board finds that there are genuine disputes of material fact in this case that preclude granting summary judgment.

UBTI

During the 1974 Constitutional Convention,[9] the drafters referred to the federal concept of Unrelated Business Taxable Income ("UBTI"). UBTI is governed by 26 USC § 511 and 512, and 26 C.F.R. § 1.513–1.[10] 26 C.F.R. § 1.513–1(b) explains that UBTI is gross income derived from any unrelated trade or business.[11] In relevant

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9 See discussion of *Hotel Dieu*, supra.

10 See also 26 C.F.R. § 1.511–1 and related regulations.

11 The term is further subject to various deductions, modifications, and other special provisions in the accompanying statutes and regulations.

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part, an "unrelated" trade or business is one conducted such that it is "not substantially related (other than through the production of funds) to the organization's performance of its exempt functions." *Id.* The regulations further contemplate that exempt business activities must have a "causal relationship to the achievement of exempt purposes (other than through the production of income)" ; and that this causal relationship must be a "substantial one." 26 C.F.R. § 1.513–1(d)(2). Explained in another way, the activities must "contribute importantly to the accomplishment of" the exempt purpose. *Id.* The regulation describes the UBTI inquiry as dependent upon the facts and circumstances of each case. *Id.* Typically, federal courts have informed the inquiry by examining: competition with for-profit entities; the extent to which services are provided at below cost; the existence of reasonable financial reserves; pricing policies; and whether the entity's advertisements are akin to the advertisements of for-profit entities. *Airlie Foundation v. IRS*, 283 F.Supp.2d 58 (D.C. Cir. 2003).

The IRS ruled that income from a hotel was unrelated to a planned hospital in I.R.S. Priv. Ltr. Rul. 803-1075, 1980 WL 134153 (May 7, 1980). In that case, a 501(c)(3) non-profit purchased real estate in an area where it planned to build a hospital. The non-profit also purchased a hotel adjacent to the future hospital site. At the time of the ruling the non-profit had not finished purchasing all of the houses it needed. Until it could complete those purchases, the non-profit operated the hotel for profit and rented the houses it had already purchased. The non-profit represented to the IRS that the hotel could conceivably be used by hospital staff, patients, and their relatives once the hospital was up and running. However, the IRS found that the non-profit was operating the hotel in a manner indistinguishable from a commercial operation and not for the convenience of the non-profit or its staff, unlike the example of a cafeteria inside a hospital. Further, the hotel provided typical hotel amenities like maid and janitorial services and federal law specified that rental income from

real estate owned by a non-profit was not exempt if the lessor provided services beyond those customarily provided in a rental for residence only.

Although the drafters did not explicitly or implicitly adopt federal law into the Louisiana Constitution, the interpretation of UBTI is helpful in identifying factors that are relevant to the issue in this case. This is especially true in this case because the record contains Forms 990 (Return of Organization Exempt From Income Tax) filed by the Taxpayer for the years 2019 and 2020, on which the Taxpayer reported that it had UBTI in excess of one million dollars. The Taxpayer responds that the reported UBTI did not exceed its expenses and did not result in taxable income. This raises a question as to the relationship between the operation of the hotel and the charitable purpose of the Museum.

The resulting doubt is sufficient to defeat the Taxpayers' Motion for Summary Judgment. The Board must emphasize that this holding should not be understood to suggest that the language of our State Constitution is controlled by the federal concept of UBTI. The Board merely reasons that the unrelated income that constitutes UBTI is similar enough to the unrelated income described in 21(B)(1) to require a credibility determination that precludes summary judgment in this case.

There are also sufficient facts in the summary judgment record to preclude summary judgment in favor of the Assessor. The hotel provides some services at a discount to the Museum and to Museum patrons. *See Whitten Foundation v. Granger*, 2004-0934 (La. App. 1 Cir. 11/3/06), 950 So.2d 720. There is evidence that the hotel is operating at a loss. *See Pratt-Stanton Manor Corp. v. Parish of Orleans*, 2002-0358 (La. App. 4 Cir. 6/19/02), 821 So.2d 748. The Hotel provides benefits to the Museum. *See New Orleans Towers Affordable Housing Corp. v. Kahn*, 98-1240 (La. App. 4 Cir. 12/29/98) (citing *Bd. of Administrators of the Tulane Educ. Fund v. La. Tax Comm'n*, 97–0663 (La. App. 4 Cir. 10/1/97), 701 So.2d 702). In addition, the Hotel provides educational programming by hosting and broadcasting symposia, and by displaying

artifacts, art, and other exhibits in a manner that contributes to its charitable purpose. *See* 26 C.F.R. § 1.513–1(d)(4)(iv), Example 2.

Genuine disputes of material fact prevent this matter from being resolved on summary judgment. A trial is necessary to evaluate the credibility of the Taxpayer's claim that the operation of the hotel is related to its charitable purpose. In addition, the Board must weigh contradictory evidence concerning the Taxpayer's intent and the extent to which the commercial operation of the Hotel benefits and/or facilitates the accomplishment of the Taxpayer's charitable purpose. Accordingly, both Motions for Summary Judgment will be denied.

JUDGMENT RENDERED AND SIGNED AT BATON ROUGE, LOUISIANA, THIS 8 DAY OF MARCH, 2023.

FOR THE BOARD:

LOCAL TAX JUDGE CADE R. COLE

BOARD OF TAX APPEALS
STATE OF LOUISIANA
LOCAL TAX DIVISION

UNIVERSITY OF NEW ORLEANS RESEARCH AND TECHNOLOGY FOUNDATION, INC.

Petitioner

DOCKET NO. L01362

versus

NORMAN WHITE CHIEF FINANCIAL OFFICER AND DIRECTOR OF FINANCE CITY OF NEW ORLEANS; ERROLL G. WILLIAMS, ASSESSOR, ORLEANS PARISH; AND LAWRENCE E. CHEHARDY, CHAIRMAN, LOUISIANA TAX COMMISSION

Respondents

****

JUDGMENT ON ORIGINAL EXCEPTIONS AND SUPPLEMENTAL EXCEPTIONS OF NO CAUSE OF ACTION AND NO RIGHT OF ACTION

****

This matter came for hearing before the Board on August 11, 2022, on the Original Exceptions including the Declinatory Exception of Lack of Subject Matter Jurisdiction and Peremptory Exceptions of No Cause of Action and No Right of Action (the "Original Exceptions") and the Supplemental Exceptions of No Cause of Action and No Right of Action filed by Assessor, Erroll G. Williams (the "Assessor").

Present were:

Cheryl Kornick and Tyler Trew, counsel for Petitioner, University of New Orleans Research and Technology Foundation, Inc.; Jordan S. Varnado, counsel for Defendants, Louisiana Tax Commission and Lawrence E. Chehardy, in his official capacity as Chairman of the Louisiana Tax Commission (via video); Reese F. Williamson, counsel for Erroll G. Williams, in his official capacity as Assessor of Orleans Parish ("Assessor Williams"); and Tanya L. Irvin and Kimberly K. Smith, counsel for Norman White Chief Financial Officer and Director of Finance, City of New Orleans (via video).

Having considered the pleadings, memoranda, evidence, law, and arguments of counsel, and for the reasons orally stated on the record:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Original Exceptions **ARE HEREBY OVERRULED** with respect to Paragraph Three of Taxpayer's Prayer for Relief, subject to the understanding that the Board does not have jurisdiction to determine the amount of tax owed on any taxable portion of the Property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Supplemental Exceptions of No Cause of Action and No Right of Action **ARE HEREBY OVERRULED**. The Board's ruling on the Supplemental Exceptions of Prescription will be issued in a separate Judgment.

JUDGMENT RENDERED AND SIGNED AT BATON ROUGE, LOUISIANA, THIS 9th **~~12~~TH DAY OF** March **~~JANUARY~~, 2023.**

FOR THE BOARD

LOCAL TAX JUDGE CADE R. COLE

BOARD OF TAX APPEALS
STATE OF LOUISIANA
LOCAL TAX DIVISION

WORLD WAR II THEATRE, INC.

Petitioner

versus DOCKET NO. L01363

NORMAN WHITE CHIEF FINANCIAL OFFICER AND DIRECTOR OF FINANCE CITY OF NEW ORLEANS;
ERROLL G. WILLIAMS, ASSESSOR, ORLEANS PARISH;
AND LAWRENCE E. CHEHARDY, CHAIRMAN, LOUISIANA TAX COMMISSION

Respondents

****
JUDGMENT ON ORIGINAL AND SUPPLEMENTAL EXCEPTIONS
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This matter came for hearing before the Board on August 11, 2022, on the Original Exceptions including the Declinatory Exception of Lack of Subject Matter Jurisdiction and Peremptory Exceptions of No Cause of Action and No Right of Action (the "Original Exceptions") and the Supplemental Exceptions of No Cause of Action, No Right of Action, and Prescription (the "Supplemental Exceptions") filed by Assessor, Erroll G. Williams (the "Assessor").

Present before the Board were: Cheryl Kornick and Tyler Trew, counsel for Petitioner, World War II Theatre, Inc.; Jordan S. Varnado, counsel for Defendants, Louisiana Tax Commission and Lawrence E. Chehardy, in his official capacity as Chairman of the Louisiana Tax Commission (via video); Reese F. Williamson, counsel for Erroll G. Williams, in his official capacity as Assessor of Orleans Parish ("Assessor Williams"); and Tanya L. Irvin and Kimberly K. Smith, counsel for Norman White Chief Financial Officer and Director of Finance, City of New Orleans (via video).

Having considered the pleadings, memoranda, evidence, law, and arguments of counsel, and for the reasons orally stated on the record:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Original Exceptions **ARE HEREBY OVERRULED** with respect to Paragraph Three of Taxpayer's Prayer for Relief, subject to the understanding that the Board does not

have jurisdiction to determine the amount of tax owed on any taxable portion of the Property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Supplemental Exceptions **ARE HEREBY OVERRULED**.

JUDGMENT RENDERED AND SIGNED AT BATON ROUGE, LOUISIANA, THIS 8th DAY OF March, 2023.

FOR THE BOARD

LOCAL TAX JUDGE CADE R. COLE

BOARD OF TAX APPEALS
STATE OF LOUISIANA
LOCAL TAX DIVISION

UNIVERSITY OF NEW ORLEANS RESEARCH AND TECHNOLOGY FOUNDATION, INC.

Petitioner

DOCKET NO. L01362

versus

NORMAN WHITE CHIEF FINANCIAL OFFICER AND DIRECTOR OF FINANCE CITY OF NEW ORLEANS; ERROLL G. WILLIAMS, ASSESSOR, ORLEANS PARISH; AND LAWRENCE E. CHEHARDY, CHAIRMAN, LOUISIANA TAX COMMISSION

Respondents

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JUDGMENT ON SUPPLEMENTAL EXCEPTIONS WITH REASONS

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On August 11, 2022, this matter came before the Board for hearing on the Supplemental Exceptions filed by Erroll G. Williams, Assessor, Orleans Parish ("Assessor"). Presiding at the hearing was Local Tax Judge Cade R. Cole. Present before the Board were Cheryl M. Kornick and Tyler D. Trew, attorneys for the University of New Orleans Research and Technology Foundation, Inc. ("UNO") and Reese F. Williamson, attorney for the Assessor. Attorneys for Norman White, Chief Financial Officer and Director of Finance, City of New Orleans ("Collector")[1] and Lawrence E. Chehardy, Chairman, Louisiana Tax Commission ("Commission")[2] appeared via Zoom to observe the proceedings. At the conclusion of the hearing, the Board overruled the Supplemental Exceptions of No Cause of Action and No Right of Action, and took the Supplemental Exceptions of Prescription under advisement. The Board now rules on the Supplemental Exceptions of Prescription as follows:

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1 Tanya Irvin and Kimberly Smith.
2 Jordan Varnado.

IT IS ORDERED, ADJUDGED AND DECREED that the Assessor's Supplemental Exceptions of Prescription are SUSTAINED and UNO's claims under La. Const. art. VII, Section 21(B) are hereby DISMISSED. UNO's claims under La. Const. art. VII, Section 21(A) are not affected by this ruling and are not dismissed.

Judgment Rendered and Signed at Baton Rouge, Louisiana, on this 8th day of March, 2023.

FOR THE BOARD:

LOCAL TAX JUDGE CADE R. COLE

BOARD OF TAX APPEALS
STATE OF LOUISIANA
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REASONS FOR JUDGMENT ON SUPPLEMENTAL EXCEPTIONS

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and took the Supplemental Exceptions of Prescription under advisement. The Board now issues the attached Judgment for the following reasons:

Background

UNO filed the instant Petition to recover *ad valorem* property taxes paid under protest with respect to property owned by UNO and located at: 2285 Lakeshore Drive; 2219 Lakeshore Drive; 2253 Lakeshore Drive; and 2021 Lakeshore Drive, for tax year 2022 ("Property"). In its Petition, UNO asserts that the Property is exempt from *ad valorem* taxation under the exemption for public property used for public purposes provided for by La. Const. art. VII, Section 21(A) ("21(A)") and/or alternatively exempt under the exemption for property owned and operated for charitable purposes provided for in La. Const. art. VII, Section 21(B) ("21(B)", the "21(B) Exemption", or the "Exemption"). The Assessor's Supplemental Exceptions of Prescription and this Judgment are concerned only with UNO's claims under 21(B).

Prior to the hearing, the parties agreed that the eventual ruling on the Supplemental Exceptions in this matter would be governed by the Board's ruling on substantially identical Supplemental Exceptions filed by the Assessor in Docket No. L01363. The Board overruled the Supplemental Exceptions in Docket No. L01363, finding that it was close case and resolving any doubt in favor of maintaining the Petition.

Counsel for UNO then stated that the facts in this case were materially different from the facts in Docket No. L01363 for purposes of the Board's ruling and asked for the opportunity to supplement the factual record. The Assessor objected. The Board held the record open for the Taxpayer provide supplementary evidence and for the Assessor to lodge any objection to the introduction of said supplementary evidence. The Board will now rule on the Assessor's objections.

Assessor's Objections

The Assessor objects to the admission of the Taxpayer's Factual Record based the agreement between the parties. A letter memorializing the agreement in writing was filed with the Board. The parties' agreement states that, at the hearing:

> [T]he Board can address the supplemental exceptions filed in WWII Theater, Docket No. L01363. Those will be timely briefed. The supplemental exceptions in UNO R&T, Docket No. L01362, and the briefing in that matter, can be deferred, as the parties would expect the Board's ruling in WWII Theatre to govern in that case as well.

An email thread with the following exchange was attached to the letter:

> [Counsel for UNO]: With respect to the supplemental exceptions filed in the WWII Theatre and UNO R&T cases, as we discussed, we have not received from the BTA notice of a hearing date for those exceptions. In the interest of efficiency, we will agree that the WWII Theatre Supplemental Exceptions will be heard on July 14 at an in-person hearing. We will defer the UNO R&T supplemental exceptions as those likely will be guided by the ruling in WWII Theatre. Please respond to this email demonstrating your agreement. Once we receive that, we will send a letter to the BTA to make sure we are all on the same page for the July 14 hearing.
>
> [Counsel for the Assessor]: I thought we were going to agree that the board will apply its ruling on the supplemental exceptions against WWII Theatre to those exceptions in UNO R&T? I only bring this up because your bullet point number 2 doesn't expressly agree to do so. I would like to have an agreement to apply the WWII Theatre ruling to UNO R&T, as that would be the most efficient thing to do.
>
> Subject to clarification on those two points, we are in agreement.
>
> [Counsel for UNO]: I will put those in the letter to the BTA and send it Tuesday, copying you. Thank you, and have a good holiday.
>
> [Counsel for the Assessor]: To avoid confusion, the agreement applies to the ruling on the exceptions from Filmore/MFLC that overlap in WWII Theatre, WWII Museum and UNO. . . . The remainder is correct, being that the eventual ruling on the supplemental exceptions against WWII Theatre will be applied to the supplemental exceptions against UNO.

The parties could not have intended for the Board to issue a ruling that is not supported by the facts in the record in this case Moreover, if the parties had intended to bar the introduction of evidence at the hearing, they could have expressed language to that effect in their agreement. Instead, what the parties did express was that

briefing in this case could be deferred. That is not a stipulation that the facts of the two cases are identical. Nor is it an express prohibition against introducing evidence. The Assessor's objections will be overruled.

Factual Record

UNO's supplemental record contains the Affidavit of its counsel James Exnicios. Attached to the Affidavit as Exhibit A is a 2011 letter from the Assessor's counsel to Mr. Exnicios. The 2011 letter memorializes an agreement between the parties concerning tax years 2012 through 2015 and "all prior tax periods." The agreement required UNO to submit to the Assessor annual certifications concerning the proportion of commercial and non-commercial occupancy of the Property.

Exhibit B to Mr. Exnicios's Affidavit is a letter from UNO's President & CEO Eileen K. Byrne to the Assessor's counsel. Ms. Byrne's statements in the letter are related to the proportionate occupancy of the Property for the year 2018. The attached occupancy schedules detail tenants and calculates their share of the square footage of each building.

Exhibits C and D are printouts from the websites of the Assessor and the Louisiana Tax Commission ("LTC"). Mr. Exnicios avers that these printouts represent publicly available records on which UNO relied. The printouts in Exhibit C are attributed to the Assessor for the year 2018. In Exhibit C, the Property Class is described thusly:

2021 Lakeshore Drive	Commercial
2219 Lakeshore Drive	Exempt
2285 Lakeshore Drive	Exempt
2253 Lakeshore Drive	Exempt

UNO argues that this shows that the Assessor was still treating three of the four buildings as exempt and one building as partially exempt.

The printouts in Exhibit D are attributed to the LTC for the years 2019 and 2020. In the LTC printouts, the Property is described as follows:

2285 Lakeshore Drive	
2019	Status: Exempt/Tax Free
Description	Total Taxable Assessed Values
Schools & Classrooms	$0
No Land Value (Leased Property	$0
Total Taxes Due	$0
2020	Status: Active
Offices, Medical & Public Buil[dings]	$75,8720
Commercial Non-Subdivision Lot	$0
Total Taxes Due	$0

2219 Lakeshore Drive	
2019	Status: Exempt/Tax Free
Description	Total Taxable Assessed Values
Schools & Classrooms	$0
No Land Value (Leased Property	$0
Total Taxes Due	$0
2020	Status: Active
Offices, Medical & Public Buil[dings]	$924,100
Commercial Non-Subdivision Lot	$0
Total Taxes Due	$0

2253 Lakeshore Drive	
2019	Status: Exempt/Tax Free

Description	Total Taxable Assessed Values
Schools & Classrooms	$0
No Land Value (Leased Property	$0
Total Taxes Due	$0
2020 Status: Active	
Commercial Non-Subdivision Lot	$0
Garages, Industrials, Lofts[ ]	$217,800
Total Taxes Due	$0

2021 Lakeshore Drive

2019 Status: Exempt/Tax Free	
Description	Total Taxable Assessed Values
No Land Value (Leased Property	$0
Offices, Medical & Public Buil[dings]	$235,490
Total Taxes Due	$0
2020 Status: Active	
Commercial Non-Subdivision Lot	$0
Offices, Medical & Public Buil[dings]	$288,410
Total Taxes Due	$0

The Taxpayer claims that these records show that the Assessor put the Property back on the tax rolls for 2020. This fact appears undisputed as the Assessor also states that he placed the Property on the tax rolls in 2020 in Paragraph 13 of his Affidavit that was attached to his Opposition to UNO's Factual Record as Exhibit B.

The Assessor attached to his affidavit an email thread between himself and UNO's Chairman. The earliest email in the thread was sent on October 8, 2019, and the last email was sent on November 13, 2019. The correspondence appears to show that the parties scheduled a meeting to discuss tax assessments on the Property in late October 2019. The last email is from UNO's Chairman, and it expresses thanks for an explanation of property taxing policies from the Assessor. UNO's Chairman

also asks about phasing in new tax values to give UNO a "chance to negotiate leases with Tenants that are fully engaged with UNO and/or Non Profits. In addition, as present leases end. we can renegotiate leases that hold Tenants responsible for their share of taxes." This is the only instance in the record where nonprofits are mentioned.

Discussion

The Supplemental Exceptions of Prescription are based on La. R.S. 33:2828. The statute establishes a procedure to claim the exemption from ad valorem tax for property owned by a charitable organization established by La. Const. art. VII, Section 21(B) (the "21(B) Exemption" or the "Nonprofit Exemption") that applies only in the city of New Orleans:

> [A]n exemption from ad valorem taxation granted to property pursuant to Article VII, Section 21(B) of the Constitution of Louisiana shall be applied for annually by completing an application form provided by the assessor and certifying that property qualifies for the exemption sought.
>
> * * *
>
> B. . . . (2) Each assessor shall be responsible for delivering the application form to the listed owner of each such tax exempt property on the assessment rolls located in the respective assessor's district, at the address shown on the assessment rolls.
>
> * * *
>
> C. (1) Each owner of such tax exempt property shall return the completed application form, duly sworn to, within twenty days after the form has been delivered at the address shown on the assessment rolls. The completed application form may be submitted to the assessor in person or by first class mail.
>
> * * *
>
> D. Each assessor shall evaluate and grant or deny the request for tax exemption, or grant a partial tax exemption based on the assessed value of that proportion of the property not being used for an exempt purpose, by the first day of August of each year which shall determine the liability for or exemption from taxation for the calendar year. Each determination by the assessor shall be subject to review as provided by law.

UNO did not submit an application for the 21(B) Credit for 2022 or for any prior tax year. The Assessor contends that UNO's 21(B) claims are prescribed by its failure to submit an application in time for the Assessor to make the determination described in La. R.S. 33:2828(D).

In the Board's view, La. R.S. 33:2828 lays out a procedure intended to provide an orderly process through which the Assessor can discern exempt and non-exempt properties. The plain language of La. R.S. 33:2828 does not require the Assessor to send an application to every taxpayer, or even every taxpayer that might apply for the 21(B) Exemption. Instead, the statute requires the Assessor to send an application form to tax exempt property on the assessment rolls in the assessor's district. La. R.S. 33:2828(B)(2). Thus, an Assessor's statutory obligation to deliver the application form is attached to property on the exempt rolls in the Assessor's district.

The statute s requirements are expressed in mandatory terms. However, the statute contains no penalties or provisions stating any consequences for noncompliance, either by the Assessor or the taxpayer. This means that the statute does not explicitly identify any prescriptive period for the Taxpayer to claim the 21(B) Exemption. To the extent that this leads to ambiguity, such ambiguity is construed against prescription and in favor of maintaining the cause of action. That is what the Board did in Docket No. L01363.

The facts in that case showed that the 21(B) Exemption was the only grounds asserted for relief. The fact that the Assessor was in litigation over the tax status of the property necessarily meant that the Assessor knew about the taxpayer's 21(B) claims. Despite that knowledge, the Assessor did not send an application form to the taxpayers. This was legally significant because the only deadline explicitly imposed on a taxpayer in La. R.S. 33:2828 is that the taxpayer must return the completed application to the Assessor within twenty days after delivery. Prescription could not be sustained based on that part of the statute because the Assessor never delivered the application. The other time limit in the statute is the August deadline for the

Assessor to grant or deny Exemption. It would be contrary to the canons of construction applicable to prescription statutes to hold the taxpayer responsible for a deadline that is expressly imposed on the Assessor when the Assessor knew of the taxpayer's 21(B) claims but did not send the taxpayer a copy of the application form.

The facts of this case are different. In this case, the exemption for public property used for public purposes found in 21(A) is UNO's primary grounds for relief and the 21(B) Exemption is only pled in the alternative. UNO did not necessarily put the Assessor on notice of its 21(B) claims in other litigation, and moreover, there is no evidence to show that it actually did put the Assessor on notice The 21(B) Exemption is not raised in the correspondence introduced by UNO. There is no mention of the 21(B) Exemption in any of the printouts from the Assessor's website or from any other source. No filings in the other litigation described in UNO's memorandum were introduced to show that UNO raised a 21(B) claim in those cases.

More importantly, the facts in this case show that the taxpayer should have been on notice of the need to obtain the form and submit it to the Assessor. The Assessor placed the Property on the tax rolls and issued assessments. If UNO believed that the 21(B) Exemption applied to its Property, it should have pursued its remedies under the law to claim that Exemption. The fact that Property was assessed in 2019 did not stop UNO from submitting applications in the following years. Despite being assessed for the tax years 2019, 2020, 2021, UNO did not submit an application by the time of the 2022 Assessment at issue. The Assessor cannot be blamed for UNO's continued failure to apply for the Exemption.

The facts in the record in this case show that the Assessor followed the law and that UNO did not. There is no evidence that UNO took action either by applying for the Exemption or by triggering the Assessor's obligation to deliver the application form. UNO persisted in its inaction for years after the Assessor put the Property on the tax rolls and began issuing assessments.

The Assessor demonstrated that UNO's alternative 21(B) claims are facially prescribed and UNO has not come forward with evidence to controvert the running of prescription. Accordingly, the Board will sustain the Assessor's Exception of Prescription and dismiss UNO's alternative 21(B) claims. This partial dismissal is not a final judgment in this case and does not have any effect on UNO's primary claims under 21(A).

Signed at Baton Rouge, Louisiana on this 8th day of March, 2023.

FOR THE BOARD:

LOCAL TAX JUDGE CADE R. COLE