BOARD OF TAX APPEALS
STATE OF LOUISIANA

CAJUN INDUSTRIES, LLC AND
CAJUN CONSTRUCTION, INC.
Petitioners

VERSUS **BTA DOCKET NO. 9247**

SECRETARY DEPARTMENT OF REVENUE,
STATE OF LOUISIANA

****

JUDGMENT WITH WRITTEN REASONS

****

A hearing on the merits of the Petition for Refund filed by Cajun Industries, LLC and Cajun Construction, Inc. (the "Taxpayer") against Kimberly Robinson, in her capacity as Secretary of the Louisiana Department of Revenue (the "Collector") was held before the Board of Tax Appeals on March 6, 2017, with Judge Tony Graphia (ret.), Chairman, and Board Members Cade R. Cole and Jay Lobrano present, and no member absent. Present before the Board were: David R. Cassidy and David R. Kelly, attorneys for Taxpayer, and Drew Talbot, attorney for the Collector. After the hearing, the case was taken under advisement, and the Board now unanimously renders Judgment as follows:

Taxpayer appeals the Collector's denial of a refund of Louisiana state sales taxes in the amount of $2,442,843.53.

Taxpayer entered into a contract (the "Contract") with United States Army Corps of Engineers (the "Corps") to build LPV 148.02 the Chalmette Levy Loop in St. Bernard Parish, Louisiana. (the "Project"). The Contract and the Project were quite involved. In general, the Project calls for materials and work to construct the Project. Taxpayer purchased various materials for the project and paid its vendors the state sales tax.

Taxpayer now contends that the sales taxes were not owed and Taxpayer wants the sales taxes refunded to it.

Taxpayers position is founded on La. R.S. 47:301(10)(g) which paragraph states:

> "(g) The term 'retail sale' does not include a sale of corporeal movable property which is intended for future sale to the United States government or its agencies, when title to such property is transferred to the United States government or its agencies prior to the incorporation of that property into a final product." (emphasis supplied)

It is the contention of Taxpayer that, in fulfilling its obligations under the Contract, it should not have paid Louisiana state sales taxes to its vendors on purchases of certain materials that were to be used in the Project. The Taxpayer contends that the materials on which it paid the sales taxes were "for future sale to the United States government or its agencies" and therefore the purchase of the material was not a "retail sale."

The Collector's position is that, as a matter of law, the purchase of such materials was not "for future sale to the United States government or its agencies." The position of the Collector is based on the principle that when a contractor purchases materials for use in a building contract, that contractor is itself liable for the sales tax because the contractor is the consumer of the materials (ie. the materials are purchased for use not resale). Collector's position is generally consistent with longstanding jurisprudence. In the case of *Claiborne Sales Company, Inc. v. Collector of Revenue,* 233 La. 1061 (La. 1957) it was stated:

> "A contractor who buys building materials is not one who buys and sells--a trader. He is not a 'dealer,' [233 La. 1067] or one who habitually and constantly, as a business, deals in and sells any given commodity. He does not sell lime and cement and nails and lumber. His undertaking is to deliver to his obligee some work or edifice or structure, the construction of which requires the application of skill and labor to these materials so that, when he finishes his task, the materials purchased are no longer to be distinguished, but something different has been wrought

> from their use and union. The contractor has not resold but has consumed the materials. Sales to contractors are sales to consumers."

See also: *State v. J. Watts Kearny & Sons*, 181 La. 554, 160 So.77, and *BillRoberts, Inc. v. McNamara*, 539 So.2d 1226 (La. 1989).

The Board has previously ruled on the application of La. R.S. 47: 301(10)(g) in a Corps construction contract. The First Circuit decision upholding the Board's Judgment in *Odebrecht Construction. Inc. v. Louisiana Department of Revenue,* can be found at 182 So.3d 132 (La. App. 1st Cir. 2015) (hereinafter referred to as "*Odebrecht I").*

§ 301(10) involves the definition of a retail sale, and paragraph (g) specifically defines a category of transactions that are not ever included within the definition of a "sale at retail." This paragraph operates as exclusion from tax. *Odebrecht I* made clear that even if the contractor would normally owe tax for the materials used, the provisions of the La. R.S. 47:301 (10)(g) exclusion can operate remove a transaction from the reach of Louisiana's sales and use tax.

This case is similar to *Odebrecht I* in that it involves the construction of a levee. In *Odebrecht I* the refund related to dirt purchases, while the present case relates to the purchase of H piles and steel Sheet piles. In *Odebrecht I* there was evidence that the title to the clay being used actually passed to the government upon delivery to the site, that they clay was separately bid, that they clay was reimbursed under the contract separately as a distinct unit cost, and that the Corps bore all risk of loss for the material through the conclusion of the project.

Title to the items separately stated in a Corps bid passes to the government upon delivery irrespective of the terms or timing of payment pursuant to FAR 52.245(e)(3)(i). This provision calling for title to pass on delivery applies when "this contract contains a provision directing the Contractor to purchase material for which the Government will reimburse the Contractor as a direct item of cost" (hereinafter

referred to as "Direct Cost Reimbursable Line Items"). As explained below, this category includes the H piles and the sheet Piles at dispute in this case.

There is a dispute over whether this contract included Direct Cost Reimbursable Line Items. 48 CFR 2.101 defines a direct cost as: "(A)ny cost that is identified specifically with a particular final cost objective....Costs identified specifically with a contract are direct costs of that contract."

48 CFR 3.302 defined line item as, "an item of supply or service, specified in a solicitation, that the offeror must separately price."

The Board finds that under the evidence presented that these items qualify as Direct Cost Reimbursable Line Items, therefore title passed to the Corps upon delivery to the site, which is obviously prior to its inclusion into the levee.

The Collector argues that there was no sale to the United States, that the Taxpayer was the contractor user of the materials and that the only consideration was the aggregate contract price for his work as contractor in its entirety.

In addition to the consistent civil code definition, La. R.S. 47:301(12) provides that: "Sale" means any transfer of title or possession, or both...., in any manner or by any means whatsoever, of tangible personal property, for a consideration...."

The Supreme Court has directed that "Tax exemptions are strictly construed in favor of the Department and "must be clearly and unequivocally and affirmatively established" by the taxpayer. Exclusions, on the other hand, are construed liberally in favor of the taxpayers and against the taxing authority. *Harrah's Bossier City Inv. Co., LLC v. Bridges*, 2009–1916, p. 10 (La.5/11/10), 41 So.3d 438, 446. In *Odebrecht I,* the Board and the First Circuit both held that §10(g) is an exclusion and that any ambiguity in its provisions must be construed in favor of the taxpayer.

Collector's reliance on who bore the economic burden of the tax is misplaced. As in *International Paper*, *supra,* the Collector is attempting to introduce a new factor that is not actually an element of the exclusion. The fact that the consideration is paid before installation does not itself preclude the refund items from being considered sold to the United States. The arguments about the equity of this situation are better addressed to the Legislature, in applying the text of this exclusion they are of no moment.

The transfer of possession is sufficient to trigger a sale, and for these refund items that possession (through legal title) transferred upon delivery and prior to any use.

Furthermore we are constrained to give liberal effect to this exclusion statute which merely provides that the property be "intended for future sale to the United States." In the somewhat similar cases decided yesterday, *Odebrecht II and Odebrecht III,* the Board offered guidance to narrow the scope of this exclusion, but none of those factual issues are replicated in the present case since this Taxpayer has only ever sought refund of the same items approved for refund in *Odebrecht II and III*.

The Collector's arguments about the regulations and contract provisions which state that the Contractor must bear all state and local taxes do not conflict with this Board's disposition of the present case. There is no dispute that this Taxpayer would have owed the taxes that it paid but for the application of this exclusion. The question becomes the scope of the exclusion, and this request for refund fulfills the applicable elements spelled out in the law. The fact that the federal procurement rules give Taxpayer the right to pay the taxes is of no moment, they also give it the right to seek the refund that is at issue in this case.

For the foregoing written reasons:

IT IS ORDERED, ADJUDGED AND DECREED that the Taxpayer's Petition for Refund BE AND IS HEREBY GRANTED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there is Judgment rendered against the Secretary, Louisiana Department of Revenue and in favor of Cajun Industries, LLC and Cajun Construction, Inc. in the amount of $2,442,843.53, together with interest as provided by law, with each party to bear their own costs.

Baton Rouge, Louisiana this 12 day of April, 2016.

FOR THE BOARD:

JUDGE TONY GRAPHIA, RET.
CHAIRMAN, LOUISIANA BOARD OF TAX APPEALS