BOARD OF TAX APPEALS
STATE OF LOUISIANA

LOUISIANA DEPARTMENT OF REVENUE, AND KEVIN RICHARD, IN HIS OFFICIAL CAPACITY AS THE SECRETARY OF THE LOUISIANA DEPARTMENT OF REVENUE
Petitioners

VERSUS **B.T.A. DOCKET NO. 13493D**

GOLDEN NUGGET LAKE CHARLES, LLC
Respondent

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JUDGMENT AND REASONS

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On July 13, 2023, this matter came before the Board for a hearing on the *Peremptory Exception of No Cause of Action* filed by Golden Nugget Lake Charles, LLC ("Taxpayer"). Presiding at the hearing were Francis J. "Jay" Lobrano, Chairman, Vice-Chairman Cade R. Cole, and Judge Lisa Woodruff-White (Ret.). Appearing before the Board were Drew Talbot, attorney for the Louisiana Department of Revenue ("Department") and Brian Ballay, attorney for the Taxpayer. At the conclusion of the hearing, the Board took the matter under advisement. The Board now renders this non-final Judgment in accordance with the attached Reasons:

IT IS ORDERED, ADJUDGED, AND DECREED that the Taxpayer's *Peremptory Exception of No Cause of Action* BE AND IS HEREBY OVERRULED.

Judgment Rendered and Signed at Baton Rouge, Louisiana, on this 17th day of August, 2023.

FOR THE BOARD:

Francis J. "Jay" Lobrano, Chairman
Louisiana Board of Tax Appeals

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Background:

On December 28, 2022, the Department filed the instant *Petition for Declaratory Judgment and for Taxes*. In its Petition, the Department alleges that the Taxpayer operated the "Golden Nugget Lake Charles" casino ("Casino") and the "Golden Nugget Lake Charles Hotel" ("Hotel") during the sales Tax Periods beginning on January 1, 2019, and continuing through December 31, 2022 ("Tax Periods"). The Department claims that the Taxpayer owes sales tax on Hotel rooms and poolside cabanas furnished and rented to patrons.

The Department's Petition acknowledges that the Hotel rooms and poolside cabanas were purportedly provided to patrons on a "complimentary" basis. However, the Department alleges that these transactions were, in reality, exchanges for

consideration and not gratuitous donations. The Department characterizes the patrons' gaming activities at the Casino as the consideration received by the Taxpayer in these transactions.

Further, the Department alleges that the "consideration" is susceptible to monetary valuation in two ways. First, the Department asserts that the actual amount of consideration is something the Taxpayer calls a "theoretical win." This "theoretical win" figure is purportedly an extrapolation derived from proprietary formulas that use data gathered from a patron's past activities. Secondly, and in the alternative, the Department asserts that a value can be determined by multiplying the number of "complimentary by the "average seasonal rate" of rooms sold during the Tax Period. This "average seasonal rate" was allegedly used to determine tax liability in the case of *Jazz Casino Co., L.L.C. v. Bridges*, 2020-01145 (La. 2/9/21), 309 So.3d 729.[1]

In its Exception, the Taxpayer argues that the Department has not alleged sufficient facts to show that any taxable sale occurred. The Taxpayer points to what it describes as the absence of a separate and identifiable price paid as consideration for the "complimentary" items. In addition, the Taxpayer maintains that the Department already treated the supposed consideration as revenue from gaming and wagering transactions subject to franchise fees under La. R.S. 27:91. The Taxpayer argues that the Department cannot be allowed to re-characterize the true object of the prior gaming transactions and tax them again. The Taxpayer also contends that no authority exists in Louisiana law to authorize the Department to impose sales tax on "complimentary" items.

Exception of No Cause of Action:

"The function of an exception of no cause of action is to test the legal sufficiency of the petition by determining whether the law affords a remedy on the facts alleged in the pleading." *Everything on Wheels Subaru, Inc. v. Subaru S., Inc.*, 616 So.2d

[1] As discussed below, this involved a special statutory provision related only to the land based casino in New Orleans.

1234, 1235 (La. 1993). No evidence may be introduced in support of or opposition to an exception of no cause of action. La. C.C.P. Art. 931. Consequently, the court accepts all well-pleaded allegations of fact within the four corners of the petition as true for purposes of ruling on the exception. *Guidry v. Ave Maria Rosary & Cenacle, Inc.*, 2021-507, p. 19-20 (La. App. 3 Cir. 6/1/22, 19–20), 341 So.3d 779, 793; *Phipps v. Chesson*, 96-26, p. 3 (La. App. 3 Cir. 11/6/96), 682 So.2d 935, 937. "Because the exception raises a question of law based solely on the sufficiency of the petition, an exception of no cause of action should be granted only when it appears beyond doubt that the plaintiff cannot prove any set of facts which would entitle him to relief." *Kendrick v. Estate of Barre*, 2021-00993, p. 3 (La. 3/25/22), 339 So.3d 615, 617.

Separate and Identifiable Price:

Taxpayer argues that a purportedly free transfer of property is not taxable unless there is a "separate and identifiable" price paid for the property. Taxpayer cites *Columbia Gulf Transmission Co. v. Bridges*, 2008-1006 (La. App. 1 Cir. 6/25/09), 28 So.3d 1032, as an example of this principle. In *Columbia*, the taxpayer provided natural gas transmission services to its customers via interstate pipeline. At compressor stations along the pipeline some of the customer's gas was diverted and consumed in order to restore pressure lost in transit ("Compressor Gas"). The customer did not charge the taxpayer for Compressor Gas. The taxpayer therefore took the position that it did not owe sales tax on Compressor Gas because its "cost price" was zero.

As noted by the First Circuit, the taxpayer was regulated by the Federal Energy Regulatory Commission ("FERC") pursuant to a Gas Tariff, which is a compilation, on electronic media, of all of the effective rate schedules of a particular natural gas company, and a copy of each form of service agreement. 18 C.F.R. § 154.2(b). The Gas Tariff prohibited the taxpayer from purchasing Compressor Gas from a third party. The Gas Tariff also provided that Compressor Gas was included in "Retainage," a percentage discount for lost an unaccounted for gas in the price of the taxpayer's services.

The Court held that the taxpayer's customers implicitly received consideration for the Compressor Gas in the form of the reduced rate for services. The Court further stated that the "absence of a set price in transactions of this nature does not prevent the occurrence of a sale so long as the transaction is supported by some type of consideration." *Columbia*, 2008-1006, at p. 15, 28 So.3d at 1043. The Court further held that the absence of evidence of the value of the consideration was an unresolved issue of material fact. Accordingly, the Court reversed and remanded for further proceedings.

The holding in *Columbia* does not require the Department to allege that a "set price" was paid in order to state a cause of action. Rather, the alleged consideration exchanged in a taxable sale must be susceptible to valuation in money. On summary judgment, the Court held that the precise value of the consideration was an issue of material fact to be established by evidence. *A fortiori*, a resolution of that factual question is even more improper when ruling on an Exception of No Cause of Action, when evidence outside the Petition cannot be considered. Here, the Department does allege that there was an exchange of consideration, and so alleges that the value of the consideration can be determined by using the "theoretical win" or "average seasonal rates." The Department's allegations are sufficient to allege the material facts identified by the Court in *Columbia*.

Gaming Franchise Fees under La. R.S. 27:91:

The Taxpayer claims that it pays Gaming Franchise Fees under La. R.S. 27:91. The Taxpayer further contends that this statute imposes a tax on gaming and wagering transactions. The Taxpayer asserts that the receipts from gaming and wagering transactions are the same receipts that the Department now claims to be from taxable sales. The Taxpayer's position is that prior payment of the Gaming Franchise Fees establishes that the transactions had gaming and wagering as their true object, and the Department cannot now re-characterize a portion of those same transactions.

An Exception of No Cause of Action is not the proper vehicle for these arguments. In ruling on the Exception, the Board confines its review to the four corners of the Petition and the well pleaded allegations therein. In the Petition, the Department does not allege that the true object of furnishing "complimentary" items was gaming and wagering. More importantly, the Department does not allege that the Taxpayer paid Gaming Franchise Fees on the transactions described in the Petition. The prior payment of tax is an essential fact underpinning the Taxpayer's argument. That fact may be established on summary judgment or at trial. However, for purposes of the Exception of No Cause of Action, the Taxpayer cannot offer evidence to prove facts not alleged in the Petition.

La. R.S. 27:243 and *Jazz Casino*

The Taxpayer argues that neither La. R.S. 27:243 nor *Jazz Casino* authorize the tax alleged to be due in the Petition. La. R.S. 27:243 provides requirements for a Land-Based Casino Operating Contract. When that statute was enacted, there was only one land-based casino in Louisiana. The law was intended, in part, to ease economic restrictions on the sole casino operator to which it applied as that operator emerged from bankruptcy. Thus, Act 1 of the First Extraordinary Session of 2001 removed a restriction that had prevented the operator from renting offsite hotel rooms. As a condition to this change, however, the legislature required the casino operator to pay room taxes on all discounted and complimentary rooms based on the "average seasonal rates" for hotel rooms from the preceding year by La. R.S. 27:243(C)(1)(i)(2).

After Act 1 took effect, the casino operator built a hotel. In addition, the operator also reserved blocks of rooms at third-party hotels. The operator provided complimentary rooms to its patrons from its own hotel and sometimes from the third-party hotels. The operator did not pay the State's sales tax on the complimentary rooms provided from its own hotel. However, the operator did pay State sales taxes on the third-party hotel rooms when it reserved them based on a contractually negotiated rate. *Jazz Casino*, 2019-1530, at p. 5-6, 10, 309 So.3d at 746, 748.

In 2018, the Department filed a declaratory judgment action asserting that the operator owed State room taxes on all complimentary rooms based on the average seasonal rate as set forth in La. R.S. 27:243. The First Circuit ruled in favor of the Department. However, the Louisiana Supreme reversed the portion of the First Circuit's ruling concerning the rooms supplied by third-party hotels, because La. R.S. 27:243 did not apply to hotels that the casino did not "own" or "operate." *Jazz Casino Co., L.L.C. v. Bridges*, 2020-01145 (La. 2/9/21), 309 So.3d 729.

La. R.S. 27:243 does not apply to the Taxpayer in this case and *Jazz Casino* is factually and legally distinguishable. Contrary to the Taxpayer's argument, however, the Department is not relying on either as authority for the imposition of tax. The Department is citing *Jazz Casino* as an example of how complimentary rooms have been valued for purposes of calculating the amount of sales tax. Furthermore, that method of valuation is only an alternative to the valuation method based on the "theoretical win" that the Department maintains to be the true value of the consideration received.

The Department's actual basis in law for imposing Louisiana's sales tax is apparent from Paragraph 20 of the Petition. Therein, the Department alleges that, "[t]he State of Louisiana imposes a State sales tax on . . . the furnishing of sleeping rooms by hotels, as well as the sale of admissions or the privilege of access to or the use of amusement, entertainment, athletic or recreational facilities." This language is found in the definition of taxable sales of services in La. R.S. 47:301(14). Thus, contrary to the Taxpayer's argument, the Department does cite authority from Title 47 of the Revised Statutes for imposition of the tax. The Department's allegations are sufficient to state a cause of action under the general sales tax statutes.

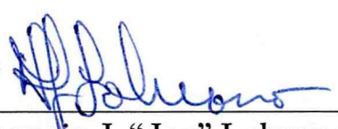
Conclusion

As explained above, an exception is only about the Department's Petition, not the underlying facts. The Department alleges that the purportedly "complimentary" Hotel rooms and poolside cabanas were not provided in gratuitous transfers, but through taxable sales of services and rentals. For purposes of an Exception of No

Cause of Action, the Department is not required to allege a separate and identifiable price for these transactions. Rather, the Department must allege that the items were provided in exchange for a consideration that can be valued in money. The Department has satisfied that requirement by alleging that the Taxpayer received consideration in the form of gaming activity from its patrons and that the value of this consideration can be determined by using the "theoretical win" or "average seasonal rate" formulas. The Department's cited authority for imposing the tax is the general sales tax statutes in Title 47, not La. R.S. 27:243 and *Jazz Casino*. Finally, an Exception of No Cause of Action cannot be sustained on the basis of facts that have not been alleged in the Petition. Although the Taxpayer may put forth proof of those facts on summary judgment or at trial, it cannot do so in the instant Exception. Accordingly, the Taxpayer's Exception of No Cause of Action cannot be sustained.

Baton Rouge, Louisiana, this day, August 17, 2023.

FOR THE BOARD:



Francis J. "Jay" Lobrano, Chairman
Louisiana Board of Tax Appeals