STATE OF LOUISIANA
BOARD OF TAX APPEALS

HERC RENTALS, INC.
PETITIONER

VERSUS **No. 10716D**

KIMBERLY ROBINSON, SECRETARY OF THE LOUISIANA DEPARTMENT OF REVENUE
RESPONDENT

JUDGMENT WITH WRITTEN REASONS

This matter came before the Board of Tax Appeals (the "Board) for hearing on October 8, 2020 on the *Motion for Summary Judgment* filed by the Department of Revenue, State of Louisiana, (the "Department"), and the *Cross Motion for Summary Judgment* filed by HERC Rentals, Inc., (the "Taxpayer"), with Judge Tony Graphia (Ret.), Chairman, presiding and board members Cade R. Cole and Jay Lobrano present. Participating in the hearing were attorney Aaron D. Long, representing the Department, and attorney Herbert "Chip" Hines, representing the Taxpayer. After the hearing, the Board took the motions under advisement. The Board now renders Judgment in accordance with the written reasons attached herewith.

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

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Judgment be rendered in favor of the Department and against the Taxpayer,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Department's denial of the Taxpayer's claim for refund under La. R.S. 47:6006 for Corporate Income Tax for the tax periods 2013, 2014, and 2015 is sustained and the Taxpayer's Petition BE AND IS HEREBY DISMISSED.

JUDGMENT RENDERED AND SIGNED at Baton Rouge, Louisiana, this 13 day of JANUARY 2021.

FOR THE BOARD:

JUDGE TONY GRAPHIA (RET.)
CHAIRMAN

STATE OF LOUISIANA
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WRITTEN REASONS FOR JUDGMENT

This matter came before the Board of Tax Appeals (the "Board) for hearing on October 8, 2020 on the *Motion for Summary Judgment* filed by the Department of Revenue, State of Louisiana, (the "Department") (the "Department's Motion"), and the *Cross Motion for Summary Judgment* filed by HERC Rentals, Inc., (the "Taxpayer") (the "Taxpayer's Motion"), with Judge Tony Graphia (Ret.), Chairman, presiding and Board Members Cade R. Cole and Jay Lobrano present. Participating in the hearing were attorneys Aaron D. Long, representing the Department, and Herbert "Chip" Hines, representing the Taxpayer. After the hearing, the Board took the motions under advisement. The Board now issues the attached Judgment for the following written reasons.

Taxpayer appeals under La. R.S. 47:1625 from the Department's partial denial of refunds for corporate income tax for the tax periods 2013, 2014, and 2015. Taxpayer claimed the Inventory Tax Credit under La. R.S. 47:6006 ("ITC") for "rented machinery and equipment that was sold to third parties." Taxpayer predominately rents heavy construction equipment and machinery to customers. Taxpayer derives approximately

95% of its revenues from equipment rentals. Taxpayer is also a dealer of certain brands of new equipment and sells consumables such as gloves and hardhats at many locations. However, only the Taxpayer's equipment rental fleet is at issue in the present matter.

A motion for summary judgement will be granted after an opportunity for adequate discovery "if the motion, memorandum, and supporting documents show that there is no genuine issue of material fact and that the mover is entitled to judgment as a matter of law." La. Code. Civ. Proc. 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, LLC.*, 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. *Arceneaux v. Lafayette Gen. med. Ctr.*, 2017-516, p. 4-5 (La. App. 3 Cir. 7/26/17), 248 So.3d 342, 346. The burden of proof rests with the mover, but if the mover will not bear the burden of proof at trial on the issue that is before the court on the motion for summary judgment, the mover's burden does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out the absence of factual support

for one or more essential elements to the adverse party's claim, action, or defense. La. Code. Civ. Proc. art. 966(D)(1).

The Taxpayer offered twelve exhibits in support of its motion. The Department objected to all of the Taxpayer's exhibits except for Taxpayer Exhibit 1 (Taxpayer's 2013, 2014, and 2015 amended returns). La. Code. Civ. Proc. art. 966(A)(4) requires that the Board consider all objections prior to rendering judgment. The Board must specifically state on the record or in writing which documents, if any, it held to be inadmissible or declined to consider. La. Code. Civ. Proc. art. 966(D)(2).

The Department objected to Taxpayer Exhibit 2 for lack of personal knowledge in accordance with Code of Evidence article 602 and Code of Civil Procedure article 967, and lack of relevance in accordance with Code of Evidence article 401. Taxpayer Exhibit 2 is the Affidavit of Marlin Shaw ("Shaw"), Vice President of Tax at HERC Rentals. Shaw did not begin working for the Taxpayer until 2016, after the tax periods at issue. Code of Civil Procedure article 967 requires that supporting affidavits be made on personal knowledge, which is defined as what an affiant saw or heard, as opposed to what he learned second hand from another source. *Gypsum Subfloor, Inc. v. DDG Const., Inc.*, 2019-877 (La. App 3 Cir. 7/8/20), 204 So.3d 573, 577.

In *Chavers v. Bright Truck Leasing*, the Third Circuit held that that a vice-president may have personal knowledge because of the position they hold. 2006-1011 (La. App. 3 Cir. 12/6/06), 945 So.2d 838, *writ denied*, 2007-0304 (La. 4/5/07), 954 So.3d 141; *Schexnaider v. State Farm Mut. Auto. Ins. Co.*, 2015-0272 (La. App 1 Cir. 11/9/15), 184, So.3d 108.

However, in *Chavers* the affiant's statements were supported by evidence, a corporate deposition, and a lease agreement, and no contradictory evidence was presented on the matter at issue. In the present matter, Shaw's affidavit is not supported by other properly authenticated and admissible evidence, and his assertions in fact rebutted by the Department's contradictory evidence. There is nothing in this record that establishes Shaw's actual knowledge of the periods at issue.

The Department also argues that Shaw's statements are irrelevant because they are written in the present tense and do not speak to the events of 2013, 2014, and 2015. In their present form, Shaw's statements about the Taxpayer's current practices do not have any tendency to make the existence of any facts of consequence during the 2013, 2014, or 2015 tax years more or less probable. Shaw's statements about the present time are not relevant to the issues in this case and the Department's objections are sustained.

The Department objected to Taxpayer Exhibits 3–12 attached to Shaw's affidavit for lack of authentication in accordance with LCE art. 901(A), and on other grounds.[1] La. C.C.P. art. 966 specifies that "[t]he only documents that may be filed in support of or in opposition to [a motion for summary judgment] are pleadings, memoranda, affidavits, depositions, answers to interrogatories, certified medical records, written

[1] The Department objected to Taxpayer Exhibits 3–12 for lack of authentication in accordance with LCE art. 901(A). The Department raised additional authenticity objections specific to Taxpayer's Exhibits 4, 5, 6, because they are unsigned customer contracts. The Department also objected to the relevance of Taxpayer Exhibit 9 because this document was last updated on August 13, 2018 and printed on February 22, 2019.

stipulations, and admissions. Any evidence not contemplated by C.C.P. art. 966(A)(4) must be properly authenticated by an affidavit or deposition to which they are attached. *See Terrell v. Town of Lecompte*, 2018-1004 (La. App. 3 Cir. 6/15/19), 274 So.3d 605. Shaw does not, in any manner, swear to or assert the validity of Taxpayer Exhibits 3-12. The Taxpayer conceded before the Board that these documents were not explicitly mentioned in the affidavit, but rather that were "related" to the contents of the affidavit itself.

The legislative purpose of CCP articles 966 and 967 is to prevent any party from using unsworn and unverified documents as summary judgment evidence. *Unifund CCR Partners v. Perkins*, 2012-1851 (La. App. 1 Cir. 9/25/13), 134 So.3d 626.632. Merely attaching these documents to a motion for summary judgment does not transform them into competent summary judgment evidence. *Bunge North America, Inc. v. Board of Commerce & Industry*, 07-1746 (La. App. 1 Cir. 5/2/08), 991 So.2d 511, 527. As a result of the fact that Taxpayer's Exhibits 3-12 are unsworn, unverified, and not otherwise self-authenticating, they are not competent summary judgment evidence.

The substantive question presented is whether Taxpayer held its equipment rental fleet out for sale in the ordinary course of business with a good faith intention of selling it to the final consumer, such that it would be considered "inventory" as that term is used in La. R.S. 47:6006. *See* LAC 61:V.1701, *Louisiana Machinery Co., LLC v. Bridges*, B.T.A. Docket No. 6379 (La. Bd. Tax App. 1/7/2014), 2014 WL 901454. Generally, a statute that imposes a tax is construed in favor of the

taxpayer. *McNamara v. Central Marine Service, Inc.*, 507 So.3d 207, 208 (La. 1987). However, ambiguity in tax credit statutes, like this one, is instead strictly construed against the taxpayer. *Ethyl Corp. v. Collectors of Revenue,* 351 So.2d. 1290, 1293 (La. App. 1 Cir. 1977), *writ denied*, 353 So.2d 1035 (La. 1978).

Louisiana Revised Statute 47:6006 provides that "there shall be allowed a credit against any Louisiana income or corporate franchise tax for ad valorem taxes paid to political subdivisions on inventory held by . . . retailers." La. R.S. 47:6006(A) (2015).[2] The revised statues do not define the term "inventory." However, Louisiana's *Ad Valorem* tax regulations define inventory as "the aggregate of items of tangible personal property" which are "held for sale in the ordinary course of business"[3] or "are utilized in marketing or distribution activities." LAC 61:V.1701(A)(1), (4). This definition "embraces . . . goods ... awaiting sale which include, but are not limited to: the merchandise of a retail . . . concern . . . [and] goods which are used or trade-in merchandise." LAC 61:V.1701(B)(1).

In *Louisiana Machinery*, the Board held that nothing in La. R.S. 47:6006 nor LAC 61:V.1701 excludes property that is actually held out

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[2] This article was amended in 2016 to explicitly disallow a credit for short term rental equipment, and amended again in 2017 to specifically allow a credit for short term rental equipment under specified qualifications.

[3] The phrase "ordinary course of business" is also undefined. Taxpayer offers the Black's Law Dictionary definition for "course of business," defined as "the normal routine in managing a trade or business." Black's Law Dictionary (11th ed. 2019). The Department offers the Merriam-Webster Legal Dictionary definition that defines "ordinary course of business" as "the usual manner and range of a business especially considered in relation to the amount, circumstances, and validity of a particular transfer." Merriam-Webster Legal Dictionary (Last accessed Dec. 18, 2020). The Secretary argues that if the Board accepts the Taxpayer's definition of "course of business" that all property owned would be classified as "inventory." The Secretary argues anecdotally that there is a distinction between property owned and property held in "inventory" stating that if you own a car that you will eventually sell, but do not intend to sell it today, then it is not a good held out for sale during the entire course of ownership.

for sale from the definition of inventory solely because it was also rented awaiting sale. *Louisiana Machinery*, 2014 WL 901454 at *2. Louisiana Machinery Co. ("LMC") was the Caterpillar equipment dealer for Louisiana. LMC's rentals were to facilitate its sales by reducing buyers' acquisition costs. *Id.* at *1. Rentals also allowed customers to "try the Equipment before they buy." LMC's equipment was generally the most expensive on the market, and rentals enabled prospective purchasers to pay for use that brought the purchase price in line with competitors. LMC could sell a rented piece of equipment to a third party and then swap the rented equipment by giving the renter a like piece of equipment in order to deliver the sold piece of equipment to the buyer. LMC sold "virtually all" of the items that it held out for sale in the ordinary course of business and derived the vast majority of its revenues, approximately 94%, from its equipment sales.

In light of the facts detailed above, the Board found LMC held its equipment out for sale in the ordinary course of business while it *simultaneously* rented the equipment to customers. However, the Board cautioned that "[t]his ruling should not be understood to mean that any item that is owned by a business and on which the ad valorem tax is self-reported as inventory[4] and paid to a political subdivision is entitled to the credit provided by R.S. 47:6006. Only that inventory which is held with the good faith intention of selling it in the ordinary course of the taxpayer's business would qualify." *Id.*

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[4] Taxpayers self-report property tax on a LAT-5 form, and if it were not reported as inventory it would still be subject to tax as it would have to be reported on the form as miscellaneous personal property or furniture/equipment (for which there is not a separate state credit).

The Taxpayer claims that the facts of this case are nearly identical to the facts of *Louisiana Machinery*. However, this Taxpayer derived approximately 95% of its revenue from equipment rentals. By way of comparison, rentals provided only 6% of LMC's revenue. It took this Taxpayer an average of 6.6 years to sell a piece of equipment. LMC sold 90% of its equipment within three years. The disparity in the proportion of revenue from rentals and the time taken sell equipment is substantial.

Taxpayer argues that there was a purchase option in every contract. The Department's Exhibit 5 contains three equipment rental contracts and the alleged purchase option in each rental contract provides the following:

> Notwithstanding any other terms in this agreement, HERC hereby grants to customer the option to purchase **the item(s) of Equipment Identified on the Front of this Agreement as having a Purchase Option Price** for the purchase Option Price shown. Customer may exercise this option only by providing written notice to HERC at the renting location, together with full payment of the Option Price, prior to the twenty-right day following the date of this Agreement or the estimated return date shown on the Front of this Agreement, whichever date is earlier. (Emphasis Added).

Not a single rental agreement in evidence contains a purchase option price. Therefore, by their own terms, none of the rental agreements in evidence actually contain a valid purchase option.

Further, the Taxpayer alleges that it held its equipment out for sale through a website and catalog. The Taxpayer's motion states that the catalog on its website "highlight[ed] specific equipment for sale to the public." Taxpayer offered screenshots of its website, but these were not authenticated. Consequently, there is no competent summary judgment

evidence supporting Taxpayer's contention or showing what was on the Taxpayer's website during the tax periods at issue.

Taxpayer's Form 10-K, a disclosure form filed with Securities and Exchange Commission as a publicly traded company, admitted as Department's Exhibit 4, states the following regarding Taxpayer's rental fleet:

> HERC acquires its equipment from a variety of manufacturers. The equipment is typically new at the time of acquisition and is not subject to any repurchase program. The per-unit acquisition cost of units of rental equipment in HERC's fleet varies from over $200,000 to under $100. As of December 31, 2013, the average per-unit acquisition cost (excluding small equipment purchased for less than $5,000 per unit) for HERC's fleet in the United States was approximately $39,300. As of December 31, 2013, the average age of HERC's worldwide rental fleet was 43 months.
>
> HERC disposes of its used equipment through a variety of channels, including private sales to customers and other third parties, sales to wholesalers, brokered sales and auctions.

Similarly, Taxpayer's 2013, 2014, and 2015 HERC LA Asset Listings the Taxpayer refers to the sale of its rental fleet as "Retirements" and not as "sold inventory." Further, the Taxpayer states in its memorandum that it sold its rental fleet because, "[a]s a practical matter, customers do not want to rent out old, unreliable equipment that has deteriorated to the extent of, or even beyond, its useful life."

The Department has demonstrated substantial distinctions between Taxpayer and LMC in terms of the proportion of revenue from sales and the time taken to sell equipment. More importantly, there is an absence of factual support for necessary elements of the Taxpayer's claim. There is no competent summary judgment evidence to support the Taxpayer's claim that its equipment rental fleet was actually held out for

sale in the ordinary course of business. Nearly all of the revenue of this Taxpayer came from rentals. The Taxpayer, by its own admission, stated that it only sold its equipment rental fleet at the end of its useful life. There is a difference between managing the composition of a rental fleet by disposing of equipment at the end of its useful life and actually holding a fleet out for sale as inventory in the ordinary course of business while also renting it. Accordingly, the Taxpayer's Motion should be denied and the Department's Motion should be granted.

Baton Rouge, Louisiana this 13 day of January, 2021.

FOR THE BOARD:

JUDGE TONY GRAPHIA (RET.)
CHAIRMAN