

BOARD OF TAX APPEALS
STATE OF LOUISIANA
LOCAL TAX DIVISION

Republic National Distributing Company, LLC

Petitioner

v.

B.T.A. Docket NO. L00395

Norman Foster, Director of Finance and Chief Financial Officer,
Department of Finance,
City of New Orleans, Parish of Orleans

Respondent

JUDGMENT ON CROSS MOTIONS FOR SUMMARY JUDGMENT AND
TAXPAYER'S REVISED SECOND MOTION FOR SUMMARY JUDGMENT
WITH REASONS

On August 11, 2022, this matter came before the Board for hearing on the Second¹ Motion for Summary Judgment filed by Republic National Distributing Company, LLC ("Taxpayer"). Present at the hearing were Stephanie Laborde, counsel for Taxpayer² and Tanya Irvin and Kimberly Smith on behalf of Norman Foster, Director of Finance and Chief Financial Officer, Department of Finance, City of New Orleans, Parish of Orleans ("Collector"), with Local Tax Judge Cade R. Cole presiding.³ After the hearing the matter was taken under advisement. The Board now issues Judgment in accordance with the attached Reasons.

IT IS ORDERED, ADJUDGED AND DECREED that the Taxpayer's Second Motion for Summary Judgment is GRANTED.

¹ Taxpayer's first Motion for Summary Judgment and the Collector's Motion for Summary Judgment were heard on December 2, 2021 ("First MSJ Hearing"), and taken under advisement.

² Yvette D'Aunoy appeared on behalf of the Taxpayer at the First MSJ Hearing.

³ Also appearing to observe proceedings were Sean McLoughlin, Willie Kolarik, and Jaye Calhoun, representatives for Southern Glazer's Wine and Spirits of Louisiana, LLC ("Southern Glazer's"). Southern Glazer's filed a Petition docketed as L00397 and it is not a party to this matter. Docket Nos. L00395 and L00397 were argued together at the First MSJ Hearing. Since then, the Taxpayer and Southern Glazer's obtained new counsel and the matters were argued separately for purposes of the Second MSJ.

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

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Taxpayer's First Motion for Summary Judgment is DENIED AS MOOT.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be Judgment in favor of the Taxpayer and against the Collector and that the Collector is HEREBY ORDERED to return the amounts paid under protest to the Taxpayer.

Judgment Rendered and Signed at Baton Rouge, Louisiana, on this 5 day of October, 2022.

FOR THE BOARD:



LOCAL TAX JUDGE CADE R. COLE

BOARD OF TAX APPEALS
STATE OF LOUISIANA
LOCAL TAX DIVISION

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B.T.A. Docket NO. L00395

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REASONS FOR JUDGMENT ON CROSS MOTIONS FOR SUMMARY
JUDGMENT AND TAXPAYER'S REVISED SECOND MOTION FOR
SUMMARY JUDGMENT

On August 11, 2022, this matter came before the Board for hearing on the Second¹ Motion for Summary Judgment filed by Republic National Distributing Company, LLC ("Taxpayer"). Present at the hearing were Stephanie Laborde, counsel for Taxpayer², and Tanya Irvin and Kimberly Smith on behalf of Norman Foster, Director of Finance and Chief Financial Officer, Department of Finance, City of New Orleans, Parish of Orleans ("Collector"), with Local Tax Judge Cade R. Cole presiding.³ After the hearing, the matter was taken under advisement. The Board now issues Judgment for the following reasons:

¹ Taxpayer's first Motion for Summary Judgment and the Collector's Motion for Summary Judgment were heard on December 2, 2021 ("First MSJ Hearing"), and taken under advisement.

² Yvette D'Aunoy appeared on behalf of the Taxpayer at the First MSJ Hearing.

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Background

Taxpayer is a wholesale dealer of High Alcoholic Content Beverages (“HACB”). Taxpayer, an LLC registered and authorized to do business in Louisiana with its office in Jefferson Parish, has obtained licenses and permits from the State and from Jefferson Parish for its business as a wholesaler of HACB. Taxpayer does not pay an occupational license tax to Jefferson Parish for the privilege of doing business as a wholesale dealer of HACB within its territory. During the tax periods at issue, Taxpayer sold and delivered HACB to businesses located in Orleans Parish with its own trucks.

The Collector sought to collect New Orleans’ Gallonage Tax⁴ from the Taxpayer. Taxpayer undisputedly had no physical office or business location in New Orleans, and the city of New Orleans has not issued an occupational license to Taxpayer. Taxpayer paid the tax under protest and filed the instant Petition to recover the taxes paid under protest. In its Second Motion for Summary Judgment, Taxpayer argues that it is not subject to tax by operation of La. R.S. 26:74(E).

Motion to Strike

Before addressing the substantive issues presented, the Board must address the Collector’s Motion to Strike. Taxpayer attempted to introduce documents⁵ purported to be Louisiana and Jefferson Parish permits and licenses authorizing its business as an HACB wholesale dealer in the state of Louisiana and in Jefferson

⁴ New Orleans Code of Ordinances §§ 10.501, 10.511.

⁵ Affidavit of John Mendelsohn, Exhibit “A” *State of Louisiana Department of Revenue Office of Alcohol and Tobacco Control Liquor Wholesale Permit*; Exhibit “B” *Sheriff and Ex-Officio Tax Collector – Jefferson Parish, Louisiana 2021 Alcohol Wholesale Permit*; a second Exhibit “B” *Sheriff and Ex-Officio Tax Collector – Jefferson Parish, Louisiana 2021 Occupational License Tax*; a second Exhibit “A” *State of Louisiana Department of Revenue Office of Alcohol and Tobacco Control Liquor Wholesale Permit*; an exhibit labeled Exhibit “B in globo” *Sheriff and Ex-Officio Tax Collector – Jefferson Parish, Louisiana 2021 Alcohol Wholesale Permit*; and an exhibit labeled “in globo B”: *Sheriff and Ex-Officio Tax Collector – Jefferson Parish, Louisiana 2021 Occupational License Tax*. Revised Affidavit of John Mendelsohn, Exhibit “1A” *State of Louisiana Department of Revenue Office of Alcohol and Tobacco Control Liquor Wholesale Permits*; Exhibit “1B” *Sheriff and Ex-Officio Tax Collector – Jefferson Parish, Louisiana Alcohol Wholesale Permits and Sheriff and Ex-Officio Tax Collector – Jefferson Parish, Louisiana Occupational Licenses*.

Parish. The Collector moved to strike the alleged permits on the grounds that they are unsworn, uncertified, unauthenticated, and inadmissible hearsay.

Under La. C.C.P. art. 966(A)(4), only the following documents may be filed in support of or in opposition to a motion for summary judgment: “pleadings, memoranda, affidavits, depositions, answers to interrogatories, certified medical records, written stipulations, and admissions.” The comments to subparagraph (A)(4) explain that other documents may be considered if properly authenticated by an affidavit or deposition to which they are attached. Authentication of business records requires testimony of the custodian or other qualified witness regarding the business’ record-keeping procedures. *See McRay v. Booker T. Washington Nursing Home*, 30,399 (La. App. 2 Cir. 4/8/98), 711 So.2d 772. Public records are not self-authenticating unless they do not contain an official certification of authenticity from the agency that created them. *Price v. Roy O. Martin Lumber Co.*, 2004-0227, p. 10 (La. App. 1 Cir. 4/27/05), 915 So.2d 816, 823, *writ denied*, 2005-1390 (La. 1/27/06), 922 So.2d 543.

The alleged permits do not include certification that would make them self-authenticating. Taxpayer contends that they are authenticated by the Affidavit(s) of John Mendelsohn. Mr. Mendelsohn avers that he is the Taxpayer’s Director of Operations and that he has personal knowledge that Taxpayer possessed and maintained the purported permits. Mr. Mendelsohn does not claim to have personal knowledge of the creation and issuance of permits. The custodians with knowledge of what the permits are and the meaning of the terms they contain would be the custodian of records for Jefferson Parish and the State. The nature and content of the records should have been authenticated by their respective governmental custodians. Accordingly, the Collector’s Motion to Strike will be granted, and the permits objected to will be stricken from the record.⁶ Nevertheless, it should be noted that the Board nevertheless finds Mr. Mendelsohn’s assertions that Taxpayer obtained and

⁶ The Taxpayer elected to proffer these documents as Taxpayer Proffer #1.

possessed the permits to be within the scope of his personal knowledge and uncontradicted.

The Collector also objected to Paragraph 8 of Mendelsohn's Affidavit as conclusory and unsubstantiated. That Paragraph reads: "In order to obtain a license from the State of Louisiana to engage in business as a wholesale dealer of high content alcoholic beverages, Republic National Distributing Company, LLC must show the State of Louisiana that the required local permit has been obtained or applied for" It is well settled that conclusory facts and conclusions of law cannot be utilized on a summary judgment motion. *Thompson v. S. Cent. Bell Tel. Co.*, 411 So.2d 26, 28 (La. 1982). In addition, a witness may only offer testimony that is based on personal experience. La. C.C.P. 967(A). The Board affords no weight to Mr. Mendelsohn's conclusions or legal opinions, and to the extent that his statement can be construed as such, it is stricken.

Discussion

Local governmental subdivisions possess only such powers of taxation as has been granted to them by express provisions of the state's constitution and statutes. *Radiofone, Inc. v. City of New Orleans*, 630 So.2d 694 (La. 1994). Article VI, § 28 of the Louisiana Constitution authorizes a local government to impose an occupational license tax not greater than that imposed by the state unless approved by law enacted by two-thirds of the elected members of each house of the legislature. The framers of Louisiana's Constitution knew what they meant when referencing a rate up to the rate levied by the state. At that time, there was, in fact, an occupational license tax levied by the state. However, in Act 107 of 1986, the Legislature abolished the state's occupational license tax and authorized local taxing authorities to impose a local occupational license tax not to exceed the maximum rate set by that statute. La. R.S. 47:341. The legislature further prohibited local governments from levying a tax on the manufacture, distribution, transportation, or importation of alcoholic beverages without express legislative authorization in Title 26, Chapter 2 of the Revised

Statutes. La. R.S. 47:360(D)(4); La. R.S. 26:491. Even though there is no longer a state occupational license tax, the Louisiana Supreme Court found that the state-levied alcohol taxes could be re-characterized as occupational license taxes such that the City of New Orleans could impose an occupational license tax on dealers engaged in the handling of high alcoholic content beverages up to those amounts. *Beer Industry League of Louisiana v. City of New Orleans*, 2018-0280, (La. 6/27/18), 251 So.3d 380, *rehearing denied* 4-3.

This case presents a question of application of the tax, rather than a facial challenge to its constitutionality. Taxpayer argues that it is not subject to said tax under La. R.S. 26:74(E). That provision states:

When a person obtains the required local wholesaler's permit to engage in business as a wholesaler of beverages of high alcoholic content, he may do business in other municipalities or parishes and these municipalities and parishes shall not impose a tax or license of any nature on him to do business within their territorial limits unless he maintains a regular branch of his wholesale business within their respective limits.

The dispute is whether the Taxpayer has fulfilled the criteria required to trigger this provision's prohibition against any form of taxation or license by the local taxing authority.

The Collector argues that the provision does not apply because the Taxpayer has not obtained a permit for the handling of HACB, and because the Taxpayer has not paid occupational license tax to Jefferson Parish for the privilege of doing business as a dealer of HACB. In support of these contentions, the Collector points to Exhibit C in globo to Taxpayer's first Amended Petition, admitted into the record for purposes of the Taxpayer's first Motion for Summary Judgment. This Exhibit is a letter from the Taxpayer's officer to the Jefferson Parish collector. The contents of the letter advise the Jefferson Parish collector of the Taxpayer's position that no occupational license tax is due on Taxpayer's business as a wholesaler of HACB. Additionally, in its brief, the Collector argues that Jefferson Parish has not required a permit fee for Taxpayer's handling of HACB; therefore a condition precedent for

application of La. R.S. 26:74(E) has not been established. Moreover, Taxpayer admits that it did not pay occupational license tax to Jefferson Parish specifically for the privilege of conducting its business as wholesaler of HACB.

Determining whether the phrase “the required local wholesaler’s permit to engage in business” as a wholesaler of HACB in La. R.S. 26:74(E) means “paid occupational license tax for the privilege of engaging in business as” a wholesaler of HACB is a question of statutory interpretation. It is a fundamental principle of statutory interpretation that when the words of the statute are clear and unambiguous, and their application does not lead to absurd consequences, then the law shall be applied as written without further search for the intent of the legislature. La. C.C. art. 9, *Lopinto v. Expedia, Inc. (WA)*, 21-132, p. 8 (La. App. 5 Cir. 12/23/21), 335 So.3d 432, 439–40. This principle applies to taxing statutes. *Id.* When the words of a statute are subject to multiple reasonable interpretations, their meaning must be discerned from the context in which they are found and the text of the law as a whole. La. C.C. art. 12.

On its face, La. R.S. 26:74(E) does not require the Taxpayer to pay occupational license tax. As written, the required permit is simply whatever permit is required to engage in business as a wholesaler of HACB. The statute does not require a local taxing authority to impose an occupational license tax on HACB wholesalers. The natural result of this interpretation is not absurd. The nature of the permit, its requirements and its prohibitions are all described in the surrounding statutes. *See, e.g.* La. R.S. 26:71 – 108. The clear wording of the statute obviates further inquiry into their meaning.

Nevertheless, the Board has searched the jurisprudence for any guidance as to interpreting La. R.S. 26:74(E) or La. R.S. 26:74. In *Beer Industry*, the Court noted: “Parishes and municipalities may require annual permits and fees from dealers under La. R.S. 26:74, and the amounts of such permit fees are limited.” *Beer Industry*, 251 So.3d at 388, n. 10. In *St. Landry Parish Police Jury v. Zerangue*, 95-0877, (La.

11/27/95); 664 So.2d 388, the Court held that La. R.S. 26:74(A) and (B) gave the local authority, not the sheriff, the power to charge and collect liquor permit fees. *Id.* at 392-93. In so holding, the Court distinguished the legislative grant of authority to collect occupational license taxes, which could not be wrested from the Sheriff. *Id.* In *McDaniel v. Town of Krotz Springs*, 448 So.2d 874, 877, n. 4 (La. Ct. App. 1984), the Court cited La. R.S. 26:74 and La. R.S. 26:71 to advise an applicant of the need to obtain both state and local permits. In *Maw Enterprises, L.L.C. v. City of Marksville*, 2014-0090, (La. 9/3/14), 149 So.3d 210, the Court described the statute as addressing “[l]ocal license and permit fees . . .” and observed that “[p]arishes and municipalities may require annual permits and fees from dealers holding state permits under this Chapter.” In each of the above cases, La. R.S. 26:74 has been interpreted to grant authority to enact liquor permit fees and never to grant authority to levy an occupational license tax.

Historically, liquor license fee requirements were understood as an exercise of the police power, rather than the power to tax. Louisiana imposed licensing fees on dealers of alcoholic beverages long before the enactment of La. R.S. 26:74. *See Flournoy v. Grady*, 25 La. Ann. 591 (La. 1873); *City of New Orleans v. Smythe*, 41 So. 33 (La. 1906). Licensing and the attendant fees were challenged and upheld under the state’s and local governments’ authority to regulate the moral, social, or economic welfare of the public. *City of New Iberia v. Erath*, 42 So. 945, 947 (La. 1907) (Louisiana Constitution of 1898); *Reynolds v. Louisiana Bd. of Alcoholic Beverage Control*, 181 So.2d 377, 382 (La. 1965) (Louisiana Constitution of 1921).

Licensing is a component of Louisiana’s current overall regulatory structure governing commerce in alcoholic beverages designed to produce a three-tiered industry: suppliers, wholesalers, and retailers. *Manuel v. State, Office of Alcohol & Tobacco Control*, 2007-1620 (La. App. 3 Cir. 4/30/08), 982 So.2d 316, *writ denied*, 2008-1061 (La. 8/29/08), 989 So.2d 107. Courts have upheld these restrictions on commerce in order preserve the existence of the wholesaler tier, recognizing the

State's authority to do so under the 21st Amendment. *Id.* at 340; *Schwegmann Giant Super Markets v. Edwards*, 552 So.2d 1241, 1245 (La. Ct. 1 App. 1989), *writ denied*, 556 So.2d 1280 (La. 1990). The three-tiered structure has been described as protecting the "separation, independence, and stability of the tiers." *Manuel*, 982 So.2d at 333.

The above illustrates one aspect of the potential disruption that would result from re-characterizing liquor license fees as occupational license taxes. Certainly, these requirements share some commonalities with occupational license taxes. An occupational license tax is one that is imposed on the activity or privilege of conducting a business or practicing a profession. *Beer Industry*, 251 So.3d at 389. An occupational license tax is an "indirect" tax on the activity or privilege, not a direct tax on people or property. *Id.* Liquor licenses are required "before engaging in the business of manufacturing, supplying, or dealing in alcoholic beverages" La. R.S. 26:71(A), 74(A), 75(A). However, this logic could lead to re-characterizing a wide variety of taxing and licensing provisions as occupational license taxes. For example, the state licensing requirements for gaming equipment are potentially susceptible to re-characterization as they apply to any person who "manufactures, sells, distributes, transports, or repairs any gaming equipment within this state for use outside this state" La. R.S. 47:7003(A) The same could potentially be said of the State's tax on Transportation and Communication Utilities, which is imposed "for the privilege of engaging in" the business of "owning or operating, or owning and operating, any public utility" in Louisiana as set forth in La. R.S. 47:1001 *et. seq.*

The required permit and the corresponding fee are defined in Jefferson Parish Code of Ordinances, in which Chapter 4, Alcoholic Beverages, Article I, Sec. 4-16, Dealer Permits, provides:

Before engaging in the business of dealing in alcoholic beverages within the territorial limits of the parish, except the corporate limits of municipalities for the year 1998, all persons shall obtain from the sheriff and ex officio tax collector for the Parish of Jefferson, annually, dated from January first of each year, a permit to conduct each separate

business and shall pay the parish all fees assessed therefor, all in accordance with the schedule set forth in this article.

The fees for wholesale dealers of HACB are provided in Sec. 4-24, Fees, which states in relevant part:

(e) Wholesale liquor permit. A wholesale liquor permit shall be issued to a wholesale dealer in alcoholic beverages of either high alcoholic content or both low and high alcoholic content. The fee for such permit shall be the sum of one thousand dollars (\$1,000.00) per annum for each place of business.

The quoted provisions and the related ordinances establish that a permit and permit fee are required for wholesalers of HACB. La. R.S. 26:74(E) logically refers to this permit and not to an occupational license tax. Taxpayer satisfied the requirements of La. R.S. 26:74(E) by obtaining this permit.

La. R.S. 26:74(E) applies and prevents the Collector from imposing “a tax or license of any nature” on the Taxpayer “to do business within” New Orleans’ “territorial limits,” unless the Taxpayer maintains a regular branch of its wholesale business in New Orleans. The only undisputed activity of the Taxpayer within the Collector’s jurisdiction is that Taxpayer used its own vehicles to deliver HACB to businesses located in Orleans Parish during the tax periods at issue.⁷

The statutes do not define a “regular branch” of a “wholesaler business.” However, the general provisions of Title 26 incorporate the requirement of maintaining a “warehouse or warehouses for the storage and warehousing of alcoholic beverages of high alcoholic content in the area where domiciled and licensed by the state” into the definition of “Wholesale dealer.” La. R.S. 26:2(30). Alcoholic beverage wholesalers must “maintain warehouse space either owned or leased by the wholesaler, or dedicated to his use in a public warehouse” La. R.S. 26:82. Under

⁷ Exhibit A to Collector’s Motion for Summary Judgment, Responses to Requests for Admission, Response to Request for Admission Nos. 4, 5.

these facts, the Board finds that the Taxpayer did not have a regular branch of its wholesale business in New Orleans.

Based on the foregoing, the Board finds that the Taxpayer obtained the required state and local permits to operate as a wholesale dealer of high alcoholic content beverages in Jefferson Parish, triggering the protections of La. R.S. 26:74(E). That statute prevents the Collector from imposing a tax or license for doing business as a wholesaler of HACB in New Orleans. The Taxpayer did not negate this protection by maintaining a regular branch of its wholesale business within the city of New Orleans. The Collector's attempts to impose an occupational license tax on Taxpayer's handling of HACB in New Orleans, in the conduct of Taxpayer's business as a wholesaler of HACB, are contrary to law. The Taxpayer's payment under protest must be refunded and Judgment will be entered accordingly.

Baton Rouge, Louisiana, this 5 day of October, 2022.

FOR THE BOARD:



LOCAL TAX JUDGE CADE R. COLE

BOARD OF TAX APPEALS
STATE OF LOUISIANA
LOCAL TAX DIVISION

SOUTHERN GLAZER'S WINE AND SPIRITS OF LOUISIANA, LLC

Petitioner

versus

B.T.A. DOCKET NO. L00397

NORMAN FOSTER, DIRECTOR OF FINANCE
AND CHIEF FINANCIAL OFFICER,
DEPARTMENT OF FINANCE,
CITY OF NEW ORLEANS, PARISH OF ORLEANS

Respondent

JUDGMENT ON CROSS MOTIONS FOR SUMMARY JUDGMENT AND
TAXPAYER'S REVISED SECOND MOTION FOR SUMMARY JUDGMENT
WITH REASONS

On August 11, 2022, this matter came before the Board for hearing on the Second¹ Motion for Summary Judgment filed by Southern Glazer's Wine and Spirits of Louisiana, LLC ("Taxpayer"). Present at the hearing were Jaye Calhoun, William J. Kolarik, II, and Sean T. McLaughlin, counsel for Taxpayer² and Tanya Irvin and Kimberly Smith on behalf of Norman Foster, Director of Finance and Chief Financial Officer, Department of Finance, City of New Orleans, Parish of Orleans ("Collector"), with Local Tax Judge Cade R. Cole presiding.³ After the hearing the matter was taken under advisement. The Board now issues Judgment in accordance with the attached Reasons.

¹ Taxpayer's first Motion for Summary Judgment and the Collector's Motion for Summary Judgment were heard on December 2, 2021 ("First MSJ Hearing"), and taken under advisement.

² Yvette D'Aunoy appeared on behalf of the Taxpayer at the First MSJ Hearing.

³ Also appearing to observe proceedings was Stephanie LaBorde, representative for Republic National Distributing Company, LLC ("Republic"). Republic filed a Petition docketed as L00395 and it is not a party to this matter. Docket Nos. L00395 and L00397 were argued together at the First MSJ Hearing. Since then, the Taxpayer and Republic obtained new counsel and the matters were argued separately for purposes of the Second MSJ.

IT IS ORDERED, ADJUDGED AND DECREED that the Taxpayer's Second Motion for Summary Judgment is GRANTED.

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

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Taxpayer's First Motion for Summary Judgment is DENIED AS MOOT.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be Judgment in favor of the Taxpayer and against the Collector and that the Collector is HEREBY ORDERED to return the amounts paid under protest to the Taxpayer.

Judgment Rendered and Signed at Baton Rouge, Louisiana, on this 6th day of October, 2022.

FOR THE BOARD:



LOCAL TAX JUDGE CADE R. COLE

BOARD OF TAX APPEALS
STATE OF LOUISIANA
LOCAL TAX DIVISION

SOUTHERN GLAZER'S WINE AND SPIRITS OF LOUISIANA, LLC

Petitioner

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¹ Taxpayer's first Motion for Summary Judgment and the Collector's Motion for Summary Judgment were heard on December 2, 2021 ("First MSJ Hearing"), and taken under advisement.

² Yvette D'Aunoy appeared on behalf of the Taxpayer at the First MSJ Hearing.

³ Also appearing to observe proceedings was Stephanie LaBorde, representative for Republic National Distributing Company, LLC ("Republic"). Republic filed a Petition docketed as L00395 and it is not a party to this matter. Docket Nos. L00395 and L00397 were argued together at the First MSJ Hearing. Since then, the Taxpayer and Republic obtained new counsel and the matters were argued separately for purposes of the Second MSJ.

Background

Taxpayer is an LLC registered and authorized to do business in Louisiana and a wholesale dealer of High Alcoholic Content Beverages (“HACB”). Taxpayer maintains its primary office in St. Charles Parish and does not maintain an office or business location in the City of New Orleans. Taxpayer obtained the necessary license from the State for its business as a wholesaler of HACB. Taxpayer applied for and obtained the necessary occupational license from St. Charles Parish to engage in business as a wholesale distributor within the parish. However, Taxpayer does not pay occupational license tax to St. Charles Parish for the privilege of doing business as a wholesale distributor of HACB specifically. Taxpayer does pay occupational license tax to St. Charles Parish based upon sales of other products. During the tax periods at issue, Taxpayer sold HACB to businesses located in Orleans Parish made deliveries to those businesses with its own trucks.

The Collector sought to collect New Orleans’ Gallonage Tax⁴ from the Taxpayer. Taxpayer undisputedly had no physical office or business location in New Orleans, and the city of New Orleans has not issued an occupational license to Taxpayer. Taxpayer paid the tax under protest and filed the instant Petition to recover the taxes paid under protest. In its Second Motion for Summary Judgment, Taxpayer argues that it is not subject to tax by operation of La. R.S. 26:74(E).

Motion to Strike

Before addressing the substantive issues presented, the Board must address the Collector’s Motion to Strike. The Collector objects to the introduction of documents purported to be Louisiana and St. Charles Parish permits and licenses authorizing Taxpayer’s business as an HACB wholesale dealer, as well as application and renewal application forms for the occupational license issued by St. Charles

⁴ New Orleans Code of Ordinances §§ 10.501, 10.511.

Parish to a wholesale distributor.⁵ purported to in the state of Louisiana and in St. Charles Parish. Taxpayer The Collector moved to strike the alleged permits on the grounds that they are unsworn, uncertified, unauthenticated, and inadmissible hearsay, and not competent summary judgment evidence.

Under La. C.C.P. art. 966(A)(4), only the following documents may be filed in support of or in opposition to a motion for summary judgment: “pleadings, memoranda, affidavits, depositions, answers to interrogatories, certified medical records, written stipulations, and admissions.” The comments to subparagraph (A)(4) explain that other documents may be considered if properly authenticated by an affidavit or deposition to which they are attached. Authentication of business records requires testimony of the custodian or other qualified witness regarding the business’ record-keeping procedures. *See McRay v. Booker T. Washington Nursing Home*, 30,399 (La. App. 2 Cir. 4/8/98), 711 So.2d 772. Public records are not self-authenticating unless they do not contain an official certification of authenticity from the agency that created them. *Price v. Roy O. Martin Lumber Co.*, 2004-0227, p. 10 (La. App. 1 Cir. 4/27/05), 915 So.2d 816, 823, *writ denied*, 2005-1390 (La. 1/27/06), 922 So.2d 543.

The documents described as permits and licenses do not include an official certification that would make them self-authenticating. Taxpayer contends that they are authenticated by the Affidavit(s) of John Berry. Mr. Berry avers that he is the Taxpayer’s Regional Administrator for the State of Louisiana and that he has personal knowledge of Taxpayer’s operations and its Louisiana state and local alcohol permitting and tax-related matters, including full access any and all pertinent

⁵ Attached to Taxpayer’s First MSJ: two exhibits, both labeled Exhibit “A” and both described as “State of Louisiana Department of Revenue Office of Alcohol and Tobacco Control Liquor Wholesale Permit”; two more exhibits, both labeled Exhibit “B in globo” and both described as “Parish of St. Charles License.”

Attached to Taxpayer’s Second MSJ: Exhibit “A” (Parish of St. Charles Licenses, applications, “and various other documents”); and another Exhibit “B” that is described as “State of Louisiana Department of Revenue Office of Alcohol and Tobacco Control Liquor Wholesale Permits.”

documents. Mr. Berry personally signed Taxpayer's renewal application to St. Charles Parish for the occupational license. He was also directly involved in paying the license fees for submitting the applications, and this is evidenced by his signature on the check requests for payment, as well as an email that accompanied one such request. As an officer personally involved in their creation and maintenance, he is a competent affiant to authenticate the applications and license fee payment documentation. The Collector's Motion to Strike is overruled with respect to the applications, the check requests, the email from John Berry to "Regional Accounting - Accounts Payable" dated January 7, 2020, and also with respect to the document titled "License Fee Receipt Information" evidencing payment for the 2015 year of a "WHOLESALE LIQUOR RENEWAL FEE." However, Mr. Berry is not an official of the St. Charles Parish collector and does not have the necessary first-hand knowledge of the creation and issuance of the licenses and permits. Accordingly, the Collector's Motion to Strike will be granted, with respect to said licenses and permits.⁶

Nevertheless, striking the permits does not affect the undisputed facts presented on summary judgment. Mr. Berry avers that Taxpayer obtained and possessed the required permits from the State and St. Charles Parish to do business as a wholesale dealer of HACB in St. Charles Parish. The facts asserted by Mr. Berry stand un-contradicted and are sufficient on their own for the Board's determination.⁷

The Collector also objected to Mr. Berry's representation that: "In order to obtain a license from the State of Louisiana to engage in business as a wholesale dealer of high content alcoholic beverages, Southern Glazer's Wine and Spirits of Louisiana, LLC must show the State of Louisiana that the required local permit has been obtained or applied for" It is well settled that conclusory facts and conclusions of law cannot be utilized on a summary judgment motion. *Thompson v.*

⁶ The Board allowed the Taxpayer to proffer these documents as Taxpayer Proffer #1.

⁷ The Collector claims that Mr. Berry's affidavit is contradicted by a statement in the Affidavit of Alan N. Greenspan, Esq., attached to the Taxpayer's First MSJ. Mr. Greenspan averred that Taxpayer pays occupational license tax fees to St. Charles Parish based upon sales of products other than HACB. This is not a contradiction. A taxpayer can obtain a liquor permit and still be subject to occupational license tax in the jurisdictions in which they maintain a regular place of business. La. R.S. 26:74(E).

S. Cent. Bell Tel. Co., 411 So.2d 26, 28 (La. 1982). In addition, a witness may only offer testimony that is based on personal experience. La. C.C.P. 967(A). The Board affords no weight to Mr. Berry's conclusions or legal opinions, and to the extent that his statement can be construed as such, it is stricken.

Discussion

Local governmental subdivisions possess only such powers of taxation as has been granted to them by express provisions of the state's constitution and statutes. *Radiofone, Inc. v. City of New Orleans*, 630 So.2d 694 (La. 1994). Article VI, § 28 of the Louisiana Constitution authorizes a local government to impose an occupational license tax not greater than that imposed by the state unless approved by law enacted by two-thirds of the elected members of each house of the legislature. The framers of Louisiana's Constitution knew what they meant when referencing a rate up to the rate levied by the state. At that time, there was, in fact, an occupational license tax levied by the state. However, in Act 107 of 1986, the Legislature abolished the state's occupational license tax and authorized local taxing authorities to impose a local occupational license tax not to exceed the maximum rate set by that statute. La. R.S. 47:341. The legislature further prohibited local governments from levying a tax on the manufacture, distribution, transportation, or importation of alcoholic beverages without express legislative authorization in Title 26, Chapter 2 of the Revised Statutes. La. R.S. 47:360(D)(4); La. R.S. 26:491. Even though there is no longer a state occupational license tax, the Louisiana Supreme Court found that the state-levied alcohol taxes could be re-characterized as occupational license taxes such that the City of New Orleans could impose an occupational license tax on dealers engaged in the handling of high alcoholic content beverages up to those amounts. *Beer Industry League of Louisiana v. City of New Orleans*, 2018-0280, (La. 6/27/18), 251 So.3d 380, *rehearing denied* 4-3.

This case presents a question of application of the tax, rather than a facial challenge to its constitutionality. Taxpayer argues that it is not subject to said tax under La. R.S. 26:74(E). That provision states:

When a person obtains the required local wholesaler's permit to engage in business as a wholesaler of beverages of high alcoholic content, he may do business in other municipalities or parishes and these municipalities and parishes shall not impose a tax or license of any nature on him to do business within their territorial limits unless he maintains a regular branch of his wholesale business within their respective limits.

The dispute is whether the Taxpayer has fulfilled the criteria required to trigger this provision's prohibition against any form of taxation or license by the local taxing authority.

The Collector argues that the provision does not apply because the Taxpayer has not obtained a permit for the "handling of HACB, and because the Taxpayer has not paid occupational license tax to St. Charles Parish for the privilege of doing business as a dealer of HACB. Determining whether the phrase "the required local wholesaler's permit to engage in business" as a wholesaler of HACB in La. R.S. 26:74(E) means "paid occupational license tax for the privilege of engaging in business as" a wholesaler of HACB is a question of statutory interpretation. It is a fundamental principle of statutory interpretation that when the words of the statute are clear and unambiguous, and their application does not lead to absurd consequences, then the law shall be applied as written without further search for the intent of the legislature. La. C.C. art. 9, *Lopinto v. Expedia, Inc. (WA)*, 21-132, p. 8 (La. App. 5 Cir. 12/23/21), 335 So.3d 432, 439-40. This principle applies to taxing statutes. *Id.* When the words of a statute are subject to multiple reasonable interpretations, their meaning must be discerned from the context in which they are found and the text of the law as a whole. La. C.C. art. 12.

On its face, La. R.S. 26:74(E) does not require the Taxpayer to pay occupational license tax. As written, the required permit is simply whatever permit is required to engage in business as a wholesaler of HACB. The statute does not require a local

taxing authority to impose an occupational license tax on HACB wholesalers. The natural result of this interpretation is not absurd. The nature of the permit, its requirements and its prohibitions are all described in the surrounding statutes. *See, e.g.* La. R.S. 26:71 – 108. The clear wording of the statute obviates further inquiry into their meaning.

Nevertheless, the Board has searched the jurisprudence for any guidance as to interpreting La. R.S. 26:74(E) or La. R.S. 26:74. In *Beer Industry*, the Court noted: “Parishes and municipalities may require annual permits and fees from dealers under La. R.S. 26:74, and the amounts of such permit fees are limited.” *Beer Industry*, 251 So.3d at 388, n. 10. In *St. Landry Parish Police Jury v. Zerangue*, 95-0877, (La. 11/27/95); 664 So.2d 388, the Court held that La. R.S. 26:74(A) and (B) gave the local authority, not the sheriff, the power to charge and collect liquor permit fees. *Id.* at 392-93. In so holding, the Court distinguished the legislative grant of authority to collect occupational license taxes, which could not be wrested from the Sheriff. *Id.* In *McDaniel v. Town of Krotz Springs*, 448 So.2d 874, 877, n. 4 (La. Ct. App. 1984), the Court cited La. R.S. 26:74 and La. R.S. 26:71 to advise an applicant of the need to obtain both state and local permits. In *Maw Enterprises, L.L.C. v. City of Marksville*, 2014-0090, (La. 9/3/14), 149 So.3d 210, the Court described the statute as addressing “[l]ocal license and permit fees” and observed that “[p]arishes and municipalities may require annual permits and fees from dealers holding state permits under this Chapter.” In each of the above cases, La. R.S. 26:74 has been interpreted to grant authority to enact liquor permit fees and never to grant authority to levy an occupational license tax.

Historically, liquor license fee requirements were understood as an exercise of the police power, rather than the power to tax. Louisiana imposed licensing fees on dealers of alcoholic beverages long before the enactment of La. R.S. 26:74. *See Flournoy v. Grady*, 25 La. Ann. 591 (La. 1873); *City of New Orleans v. Smythe*, 41 So. 33 (La. 1906). Licensing and the attendant fees were challenged and upheld under

the state's and local governments' authority to regulate the moral, social, or economic welfare of the public. *City of New Iberia v. Erath*, 42 So. 945, 947 (La. 1907) (Louisiana Constitution of 1898); *Reynolds v. Louisiana Bd. of Alcoholic Beverage Control*, 181 So.2d 377, 382 (La. 1965) (Louisiana Constitution of 1921).

Licensing is a component of Louisiana's current overall regulatory structure governing commerce in alcoholic beverages designed to produce a three-tiered industry: suppliers, wholesalers, and retailers. *Manuel v. State, Office of Alcohol & Tobacco Control*, 2007-1620 (La. App. 3 Cir. 4/30/08), 982 So.2d 316, writ denied, 2008-1061 (La. 8/29/08), 989 So.2d 107. Courts have upheld these restrictions on commerce in order preserve the existence of the wholesaler tier, recognizing the State's authority to do so under the 21st Amendment. *Id.* at 340; *Schwegmann Giant Super Markets v. Edwards*, 552 So.2d 1241, 1245 (La. Ct. 1 App. 1989), writ denied, 556 So.2d 1280 (La. 1990). The three-tiered structure has been described as protecting the "separation, independence, and stability of the tiers." *Manuel*, 982 So.2d at 333.

The above illustrates one aspect of the potential disruption that would result from re-characterizing liquor license fees as occupational license taxes. Certainly, these requirements share some commonalities with occupational license taxes. An occupational license tax is one that is imposed on the activity or privilege of conducting a business or practicing a profession. *Beer Industry*, 251 So.3d at 389. An occupational license tax is an "indirect" tax on the activity or privilege, not a direct tax on people or property. *Id.* Liquor licenses are required "before engaging in the business of manufacturing, supplying, or dealing in alcoholic beverages . . ." La. R.S. 26:71(A), 74(A), 75(A). However, this logic could lead to re-characterizing a wide variety of taxing and licensing provisions as occupational license taxes. For example, the state licensing requirements for gaming equipment are potentially susceptible to re-characterization as they apply to any person who "manufactures, sells, distributes, transports, or repairs any gaming equipment within this state for use outside this

state” La. R.S. 47:7003(A) The same could potentially be said of the State’s tax on Transportation and Communication Utilities, which is imposed “for the privilege of engaging in” the business of “owning or operating, or owning and operating, any public utility” in Louisiana as set forth in La. R.S. 47:1001 *et. seq.*

La. R.S. 26:74(E) prevents the Collector from imposing “a tax or license of any nature” on the Taxpayer “to do business within” New Orleans’ “territorial limits,” unless the Taxpayer maintains a regular branch of its wholesale business in New Orleans. The only undisputed activity of the Taxpayer within the Collector’s jurisdiction is that Taxpayer used its own vehicles to deliver HACB to businesses located in Orleans Parish during the tax periods at issue.⁸

The statutes do not define a “regular branch” of a “wholesaler business.” However, the general provisions of Title 26 incorporate the requirement of maintaining a “warehouse or warehouses for the storage and warehousing of alcoholic beverages of high alcoholic content in the area where domiciled and licensed by the state” into the definition of “Wholesale dealer.” La. R.S. 26:2(30). Alcoholic beverage wholesalers must “maintain warehouse space either owned or leased by the wholesaler, or dedicated to his use in a public warehouse” La. R.S. 26:82. Under these facts, the Board finds that the Taxpayer did not have a regular branch of its wholesale business in New Orleans.

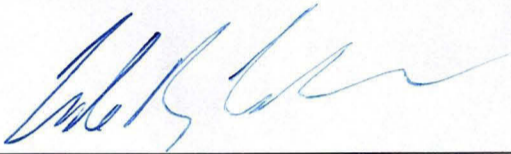
There is no genuine dispute that the Taxpayer obtained the required state and local permits to operate as a wholesale dealer of high alcoholic content beverages in St. Charles Parish. This fact triggers the protections of La. R.S. 26:74(E). The Collector is thereby prevented from imposing a tax or license on the Taxpayer for doing business as a wholesaler of HACB in New Orleans. The Taxpayer did not negate this protection by maintaining a regular branch of its wholesale business within the city of New Orleans. Therefore, the Collector’s attempts to impose an occupational

⁸ Exhibit A to Collector’s Motion for Summary Judgment, Responses to Requests for Admission, Response to Request for Admission Nos. 4, 5.

license tax on Taxpayer's handling of HACB in New Orleans, in the conduct of Taxpayer's business as a wholesaler of HACB, are contrary to law. The Taxpayer's payment under protest must be refunded and Judgment will be entered accordingly.

Baton Rouge, Louisiana, this 6th day of October, 2022.

FOR THE BOARD:



LOCAL TAX JUDGE CADE R. COLE