BOARD OF TAX APPEALS
STATE OF LOUISIANA

MARKS AVIATION GROUP LLC
PETITIONER

VERSUS **DOCKET NO. 11576D**

KIMBERLY ROBINSON, SECRETARY, LOUISIANA DEPARTMENT OF REVENUE
RESPONDENT

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JUDGMENT

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A full trial on the merits was conducted before the Louisiana Board of Tax Appeals (the "Board") on November 3rd, 2021. Present in court were: Lawrence Lewis, Onebane Law Firm, on behalf of Taxpayer Marks Aviation, LLC (the "Taxpayer"); and Christopher Brault on behalf of Respondent, Kimberly L. Robinson, Secretary, Department of Revenue (the "Department"). Judge Tony Graphia (ret.), Chairman, presiding, and Board Members Cade R. Cole and Francis J. "Jay" Lobrano, present.

Considering the law, evidence and arguments of counsel,

IT IS ORDERED, ADJUDGED AND DECREED that Judgment be rendered in favor of the Taxpayer and against the Department, and that the Department's assessment be vacated and set aside.

Judgment rendered and signed at Baton Rouge, Louisiana, this 8th day of December, 2021.

For the Board:

Judge Tony Graphia (Ret.), Chairman
Louisiana Board of Tax Appeals

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WRITTEN REASONS

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Before this Board is the Petitioner, Marks Aviation Group, LLC ("Taxpayer"), who contests the assessment of the Louisiana Department of Revenue and Taxation (the "Department") of additional sales and use tax for the periods January 1, 2015 through June 30, 2017 (the "Audit Period"). Specifically, the Department assessed Marks with an additional $40,309.87 in sales and use tax for the period of April 2015; $24,595.62 for the period of July 2015, and $21,971.87 for the period of July 2016. Originally, Taxpayer filed a Motion for Partial Summary Judgment seeking a judgment from this Board vacating and cancelling the assessment with respect to the purchase of three second-hand helicopters and the subsequent transfer of those helicopters to a related entity[1]. Ultimately, however, the Taxpayer withdrew the motion and opted to move forward with a trial before the Board on the merits. The Trial was scheduled and conducted before the full Board on November 3, 2021, Judge Tony Graphia (ret.), Chairman, presiding, and Board Members Cade R. Cole and Francis J. "Jay" Lobrano, present. Participating in the trial were: Lawrence L. Lewis, Onebane

[1] There were additional adjustments made during the audit, which were settled prior to trial.

Law Firm, attorney for Taxpayer and Christopher Brault, attorney for the Department. After the hearing, the case was taken under advisement.

FACTS

The material facts of this case are undisputed. The Taxpayer and the Department filed a Joint Stipulation of Facts and Exhibits setting forth certain undisputed facts and exhibits, which, together with the un-controverted testimony at trial, establish the following facts: Taxpayer is a Louisiana limited liability company with its principal place of business located in Lafayette, Louisiana. Lloyd L. Marks ("Marks") is the sole member and manager of the Taxpayer. In addition, Marks is the sole member and manager of a related company, Ranger Aviation Leasing, LLC ("Ranger"). Taxpayer is in the business of purchasing used (and sometimes damaged) helicopters, refurbishing them, and then selling or leasing them to third parties as operable and certified helicopters[2]. Marks testified that in cases where the Taxpayer locates a purchaser for its refurbished helicopters, the Taxpayer is the entity that sells and transfers title to the Helicopter to that purchaser. However, when Taxpayer locates a third party who wishes to lease one of its refurbished helicopters, Taxpayer transfers the helicopter to Ranger, who in turn enters into a "dry" lease with the third party, which is in effect a net lease where the third party assumes all obligations with respect to the helicopter. As both Taxpayer and Ranger are companies owned entirely by Marks, no money or other consideration is paid by Ranger to Taxpayer on the transfer of the helicopters intended to be dry-leased to third parties. The terms of the lease are that the third party lessee of the helicopter is responsible for providing the operator (the pilot), and is responsible for all maintenance, repairs, and any other expenses associated with operating the helicopter. Notably, there is no consideration paid by Ranger to Taxpayer on the transfer of a helicopter to Ranger for the purpose of entering in a

dry lease with the third party end user. Simply, the transfer is recorded with the Federal Aviation Administration, which vests title in the helicopter with Ranger.

At trial, Gregory Broussard, the Department's revenue tax auditor that conducted the audit of the Taxpayer, testified that Taxpayer had sold several of its refurbished helicopters to third parties during the audit period and that the Taxpayer's purchase of those helicopters was not subject to sales tax since the purchases were exempt purchases for re-sale. However, the Department identified three helicopters that the Taxpayer transferred to Ranger for subsequent dry lease to unrelated third parties[3] and assessed sales and use taxes against the Taxpayer on those three helicopters. The Department's assessment of sales and use tax was based on the post-refurbishment value of the helicopters, and not the original purchase price that Taxpayer paid for the helicopters. Those three helicopters were identified by their FAA registration numbers, and were N207RA, N453RA and N463RA (sometimes these three helicopters are collectively referred to as the "Helicopters"). As part of the joint stipulation between the Taxpayer and the Department, the lease contracts for N453RA and N4463 were introduced into the record without objection. The third helicopter, N207RA, was not leased but instead sold by Ranger as a result of the customer's decision to purchase the helicopter rather than lease it.

At issue is the Department's imposition of the sales and use tax on the Helicopters. Summarily, the Department argues that the Taxpayer's transfer of the Helicopters to Ranger constituted a taxable use of the Helicopters by the Taxpayer and thus sales and use taxes were due by the Taxpayer on the value of the Helicopters at the time of the transfer. The Taxpayer argues that the transfer of the

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[2] Taxpayer also provided helicopter repair and certification services to third parties. These services are not in question.

[3] Although it was anticipated that all three of the disputed helicopters would be leased by Ranger to third parties pursuant to dry leases, ultimately one of the helicopters was sold by Ranger to the third-party customer because the customer changed its mind and decided to purchase the helicopter rather than lease it.

Helicopters to Ranger should be ignored for sales and use tax purposes since Ranger and Taxpayer were both owned 100% by Marks and under applicable jurisprudence, the two entities should be treated as a single entity. As such, the Taxpayer argues that no sales and use tax is due by the Taxpayer as the purchase and subsequent leasing of the Helicopters falls within the "sale for re-lease" exception to the sales and use tax. For the reasons that follow, we agree with the Taxpayer and vacate the assessment.

OPINION

La. R.S. 47:302 imposes a sales and use tax upon the sale at retail, the use, the consumption, the distribution, and the storage for use or consumption in Louisiana, of tangible personal property. La. R.S. 47:302(A)(1) imposes the sales tax on the retail sale of tangible property in Louisiana, and this tax is typically collected and remitted by the seller of the property. La. R.S. 47:302(A)(2) imposes the use tax on tangible personal property that is purchased outside of Louisiana but is used or consumed (or stored for use or consumption) in Louisiana, and the use tax is typically paid and remitted by the purchaser of the property. There are two exclusions to the sales and use tax applicable in this case. First, La. R.S. 47:301(10)(a)(i) excludes the purchase of tangible property for the purpose of resale from the imposition of the sales and use tax. Second, La. R.S. 47:401(10)(a)(iii) excludes the purchase of tangible property for the purpose of subsequent lease of the property from the imposition of the sales and use tax.

It is undisputed that had the Taxpayer (rather than Ranger) leased helicopters N453RA and N4463 pursuant to the dry leases and sold helicopter N207RA to the purchaser, Taxpayer would not owe any sales or use tax.[4] Mr. Broussard, the Department's only witness, testified that he agreed with that position. Therefore, the only question to be decided in this case is whether Taxpayer's transfer of the

Helicopters to Ranger somehow triggered a taxable event that would subject Taxpayer to the sales and use tax. We hold that it does not.

The Department argues that the Taxpayer improperly used its resale certificate because it did not "sell" the Helicopters to Ranger, and therefore "the resale certificate should not have been used in making the purchases." Further, the Department argues that somehow the transfer of the Helicopters by Taxpayer to Ranger constituted a taxable use of the Helicopters by the Taxpayer, thus rendering the Taxpayer liable for the use tax on the post-refurbishment value of the Helicopters pursuant to La. R.S. 47:302(A)(2).

We disagree with the Department's argument that somehow the transfer of the Helicopters from Taxpayer to Ranger created a taxable use or constituted a taxable event for purposes of the sales and use tax. Marks was the sole member of both the Taxpayer and Ranger. For federal tax purposes, the transfer of the Helicopters from the Taxpayer to Ranger for no cash or other consideration[5] is considered a distribution of the Helicopters from the Taxpayer to Marks, followed by a contribution of the Helicopters by Marks to the capital of Ranger[6]. We see no reason to differentiate the transaction for sales and use tax purposes. La. R.S. 47:301(12) defines a sale for sales tax purposes as a "transfer of title or possession, or both, exchange, barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property, **for a consideration."** [emphasis added]. Our jurisprudence has recognized that a gratuitous transfer is not a sale for this purpose. *See Bridges v. Production Operators, Inc.* 974 So.2d 54 (La.

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[4] Presumably, all three helicopters were sold/leased outside of Louisiana, and therefore Taxpayer would not be liable for sales or use tax on the subsequent sale/rental of the helicopters.

[5] Marks testified that no cash consideration was paid by Ranger for the Helicopters, nor did Ranger execute or acknowledge any indebtedness to Taxpayer as consideration for the purchase. . In addition, Marks testified that neither Taxpayer or Ranger made an accounting entry indicating a "due to/due from" resulting from the transfer of the Helicopters.

[6] See, e.g., Rev. Rul. 69-630, 1969-2C.B. 112; Rev. Rul. 78-83 (1978-1 C.B. 79).

App. 4th Cir. 2008)[7]. Thus, for example, the donation of a motor vehicle by a parent to a child is not subject to sales and use tax because the transfer does not fall within the definition of a "sale" and therefore is not a legal "consideration" for the transfer as contemplated by La. R.S. 47:301(12). Although the typical reason or cause for such a donation is the love and affection a parent has for a child, clearly the term "consideration" as used in La. R.S. 47:301(12) is not so broad as to include such a non-pecuniary basis for the transfer. We consider a transfer of tangible property between two entities (in this case limited liability companies disregarded from their sole member for federal and state income tax purposes) for no cash consideration (or other consideration in the form of a note, exchange, or a barter for services) is more akin to a gratuitous donation than a traditional transfer for value. As such, the transfer of the Helicopters from Taxpayer to Range does not create a taxable event (either as a taxable retail sale or a taxable use) to the Taxpayer for purposes of the sales and use tax[8].

Alternatively, the record establishes that Ranger is an entity that should be disregarded from Taxpayer for sales tax purposes. We exhaustively reviewed and analyzed the Louisiana jurisprudence addressing the issue of whether an entity should be disregarded from an affiliated entity for sales tax purposes in our recent decision of *Compass Energy Operating, L.L.C. v. Department,* Docket No. 9523D (La. Bd. Tax Appeals June 3, 2021). Factors include: (1) treatment of the entities as disregarded for federal tax purposes; (2) whether the entity has employees; (3) whether there is a markup or profit (or any consideration) in a transaction between

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[7] In *Bridges v. Production Operators, Inc.*, the issue was whether fuel gas supplied to a compression services company for "no stated consideration" was subject to sales and use tax. The court correctly found that the overall transaction included the fuel gas as a "barter" item, since both parties received consideration in the transaction. In the instant matter, no such "barter" consideration exists.

[8] The record establishes that Ranger never operated the helicopters for hire (with a pilot provided) or otherwise operated the helicopters in providing a service or in its own business. The sole purpose for the acquisition of the Helicopters by Ranger was to lease them on a dry lease basis or sell them. Therefore, even if the transfer of the Helicopters by the Taxpayer

related parties; (4) the existence of a written agreement with arm's length provisions between the related parties; (5) whether the two entities in question operate out of the same location; and (6) whether the entity has its own operating business or is just holding assets for rental or sale. *See Compass,* supra, at pages 10-13.

In the instant case, if Ranger is disregarded from the Taxpayer for sales and use tax purposes, then the lease and sale of the Helicopters by Ranger to the third party lessees/purchaser is attributed to Taxpayer, and under the Department's own admission, would not result in the imposition of a sales or use tax liability on the Taxpayer. With respect to this issue, the following facts were establish at trial: (1) Taxpayer and Ranger were disregarded entities for federal tax purposes; (2) Ranger had no employees; (3) no consideration was paid by Ranger to Taxpayer for acquisition of the Helicopters; (4) other than the minimal amount of documentation required by the FAA to transfer the Helicopters, there was not a written contract between Taxpayer and Ranger for the transfer of the Helicopters; (5) Ranger operates its minimal business out of the Taxpayer's principal business office; and (6) Ranger does not operate an active business other than the dry leasing or selling of helicopters. Based on the above factors, we find that Ranger should be deemed a disregarded entity from the Taxpayer for this purpose. For this alternative reason, we find that there is no taxable event imposing sales and use tax on the Helicopters in the hands of the Taxpayer.

For the foregoing reasons, the Department's assessment of sales and use tax against Mark's Aviation Group, LLC for the periods January 1, 2015 through June 30, 2017 is vacated.

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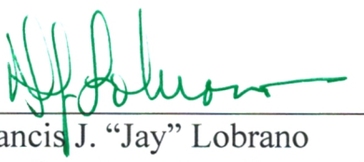
to Ranger constitutes a "sale" for purposes of the sales tax, La. R.S. 47:301(10)(a)(i) and (iii) exclude the transfer of the Helicopters from the definition of a taxable sale or use.

Baton Rouge, Louisiana, this 8th day of December, 2021.

For the Board:



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