STATE OF LOUISIANA
BOARD OF TAX APPEALS
LOCAL TAX DIVISION

ANDERSON MEMORY CARE, LLC,
SUMMERFIELD RETIREMENT CENTER, LLC,

VS. **BTA DOCKET NO. L01161**

RANDY SMITH, ST. TAMMANY PARISH SHERIFF,
SALES AND USE TAX COLLECTOR,

* *

NON-FINAL JUDGMENT WITH REASONS
ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

* *

On November 2, 2023, this matter came before the Board for hearing on the *Motion for Summary Judgment* filed by Anderson Memory Care, LLC, ("Anderson") and Summerfield Retirement Center, LLC ("SRC")[1] (collectively, "Taxpayers"), and on the *Tax Collector's Motion for Summary Judgment* filed by Randy Smith, St. Tammany Parish Sheriff, Sales and Use Tax Collector (the "Collector"), with Local Tax Judge Cade R. Cole, presiding. Appearing before the Board were Nicole Frey, attorney for the Taxpayers, and Ryan Marcomb and Aaron Gilles non-attorney representatives of the Taxpayers, and Margaret Kern, attorney for the Collector. At the conclusion of the hearing, the Board took the matter under advisement. The Board now renders this Judgment in accordance with the attached Written Reasons.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Taxpayers' *Motion for Summary Judgment* be and is hereby GRANTED IN PART as modified to a *Motion for Partial Summary Judgment,* the Taxpayers' furnishing of meals and food to employees and residents were sales and thus the Taxpayers' purchases of items used to provide said meals were non-taxable sales for resale. IT

[1] The hearing on the cross-motions for summary judgment in this matter was immediately followed by a hearing on cross-motions for summary judgment in BTA Docket No. L01474, in which "Summerfield of Hammond, LLC" ("SH") is a party. SRC and SH are represented by the same counsel.

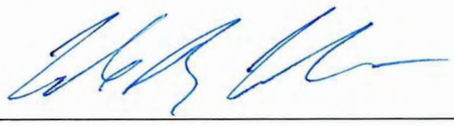
IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Taxpayers' *Motion for Summary Judgment* in all other respects is WITHDRAWN.

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

This is a non-final Order and does not constitute an appealable Judgment as contemplated by La. R.S. 47:1410 and La. R.S. 47:1434.

Judgment Rendered and Signed at Baton Rouge, Louisiana, on this 14th Day of March, 2024.

FOR THE BOARD:



LOCAL TAX JUDGE CADE R. COLE.

STATE OF LOUISIANA
BOARD OF TAX APPEALS
LOCAL TAX DIVISION

ANDERSON MEMORY CARE, LLC,
SUMMERFIELD RETIREMENT CENTER, LLC,

VS. **BTA DOCKET NO. L01161**

RANDY SMITH, ST. TAMMANY PARISH SHERIFF,
SALES AND USE TAX COLLECTOR,

****

REASONS FOR NON-FINAL JUDGMENT ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

****

On November 2, 2023, this matter came before the Board for hearing on the *Motion for Summary Judgment* filed by Anderson Memory Care, LLC, ("Anderson") and Summerfield Retirement Center, LLC ("SRC") (collectively, "Taxpayers"), and on the *Tax Collector's Motion for Summary Judgment* filed by Randy Smith, St. Tammany Parish Sheriff, Sales and Use Tax Collector (the "Collector"), with Local Tax Judge Cade R. Cole, presiding. Appearing before the Board were Nicole Frey, attorney for the Taxpayers, and Ryan Marcomb and Aaron Gilles non-attorney representatives of the Taxpayers, and Margaret Kern, attorney for the Collector. At the conclusion of the hearing, the Board took the matter under advisement. The Board now issues the foregoing Judgment for the following reasons:

Background

Taxpayers are Level 3 Adult Residential Care Providers ("ARCP's") certified by the Louisiana Department of Health and Hospitals ("DHH").[2] As Level 3 ARCP's, Taxpayers provide assisted living services to their residents subject to DHH regulations. DHH regulations require Taxpayers to provide their residents with three meals a day. LAC 48:I.6849. Taxpayers provide said meals to their residents in accordance with these regulations. In addition, Taxpayers sell some of the meals to their employees.

---

2 *See* La. R.S. 40:2166.3(2), 2166.5(B)(11)(c); LAC 48:I.6801(H)(1), 6803 (Adult Residential Care Provider).

Residents do not get choose meals from a menu. In fact, residents do not play any role in selecting what they will eat. The only exception is when the Taxpayers make accommodations for residents with dietary restrictions. Otherwise, Taxpayers' nutritionists and dieticians determine the type, contents, and scheduling of meals. Taxpayers' employees assemble meals in an on-site kitchen. The assembled meals are made available for residents in a cafeteria during breakfast, lunch, and dinner dining hours. All food is consumed on the premises However, residents do not have to eat in the cafeteria. Residents have the option to pick up their meal for "take-out" at the kitchen door, provided they make arrangements in advance. Alternatively, and for an additional fee, the Taxpayers' employees can bring the meals to the residents' rooms if requested. Outside of dining hours, snacks, fruits, and beverages are always available upon request.

Taxpayers provide ARCP services under the terms of their Resident Agreements and Resident Handbooks. The Resident Agreements provide for a monthly rental price that consists of: (1) the base rent for an apartment; (2) a variable fee based on the level of care provided; and (3) a fee based on the number of residents living in the apartment. The variable level of care is scored based on the particular special needs of the resident. Dietary restrictions can be a factor that increases a residents' score, but meals are not a factor.

Except for meals sold to guests, Taxpayers do not itemize meals on monthly bills. Residents do not get a refund or discount if they do not consume a meal. The bills are generally lump sum. Residents do not get a refund or discount if they do not consume a meal.

Only specific a-la-carte services, like meal delivery, are itemized. Meals sold to guests are treated this way and itemized. Guest meals are covered in the Resident Agreements, which provide that non-resident guests can purchase meals for a price. The price for guest meals in SRH's Resident Agreement is $7.00. Anderson's Resident Agreement states that the guest meal price is "subject to change." The price is reduced for guest children.

During the sales tax periods from January 1, 2017, to December 31, 2020 (the "Tax Periods"), Taxpayers paid sales tax on purchases of pre-prepared food, condiments, cooking oils, butter, dressing, fruits, snacks, and drinks (collectively, the "Items"). On December 31, 2020, Taxpayers filed refund claims, asserting that their purchases were exempt under La. R.S. 47:305(D)(2)(a)(ii), and additionally or alternatively excluded from taxation as raw materials purchased for further processing under La. R.S. 47:301(10)(c)(i)(aa)(l)(aaa)-(ccc) and/or sales for resale under La. R.S. 47:301(10)(a)(ii). The Collector denied the refund claims on June 16, 2021. Taxpayers timely appealed to the Board.

The matter has been presented to the Board on Cross-Motions for Summary Judgment. At the hearing, Taxpayers modified their *Motion for Summary Judgment* to a *Motion for Partial Summary Judgment*. As modified, Taxpayers seek a ruling solely on the taxability of their purchases of the Items at issue. Taxpayers modified their Motion to allow for a later determination of the amount of their refund, should the Board rule in their favor.

Summary Judgment Standard

"The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of every action, except those disallowed by Article 969." La. C.C.P. 966(A)(2). "The procedure is favored and shall be construed to accomplish these ends." *Id.* "After an opportunity for adequate discovery, a motion for summary judgment shall be granted if the motion, memorandum, and supporting documents show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law." La. C.C.P. art. 966(A)(3). A party may move for summary judgment for all or part of the relief prayed for. La. C.C.P. art. 966(A)(1). Summary judgment is appropriate when the facts are undisputed and the matter presents a purely legal question. *Leisure Recreation & Entm't, Inc. v. First Guar. Bank*, 2021-00838, p. 12 (La. 3/25/22), 339 So.3d 508, 517, *reh'g denied*, 2021-00838 (La. 5/10/22), 347 So.3d 88.

Discussion

Taxpayers clarified in their *Memorandum in Opposition to the Collector's Cross Motion* that they are no longer claiming that the transactions at issue are exempt under La. R.S. 47:305(D)(2)(a)(ii) (the "305(D)(2) Exemption"). The 305(D)(2) Exemption applies to the sales of meals furnished "[t]o the staff and patients of hospitals and to the staff and residents of nursing homes, adult residential care providers, and continuing care retirement communities." The Exemption clearly applies to the sale of meals from an ARCP to a resident or employee. However, in this case, the Items at issue were sold by wholesalers to ARCP's.

Nevertheless, Taxpayers believe that for the 305(D)(2) Exemption to mean something, the transaction between Taxpayers and their residents must be treated as a sale. If the transaction is not a sale, then, according to the Taxpayers, there is nothing for 305(D)(2) to exempt. However, if the transaction is presumed to be a sale, then the Items were purchased either for resale or for further processing and resale. Sales for resale are not taxable "sales at retail" for purposes of local sales tax. La. R.S. 47:301(10)(a)(ii). Regardless of whether the Items were purchased for resale or further processing, the Taxpayers' argument depends on there being a sale between the ARCP and the resident or employee.

Since the Taxpayers furnish both services and property, the Board must decide whether to apply the holding in *S & R Hotels v. Fitch*, 634 So.2d 922, (La. Ct. App. 1994) to this case. *S & R Hotels* is controlling in the Second Circuit. However, an appeal from the Board's decision in this case would lie with the First Circuit. The Second Circuit's decision is not binding on the First Circuit. *See Derbonne v. State Police Comm'n*, 2019-1455, p. 14 (La. App. 1 Cir. 10/14/20), 314 So.3d 861, 871, *writ denied*, 2020-01323 (La. 2/17/21), 310 So.3d 1152.

In *S & R Hotels*, the Second Circuit articulated a rule for determining whether a service provider sells property to their customer when the property is furnished contemporaneously with a service. The facts of the case involved a hotel's purchases of food and drinks. The hotel advertised that the food and drinks were

"complimentary" amenities for patrons. This was part of a marketing strategy to appear more luxurious than a traditional hotel. However, the hotel produced evidence at trial showing that the food and drinks were not actually free. Their cost was actually included in the price charged to guests. Further, the hotel was also able to prove the specific, separate, price of the food and drink per customer.

The Court began its analysis with the principle that "retail" means selling commodities or goods in small quantities to the ultimate consumer and that a "retail sale" is any sale by one regularly engaged in the business of selling to customers who buy for their use or consumption and not for resale to others. *Id.* at 925 (citing *Codesco v. Collector of Revenue*, 365 So.2d 577 (La. App. 1st Cir. 1978). The Court then gleaned a rule from a review of decisions from Louisiana and other jurisdictions: "[W]hen there is a showing that the goods initially purchased by the business are not ordinarily furnished in the traditional course of providing a service and there is a showing that the goods are resold to the ultimate consumer, the business is not required to pay sales tax." *Id.*

The Court explained how it arrived at the rule by reviewing several decisions from Louisiana and other jurisdictions. The Court found that goods typically provided in connection with a particular service were not considered to be purchased for resale, such as: snacks furnished at a hotel bar and meals purchased by a catering and housekeeping company. The Court also noted that similar exclusions had been held applicable to in-flight meals when the price was separable from the price of the ticket and actually charged to the customer. However, airlines that always charged passengers for meals, even when no meals were actually served, were held not have purchased the meals for resale.

If *S & R Hotels* applies, then the Taxpayers lose. The problem is the part of the test that asks if the goods are ordinarily furnished in connection with providing a service. Pertinently, DHH regulations require ARCP's to provide meals to their residents. It follows that meals are a kind of good ordinarily furnished in connection with ARCP services.

Nevertheless, the Board finds that *S & R Hotels* should not be extended to the facts of this case. Instead, the answer to the question presented lies in the definition of "sale" in La. R.S. 47:301(12). The statute provides:

> "Sale" means any 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, and includes the fabrication of tangible personal property for consumers who furnish, either directly or indirectly, the materials used in fabrication work, **and the furnishing, preparing or serving, for a consideration, of any tangible personal property, consumed on the premises of the person furnishing, preparing or serving such tangible personal property**. A transaction whereby the possession of property is transferred but the seller retains title as security for the payment of the price shall be deemed a sale.[3]

The emphasized language tracks with the facts of this case. Taxpayers' employees either use the Items to prepare meals, or, in the case of bottled drinks and fruit, simply furnish the goods. All of the items are consumed on the premises. The language used in the definition contemplates transactions that resemble services. Moreover, any ambiguity in the breadth of the definition, or resulting from its overlapping with the definition of the sale of a service, must be construed in the Taxpayers' favor.

In *City of Baton Rouge v. Mississippi Valley Food Serv. Corp.*, 396 So.2d 353, 354 (La. Ct. App. 1981), the First Circuit held a food service contractor's furnishing of meals to a hospital staff and patients were exempt sales.[4] The taxpayer in that case was a contractor, but the Court noted that, in prior tax periods, when the hospital itself had furnished the meals, the same transactions were unquestionably exempt. When the contractor took over, it continued to operate out of the hospital's kitchen in the same way that the hospital had operated. Most patients did not even know that there had been a change. The First Circuit decided that the change in identity of the vendor should not change the application of the 305(d)(2) Exemption (as it applies to hospitals). The Court emphasized that 305(d)(2) does not require the hospital, specifically, to be a party to the exempt transaction.

---

[3] *Id.* [emphasis added].

[4] Other services provided by the taxpayer were not at issue on appeal, specifically: cafeteria sales, vending sales, and catering charges. *Id.* at 354.

More importantly, the Court rejected the collector's argument that the transactions were not sales of tangible personal property. The collector could make that argument in part because the taxpayer did not directly charge the patients and staff for the meals. Instead, the taxpayer charged the hospital based on a contractually established schedule of meal prices. The hospital passed the cost back to the patients through invoices, or to staff through paycheck deductions. Even though the patients and staff were not directly charged, the Court found them to be the ultimate consumers, literally, of the meals. The Court also considered the legislature's intent in enacting 305(d)(2) to keep hospitalization costs down.

In *R & B Falcon Drilling USA, Inc. v. Sec'y, Dep't of Revenue*, 2009-0256 (La. App. 1 Cir. 1/11/10), 31 So.3d 1083, the taxpayer provided drilling barges to customers in the oil and gas industry. The taxpayer's standard contract provided for two meals a day for the customer's personnel at no extra charge. However, if additional meals were provided there was an extra meal charge applied on a per-meal or per-day basis. The First Circuit held that the sales of extra meals were taxable retail sales, even while recognizing that providing those meals was an ordinary and integral part of R & B Falcon's service. Under *S & R Hotels*, however, property that is ordinary and integral to providing a service is treated as if it were consumed by the vendor, not sold to the customer.

The absence of separate itemization of the meals is not fatal to the Taxpayers' argument. The First Circuit has held that "a sale can occur without a set price so long as the transaction is supported by some type of consideration." *Columbia Gulf Transmission Co. v. Bridges*, 2008-1006, p. 15 (La. App. 1 Cir. 6/25/09), 28 So.3d 1032, 1043. The competent summary judgment evidence shows that the cost of the meals was included in room and board. The Collector questions how the Taxpayer would calculate the exact amount allocable to meals and food, but does not genuinely dispute that the cost of these items represents some portion of room and board. Further, the price charged to residents and staff has no bearing on the Taxpayers' refund calculation. The Collector has also not raised any issue as to whether the Items were used for any purpose other than to be furnished to staff, residents, or guests.

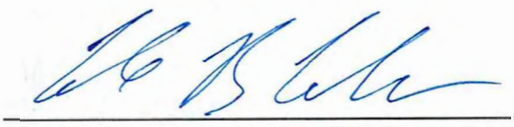
Consequently, there is no reason why the refund cannot be calculated based on the tax paid on the purchase of goods.

In reality, separately itemizing the meals would be pointless. Whether separately itemized or not, the meals are exempt under 305(d)(2). ARCP services are also not taxable. In fact, nothing on the residents' invoices is taxable. Thus, itemizing the meals would have no effect on the relationship between the Taxpayers and their residents.

Accordingly, the Board will rule in favor of the Taxpayers on the limited legal question presented. An ARCP's purchases of food and ingredients for use in providing meals, snacks, and drinks to its residents and staff are sales for resale that are not subject to sales tax. The only remaining issue in this case is determining the amount of the refund. Accordingly, the Board will grant the Taxpayers' *Motion for Partial Summary Judgment* as modified and deny the Collector's *Motion for Summary Judgment*.

Baton Rouge, Louisiana, on this 14th Day of March, 2024.

FOR THE BOARD:



LOCAL TAX JUDGE CADE R. COLE