STATE OF LOUISIANA
BOARD OF TAX APPEALS
LOCAL TAX DIVISION

CAMELOT OF NORTH OAKS, LLC,
KENTWOOD MANOR NURSING HOME, LLC,
AND SUMMERFIELD OF HAMMOND, LLC

VS. BTA DOCKET NO. L01474

TANGIPAHOA PARISH SCHOOL SYSTEM,
SALES AND USE TAX DIVISION

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JUDGMENT WITH REASONS
ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

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On November 2, 2023, this matter came before the Board for hearing on the *Motion for Partial Summary Judgment* filed by the Tangipahoa Parish School System, Sales & Use Tax Division (the "Collector"), and on the Taxpayers' *Cross Motion for Summary Judgment* filed by Camelot of North Oaks, LLC ("Camelot"), Kentwood Manor Nursing Home, LLC ("Kentwood"), and Summerfield of Hammond, LLC ("SH")[1] (collectively, "Taxpayers"), with Local Tax Judge Cade R. Cole, presiding. Appearing before the Board were Nicole Frey, attorney for the Taxpayers, and Drew Talbott, attorney for the Collector. Also appearing before the Board were Ryan Marcomb and Aaron Gilles, non-attorney representatives for the Taxpayers.[2] At the conclusion of the hearing, the Board took the matters under advisement. The Board now renders this Judgment in accordance with the attached Written Reasons.

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

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Taxpayers' *Cross Motion for Summary Judgment* be and is hereby GRANTED IN

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[1] The hearing on the cross-motions for summary judgment in this matter was immediately preceded by a hearing on cross-motions for summary judgment in BTA Docket No. L01161, in which "Summerfield Retirement Center, LLC" ("SRC") is a party. SRC and SH are represented by the same counsel. Further, counsel stipulated that the colloquy from Docket No. L01161 would be made a part of the record of the hearing in Docket No. L01474. The issues presented in these cases are essentially the same, with the major difference being that Camelot and Kentwood are Nursing Homes.

[2] The record reflects an appearance by Margaret Kern, attorney for the collector of St. Tammany Parish. St. Tammany is not a party to this case, but is a party to Docket No. L01161.

PART, 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 IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Collector shall issue a refund to Camelot in the amount of $27,918.57 with interest calculated in accordance with La. R.S. 47:337.80.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Collector shall issue a refund to Summerfield in the amount of $33,866.10 with interest calculated in accordance with La. R.S. 47:337.80.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Collector shall issue a refund to Kentwood in the amount of $19,570.49 along with interest calculated in accordance with La. R.S. 47:337.80.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Taxpayers' *Cross Motion for Summary Judgment* be and is hereby DENIED IN PART, the Taxpayers are not entitled to prevailing party fees under La. R.S. 47:337.13.1.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that there be Judgment in favor of the Taxpayers and against the Collector.

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
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REASONS FOR JUDGMENT

ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

* *

On November 2, 2023, this matter came before the Board for hearing on the *Motion for Partial Summary Judgment* filed by the Tangipahoa Parish School System, Sales & Use Tax Division (the "Collector"), and on the Taxpayers' *Cross Motion for Summary Judgment* filed by Camelot of North Oaks, LLC ("Camelot"), Kentwood Manor Nursing Home, LLC ("Kentwood"), and Summerfield of Hammond, LLC ("SH")[1] (collectively, "Taxpayers"), with Local Tax Judge Cade R. Cole, presiding. Appearing before the Board were Nicole Frey, attorney for the Taxpayers, and Drew Talbott, attorney for the Collector. Also appearing before the Board were Ryan Marcomb and Aaron Gilles, non-attorney representatives for the Taxpayers.[2] At the conclusion of the hearing, the Board took the matters under advisement. The Board now issues the foregoing Judgment for the following reasons:

Background

Camelot and Kentwood are Nursing Homes (collectively, the "Nursing Homes") licensed by the Louisiana Department of Health and Hospitals ("DHH") under La. R.S. 40:2009.22. SH is a Level 3 Adult Residential Care Provider ("ARCP's") certified

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[1] The hearing on the cross-motions for summary judgment in this matter was immediately preceded by a hearing on cross-motions for summary judgment in Docket No. L01161, in which "Summerfield Retirement Center, LLC" ("SRC") is a party. SRC and SH are represented by the same counsel. Further, counsel stipulated that the colloquy from Docket No. L01161 would be made a part of the record of the hearing in Docket No. L01474. The issues presented in these cases are essentially the same, with the major difference being that Camelot and Kentwood are Nursing Homes instead of Adult Residential Care Providers.

[2] The record reflects an appearance by Margaret Kern, attorney for the collector of St. Tammany Parish. St. Tammany is not a party to this case, but is a party to Docket No. L01161.

by the DHH pursuant to La. R.S. 40:2166.1 through 2166.8. ARCP's and the Nursing Homes must provide their residents with meals under DHH regulations. LAC 48:I.6849, 9831 – 41. The Nursing Homes are subject to additional regulations under Medicaid.

Taxpayers contract with their residents to provide three meals a day. With respect to residents of the Nursing Homes who are covered by Medicaid, the contract provides that dietary services are paid for as a component of Medicare's per diem payment. During the tax periods at issue[3], Taxpayers purchased ingredients that they used to prepare meals for residents. Occasionally, Taxpayers also sold meals to their employees and to the guests of residents. All of the meals were prepared by Taxpayers' employees and consumed on the premises.

Taxpayers claimed refunds on the sales taxes that they paid when they purchased the ingredients from wholesalers. Camelot filed a refund claim in the amount of $27,918.57. Kentwood filed a refund claim in the amount of $19,570.49. SH claimed a refund in the amount of $33,866.10. The Collector denied Camelot's refund claim. The Collector initially issued refunds to Kentwood and SH, but later sought to claw the refunds back through assessment.

The Taxpayers' residents are billed in advance on monthly invoices. The invoices provide a lump sum for all services provided. The cost of meals is not itemized on the invoices. The amount charged for the meals does not vary if the residents consume more or less than three meals per day. Residents do not get a refund if they do not eat a meal. Residents are not charged extra if they get seconds or thirds.

The price charged for a meal provided to a guest is set by contract. The contracts provided for a reduced price for child guests. In addition, some meals were provided to the Taxpayers' employees. The price charged to an employee is set by the Taxpayers. Employees are generally charged less than half of the adult guest meal price.

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[3] The tax periods at issue are different for each Taxpayer. The tax periods at issue for Camelot are October 1, 2018, through April 30, 2021. The tax periods at issue for Kentwood are January 1, 2017, through December 31, 2019. The tax periods at issue for SH are January 1, 2017, through December 31, 2020. Although the tax periods and amounts at issue vary, the salient facts and law are in other respects identical.

According to the deposition testimony of Ryan Marcomb, the designated officer[4] for SH, the primary distinction between Nursing Homes and ARCP's is that ARCP's do not accept Medicaid or Medicare. In addition, an ARCP only provides some healthcare assistance for residents with limited healthcare needs, whereas Nursing Homes are Skilled Nursing Facilities that provide robust healthcare services. The healthcare needs of Nursing Home residents exceed the capacity of what an ARCP can provide.

The matter has been presented to the Board on Cross-Motions for Summary Judgment. Taxpayers pray for final judgment in their favor and prevailing party fees under La. R.S. 47:337.13.1.[5] The Collector prays for partial summary judgment. The Collector's Motion is directed at the Nursing Homes only.[6] The question presented by both motions is whether the purchases of ingredients were taxable.

Summary Judgment

"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).

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[4] Mr. Marcomb is employed by Marquis Senior Management ("Marquis"). Marquis has a management agreement with SH to manage the day-to-day operations of the community.

[5] La. R.S. 47:337.13.1(B)(1) provides:

> Except as otherwise provided for in Paragraph (A)(3) of this Section, the prevailing party in a dispute, contest, or other controversy involving the determination of sales and use tax due shall be entitled to reimbursement of attorney fees and costs, not to exceed ten percent of the taxes, penalties, and interest at issue, unless the position of the non-prevailing party is substantially justified. The prevailing party is defined as the party which has substantially prevailed with respect to the amount in controversy or substantially prevailed with respect to the most significant issue or set of issues presented. A position is substantially justified if it has a reasonable basis in law and fact. The reimbursement amount for attorney fees and costs shall be subject to the discretion of the court or Board of Tax Appeals as to reasonableness.

[6] The Collector has reserved filing summary judgment against SH (the ARCP) and opposes granting Taxpayers' motion as to SH.

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 at the hearing 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 or Nursing Home to a resident or employee. However, in this case, the Items at issue were sold by wholesalers to an ARCP or Nursing Home.

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 or Nursing Home 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. In addition, DHH regulations and Medicare and Medicaid impose the same requirements on Nursing Homes. It follows that meals are a kind of good ordinarily furnished in connection with ARCP and Nursing Home 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.[1]

The emphasized language tracks with the facts of this case. Taxpayers' employees use the ingredients to prepare meals for residents. All of the meals 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.[7] 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

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

hospitals). The Court emphasized that 305(d)(2) does not require the hospital, specifically, to be a party to the exempt transaction.

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. It is indisputable that the cost of meals is factored into the price charged to the residents.

It is undisputed that Medicare and Medicaid actually prohibit the Nursing Homes from itemizing food on their invoices. Furthermore, separately itemizing the

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

Accordingly, the Board will grant the Taxpayers Motion for Summary Judgment in part and deny the Collector's Cross Motion for Partial Summary Judgment. An ARCP or Nursing Home's purchases ingredients for use in providing meals its residents and staff are sales for resale that are not subject to sales tax. The parties are further in agreement as to the amount of the refunds.

However, the Board will deny the Taxpayers' Motion for Summary Judgment with respect to prevailing party fees. La. R.S. 47:337.13.1(B)(1) allows for prevailing party fees if the non-prevailing party's position is not substantially justified. The Collector argued that the holding of *S & R Hotels* should be extended to the First Circuit. This argument had a reasonable basis in law. Accordingly, an award of prevailing party fees is not appropriate in this case.

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

FOR THE BOARD:

LOCAL TAX JUDGE CADE R. COLE