

BOARD OF TAX APPEALS
STATE OF LOUISIANA
LOCAL TAX DIVISION

NATIONAL OILWELL VARCO, L.P.,
Petitioner,

vs.

BTA DOCKET NO. L00283

AMANDA H. GRANIER, COLLECTOR
LAFOURCHE PARISH SCHOOL BOARD,
SALES AND USE TAX DEPARTMENT,
AND LAFOURCHE PARISH SCHOOL
BOARD, SALES AND USE TAX
DEPARTMENT,

Respondents.

JUDGMENT ON MOTION FOR PARTIAL SUMMARY JUDGMENT AND
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT WITH REASONS

On March 10, 2022, this matter came before the Board for hearing on the *Motion for Partial Summary Judgment* filed by National Oilwell Varco, L.P. ("Taxpayer"), and the *Defendant's Motion for Summary Judgment* filed by Amanda H. Granier in her capacity as Sales Tax Collector for the Lafourche Parish School Board, Sales and Use Tax Department, and the Lafourche Parish School Board, Sales and Use Tax Department (collectively the "Collector") with Local Tax Judge Cade R. Cole presiding. Present at the hearing were Jesse "Jay" R. Adams, III, attorney for the Taxpayer, and Patrick M. Amedee, attorney for the Collector. At the conclusion of the hearing, the Board took the matter under advisement. The Board now renders Judgment in accordance with the attached written reasons.

IT IS ORDERED, ADJUDGED AND DECREED that the *Motion for Partial Summary Judgment* filed by the Taxpayer IS HEREBY DENIED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the *Defendant's Motion for Summary Judgment* filed by the Collector IS HEREBY DENIED.

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

FOR THE BOARD:

A handwritten signature in green ink, appearing to be 'C. R. Cole', written in a cursive style.

LOCAL TAX JUDGE CADE R. COLE

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REASONS FOR JUDGMENT ON MOTION FOR PARTIAL SUMMARY
JUDGMENT AND DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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Background:

This matter is an appeal for redetermination of a Notice of Assessment dated June 30, 2016 (the "Assessment") issued by the Collector to Taxpayer for Lafourche Parish Sales Tax, interest, and penalties in the aggregate amount of \$450,840.76 for the tax periods beginning on December 1, 2009, up to and including the tax period ending December 31, 2011 (the "Tax Periods"). The Assessment followed an audit of

Taxpayer by over a dozen parishes (the “Audit”). The audit was conducted by Broussard Partners & Associates (the “Auditor”).

Taxpayer filed the instant *Petition for Redetermination of Assessment* on July 18, 2016.¹ On September 5, 2016, the Collector filed its *Answer to Petition for Redetermination of Assessment and Reconventional Demand*.² After an opportunity for discovery, on August 26, 2021, Taxpayer filed its *Motion for Partial Summary Judgment*. Thereafter, on September 8, 2021, the Collector filed its *Defendant’s Motion for Summary Judgment*.

During the Tax Periods, the Taxpayer was engaged in the manufacture, sale, rental and service of equipment and components used in oil and gas drilling and oilfield services at facilities in Louisiana. Taxpayer’s operations were mainly conducted by distinctive divisions, which the Taxpayer calls “Ledgers.” Two Ledgers are at presently at issue. First, there is Ledger 565, which was Taxpayer’s distribution division. Second, there is Ledger 633, a division that rented and sold large generators. Taxpayer and Collector entered into Sampling Agreements for both Ledger 565 and Ledger 633.

According to the Affidavit of Taxpayer’s Senior Tax Audit Manager, Mr. Emile McDaniel, the Auditor provided a copy of the Sampling Agreement for Ledger 565 on January 22, 2014. The Auditor provided a copy of the Sampling Agreement for Ledger 633 on January 29, 2014. On March 14, 2014, the following email exchange occurred between Mr. McDaniel and the Auditor’s representative, Ms. Olivia Solimon:

[Mr. McDaniel]: What is the total population amount for Ledger 633?

* * *

[Ms. Solimon]: The total sample population is \$1,439,592.10. The total population before exclusions was \$42,593,844.70, the exclusions totaled \$41,154,252.60. This is for all three parishes combined. Let me know if you have any other questions!

¹ Taxpayer filed an *Amended and Supplemental Petition for Redetermination of Assessment and for Refund or Credit of Tax Overpayments* on October 7, 2019.

² The Collector’s reconventional demand seeks to recover attorney’s fees. Taxpayer answered the reconventional demand on Jan 19, 2018.

Both Sampling Agreements were executed by authorized representatives of the Auditor and the Taxpayer.

In memoranda and Affidavits, Taxpayer appeared to allege that Ms. Soliman either misrepresented the population actually sampled, or that other employees of the Auditor changed the population after she ceased involvement in the Audit. However, the Collector also introduced testimony explaining how it calculated the amount of the Ledger 633 population. Moreover, at the hearing, counsel for Taxpayer acknowledged that the Auditor did what it said it would do in the letters detailing the Sampling Agreements. Thus, the Board finds it undisputed that the Collector did not mislead Taxpayer's representatives. The Board will accordingly apply the Sampling Agreements, provided that those agreements are otherwise found to be in compliance with the law.

Discussion – Summary Judgment Standard

A motion for summary judgment must 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); *Porto v. TBC Grand Bayou, LLC*, 2019-1376, p. 3 (La. App. 1 Cir. 5/11/20); 303 So.3d 1060, 1062. The Board may consider “only those documents filed in support of or in opposition to the motion for summary judgment and shall consider any documents to which no objection is made.” La. C.C.P. art. 966(D)(2). The Board may grant partial summary judgment as to a particular legal issue. La. C.C.P. art. 966(E). *Quality Env'tl. Processes, Inc. v. Energy Dev. Corp.*, 2016-0171, p. 14 (La. App. 1 Cir. 4/12/17); 218 So.3d 1045, 1060. However, Partial summary judgment is not permitted for purposes of simply deciding a pivotal legal issue without granting some form of relief.

Taxpayer's Motion to Strike

In its opposition, Taxpayer moves to strike portions of the Affidavits of the Collector and Travis Fletcher as hearsay not based on personal knowledge, and as irrelevant legal conclusions. Both Affidavits, generally, are properly based on the

personal experience and familiarity of the affiants with the audit and the background facts of this case. However, the specific portions of the affidavits alleged to be hearsay, Paragraph K of the Collector's Affidavit and Paragraph I of the Fletcher Affidavit, are based on "information and belief." Both statements describe exchanges between the Auditor and the Taxpayer prior to requesting that Taxpayer pull invoices. The Board will grant the motion to strike, and does not consider those allegations that are based on information and belief. The Board will also not consider the conclusory statement in Paragraph M of the Collector's Affidavit and Paragraph K of the Fletcher Affidavit describing the Sampling Agreement was an arms-length transaction. With respect to statements by Mr. Fletcher in Paragraphs M, N, and O concerning practices in audits by other clients and the AICPA guidelines, the Board will grant the motion to the extent that Mr. Fletcher has not yet been qualified to give an expert opinion and the Board gives no consideration to his conclusions. However, generally accepted auditing practices are at issue in this case, and the objections raised by the Taxpayer concern the evidentiary weight of his testimony. Thus, the Board does consider the statements to the extent they reflect Mr. Fletcher's personal experience with auditing practices.

The question presented by the cross motions for summary judgment is whether the Sampling Agreements violate AICPA principles as required by La. R.S. 47:337.35(C)(4). The Taxpayer asks the Board to vacate the Sampling Agreements and to order the implementation of new sampling procedures in conformity with those principles. The Collector asks the Board to uphold the Sampling Agreements and find them to be binding on the Taxpayer. The Collector further seeks judgment in its favor.

Both motions turn on the application of La. R.S. 47:337.35(C)(4), which provides:

Generally recognized sampling techniques and standards set forth by the American Institute of Certified Public Accountants shall be used as guidance in developing audit sampling techniques for purposes of this Section.

The statute further establishes that if a taxpayer proves that the Collector's sampling procedure failed to meet this requirement, then La. R.S. 47:337.35(C)(3) requires that the "disputed sampling procedure" be replaced by a projection "based upon a new sample that conforms to generally recognized sampling techniques."

La. R.S. 47:337.35(C)(3) and (4) were discussed by the Louisiana Supreme Court in *Yesterdays of Lake Charles, Inc. v. Calcasieu Parish Sales & Use Tax Dep't*, 2015-1676 (La. 5/13/16); 190 So.3d 710. In *Yesterdays*, the Court held the taxpayer had the evidentiary burden of proving the Collector's non-compliance with AICPA principles. In that case, the taxpayers proposed an alternative method based on guidance from the Louisiana Association of Tax Administrators, but that was not enough.³ The Court held that the Taxpayers had failed to put forth any "testimony, expert or otherwise," showing that the Collector failed to follow generally recognized sampling techniques or AICPA standards. In addition, Taxpayers could not show that their alternative was "more in line with generally recognized sampling techniques or that it complied with AICPA guidelines, while the Collector's method did not." *Id.* at p.26-27; 727.

The Taxpayer's approach in this case is different, since it has not offered an alternative methodology. Still, at this stage the Taxpayer has not provided the kind of evidence on which the Court put a premium: expert testimony, specifically on compliance with AICPA standards and generally accepted auditing principles. Although both parties have provided expert testimony, neither confronted this critical issue. Taxpayer's expert witness Dr. Paul Li testified in his deposition that he was not giving an opinion as to "whether or not a sampling model might comply with AICPA requirements." Likewise, the Collector's expert witness Dr. Alan Kvanli conceded that he is not an accountant and expressly stated that he was not offering any opinion about "accounting principles."

³ The taxpayers in *Yesterdays* also generally protested the amount of the assessment and the collector's failure to take into account factors such as spillage.

The evidence concerning AICPA principles is presented through excerpts of AICPA publications. The excerpted materials are: the Statement on Auditing Standards No. 39 (June 1981); AU-C Section 530, Audit Sampling (2020); and the AICPA's Audit Guide (2019).⁴

After reviewing the evidence, the Board finds that the present dispute touches upon several key concepts in the AICPA principles. First, there is the concept of Sampling Risk. Sampling Risk arises from the possibility that tests restricted to a sample may lead the auditor to conclusions that are different from the conclusions the auditor would reach if the test were applied in the same way to all items in the account balance or the class of transactions. This is because a particular sample may contain proportionately more or less errors than the whole. The AICPA principles instruct auditors to use their judgment in selecting sample populations, and to evaluate sampling results in order to reduce Sampling Risk to a tolerable level. What constitutes acceptable Sampling Risk is left to the auditor's judgment and can depend on a variety of factors. Such factors include the completeness of available records and the comparative cost of conducting a fully detailed audit.

The second principle implicated here is need to select a "representative" sample. This principle is related to the first in that the creation of a representative sample is necessary to reduce Sampling Risk. The term "representative" in this sense does not mean that the sample must contain transactions of every category. The Statement on Auditing Standards explains:

24. Sample items should be selected in such a way that the sample can be expected to be representative of the population. Therefore, all items in the population should have an opportunity to be selected. For example, random-based selection of items represents one means of obtaining such samples.

The Audit Guide describes "representative" in the context of sampling as conveying the "sense that the sample results are believed to correspond, at the stated risk level, to what would have been obtained had the auditor examined all items in the

⁴ This material is not included within La. C.C.P. art. 966(A)(4), but no party objected pursuant to La. C.C.P. art. 966(D)(2).

population in the same way as examined in the sample.” With emphasis, the Audit Guide cautions: “*Correspond* does not mean that the projected misstatement from the sample will exactly equal the misstatement in the population (which the auditor does not know). Rather a sample is expected to be representative if it is free from selection bias.” [emphasis in original]. The Audit Guide also explains the significance of the term “representative”:

Representative relates to the total sample, not to individual items in the sample. Also, representative does not relate to the sample size, but to how the sample was selected. The sample generally is expected to be representative only with respect to the occurrence rate or incidence of misstatements, not their specific nature. . . .

Therefore, a sample is sufficiently representative if it can reasonably be expected to reduce sampling risk to tolerable levels. To be representative, the sample need not be a perfectly proportionate reflection of the total population, but should be free from selection bias. All transactions in the sample should have an equal opportunity to be selected for detailing and projection.

Third, the AICPA instructs auditors to evaluate the results of their sampling procedures. AU-C Section 530.14, “Evaluating the Results of Audit Sampling” states:

The auditor should evaluate

- a. the results of the sample, including sampling risk, and . . .
- b. whether the use of audit sampling has provided a reasonable basis for conclusions about the population that has been tested. . . .

Likewise, the Statement on Auditing Standards, states:

There are two general approaches to audit sampling: nonstatistical and statistical. Both approaches require that the auditor use professional judgment in planning, performing, and evaluating a sample and in relating the evidential matter produced by the sample to other evidential matter when forming a conclusion about the related account balance or class of transactions. The guidance in this Statement applies equally to nonstatistical and statistical sampling.

The AICPA materials guide auditors to evaluate their sampling results regardless of whether the sampling methods are statistical or non-statistical in nature. Evaluation of sampling results is not intended to be a comparison with the results of a fully

detailed audit. The goal of evaluation is to test whether the sample provided a reasonable means of approximating of the results of a full audit, considering acceptable parameters of Sampling Risk, and practical concerns such as expense and incomplete data.

The Board has considered testimony from the Collector and the Auditor's employees and officers, provided via affidavits and depositions, in light the foregoing principles. Marcia Raskin, a supervisor employed by the Auditor, developed the audit sample and plan for the accounts at issue. In her deposition, Ms. Raskin testified that she did not calculate a percentage representation of confidence with the precision of the sampling results. Nevertheless, she testified that the Auditor's software and practices aimed for a threshold of 75% confidence. This benchmark was used by the Auditor in determining how many strata should be used and where the strata breaks should fall in the sample population. Ms. Raskin's work did not consist solely of plugging data into the Auditor's software. Although the software suggested where to strata could be divided, her testimony was that it was a "judgment call as to how many stratum we select." Ms. Raskin also testified that the Auditor, using its software, could adjust sample size to compensate for the number of transactions, the fact that multiple parishes were involved in the audit, and the adequacy of available customer data. At this stage, this testimony is sufficient to contradict the Taxpayer's assertion that the Auditor completely failed to establish acceptable parameters for Sampling Risk.

Taxpayer also alleges a violation of AICPA principles in the Auditor's failure to ensure a minimum level of representation of transactions from every Parish in the sample. However, the evidence also shows that the Auditor had a factual basis for not stratifying the sample by Parish. Ms. Raskin testified that the fact that three Parishes ultimately had no transactions pulled into the sample was not necessarily a problem since the transactions, regardless of what Parish they were associated with, were of a similar nature. Additionally, according to Ms. Raskin, if one of the Parishes had had very little activity, then the Auditor would have considered pulling that Parish out for detailed review. However, she stated that no such situation existed in

any of the Parishes involved. More importantly, Ms. Raskin was of the opinion that the amount owed by the Taxpayer to all Parishes in total would be the same regardless of whether the samples were stratified by Parish or not. In her judgment, the decision to not stratify the samples by Parish did not affect the reliability or accuracy of the multi-parish audit on the whole.

The Taxpayer additionally contends that the Auditor totally failed to evaluate its sampling results. The evidence concerning this contention is inconclusive. On the one hand, there is no documented evidence of the Auditor performing post-sampling evaluations. There were opportunities when such an evaluation could have occurred, like when Ms. Raskin's supervisors reviewed her work. There was also a protest hearing where the Taxpayer could have advanced its own evaluation of the procedures. Instead, the testimony of the Taxpayer's expert was that he did not conduct an evaluation, or that he could not have determined potential sampling error parameters ahead of time based on the information available.⁵

This is not sufficient grounds for summary judgment. To prevail, the Taxpayer must be able to show how an evaluation of the sampling results would have called the reliability of the sample into question. This showing cannot be based solely on the fact that some Parishes were not selected for the sample, or that some were ultimately more or less fortunate than others when their respective share of tax was determined. Unequal outcomes vis-à-vis the Parishes does not affect the Taxpayer. There should be evidence that the calls the cumulative results for the entire multi-Parish audit into question. It would also be significant if the Taxpayer could show that the results of an evaluation should have put the Auditor on notice that it could not satisfy the 75% confidence benchmark mentioned by Ms. Raskin in her deposition.⁶

In accordance with the foregoing reasons, the Board will not grant summary judgment in favor of the Taxpayer or the Collector. A material factual question as to

⁵ The Taxpayer filed a *Motion to Substitute Exhibit* offering a substitute affidavit from its expert Dr. Li, in lieu of Li's affidavit originally attached to the Taxpayer's opposition memorandum. The Collector did not file an objection to the substitution.

⁶ In this respect, trial may be necessary to resolve the contradictory testimony of Dr. Li and Dr. Kvanli.

whether the sampling methodology employed was in compliance with AICPA standards has been raised. Both parties have produced conflicting evidence on this question. If either party were able to present undisputed expert testimony on whether the Sampling Agreements complied or did not comply with AICPA guidelines, then this case could be resolved on a renewed motion for summary judgment. Otherwise, a trial on the merits will be necessary to resolve questions of credibility and conflicting evidence.

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

FOR THE BOARD:



LOCAL TAX JUDGE CADE R. COLE