

BOARD OF TAX APPEALS
STATE OF LOUISIANA
LOCAL TAX DIVISION

ATCO STRUCTURES & LOGISTICS
(USA) INC.

Petitioner

versus

BTA DOCKET NO. L00931

KIMBERLY TYREE, IN HER
CAPACITY AS DIRECTOR FOR THE
CALCASIEU PARISH SCHOOL BOARD
SALES AND USE TAX DEPARTMENT;
AND THE CALCASIEU PARISH
SCHOOL BOARD AS THE SINGLE SALES
AND USE TAX COLLECTOR IN
CALCASIEU PARISH

Respondent

JUDGMENT ON EXCEPTION OF NO RIGHT OF ACTION, DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT, AND CROSS-MOTION FOR
SUMMARY JUDGMENT WITH REASONS

On December 9, 2021, this matter came before the Board for hearing on the *Exception of No Right of Action* and *Defendant's Motion for Summary Judgment* filed by Kimberly Tyree, in her Capacity as Director for the Calcasieu Parish School Board Sales and Use Tax Department; and the Calcasieu Parish School Board as the Single Sales and Use Tax Collector in Calcasieu Parish (collectively referred to as the "Collector"), and the *Cross Motion for Summary Judgment* filed by ATCO Structures & Logistics (USA) Inc. ("Taxpayer") with Local Tax Judge Cade R. Cole presiding. Present at the hearing were Robert S. Angelico and Cheryl M. Kornick, attorneys for the Taxpayer, and Russell "Rusty" J. Stutes, Jr. and Russell J. Stutes, III, attorneys for the Collector. At the conclusion of the hearing, the Board took the matter under advisement. The Board now renders Judgment as follows.

IT IS ORDERED, ADJUDGED AND DECREED that the Collector's *Exception of No Right of Action* IS HEREBY OVERRULED.

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

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Taxpayer's *Cross Motion for Summary Judgment* IS HEREBY DENIED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be Judgment in favor of the Collector and against the Taxpayer, and the Taxpayer's claims are HEREBY DISMISSED.

Judgment Rendered and Signed at Baton Rouge, Louisiana on this 1 day of June, 2022.

FOR THE BOARD:



LOCAL TAX JUDGE CADE R. COLE

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Background:

Taxpayer filed a refund claim with the Collector on December 27, 2019, alleging an overpayment of \$2,364,886.75 of Calcasieu Parish sales and/or lease tax

(the “Refund Claim”), and related interest and penalties, for the tax periods of January 2016 through June 2019 (the “Tax Periods”). By notice dated January 15, 2020, the Collector denied the Refund Claim in its entirety. Taxpayer filed the instant *Petition to Review Denial of Refund* on April 14, 2020.

The underlying dispute in this case concerns the applicability of local sales or lease tax on certain property (the “Property”) that Taxpayer leased to First Flight Holdings, LLC (“First Flight”). Taxpayer claims that the Property were immovables. The Collector disagrees.

For purposes of Calcasieu Parish Lease Tax, a lease or rental as the “leasing or renting of tangible personal property” La. R.S. 47:301(7)(a). The Collector describes the Property as “pods,” and maintains that their construction was of a temporary nature, intended to be removed once they fulfilled their purpose. Further, the Collector asserts, and the Taxpayer does not dispute, that the Property has, in fact, been removed.

Taxpayer contends that the Property satisfies the test for classifying a structure as an immovable “building,” or as a component part of a building, because the property would be considered a building according to “the prevailing notions of society,” citing *P.H.A.C. Services v. Seaways International, Inc.*, 403 So.2d 1199 (La. 1981). Alternatively, the Taxpayer asserts that the structures are immovable “other constructions” under La. Civ. Code Article 464 and related jurisprudence.

The Property in this matter was used in a workforce housing complex known as Moss Lake Village. Moss Lake Village was operated by First Flight, and was located on approximately 100 acres of property at the West Calcasieu Airport in Carlyss. Moss Lake Village consisted of 1500 five-person sleeper rooms; about 400 duplex apartments with four different rooms in each; two kitchen/dining facilities, each comprised of 17 units; two 7-unit recreational facilities; and four laundries, each consisting of two units. Moss Lake Village existed to house workers during construction of a liquefied natural gas facility nearby.

From January 1, 2016, through May 31, 2016, neither Taxpayer nor First Flight collected Calcasieu Parish Lease Tax on the rental payments for the Property. On August 4, 2016, the Collector issued a Notice of Tax Due to Taxpayer for a total amount of \$165,242.98. Taxpayer paid the amount specified and began remitting payments of sales/lease taxes to the Collector for the remainder of the Tax Periods. None of the payments were made under protest.

First Flight apparently refused to pay sales/lease tax on the Property. This led to a dispute between Taxpayer and First Flight. That dispute resulted in arbitration. As a result of the arbitration, Taxpayer obtained the right to pursue the instant Refund Claim.

The Property is no longer at Moss Lake Village. It was disassembled and removed after the LNG plant was finished. Some portions of the Property were subsequently leased again elsewhere. Other portions of the Property now sit idle on storage yards outside Louisiana.

According to the Collector, every agreement, authority, and approval associated with the housing units required their removal once they were no longer needed. Taxpayer nevertheless argues that the Property possessed a degree of permanence in that it was “designed to remain in place, securely attached to the ground as long as workforce housing was needed in the area.” Taxpayer also emphasizes that the Property was designed to withstand category four hurricane-force winds.

Taxpayer attached the affidavit of its designated corporate official Chris Myers to its motion. Attached to Myers’ Affidavit are ATCO marketing materials with photographs depicting the Property. The photographs show the interior and exterior views of the Property. An aerial photograph shows the Property arranged to form Moss Lake Village. The materials also feature floor plans and descriptive text for different units in the Property.

An exterior photograph depicts a covered wooden walkway provides access to several modular, rectangular structures, undoubtedly the housing units of the

Property. A similar exterior photograph shows the same kind of walkway, at nighttime, with visible identification placards on the units. In yet another photograph, a gravel patio area is visible. The patio area is covered by a corrugated metal awning, and features a hexagonal wooden picnic table with angular wooden benches near what appears to be a barbecue pit. A basketball court, presumably cement, can be seen in the background.

The materials provide photographs of a recreation room with game tables for ping-pong, foosball, and pool, as well as two or three rows of leather chairs or couches facing the same direction. A similar arrangement of rows of cushioned black chairs facing a large screen in another photo suggests that this a “TV lounge” or “TV/movie viewing area.” A photograph on a page titled “Recreation Centers” depicts rows of exercise equipment. Another common area, seemingly a mess hall, presents the interior of a large room lined with rows of white plastic tables with black chairs. Each tables offers napkin dispensers and condiments. There is a comparable photo on a page titled “Kitchen/Diner (Serves 1500)” with a wider view. On that page, there is another photo of a large kitchen area with metal stoves and appliances. A page titled “Guest Laundry” depicts a room with washing and/or drying machines.

There are four distinct interior photos of living quarters. One photograph shows a window, work table and chair, a brown door, and a sink with a mirror. Another photo, likely of the same room but from the angle of the window, shows a bed with drawers underneath, a wall-mounted light fixture, a wall-mounted television, a narrow rectangular upright dresser or locker, a gray door, a brown door opening to an adjacent bathroom, and a table and chair. From the title of the page where they appear, these photos depict a “5-Room Sleeper.” A floor plan on the same page shows that each room is part of a larger linear structure containing five living quarters, each consisting of a bedroom and a bathroom. The overall shape of the structure is 1 room wide and 5 rooms long, and looks like the bed of a truck trailer.

A page titled “Apartment Sleepers” displays a kitchen area with a sink, cabinets, a refrigerator, a microwave, a stove, and a dining table with a single chair.

The other photo shows a bed, dresser or locker (which may be what the materials call an “armoire”), and wall-mounted air conditioning unit and television. The accompanying floor plan depicts another trailer-shaped structure, bisected into two, two-person “apartments.” Each “apartment” has a common kitchen area, but also two private bedroom areas, each with access to its own bathroom.

In addition to the above, there is another set of photos from Exhibit number 8 to the Myers deposition introduced only in black and white. This set of photos is expressly entitled “Moss Lake Village Workforce Housing Village, Sulphur LA.” Many of the photos previously described are included in this set. In addition, there is a photo of a room with metal wire shelves and a drink cooler. This would presumably be the Commissary.

All of the diagrams shown in connection with the common areas display dashed lines which break the room into trailer-sized segments. According to the Taxpayer, these are “modules used in the construction of a larger, immovable property facility.” So divided, the diagram of the kitchen or mess hall shows how the room is assembled by adjoining 17 individual trailer-shaped structures. Likewise, the other common areas are assembled by joining similar trailer-shaped structures as follows: seven for the Recreation Center, two for the Guest Laundry, and two for the Commercial Laundry.

The Collector’s exhibits contain photographs of the Property as well. The photographs offered by the Collector show some of the Property harnessed to the trailer beds of eighteen-wheelers. Another photograph of the side of a unit at ground level, supported by what appears to be cinderblock pylons. The pylons are themselves situated on top of a sheet-like platform. In addition, wheels or tires are visible between some of the cinderblock pylons.

Exception of No Right of Action

The Collector raises the exception of no right of action under La. R.S. 47:337.77(F). That provision states:

This Section shall not be construed to authorize any refund of tax overpaid through a mistake of law arising from the misinterpretation by the collector of the provisions of any law or of any rules and regulations. In the event a taxpayer believes that the collector has misinterpreted the law or rules and regulations contrary therewith, his remedy is by payment under protest and suit to recover or petition to the Board of Tax Appeals, as provided by law.

The party raising a peremptory exception bears the burden of proof. *Shorter v. Akins*, 2011-1553, p. 2 (La. App. 3 Cir. 4/4/12); 86 So.3d 883, 885, *writ denied*, 2012-1363 (La. 10/8/12); 98 So.3d 853 (quoting *Falcon v. Town of Berwick*, 03-1861, p. 3 (La. App. 1 Cir. 6/25/04), 885 So.2d 1222, 1224).

This provision was examined, in *Tin, Inc. v. Washington Parish Sheriff's Office*, 2012-2056 (La. 3/19/13), 112 So.3d 197. In *Tin*, a Taxpayer made four consecutive refund requests all relating wholly or partially to caustic soda. The Washington Parish collector denied the first request, stating: “[a]t this time, we must respectfully decline your request for the refund of sales taxes outlined in your correspondence.” *Id.*, at p. 2, 112 So.3d at 199. The Taxpayer’s second refund request raised additional claims for sodium hydrosulfide. The collector did not respond to this request. Absent any other indication of the Collector’s position in the record, the Court held: “there was no reason for TIN to believe the Collector had made a ‘mistake of law arising from the misinterpretation ... of the provisions of any law or of the rules and regulations promulgated thereunder’” with regard to the second refund request. *Id.*, at p. 12, 112 So.3d at 205.

The absence of explanation or response from the collector in *Tin* contrasts with the affirmative, published interpretation of law in *Bannister Properties, Inc. v. State*, 2018-0030 (La. App. 1 Cir. 11/2/18); 265 So.3d 778, *writ denied*, 2019-0025 (La. 3/6/19); 266 So.3d 902. The Court in *Bannister* examined a similar prohibition against refunds from the Louisiana Department of Revenue that formerly existed in La. R.S. 47:1621(F).¹ The refund claim in *Bannister* was entirely based on the decision in *UTELCOM, Inc. v. Bridges*, 2010-0654 (La. App. 1st Cir. 9/12/11), 77 So.3d 39, 48-50,

¹ This provision was repealed by 2019 Act 367.

writ denied, 2011-2632 (La. 3/2/12), 83 So.3d 1046 that overturned franchise tax regulation LAC 61:I.301(D). The mistake of law that triggered the prohibition against the refund claim was a promulgated regulation.

The provision at issue was examined by the Board in *Noranda Intermediate Holding Corp. v. St. James Parish Sch. Bd.*, Docket No.L00328 (La. Bd. Tax App. 03/03/21); 2021 WL 2961383. In *Noranda*, the taxpayer claimed a refund for purchases of lime used in manufacturing smelter grade alumina. The St. James Parish Collector claimed to have previously audited the taxpayer and thereby taken a legal position that precluded future refund claims. However, the actual communication in evidence from the audit, and the testimony of the collector, established that the collector never communicated a position on the taxability of the chemical purportedly purchased for further processing. In fact, the collector in *Noranda* expressly testified that she had never issued any notice to the taxpayer regarding the further processing exclusion. Absent any discernible position on the further processing exclusion, or whether said exclusion was applicable to lime, the Board overruled the exception.

In this case, there is no pre-existing refund denial, nor was there a promulgated regulation on which the Taxpayer relied. What is in the record is the Notice of Tax Due dated August 4, 2016. That notice says:

Our records indicate we have received a sales/use tax return and or hotel/motel tax return with an insufficient remittance or without a remittance for the period(s) below. Pursuant to the Uniform Local Sales Tax Code (R.S. 47:337.55) I am required to notify you that these taxes assessed on the return together with penalties and interest as computed below are now due.

The schedule that follows lists the type of tax as 10DA Sales/Use. There is no mention of the property at issue in this case on the notice. Nor is there any instructions for remitting tax on future returns. In sum, the position taken by the Collector, according to the Notice of Tax Due, was simply that Taxpayer's remittance was deficient, and that interest and penalties were due upon and in addition to the deficiency.

To successfully raise the exception of no right of action under La. R.S. 47:337.77(F), the Collector should be able to point to a clear instance where it disclosed its legal position. “Where doubt exists regarding the appropriateness of an objection of no right of action, it is to be resolved in favor of the plaintiff.” *Pearce v. Lagarde*, 2020-1224, p. 11 (La. App. 1 Cir. 10/7/21); 330 So.3d 1160, 1167, *reh’g denied* (Nov. 4, 2021), *writ denied*, 2022-00010 (La. 2/22/22); 333 So.3d 446. The exception should be overruled when the pleadings can be reasonably construed in a way that permits litigants their day in court. *Gahagan v. Thornton*, 2003-851, p. 3 (La. App. 3 Cir. 12/10/03); 861 So.2d 813, 815. The Collector had the opportunity to enunciate its legal position in the Notice of Tax Due. The Collector chose only to specify that a deficiency existed. The Collector’s decision not to explain why it found a deficiency should have some consequence. Any doubt as to the Collector’s position should be construed against the granting of the exception. Accordingly, the exception will be overruled.

Cross Motions for Summary Judgment

The Civil Code defines tracts of land and their component parts as immovables. La. Civ. Code art. 462. Buildings, other constructions permanently attached to the ground are component parts of a tract of land when they belong to the owner of the ground. La. Civ. Code art. 463. The term “building” is not defined in the Civil Code, but has been analyzed in the jurisprudence. The Louisiana Supreme Court has held that a building must be a structure of some permanence, but not necessarily a structure intended for habitation. *Olsen v. Shell Oil Co.*, 365 So.2d 1285, 1289 (La. 1978). Whether a structure is a building is determined by the courts according to prevailing notions in society. *Benoit v. Acadia Fuel & Oil Distributors, Inc.*, 315 So.2d 842, 846 (La. Ct. App. 1975), *writ refused*, 320 So.2d 550 (La. 1975); *P. H. A. C. Servs., Inc. v. Seaways Int’l, Inc.*, 403 So.2d 1199 (La. 1981).

The classification of modular units for purposes of Louisiana’s state lease tax was at issue in *Bridges v. Nat’l Fin. Sys., Inc.*, 2006-0957 (La. App. 1 Cir. 3/23/07); 960 So.2d 202, *writ denied*, 2007-1600 (La. 11/2/07); 966 So.2d 602. The taxpayer in

that case leased modular banking units to its customers that wanted to open branch locations in rural and urban areas of Louisiana. Like the Taxpayer in this case, the taxpayer in *National Financial Systems* argued that its modular structures were buildings within the meaning of Civil Code article 464. The modular units in that case were leased under contracts, typically for a term of one to two years. The lease contracts obligated the taxpayer to remove the modular banking units within thirty days of the termination of the lease. Removal of the units entailed jackhammering concrete to remove additions such as a vestibule, drive-up lanes, and a canopy. The structure itself could be removed with a hydraulic jack and a tractor. The Court also noted that the modular banking units were later removed and the taxpayer attempted to rent them out to other entities. *Id.*, 960 So.2d at 207-08; 2006-0957 at p. 9-10. These facts demonstrated to the Court that the modular units were designed and intended to be moved, like movables “that normally move or can be moved from one place to another.” *Id.* (citing La. Civ. Code art. 471).

The Taxpayer compares the facts of this case to *P. H. A. C. Servs., Inc. v. Seaways Int'l, Inc.*, 403 So.2d 1199 (La. 1981) (“*Seaways*”). *Seaways* concerned a three-story steel structure that was built on blocks at a construction site for later transport and attachment to an offshore drilling platform. The Louisiana Supreme Court held that the structure was a building. The Court reviewed photographs of the building and noted that it was “three story high permanent steel structure with a helicopter landing pad constructed above it, built at a cost of over \$400,000.” *Id.* at 1203-04. The fact that the structure could be moved did not sway the court, because “immovability is a legal concept and not an inherent quality of a thing.” *Id.* at 1204. The Court explained that immovability by nature did not hinge on an owner’s subjective intentions. *Id.*

The Property at issue here has more in common with the property in *National Financial Systems*. The Property is made up of modular units designed to be assembled, disassembled, moved, and re-used as many times as desired. The Property does not have the same degree of permanence possess by the “three story high **permanent** steel structure” in *Seaways*. *Id.* (emphasis added). The structure in

Seaways was to be moved once and then to remain at its final location on an oil platform. Its degree of permanence was inherent in both its construction and the fact that it was not meant to be disassembled moved repeatedly.

The Property here was designed to be moved and used in different locations multiple times, it was not designed to be constructed in one location and then moved once to its permanent destination. The Board's analysis does not turn on subjective intent. As detailed in the facts recited above, the Board has reviewed the photographs of the Property. These are not three story tall steel structures with helipads on their roofs. The Property is made up of trailer sized compartments. The interior photographs show that the facilities are supplied with plastic furniture and designed to maximize space efficiency. This shows that the Property fulfils its function admirably, but not permanently. The exterior photographs show structures that look like truck trailers. Another photograph shows that the tires were still attached to the Property when it was assembled. The floor plans show how the individual units can be pulled apart.² The objective facts show that the Property did not lose its mobile and transportable character while it was stationed in Moss Lake Village.

The Taxpayer's alternative argument that the Property was "other constructions permanently attached to the ground" is not persuasive. Whether an object is an "other construction" depends on: (1) the size of the structure, (2) the degree of its integration or attachment to the ground, and (3) its permanency. *Bayou Fleet P'ship v. Dravo Basic Materials Co., Inc.*, 106 F.3d 691, 694 (5th Cir. 1997). As explained above, the Board finds that the Property lacks the requisite degree of permanency to be considered an immovable. In addition, the Property lacks the necessary integration with the soil. Taxpayer compares the Property to the petroleum storage tanks in *Carter Servs., LLC v. Caddo-Shreveport Sales and Use Tax Comm'n*, Docket No. L00315 (La. Bd. Tax App. 1/9/19); 2019 WL 2487980. The integration of the petroleum storage tanks with the soil in that case was demonstrated by the

² Taxpayer offers a unique argument that the Property could be considered to have been incorporated into itself as an immovable, considering the number of units combined together as a whole village. The Board finds that this argument cannot prevail because of the ease with which the Property can be disassembled and reused.

photographs in the record, the pipe running from the tanks into the ground, and by their great size, weight, and difficulty in removal. *Id.* at *3. In this case, the photographs do not show such a degree of integration, they show that the trailers rested on cinderblocks and some even had wheels still attached. These characteristics are not outweighed by the fact that the Property was connected to utilities.

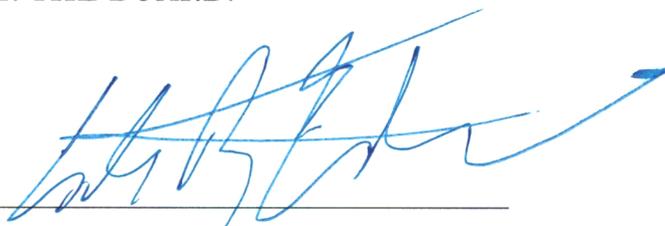
Finally, in both its primary and alternative arguments the Taxpayer asserts that the Property's immovable nature is shown by the fact that it was designed to withstand, and possibly did withstand, hurricane force winds. Taxpayer cites to *Graffagnino v. Lifestyles, Inc.*, 402 So.2d 742 (La. Ct. App. 1981) in support of this argument. *Graffagnino* dealt with an "O'Dome" structure, which was designed to be an easily portable dwelling. The trial Court found that the fact that the structure was designed to withstand storms and high winds weighed in favor of finding that it had a high degree of permanency. *Id.* at 744. The Court of Appeal affirmed that this conclusion as properly within the lower Court's discretion. Nevertheless, this was not the only fact relied upon by the trial Court in reaching its decision. Of equal or greater significance was the fact that the O'Dome would lose its identity if disassembled and transported. That observation should be considered in light of the Court's citation to *Bailey v. Kruithoff*, 280 So.2d 262 (2nd Cir. 1975). In *Bailey*, the Court held that a fence was immovable because it was embedded in the ground and because it had no identity when it was moved. *Id.* at 264. In this case, the Property is not like a fence, nor is it like the building materials of the O'Dome. The Property is modular units. Modular units, as their name implies, do not lose their identity when they are disassembled. Rather, the Taxpayer's actions show that the ability to be disassembled used for future projects is an essential reason to employ modular units.

In accordance with the foregoing reasons, the Taxpayer's *Cross Motion for Summary Judgment* will be denied, and the Collector's *Motion for Summary Judgment* will be granted. The Property here consists of modular units. The objective evidence of the Property's nature shows that they are detachable, temporary trailers that can be moved from one jobsite to another. In fact, the Property at issue was moved to other job sites after its purpose was fulfilled. The Property lacks the degree

that can be moved from one jobsite to another. In fact, the Property at issue was moved to other job sites after its purpose was fulfilled. The modular units at issue lack the degree of permanence required to be buildings or other constructions. Further, they lack the necessary integration with the soil to be other constructions. Judgment will be entered accordingly.

Baton Rouge, Louisiana, this 1 day of June, 2022.

FOR THE BOARD:

A handwritten signature in blue ink, appearing to be 'CADE R. COLE', written over a horizontal line.

LOCAL TAX JUDGE CADE R. COLE