

**BOARD OF TAX APPEALS
STATE OF LOUISIANA
LOCAL DIVISION**

**JAZZ CASINO COMPANY, LLC
PETITIONER**

VERSUS

DOCKET NO. L00007

**CITY OF NEW ORLEANS, NORMAN
FOSTER, DIRECTOR, DEPARTMENT
OF FINANCE, BUREAU OF REVENUE, and ANTHONY REILLY,
COLLECTOR
RESPONDENT**

**JUDGMENT
WITH ADDITIONAL WRITTEN REASONS**

A hearing on Jazz Casino Company, LLC's ("Taxpayer") Motion for Summary Judgment was held before Local Tax Judge Cade R. Cole, Board of Tax Appeals (the "Board"), in Baton Rouge, Louisiana on July 14, 2015. Present before the Board-Local Division were: Jesse R. Adams, III and Andre B. Burvant, attorneys for Taxpayer and Robert R. Rainer and Frederick Mulhearn, attorneys for the City of New Orleans ("Collector"). After the presentation of evidence and argument of counsel, the matter was taken under advisement, and the parties were directed to file post-hearing memoranda.

The issue before the Board is the validity of Waiver and Extension of Prescriptive Period dated December 21, 2012 (the "December 21, 2012 Waiver"), a copy of which is attached to Taxpayer's Motion for Summary Judgment under consideration here as Exhibit A.

The Taxpayer appealed the Collector's Notice of Assessment of sales and use taxes dated March 4, 2013 in the amount of \$885,662.63 plus interest, penalties and the cost of audit for the period 01/01/04 – 06/03/07.

The Collector has filed First, Second, Third and Fourth Supplemental and Amending Reconventional Demands, which together demanded additional sales and use taxes and related charges for the same period as the original assessment. If there is judgment in favor of Taxpayer on its Motion for Summary Judgment, it will be dispositive of all of the taxes that the Collector has assessed.

The December 21, 2012 Waiver recites that it extended the period within which the Collector could timely assess the taxes at issue for 60 days, or until March 1, 2013.

The December 21, 2012 Waiver, if valid, would mean that the Collector's assessment was untimely and the time to assess the taxes had lapsed.

It is the position of the Collector that prior to the execution of the December 21, 2012 Waiver, the Taxpayer and the Collector agreed to an extension of ninety days, not sixty days.

The Collector's position is based on several emails between Anthony C. Riley, Deputy for the Collector ("Riley"), and Kit Floyd, Director of sales and property tax for Harrah's Casino ("Floyd"). The emails in question took place on December 21, 2012. One email from Riley states that Floyd can "strike through" a provision in the waiver stating "one year" and reducing it to "ninety" days or that Riley could update the waiver. Floyd responded to Riley by email: "Please update the waivers, I will have to send to an officer of the company to sign."

It is the Collector's position that the conversations and emails between Riley and Floyd created a binding agreement to extend the prescriptive period for ninety days from December 31, 2012. Collector avers that the actions of the Taxpayer in changing the December 21, 2012 Waiver, to extend the prescriptive period for sixty days, failed to properly reflect what the Taxpayer had already agreed to, ie. a waiver of 90 days.

The undisputed facts reveal that Riley sent a waiver stating ninety days to Floyd who turned over the waiver to Nathaniel Tannehill, the Director of Finance for Taxpayer in New Orleans. Tannehill struck through the “ninety” days in the waiver and inserted with pen and ink “sixty” in its place. Tannehill also struck through “Las Vegas, NV” and inserted in its place “New Orleans, LA”. The altered waiver was presented to Dan Real, the then Chief Executive Officer of Jazz Casino Company who signed the waiver on December 21, 2012. On December 26, 2012, Floyd sent Riley an email along with a PDF copy of the signed December 21, 2012 Waiver, and the original was sent to Riley by Fedex which was to arrive by December 28, 2012.

Discussion of Relevant Law

Recognizing our citizenry’s need for certainty in its tax obligations and the need to concomitantly limit the tax refund exposure of its government, the people of Louisiana have enshrined in our Constitution the right of liberative prescription from tax liabilities. La. Const. Art. VII, Sect. 16. This prescription may be suspended or interrupted in accordance with law. *Id. See, e.g.* La. R.S. 47:337.67.

The suspension relevant in this case is referenced in §337.67(C)(1) which requires a written agreement between the Taxpayer and the Collector. The Collector in this instance has operated with a “waiver” form, which seeks to have the taxpayer unilaterally waive the right to plead prescription.

The Collector believes that Taxpayer committed a “bait and switch” by having its tax manager advise via email that the Taxpayer would agree to a ninety-day waiver, then submitting the form (after altering it) with only a sixty-day waiver. The Taxpayer’s conduct in this case raises some concern. It clearly would have been a more transparent business practice to take steps to point out to the Collector the change it had made in the Waiver form.

The Collector focuses on whether Floyd had the authority to execute a waiver. The Board agrees with the Collector's assertion that Floyd had the authority pursuant to R.S. 47:1671 (made applicable in this Local case via subsection (E)). However Floyd never signed any waiver. In her emails she always stated that the waiver had to be signed by an officer of the Taxpayer. *Exhibit 2 to Riley Deposition 2*.

The Collector argues that these emails between Floyd and Riley gave rise to a written agreement to waive prescription, i.e. that the email to execute the waiver was the agreement to do something, and the Waiver was merely a manifestation of that prior agreement.

Under normal circumstances, this position may prove sufficient to at least survive summary judgment, see *Elevating Boats, Inc. v. St. Bernard Parish*, 20000-3518 (La 9/5/01), 795 So.2d 1153, 1165. However, in the present case, the record makes clear that the parties clearly intended to use a particular form to effectuate their agreement.

The December 21, 2012 Waiver is an authentic act, and its terms are clear, explicit and do not lead to absurd consequences. There is no need to look through to parol evidence concerning the parties underlying intent.

La. C. C. Art. 1947 states that:

“When, in the absence of a legal requirement, the parties have contemplated a certain form, it is presumed that they do not intend to be bound until the contract is executed in that form.”

The evidence presented convinces the Board that both Collector and Taxpayer contemplated that the December 21, 2012 Waiver was the form intended to represent their agreement to waive Taxpayer's ability to plead prescription.

The communication from the Collector states that Taxpayer must return the waiver before the applicable deadline or the Collector may file suit against

Taxpayer. This warning would not have been necessary if the emails had already effectuated a valid agreement to suspend prescription.

The document was created by and was the standard form used by the Collector to waive prescription. It was the same form that had been used to waive prescription by the Taxpayer previously. In this case, the collector's form says, and the messages between the parties clearly reflect, that the waiver had to be signed by a responsible officer of the Taxpayer and had to be returned to the Collector to be effective.

The December 21, 2012 Waiver (with the 60 day change) was returned to the Collector and was in the Collector's possession for over two months prior to the running of prescription. This is not a case where a last-minute change prevented the other party from taking an action to protect its interest, the Collector was left with weeks to issue a formal assessment prior to the running of prescription.

The Taxpayer failed to highlight its change to the Collector when it delivered the December 21, 2012 Waiver, but the change of 90 days to 60 days is apparent from the face of the waiver. Unfortunately, no one representing the Collector examined the executed waiver upon its return to the Collector.

The December 21, 2012 Waiver gave the Collector until March 1, 2013 to timely assess the Taxpayer.

The Collector also avers that Taxpayer should lose its right to plead prescription due to its conduct in defending the assessment on other grounds and failing to raise prescription until very recently. A similar concept was recently dismissed by the Third Circuit in an arguably more egregious case. *Yesterdays of Lake Charles, Inc. v. Calcasieu Parish Sales and Use Tax Department*, 2015 WL

2224268 (La. App. 3 Cir. 5-13-15), *writ application pending* (the Collector apparently had a valid waiver but lost it before introducing it into evidence).

The Collector also asserts suspension via the false or fraudulent return provision. However, in *Poirier v. Collector of Revenue*, the Court observed that:

it is the taxpayer's responsibility to file a correct income tax return but the failure to file a correct return does not necessarily constitute fraud.....Fraud implies bad faith, intentional wrong doing and a sinister motive.

417 So.2d 410, 412-13 (La. App. 1 Cir. 1982)

It is the ruling of the Board that the December 21, 2012 Waiver waived prescription for only sixty days. Therefore, the assessment by the Collector on March 4, 2013 was untimely, and the right of the Collector to assess the taxes at issue was barred by prescription.

The Collector has shown no other valid basis for suspension, therefore the ability to collect the taxes in dispute is prescribed.

Considering the record and proceedings had in this matter, the law and evidence being in favor thereof, and for the foregoing Written Reasons:

IT IS ORDERED, ADJUDGED AND DECREED that Taxpayer's Motion for Partial Summary Judgment is HEREBY DISMISSED as moot.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Taxpayer's Supplemental Motion for Summary Judgment is HEREBY GRANTED, the Collector's assessment in this case is prescribed and that assessment is HEREBY VACATED.

Signed at Baton Rouge, Louisiana on this 7th day of August, 2015



LOCAL TAX JUDGE CADE R. COLE
LOUISIANA BOARD OF TAX APPEALS