

2019 WL 2487887 (La.Bd.Tax.App.)

Board of Tax Appeals

State of Louisiana

LERNER NEW YORK, INC., PETITIONER

v.

NEWELL D. NORMAND, SHERIFF, AND EX-OFFICIO TAX COLLECTOR FOR  
JEFFERSON PARISH; JEFFERSON PARISH SHERIFF'S OFFICE, BUREAU OF  
REVENUE AND TAXATION, SALES AND USE TAX DIVISION, RESPONDENTS

Docket No. L00393

April 16, 2019

**JUDGMENT**

\*1 This matter came before the Louisiana Board of Tax Appeals - Local Division (the "Board") for a hearing on the merits on August 16, 2018, with Local Tax Judge Cade R. Cole presiding. Participating in the hearing were Kenneth Fonte for Newell D. Normand (now Joseph Lopinto), Sheriff, and Ex-Officio Tax Collector for Jefferson Parish; Jefferson Parish Sheriffs Office, Bureau of Revenue and Taxation, Sales and Use Tax Division, (the "Collector") and Andre B. Burvant, Matthew A. Mantle and John F. Fletcher for Lerner New York, Inc. (the "Petitioner"). After the hearing, the matter was taken under advisement. The Board now issues Judgment in accordance with the written reasons attached herewith.

IT IS ORDERED, ADJUDGED AND DECREED that the Petitioner is not entitled to a credit under [La. R.S. 47:337.86\(A\)\(1\)](#).

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Petitioner is liable to the Collector for Jefferson Parish sales tax collected from Petitioner's online sales into Jefferson Parish and improperly remitted to the Louisiana Department of Revenue (the "Department") via Direct Marketer Returns ("DMR's") for the tax periods January 1, 2010 through April 30, 2017.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Petitioner is entitled to a credit under [La. R.S. 47:337.86\(E\)\(1\)](#) in the amount of \$45,223.69 for the tax periods July 1, 2010 through March 31, 2017.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Petitioner is liable for the resulting Jefferson Parish sales tax in the amount of \$84,611.29, interest in the amount of \$27,861.41 and penalties in the amount of \$21,152.82 for the tax periods in dispute.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Petitioner is liable for attorney's fees as provided by law in the amount \$13,362.55.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be Judgment in favor of Petitioner, Lerner Inc., and against the Collector, Jefferson Parish Sheriff, for refund of \$46,202.61 of the tax that Petitioner paid under protest, plus additional applicable interest in the amount of \$3,212.03 calculated through April 15, 2019, plus additional interest accruing thereon until date of payment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be Judgment in favor of the Collector and against the Petitioner for the remaining balance held by the Collector in escrow pursuant to Petitioner's payment under protest, and that that amount shall be retained by Collector.

Judgment rendered and signed in Baton Rouge, Louisiana this 16 day of April, 2019.

### WRITTEN REASONS FOR JUDGMENT

This matter came before the Louisiana Board of Tax Appeals - Local Division (the “Board”) for a hearing on the merits on August 16, 2018, with Local Tax Judge Cade R. Cole presiding. Participating in the hearing were Kenneth Fonte for Newell D. Normand, Sheriff, and Ex-Officio Tax Collector for Jefferson Parish; Jefferson Parish Sheriff s Office, Bureau of Revenue and Taxation, Sales and Use Tax Division, (the “Collector”) and Andre B. Burvant, Matthew A. Mantle and John F. Fletcher for Lerner New York, Inc. (the “Petitioner”). After the hearing, the matter was taken under advisement. The Board now issues the attached Judgment for the following written reasons.

\*2 On January 8,2019, the Board rendered an interlocutory Judgment and issued Written Reasons on the merits of this case. The Board hereby incorporates the factual findings and reasons stated therein by reference. In that Judgment, the Board concluded that the Petitioner was liable for Jefferson Parish sales tax collected from the Petitioner's online sales into Jefferson Parish and improperly remitted to the Louisiana Department of Revenue (the “Department”) via Direct Marketer Returns (“DMR's”) for the tax periods January 1, 2010 through April 30, 2017. The Board also determined that the Petitioner was entitled to a credit under [La. R.S. 47:337.86\(E\)\(1\)](#) in the amount of \$45,191.14 for the tax periods July 1,2010 through March 31, 2017. The Board then ordered the parties to submit a proposed judgment in accordance with the Board's Written Reasons.

The parties are unable reach an agreement on the judgment. In particular, the parties disagree on the correct amount of the credit, if any. The Collector re-urges its argument that the Petitioner is not entitled to the credit at all. The parties also do not see eye-to-eye on the amount of interest due on the Petitioner's underpayments of tax, as well as interest on any refund due to the Petitioner. Finally, the Collector asserts that any credit should be reduced by the Jefferson Parish Sheriff s commissions under [La. R.S. 13:5523\(B\)\(2\)](#). The Collector argues that this reduction is necessary because it was the Petitioner's misconduct that deprived the Sheriff of the commission.

The Board has already ruled on the issue of whether the Petitioner is entitled to a credit under [La. R.S. 47:337.86\(E\)\(1\)](#). That statute provides in part:

Notwithstanding any other law to the contrary, no person shall be taxed with respect to a particular event more than once, provided that the person collecting and remitting taxes can produce to the collector documentary evidence to show a good faith effort to recover taxes paid to the incorrect taxing authority. Such documentary evidence shall consist of the following:

(a) A formal request for refund by **certified** mail which **includes** all evidence supporting such claim to the taxing authority paid in error.

The Board refers to, and incorporates herein, its reasoning as set forth in the January 8, 2019 interlocutory Judgment as to why the Petitioner is entitled to a credit under this statute. In sum, the Petitioner is. entitled to the credit against double taxation because.it has paid the taxes at issue once to Department via its DMR's, and again to the Collector under protest. Further, and equally importantly, the Board's has determined that the Petitioner has demonstrated a good faith effort to recover the taxes paid to the Department. The Department has declined to issue said refund.

The Collector argues that the language of the statute does not permit a credit in this case, because the Petitioner's DMR payments were not made “in error.” The Collector claims that the Petitioner remitted Jefferson Parish sales tax on its DMR's knowingly, intentionally, in bad faith and/or as a result of gross negligence. According to the Collector, intentional or grossly negligent conduct is outside the definition of an “error.”

\*3 The statute provides specific guidance on what a taxpayer must do to demonstrate a good faith effort to recover taxes paid in error, which is a distinct provision from the ‘bad faith’ element provided for under the relief from penalties and interest. The relevant statutory guidance does not depend on the taxpayer's state of mind when it remitted the tax. Instead, the statute

requires the taxpayer to act in good faith in requesting a refund of the incorrectly remitted taxes. The Board is reluctant to incorporate additional principles into the text of this provision when the legislature specifically provided this credit to taxpayers, “[n]otwithstanding any other law to the contrary.”

The Collector argues that the credit should be limited to only the Jefferson Parish sales tax that the Petitioner collected and remitted on its DMR's. The Collector does not agree with the Board's decision to base the amount of the credit on the entire amount of DMR distributions received by the Parish on account of Lerner's remittances. The Collector actually received DMR distributions based on Lerner's remittances covering all parishes, and the Board sees no reason to limit it to the portion originating in Jefferson.<sup>1</sup> The Board maintains its analysis that the credit is the full amount that was actually received by the Collector via the [La. R.S. 47:302\(K\)](#) payments back to the Collector on account of Lerner's erroneous remittances to the Department, no more and no less.

The parties are also at odds over the correct date on which to mark the payment of tax for purposes of calculating interest. This dispute apparently encompasses both interest on underpayments of tax, and interest on any refunds of overpayments. The Collector argues that the Petitioner has failed to introduce evidence showing when the Department distributed the Parish Portion of its DMR collections to Jefferson Parish.

The Petitioner asks that the Board bifurcate its calculation of interest on underpayments of tax. What the Petitioner would have the Board do is calculate interest on the entire amount of tax due for each period beginning on the due date and ending on the date of the corresponding DMR distribution. On that date, the Petitioner asks to be credited for its portion of the distribution received by Jefferson Parish. The amount due would be reduced accordingly. Then, the Petitioner would calculate interest on the remaining liability from the date of distribution to the date of the payment under protest.

The Board will not adopt the Petitioner's method because the evidence in this case is not sufficient to establish the precise date when Jefferson Parish received its share of the DMR distributions. The Petitioner points out that under [La. R.S. 47:302\(K\)\(7\)\(a\)\(ii\)](#), the Parish Portion of DMR collections is to be distributed to the parishes on a quarterly basis for tax periods beginning April 1, 2016.<sup>2</sup> And, the Petitioner introduced schedules showing the amount of DMR collections to be distributed to each parish. With some variation in phraseology, the schedules all indicate that the Parish Portion is “to be distributed” or was “distributed to Parishes.” However, the schedules do not list any particular date on which those distributions occurred.

\*4 The Petitioner maintains that this evidence is sufficient to establish the date of distribution. The absence of a specific date for the Board to treat as the date of distribution is the missing link. The only date of payment that can be established from the record in this case is the date of the Petitioner's commencement of this action via payment under protest. Accordingly, the Board will calculate interest due on Jefferson Parish sales tax from the date the tax became due to that date.

This conclusion necessarily renders the dispute about allocating the credit to individual tax periods moot. The Collector asks the Board to determine the amount of the credit attributable to each individual tax period. According to the Collector, this is necessary in order to impute the credit first to interest and then to the amount of tax due. See [La. C.C. art. 1864](#). However, the payment under protest constituted a full payment of the Assessment, including tax, penalties and interest. Therefore, it is unnecessary to impute the payment to interest or penalties before the underlying tax liability. The Petitioner's payment under protest was sufficient to discharge the entire amount assessed, regardless of the order in which the particular items of liability are discharged in.

Finally, the Collector asks the Board to reduce the credit by the amount of lost collection commissions under [La. R.S. 13:5523\(B\)\(2\)](#). That statute provides for the compensation of local sheriffs for their efforts in collecting Parish sales and use taxes. However, under [La. R.S. 47:302\(K\)\(7\)\(a\)\(ii\)](#), no such compensation is provided to a sheriff when the parish receives its share of DMR distributions. Because Jefferson Parish received its portion of the Petitioner's remittances via DMR's, the Sheriff received no commission.

The Collector's position is that the Sheriff was deprived of the commission as a direct result of the Petitioner's wrongful conduct. The Board is sympathetic to the Collector's concerns in this respect. However, there is no legal authority for reducing the credit in the manner requested. The Board observes that the Taxpayer did not get full credit for its DMR remittances, only the portion that was actually returned to the Collector.

The Board determines the total tax due for all of the tax periods at issue to be \$84,611.29. Interest thereon from the due date until the date of payment under protest is \$27,861.41. Penalties are due in the amount \$21,152.82. In addition, the Collector is awarded attorney's fees in the amount of \$13,362.55. The total owed by Petitioner to the Collector is therefore \$146,988.08.

The Board calculates the total credit to which the Petitioner is entitled to be \$45,223.69. This amount is slightly higher than previously determined after considering mathematical corrections. This amount is also larger than the amount claimed by the Petitioner. The reason for the difference is that on Petitioner's calculations, the Parish Portion ratio for the period of July 2015 to March 2016 is listed as 44.44%. However, the schedules produced by the Petitioner indicate that for this period the Parish Portion ratio was actually 50%. The Board notes that for periods after March 1, 2016 the local share of tax pursuant to [R.S. 47:302\(K\)](#) decreased since the state tax was increased above 4%, however the Subsection K tax rates were an equal 4% (state and local) prior to March of 2016. The record evidence comports with the statutory law, therefore this correction has been made.

\*5 The Petitioner paid the amount of \$ 147,967.00 under protest. After applying the amount of the credit and the protest amount, the Petitioner is owed a refund of \$46,202.61 out of its payment under protest escrow balance. Petitioner is also owed interest on this refund in the amount of \$3,212.03 under [La. R.S. 47:337.80\(A\)\(2\)](#), along with additional interest from the date of Judgment. The remainder of its payment under protest escrow balance is awarded to the Collector.

Baton Rouge, Louisiana this 16 day of April, 2019.

FOR THE BOARD:

Cade R. Cole  
Local Tax Judge

#### Footnotes

- 1 This decision recognizes the fact: that, Jefferson Parish has already received some of the money it claims to be entitled to in this case. The additional reduction urged by the Collector would mean that the Petitioner would receive no credit for remittances that were distributed to Jefferson Parish, but were related to transactions that were properly taxable in other parishes.
- 2 From July 1, 2009 to June 30, 2015, distributions were to be made on a yearly basis, often more than a full year in arrears since it was subject to appropriation. A single distribution was made for the tax periods beginning July 1, 2015, and ending March 31, 2016.

2019 WL 2487887 (La.Bd.Tax.App.)