

STATE OF LOUISIANA
BOARD OF TAX APPEALS
LOCAL TAX DIVISION

TORTUGA CHARTERS, LLC,
Petitioner

VERSUS

DOCKET NO. L00637

TAX COLLECTOR,
PARISH OF ST. TAMMANY,
Respondent

JUDGMENT

This matter came before the Board of Tax Appeals – Local Tax Division (the “Board”) for a hearing on the *Second Motion for Summary Judgment* filed by Tortuga Charters, LLC (“Taxpayer”) and the *Motion for Summary Judgment* filed by the Tax Collector for the Parish of St. Tammany (“Collector”) on September 11, 2020, with Local Tax Judge Cade R. Cole presiding. Participating in the hearing were Matthew A. Treuting, attorney for the Taxpayer, and Margaret H. Kern, attorney for the Collector. After the hearing, the motions were taken under advisement. The Board now issues Judgment in accordance with the written reasons attached hereto.

IT IS ORDERED, ADJUDGED AND DECREED that the Taxpayer’s *Second Motion for Summary Judgment* BE AND IS HEREBY DENIED.

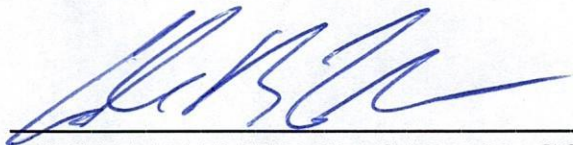
IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Collector’s *Motion for Summary Judgment* BE AND IS HEREBY GRANTED IN PART, the Taxpayer’s claim for a refund of tax paid under protest is DISMISSED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Collector’s *Motion for Summary Judgment* BE AND IS HEREBY DENIED IN

PART, the Collector is not entitled to summary judgment dismissing Taxpayer's claim for refund of penalties, interest, and costs paid under protest.

Judgment Rendered and Signed at Baton Rouge, Louisiana, this 25th day of November, 2020.

FOR THE BOARD:



LOCAL TAX JUDGE CADE R. COLE

**STATE OF LOUISIANA
BOARD OF TAX APPEALS
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WRITTEN REASONS FOR JUDGMENT

This matter came before the Board of Tax Appeals – Local Tax Division (the “Board”) for a hearing on the *Second Motion for Summary Judgment* filed by Tortuga Charters, LLC (“Taxpayer”) and the *Motion for Summary Judgment* filed by the Tax Collector for the Parish of St. Tammany (“Collector”) on September 11, 2020, with Local Tax Judge Cade R. Cole presiding. Participating in the hearing were Matthew A. Treuting, attorney for the Taxpayer, and Margaret H. Kern, attorney for the Collector. After the hearing, the motions were taken under advisement. The Board now issues the attached Judgment for the following written reasons.

This is a payment-under-protest petition under La. R.S. 47:337.63. On July 31, 2018, the Collector issued a Notice of Assessment to Taxpayer for \$64,125.00 in sales and/or use tax, \$7,214.06 in interest, \$16,031.25 in penalties, and \$3,206.25 in costs for a total of \$90,576.56 (the “Assessment”). The Assessment relates to the Taxpayer’s purchase of a yacht identified as “2016 Hatteras 45 Express - Hull #HATHS31OA616” (the “Vessel”). The Taxpayer claims to have purchased the Vessel from a person not in the business of selling yachts in an isolated or occasional sale excluded from sales and use tax under La. R.S. 47:301(10)(c)(ii)(bb)

("Occasional Sale Exclusion"). The Occasional Sale Exclusion is adopted by reference and incorporated into St. Tammany Parish's Sales and Use Tax Ordinances by the Uniform Local Sales Tax Code and Section 22-310 of the St. Tammany Parish Code.

This is the Taxpayer's second motion for summary judgment. The Board denied the Taxpayer's first motion because the competent summary judgment evidence did not show that the then-apparent seller, Igor Sivokozov (through an LLC under his control), was not in the business of buying and selling boats. It is undisputed that Sivokozov held title to the Vessel until transferring said title to the Taxpayer. The Taxpayer has now produced an affidavit from Sivokozov stating that he is a real estate developer and investor and has never been in the boat-dealing business. The Taxpayer has supported Sivokozov's affidavit through a diligent search of Florida state records (the state where the Vessel was purchased), showing no record of Sivokozov ever being registered as a boat dealer. Although Sivokozov purchases a new yacht almost every year, he does so for his personal enjoyment and not for his business. Therefore, Sivokozov is not in the business of buying and selling boats.

However, the Collector has raised a new issue in its *Motion for Summary Judgment*. The Collector now argues that Sivokozov is not the real seller. According to the Collector, Sivokozov actually transferred possession, control, and de facto ownership of the Vessel to Hatteras Yachts/CABO Yachts, LLC ("Hatteras Yachts"). Hatteras Yachts is in the business of manufacturing and selling boats. Sivokozov received a credit for the Vessel from Hatteras Yachts, which he applied to the purchase of a new yacht. The Collector, therefore, concludes that Hatteras Yachts was the true owner and seller of the Vessel. The Collector views Sivokozov's transfer of title as a mere formality.

A motion for summary judgment will be granted, after an opportunity for adequate discovery, if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the mover is entitled to judgment as a matter of law.” La. C.C.P. art. 966(A)(3). A fact is material if it may insure or preclude recovery, affect a litigant’s ultimate success, or determines the outcome of the legal dispute. *June Med. Servs., LLC v. Louisiana Dep’t of Health*, 2019-0191, (La. App. 1 Cir. 3/4/20), 302 So.3d 1161, *reh’g denied* (July 8, 2020). An issue is “genuine” if reasonable persons could disagree. *Pelle v. Munos*, 2019-0549, (La. App. 1 Cir. 2/19/20), 296 So.3d 14.

Any doubt as to a dispute regarding a genuine issue of material fact must be resolved against granting the motion and in favor of a trial on the merits. *Collins v. Franciscan Missionaries of Our Lady Health Sys., Inc.*, 2019-0577 (La. App. 1 Cir. 2/21/20), 298 So.3d 191, 195, *writ denied*, 2020-00480 (La. 6/22/20), 297 So.3d 773. The party requesting summary judgment bears the burden of proof. *Davis v. A Bar & Grill with a Bite, Inc.*, 2019-1928 (La. 3/16/20), 294 So.3d 1051. However, a properly supported motion will be granted unless the non-moving party produces evidence of a material factual dispute. *Dortch v. Jane Doe & Chrysler Grp., LLC*, 2016-0933 (La. App. 1 Cir. 4/6/17), 217 So.3d 449, 452. Mere allegations of the existence of a material factual dispute will not defeat a well-supported motion for summary judgment; the opposing party must set forth specific facts showing a genuine issue for trial. *Campbell v. Dolgencorp, LLC*, 2019-0036, (La. App. 1 Cir. 1/9/20); 294 So.3d 522.

The question is who sold the Vessel to the Taxpayer. The Occasional Sale Exclusion provides that the term “‘sale at retail’ does not include an “isolated or occasional sale of tangible personal property by a person not engaged in such

business.” A “sale” is defined, in pertinent part, as “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.” La. R.S. 47:301(12). It is undisputed that Sivokozov transferred title to the Taxpayer. It is also undisputed that Hatteras Yachts transferred possession of the Vessel to the Taxpayer. Either transfer could be considered a sale under the text of our law.

The true seller of the Vessel must be determined by the substance of the transaction. *See Int’l Paper Co. v. E. Feliciana Par. Sch. Bd.*, 2002-0648, p. 5 (La. App. 1 Cir. 3/28/03), 850 So.2d 717, 721 (“[I]t is the substance of the transaction, not the form, that is controlling for the determination of tax liability for sales or use tax purposes.”), *writ denied*, 2003-1190 (La. 6/20/03), 847 So.2d 1235. An examination of the competent summary judgment evidence shows that Sivokozov, through business entities under his control,¹ purchased the Vessel from Hatteras Yachts on January 22, 2016. Sivokozov later returned the Vessel in exchange for a credit that he used to purchase a new and larger yacht. Sivokozov paid the remainder of the purchase price for the newer yacht in cash. Sivokozov surrendered possession of the Vessel to Hatteras Yachts when he purchased his new yacht. Hatteras Yachts referred the Vessel to MarineMax East, Inc. (the “Broker”)² to find a buyer on the resale market. Sivokozov executed a limited power of attorney authorizing the Broker’s representatives to execute any documents necessary to effectuate the sale of the Vessel.

¹ Upon construction, the manufacturer transferred title to the Vessel to Hatteras 45 EX, LLC as first owner. The sole member of Hatteras 45 EX, LLC is Ocean 1001, LP. Mr. Sivokozov executed the operating agreement of Hatteras 45 EX, LLC in his capacity as trustee of the Sivokozov Family Trust, the General Partner of Ocean 1001, LP. Sivokozov signed Hatteras 45 EX, LLC’s articles of organization in his capacity as manager of Hatteras 45 EX, LLC. Sivokozov created Hatteras 45 EX, LLC for the specific purpose of executing the purchase agreement for the Vessel.

² More precisely, it was the Sales and Service Team at Hatteras of Latin America, an affiliate of Hatteras Yachts, that directed the sale of the Vessel to the Broker.

After Sivokozov sailed away (figuratively or literally) with his new yacht, he played no role in negotiating the sale of the Vessel to the Taxpayer. Sivokozov retained no further right to possess the Vessel. Sivokozov retained no right to object to the sale negotiated by the Broker. When the Taxpayer paid the purchase price for the Vessel, it issued funds to the Broker. The Broker then remitted the proceeds, less its commission, to Hatteras Yachts. Sivokozov received none of the proceeds from the sale of the Vessel.

The preceding facts are recited in the affidavit of John D'Agostino dated June 16, 2020 attached to the Collector's motion. D'Agostino is a representative of Hatteras Yachts. He personally negotiated the sale of both the Vessel and the newer yacht to Sivokozov. D'Agostino swears that Sivokozov is an excellent customer who regularly purchased yachts before and after the sale of the Vessel. According to D'Agostino, Hatteras Yachts does not require a written contract when Sivokozov trades in an old yacht. Therefore, D'Agostino's personal knowledge is the only source of information on the transfer of possession of the Vessel from Sivokozov to Hatteras Yachts. He was a witness for both sides, and his assertions of fact on this matter were undisputed.

The Taxpayer relies on an earlier affidavit by D'Agostino dated December 18, 2019. Although the affidavits are different, the parties claim that they are factually consistent. Neither party questions D'Agostino's credibility. The Collector's position is that D'Agostino's later affidavit provides additional facts and clarification. The Taxpayer argues that D'Agostino's later affidavit contains meritless legal conclusions and opinions. The Board will consider D'Agostino's factual statements in both affidavits to be undisputed. The Board affords no weight to D'Agostino's conclusions of law, if any.

In his December 18, 2019 affidavit, D'Agostino states that the Broker negotiated the sale of the Vessel to the Taxpayer and attaches a Brokerage Purchase and Sale Agreement. The Brokerage Purchase and Sale Agreement identifies the Taxpayer as the buyer of the Vessel and "OWNER OF RECORD" as the seller. "OWNER OF RECORD" is not defined³ in the contract, but an attached "Seller Closing Statement" lists Hatteras 45EX, LLC (an LLC under Sivokozov's control) as the seller. The Brokerage Purchase and Sale Agreement states that "the risk of loss, damage or destruction of the Vessel shall be borne by the Seller until the transaction is closed."

Despite the terms of the Brokerage Purchase and Sale Agreement, there is no genuine possibility that Sivokozov continued to bear the risk of loss of the Vessel after he traded it in. The summary judgment evidence establishes that Sivokozov received consideration in exchange for the Vessel in the form of a cash-value credit. He then expended this credit on the purchase of the new yacht. Once he had his new yacht, the fate of his old vessel would not have mattered to him. Nothing suggests that he would have been compelled to return his new yacht if a purchaser could not be found for the Vessel.

In addition, there is a "No Lien Affidavit" attached to D'Agostino's December 18, 2019 affidavit. The No Lien Affidavit is sworn to by Sivokozov and notarized by D'Agostino. In that document, Sivokozov attests that he is the lawful owner of the Vessel. Sivokozov swears that "there is no other person in possession who has any right in the Vessel." Sivokozov also swears in relevant part that "within the past ninety (90) days there have been no . . . contracts entered into for the brokerage or

³ Although not relevant to the tax period at issue, Florida Statute § 328.0015 (effective July 1, 2023) defines "owner of record" as "the owner indicated in the files of the department or, if the files indicate more than one owner, the one first indicated."

sale of the Vessel.” The No Lien Affidavit is dated June 7, 2017. Sivokozov’s signature indicating acceptance of The Brokerage Purchase and Sale Agreement is dated May 13, 2017.

The only reason for Sivokozov to execute the No Lien Affidavit in the first place was to perfect the brokerage and sale of the Vessel. The No Lien Affidavit is incorrect when it states that no contract for brokerage or sale of the vessel had been entered into during the last 90 days. The undisputed summary judgment evidence presented shows that the No Lien Affidavit was a mere formality, and it does not create a genuine dispute over whether Sivokozov surrendered possession and control of the Vessel to Hatteras Yachts.

The Board concludes that, in substance, the Taxpayer purchased the Vessel from Hatteras Yachts. This sale occurred in Florida, and the Board would reach the same conclusion under Florida law. During the tax period at issue, Florida law defined an “owner” of a vessel as “a person, other than a lienholder, having the property in or title to a vessel.” FL ST § 327.02 (28). Under Florida law, a person may be deemed to have beneficial ownership of a vessel by having control and authority over its use, even though another person holds the certificate of title. *In re Chesley*, 551 B.R. 663, 671 (Bankr. M.D. Fla. 2016) (citing *Stirrup v. Reiss*, 410 So.2d 537 (Fla. Dist. Ct. App.1982)). Hatteras Yachts indisputably had control, authority, and possession⁴ of the Vessel after the trade-in, and would therefore be treated as the owner of the Vessel under Florida law.

The Occasional Sale Exclusion does not apply to a sale by a person who is in the business of selling the type of property sold. The Vessel is a yacht. Hatteras

⁴ Alternatively, Florida law also allows a merchant in the business of selling vessels to transfer ownership of a vessel entrusted to the merchant by the vessel’s actual owner to a good faith purchaser in the ordinary course of business. Fla. Stat. § 672.403(2); *In re Aquamarine USA Inc.*, 319 B.R. 270, 272 (Bankr. M.D. Fla. 2004).

Yachts is in the business of manufacturing and selling yachts. Therefore, the Occasional Sale Exclusion does not apply to the sale of the Vessel. Accordingly, the Taxpayer is liable for the tax assessed by the Collector.

However, there remain unresolved issues precluding final judgment in favor of the Collector. In its Petition, the Taxpayer asserts an alternative good faith defense against any liability for penalties.⁵ The Collector's motion for summary judgment did not address the Taxpayer's alleged good faith defense. La. C.C.P. art. 966(F) expressly provides that a "summary judgment may be rendered or affirmed only as to those issues set forth in the motion under consideration by the court at that time." Accordingly, the Board will withhold final judgment pending resolution of any remaining disputes concerning good faith and potential liability for penalties.

Baton Rouge, Louisiana this 25th day of November, 2020.

FOR THE BOARD:



LOCAL TAX JUDGE CADE R. COLE

⁵ Our courts have recognized a "narrow jurisprudential exception to the assessment of penalties based on a taxpayer's good faith," with that exception effected by the language in the collector's penalty ordinances. *Enter. Leasing Co. of New Orleans v. Curtis*, 2007-0354 (La. App. 1 Cir. 11/2/07), 977 So. 2d 975, 982, writ denied, 2007-2320 (La. 2/1/08), 976 So. 2d 719.