

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

**WILLOW BEND VENTURES, LLC
PETITIONERS**

VERSUS

DOCKET NO. L00003

**COLLECTOR, ST. JOHN THE BAPTIST
PARISH SALES AND USE TAX OFFICE**

JUDGMENT WITH WRITTEN REASONS

A hearing on Willow Bend Ventures, LLC (the "Taxpayer's") Petition for Redetermination of an Assessment against the St. John the Baptist Sales and Use Tax Office (the "Collector") was heard by the Board on May 31 and June 1, 2016 before Local Tax Judge Cade R. Cole. Participating in the hearing were: Cloyd F. Van Hook, attorney for the Taxpayer, and Patrick Amedee, attorney for the Collector. After the hearing, the case was taken under advisement. Due to the recent surge and high volume of cases involving La. R.S. 47:301(10)(g), the Board has carefully reviewed this matter after an extended period under advisement, while also hearing other cases.

Taxpayers appeal the Collector's May 23, 2014 assessment in the amount of \$1,605,244.42. This assessment was originally pending in arbitration until the petition was filed with this Board pursuant to the provisions of Act 640 of 2014. The matter was set and continued on two occasions to allow the parties to continue to work to narrow the extremely voluminous record (from many tens of thousands of pages of likely exhibits to mere thousands).

Taxpayer operated a borrow pit in St. John the Baptist Parish and failed to file tax returns for the periods in question, resulting in an audit by the Collector.

Taxpayer sells dirt, clay or fill (dirt) that has been "processed" by drying the dirt so that it has a prescribed moisture content. The dirt cannot be sold without this "processing." The Taxpayer loads the dirt into trucks so that it can be removed from Taxpayer's dirt pit. Taxpayer, on its bill of sale or invoice separately, states a price for the dirt and a price for the processing and loading. Taxpayer claims that there is no sales tax due on the processing and loading but only on the price that it separately states for dirt. The Collector's position is that the dirt, processing and loading are all part of the sales price and is taxable.

La. R.S. 47:301(13) states in pertinent part:

(13)(a) 'Sales price' means the total amount for which tangible personal property is sold...including any services...that are part of the sale valued in money...and includes the cost of materials used, labor or service costs...

See also, LAC 61:I:4301.

The Taxpayer cites to a prior decision of the Board concerning loading and hauling, that case revolved around distinct transportation costs and is distinguishable from the processing and loading charge in the present case. The definition of "sales price" clearly shows that a sales tax is due on the dirt price, including the processing and loading charge levied here.

The next question that the Board will address is the point of sale, whether the sale of the dirt took place in Saint John the Baptist Parish or somewhere else. If the sale took place in Saint John the Baptist Parish, it is subject to that parish's sales tax unless excluded from sales tax in some other provision in this judgment.

The Collector agrees that in situations where the Taxpayer transported the dirt from its dirt pits, the sale of that dirt is not a Saint John the Baptist Parish sale, and the Collector does not seek to tax such sale. Of course, in those transactions where Taxpayer actually charged the tax, irrespective of whether it should have, then the tax must be turned over to the Collector. *See e.g. Sabine Pipe & Supply Co. v. McNamara*, 411 So.2d 1167 (La. App. 1st Cir. 1982). The Taxpayer here did not provide any proof that the tax levied and collected was remitted anywhere else.

The thing, the price, and the consent of the parties are requirements for the perfection of a sale. La. CC art. 2439. La. C.C. Art. 2456 states: "Ownership is transferred between the parties as soon as there is an agreement on the thing and the price is fixed, even though the thing sold is not yet delivered nor the price paid." La. R.S. 47:301(12) defines "Sale" as, "any transfer of title or possession, or both...in any manner or by any means whatsoever, of tangible personal property, for a consideration..."

The Board finds that under the evidence offered here that once a purchaser, or someone on his behalf, has his truck loaded with dirt the sale is complete even if the price has not yet been paid. Therefore, excluding sales where Taxpayer delivered the dirt and did not charge tax, discussed above, the point of sale is in Saint John the Baptist Parish.

The transactions with Taxpayer's vendees who presented to Taxpayer a valid exemption certificate, and from whom Taxpayer did not actually collect sales tax, such transactions are not subject to sales tax.

The Collector correctly points out that it has long been the rule in Louisiana that a contractor is the consumer not the reseller of tangible personal property used in fulfilling its construction contract. *See e.g.*, 61 LAC I.4372; *Bill Roberts Inc. v. McNamara*, 539 So.2d 1226 (La. 1989). The Collector also correctly cites to the US Supreme Court jurisprudence that allows states to impose taxes on federal contractors.

However, as a matter of legislative grace the Legislature has enacted a specific exclusion for certain transactions involving the federal government. Taxpayer has claimed an exclusion from the taxability of many of the transactions under the provisions of this exclusion. La. R.S. 47:301(10)(g), provides that: “[t]he term "retail sale" does not include a sale of corporeal movable property which is intended for future sale to the United States government or its agencies, when title to such property is transferred to the United States government or its agencies prior to the incorporation of that property into a final product.”

The Board agrees with the Taxpayer that this provision is an exclusion from sales and use tax and (not an exemption) and has construed its provisions accordingly.

In this case, one issue has arisen as to whether that sub-paragraph’s provisions pertain only to one who sells not only directly to the United States government or its agencies, but also to an entity who sells to an entity that partakes in a contract with direct items of cost deemed sales to the United States government or its agencies; that is, a sale by Willow Bend to a subcontractor of a federal contractor. After adhering to the interpretative rule of construing the exclusion in favor of the Taxpayer and the broadness of the statutory language of a sale being “intended for future sale to the United States government or its agencies,” the Board finds that these sales can qualify for the exclusion when supported by the facts and evidence in this record.

Taxpayer pleads that it not be required to pay any taxes that were found to be due by the Board if the Taxpayer’s vendee did not pay the sales price to Taxpayer. Taxpayer claims that this is the treatment allowed by GAAP rules. The Board rejects the Taxpayer’s argument that GAAP rules govern this situation. The issue is determined by Louisiana laws not accounting book principles.

When Taxpayer makes a taxable sale, it is required to pay the amount of the Tax to the Collector no later than the 20th day of the month following the sale. This is true even if the sale was a credit sale and even if the taxpayer has not received any of the sales price from its vendee.

The Taxpayer is free to make any type of payment arrangement with its vendee, but any such agreement is not the concern of the Collector.

When the sale is made, the tax is due at the time of the sale and is payable the next month. The taxpayer who has violated the law will not be allowed to use non-payment of the sales price as a defense to being required to pay the sales price to the Collector. There is relief to the taxpayer who has paid the tax to the Collector and has not been paid by its vendee. That relief is found in La. R.S. 47:315 but that issue is not ripe and is not before the Board.

This case differs from *Odebrecht I* since we have no direct evidence about how each contractor or subcontractor used their purchased dirt. The Taxpayer could have called them as witnesses to establish the evidentiary basis for its claims, instead we were asked to make connections based on likely or potential meanings of various notations on documents.

In addition to the normal burden of proof in challenging an assessment to show by a preponderance of the evidence that your facts entitle you to win under the applicable law, the Collector argues that the Taxpayer's failure to file returns allowed the Collector to rely upon its reasonable approximations and that there were insufficient records to refute them. *See e.g., Yesterdays v. Calcasieu Parish Sales and Use Tax Dept.*, 190 So.3d 710 (La. 5/13/16).

The Taxpayer must show that each sale of dirt was intended for future sale to the Army Corps of Engineers and that title to the dirt was transferred to the Corps of Engineers prior to incorporation of the dirt into a final product.

The Board finds that references to an identifiable Corps Contract on an invoice when tied to that Contractor's purchases for its own contract will be excluded. The Board finds that where there is record proof of a subcontract from a Corps Contractor and the invoice ties the subcontractor's purchases to that that parent Contract in an identifiable way then those purchases will also be excluded. The Board finds that to be reasonable enough support for applying the §301(10)(g) exclusion to those transactions. However, the Taxpayer has not met its burden of proof where there are no Contract identifiers on the invoices (ie. we have no evidentiary tie from the dirt purchases back to the Corps contract averred to cover that purchase).

The Taxpayer avers that we should go further and 'fill in the gaps' of missing information by inference and with supposition. The Board disagrees and finds that those sales to subcontractors where the subcontractor's direct relationship with a Corps contract was not proven by record

evidence will be subject to tax. The Collector's post-trial memo correctly detailed those items and they total to \$296,076.60 in tax due (on the part of the sales price labeled processing).

The Board also finds that those generic references to towns or places without anything more to tie an invoice to an identifiable Corps contract are insufficient to meet Taxpayer's burden of proof. For example, the Board has no way of knowing from this record that an invoice reference to Chalmette means a particular Corps job in that city. The Collector's post-trial memo correctly detailed these items and they total \$152,385.25 in tax due (on the part of the sales price labeled processing).

The Board also finds that the Taxpayer collected and failed to remit \$121,009.75 in sales tax on the part of the sales price labeled dirt, and that this entire amount is due to the Collector under the long established *Sabine Pipe* doctrine.

The parties stipulated that the use tax owed by the Taxpayer equaled \$40,000.00.

The Taxpayer has been relieved of paying tax on those items where it established that the transportation proved a different point of sale, on any separately stated trucking, and on those items where it had the record evidence to prove a link to a Corps contract and the contract is identified on related invoices.

Therefore the Board finds that tax in the amount of \$609,471.60 is due together with the interest, penalties, attorney's fees, and audits costs, all as provided for by applicable law.

For the aforesaid written reasons aforesaid, and the law and evidence being in favor thereof:

IT IS ORDERED, ADJUDGED AND DECREED that the Taxpayer's Petition for Redetermination of an Assessment IS GRANTED IN PART AND IS DENIED IN PART.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Judgment is rendered in favor of St. John the Baptist Parish Sales and Use Tax Collector (St. John the Baptist Parish School Board) and against the Taxpayer, Willow Bend Ventures, LLC, in the amount of: \$609,471.60 in tax, \$182,841.48 in penalties (25% late penalty and 5% negligence penalty), \$539,608.90 in interest (1.25% per month), \$133,192.19 in attorney's fees (10% of tax, penalty and interest due), and \$14,800 in audit costs, for a total amount adjudged against the Taxpayer of \$1,479,914.17.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that each party shall bear their own court costs for these proceedings.

Baton Rouge, Louisiana this 11th day of April, 2017.

FOR THE BOARD:

A handwritten signature in blue ink, appearing to read "Cade R. Cole", is written over a horizontal line.

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