

**BOARD OF TAX APPEALS
STATE OF LOUISIANA**

**IMPALA TERMINALS BURNSIDE, LLC,
Petitioner**

VERSUS

DOCKET NO. L00189

**MARK WEST, ADMINSTRATOR,
ASCENSION PARISH SALES AND USE
TAX AUTHORITY; ASCENSION
PARISH SALES AND USETAX
AUTHORITY
Respondents**

CONSOLIDATED WITH

**IMPALA TERMINALS BURNSIDE, LLC,
Petitioner**

VERSUS

DOCKET NO. 9901D

**KIMBERLY ROBINSON, IN HER
CAPACITY AS SECRETARY OF THE
DEPARTMENT OF REVENUE, STATE
OF LOUISIANA
Respondents**

JUDGMENT

On December 13, 2017 this matter came before Local Tax Judge Cade R. Cole for hearing on the Motion for Partial Summary Judgment filed by the Ascension Parish Sales & Use Tax Authority, through Mark West, in his official capacity as the Administrator of the Authority (the “Authority”) and the Louisiana Department of Revenue (the “Department”), through Kimberly L. Robinson, in her official capacity as the Secretary of the Department (collectively the “Respondents”), the Cross-Motion for Summary Judgment filed by Petitioner, Impala Terminals Burnside, LLC (“Impala”), and the Motion for Summary Judgment filed by third-party defendant and cross-claimant Sandvik Mining Construction Canada (“Sandvik”). Participating in the hearing were Drew Talbot on behalf of Impala, Jesse “Jay” Adams on behalf of Respondents, and Martin Landrieu on behalf of Sandvik. After the hearing the

motions were taken under advisement, and the Board now renders its Judgment for the written reasons issued herewith.

IT IS ORDERED, ADJUDGED AND DECREED that Respondents' Motion for Partial Summary Judgment BE AND IS HEREBY DENIED IN PART, finding that Impala was not required to obtain advance Resale Certificates to avail itself of the Resale Exclusion.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Respondents' Motion for Partial Summary Judgment BE AND IS HEREBY GRANTED IN PART to the extent that the Board finds that Impala's purchases of these assets were not for the purpose of resale.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Impala's Cross-Motion for Summary Judgment BE AND IS HEREBY DENIED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Sandvik's motion for summary judgment BE AND IS HEREBY DENIED IN PART; a genuine dispute of material fact exists as whether Sandvik and Impala intended to terminate the provisions relating to sales and/or use tax under in the Shiploader Agreement and concerning the scope of that Shiploader Agreement as to local taxes.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Sandvik's motion for summary judgment BE AND IS HEREBY GRANTED IN PART; to the extent that Sandvik will not liable for payment of tax as a dealer when that tax has been paid by the underlying taxpayer.

**JUDGMENT RENDERED AND SIGNED at Lake Charles, Louisiana
this 8th day of February, 2018.**

FOR THE BOARD:



LOCAL TAX JUDGE CADE R. COLE

**BOARD OF TAX APPEALS
STATE OF LOUISIANA**

**IMPALA TERMINALS BURNSIDE, LLC,
Petitioner**

VERSUS

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**KIMBERLY ROBINSON, IN HER
CAPACITY AS SECRETARY OF THE
DEPARTMENT OF REVENUE, STATE
OF LOUISIANA
Respondents**

WRITTEN REASONS FOR JUDGMENT

On December 13, 2017 this matter came before Local Tax Judge Cade R. Cole for hearing on the Motion for Partial Summary Judgment filed by the Ascension Parish Sales & Use Tax Authority, through Mark West, in his official capacity as the Administrator of the Authority (the “Authority”) and the Louisiana Department of Revenue (the “Department”), through Kimberly L. Robinson, in her official capacity as the Secretary of the Department¹ (collectively the “Respondents”), the Cross-Motion for Summary Judgment filed by Petitioner, Impala Terminals Burnside, LLC (“Impala”), and the Motion for Summary Judgment filed by third-party defendant and cross-claimant Sandvik Mining Construction Canada (“Sandvik”). Participating

¹ As authorized by La. R.S. 47:1403(6) and other related statutory authority, all parties designed this case to be heard in the Board’s Local Tax Division.

in the hearing were Drew Talbot on behalf of Impala, Jesse “Jay” Adams on behalf of Respondents, and Martin Landrieu on behalf of Sandvik. After the hearing the motions were taken under advisement, and the Board now renders its Judgment for the following written reasons:

This consolidated matter concerns a sales tax dispute arising from a sale-leaseback agreement between Impala and the Ascension Parish Industrial Development Board (the “Ascension IDB”). In 2011 Impala decided to construct and operate a bulk multi-modal terminal on the Lower Mississippi River in Ascension Parish, Louisiana (the “Project”). The Project was intended to facilitate the transfer of coal, bauxite, alumina and other commodities between barges and ocean-going vessels. Impala identified a shuttered facility in Ascension Parish as a suitable site for the Project. However, because of the need for capital and because of certain tax benefits, Impala sought the assistance of the Ascension IDB in financing the development of the Project.

After some negotiation, Impala and the Ascension IDB agreed to a series of transactions by which Impala would transfer the Project to the Ascension IDB, and the Ascension IDB would then lease the Project back to Impala. Thus, Impala and the Ascension IDB entered into an Act of Sale in which Impala conveyed the underlying land and Impala’s: “right, title and interest, if any in all improvements, fixtures and movable property located thereon used in connection with the operation thereof, and all the servitudes, rights, ways, privileges, appurtenances and advantages thereunto belonging or in anywise appertaining”

The Ascension IDB leased the Project back to Impala under an agreement titled Lease Agreement and Agreement to Issue Bonds (the “Original IDB Lease”). The Original IDB Lease provides:

WHEREAS, pursuant to [Chapter 7 of Title 51 of the Louisiana Revised Statutes of 1950, as amended (La. R.S. 51:1151 et seq.) (the “Act”)], the [Ascension IDB] is authorized to issue its bonds to finance any land, easement, servitude, leasehold interest, or other interest or right in land, and any building or other facility or improvement thereon . . . and all movable and immovable properties deemed necessary in connection therewith

WHEREAS, under the Act, the [Ascension IDB] is deemed to be performing a public function on behalf of the Parish, and to be a public instrumentality of such parish, and accordingly . . . all properties at any time owned by the Lessor and the income therefrom and all bonds issued by it and the income therefrom shall be exempt from all taxation the state of Louisiana, provided, that the [Ascension IDB] may require from [Impala] of any of its projects to pay annually to the municipal taxing authorities, through the normal collecting agency, a sum in lieu of ad valorem taxes to compensate such authorities for any services rendered by them to such projects

WHEREAS, in consideration of the issuance of Additional Bonds and the financial benefit accruing to [Impala] from the in-lieu-of-tax arrangements set forth herein, the Lessee has agreed to convey ownership of the Project to the Lessor, subject to the lien of any existing mortgages liens or encumbrances, and subsequent to such conveyance will lease the Project back to the Lessor

The Original Lease further defines “Project” as:

“Project” means acquisition, construction, reconstruction, refurbishment, improvement and equipping of a marine terminal for the purpose of handling bulk materials and providing such bulk material terminal and other facilities and related facilities to be used for the purpose of handling bulk materials and other purposes located at the intersection of LA Highway 22 and LA Highway 44, in Burnside, Louisiana, as more particularly described in Exhibit A hereto, together with all additions thereto and substitutions therefore and includes those buildings, structures, fixtures, furnishings and equipment, including any structures, fixtures, furnishings and related property comprising a portion of the Project, and is further defined as all property (both movable and immovable) owned by the Lessor and leased to the Lessee herein which is not otherwise included in the definition of the Project, but not including the Lessee’s own equipment installed under the provisions of Section 5.01 hereof as to which Lessee gives Lessor the noticed described in said Section 5.01.

In connection with the Project, the Ascension IDB issued \$70,000,000 of Gulf Opportunity Revenue Bonds pursuant to a Trust Indenture with Wells Fargo Bank, National Association (“Wells Fargo”) dated October 1, 2011. The Bonds were secured by property owned by the Ascension IDB and by certain collateral provided

by Impala relating to the Project. Impala secured the opinion of counsel confirming that interest paid to the bond holders would be exempt from federal and state income taxes. The proceeds of the bonds were held in trust and made available to Impala upon request for reimbursement.

After Impala and the Ascension IDB entered into the Original IDB Lease, Impala began negotiations for the acquisition, construction and equipping of the Project. Impala contracted with Sandvik for the design, manufacture, supply, and installation of a Shiploader on April 10, 2012. Impala also entered into a contract for the design, manufacture, supply, and installation of a continuous barge unloader with Heyl & Patterson Inc. Impala contends that it was obligated under the Original IDB Lease to transfer ownership of all property it acquired and installed at the facility to the Ascension IDB. Impala points out that Section 5.01 of the Original Lease provides that “additions, modifications and improvements shall become part of the Project unless and until Lessee notifies Lessor that Lessee elects not to have them included in the Project”

Impala states that as construction of the Project continued, it became evident that additional financing was needed. For this reason, on June 1, 2013, Impala and the Ascension IDB entered into an Amended and Restated Lease Agreement and Agreement to Issue Bonds (the “Amended IDB Lease”). Under the Amended Lease, the Ascension IDB issued an additional \$130,000,000 in Louisiana Public Facilities Authority Revenue Bonds. The Amended Lease defines the Project as consisting of two components: Project A and Project B. Project A is defined as:

[T]he acquisition, construction, reconstruction, refurbishment, improvement and equipping of a marine terminal for the purpose of handling bulk materials and providing such bulk material terminal and other facilities and related facilities to be used for the purpose of handling bulk materials and other purposes located at the intersection

LA Highway 22 and LA Highway 44, in Burnside, Louisiana, located on the land described in Exhibit A hereto (the "Land"), together with all additions thereto and improvements, structures, fixtures, furnishings and equipment including any structures, fixtures, furnishings and related property comprising a portion of the Project, and is further defined as all property (movable and immovable) owned by the Lessor and leased to the Lessee herein which is not otherwise included in the definition of Project A, but not including the following: (i) Project B; (ii) the equipment and personal property subject to the Equipment Lease, and (iii) the Lessee's own equipment installed under the provisions of Section 5.01 hereof as to which Lessee gives Lessor the notice described in said Section 5.01.

Project B is defined as:

[T]he acquisition, construction, reconstruction, refurbishment, improvement and equipping of a marine terminal for the purpose of handling bulk materials and providing such bulk material terminal and other facilities and related facilities to be used for the purpose of handling bulk materials and other purposes located on the Land but specifically limited to the improvements, structures, fixtures and equipment described on Exhibit B hereto, together with all servitude and access rights necessary for the use and operation of same, and together with all additions thereto and substitutions therefor, but not including the following: the Lessee's own equipment installed under the provisions of Section 5.01 hereof as to which Lessee gives Lessor the notice described in said Section 5.01.

Exhibit B, attached to the Amended Lease describes Project B as:

The following improvements, structures, equipment and fixtures located on the Land and described as follows...

1. Wharf Marine Structure and Shiploader
2. Coal Barge Unloading Marine Foundation [and Coal Unloader]
3. Incoming Conveyor System (West Yard)
4. Outgoing Conveyor System (West Yard)
5. Transfer Towers (West Yard)

Like the Original IDB Lease, the Amended IDB Lease provides that additions, modifications, improvements become part of the Project unless Impala elects otherwise and notifies the Ascension IDB. Impala states that it has never made such an election. The Amended IDB Lease also gives Impala the option to Purchase the Project A property for the sum of \$5,000 at the termination of the lease. Impala is

given the additional option of purchasing the Project B property at fair market value at termination.

Respondents conducted a sales/use tax compliance audit of Impala for the tax period beginning on January 1, 2012 and continuing through December 31, 2014. Respondents claim that the audit revealed that Impala purchased and/or imported various items such as cranes, clamshell buckets, barge unloaders, conveyors, shiploaders as well as related parts, machinery, and equipment. According to Respondents, Impala improperly failed to pay sales taxes on the "sales price" of the assets purchased in Ascension Parish. Respondents proposed to assess sales tax on the transactions. Impala paid the proposed tax, penalty, and interest under protest and filed its Petition to recover the amounts paid. In its Petition, Impala contends that the assets were purchased for resale to the Ascension IDB and thus not subject to sales and/or use tax.

Respondents answered Impala's Petition with a reconventional demand against Impala asserting that the assets were not purchased for resale. Respondents claim that Impala's accounting practices with respect to the assets belie its contention that the assets were purchased for resale. Respondents also aver that Impala did not produce any sales invoices or purchase orders for the alleged sales of assets to the Ascension IDB. According to Respondents, Impala identified the assets on its fixed asset register/depreciation schedule, a business record that Respondents claim is customarily prepared and kept by companies to indicate ownership of listed property. Impala also allegedly did not report gross sales on its state or local sales and use tax returns, nor did it report any deductions for assets purchased for resale. Finally, Respondents note Impala did not report any gross receipts on the face of its

occupational license tax reporting forms for any amounts representing alleged sales to the Ascension IDB.

Respondents also asserted a third-party demand against Sandvik. Respondents claim that Sandvik is a “dealer” obligated to charge, collect and remit to Respondents sales and use taxes from the sale of the Shiploader and Wharf Conveyor. In the alternative, Respondents contend that Sandvik is liable as a contractor to pay sales and use taxes on the parts and materials from the construction of the Shiploader and Wharf Conveyor. Sandvik denied Respondents’ claims and instituted a cross-claim against Impala based on the terms of its contract.

Respondents filed their Motion for Partial Summary Judgment on March 14, 2017 arguing that the assets were not purchased for resale and Impala failed to obtain a Resale Dealer Exemption Certificate as required under Louisiana law. On June 19, 2017 Sandvik and Impala filed Motions for Summary Judgment. In its motion for summary judgment, Impala argues that the assets were purchased for resale to the Ascension IDB and thus not subject to tax. Sandvik joins with Impala in asserting that the Resale Exclusion applies, but alternatively argues that even if it does not apply, under the terms of its contract with Impala, Impala is solely liable for payment of sales and/or use tax. The applicability of the Resale Exclusion is a threshold issue; if the exclusion applies then most, if not all, other issues presented by the various motions would be rendered moot. Accordingly, the Board will address the applicability of the Resale Exclusion first.

In order to prevail on a motion for summary judgment, the movant must show that there are no genuine issues of material fact and that he or she “is entitled to judgment as a matter of law.” LA. C.C.P. art. 966(A)(3); *Duncan v. U.S.A.A. Ins.*

Co., 06-363 (La. 11/29/06), 950 So.2d 544, 547. A fact is material when its existence or nonexistence may be essential to the plaintiff's cause of action. *Smith v. Our Lady of the Lake Hosp., Inc.*, 93-2512 (La. 7/5/94), 639 So.2d 730, 751. A genuine issue of material fact is one as to which reasonable persons could disagree; if reasonable persons could reach only one conclusion, there is no need for trial on that issue and summary judgment is appropriate. *Smitko v. Gulf S. Shrimp, Inc.*, 11-2566 (La. 7/2/12), 94 So.3d 750, 755. Summary judgment is favored by law and provides a vehicle by which the just, speedy, and inexpensive determination of an action may be achieved. LA. C.C.P. art. 966(A)(2). The trial court is required to render summary judgment "if the motion, memorandum, and supporting documents show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. LA. C.C.P. art. 966(A)(3).

Respondents argue that the Resale Exclusion in R.S. 47:301(10)(a)(i) and (ii), requires that a transaction must be made in strict compliance with the rules and regulations in order to be excluded from state and local sales tax, and that Impala did not comply with the applicable rules and regulations because of the failure to obtain a Resale Certificate. R.S. 47:301(10)(a)(i) and (ii) provide that a "retail sale" or "sale at retail" means a sale to a consumer or to any other person for any purpose other than for resale as tangible personal property Any dealer making a sale for resale . . . which is not in strict compliance with the rules and regulations, shall himself be liable for and pay the tax." The Secretary argues that the "rules" for obtaining a Resale Certificate are outlined in Revenue Information Bulletin 09-015, dated June 23, 2009 (the "RIB"). Although the Bulletin states on its face that it is "not binding on the public," Respondents argue that the legislature has elevated the RIB by mandating that local collectors accept a Resale Certificate issued by the

Department of Revenue, and by providing statutory guidelines governing the Department's renewal and suspension of Resale Certificates in R.S. 47:13.

The Board finds that failure to obtain a Resale Certificate does not constitute a failure to strictly comply with the “rules and regulations” as those terms are used R.S. 47:301(10)(a)(i) and (ii). A Revenue Information Bulletin is an informal statement of information issued for the public and employees that is general in nature. A Revenue Information Bulletin is not a rule or regulation, nor does it have the force and effect of law and is not binding on the public or the Department. The Department is authorized to properly promulgate formal rules and regulations, pursuant to the Administrative Procedure Act, but it did not choose to do that in this instance.

Further, the statutory provisions cited by Respondents do not state that a taxpayer is required to obtain a Resale Certificate. In the absence of an applicable rule, regulation, or statutory mandate expressing such a requirement, Impala was not required to obtain a Resale Certificate. Accordingly, Respondents’ motion for summary judgment will be denied to the extent that it seeks a declaration that Impala was required to obtain an advance Resale Certificates in order to avail itself of the Resale Exclusion.

Having determined that the absence of a Resale Certificate is not fatal to Impala’s argument, the next question is whether Impala purchased the assets for purpose of resale as tangible personal property. Under Louisiana law, assets purchased by a dealer for resale as tangible personal property are not taxed upon the original purchase. *See* R.S. 47:301(10)(a)(i), (ii). However, in the case of a contractor who installs the purchased assets on its own, the contractor is deemed to

be the consumer of the asset and the original purchase is subject to tax. *See Bridges v. Cepolk Corp.*, 2013-01051 (La. App. 3 Cir. 2/12/14), 153 So.3d 1142. Louisiana law dictates that the substance of transaction is determinative as to whether the transaction is subject to tax. *Cajun Contractors, Inc. v. State Dep't of Revenue & Taxation*, (La. App. 1 Cir. 10/14/1987), 515 So.2d 625.

The terms of the Original Lease and the Amended Lease gave Impala the right to possess and operate the Project. The logical reason for which Impala purchased the assets was therefore to operate and develop the project into a more productive enterprise. There is no suggestion that Impala purchased the assets and then surveyed the market for a secondary purchaser. While Impala may have ultimately transferred title to the assets to the Ascension IDB, Impala did not enter into negotiations with the Ascension IDB in order to establish a dealer-purchaser relationship. Impala's Secretary and Treasurer Rodney Malcolm stated in his affidavit that Impala entered into negotiations with the Ascension IDB "because of the need for capital and because of potential tax benefits."

The accounting and tax reporting treatment of the assets also does not support the contention that Impala intended to resell the assets to the Ascension IDB. As pointed out by Respondents, Impala listed the assets on its books as if it was the owner. Further, Impala did not report the alleged sales on its tax returns either as deductions or as gross sales. Finally, although Impala was not required to obtain Resale Certificates to take advantage of the resale exclusion, the failure to obtain them in such a sophisticated and carefully constructed transaction does provide some tangential support to the Department's contention that Impala did not intend to "resell" the assets.

Indeed, treating the transactions as sales for resales does not make sense from Impala's perspective. After Impala purchased the assets it was reimbursed only half their value from the bond proceeds. Thus, if Impala were correct in asserting that the transactions were purchases for resale, then Impala would effectively have sold the assets to the Ascension IDB for half their value, and then paid the Ascension IDB rent to use those same assets. A sale for resale does not appear to be the actual object of the underlying transaction.

The transfer of title to the Ascension IDB does not in itself compel the conclusion that Impala intended to resell the assets. The Original IDB Lease and the Amended IDB Lease both specify that Impala sought to take advantage of the tax benefits resulting from the Ascension IDB's ownership of the Project. Impala thus sought to transfer title to the assets purchased to the Ascension IDB so that Impala would not have to pay property tax on the Project property. Further, the Ascension IDB's ownership of the property meant that income from the bonds would not be subject to income tax, which meant that Impala's payments on the bonds would be less costly. To assure that this tax advantage would result, Impala sought the opinion of legal counsel. Accordingly, minimizing tax liability and lowering the cost of bond premiums was the sole reason for Impala to convey title of the Project to the Ascension IDB.

For the above reasons, the Board finds that the assets in questions were not purchased as an actual sale for resale. Accordingly, Respondents' Motion for Partial Summary Judgment will be granted in part to the extent that the assets were not purchased for resale and Impala's Cross-Motion for Summary Judgment will be denied. The Board recognizes that issues related to immovable versus movable classification, the interstate and coastwise commerce exemption, and litany of other

issues have not been raised in these cross motions. The Board's finding is on the issue at hand, and the remaining issues on taxability are reserved for trial, or potentially as the subject of a future motion.

Having dealt with the threshold issue of the Resale Exclusion, the Board must address Sandvik's Motion for Summary Judgment. Sandvik requests that the Board grant summary judgment declaring that it has no liability as a dealer or contractor and dismissing it from the action under the terms of a contract of sale between Sandvik and Impala. On April 10, 2012, Impala entered into a Shiploader Agreement with Sandvik wherein Impala agreed to purchase a Shiploader and Wharf Conveyor. The Shiploader Agreement provides that Impala is responsible for payment of "sales or use taxes in respect of the Equipment and the Work in accordance with the Laws and Regulations applicable at the Site" The Shiploader Agreement places responsibility for all other taxes, which are identified Article 11.01 of the Shiploader Agreement's General Conditions, on Sandvik. Article 11.01 of the General Conditions states that the Contract Price is inclusive of "all federal, state, regional and local taxes, goods and services taxes, and other sales taxes effective or enacted as of the Effective Date or thereafter, each as imposed on [Sandvik] or its Subcontractors or the Work," subject to the exception that Sandvik "shall not be liable for, and the Contract Price shall exclude, any real estate taxes or ownership taxes on the Site and sales and use taxes of the State of Louisiana."

Sandvik requests that the Board grant summary judgment declaring that it is not liable as a dealer under R.S. 47:304(C) and R.S. 47:337(C) because of Impala's payment under protest. Both statutes provide:

Dealers shall, as far as practicable, add the amount of the tax imposed under this chapter in conformity with the schedule or schedules to be prescribed by the collector pursuant to authority conferred herein, to the

sale price or charge, which shall be a debt from the purchaser or consumer to the dealer, until paid, and shall be recoverable at law in the same manner as other debts. Any dealer who neglects, fail or refuses to collect the tax herein provided, shall be liable for and pay the tax himself.

Respondents argue that Impala's remittance of the proposed tax under protest does not amount to a payment of the tax that would discharge the dealer's obligations within the meaning of statutes. Respondents cite to several cases interpreting the meaning of the terms remit and payment, however none of these cases stand for the proposition that a purchaser's remittance of sales and/or tax under protest would not relieve a dealer of the obligation to pay the tax under R.S. 47:304(C) and R.S. 47:337(C). *Cajundome Com'n v. Meche*, 2008-1057 (La.App. 3 Cir. 2/4/09), 3 So.3d 607 (holding that dealer entity statutorily excused from payment of sales tax was still required to collect and remit tax); *AWC, Inc. v. CSF Construction, Inc.*, 2005-0865 (La.App. 4 Cir. 4/26/06), 931 So.2d 382, 384 (holding dealer's remittance of sales tax to the state not conclusive in a contractual dispute over which party agreed to be responsible for the tax); *L.D. Brinkman & Co. (Texas), Inc. v. Kennedy*, 1999-0862 (La.App. 1 Cir. 5/12/00), 762 So.2d 150 (holding, as a matter of procedure, that use of the payment under protest merely requires proof of timely remittance of the tax rather than proof of actual payment).

The Board can discern no circumstance under which Sandvik could be required to pay the proposed tax as dealer when the tax has already been paid under protest by the underlying taxpayer. If the Board were to ultimately determine that the proposed taxes are due because the transactions qualified as retail sales, the tax would be satisfied by the release of the escrowed funds. No further payment by Sandvik would be necessary. If the Board determines that taxes are not due, the

escrowed amounts will be returned to Impala. Consequently, Sandvik is entitled to summary judgment with respect to its liability as a dealer.

The Board recognizes that an alternative theory of liability against Sandvik is that it would owe contractor use tax on the materials and supplies used to construct an immovable. The Board agrees that the third-party demands must remain viable on this issue, until the classification of the Shiploader has been finally decided.

Sandvik would argue that it should still be released by finding in its favor on its cross claim against Impala, and holding that Impala has contractually assumed any of Sandvik's liability for taxes. Impala argues that there is an ambiguity in the contractual language because it refers to "sales taxes of the state of Louisiana," but fails to mention parish/local sales tax. Impala also argues that there was a settlement agreement which supercedes the Shiploader Agreement, and that pursuant to this settlement agreement their tax obligations were extinguished.

After the execution of the Shiploader Agreement, a dispute arose between Impala and Sandvik over monies owed for work, materials, and/or services which ultimately resulted in their entering into an agreement titled "Receipt, Release and Compromise Agreement, and Release of Lien" (the "Release") on December 8, 2014. The Release recites:

WHEREAS Sandvik and Impala (the "Parties") entered into a Shiploader Agreement executed April 5, 2012 ("Shiploader Agreement"), pursuant to which Sandvik delivered a Shiploader to Impala's Burnside Marine Terminal at Darrow, Ascension Parish, Louisiana (the "Burnside Facility") and provided related equipment and services (the "Shiploader Project");

WHEREAS a dispute arose between Impala and Sandvik regarding monies allegedly owed by the Parties to each other for work, materials, and/or services provided by or on behalf of each Party in connection with the Shiploader Project and/or the Shiploader Agreement (the "Claims")

The Release further provides as part of the compromise between the parties that Sandvik:

[D]oes by these presents forever release and discharge any and all Claims of any nature whatsoever that it may have against Impala . . . and any such Claims shall and are hereby settled, adjusted, and compromised in full between the parties hereto, and Sandvik does by these presents forever release, relinquish, acquit, and discharge Impala . . . for any and all claims and causes of action for damages, costs, or expenses, present or future, on account of, or anywhere growing out of the Claims and/or Shiploader Project as described above, the facts of which occurred through the latest date of the signing of this settlement.

Sandvik contends that the Shiploader agreement controls and obligates Impala to pay sales and use taxes, if due, to the appropriate taxing authority. Sandvik further points out that because Impala has already paid the proposed tax, there is no possible scenario in which Sandvik will be required to pay out of its own pocket. Impala contends that the Release controls and Sandvik has released any claims it may have had against Impala. Impala also claims that if the Shiploader Agreement controls, Impala's obligation with respect to sales and use tax under the Shiploader Agreement are limited by the language "in accordance with the Laws and Regulations applicable at the Site" because under Louisiana law Sandvik as a contractor is liable for sales tax owned on the cost of materials and equipment used in constructing an immovable. Sandvik replies that the language of the Release was not intended to release Impala from its contractual responsibility for sales and/or use taxes imposed by the state of Louisiana or local parishes under the Shiploader Agreement.

"A compromise is a contract whereby the parties, through concessions made by one or more of them, settle a dispute or an uncertainty concerning an obligation or other legal relationship." LA. C.C. art. 3071. A compromise instrument is the law between the parties and must be interpreted according to the parties' true intent. *Succession of Bourg*, 2016-1347 (La. App. 1 Cir. 9/21/17), 231 So. 3d 673, 677. A compromise resolves only to those matters the parties intended to settle. LA. C.C.

art. 3072. Parties may agree to release future claims, known and unknown, as part of a compromise. *Holloway Drilling Equipment, Inc. v. Bodin*, 2012-355 (La.App. 3 Cir. 11/7/12), 107 So.3d 699, 706. A release of a future action must be free from doubt. *Ritchie v. Azar*, 383 So.2d. 360, 364 (La. 1980). However, a release of “any and all future claims” is sufficient to encompass all future claims both known and unknown. *State ex rel. Sabine River Auth. v. Meyer & Assocs., Inc.*, 2007-214 (La. App. 3 Cir. 10/3/07), 967 So. 2d 585, 590.

The Release provides that Sandvik releases any and all future claims for damages, costs, or expenses growing out of the Claims and/or Shiploader Project (both are defined terms under the agreement and are given those meanings in lieu of any common meaning). The term Shiploader Project as used in the Release refers to Sandvik’s “provision of equipment and services related to the delivery of the Shiploader.” The capitalized term Claims as used in the Release refers to the dispute between Impala and Sandvik “regarding monies allegedly owed by the Parties to each other for work, materials, and/or services provided by or on behalf of each Party in connection with the Shiploader Project and/or the Shiploader Agreement.” The term Shiploader Agreement as used in the Release refers to the aforementioned Shiploader Agreement executed April 5, 2012, “pursuant to which Sandvik delivered a Shiploader to Impala’s Burnside Marine Terminal at Darrow, Ascension Parish, Louisiana.” The Release does not refer to the definitions provided in the Shiploader Agreement.

The Release does not state that Sandvik releases all claims arising under the entire Shiploader Agreement. Rather, the Release states that Sandvik releases all claims arising out of its provision of services and equipment related to the delivery of the Shiploader pursuant to the Shiploader Agreement. Further, there is no

provision in the Release that clarifies whether Impala and Sandvik intended to modify or terminate the terms of the Shiploader Agreement relating to taxes, and the Release does not specifically mention the portions of the Shiploader Agreement relating to taxes.

On the present evidence, it appears that the release did not end Impala's tax obligations under the agreement and completely terminate the provisions of the Shiploader Agreement relating to taxes. Impala disputes this interpretation, but there is a lack of summary judgment evidence concerning the intended scope of the Release. In any event, there remains a facial contractual ambiguity concerning whether the references to taxes of the State of Louisiana also include local taxes due to how various other cross references in other clauses are applied.

The Board finds insufficient summary judgment evidence concerning the intended scope of the Release and the parties intent concerning the Shiploader Agreement's application to local taxes. Therefore, the Board finds that there is a genuine dispute as to an issue of material fact precluding the Board from granting summary judgment in Sandvik's favor inasmuch as Sandvik requests that the Board declare Impala to be liable for all sales and/or use tax under the Shiploader Agreement and the Release.

Lake Charles, Louisiana this 8th day of February, 2018.

FOR THE BOARD:



LOCAL TAX JUDGE CADE R. COLE