NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT

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WJC. MG
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2016 CA 0673

TURNER BROS. CRANE AND RIGGING, LLC OF DELAWARE

VERSUS

THE ASCENSION PARISH SALES AND USE TAX AUTHORITY AND MARK WEST, COLLECTOR OF REVENUE FOR ASCENSION PARISH

Judgment rendered JUL 05 2017

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On Appeal from the
Twenty-Third Judicial District Court
In and for the Parish of Ascension
State of Louisiana
No. 106791 Div. E

The Honorable Alvin Turner, Jr., Judge Presiding

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Christian N. Weiler
John J. Weiler
New Orleans, LA

Attorneys for Plaintiff/Appellant
Turner Bros. Crane and Rigging,
LLC of Delaware

Jesse R. Adams, III
Andre B. Burvant
Justin B. Stone
New Orleans, LA

Drew M. Talbot
Robert R. Rainer
Baton Rouge, LA

Attorneys for Defendants/Appellees
Ascension Parish Sales and Use Tax
Authority and Mark West, Collector
of Revenue for Ascension Parish

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BEFORE: WELCH, CRAIN, AND HOLDRIDGE, JJ.

HOLDRIDGE, J.

Plaintiff, Turner Bros. Crane and Rigging, LLC of Delaware ("Turner"), appeals the judgment of the trial court upholding an assessment of use tax by defendants, the Ascension Parish Sales and Use Tax Authority and Mark West, Collector of Revenue for Ascension Parish (hereinafter collectively referred to as "the Authority"). Turner also appeals the denial of its claim for refund of that use tax. The Authority filed an answer to the appeal, seeking additional taxes. We affirm that part of the judgment upholding the assessment of the use tax and the denial of Turner's claim for a refund, but reverse and remand for a determination of the amount of credit to which Turner is entitled. We deny the Authority's answer to the appeal.

FACTS AND PROCEDURAL HISTORY

Turner owned and operated a crane company, which leased cranes to different entities; its principal place of business was in Oklahoma and it also operated in Texas. Turner also imported large cranes into Louisiana for use on various jobs in several parishes, including Ascension Parish. In 2004, it leased space at a yard in Ascension Parish to store some of its cranes. The Authority initially audited Turner for use tax on its cranes in Ascension Parish for the tax period from December 1, 2000 through June 30, 2004 and later filed suit to collect those taxes. The parties settled those claims for a lump-sum settlement of $250,000, as memorialized in a Settlement Agreement.

Following the settlement, Turner continued to use the storage yard in Ascension Parish and imported cranes to perform jobs or be stored in Ascension Parish. The Authority audited Turner a second time for the tax period from July 1, 2004 through December 31, 2008. The audit involves nine cranes owned by Turner. The Authority initially assessed Turner with taxes and related penalties

and interest of $130,937.87. This audit and its findings are the basis of the issues involved in this appeal.

Sales and use taxes are complementary taxes. Word of Life Christian Ctr. v. West, 2004-1484 (La. 4/17/06), 936 So.2d 1226, 1232. The sales tax applies when the taxable transaction is consummated within the taxing jurisdiction. Id. The use tax applies when the transaction is consummated outside the taxing jurisdiction, and the goods are subsequently imported and used in the taxing jurisdiction. Id. The use tax is collected against a taxpayer's use, storage, or consumption of property, typically purchased out of state, that would have been subject to a sales tax in the state of use had the goods been bought within the taxing jurisdiction. Id. at 1233.

The taxable moment for a use tax occurs when out-of-state purchased goods have been withdrawn from interstate commerce and come to rest in Louisiana. See Word of Life, 936 So.2d at 1239. Articles of tangible personal property are subject to imposition of use tax on the "cost price," which is defined as "the actual cost of the articles of tangible personal property ... or the reasonable market value of the tangible personal property at the time it becomes susceptible to the use tax, whichever is less." La. R.S. 47:301(3)(a). The use tax rate in Ascension Parish for the audit period of July 1, 2004 through December 31, 2008 was 4.5%.

Louisiana Revised Statutes 47:337.15(A) and 47:337.86(A) require that a taxing authority grant the taxpayer a credit against the use tax for sales or use tax previously paid by the taxpayer to another taxing jurisdiction on the same article of personal property. This credit prevents multiple taxation by taxing jurisdictions that the goods may move through following the out-of-state purchase. See Word of Life, 936 So.2d at 1234.

In this case, the nine cranes, which were identified as unit numbers 341, 354, 359, 361, 369, 374, 375, 379, and 383, incurred a taxable "use" in Ascension Parish.[1] As such, absent some exclusion or exemption, Turner owed use taxes on the "cost price" of those cranes, subject to any credit to which Turner might be entitled. Turner claimed it was owed a credit for taxes it paid to other similar taxing authorities through self-assessments and as a result of various settlements, including the settlement of the earlier audit with Ascension Parish.

Turner filed a petition to appeal the Authority's tax assessment and the denial of its claim for refund.[2] Turner sought credit for use taxes it paid and a refund for $123,455.25 in taxes allegedly overpaid.[3] The Authority answered the petition and filed a reconventional demand, seeking judgment against Turner in the amount of $130,937.87 for the unpaid use taxes, together with penalties and interest, that its audit showed were due.

Trial on the merits began on March 30, 2015, but was later recessed to allow the parties additional time to conduct further discovery. The trial resumed on September 17, 2015, and ended on September 18, 2015. The trial court rendered judgment dismissing the appeal with prejudice, denying Turner's request for a refund of taxes it alleged it overpaid. The trial court also rendered judgment in favor of the Authority on its reconventional demand and awarded it $145,271.25, consisting of taxes due for the period from July 1, 2004, continuing through

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[1] At trial, Turner and the Authority stipulated that at some point the cranes at issue did work or were stored in Ascension Parish during the audit period.

[2] Suit was filed on April 24, 2013.

[3] Turner initially sought a refund of $28,701.05, then amended its petition to request a refund of $303,013.53. According to the trial court's reasons for judgment, in Turner's post-trial memorandum, it reduced its refund request to $123,455.25.

December 31, 2008, along with penalties and interest.[4] The trial court also awarded the Authority statutory interest accruing on the unpaid tax amounts from January 1, 2016, until paid and assessed court costs of $7,170.65 against Turner.

On appeal, Turner urges eight assignments of error: (1) the trial court erred in allowing the Authority to impose use tax on the cranes that it alleges were included in the prior Settlement Agreement; (2) the trial court erred in denying Turner the statutorily mandated credit for taxes Turner paid to other local taxing jurisdictions on the same cranes; (3) the trial court erred in affirming the Authority's assignment of credits for tax paid by Turner to other local taxing jurisdictions based on the dates that Turner paid the tax, instead of on the dates the tax was allegedly due and payable; (4) the trial court erred in determining that certain cranes were not purchased in a "sale" through a transaction called the "Saw Mill Transaction"; (5) the trial court erred in holding that the isolated and occasional sale exclusion did not apply to the cranes acquired in the Saw Mill Transaction; (6) the trial court erred in granting judgment for the Authority; (7) the trial court erred in denying Turner's request for refund of tax; and (8) the trial court erred in assessing Turner with costs. The Authority has answered the appeal seeking additional taxes from Turner based on the additional business records disclosed by Turner for the first time during the trial.

ANALYSIS

Standard of Review

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[4] The $145,271.25 awarded by the trial court consists of $57,333.51 in taxes, $15,852.13 in penalties, and $72,085.61 in interest. The amount of interest increased since the Authority filed its reconventional demand.

We note that the trial court in its reasons for judgment identified eight cranes; however, the omission of one crane number in the series appears to be a typographical error because the trial court's award is based on the assessment of use taxes on all nine cranes.

This court reviews the legal conclusions of the trial court under a de novo standard of review. Holly & Smith Architects, Inc. v. St. Helena Congregate Facility, Inc., 2006-0582 (La. 11/29/06), 943 So.2d 1037, 1045. As to factual findings of the trial court, this court applies a manifest error standard and will set aside a district court's findings of fact if that finding is clearly wrong in light of the record reviewed in its entirety. Hall v. Folger Coffee Co., 2003-1734 (La. 4/14/04), 874 So.2d 90, 98. The trial court as the trier of fact is charged with assessing the credibility of the witnesses and, in doing so, is free to accept or reject, in whole or in part, the testimony of any witness. Commercial Flooring and Mini Blinds, Inc. v. Edenfield, 2013-0523 (La. App. 1 Cir. 2/14/14), 138 So.3d 30, 40.

Saw Mill Transaction
(Assignments of Error Nos. 4 and 5)

In Turner's Assignments of Error Numbers 4 and 5, it asserts that five of the nine cranes were improperly taxed by the Authority because they were part of a transaction referred to as the Saw Mill Transaction and are subject to the isolated and occasional sale exclusion. On September 25, 2002, Turner Bros. Crane & Rigging, Inc., ("Turner, Inc.") and Beckham Operating Corporation ("Beckham") agreed to combine substantially all of their assets into Turner, a newly created company, in the Saw Mill Transaction. After the initial transaction, Turner was owned totally by the owners of Turner, Inc. and Beckham. Then Turner transferred those interests to Turner Brothers Holdings, LLC, a holding company, which returned the interests to Turner. Next, Saw Mill Capital, LLC, a private equity firm, purchased a 75% ownership interest in Turner, and the remaining 25% ownership interest was retained by the owners of Turner, Inc. and Beckham.

Turner contends that it acquired five of the nine cranes at issue in this litigation, unit numbers 341, 354, 361, 369, and 375, in the Saw Mill Transaction. Turner characterizes the Saw Mill Transaction as a sale for sales tax purposes, and it contends that the isolated and occasional sales tax exclusion applies. Therefore, it argues that the Saw Mill Transaction is not subject to sales tax. Turner then argues that if no sales tax could be imposed, the use tax cannot be imposed on an article of tangible personal property. See La. R.S. 47:301(19)(b).[5] Turner asserts that the isolated or occasional sale classification is an exclusion, not an exemption, and as such, it is construed liberally in its favor as the taxpayer and against the taxing authority. See Harrah's Bossier City Inv. Co., LLC v. Bridges, 2009-1916 (La. 5/11/10), 41 So.3d 438, 446.

Louisiana Revised Statutes 47:301(12) defines a sale 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." Louisiana Revised Statutes 47:301(10)(a)(ii) defines a sale at retail for purposes of the imposition of sales and use tax levied by a political subdivision in pertinent part as a sale to a consumer or to any other person for any purpose other than for resale in the form of tangible personal property. Pursuant to La. R.S. 47:301(10)(c)(ii)(bb), "[t]he term 'sale at retail' does not include an isolated or occasional sale of tangible personal property by a person not engaged in such business."

The trial court discussed the Saw Mill Transaction in its reasons for judgment as follows, in pertinent part:

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[5] No use tax shall be due or collected by the state or any political subdivision if the sale of that property would be excluded or exempted from sales tax at the time that property becomes subject to the taxing jurisdiction of the taxing authority. See La. R.S. 47:301(19).

> [Turner] has submitted to this court, pages and pages of documents which represent the "Saw Mill Transaction" and based on the court's review of said documents, it is clear the "Saw Mill Transaction" does NOT constitute "an isolated or occasional sale of tangible property[."] Instead, the "Sawmill Transaction" [sic] was a rather complicated series of transactions, which taken as a whole, resemble a merger and/or acquisition more than an "isolated or occasional sale[."] First, Turner Bros. Crane & Rigging, Inc. and Beckham Operating Corporation, two then existing corporations, agreed to combine most of their respective assets into [Turner] (the taxpayer herein), a then newly created company. On the same day, Saw Mill Capital, LLC purchased a seventy-five (75%) ownership interest in [Turner] (taxpayer). It is important to note that Turner Bros. Crane & Rigging, Inc. and Beckham Operating, [sic] Corporation transferred almost all of their respective company assets to [Turner]; their employees were maintained at the same salary and benefits, as did their insurance and 401k plans; and their contracts with third parties remained in tact [sic]. It would be a grave injustice for this court to allow [Turner] to escape tax liabilities by simply engaging in a merger and acquisition type transaction such as the "Saw Mill Transaction[."]

Turner contends that the trial court erred in determining what constituted a sale for sales tax purposes and in ignoring the separate corporate existence of the entities in the Saw Mill Transaction through which Turner acquired the five cranes. Turner also argues that the trial court erred in failing to find that the Saw Mill Transaction constituted an isolated or occasional sale. Turner relies on Marmac Corp. v. McNamara, 546 So.2d 585 (La. App. 1 Cir. 1989), wherein this court held that a taxpayer, which was in the business of servicing and leasing barges and which sold an average of 1.5 barges a month from a fleet of 750 barges, was not in the business of selling barges at retail.[6] Therefore, the court found that the sales of the barges by the taxpayer were casual sales not subject to sales tax. Id. at 588. This court commented that the sales of the barges, which were old and sold for scrap or other use when no longer serviceable for leasing, were merely incidental to the main business of the taxpayer as a lessor of barges. Id. at 586, 588. Turner

[6] The parties jointly stipulated as to the facts in Marmac, 546 So.2d at 586.

argues that similarly, Beckham, which provided the cranes involved in the Saw Mill Transaction, was a lessor and operator of cranes, and therefore, any sale of a crane was incidental to its primary business of leasing. Turner added that Beckham was disposing of a substantial part of its business rather than making incidental dispositions.

In further support for its contention, Turner relies on Revenue Ruling 06-002 (4/7/06), wherein the Louisiana Department of Revenue considered whether the contribution of vehicles titled in Louisiana from a previously existing business into a newly created Louisiana limited liability company in exchange for a membership interest would result in any sales tax liability related to the vehicles. Turner also contends that transactions between related entities can be sales and that corporate formalities must be respected, citing Hilton Hotels Corp. v. Traigle, 360 So.2d 245, 246-47 (La. App. 1 Cir. 1978) and Associated Hosp. Servs., Inc. v. State, Dep't. of Revenue & Taxation, 588 So.2d 356, 357-60 (La. 1991).

The Authority initially responds to Turner's contention by noting that Turner failed to put on any testimony or evidence that the Saw Mill Transaction was an isolated or occasional sale. The Authority then contends that a multi-stepped leveraged buyout of two family-owned businesses by a private equity firm, Saw Mill, did not constitute a non-taxable "isolated or occasional" sale of tangible personal property by a person not engaged in such business under La. R.S. 47:301(10)(c)(ii)(bb). The Authority notes that sales and/or use tax liabilities become a successor business' debt when a predecessor business sells itself as a going concern, or sells its stock of goods to a successor entity, citing Grey Wolf Drilling Co. v. Endris, 2003-860 (La. App. 3 Cir. 12/23/03), 862 So.2d 1248, 1251-52, the relevant corporate law in La. R.S. 12:1361(6), and the sales tax law of La. R.S. 47:337.21. See also Livingston Parish School Board ex rel. Sales & Use

Tax Div. v. Hwy 43 Cornerstore, LLC, 2012-0103 (La. App. 1 Cir. 5/23/12), 93 So.3d 709, 714-15. The Authority also argues that even if this were to be considered an isolated or occasional sale, the interrelationship of the separate companies should be disregarded for sales tax purposes, citing United Cos. Printing Co. v. City of Baton Rouge, 569 So.2d 186 (La. App. 1 Cir. 1990), St. Gabriel Indus. Enters., Inc. v. Broussard, 602 So.2d 1087 (La. App. 1 Cir. 1992), and Con-trux Constr. v. Sec'y, Dep't of Revenue & Taxation, 30,342 (La. App. 2 Cir. 4/8/98), 711 So.2d 324.

We agree with the Authority's contention that Turner failed to prove that it was entitled to the isolated or occasional sale exclusion, assuming for the purposes of this appeal that the Saw Mill Transaction was a sale. Turner failed to put forth evidence or testimony establishing that the Saw Mill Transaction was an occasional or isolated sale by a person not engaged in such business. The documents supporting the Saw Mill Transaction were entered into evidence at trial. However, Jack E. Turner, II, the president of Turner, Inc., the vice president of Beckham, and the Chief Executive Officer of Turner, and the main signatory on most of the documents for all three entities involved in the transaction (Turner, Beckham, and Turner, Inc.), did not testify, although he was listed as a potential witness in earlier discovery responses. Moreover, no testimony or documentary evidence was offered to establish what Turner, Inc. and/or Beckham were regularly in the business of doing when the Saw Mill Transaction took place.

None of Turner's trial witnesses were employed by or represented Turner, Beckham, or Turner, Inc. when the Saw Mill Transaction was executed on September 25, 2002. One of Turner's witnesses, Ronald Youtsey, began working for Turner as a controller in July of 2008. Another witness, John Schissler, was hired by Saw Mill Capital to become the Chief Financial Officer of Turner on June

25, 2007; he was not employed with Turner when the Saw Mill Transaction occurred and had no personal knowledge of the transaction. The trial court sustained the Authority's objection to Mr. Schissler's testimony interpreting the Saw Mill Transaction because he lacked personal knowledge of the transaction. Michael Miller testified that the Saw Mill transaction was an occasional sale because the selling entity was not a dealer that was selling cranes. However, Mr. Miller was Turner's third party CPA and was neither directly employed by nor did he represent Turner, Beckham, Saw Mill, or Turner, Inc., at the time of the Saw Mill Transaction.[7] We note that in the supporting documentation for the Saw Mill Transaction is the certificate of incorporation for Turner, Inc., which contains the provision that "[t]he objects and purposes for which the Corporation is organized are as follows: (a) To carry on the business of distributors, wholesalers or agents, to buy, sell and deal at wholesale or retail, merchandise, goods, wares and commodities of every sort...."[8] Miller's testimony concerning the Saw Mill Transaction as Turner's third party CPA was speculative, and no one from Beckham or Turner, Inc. testified in person or by trial depositions.

Therefore, we find that even if the Saw Mill Transaction qualified as a sale, Turner failed to establish that the Saw Mill transaction constituted an isolated or occasional sale as defined by La. R.S. 47:301(10)(c)(ii)(bb). Even assuming that an isolated or casual sale is an exclusion and, as such, is liberally construed in

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[7] Mr. Miller worked for the accounting firm Turner used, KPMG, and was involved in this matter at the end of the first audit. In the second audit, Mr. Miller (who then worked for Merit Advisors Tax Consulting Firm) was the primary point of contact with the auditors from Broussard and Associates, who were hired by the Authority to perform the audit of Turner, and later with Ms. Krennerich, an auditor for the Authority.

[8] The cranes transferred in the Saw Mill Transaction came from Beckham, but as stated above, no testimony or evidence established what it was in the business of doing. While the Saw Mill Transaction contains a provision defining business as the business of providing crane rentals, that provision also adds as part of the definition "any other business conducted by" Turner, Inc., Beckham, and Turner before the closing.

favor of the taxpayer,[9] Turner still has the burden of proving that the statutory provision applies to it. Because Turner failed to meet this burden of showing that the isolated or occasional sale exclusion is applicable to it, we find no manifest error in the trial court's determination that the isolated or casual sale exclusion did not apply. Therefore, Turner's Assignments of Error Numbers 4 and 5 lack merit.

Prior Ascension Settlement
(Assignment of Error No. 1)

On July 29, 2011, Mr. West and Mr. Schissler signed a Settlement Agreement as the representatives of the Authority and Turner, respectively. The settlement settled the earlier lawsuit filed by the Authority against Turner for the tax period from December 1, 2000 through June 30, 2004, which sought recovery of taxes of $750,000, penalties of $187,500.11, interest of $975,312.84 as of June 1, 2011, attorney's fees of 10% of total tax, penalty and interest found due, and audit costs of $13,227. Turner contended that the settlement extinguished the Authority's right to impose use tax for the tax periods on five of the nine cranes sought to be taxed in this suit.

The trial court did not find that the settlement extinguished use tax claims as to certain cranes because the Settlement Agreement was silent as to which cranes were involved. The trial court also noted that the Settlement Agreement was also silent as to what part of the $250,000 payment, if any, represented taxes, penalties, interest, attorney's fees, audit costs, or any other items. The trial court concluded

[9] A tax exemption is a provision that exempts from tax a transaction that would, in the absence of the exemption, otherwise be subject to tax. That is, there has been a statutory decision not to tax a certain transaction that is clearly within the ambit and authority of the taxing statutes to tax. An exclusion, however, concerns a transaction that is not taxable because it falls outside the scope of the statute giving rise to the tax, by the language of the statutes. Tax exemptions are strictly construed in favor of the State and must be clearly and unequivocally and affirmatively established by the taxpayer. Exclusions, on the other hand, are construed liberally in favor of the taxpayers and against the taxing authority. Harrah's Bossier City Inv. Co., LLC v. Bridges, 41 So.3d at 446.

by stating that "there is no way the court is in a position to determine this information, absent any credible evidence."

In Assignment of Error Number 1, Turner contends that the trial court improperly allowed the Authority to assess taxes on five of the nine cranes for which the liability for use tax had already been satisfied under the Settlement Agreement. Turner relies on the following language of the Settlement Agreement: "[T]he Authority does hereby forever release, acquit, waive and discharge TURNER ...from all other claims, without limitation, asserted or assessed, or which could have been asserted or assessed, by the Authority in connection with the [First] Lawsuit." It asserts that because the settlement resolved all claims that were or could have been asserted, any claims the Authority may have had for use tax on five of the nine cranes it alleges were in Ascension Parish at the time of the audit were satisfied.

Turner relies on the testimony of David Cowley, a former employee, to support its contention that six cranes (354, 361, 374, 379, 383, and one whose number he could not recall) were in Ascension Parish during the first audit period. Turner contends that the Settlement Agreement included the five identified cranes because they were present in the parish, despite the fact that the agreement did not specifically identify any cranes.

Regarding the first assessment and lawsuit, Mr. West testified at trial that the Authority attempted to perform an audit on Turner after Kressy Krennerich, an auditor for the Authority, observed about fifteen cranes in a Prairieville storage yard in Ascension Parish when she regularly drove by the yard. Mr. West testified that during the entire first audit, the Authority encouraged Turner to provide it with documentation for all the assets that came into Ascension Parish, so the Authority could properly assess Turner. The Authority asserts that pursuant to La. R.S.

47:337.28(A), it was authorized to estimate Turner's tax liability, and this estimate was ignored by Turner, resulting in a final assessment due to Turner's failure to timely respond.[10]

According to Mr. West, he did not know that the Ascension Parish yard was also leased to a third party.[11] Mr. West admitted that it was possible the six cranes that Mr. Cowley referred to were in the yard during the first audit period; however, Mr. West then testified that it was his understanding there were thirty Turner cranes in Louisiana and that all thirty cranes could have been in Ascension Parish at any given time. He testified that at least fourteen cranes that were agreed upon were in Ascension Parish at one time or another. Mr. West explained:

> The ... Authority attempted to perform an audit of the all the assets that were imported into Ascension Parish as caused by Turner....
>
> We were unable to establish everything that came in. Not on a lack of our efforts. With that, we ended up making an estimated assessment. Throughout the terms of attempting to draw up this agreement, up to the very end, we were hoping to establish a list of documents or a list of assets to the best of [Turner's] ability so we could document what to apply taxes to. Their inability to produce that caused us to not be able to put that specific information in the agreement.

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[10] La. R.S. 47:337.28(A) states:

> In the event any dealer fails to make a report and pay the tax as provided in this Chapter or in case the dealer makes a grossly incorrect report or a report that is false or fraudulent, the collector shall make an estimate of the retail sales of such dealer for the taxable period, of the gross proceeds from rentals or leases of tangible personal property by the dealer, or the cost price of all articles of tangible personal property imported by the dealer for use or consumption or distribution or storage to be used or consumed in the taxing jurisdiction, and of the gross amounts paid or charged for services taxable; and it shall be the duty of the collector to assess and collect the tax together with any interest and penalty that may have accrued thereon, which assessment shall be considered prima facie correct and the burden to show the contrary shall rest upon the dealer.

Ms. Krennerich testified that Broussard Partners & Associates, the Authority's third party auditor, informed her that records were determined either not to be available or not to be in existence. Therefore, the Authority had Broussard Partners give it an estimated value of what a crane for that type of company would cost, and Broussard Partners estimated $1,000,000.00 per crane.

[11] Ms. Krennerich testified that Turner's name was on the fence.

Mr. West also stated that the Authority settled its large claim against Turner because a review of Turner's records by an independent CPA firm showed that the assessment would probably bankrupt Turner. Mr. West testified that the audit involved in this suit (the second audit) had already been scheduled when the parties signed the Settlement Agreement.

At trial, Mr. Cowley, who worked for the Turner family from 1996 through 2011 or 2012, when he retired, and who was an executive vice-president for Turner in 2002, testified that he was originally hired to start the Turner operation in Longview, Texas. The Turner business expanded into Louisiana after it had been acquired by Saw Mill, according to Mr. Cowley. He testified that he negotiated a lease agreement with George Robinson, the owner of the property in Ascension Parish where the cranes were stored.[12] Mr. Cowley stated that Mr. Robinson also used the yard, so Turner rented half of the yard and the office space.

Mr. Cowley testified that he sent six cranes to Louisiana from Longview, Texas. He identified them as unit numbers 374, 354, 383, 379, 361, and one as to which he could not remember the number. According to Mr. Cowley, the first cranes to work in Louisiana were units 374 and 383, which performed work at Dow Chemical in Iberville Parish. When asked by the trial court at what point those units were in the Ascension Parish yard, Mr. Cowley answered, "I'm not for sure, Your Honor. It's been a long time." He testified that the most cranes Turner ever had in the Ascension Parish yard was four, along with Mr. Robinson's equipment and the cranes' auxiliary equipment. However, he also stated that while the yard could at most store four cranes, Turner could also have had more cranes on the job sites working in Ascension Parish at that time, but he "could not say for

[12] Turner did not introduce the lease agreement into evidence at trial because its copy was not signed. The lease agreement Mr. Cowley was questioned about was dated to begin April 1, 2005 and end in 2006, but he testified that the cranes were in Ascension Parish in 2004.

certain if that happened." He additionally testified he was "sure that it did happen some" that cranes came from Texas and performed a particular job and went back.

When asked how Mr. Cowley knew about the six cranes he talked about, he answered that he was responsible for Turner in Longview, Texas, and that this location was where the cranes came from. He said that he gave "them the unit numbers, so that's how I remember them numbers." In questioning by the trial court, Mr. Cowley testified that he knew that the cranes were doing work in Ascension Parish in "2004-2005." During questioning by the Authority's counsel, Mr. Cowley stated that six cranes were stationed at the Ascension Parish yard, but only four could fit "[i]f the big cranes come back into that yard" and he could not remember "exactly where they were stored at on any given date." The Authority moved to strike Mr. Cowley's testimony based on the best evidence rule after he admitted during questioning by the Authority's counsel that Turner kept documents that tracked the location of the cranes, but his testimony was purely from memory about his employment with Turner over ten years before the trial. The trial court denied the motion to strike.

Mr. Miller's schedules and testimony applied the entire $250,000 settlement payment to six cranes, but only five were specifically identified. Mr. Miller's testimony was that there was "an unlimited number of units" that were "potentially" stored in Ascension Parish during the three-month period from April of 2004 until the end of the first audit. Mr. Miller also testified, "So we'd always believed that there were two units initially ... in Ascension Parish, probably during that three-month period of time and were most likely 354 and 361. ... Admittedly there is some uncertainty with that." Mr. Miller explained that beginning in November of 2003, Turner created a worksheet to track the cranes and where they were used, but before that Turner only had information from some of the Louisiana

state returns that had been filed that contained some copies of transportation permits and some information in the general ledger.

Mr. Schissler testified that he was involved with the Settlement Agreement. He testified that Turner was going bankrupt when the first suit was filed and that the company had no money to fight the Authority. He also testified that the parties agreed to name two cranes at a later date for which Turner would receive credit, but he admitted that there was nothing in the agreement regarding any specific cranes or future credit. Mr. Youtsey, Turner's controller, was employed with Turner in 2008. He testified he had a "[v]ery minor role" in the first lawsuit in Ascension Parish and also stated that at that time, Turner was near bankruptcy. Mr. Youtsey believed, based on direct conversations with the CEO and with Mr. West, that Turner would get credit for cranes that were involved in the second audit. However, Mr. West testified that the Authority had no intention of giving credit based on the settlement.

The Authority notes, as did the trial court, that the Settlement Agreement did not specify which cranes were covered by the settlement and it did not specify what the $250,000 amount represented. As such, the Authority contends that it could not grant Turner credit for taxes paid on specific articles of tangible personal property pursuant to La. R.S. 47:337.86. At the time of the settlement, there were no records to establish which cranes were in Ascension Parish. Lastly, the Authority asserts that the Settlement Agreement also includes a release by Turner as to it, which states:

> [Turner] does hereby forever release, acquit, waive and discharge the Authority from any and all claims (including claims for refunds of overpayment of taxes), without limitation, asserted, or which could have been asserted by [Turner] in the Lawsuit. [Turner] hereby forever releases and surrenders any and all rights to taxes, penalties and interest paid in connection with, or related to the Lawsuit for the taxable years at issue.

The Settlement Agreement also contains a provision limiting the effect of the settlement as follows:

> This Settlement Agreement represents a full, complete, final, and binding settlement for the Audit Period. The Settlement Agreement is exclusively limited to the Audit Period, and has no effect as to [Turner's] Ascension Parish sales and/or use tax transactions which occurred on or after June 30, 2004. The settlement of the Lawsuit of the 23rd Judicial District Court shall be of no precedential value and may not be cited by the Authority or [Turner] to support any particular position. This Settlement Agreement shall not be construed by the Authority or [Turner] as an admission by any party concerning any claims or issues asserted for the Audit Period.

Moreover, in contrast to the Settlement Agreement in this suit, in December of 2008, Mr. Youtsey, Turner's controller, entered into a settlement on behalf of Turner with the tax collector for Iberville Parish settling claims arising out of the sales and use tax audit in that parish for the tax years from 2001 through 2004. That agreement specifically identified the cranes involved (unit numbers 354, 361, 364, 374, 379, 381, and 383 were those also involved in this suit) and stated that the tax collector "shall provide them full credit therefore in accordance with La. R.S. 47:337:15(A)(3)(a) and 47:337.86."[13]

The Authority contends that it could not grant Turner credit for taxes paid on the cranes allegedly involved in the settlement because Turner did not prove that use taxes were paid on those cranes through the settlement. Moreover, it argues that it did not have records at the time of the settlement that would have enabled it to determine how many and/or which cranes were in Ascension Parish during the first audit period.

We cannot say that the trial court's finding that Turner was not entitled to any credit for taxes paid to the Authority for any portion of the $250,000

[13] We note that the Iberville Parish Settlement Agreement refers to "defendants" and "them," but it appears that only Turner, Inc. was a defendant in the matter.

settlement from the first audit was manifestly erroneous. As the trial court noted in its reasons for judgment, the Settlement Agreement was silent as to which cranes it covered and as to which part, if any, of the settlement was for taxes as opposed to penalties, interest, attorney's fees, and audit costs. Additionally, we find no error in the court's conclusion that it could not determine that information based on the testimony of Turner's witnesses. Therefore, the trial court did not err in denying Turner credit because Turner could not prove that the cranes audited in the current suit were the same cranes involved in the Settlement Agreement, and Assignment of Error Number 1 lacks merit.

Credit for Taxes Paid in Other Local Taxing Jurisdictions;
Credits Pursuant to La. R.S. 47:337.86(A)
(Assignments of Error Nos. 2 and 3)

Turner contends that the trial court erred by failing to give it the appropriate credits for all sales and use tax it paid on each crane to other local taxing jurisdictions. In Assignment of Error Number 2, Turner contends that the trial court erred in imposing a requirement that the taxpayer must file refund claims for all previous taxes paid for which it wished to receive a credit, regardless of whether the taxes were in fact owed and thus were paid to the proper jurisdiction or whether the taxes were paid based on a different taxable event. In Assignment of Error Number 3, Turner contends that the trial court erred in affirming the Authority's assignments of credits for tax paid by Turner to other local taxing jurisdictions based on the dates that Turner paid the tax, instead of on the dates the tax was allegedly due and payable.

The pertinent statutes for credits for taxes paid are La. R.S. 47:337.15(A)(3) and La. R.S. 47:337.86. Louisiana Revised Statutes 47:337.15(A)(3) states, in pertinent part:

(3)(a) A credit against the use tax imposed by the local ordinance shall be granted to taxpayers who have paid a similar tax upon the sale or use of the same tangible personal property in another taxing jurisdiction, whether in this state or in another state. The credit provided herein shall be granted only in the case where the taxing authority to which a similar tax has been paid grants a similar credit as provided herein ....

(b) The amount of the credit shall be calculated as provided in R.S. 47:337.86. In no event shall the credit be greater than the tax imposed in the other taxing jurisdiction upon the particular tangible personal property which is subject to the tax imposed by local ordinances.

Louisiana Revised Statutes 47:337.86 states the following in pertinent part:

A. (1) A credit against the sales and use tax imposed by any taxing authority of the state shall be granted to a taxpayer who paid monies, whether or not paid in error, absent bad faith, based upon a similar tax, levy, or assessment upon the same tangible personal property in a taxing jurisdiction of this state or another state. The credit granted herein shall be applicable only when a similar taxing authority is seeking to impose and collect a similar tax, levy, or assessment from a taxpayer upon the same tangible personal property for which the taxpayer has paid a similar tax, levy, or assessment to a similar taxing authority.

Further, in addition to receiving a credit for taxes paid, a taxpayer will only be subject to a use tax on the same tangible property once, even when such payments were erroneously made, but only when the taxpayer can show it made a good faith effort to recover the taxes paid to an incorrect taxing authority. Specifically, La. R.S. 47:337.86(E) states the following:

E. (1) 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.

(b) A second request for refund by certified mail if no response was received within sixty days of the first refund request.

(c) Either the response approving or denying the first or second refund

request, whichever may be applicable, or an affidavit from the person stating that no response was received within sixty days of the second refund request.

(d) Notwithstanding any provision of law to the contrary, any taxpayer who receives an assessment and who has complied with any applicable provisions of Subparagraphs (a) through (c) of this Paragraph, may within thirty calendar days of the date of notice, take any action specified in R.S. 47:337.51(A)(1).

(2) (a) The collector shall not impose penalties or interest on taxes erroneously paid or remitted to another taxing authority unless the erroneous payment or remittance was the result of gross negligence or due to intentional conduct of bad faith on the part of the dealer that collected and remitted the taxes or on the part of the taxpayer that paid the taxes. In instances where a legitimate disagreement exists as to which taxing authority is owed, the involved taxing authorities shall resolve the dispute among themselves through any legal means provided by law, including the filing of a rule or petition against the other taxing authority in the manner provided for in R.S. 47:337.101.

(b) For the purposes of this Section, a "similar taxing authority" means a political subdivision having and performing the same governmental functions as the political subdivision seeking to impose the sales or use tax.[14]

(footnote added).

The trial court in its reasons for judgment decided the credits issue as follows:

> With regard to the amount of taxes owed by [Turner], the court finds, based on the testimony of Kressy Krennerich there were eight (8) cranes in Ascension Parish subject to use tax during the tax audit period. Those cranes are as follows, unit numbers 354, 361, 369, [383,][15] 375, 374, 379, 359 and 341. The court further finds the collective taxable value of said cranes to be $4,211,636.38 and after applying a tax rate of 4.5%, and a credit for taxes paid in the amount of $132,190.13[2], in accordance with Schedule 1 of the Authority's bench book tab 9, the tax balance due to the Authority is $57,333.51, together with penalties and interest thereon.

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[14] The trial court applied La. R.S. 47:337.86(E)(2)(a) as it read prior to its amendment by 2015 La. Acts, No. 210. Section 4 of the amendment says its provision are procedural and interpretive and are effective on the effective date of 2014 La. Acts, No. 640, which was June 12, 2014. We note that the failure to apply the current version of the statute has no bearing in this case because penalties and interest were not at issue.

[15] See footnote 4.

> In so holding, the court rejects the testimony of [Turner's] expert, [Michael] Miller, in that it is unreliable and flawed in many respects. There were times in the trial of this matter that Mr. Miller changed his testimony and admitted that perhaps some errors were made in his calculations or in the underlying facts which support his calculations. The court is of the opinion that [Turner] displayed a pattern of secreting documents and evidence from the Authority in an effort to diminish its tax liability to the parish. For example, the values of [Turner's] cranes would increase and decrease based on which value was beneficial to the company at any given time.
>
> Conversely, the court was very impressed with Ms. Krennerich's testimony. It was apparent to the court that she invested a lot of time and effort into determining the amount owed based on the facts, as best as they were available to her. Ms. Krennerich used [Turner] source documents to arrive at all her calculations and she did so even when the outcome would be detrimental to the Authority. Moreover, Ms. Krennerich has over 18 years of experience in working with use tax assessments and has performed hundreds of audits during her tenure with the Ascension Parish Sales and Use Tax Authority.
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> [2] It is important to note that although [Turner] argues that it overpaid monies to the improper taxing authority, [Turner] cannot meet its burden under La. R.S. 47:337.86 to show that it made a "good faith effort" when by its own admission it made absolutely NO effort to collect the monies allegedly erroneously paid to the incorrect taxing authority.

Turner argues that the trial court misinterpreted La. R.S. 47:337.86(A)(1) because it did not have to file a claim for a refund under La. R.S. 47:337.86(E) in other parishes to receive a credit because this requirement only applies when tax is paid to the wrong parish on a transaction. Turner points out that it did owe taxes to the jurisdictions it paid. Turner contends that it submitted evidence into the record proving it paid sales tax on numerous cranes in Texas on their initial purchase during the 1990s. Turner also seeks credit for taxes it paid in response to a multi-parish audit. According to Turner, La. R.S. 47:337.86(E) is not applicable because it did not collect the taxes, it only remitted them, and is not a dealer, which is to whom La. R.S. 47:337.86(E) applies. Turner argues that the taxable moment in Ascension Parish is different from the taxable moments in other parishes and the

sale of certain cranes in Texas. In other words, it contends that each of the tax payments for which it seeks a credit is an entirely separate event from the taxable moment in Ascension Parish. Turner also argues that even if it was required to file a claim for a refund, the prescriptive periods have run on those claims. Lastly, Turner contends that the Authority bore the burden to prove it acted in bad faith, but failed to do so.

Turner also contends that it is entitled to a credit for the use tax paid pursuant to the Iberville Parish Settlement. It argues that the credits are to be applied chronologically under La. R.S. 47:337.15 and La. R.S. 47:337.86 based on when the tax becomes due and payable. Turner alleges that the Authority improperly based the credits on the date of the payment, and therefore, most of the use tax paid for the Iberville Settlement could not be used as a credit against Turner's liability, although it should have been.

The Authority argues that all legally allowable credit was given to Turner when it met the criteria in La. R.S. 47:337.86. It asserts that Turner was only entitled to credit for taxes it paid, absent bad faith, and upon the same tangible personal property. The Authority contends that Turner had the burden to prove it was not in bad faith but failed to carry its burden by not presenting evidence or testimony as to its improper tax payment methodology. The Authority asserts that Turner knew it had use tax issues but failed to correct its methodology of calculating use taxes. The Authority points out that it allowed Turner a credit for taxes paid that were specifically identified in the Iberville Parish Settlement and for taxes paid to other local taxing jurisdictions and Texas, if the taxes were paid prior to the cranes becoming subjected to Ascension Parish's use tax.

The Authority also argues that Turner believed the Authority's assessment of taxes represented a demand by the Authority for taxes paid to other jurisdictions

and as such, Turner had to request a refund from those other jurisdictions before receiving credit from the Authority for taxes paid beyond what the Authority already recognized. Because Turner did not do this, the Authority argues it waived its right to object by failing to submit refund claims to other jurisdictions, citing Elevating Boats, Inc. v. St. Bernard Parish, 2000-3518 (La. 9/5/01), 795 So.2d 1153, 1172-73.[16] As to Turner's claims that any request for refunds would have been pointless because the tax periods had prescribed, the Authority contends that Turner failed to present admissible evidence to support this contention. Lastly, the Authority contends that Turner had evidence dating back to 2004 placing it on notice that it had local sales and use tax compliance issues, which, if properly addressed, would have possibly led to refund claims and/or amended tax return filings. However, Turner excused itself from filing refund claims because it did not want to be audited.

In interpreting La. R.S. 47:337.86, we begin with the well-settled premise that taxing statutes must be strictly construed against the taxing authority, and where a tax statute is susceptible of more than one reasonable interpretation, the construction favorable to the taxpayer is adopted. Barfield v. Bolotte, 2015-0847 (La. App. 1 Cir. 12/23/15), 185 So.3d 781, 785, writ denied, 2016-0307 (La. 5/13/16), 191 So.3d 1058. Likewise, exemptions from taxation or tax credits that relieve a tax burden are strictly construed and must be clearly, unequivocally, and affirmatively established. Id. When a tax law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation shall be made in search of legislative intent. Id.

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[16] Elevating Boats was overruled in part on other grounds by Anthony Crane Rental, L.P. v. Fruge, 2003-0115 (La. 10/21/03), 859 So.2d 631, 639. Louisiana Revised Statutes 33:2718.2, the statute dealing with credits which the court interpreted in the case, was repealed by 2003 La. Acts, No. 73, which was effective July 1, 2003.

We find the trial court erred in reading La. R.S. 47:337.86 to require Turner to file claims for refunds. Louisiana Revised Statutes 47:337.86(E) does not apply to the circumstances of this case because the use taxes assessed by other parishes and the sales tax assessed by Texas on the cranes were for different taxable moments, concern different events, and were paid to the correct taxing authorities. See La. R.S. 47:337.86(E)(1) ("no person shall be taxed with respect to a particular event more than once." (emphasis added)). Moreover, Ms. Krennerich did give Turner additional credits when she recalculated the taxes using Turner's additional documentation without considering the existence of refund claims.[17] The Authority offered into evidence Exhibit D-14, which contains Ms. Krennerich's charts and documentation based on Turner's additional documentation. Ms. Krennerich's updated spreadsheet shows an increase in the tax amount from $189,523.64 to $224,545.80, an increase in the credit for taxes paid from $132,190.13 to $158,690.89, and an increase in the tax balance due from $57,333.51 to $65,854.91. Regarding some of the credits Turner sought, Ms. Krennerich testified that she gave full credit for the crane units 354 and 369 based on Turner's additional documentation showing that Texas sales tax was paid in October of 1997 and August of 1997, respectively. Exhibit D-14 also contains

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[17] It appears that La. R.S. 47:337.86 would apply to Turner as a dealer pursuant to La. R.S. 47:301(4), which states, in pertinent part:

> "Dealer" includes every person who manufactures or produces tangible personal property for sale at retail, for use, or consumption, or distribution, or for storage to be used or consumed in a taxing jurisdiction. "Dealer" is further defined to mean:
> ...
> (d)(i) Any person who leases or rents tangible personal property for a consideration, permitting the use or possession of the said property without transferring title thereto.

Louisiana Revised Statutes 47:304(A) requires dealers to collect taxes from the purchaser or consumer generally. For the purpose of collecting and remitting sales and use taxes to the state, the dealer is the agent of the state. La. R.S. 47:306(A)(5). Louisiana Revised Statutes 47:1576 concerns remittance of taxes under protest.

support documentation showing the other additional credits Ms. Krennerich applied to each crane. Under the circumstances of this case, the requirement of La. R.S. 47:337.86(E) that Turner file requests for refunds was not applicable.

However, Turner's contention that the Authority erred in basing the credits on payments of taxes instead of when the taxes were due and payable, that is, when they accrued, has no merit because the language of La. R.S. 47:337.15(A)(3)(a) and 47:337.86(A)(1) expressly refers to "taxpayers who have paid," "the taxing authority to which a similar tax has been paid," monies "paid," "whether or not paid in error," and "for which the taxpayer has paid a similar tax."

Thus, Assignment of Error Number 2 regarding the requirement of filing a request for refund has merit; however, Assignment of Error Number 3 regarding basing the credit on the date of payment lacks merit. The trial court erred in failing to apply the credits determined by Ms. Krennerich based upon Turner's additional documentation as set forth in Exhibit D-14.

Judgment in Favor of the Authority; Denial of Request for Refund of Tax; Costs Assessed to Turner
(Assignments of Error Nos. 6, 7 and 8)

Turner did not separately brief these assignments of error and Turner's contentions supporting reversal of the trial court's rulings have been addressed in the previous assignments of error.

Increase in Taxes Due the Authority
(Answer to Appeal)

The Authority contends that the trial court erred in awarding it only $57,333.51 in taxes assessed as opposed to $65,854.91. The lower figure was the amount for which Turner was originally assessed, and the higher figure was based on Ms. Krennerich's adjusted findings using the additional business records introduced at the end of the first day of trial. In both valuations, Ms. Krennerich

used values for the cranes that Turner assigned on its federal depreciation schedule or book asset listings, but with the additional documentation, these values were higher than her original valuations. Turner's records showed that the depreciable values increased over time.

The Authority asserts that the cost price upon which the use tax is based is the lesser of the actual cost of the cranes or the reasonable market value. See La. R.S. 47:301(3)(a). Prior to the recess to review Turner's additional documents, the Authority points out that Turner did not object to its use of the fixed asset schedule to calculate the cranes' cost price.

Turner argues that the trial court properly rejected the Authority's adjustment to the cranes' value, which was based on the records of Green Leasing Corporation (Green Leasing), a company owned by Turner. Turner argues that the values in Green Leasing's records were irrelevant to the values of the cranes from Turner's records. According to Turner, these values were the highest values of the cranes on the books of Green Leasing at any particular time and were not the cranes' values at the time of their use in Ascension Parish. In some cases, the increased cost price was from a date more than three years after the cranes were first used in Ascension Parish.

We find no error in the trial court's rejection of the Authority's use of the higher values for the cranes. A trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. Smith v. Roussel, 2000-1028 (La. App. 1 Cir. 6/22/01), 809 So.2d 159, 164. The trial court asked Ms. Krennerich hypothetically how it could happen that a crane valued at $100,000 in 2001 could be valued at $400,000 in 2005. She answered, "I've never seen it." The court later asked her, "How in the world could you really realistically think that that crane has an asset value of another $300,000?", to which she replied, "That's my question."

The trial court did not err in using the Authority's original values for the cranes. The answer to the appeal lacks merit.

CONCLUSION

For the foregoing reasons, the judgment of the trial court is affirmed insofar as it upheld the assessment of use tax on and the denial of a claim for refund by Turner Bros. Crane and Rigging, LLC of Delaware by the Ascension Parish Sales and Use Tax Authority and Mark West, Collector of Revenue for Ascension Parish is affirmed. The judgment is reversed insofar as it determined the total credits to which Turner Bros. Crane and Rigging, LLC of Delaware was entitled against the use tax, and the matter is remanded for the trial court to determine those sums, together with the resulting taxes, penalties, and attorney's fees due by Turner Bros. Crane and Rigging, LLC of Delaware, consistent with our finding herein that Turner was not required to request a refund of any payments made to the correct taxing entity in order to receive a credit therefor. The answer to the appeal seeking an increase in taxes awarded is denied. Costs of this appeal are assessed to Turner Bros. Crane and Rigging, LLC of Delaware.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED; ANSWER TO APPEAL DENIED.