

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2012 CA 0024

WASHINGTON PARISH SHERIFF'S OFFICE AND ROBERT J. "BOBBY"
CROWE, IN HIS OFFICIAL CAPACITY AS THE DULY ELECTED SHERIFF
AND EX-OFFICIO SALES AND USE TAX COLLECTOR FOR
WASHINGTON PARISH

VERSUS

LOUISIANA MACHINERY COMPANY, LLC

J M Blay Jr

E J Blay Jr

CONSOLIDATED WITH

NUMBER 2012 CA 0025

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CROWE, IN HIS OFFICIAL CAPACITY AS THE DULY ELECTED SHERIFF
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VERSUS

LOUISIANA MACHINERY RENTALS, LLC

Judgment Rendered: FEB 15 2013

Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of Washington
State of Louisiana
Suit Number 101,697 c/w 101,742

Honorable Allison H. Penzato, Presiding

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* * * * *

BEFORE: CARTER, GUIDRY, AND GAIDRY, JJ.

GUIDRY, J.

In this tax proceeding, Louisiana Machinery Company, LLC (LMC) and Louisiana Machinery Rentals, LLC (LMR) appeal from judgments of the trial court granting partial summary judgment in favor of the Washington Parish Sheriff's Office and Robert J. "Bobby" Crowe, in his official capacity as ex officio sales and use tax collector for Washington Parish (WPSO), ordering LMC to pay \$67,757.75 plus additional interest accruing on the net tax amount of \$31,707.78 from August 10, 2011 until paid, and ordering LMR to pay \$24,451.71 plus additional interest accruing on the net tax amount of \$11,769.09 from August 10, 2011, until paid. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

On October 25, 2010, WPSO filed summary proceedings against LMC and LMR under provisions of the Uniform Local Sales Tax Code (ULSTC). WPSO averred that LMC was a registered dealer for Washington Parish sales and use tax purposes and during the tax period December 1, 2003 through June 30, 2007, operated as Louisiana's sole statewide Caterpillar franchise dealer, selling at retail, leasing and/or repairing various new and used Caterpillar equipment and parts in Washington Parish. WPSO also averred that LMR, who failed to register as a dealer with WPSO for Washington Parish sales and use tax purposes, operated as a division forming part of Louisiana's sole statewide Caterpillar franchise dealer during the same tax period, also selling at retail, leasing and/or repairing various new and used Caterpillar equipment and rentals in Washington Parish.

In both proceedings, WPSO alleged that in the course of their sales, servicing and leasing business, LMC and LMR made taxable sales of repairs to and/or leases of various articles of tangible personal property. WPSO averred that it contracted with a private auditing firm, Broussard Partners and Associates (Broussard), to conduct an audit of LMC and LMR's books, which audit revealed

that LMC and LMR incorrectly failed to charge and collect sales and use taxes from their customers in Washington Parish on their taxable sales, leases and/or repairs. WPSO alleged that under the provisions of the ULSTC, LMC and LMR were liable to it for the taxes they failed to charge, collect, and remit along with corresponding penalties and interest due.

WPSO averred that the audit of LMC originally revealed a sales and/or use tax deficiency in the amount of \$42,848.35, and the audit of LMR originally revealed a sales and/or use tax deficiency of \$5,273.81. On November 23, 2009, WPSO issued a "30-Day Notice of Intent to Assess Additional Tax Due-La. R.S. 47:337.48B" for the tax deficiency, plus a penalty of \$10,712.18 and interest of \$25,994.53 for a total of \$79,555.06. On the same date, WPSO also issued to LMR a "30-Day Notice of Intent to Assess Additional Tax Due-La. R.S. 47:337.48B" for the tax deficiency, plus a penalty of \$1,318.55 and interest of \$2,861.63 for a total of \$9,453.99. WPSO averred that LMC and LMR failed to respond to the intent to assess notice within the allotted time in any of the manners prescribed by law.

Consequently, WPSO asserted that on December 23, 2009, it issued to LMC and LMR, via certified mail, formal "NOTICE[S] OF ASSESSMENT 60-Day Assessment—La. R.S. 47:337.51," assessing LMC the total amount of \$79,555.06 and assessing LMR the total amount of \$9,453.99. After considering additional documents, records, and papers submitted by LMC and LMR to Broussard, WPSO reduced LMR's tax deficiency and issued a "REVISED-NOTICE OF ASSESSMENT 60-Day Notice—La. R.S. 47:337.51" dated May 5, 2010, in the total amount of \$61,698.64, including tax, penalty and interest. However, WPSO increased LMR's tax deficiency and issued a "REVISED-NOTICE OF ASSESSMENT 60-Day Notice—La. R.S. 47:337.51" dated May 5, 2010, in the total amount of \$22,202.64, including tax, penalty and interest. WPSO alleged that

these notices of assessment were issued in accordance with all statutory requirements and advised LMC and LMR of their remedies under the law.

WPSO alleged that when LMC and LMR failed to respond to the revised notices of assessment in any manner within the time provided, WPSO filed its petitions, alleging that the assessments, including additional accrued interest, had become final and were the legal equivalent of a judgment against LMC and LMR under the ULSTC. WPSO alleged that with additional accrued interest the total tax penalty and interest through October 31, 2010, for LMC was \$64,076.42 and for LMR was \$23,085.35, which, along with interest continuing to accrue until paid, WPSO sought to make executory. WPSO also sought an injunction, enjoining LMC and LMR from future pursuit of business in Washington Parish until full payment of all amounts due WPSO; registration of a lien and privilege on all property owned by LMC and LMR to secure payment of the amounts due; attorney fees for its employment of counsel to assist in the collection of taxes and penalties; and audit costs for LMC and LMR's filing of "grossly incorrect reports."

WPSO attached to its petitions the affidavit of Mechelle Galloway, CPA, Chief Financial Officer for WPSO, who stated that the facts as alleged in the petition were true and correct to the best of her knowledge and belief. Therefore, WPSO alleged that it had established a prima facie case in accordance with La. R.S. 13:5034, 47:337.61 and comparable provisions of local ordinances, and that the burden shifted to LMC and LMR to establish anything to the contrary.

On December 6, 2010, LMC and LMR filed answers, exceptions, and affirmative defenses to WPSO's petitions. In their answers, LMC and LMR specifically denied the tax, penalties, interest, and audit costs were owed by them; raised the dilatory exceptions of unauthorized use of summary proceeding and vagueness or ambiguity of the petition; and raised the peremptory exception of prescription. Their affirmative defenses alleged error or mistake; extinguishment

of the obligation or, alternatively, offset; waiver of penalties, interest, and audit costs attributable to the amount of tax found due; non-taxability of the transactions included in the subject assessments; and lack of finality of the assessment.

On December 13, 2010, LMC and LMR filed supplemental and amending answers and affirmative defenses, asserting to the extent WPSO might contend that provisions of the ULSTC preclude LMC and LMR from raising or presenting evidence relevant to defenses as to the validity and/or correctness of the audit and/or assessment with no right of judicial review, then those statutes, as interpreted by WPSO, are unconstitutional.

After WPSO filed an unopposed motion and order to transfer and consolidate the two cases pending against LMC and LMR, the trial signed an order on January 21, 2011, consolidating the two cases for trial.

Thereafter, WPSO filed a peremptory exception raising the objection of peremption, seeking to dismiss all of LMC and LMR's exceptions, affirmative defenses, and denials urged in their responsive pleadings. WPSO also filed a partial motion for summary judgment, alleging there were no genuine issues of material fact, and that it was entitled to judgment as a matter of law in its favor and against LMC and LMR declaring that the revised notices of assessment are final and are the executory judgment of the court. WPSO reserved its claims for reasonable attorney's fees and audit costs to be determined. WPSO also moved to strike LMC and LMR's supplemental and amending answers and affirmative defenses on the grounds that they were urged separately and weeks after LMC and LMR's first responsive pleadings, and that these defenses had been rejected by both the Louisiana and United States Supreme Courts.

Following a hearing, the trial court granted the motion to strike and partial motion for summary judgment and ordered that the exceptions of prescription and

subject matter jurisdiction were moot.¹ The trial court rendered judgment in favor of WPSO and against LMC, declaring that the revised notice of assessment, in the sum of \$67,757.75, plus additional interest accruing on the net tax amount of \$31,707.78 from August 10, 2010, until paid, is the final and executory judgment of the court. The trial court also rendered judgment in favor of WPSO and against LMR, declaring that the revised notice of assessment, in the sum of \$24,451.72, plus additional interest accruing on the net tax amount of \$11,769.09 from August 10, 2011, until paid, is the final and executory judgment of the court. Both judgments reserved to WPSO its claims for reasonable attorney's fees and audit costs to be determined in a subsequent summary proceeding. Both judgments state, that after considering the factors set forth in R.J. Messinger v. Rosenblum, 04-1664 (La. 3/2/05), 894 So. 2d 1113, 1122, there is no just reason for delay, and that the judgments are final for purposes of appeal pursuant to La. C.C.P. art. 1915(B)(1). LMC and LMR now appeal from these judgments.

DISCUSSION

"Laws regulating the collection of taxes are *sui generis* and comprise a system to which general provisions of the law have little, if any, relevance." Mallard Bay Drilling, Inc. v. Kennedy, 04-1089, p. 22 (La. 6/29/05), 914 So. 2d 533, 549.

Louisiana Revised Statute 47:337.45 provides several alternative remedies for the tax collector to recover delinquent taxes:

- (1) Assessment and distraint, as provided in R.S. 47:337.48 through 337.60.
- (2) Summary court proceeding, as provided in R.S. 47:337.61.
- (3) Ordinary suit under the provisions of the general laws regulating actions for the enforcement of obligations.

¹ Prior to the hearing, LMC and LMR voluntarily withdrew their dilatory exceptions of vagueness and ambiguity and peremptory exceptions of prescription.

The collector may choose which of these procedures he will pursue in each case, and the counter-remedies and delays to which the taxpayer will be entitled will be only those which are not inconsistent with the proceeding initiated by the tax collector, La. R.S. 47:337.45(B). The fact that the tax collector has initiated proceedings under the assessment and distraint procedure will not preclude him from thereafter proceeding by summary or ordinary court proceedings for the enforcement of the same tax obligation. La. R.S. 47:337.45(B).

In the instant case, WPSO initiated proceedings under the assessment and distraint procedure. At the time WPSO assessed the amount of tax, interest and penalties owed by LMC and LMR, La. R.S. 47:337.51 provided:

A. Having assessed the amount determined to be due, the collector shall send a notice by certified mail to the taxpayer against whom the assessment is imposed at the address given in the last report filed by said taxpayer, or to any address obtainable from any private entity which will provide such address free of charge or from any federal, state, or local government entity, including but not limited to the United States Postal Service or from the United States Postal Service certified software. If no report has been timely filed, the collector shall send a notice by certified mail to the taxpayer against whom the assessment is imposed at any address obtainable from any private entity which will provide such address free of charge or from any federal, state, or local government entity, including but not limited to the United States Postal Service or from the United States Postal Service certified software. This notice shall inform the taxpayer of the assessment and that he has sixty calendar days from the date of the notice to (a) pay the amount of the assessment; (b) request a hearing with the collector or; (c) pay under protest in accordance with R.S. 47:337.63.

B. If any dealer shall be aggrieved by any findings or assessment of the collector, he may, within thirty days of the receipt of notice of the assessment or finding, file a protest with the collector in writing, signed by himself or his duly authorized agent, which shall be under oath and shall set forth the reason therefore, and may request a hearing. Thereafter, the collector shall grant a hearing to said dealer, if a hearing has been requested, and may make any order confirming, modifying or vacating any such finding or assessment. The filing of any such protest shall not abate any penalty for nonpayment, nor shall it stay the right of the taxing authority to collect the tax in any manner herein provided. Appeals from the decision of the collector shall be directed to any state, city or federal court of competent jurisdiction. This Section shall afford a legal remedy and right of action in any state, city or federal court having jurisdiction of the parties and subject

matter for a full and complete adjudication of any and all questions arising in the enforcement of the local ordinance and this Chapter as to the legality of any tax accrued or accruing or the method of enforcement thereof.

WPSO originally sent notices of assessment to LMC and LMR, dated December 23, 2009. However, after Broussard received additional information from LMC and LMR, WPSO issued revised notices of assessment to LMC and LMR on May 5, 2010. These revised notices set forth the taxing period, due date, and amount owed and also provided:

NOTICE: As provided in La. R.S. 47:337.51 B, if you wish to protest, you have thirty (30) calendar days from the date hereof to file with this office a written protest, signed by you or you duly authorized agent, which shall be under oath, fully disclosing the reasons thereof, and request a hearing.

If you do not timely file a written protest and request a hearing, you have sixty (60) calendar days from the date hereof to:

- 1) Pay the amount set forth herein, or
- 2) Pay the total amount set forth herein above under protest as provided in La. R.S. 47:337.63 and file suit for recovery within thirty (30) days of payment, or
- 3) Within thirty (30) days of receipt of this Notice of Assessment, file suit in any state court of competent jurisdiction contesting the final assessment, and in connection therewith, post a commercial bond or other security as provided in La. R.S. 47:337.64 in accordance with the procedures set forth therein.

DO NOT DISREGARD THIS NOTICE. FAILURE TO ACT WITHIN THE TIME OR MANNER PROVIDED WILL RESULT IN THE ASSESSMENT BECOMING FINAL AND ENFORCEABLE BY WARRANT FOR DISTRAINT. ADDITIONAL PENALTIES, INTEREST AND COLLECTION FEES MAY BE ASSESSED AT THAT TIME.

After sending these notices and receiving no response from LMC or LMR within the time prescribed by La. R.S. 47:337.51, WPSO initiated a summary proceeding on October 25, 2010. In this summary proceeding, WPSO alleged that the revised assessments had become final and were the equivalent of a final judgment, which it sought to be made executory. In conjunction therewith, WPSO submitted an affidavit of Michelle Galloway, who stated under oath that she had read the petitions and that to the best of her knowledge and belief, all of the

allegations of fact contained therein are true and correct. Additionally, WPSO submitted copies of the revised notices of assessment.

LMC and LMR do not dispute that they failed to respond to the revised notices of assessment in any manner. However, they contend that 1) the notices of assessment do not comply with the statutory requirements set forth in La. R.S. 47:337.51(A) and therefore, are invalid and void and 2) the assessments were not final after sixty days from the date of notice of assessment.

As noted by this court in Livingston Parish School Board v. Louisiana Machinery Company, L.L.C., 11-1235, p. 9 (La. App. 1st Cir. 6/8/12), 98 So. 3d 404, the availability of relief under La. R.S. 47:337.61 as dependent upon compliance with the notice requirements of La. R.S. 47:337.51(A) is inconsistent with the statutory classification of the summary proceeding as an alternative remedy in addition to any other procedure for the enforcement and collection of sales and use taxes. If a prior assessment is unnecessary to a tax collector employing summary proceedings, then compliance with the notice provisions applicable to a formal assessment cannot be a condition precedent. Livingston Parish School Board, 11-1235 at p. 9, 98 So. 3d at ____.

However, in the instant case, the summary proceedings were entirely premised and dependent upon the alleged finality of the revised assessments. See Catahoula Parish School Board v. Louisiana Machinery Rentals, LLC, 12-443, p. 4 (La. App. 3rd Cir. 10/24/12), ____ So. 3d _____. Therefore, though generally the availability of relief under La. R.S. 47:337.61 is not dependent upon compliance with the notice requirements of La. R.S. 47:337.51, when the finality of an assessment is the sole basis upon which a tax collector seeks relief pursuant to a subsequent summary proceeding, then it naturally follows that compliance with the notice provisions is necessary. See Catahoula Parish School Board, 12-443 at p. 4; see also Ascension Parish Sales and Use Tax Authority v. Louisiana Machinery

Rentals, Inc., 11-1784, p. 9 (La. App. 1st Cir. 3/30/12), 92 So 3d 404, 410 and West Baton Rouge Parish Revenue Department v. Louisiana Machinery Rentals, L.L.C., 11-0711, pp. 11-13 (La. App. 1st Cir. 3/9/12), 91 So. 3d 1032, 1040-1041 (examining notices of assessment and finding taxing authority complied with La. R.S. 47:337.51 in reviewing summary proceeding initiated by taxing authority seeking to have notice of assessment declared to be a final judgment and made executory).

In the instant case, the revised notices of assessment state that pursuant to La. R.S. 47:337.51, LMC and LMR are notified of the amount of sales and/or use taxes, interest, and penalties owed for the specified period and set forth the remedies available to LMC and LMR as taxpayers under La. R.S. 47:337.51(A) and more specifically as dealers under La. R.S. 47:337.51(B). The notices also go beyond the statutory requirement by setting forth an alternative remedy for dealers who pay under protest under La. R.S. 47:337.64.

Further, we find no merit to LMC and LMR's argument on appeal that the revised notices of assessment are deficient because they do not notify LMC and LMR that they have 60 days from the date of the notice to request a hearing as mandated by La. R.S. 47:337.51(A). Louisiana Revised Statute 47:337.51(B), which relates specifically to dealers, states that a dealer aggrieved by any findings or assessment of the collector may, within 30 days, file a protest with the collector and request a hearing. Therefore, the notices inform LMC and LMR, as taxpayers who are also dealers, of the statutory delay within which they have to request a hearing with the tax collector, as well as the other statutory remedies available generally to taxpayers and those specifically available to dealers. Accordingly, we find that the notices comply with the statutory notice requirements of La. R.S. 47:337.51(A) and (B).

Finally, because the notices comply with the assessment and distraint provisions governing notice, and LMC and LMR chose not to avail themselves of any of the statutory remedies available to them, once the sixty-day period expired with no protest or payment from LMC and LMR, the revised assessments were final and were the equivalent of a final and enforceable judgment, precluding LMC and LMR from thereafter raising defenses, whether by exception or on the merits, in a summary rule to collect the sales tax.² See Ascension Parish Sales and Use Tax Authority, 11-1784 at p. 9, 92 So. 3d at 410; West Baton Rouge Parish Revenue Department, 11-0711 at pp. 11-14, 91 So. 3d at 1040-1041; see also La. R.S. 47:337.52. Therefore, when WPSO established through the affidavit of Galloway that it had followed all the steps of the assessment and distraint procedure without any response from LMC and LMR, it satisfied its burden of proving that its assessments had become final, and that it was entitled to judgment in its favor as a matter of law. See West Baton Rouge Parish Revenue Department, 11-0711 at p. 13, 91 So. 3d at 1041; See also La. R.S. 47:337.61(4) (setting out that an affidavit of the taxing authority or the collector's representative stating that the facts alleged in the pleadings are "true to the best of the affiant's knowledge and belief" will satisfy the evidentiary requirements and establish a prima facie case in favor of the taxing authority).

CONCLUSION

For the foregoing reasons, we affirm the judgments of the trial court. All costs of this appeal are assessed to Louisiana Machinery Company, LLC and Louisiana Machinery Rentals, LLC.

AFFIRMED.

² Because we find that the revised assessments at issue are final, precluding LMC and LMR from presenting any defenses in the summary proceeding by way of exception or on the merits, we likewise find no error in the trial court's denial of LMR's peremptory exception raising the objection of improper party defendant.