STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2013 CA 1323

POT-O-GOLD RENTALS, LLC

VERSUS

CITY OF BATON ROUGE

Judgment Rendered: SEP 17 2014

* * * * * * * *

Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Case No. C609,154

The Honorable William A. Morvant, Judge Presiding

* * * * * * * *

Mary E. Roper
Parish Attorney
Randy Ligh
Special Assistant Parish Attorney
Blake A. Pino
Assistant Parish Attorney
Baton Rouge, Louisiana

Counsel for Defendant/Appellant
City of Baton Rouge

David R. Cassidy
David R. Kelly
Nicole F. Gould
Baton Rouge, Louisiana

Counsel for Plaintiff/Appellee
Pot-O-Gold Rentals, LLC

* * * * * * * *

BEFORE: KUHN, GUIDRY, McDONALD, HIGGINBOTHAM, AND THERIOT, JJ.

McDonald, J. dissents and assigns reasons.
Higginbotham, J. dissents and adopts J. McDonald's reasons.

THERIOT, J.

The defendant, the City of Baton Rouge and Parish of East Baton Rouge (City) appeals the judgment of the Nineteenth Judicial District Court rendered in favor of the plaintiff, Pot-O-Gold Rentals, LLC (Pot-O-Gold). On motion for summary judgment, the trial court determined that the plaintiff's waste removal services were not taxable as gross proceeds derived from the lease or rental of tangible personal property and ordered the City to refund taxes that had been paid by the plaintiff under protest. For the following reasons, we reverse and remand.

STATEMENT OF THE FACTS

Pot-O-Gold is a Louisiana limited liability company that offers a variety of waste management services. Relevant here, Pot-O-Gold owns portable toilets and holding tanks that it leases to customers, and offers cleaning and sanitation services for these rented toilets and tanks. Pot-O-Gold's related waste management services include the pumping, removing, hauling, and disposal of generated or collected human waste in its rented toilets and tanks. Pot-O-Gold also offers cleaning and sanitation services for portable toilets and holding tanks owned by others and does not require rental customers to purchase its sanitation or cleaning service. However, if a rental customer chooses to reject related sanitation or cleaning service, the customer is charged a higher rental fee.

The present dispute derives from a 2011 sales and use tax compliance audit of Pot-O-Gold's operations conducted by the City for the period from January 1, 2007 through December 31, 2008. The audit revealed that, although Pot-O-Gold collected taxes on its rentals of portable toilets and holding tanks, it had not generally collected taxes for the cleaning or sanitation services it provided in connection with these rentals or for fuel

surcharges on such rentals.[1] Thus, the City issued a $69,821.65 assessment to Pot-O-Gold, representing the sum of sales taxes owed ($37,160.92) along with interest ($23,370.14) and penalties ($9,290.59). Pot-O-Gold paid the assessment under protest and filed the instant suit seeking recovery thereof.

ASSIGNMENTS OF ERROR

On appeal, the City argues that the trial court erred in granting Pot-O-Gold's motion for summary judgment. Specifically, the City contends:

1) The trial court erred by allowing the splitting and dividing of proceeds from rental contracts into taxable and nontaxable components.
2) The trial court erred by failing to recognize that services, ordinarily nontaxable if standing alone, may nonetheless be taxable as gross proceeds derived from a lease or rental.
3) The trial court erred by inappropriately relying on and misinterpreting relevant jurisprudence.
4) The trial court erred by relying on non-binding Revenue Rulings and a letter sent by the Louisiana Department of Revenue.
5) The trial court erred by granting Pot-O-Gold's motion for summary judgment even though there were outstanding issues of material fact.

STANDARD OF REVIEW

An appellate court must review a grant of summary judgment *de novo*, utilizing the same criteria that govern the trial court's consideration of whether or not summary judgment is appropriate. See, e.g., *Guillory v. Interstate Gas Station,* 94-1767 (La. 3/30/95), 653 So.2d 1152, 1155; *J. Ray McDermott, Inc. v. Morrison*, 96-2337 (La. App. 1st Cir. 11/7/97), 705 So.2d 195, 202 writs denied, 97-3055, 97-3062 (La. 2/13/98), 709 So.2d 753, 754.

[1] Although the City assessed taxes on both fuel surcharges and related services, the parties mutually agreed in open court that arguments relating to the cleaning, sanitation, and waste removal services likewise apply to the fuel surcharge issues. Thus, discussion here will be limited to those services fully briefed on appeal.

Summary judgment should be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, 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(B)(2). Summary judgment is designed to ensure just, speedy, and inexpensive determination of disputes and is thus favored under Louisiana law. La. C.C.P. art. 966(A)(2).

DISCUSSION

In its first two assignments of error, the City essentially argues that the trial court erred by misinterpreting and misapplying statutory tax law. [2] The Louisiana Constitution allows local governments to levy and collect taxes on "the sale at retail, the use, the lease or rental, the consumption, and the storage for use or consumption, of tangible personal property and on sales of services as defined by law...". La. Const. art. VI, § 29(A). In accordance with this allowance, the City enacted Ordinance 10127 § 2, which provides in relevant part:

> (a) There is hereby levied from and after January 1, 1995, for general municipal purposes, a tax upon the sale at retail, the use, the consumption, the distribution and storage as defined herein, and upon the **lease or rental of tangible personal property** and the sale of services within the City at a rate of two (2%) percent. This tax is levied under the general taxing authority conferred upon the City, as ratified by Article 6, Section 6 of the Louisiana Constitution of 1974.
>
> * * *
>
> (e) Each of the taxes specified herein shall be levied upon the following:
>
> * * *
>
> (3) The **gross proceeds derived from the lease or rental of tangible personal property**, where the lease or rental of such

[2] We find that the trial court's grant of summary judgment constitutes reversible error as per the appellant's first two assignments of error. Thus, we need not consider assignments of error 3 through 5.

property is an established business, or part of the same is incidental or germane to the business. [Emphasis added.]

As stated above, Pot-O-Gold's business operations included the leasing of portable toilets and holding tanks to customers and providing related cleaning and sanitation services. Although the leased toilets and tanks do constitute taxable tangible personal property,[3] Ordinance 10127 § 1(p) limits the definition of taxable "services" so as to exclude the waste removal or cleaning services provided by the appellee.[4] Thus, standing alone, Pot-O-Gold's services would ordinarily be nontaxable under the plain language of Ordinance 10127. Nonetheless, Pot-O-Gold may still incur tax liability for services that relate to the lease of tangible personal property (toilets and tanks) if the proceeds from these services constitute part of the "gross proceeds" derived from the rental of taxable tangible personal property. See Ordinance 10127 § 2(e)(3).

In its motion for summary judgment, Pot-O-Gold correctly noted that its furnished services were not an enumerated taxable service. Likewise, Pot-O-Gold contended payments received for these ordinarily nontaxable services could not be regarded as "gross proceeds" since the services were optional, not required for the rental of the toilets and tanks, and offered as an independent service separate and apart from its rental operations. Pot-O-Gold additionally pointed out that "gross proceeds" was not statutorily defined and cited jurisprudence that indicated any ambiguity or uncertainty

---

[3] The common law terminology "tangible personal property" is used to comport with the relevant Louisiana tax law(s). The phrase "tangible personal property" as used in sales/ use tax statutes is equivalent to "corporeal moveable property" as defined by the Louisiana Civil Code. See *McNamara v. Electrode Corp.*, 418 So.2d 652, 656 (La. App. 1st Cir. 1982).

[4] EBR Sales & Use Tax Ordinance 10127 § 1(p) limits taxable services to the following: furnishing of rooms by hotels and tourist camps; sales of admissions to places of amusement; furnishing of storage or parking privileges; furnishing of printing services; furnishing of laundry services; furnishing of cold storage space; and the furnishing of repairs to tangible personal property.

in statutory language should be resolved against the taxing authority and in favor of the taxpayer.

Previously, this court has been called upon to interpret the statewide counterpart to Ordinance 10127, La. R.S. 47:302, which provides in relevant part:

> B. There is hereby levied a tax upon the lease or rental within the state of each item or article of tangible personal property, as defined herein; the levy of said tax to be as follows:
>
> (1) At the rate of two per centum (2%) of **the gross proceeds derived from the lease or rental of tangible personal property**, as defined herein, where the lease or rental of such property is an established business, or part of an established business, or the same is incidental or germane to the said business. [Emphasis added.]

This court has explained that sales and use taxes, like the ones levied by La. R.S. 47:302 and Ordinance 10127, are not imposed on conveyed property itself, but rather are imposed on the event incident to the initial use of conveyed property by a purchaser or lessee. See *A.M.A. Distributors, Inc. v. School Board of the Parish of Iberville, et al.*, 98-0373 (La. App. 1st Cir. 4/1/99), 729 So.2d 765, 767, writ denied, 99-1255 (La. 6/25/99), 746 So.2d 600. As it is the *transaction* which is subject to taxation by the state or local municipality, when assessing the taxability of an agreement involving the lease of tangible personal property, there is ordinarily no breakdown into taxable and nontaxable elements. See *McNamara v. Electrode Corp.*, 418 So.2d 652, 661 (La. App. 1st Cir.), writ denied, 420 So.2d 986 (La. 1982). To determine whether the transaction is taxable, we must examine the "essence of" or the "true object of" the transaction. *Id.* at 662. The substance of the agreement, not the wording of the contract or the separation of ancillary options or services, determines the taxability of a transaction. See *Id.*

Enterprise Leasing Co. of New Orleans v. Curtis is illustrative. There, following an audit of the plaintiff corporation's operations, Livingston Parish assessed Enterprise $25,212.01 in unpaid sales and use taxes. *Enterprise Leasing Co. of New Orleans v. Curtis*, 2007-0354 (La. App. 1st Cir. 11/2/07), 977 So.2d 975, 976-77, writ denied, 2007-2320 (La. 2/1/08), 976 So.2d 719. Enterprise paid the assessment under protest and sought a refund. *Id.* at 977. Enterprise rented automobiles to customers; when renting a vehicle, customers could either choose to accept personal responsibility for any damage that might occur to the vehicle, or could purchase collision damage waiver (CDW). Enterprise had not collected sales taxes for the CDW payments. *Id.* at 976-77. The trial court found in favor of the parish, holding that the CDW payments constituted part of the gross proceeds derived from the rental of the tangible personal property automobile. *Id.* at 977.

On appeal, Enterprise argued that the sale of CDW was an optional, separate purchase that did not constitute an integral part of an indivisible rental contract and should not have been regarded as the gross proceeds of the rental of tangible personal property. *Id.* at 979. This court rejected Enterprise's argument and affirmed the trial court's decision on this point. *Id.* at 981. We explained that Enterprise and its customers had contracted for CDW as part of the rental agreement, noted that the provision of CDW could only be made available in connection with the automobile rental, and concluded that the "real object" of the transactions at issue was the lease of a tangible personal property vehicle. *Id.* at 980. Although Enterprise attempted to avoid tax liability by noting that it offered other optional services not subject to sales and use taxes, like accident insurance and supplemental liability protection, we found that any other offered nontaxable

services were immaterial to the determination of the taxability of the rental transaction. See *Id.* at 980-81.

Subsequent to our decision in *Enterprise*, the Second Circuit decided a similar dispute using the same rationale in *Rent-A-Center East, Inc. v. Lincoln Parish Sales and Use Tax Commission.* , 46,054 (La. App. 2d Cir. 3/9/11), 60 So.3d 95, 97, writ denied, 2011-0713 (La. 5/20/11), 63 So.3d 985. There, the plaintiff corporation leased various items of tangible personal property to its customers. When renting property from Rent-A-Center (RAC), customers had the option to accept personal responsibility for damage to the rented property or they could purchase optional liability damage waiver (LDW) coverage, provided through a separately signed addendum to the rental agreement. *Id.* RAC had not collected sales taxes on the proceeds derived from this LDW coverage. *Id.* On appeal of summary judgment granted in favor of the parish the Second Circuit affirmed, concluding that the essence of the transactions was the rental of tangible personal property. *Id.* at 99. Like in *Enterprise*, although the LDW proceeds would ordinarily have been nontaxable, because the service was incidental to the rental, the money collected for the LDW coverage constituted taxable gross proceeds. *Id.*

In the instant case, the trial court relied heavily on the separability of the rendered services in granting Pot-O-Gold's motion for summary judgment. For example, the trial court noted that lessees were not required to purchase the Pot-O-Gold's cleaning and sanitation services and that these services were offered to other parties independently from the appellee's rental operations. Despite recognizing that in the combined lease-services contracts at issue, the "true object" of the transactions was the furnishing of toilets and tanks, the trial court nonetheless concluded that nontaxable

services continued to be nontaxable, regardless of the relationship between the services and the leased property. This finding does not comport with established jurisprudence and was in error.

While the Second Circuit may have relied, in part, on the fact that the disputed LDW service could not be purchased from anyone other than RAC, see *Rent-A-Center*, 60 So.3d at 99, the possibility of purchasing the disputed service from another party is not dispositive. Rather, a court must review the totality of the circumstances surrounding the event incident to the initial use of the rented property, i.e. the transaction itself, to determine its taxability. See *A.M.A. Distributors, Inc.*, 729 So.2d at 767.

Here, the cleaning and sanitation services were provided in connection with, and incidental to, the rental of tangible personal property (toilets and tanks). We agree with the trial court that the "true object" of the transactions between Pot-O-Gold and its customers was the provision of the toilets and tanks. This finding should have determined the taxability of the entire transaction. Money collected for ordinarily nontaxable cleaning and sanitation services became taxable gross proceeds of the lease by virtue of the inexorably intertwined relationship between the services and the leased property. It is of no import whether the services were optional for lessees, whether the services could be purchased from another party, whether the services could be rejected, or whether the services could be purchased independently from the plaintiff by others.

CONCLUSION

Reviewing the trial court's grant of summary judgment *de novo*, we find that the grant of summary judgment was in error. The judgment of the trial court is reversed and this case is remanded for further proceedings in

accordance with this holding. All costs of this appeal are assessed to the appellee, Pot-O-Gold Rentals, LLC.

REVERSED AND REMANDED.

POT-O-GOLD RENTALS, LLC

VERSUS

CITY OF BATON ROUGE

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2013 CA 1323

McDONALD, J., DISSENTING:

I must respectfully dissent from the majority's well written and well reasoned opinion, because I believe the trial judge's opinion is just as well reasoned and is a reasonable interpretation of the relevant ordinance. Not only does the ordinance not include the cleaning and waste removal as a taxable service, it specifically excludes it. Thus, as the majority indicates, this service standing alone would not be taxable under the plain language of Ordinance 10127. Additionally, the term "gross proceeds" is not defined.

The majority points out that the sales and use tax is not only imposed on the conveyed property, but also "on the event incident to the initial use of conveyed property by a purchaser or lessee." They then resort to a discussion of determining the "essence of" or the "true object" of the transaction, finding that the substance of the agreement, and not the separation of ancillary options or services, determines the taxability of the transaction.

The majority concludes that "the cleaning and sanitation services were provided in connection with, and incidental to, the rental of tangible personal property toilets and tanks ... [and] that the 'true object' of the transactions between Pot-O-Gold and its customers was the provision of the toilets and tanks." In reaching this conclusion, the majority relies on two cases that I find clearly distinguishable. In *Enterprise*, the collision damage waiver insurance (CDWI)was only available if the vehicle was rented from Enterprise. It was not possible to rent the vehicle from another company and obtain the CDWI from Enterprise. The

same is true for the liability damage waiver insurance (LDWI) at issue in the *Rent-a-Center* (RAC) case. The LDWI was only available for property rented from RAC. These two types of property insurance coverage, while optional, are inextricably woven into the fabric of the rental agreement.

That is not the case in the Pot-O-Gold situation. Pot-O-Gold provides three different options to its customers: the lease of the portable toilet with no cleaning services included; the lease of the portable toilet with cleaning services included; and the providing of cleaning services to another vendors' portable toilet. The first is clearly taxable and the third is clearly not. It is the second situation that is at issue in this appeal. Pot-O-Gold points to the conflict between Louisiana Department of Revenue Ruling Nos. 06-013 and 06-012 that were relied on by the trial court. While Ruling 06-013 supports the taxing position, Ruling 06-012 does not. In Ruling 06-012, the LDR found that the waste removal from a trash dumpster is not a taxable service. Pot-O-Gold quotes from the ruling:

> The reason that the sales tax treatment of transactions for the furnishing of trash dumpsters and associated services ... is different from the tax treatment of transactions for the furnishing of portable toilet facilities and associated services[,] as discussed in that other [R]evenue [R]uling, is that the ["true object"] of the transactions for the dumpsters and trash pickup is the trash removal service. In the case of the transactions for portable toilets, the ["true object"] of the transaction is the furnishing of the facilities [themselves].

The trial judge found this to be distinction without a difference, so does Pot-O-Gold, and so do I. In referencing the contradiction, the trial court stated:

> But, somehow that same non-taxable service then becomes taxable it it's done in association with a port-o-let that plaintiff has provided. And I'm again at a loss at how the only differential ownership of the particular facility converts a non-taxable service that's not contained in ... parish ordinance as a taxable service somehow becomes taxable because the container, port-o-john, whatever you want to call it, is owned by the person providing the service as opposed to the service being provided to a non-owned port-o-let. I think that gives a completely inconsistent result. I think Revenue Ruling 6-012 and 6-013 give completely inconsistent results in their treatment of the disposal—removal and disposal of waste from a port-o-let and removal and disposal of waste from a dumpster. And, again, I look at

it, and their attempt to distinguish the two in the last paragraph of [Revenue Ruling] 6-012 is a distinction without a difference.

I believe the majority's interpretation creates an absurd result. Providing cleaning services for the portable toilet is not a taxable event if it is owned by someone else; it is taxable if owned by the lessor. Thus, if Pot-O-Gold were to form a separate entity that only provided cleaning services, this entity would not have to collect sales taxes.

It is hard for me (and evidently the trial judge wrestled with it) to understand the difference between the dumpster situation and the portable toilet situation. It is just as reasonable to find the true object of the portable toilet transactions is the removal of human waste as it is to find the object of the dumpster transactions is the removal of trash. Conversely, it would be just as reasonable to find that the true object of both the portable toilet and dumpster transactions is the lease of the unit and that the disposal of waste is ancillary to, and a part of, the lease.

Taxing statutes are to be interpreted liberally in favor of the taxpayer and against the taxing authority. If the statute can reasonably be interpreted more than one way, the interpretation less onerous to the taxpayer is to be adopted. *UTELCOM, Inc. v. Bridges*, 2010-0654 (La.App. 1 Cir. 9/12/11), 77 So.3d 39, 47, writ denied, 2011-2632 (La. 3/2/12), 83 So.3d 1046. In this case, Ordinance 10127 is subject to more than one reasonable interpretation. Thus, the one favoring the taxpayer, Pot-O-Gold, should be adopted, as it was by the trial judge.

For these reasons, I would affirm the judgment of the trial court.