

**BOARD OF TAX APPEALS
STATE OF LOUISIANA**

**ROBERT AND COLETTA BARRETT, JR.,
Petitioners**

V.

DOCKET NO. 11328B

**LOUISIANA DEPARTMENT OF REVENUE,
Respondent**

JUDGMENT AND REASONS

This matter came before the Board for a hearing on the merits on July 13, 2022. Presiding at the hearing were Francis J. "Jay" Lobrano, Chairman, Vice-Chairman Cade R. Cole, and Judge Lisa Woodruff-White (Ret.). Present before the Board were Debra Morris, attorney for the Secretary, Department of Revenue (the "Department"), and attorney Robert C. Barrett, Jr., representing himself and his spouse Coletta Barrett, (collectively "Taxpayers"). At the conclusion of the hearing, the Board took the matter under advisement. The Board now issues Judgment in accordance with the attached Written Reasons:

IT IS ORDERED, ADJUDGED AND DECREED that there be Judgment in favor of the Department and against the Taxpayers and that the Petition is hereby DISMISSED.

**JUDGMENT RENDERED AND SIGNED at Baton Rouge,
Louisiana, this 4th day of May, 2023.**

FOR THE BOARD:



**Francis J. "Jay" Lobrano, Chairman
Louisiana Board of Tax Appeals**

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Facts

Taxpayers claimed an overpayment and right to a refund of individual income tax for the 2013 Tax Period. Taxpayers calculated an overpayment in part based on their claim for the Motion Picture Investment Tax Credit (“MPITC”) provided for by La. R.S. 47:6007. The Department disallowed the MPITC and the refund. On May 17, 2018,

Taxpayers subsequently filed their Petition seeking a redetermination of the disallowance of their MPITC claim.¹

Much of the underlying facts are not in dispute. The MPITC was originally certified in 2013 for a production identified as Kidnapping Freddy Heineken. In 2014, RCB Enterprises, L.L.C. (“RCB”) purchased the MPITC and registered itself with the Tax Credit Registry as owner. During the 2013 Tax Year, Taxpayers owned a 90% interest in RCB. At some point between December 31, 2013, and January 3, 2018, Taxpayers acquired 100% ownership of RCB. On January 3, 2018, Taxpayers claimed the MPITC their 2013 Amended Return.

Taxpayers claim that they received the MPITC from RCB by allocation or flow-through. In support of this assertion, Taxpayers introduced a 2013 Schedule K-1 into evidence. The 2013 K-1 reflects the Taxpayers’ 90% interest in RCB that they held during the 2013 Tax Year. The 2013 K-1 further reports that RCB allocated \$10,000.00 of MPITC to Taxpayers. In addition, the Department introduced a 2013 Amended Form R-10611 showing Taxpayers’ claim for the MPITC in the amount of \$7,930.00 for the 2013 Tax Year.

Neither Taxpayers nor RCB ever filed notice of the allocation or flow-through with the Department or with the Louisiana Department of Economic Development (“LDED”). Neither did Taxpayers register themselves individually, as the owners of the MPITC with the Tax Credit

¹ Counsel for Taxpayers raised the issue of a Louisiana Citizens Insurance Credit (“LCIC”) in their Pre-Hearing Memoranda. At the hearing, Taxpayers introduced Exhibit 2013 B-1, which they claimed shows coverages for the 2013 Tax Year. However, neither counsel presented any argument on the LCIC.

Registry. Instead RCB was always the registered owner of the MPITC, as shown by the Credit Registration Forms admitted into evidence.

Taxpayers argue that ownership must flow-through from RCB to themselves because RCB is a disregarded entity for income tax purposes. Moreover, Taxpayers contend that their 100% ownership of RCB means that they were not required to file notice of transfer or register their individual ownership of the credit. The Department's position is that Taxpayers' do not own the MPITC. In addition, the Department argues that the disallowance was proper because Taxpayers did not submit the forms specified in Revenue Information Bulletin 14-005 for claiming the credit on a return.

Discussion

The requirements of notice and registration were not always mandatory pre-requisites to effect a transfer of ownership of the MPITC. The Legislature enacted the registration requirement in 2013 Act 418, otherwise known as the Tax Credit Registry Act ("TCRA"). In addition to requiring registration, the TCRA contains a transfer notice requirement in La. R.S. 47:1524(D). As enacted, that provision stated in relevant part:

(1) Joint notice from the transferor and the transferee of all tax credit transfers shall be submitted to the department, including additional information that the secretary deems necessary and appropriate. Upon receipt of the applicable tax credit information, the department shall record the transfer of the tax credit by recording the applicable identification numbers, the name of the transferor and transferee, the amount of the tax credits being transferred, and any other information deemed necessary by the secretary.

(2) Notwithstanding any other provision of law to the contrary, no issuance or transfer of tax credits after January

1, 2014, shall be effective as to third parties nor recognized by the department until it has been recorded in the registry.

(3) The effectiveness of a tax credit transfer as between the transferor and the transferee shall be provided by agreement of the parties or, in the absence of an agreement, in accordance with the provisions of the Louisiana Civil Code and its ancillaries.

La. R.S. 47:1524(B)(6) defines “transfer” to include an “allocation” of tax credits. La. R.S. 47:1524(D) as quoted above was effective from June 21, 2013,² to January 1, 2016. On its face, the statute did not nullify a transfer occurring during that period because of noncompliance with notice and registration. However, the statute did specify that noncompliance prevented the Department from recognizing the transfer. Thus, it was possible for a noncompliant transferee to be unable to claim a credit on their return, despite being able to enforce their ownership against the transferor.

In 2015 Act 129 and 2015 Act 144, the legislature eliminated that scenario. The 2015 Acts deleted La. R.S. 47:1524(D)(3) and amended La. R.S. 47:1524(D)(2) to explicitly render a transfer ineffective “as between the transferor and transferee” until it was recorded in the Registry.³ However, these changes did not go into effect until January 1, 2016.

Neither party attempted to introduce any contract of transfer or membership agreement showing the specific terms governing the transfer or allocation of the MPITC. However, a preponderance of

² The date signed by the Governor. This is the effective date under Section 3 of the TCRA.

³ Act 129 was introduced as HB 748, while Act 144 was introduced as SB 106. Both pieces of legislation make the same amendments to La. R.S. 47:1524(D)(2) and both delete Subparagraph (3).

evidence in the record shows that transfer of the MPITC occurred on November 12, 2014. That date falls after the enactment of the TCRA but before the effective date of Act 129 and Act 144. Therefore, the transfer was effective to convey ownership as between transferor and transferee. However, La. R.S. 47:1524(D)(2) still prohibits recognition of the transfer until it is recorded in the Tax Credit Registry. The fact that Taxpayers received the MPITC by allocation does not alter the Board's conclusion because, for purposes of La. R.S. 47:1524, an allocation is included in the definition of the term "transfer."

During the hearing, the Board asked counsel to address the significance of LAC 61:I.6113(A)(3) - (4)(b), which provides:

3. Allocate. If the investor tax credits are earned by, or allocated or transferred to, an entity not taxed as a corporation, the entity may allocate the credit by issuing ownership interests to any individuals or other entities on such terms that are agreed to by the relevant parties and in accordance with the terms of the allocating entity's operating agreement or partnership agreement. These terms may result in the allocation of up to 100 percent of the investor tax credits to any individual or entity regardless of the federal tax treatment of the allocation:

a. the allocating entity:

i. may be treated as a partnership for federal or state tax purposes; or

ii. may be treated as an entity that is disregarded as an entity separate from its owners for federal or state tax purposes, and in which case, each holder may agree that it will not treat the allocating entity as a partnership or itself as a partner or the ownership interest in the allocating entity as a partnership interest for federal tax or state tax purposes.

4. Claim. Tax credits may be claimed as follows . . . in the case of tax credits owned (held) by an entity not taxed as a corporation, the credits shall be deemed to flow through or be allocated to partners . . . at the end of the tax year in which

the entity acquired the credits unless the partnership or membership agreement provides otherwise

The Department submitted a post-hearing brief addressing this issue. Taxpayers did not do so despite being allowed a significant extension of time to do so. The Department's position is that the Regulation must yield to contrary statutory authority in La. R.S. 47:1524 and La. R.S. 47:6007. Alternatively, the Department argues that the Regulation is invalid because it was promulgated under La. R.S. 47:1125.1. That statute was repealed in 2017. The Department additionally points out that it did not promulgate LAC 61:I.6113. In fact, LAC 61:I.6113 was originally promulgated by LDED as LAC 61:I.1613.⁴

The Board does not agree with the Department's reasoning. First, La. R.S. 47:1125.1 was still in effect when the RCB flowed-through the MPITC to the Taxpayers. Second, LAC 61:I.6113 did not conflict with La. R.S. 47:1524 and La. R.S. 47:6007 at that time. La. R.S. 47:1524, like the Regulation, stated that the effectiveness of a transfer of a credit was determined by agreement of the parties. This did not conflict with any part of La. R.S. 47:6007 at the time. In addition, prior to January 1, 2016, none of the provisions made a transfer of the MPITC ineffective if the parties not satisfy notice and registration requirements. There is no conflict that could have prevented Taxpayers from acquiring ownership of the MPITC.

Like La. R.S. 47:1524, La. R.S. 47:6007 established that noncompliance with notice and registration results in disallowance of the

⁴ LDED re-promulgated LAC 61:I.1613 as LAC 61:I.6113 on July 19, 2019.

MPITC. From June 21, 2013 to June 28, 2015, La. R.S. 47:6007(C)(4)(b)

provided:

(b) Transferors and transferees shall submit to the Department of Revenue in writing, a notification of any transfer or sale of tax credits within ten business days after the transfer or sale of such tax credits. The notification shall include the transferor's tax credit balance prior to transfer, a copy of any tax credit certification letter(s) issued by the office and the secretary of the Department of Economic Development the transferor's remaining tax credit balance after transfer, all tax identification numbers for both transferor and transferee, the date of transfer, the amount transferred, a copy of the credit certificate, price paid by the transferee to the transferor, in the case when the transferor is a state-certified production, for the tax credits, and any other information required by the office or the Department of Revenue. For the purpose of reporting transfer prices, the term "transfer" shall include allocations pursuant to Paragraph (2) of this Subsection as provided by rule. The tax credit transfer value means the percentage as determined by the price paid by the transferee to the transferor divided by the dollar value of the tax credits that were transferred in return. The notification submitted to the Department of Revenue shall include a processing fee of up to two hundred dollars per transferee, and any information submitted by a transferor or transferee shall be treated by the office and the Department of Revenue as proprietary to the entity reporting such information and therefore confidential. However, this shall not prevent the publication of summary data that includes no fewer than three transactions.

The reference to Paragraph 2 is a typo introduced by 2009 Act 478.

Clerical and typographical errors in the Revised Statutes shall be disregarded when the meaning of the legislature is clear. La. R.S. 1:5.

Prior to Act 478, the reference was to Paragraph 3. Paragraph 3 contains a provision permitting individual members of a partnership to claim the

MPITC on their individual income tax returns. La. R.S.

47:6007(C)(3)(c)(ii). Paragraph 2 establishes the year in which the credit

is allowed and a carryforward of excess credit. The Legislature clearly

intended to refer to the allocation described in Paragraph 3. Therefore, La. R.S. 47:6007 specifically treats an allocation of the credit as a transfer for the purpose specified in the quotation above.

In the event of an allocation, LAC 61:I.6113(B)(1) requires the allocator to submit an original certificate of ownership evidencing the credits allocated or claimed to LDED. Upon receipt of such a certificate from the allocator, the LDED may issue a new certificate of ownership to the allocatee. LAC 61:I.6113(B)(1). In turn, the allocatee must submit an original certificate of ownership with the return on which the credit is claimed to the Department. LAC 61:I.6113(B)(5). If LDED fails to timely issue a certificate of ownership, that failure does not invalidate a transfer of the credit. Moreover, the taxpayer will not be prohibited from claiming an MPITC that has been otherwise transferred or claimed in accordance with the Regulation and La. R.S. 47:6007. The regulation does not conflict with the statute but actually refers to and relies on the provisions of La. R.S. 47:6007 governing transfer and application of the MPITC.

The fact that Taxpayers came to own 100% of RCB does not excuse compliance with the requirements set forth in La. R.S. 47:1524, 47:6007, and LAC 61:I.6113. Each provision imposes requirements on transactions that are expressly defined to include an allocation from a pass-through entity. Nothing in any of these provisions treats a disregarded single-member LLC differently than other pass-through entities for purposes of notice and registration. Additionally, there is no general predisposition towards collapsing the personhood of an LLC with that of its members. *See Nunez v. Pinnacle Homes, L.L.C.*, 2015-0087, p.

5 (La. 10/14/15); 180 So.3d 285, 289 (“[T]he personalities of an L.L.C. and its members are wholly separate by law.”); *Ogea v. Merritt*, 2013-1085, p. 6 (La. 12/10/13); 130 So.3d 888, 895. Accordingly, the Board holds that, although Taxpayers are the owners of the MPITC at issue, they must still satisfy the statutory and regulatory pre-requisites necessary for them to the claim the credit on their 2013 Amended Return.

Baton Rouge, Louisiana, this ^{4th} day of May, 2023.

FOR THE BOARD:



**Francis J. “Jay” Lobrano, Chairman
Louisiana Board of Tax Appeals**