

SUPREME COURT OF LOUISIANA

No. 2019-C-00263

NEWELL NORMAND, SHERIFF & EX-OFFICIO TAX COLLECTOR  
FOR THE PARISH OF JEFFERSON

VERSUS

JAN 29 2020

WAL-MART.COM USA, LLC

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL,  
FIFTH CIRCUIT, PARISH OF JEFFERSON

JW WEIMER, Justice.\*

JHB  
JW  
SJC  
The writ application in this case was granted to determine whether the lower courts correctly ruled that an online marketplace is obligated as a “dealer” under La. R.S. 47:301(4)(l) and/or by contract to collect sales tax on the property sold by third party retailers through the marketplace’s website. Because an online marketplace is not a “dealer” under La. R.S. 47:301(4)(l) for sales made by third party retailers through its website and because the online marketplace did not contractually assume the statutory obligation of the actual dealers, that is, the third party retailers, the judgment of the trial court and the decision of the court of appeal are reversed and vacated.<sup>1</sup>

\* Retired Judge Freddie Pitcher, Jr., appointed as Justice *ad hoc*, sitting for the vacancy in the First District at the time of oral argument; Retired Judge James H. Boddie, Jr., appointed Justice *ad hoc*, sitting for Justice Marcus R. Clark.

<sup>1</sup> This court’s jurisdiction over the matter was challenged in a motion to dismiss. Finding that the tax collector waived its right to enforce strict compliance with the statutory requirements for a summary proceeding under La. R.S. 47:337.61, the tax collector’s motion is denied.

Hughes, J., dissents with reasons.  
Pitcher, J., dissents for reasons assigned by Judge Hughes  
Johnson, C.J., dissents and assigns reasons

## FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Wal-Mart.com USA, LLC (“Wal-Mart.com”) operates an online marketplace at which website visitors can buy products from Wal-Mart.com or third party retailers. From 2009 through 2015, Wal-Mart.com reported its online sales in Jefferson Parish of its products and remitted the required sales tax to the Louisiana Department of Revenue and ex-officio tax collector for Jefferson Parish, then Sheriff Newell Normand (Tax Collector). The reported sales amount did not include proceeds from online sales made by third party retailers through Wal-Mart.com’s marketplace. Following an attempted audit for this period, Tax Collector filed a “Rule for Taxes” (a summary proceeding under La. R.S. 47:337.61) on February 16, 2017, alleging Wal-Mart.com “engaged in the business of selling, and sold tangible personal property at retail as a dealer in the Parish of Jefferson,”<sup>2</sup> but had “failed to collect, and remit . . . local sales taxes from its customers for transactions subject to Jefferson Parish sales taxation.” In addition, Tax Collector alleged that an audit of Wal-Mart.com’s sales transactions was attempted, but Wal-Mart.com “refused to provide [Tax Collector] with complete information and records” of Jefferson Parish sales transactions, particularly, those conducted on behalf of third party retailers. In connection with online marketplace sales by third party retailers, Tax Collector sought an estimated \$1,896,882.15 in unpaid sales tax,<sup>3</sup> interest, penalties, audit fees, and attorney fees. Wal-Mart.com was then ordered to show cause on May 2, 2017, why judgment should not be granted in favor of Tax Collector.

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<sup>2</sup> Outside of this allegation, Tax Collector provided no legal basis for holding Wal-Mart.com responsible for the third-party sales made through Wal-Mart.com’s online marketplace.

<sup>3</sup> See La. R.S. 47:337.28(A) (governing a tax collector’s authority to estimate retail sales).

On April 6, 2017, Wal-Mart.com answered and opposed this rule, asserting exceptions of no right of action and no cause of action and urging it “was not the dealer in the retail sale transactions at issue.” In its affirmative defenses, Wal-Mart.com stated that Tax Collector failed to “clearly articulate why [Wal-Mart.com] was required to collect local sales tax on the third-party retail sales transactions.” Wal-Mart.com also alleged violations of the Due Process Clause, the Commerce Clause, the Internet Tax Freedom Act (see generally 47 U.S.C. § 151 et seq.), and the Uniform Local Sales Tax Code. Attached to Wal-Mart.com’s answer was a motion for “a scheduling conference to set necessary pretrial deadlines and to set this matter for hearing/trial.” The trial court set the requested scheduling conference for May 2, 2017. Thereafter, the matter was set for trial on August 1, 2017.

Tax Collector’s pretrial memorandum was confined to its objection to Wal-Mart.com’s use of summary exhibits “concerning individual purchase transactions” at the trial, which it alleged to be in violation of La. C.E. art. 1006. In its pretrial memorandum, Wal-Mart.com stated that Tax Collector “has refused to provide a factual or legal basis for its allegation of unpaid sales tax” related to “sales between sellers of goods [that is, third party retailers] and customers seeking to purchase them” facilitated by Wal-Mart.com’s online marketplace. Wal-Mart.com urged that it was the third party retailers—as the actual sellers—that are the dealers for purposes of third-party sales.

The trial of this matter was conducted on August 1, 2017, and October 26 and 27, 2017. Upon completion of the trial, the trial court held open the record for 30 days to allow Wal-Mart.com to supplement the record with documentation requested by Tax Collector.

On November 22, 2017, Wal-Mart.com supplemented the record with additional evidence related to sales by third party retailers on the online marketplace. With the consent of Wal-Mart.com, Tax Collector's objections to Wal-Mart.com's supplementation was filed on January 3, 2018, more than 30 days after the November 22, 2017 supplementation, and the deadline for filing post-trial memoranda was set for February 5, 2018.

In its post-trial brief filed on February 5, 2018, Wal-Mart.com stated that it provides a service to third party retailers who are charged a fee. "This service has three primary components: connecting customers with Marketplace Retailers; providing one checkout system so customers can purchase from multiple Marketplace Retailers without entering their payment and shipping information separately for each item; and processing payments and protecting against fraud." Relying on statutory and regulatory provisions, Wal-Mart.com argued that "[s]ales tax is thus collected by the dealer who physically transfers title or possession of the item being sold as the seller in the transaction," *i.e.*, here the third party retailers. Because Wal-Mart.com never had physical possession of the property sold by third party retailers, Wal-Mart.com urges that its is not a dealer in the context of third-party sales. According to Wal-Mart.com, Tax Collector's assertion that Wal-Mart.com is a dealer in marketplace transactions involving third party retailers is "nothing more than [an] unsupported legal conclusion."

In its February 5, 2018 post-trial memorandum, Tax Collector asserted for the first time that Wal-Mart.com is a dealer relative to third-party sales under La. R.S. 47:301(4)(l), which arguably "does not limit, either expressly or implicitly, a 'dealer' to a person who transfers the title and/or possession of the product to the end consumer for a stated price." According to Tax Collector, had the legislature

Wal-Mart.com “collect all proceeds from such transaction.”<sup>4</sup> In light of these contractual requirements, the trial court found that third party retailers were precluded from collecting sales tax on third-party sales directly from purchasers. By judgment dated March 2, 2018, Wal-Mart.com was ordered to pay \$137,944.25 in unpaid sales tax, interest, and attorney fees to Tax Collector.

On appeal, the trial court’s judgment was affirmed. **Normand v. Wal-Mart.com USA, LLC**, 18-211, p. 7 (La.App. 5 Cir. 12/27/18), 263 So.3d 974, 980. Wal-Mart.com’s subsequently-filed application for rehearing was denied on January 16, 2019.<sup>5</sup> Afterwards, Wal-Mart.com’s writ application filed with this court on February 14, 2019, was granted for consideration of whether Wal-Mart.com is obligated to collect and remit sales tax on sales by third party retailers that are facilitated through Wal-Mart.com’s online marketplace. **Normand v. Wal-Mart.com USA, LLC**, 19-0263 (La. 5/6/19), \_\_\_ So.3d \_\_\_. Resolution of this issue depends on whether Wal-Mart.com is a dealer under La. R.S. 47:301(4)(l) relative to sales by third party retailers and, if not, whether Wal-Mart.com contractually assumed the obligation of third party retailers to collect sales tax from purchasers in connection with third-party sales made through Wal-Mart.com’s online marketplace. In response to Wal-Mart.com’s writ filing, Tax Collector filed a motion to dismiss, questioning this court’s jurisdiction to consider the merits of this case.<sup>6</sup>

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<sup>4</sup> The trial court further noted that Wal-Mart.com is compensated for its operation of the online marketplace by commissions from the third party retailers on each sale, consisting of a percentage of the sales price and shipping cost.

<sup>5</sup> Notably, the record does not contain a response by Tax Collector to Wal-Mart.com’s application for rehearing.

<sup>6</sup> See **Caldwell Parish School Board v. Louisiana Machinery Company, LLC**, 12-1383, 12-1762, p. 8 (La. 1/29/13), 110 So.3d 993, 998 (relying on La. R.S. 47:337.61(3) (quoted *infra*)) (this court “lack[s] jurisdiction to consider the validity of the decision of the court of appeal” where the writ application has not been timely filed when measured from the appellate court’s opinion, not from that court’s refusal to grant a rehearing.). This appears to be the first time that Tax Collector challenges the propriety of Wal-Mart.com’s request for a rehearing.

## DISCUSSION

### Motion to Dismiss

Pertinent to Tax Collector's motion to dismiss is La. R.S. 47:337.61, which authorizes the collection of unpaid taxes by use of a summary proceeding and provides:

In addition to any other procedure provided in this Chapter or elsewhere in the laws of this state, and for the **purpose of facilitating and expediting the determination and trial of all claims for taxes, penalties, interest, attorney fees, or other costs and charges arising, there is hereby provided a summary proceeding for the hearing and determination of all claims by or on behalf of the taxing authority, or by or on behalf of the collector, for taxes and for the penalties, interest, attorney fees, costs or other charges due thereon, by preference in all courts, all as follows:**

(1) All such proceedings, whether original or by intervention or third opposition or otherwise, brought by or on behalf of the taxing authority, or by or on behalf of the collector, for the determination or collection of any tax, interest, penalty, attorney fees, costs or other charge claimed to be due shall be summary and shall always be tried or heard **by preference**, in all courts, original and appellate, whether in or out of term time, and either in open court or chambers, at such time as may be fixed by the court, which **shall be not less than two nor more than ten days** after notice to the defendant or opposing party.

(2) All defenses, whether by exception or to the merits, made or intended to be made to any such claim, must be presented at one time and filed in the court of original jurisdiction prior to the time fixed for the hearing, and no court shall consider any defense unless so presented and filed. This provision shall be construed to deny to any court the right to extend the time for pleading defenses, and **no continuance shall be granted by any court to any defendant except for legal grounds set forth in the Louisiana Code of Civil Procedure.**

(3) That all matters involving any such claim shall be **decided within forty-eight hours after submission**, whether in term time or in vacation, and whether in the court of first instance or in an appellate court, and all judgments sustaining any such claim shall be rendered and signed the same day, and shall become final and executory on the fifth calendar day after rendition. **No new trial, rehearing or devolutive appeal shall be allowed.** Suspensive appeals may be granted, but must be perfected within five calendar days from the rendition of the judgment by giving of bond, with good and solvent security, in a sum double that of the total amount of the judgment, including costs. Such

appeals, whether to a court of appeal or to the supreme court, **shall be made returnable in not more than fifteen calendar days from the rendition of the judgment.**

(4) Whenever the pleadings filed on behalf of the taxing authority, or on behalf of the collector, shall be accompanied by an affidavit of the collector or of one of his assistants or representatives or of the counsel or attorney filing the same, that the facts as alleged are true to the best of the affiant's knowledge or belief, all of the facts alleged in said pleadings shall be accepted as prima facie true and as constituting a prima facie case, and the burden of proof to establish anything to the contrary shall rest wholly on the defendant or opposing party. [Emphasis added.]

By mandating that these tax collection matters be given preference by all courts<sup>7</sup> and providing specific time delays, this tax collection statute provides an expedited process for the determination and trial of claims by a tax collector. See Caldwell Parish School Board v. Louisiana Machinery Company, LLC, 12-1383, 12-1762, p. 9 (La. 1/29/13), 110 So.3d 993, 998 (“[T]he overall emphasis of [La. R.S. 47:337.61 is] on expediting the procedure in both the trial and appellate courts.”). In the spirit of expediting these matters, rehearings are prohibited in a summary proceeding under La. R.S. 47:337.61.<sup>8</sup> See id. (“the legislature ... eliminate[d] rehearings in an effort to make the judgment final as soon as possible.”). Therefore, in such a proceeding, the 30-day delay period for filing a writ application commences from “the mailing of the notice of the original judgment of the court of appeal,”<sup>9</sup> here December 27, 2018. When Wal-Mart.com filed its writ application on February 14, 2019, more than 30 days had passed since the appellate court’s mailing of notice. Therefore, if Wal-Mart.com’s application for rehearing with the court of appeal was

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<sup>7</sup> Notably, La. R.S. 47:337.61 does not require that Tax Collector file a motion for preferential treatment.

<sup>8</sup> See La. R.S. 47:337.61(3).

<sup>9</sup> See La. S.Ct. Rule X, § 5(a) (requiring the filing of a writ application with this court “within thirty days of the mailing of the notice of the original judgment of the court of appeal.”).

procedurally improper under the circumstances of this case, its writ application must be dismissed for lack of jurisdiction on account of it having been untimely filed. See Caldwell Parish School Board, 12-1383, 12-1762 at 8, 110 So.3d at 998 (citing Thompson v. Banburg, 231 La. 1082, 93 So.2d 666, 668 (1957)).

It is undisputed that Tax Collector initiated this collection matter as a summary proceeding under La. R.S. 47:337.61 for which citation and service of the citation is unnecessary,<sup>10</sup> rather than as an assessment and distraint or as an ordinary proceeding. See La. R.S. 47:337.45(A) (outlining the available remedies for the collection of taxes).<sup>11</sup> Tax Collector acted within its discretion in selecting to “proceed [by summary proceeding] to enforce the collection” of the sales tax owed. That selection in turn dictated the manner in which the matter would proceed. “[T]he 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 collector.” La. R.S. 47:337.45(B)(1).

In its motion to dismiss, Tax Collector seeks to have Wal-Mart.com held to the appellate procedures and delays set forth in La. R.S. 47:337.61(3), which prohibits

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<sup>10</sup> Cf. La. C.C.P. art. 1201(A) (“Citation and service thereof are essential in all civil actions except summary and executory proceedings, divorce actions under Civil Code Article 102, and proceedings under the Children’s Code. Without them all proceedings are absolutely null.”).

<sup>11</sup> In pertinent part, La. R.S. 47:337.45(A) provides:

In addition to following any of the special remedies provided in this Chapter, the collector may, in his discretion, proceed to enforce the collection of any taxes due under the local ordinance by means of any of the following alternative remedies or procedures:

(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 before the Board of Tax Appeals or any court of competent jurisdiction.

the filing of an application for rehearing. Although Wal-Mart.com repeatedly recognized in its trial court pleadings and appellate brief that the filing involved a summary proceeding under La. R.S. 47:337.61 and has complied with many of the requirements of this statute,<sup>12</sup> Wal-Mart.com contends that it was not barred by La. R.S. 47:337.61(3) from filing an application for rehearing because the actions of the parties, trial court, and appellate court destroyed the summary nature of Tax Collector's proceedings and converted it to an ordinary proceeding.

Although this court has not expressly found that the actions or inactions of the parties and/or courts can result in a summary proceeding under La. R.S. 47:337.61 being implicitly converted to an ordinary proceeding, this court in **Caldwell Parish School Board** considered this possibility.<sup>13</sup> In **Caldwell Parish School Board**, the tax collector prevailed in a district court proceeding to recover underpaid sales and use taxes. See *id.*, 12-1383, 12-1762 at 2-4, 110 So.3d at 995-96. The taxpayers appealed, and the appellate court reversed. See *id.*, 12-1383, 12-1762 at 4, 110 So.3d at 996. On review in this court, the tax collector argued the taxpayers' appeal was untimely under the five-day appeal period specifically applicable to such tax cases under La. R.S. 47:337.61(3) and, hence, the court of appeal's reversal was improper. See *id.*, 12-1383, 12-1762 at 8-9, 110 So.3d at 998. In response, the taxpayers urged that La. R.S. 47:337.61(3) did not apply to the proceedings since the tax collector's filing of a motion for summary judgment derogated from the procedures in La. R.S.

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<sup>12</sup> Wal-Mart.com presented its defenses in a manner consistent with La. R.S. 47:337.61(2). Tax Collector suggests that Wal-Mart.com was required to file an exception of unauthorized use of a summary proceeding with its other defenses to preserve its right to challenge Tax Collector's failure to pursue this matter in a summary fashion. In the absence of an exception, Tax Collector submits that Wal-Mart.com waived its right to complain about lack of compliance with La. R.S. 47:337.61.

<sup>13</sup> Cf. La. C.C.P. arts. 2644 and 2772 (governing conversion relative to executory proceedings).

47:337.61(1).<sup>14</sup> *See id.*, 12-1383, 12-1762 at 12, 110 So.3d at 1000-01. Based on the lack of compliance with this statutory provision,<sup>15</sup> the taxpayers argued that the tax collection proceedings had been converted by the tax collector into ordinary proceedings to which La. R.S. 47:337.61(3) does not apply. **Caldwell Parish School Board**, 12-1383, 12-1762 at 12, 110 So.3d at 1000. This court disagreed, observing that “[t]he rules governing ordinary proceedings are applicable to summary proceedings, except as otherwise provided by law.” *Id.*, 12-1383, 12-1762 at 13, 110 So.3d at 1001 (citing La. C.C.P. art. 2596). Since the filing of a motion for summary judgment is not precluded by La. R.S. 47:337.61, this court found that no conversion occurred. *See id.* In so ruling, this court in **Caldwell Parish School Board** left open the possibility that a tax collector’s summary proceeding for the collection of taxes could be converted to an ordinary proceeding for noncompliance with the provisions of La. R.S. 47:337.61.

The facts of the instant case are distinguishable from those of **Caldwell Parish School Board** in that the lower court proceedings here admittedly involved numerous instances of noncompliance with various provisions in La. R.S. 47:337.61 by the parties and the lower courts. It is under these circumstances that this court must determine the propriety of Wal-Mart.com’s application for rehearing.

Tax Collector properly initiated a summary proceeding by filing a “Rule for Taxes” on February 16, 2017, for which a May 2, 2017 hearing date was set.<sup>16</sup>

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<sup>14</sup> The taxpayers also argued they had complied with the five-day period, but this court rejected that argument and proceeded to address the taxpayers’ additional argument that the five-day period did not apply because the tax proceedings had been converted into ordinary proceedings. *See Caldwell Parish School Board*, 12-1383, 12-1762 at 9-12, 110 So.3d at 1000-01.

<sup>15</sup> There is no indication that the parties and the trial court in **Caldwell Parish School Board** failed to adhere to any of the other statutory requirements.

<sup>16</sup> Wal-Mart.com did not have the right to compel Tax Collector “to resort to ordinary procedure.” *See State v. Standard Oil Co. of Louisiana*, 188 La. 978, 178 So. 601, 617 (1937); *cf. Younger*

Undisputedly, the matter was not heard by the trial court within 10 days of notice (here March 6, 2017) as required by La. R.S. 47:337.61(1). Wal-Mart.com's "Exceptions, Affirmative Defenses, and Answer" was filed on April 6, 2017.<sup>17</sup> Although the hearing in this matter was initially set for May 2, 2017, it did not commence until August 1, 2017,<sup>18</sup> with trial lasting three months (concluding on October 27, 2017), due to a lengthy recess,<sup>19</sup> pursuant to the mutual agreement of the parties, during which Tax Collector conducted an audit of Wal-Mart.com's records (at Wal-Mart.com's expense) to determine if the amount of sale tax related to third-party sales was lower than the estimate alleged in Tax Collector's rule for taxes, as urged by Wal-Mart.com.<sup>20</sup>

At the conclusion of the hearing, Wal-Mart.com requested that the record be left open for the introduction of additional documentary evidence. Counsel for Tax

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**Brothers, Inc. v. Spell**, 194 La. 16, 193 So. 354, 356-57 (1939) (in which the plaintiff/defendant-in-reconvention was entitled to have the claim against him adjudicated in an ordinary proceeding, but failed to object to the use of summary proceeding by the plaintiff-in-reconvention until appeal, and was found to have elected to have his case tried summarily and have waived his the right to have it tried by the ordinary mode of procedure.).

<sup>17</sup> At this time, the most that Wal-Mart.com could have known was that Tax Collector's rule for taxes had not been scheduled for hearing within 10 days of notice, as the majority of the deviations from La. R.S. 47:337.61 came later in the proceedings.

<sup>18</sup> The May 2, 2017 trial setting was converted to a status conference, followed with a scheduling conference on May 17, 2017. This delay appears to correspond to a request made by Wal-Mart.com.

<sup>19</sup> Although continuances are permitted in an ordinary proceeding, (see La. C.C.P. arts. 1601 and 1602), pursuant to La. R.S. 47:337.61(2), "no continuance shall be granted by any court to any defendant except for legal grounds set forth in the Louisiana Code of Civil Procedure." See La. C.C.P. art. 1602 ("A continuance shall be granted if at the time a case is to be tried, the party applying for the continuance shows that he has been unable, with the exercise of due diligence, to obtain evidence material to his case; or that a material witness has absented himself without the contrivance of the party applying for the continuance.").

<sup>20</sup> In light of Tax Collector's objection to the admissibility of the summary sales transaction data offered into evidence by Wal-Mart.com (for violation of La. C.E. art. 1006), such evidence was conceivably needed by Wal-Mart.com to rebut the *prima facie* case presented by Tax Collector. See La. R.S. 47:337.61(4). As a result of the subsequent audit, the amount owed in sales tax owed on third-party sales by Wal-Mart.com, if any, was drastically reduced by stipulation of the parties from \$1,896,882.15 to \$75,413.

Collector agreed to Wal-Mart.com's request, indicating that he was in no hurry to close out the case,<sup>21</sup> and the trial court granted Wal-Mart.com 30 days to supplement the record. The record was supplemented by Wal-Mart.com on November 22, 2017. Tax Collector, with Wal-Mart.com's consent, responded to the supplementation on January 3, 2018, 12 days late. Post-trial briefs by both parties were filed on February 5, 2018, as ordered. It was at this point in the trial court proceeding that Tax Collector first asserted that Wal-Mart.com was a dealer under La. R.S. 47:301(4)(1), leaving no opportunity for Wal-Mart.com to respond to this assertion in the trial court. Judgment was rendered on March 2, 2018 (25 days after post-trial memoranda were filed, more than four months after trial was concluded, and more than a year after this suit was filed), substantially longer than the 48-hour period mandated by La. R.S. 47:337.61(3).

Although Wal-Mart.com's appeal of the trial court's judgment was perfected as required by La. R.S. 47:337.61(3) and it was directed to all concerned to be "made returnable . . . within the delay allowed by law," the record was not lodged with the appellate court within the 15-day period specified in La. R.S. 47:337.61(3) (quoted *supra*). The trial court's judgment here was rendered on March 2, 2018; however, the record was not lodged with the court of appeal until April 20, 2018, 49 days later. Furthermore, Wal-Mart.com's appeal was neither given preference nor decided within 48 hours of submission by the appellate court as required by La. R.S. 47:337.61(3). Instead, the appellate court's decision was rendered 77 days after oral arguments (which were conducted on October 11, 2018) and 297 days after the motion for appeal was filed (on March 5, 2018).

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<sup>21</sup> Relative to the length of time to be provided for Wal-Mart.com's supplementation of the record, Tax Collector's counsel stated: "I don't care whether it's one week, two weeks, 30 days or 45 days, for that matter."

Undisputedly, there were numerous acts of noncompliance with various provisions in La. R.S. 47:337.61, while Tax Collector (the beneficiary of this statutory scheme which chose to proceed by summary proceeding) did very little, if anything, to hasten the collection of unpaid taxes or ensure that this matter received preferential treatment by the courts. Although most of the acts of noncompliance did not originate with it, Tax Collector never objected to the manner in which this matter proceeded in the trial and appellate courts and many times consented to Wal-Mart.com's requests (which is laudable under the facts of this complicated case involving a *res nova* issue of law) to proceed in a manner inconsistent with the provisions of La. R.S. 47:337.61, without reserving its right to proceed summarily. Clearly, there was no overall emphasis by Tax Collector or the lower courts on expediting Tax Collector's proceeding as envisioned by La. R.S. 47:337.61.<sup>22</sup> Based on the facts and circumstances of this case, Tax Collector by its acts and omissions waived its right to demand strict compliance with La. R.S. 47:337.61, implicitly converting its summary proceeding to an ordinary proceeding.<sup>23</sup> Tax Collector has

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<sup>22</sup> The same can be said about the proceedings before this court, as Wal-Mart.com's February 14, 2018 writ application remains pending with this court 10 months later. Although Tax Collector relies on La. R.S. 47:337.61 in seeking the dismissal of Wal-Mart.com's writ, Tax Collector has not objected to the manner in which this matter has proceeded in this court, which included briefing extensions provided to both parties and oral arguments being continued. Clearly, this court did not render a decision within 48 hours of submission for decision following oral arguments on October 22, 2019. See La. R.S. 47:337.61(3).

<sup>23</sup> This court does not write on a blank slate in determining a summary proceeding can be converted to an ordinary proceeding. See Williams & Gray v. Stewart, 147 So. 103, 106 (La.App. 2 Cir. 1933) ("The summary character of the suit was destroyed by the delay, which plaintiff voluntarily caused by asking for a long continuance [of the trial]."); see also City of New Orleans v. Davis Aviation, 235 La. 992, 106 So.2d 445, 447 (La. 1958) (in classifying the nature of the tax proceeding before it, this court noted that a tax collector had a "duty to . . . advise[] the judge [regarding the nature of the proceeding] and insist[] upon compliance with the provisions thereof."). Although **Davis Aviation** did not involve the conversion of a summary rule for taxes proceeding into an ordinary proceeding, it emphasizes the role the tax collector plays in ensuring that its proceeding is conducted in the manner provided for by law. The **Davis Aviation** court classified the summary proceeding for the collection of an occupational licence tax based on the timing of the actions of the parties and the court, which were not objected to by the tax collector. Based on the lack of compliance with the requirements related to the more restrictive summary proceeding (under La. R.S. 47:1574), the **Davis Aviation** court classified the proceeding as being of the less restrictive type

not pointed to any harm arising from the limited delay caused by Wal-Mart.com's request to the court of appeal for a rehearing, especially when considered in connection with the multiple delays otherwise tolerated. Accordingly, Tax Collector's motion to dismiss is denied.<sup>24</sup>

Applicability of La. R.S. 47:301(4)(I) to an online marketplace facilitator

At issue in this case is the *res nova* issue of whether a marketplace facilitator is a dealer under La. R.S. 47:301(4)(I) and is therefore obligated by law to collect and remit sales tax on the sales made by third party retailers through its online marketplace.<sup>25</sup> Although key to this court's determination of whether Wal-Mart.com is a dealer, this statutory provision cannot be considered in isolation. Therefore, it is necessary for this court to begin by considering the relevant provisions in Louisiana's general statutory sales and use tax scheme.

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(under La. R.S. 33:4784). *Id.*, 106 So.2d at 446-47. In light of its classification in **Davis Aviation**, this court found it unnecessary to determine if tax collector's noncompliance and its failure to object to the taxpayer and trial court's noncompliance with statutory provisions that ensures a speedy disposition of a tax matter resulted in a waiver of its right to insist on strict compliance with the statutory provisions. See *id.*, 106 So.2d at 446 and n.1.

<sup>24</sup> This decision does not overrule the prior decision of this court in **Caldwell Parish School Board** in that it does not stand for the proposition that noncompliance with the 10-day requirement for a hearing in La. R.S. 47:337.61 automatically converts the tax collector's summary proceeding into an ordinary proceeding. The issue of whether a conversion-by-waiver occurred depends on the facts of the case and must, therefore, be resolved on a case-by-case basis.

By this finding, this court neither implies nor holds that extending a courtesy extension of time to an opponent will automatically result in a waiving of a tax collector's right to compel strict compliance with La. R.S. 47:337.61. If a waiver is not intended by an extension of time, the better practice is to couple any such extension with an acknowledgment that the summary nature of the proceeding is reserved. Noteworthy is that the lengthy trial recess resulted in the tax amount being reduced from approximately \$1.8 million claimed by Tax Collector to just over \$75,000. However, Tax Collector, having had the option to proceed in ordinary proceeding, benefitted by the delays by refining its legal theory as this matter slowly, as opposed to expeditiously, moved through the legal process, allowing the *res nova* issue ultimately under consideration to be urged by Tax Collector. Based on the unique facts of this case, the matter factually and legally did not lend itself to a summary proceeding.

<sup>25</sup> Whether the lower courts erred in their construction and application of La. R.S. 47:301(4)(I) to Wal-Mart.com in its capacity as a marketplace facilitator presents an interpretation of law and is, thus, subject to a *de novo* standard of review. See **Kevin Associates, L.L.C. v. Crawford**, 03-0211, p. 15 (La. 1/30/04), 865 So.2d 34, 43.

A sales and use tax is imposed on certain items of tangible personal property sold or used in this state. La. R.S. 47:302(A); see La. Const. art. VI, § 29 (which allows local governmental subdivisions to levy a tax on the sale or use of tangible personal property). Under this authority, the parish imposes a sales and use tax on each item of tangible personal property sold, used, consumed, distributed or stored in the parish.

Clearly, a dealer is responsible for collecting state and local sales tax. See La. R.S. 47:304(A) (“The tax levied in this Chapter shall be collected by **the dealer** from the purchaser or consumer.”) (emphasis added); La. R.S. 47:304(C) (“Dealers shall, as far as practicable, add the amount of the tax imposed under this chapter in conformity with the schedule or schedules to be prescribed by the collector pursuant to authority conferred herein, to the sale price or charge, which shall be a debt from the purchaser or consumer to the dealer, until paid, and shall be recoverable at law in the same manner as other debts.”); La. R.S. 47:337.17(A)(1) (“The tax levied by local ordinance shall be collected by **the dealer** from the purchaser or consumer.”); La. R.S. 47:337.17(C) (“Dealers shall, as far as practicable, add the amount of the tax imposed under the local ordinance in conformity with the schedule or schedules to be prescribed by the secretary of the Department of Revenue pursuant to authority conferred herein, to the sale price or charge, which shall be a debt from the purchaser or consumer to the dealer, until paid, and shall be recoverable at law in the same manner as other debts.”). Consequently, “[a]ny dealer who neglects, fails, or refuses to collect the tax herein provided shall be liable for and pay the tax himself.” La. R.S. 47:304(C); La. R.S. 47:337.17(C).

The legislature provided a detailed definition of who is a “dealer.” See La. R.S. 47:301(4). As correctly noted by Tax Collector, the legislature did not limit the

term “dealer” to “sellers” or persons who sell at retail.<sup>26</sup> Therefore, the term dealer encompasses a wider group of people than sellers. According to La. R.S. 47:301, “dealer” also includes manufacturers and producers (La. R.S. 47:301(4)), lessors and lessees (La. R.S. 47:301(4)(d)(i), (e) and (k)), service providers (La. R.S. 47:301(4)(f)), recipients of services (La. R.S. 47:301(4)(g)), and certain persons who make deliveries (La. R.S. 47:301(4)(h) and (j)).

Except for those persons who make deliveries referred to in La. R.S. 47:301(4)(h) and (j), the law is structured such that “the dealer” is a responsible party in the underlying transaction, that is, acting as an importer, the seller, lessor, or service provider. See La. R.S. 47:301(4)(a), (b), (d) and (f); La. Admin. Code, Reg. 61:I.4311(A) (quoted *infra*). The type of transaction at issue in this case is a “sale at retail,” which is defined, in pertinent part, as “a sale to a consumer or to any other person for any person other than for resale as tangible personal property.” La. R.S. 47:301(10)(a)(i). In pertinent part, “sale” is defined as “any transfer of title or possession, or both . . . conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property, for a consideration.” La. R.S. 47:301(12). Historically speaking, these statutory provisions contemplate that the seller and purchaser/consumer are the actual parties to the sale. Relative to sales by third party retailers on Wal-Mart.com’s online marketplace, the actual participants to the sale are the third party retailers that actually sell the goods and the purchasers. Clearly, an online marketplace is not a party to the underlying sales transaction between the third party retailers and their customers,<sup>27</sup> but rather a facilitator of the sale.

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<sup>26</sup> See La. R.S. 47:301(4)(b), (c), (h), (i) and (m) (addressing sellers who are dealers).

<sup>27</sup> Wal-Mart.com never had title or possession of the property being sold by third party retailers and did not transfer title or possession of the property to purchasers. See Marketplace Retailer Agreement, pp. 2-4, §§ 6-9. No evidence was introduced to establish Wal-Mart.com ever had possession or title of the property sold.

Furthermore, in the context of a sale at retail, La. R.S. 47:301(4)(b) defines “dealer” to be the seller;<sup>28</sup> La. R.S. 47:304, in turn, requires “the dealer” making the sale to collect the tax from the purchaser. La. R.S. 47:304(A) (“The tax levied in this Chapter shall be collected by **the dealer** from the purchaser or consumer.”) (emphasis added); La. R.S. 47:304 (B) (“Every dealer located outside the state making sales of tangible personal property . . . in this state, shall at the time of making sales collect the tax imposed by this Chapter from the purchaser.”); see La. R.S. 47:337.17(A)(1) & (B). The references to “the” dealer (as opposed to “a” dealer) in sections 304(A) and 337.17(A) and “[e]very dealer” “making sales” in section 304(B) and 337.17(B) indicate that the legislature contemplated that there can only be one dealer required to collect sales tax from the purchaser. See also La. R.S. 47:303(A)(2) (governing collection of sales tax, which references “the ‘dealer’”). In a retail sale, “the dealer” is the seller—here, the third party retailer that is transferring title and physical possession of its own property to its purchasers. The online marketplace is not a party to those sales transactions; the online marketplace only acts as a facilitator for which it receives a referral fee.<sup>29</sup>

The enactment of La. R.S. 47:301(4)(l) in 1990<sup>30</sup> did nothing to change the meaning of the expression “the dealer” in the context of a “sale at retail” in terms of its application to parties of the underlying transaction—the seller and the purchaser. According to La. R.S. 47:301(4)(l), a “dealer” includes:

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<sup>28</sup> “Every person who sells at retail, or who offers for sale at retail, or who has in his possession for sale at retail, or for use, or consumption, or distribution, or storage to be used or consumed in the taxing jurisdiction, tangible personal property as defined herein.” La. R.S. 47:301(4)(b).

<sup>29</sup> The referral fee is based on gross sales proceeds—exclusive of “any taxes separately stated and charged.” Agreement at 2, § 5.1.

<sup>30</sup> See 1990 La. Acts 478, § 1 (which initially designated this definition of “dealer” as La. R.S. 47:301(4)(k)).

[e]very person who engages in regular or systematic solicitation of a consumer market in the taxing jurisdiction by the distribution of catalogs, periodicals, advertising fliers, or other advertising, or by means of print, radio or television media, by mail, telegraphy, telephone, computer data base, cable, optic, microwave, or other communication system.

This seemingly very broad definition of “dealer” was enacted years before the commercialization of the internet, in an effort to govern the taxability of interstate sales that were escaping taxation due to jurisdictional issues. The legislature enacted La. R.S. 47:301(4) to establish a nexus for out-of-state **sellers** by declaring that regular or systematic solicitation of sales from in-state customers through a mail-order catalog was sufficient to subject out-of-state **sellers** to the state’s tax-collection jurisdiction. See National Bellas Hess, Inc. v. Department of Revenue, 386 U.S. 753, 758 (1967) (to be subject to the state’s tax-collection authority, the out-of-state mail-order seller had to have nexus with the taxing state. In the absence of a physical presence in the state, the state could not require the out-of-state seller to collect sales tax, to do so violates due process.). Pursuant to this legislation, out-of-state sellers, who lack a physical presence in the state, are required to collect and remit sales tax on the sales of their products to customers in Louisiana if they regularly or systematically solicit sales from Louisiana customers through a mail-order catalog, commercial televisions, and phone sellers.<sup>31</sup> There is no indication in La. R.S. 47:301(4)(l) that the legislature intended to expand this definition of “dealer” to include more than sellers that own the property being sold

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<sup>31</sup> A North Dakota provision similar to La. R.S. 47:301(4)(l) was struck down in **Quill Corp. v. North Dakota By and Through Heitkamp**, 504 U.S. 298 (1992), which upheld the need for physical presence in the state to impose tax collection and remittance obligations. Subsequently, **Quill Corp.** and **National Bellas Hess, Inc.** were overruled in **South Dakota v. Wayfair, Inc.**, 138 S.Ct. 2080 (2018). In light of **Wayfair, Inc.**, physical presence in a state is no longer required for the state to require an out-of-state seller, like those who utilize online marketplaces, to collect and remit sales tax. *Id.* at 2099. Under **Wayfair, Inc.**, an economic and/or virtual presence could be sufficient to establish a substantial nexus. *Id.*

and are the parties to the underlying sales transactions. That is, there is no indication the legislature intended to tax intermediaries that are only tangentially involved in sales transaction, such as a marketplace facilitator relative to sales by third party retailers. Therefore, the lower courts legally erred in concluding that the Wal-Mart.com was a “dealer” under La. R.S. 47:301(4)(l) in connection with property owned by third party retailers that was sold through Wal-Mart.com’s online marketplace.<sup>32</sup>

Such an interpretation of Louisiana general statutory sales tax scheme is supported by various regulations that were promulgated by the Louisiana Department of Revenue pursuant to its authority under La. R.S. 47:1511. See Coastal Drilling Co. v. Dufrene, 15-1793, p. 7 (La. 3/15/16), 198 So.3d 108, 114-15. Pursuant to La. R.S. 47:1511, “the secretary is authorized to prescribe rules and regulations to carry out the purposes of this Title and the purposes of any other statutes or provisions included under the secretary’s authority. These rules and regulations . . . have the full force and effect of law.”

According to La. Admin. Code, Reg. 61:I.4301,<sup>33</sup> the Department construes “dealer,” as that term is used in La. R.S. 47:301(4), to mean that:

a. State and local sales or use tax is imposed upon the **sales** of tangible personal property within a taxing jurisdiction, the use, consumption, distribution and the storage for use or consumption within a taxing jurisdiction of tangible personal property, the **lease or rental** within a taxing jurisdiction of tangible personal property, and upon the

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<sup>32</sup> Although an online marketplace is a “dealer” for the retail sales of its own products through the online marketplace, it is not a “dealer” for the retail sales made by others (*i.e.*, third party retailers) through Wal-Mart.com’s online marketplace. See DaimlerChrysler Services of North America, L.L.C. v. Secretary, Department of Revenue, 07-0010, 07-0011, p. 6 (La.App. 1 Cir. 9/14/07), 970 So.2d 616, 620 (which found that a finance company’s involvement in a car sale does not render the finance company a dealer of auto sales). That Wal-Mart.com is a dealer in connection with the online sales of its own property is not an issue in this case.

<sup>33</sup> Although this regulation has been revised since 1990, such revisions do not reference La. R.S. 47:301(4)(l).

**sales of certain services.** The tax in each instance is collectible from **the dealer.**

b. In view of the total reliance of the sales tax statutes upon the *dealer* for collection of the tax, the law meticulously ascribes to the term dealer the **broadest possible meaning** relevant to the taxes imposed by the taxing jurisdictions. R.S. 47:301(4) clearly holds **either party to any transaction, use, consumption, storage, or lease involving tangible personal property and either the performer or recipient of services liable for payment of the tax through the broad statutory definition of dealer.**

c. R.S. 47:301(4) includes as a *dealer* every person who manufactures or produces tangible personal property for sale at retail, use, consumption, distribution or for storage to be used or consumed in a taxing jurisdiction. Thus, the firm which manufactures or produces a product used or consumed by it in the conduct of its business becomes a dealer for sales and use tax purposes, even though none of that particular product is offered for sale.

d. Any person who imports property into a taxing jurisdiction, or who causes property to be imported into a taxing jurisdiction is a dealer for purposes of the sales and use tax whether the property is to be used, consumed, distributed, or for storage to be used or consumed in the taxing jurisdiction, or is intended for resale.

e. Persons who sell tangible personal property, who hold such property for sale, or who have sold tangible personal property are dealers. Similarly, any person who has used, consumed, distributed or stored tangible personal property for use or consumption in a taxing jurisdiction is defined as a *dealer*, unless it can be proved that sales or use tax has previously been paid to the taxing jurisdiction to the extent required by state and local sales or use tax law on the particular item.

f. Both the lessor (or rentor) and the lessee (or rentee) are defined as *dealers* by the statute, as are both the person who performs services of a nature subject to tax and the person for whom the services are performed. See R.S. 47:301(14) and LAC 61:I.4301.C. Sales of Services for a list of the services subject to the tax.

g. *Dealer* also includes any person engaging in business in a taxing jurisdiction. See R.S. 47:301(1) and LAC 61:I.4301.C. *Business* for the definition of *business*. *Engaging in business* is further defined to include the maintaining of an office, distribution house, sales house, warehouse or other place of business, either directly, indirectly, or through a subsidiary or through a seller authorizing an agent, salesman or solicitor to operate within a taxing jurisdiction or by permitting a subsidiary to authorize the solicitation activity. Engaging in business also includes making deliveries of tangible personal property into a

taxing jurisdiction by any means other than by a common or contract carrier. Qualification to do business within a taxing jurisdiction is not among the considerations of whether a person is engaged in business for this purpose. Neither is it material whether the place of business or personnel are permanent or temporary in nature.

h. Persons who sell tangible personal property to operators of vending machines are dealers.

i. For state sales or use tax purposes, such sales are taxable *sales at retail* as defined under R.S. 47:301(10)(b) and LAC 61:I.4301.C. *Retail Sale or Sale at Retail*. A vending machine operator is also a dealer, however, his sales of tangible personal property through coin-operated vending machines are not retail sales.

ii. For local sales or use tax purposes, such sales are sales for resale. A vending machine operator is a dealer and must report his sales of tangible personal property through coin-operated vending machines as retail sales.

i. R.S. 47:301(4)(i) also includes in the definition of *dealer* any person who makes deliveries of tangible personal property into a taxing jurisdiction in a vehicle which is owned or operated by that person. [Emphasis added.]

The emphasis in La. R.S. 47:301 on sellers/purchasers, lessors/lessees, and service providers/recipients in defining who is a dealer is reiterated in La. Admin. Code, Reg. 61:I.4303, 61:I.4307(A)(1), and 61:I.4311. Regulations pertaining to “Collection from Dealers” govern “[a]ll of the taxes imposed under . . . local sales and use tax ordinances.” La. Admin. Code, Reg. 61:I.4307(A)(1). Regulation 4307(A)(1) further recognizes that La. R.S. 47:301 defines a dealer “to be **either party to a transaction** creating a tax liability under state and local sales and use tax law.” (Emphasis added.) Moreover, according to Regulation 4311, La. R.S. 47:304 and 47:337.17 are statutes that “place the primary burden for operation of the sales tax system upon the **seller of merchandise, the performer of taxable services, and the rentor or lessor of property**, and require that he collect the tax from the purchaser, user or consumer.” La. Admin. Code, Reg. 61:I.4311(A) (emphasis added).

According to La. R.S. 47:301(4) and these regulatory provisions, which have the force and effect of law,<sup>34</sup> it is the seller of merchandise, the performer of taxable services, and the rentor or lessor of property as parties to the underlying transactions that are liable for collection of the tax. The statutory and regulatory scheme does not contemplate the existence of more than one dealer that would be obligated to collect sales tax from a purchaser. An online marketplace in its role as a facilitator for sales of third party retailers does not fall in these groups.

In connection with sales conducted and consummated by a third party, special legislation was enacted relative to auctioneers to impose the legal responsibility for collecting and remitting sales tax on third-party auctioneers. See La. R.S. 47:303(C); 47:337.15(C). In discussing traditional sales transactions and distinguishing sales transactions conducted by auctioneers for third-party sellers, Regulation 4307(C) provides:

1. Generally, the sales tax law contemplates a situation in which the owner of property, or a person having title to property, sells tangible personal property to another person, thereby creating a taxable transaction. In this instance, the sales tax law places a liability upon the seller to collect the state and local sales or use tax from the purchaser and remit the tax to the appropriate collector. Because of this basic concept, special provisions have been included in R.S. 47:303(C) and 47:337.15(C) to cover sales which do not fall within that general method of doing business. In the case of auctioneers, the actual owner of the property turns it over to the auctioneer who conducts the sale and consummates the final transfer of title, as a third party, from the owner to the purchaser. He may well represent a number of property owners at one auction sale.

2. In view of the unique position occupied by auctioneers with relationship to the owner of the property being sold, R.S. 47:303(C) and 47:337.15(C) require that all auctioneers shall register as dealers and must display their registration certificates to the public as a condition of doing business in a taxing jurisdiction. The auctioneer is then held responsible for collecting all state and local sales or use tax on articles

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<sup>34</sup> See La. R.S.47:1511.

sold by him and is responsible for properly reporting and remitting the amount collected.

This regulation and the tax laws governing auctioneers acknowledge the unique position occupied by an auctioneer as a third party to the underlying sales transaction. If this type of third-party facilitator is a “dealer” under La. R.S. 47:301(4), there would have been no need for legislation to expressly impose a legal obligation on auctioneers/non-sellers to collect and remit sales tax “on the articles sold by [them].” La. R.S. 47:303(C); 47:337.15(C). Relative to the sales for third party retailers made through the Wal-Mart.com’s online marketplace, Wal-Mart.com occupies a position similar to that of an auctioneer, requiring like treatment under the tax laws. In this respect, the laws enacted to govern the obligations of an auctioneer, who the legislature obviously believed does not qualify as a dealer under La. R.S. 47:301(4), illustrate the need for legislation to address the obligation of an online marketplace facilitator to collect sales tax on sales of third party retailers conducted through its online marketplace.<sup>35</sup>

Such an interpretation is supported by the action of the Louisiana Department of Revenue<sup>36</sup> (and apparently the other 63 parishes), which does not assess online marketplaces for sales tax on sales made by third party retailers through the online marketplace in light of Department regulations that indicate that responsibility for sales tax is on the parties to the sale—the seller and the purchaser. See La. Admin. Code, Regs. 61:I.4311(A), 61:I.4307(A)(1), and 61:I.4307(C)(1) (quoted *supra*). For

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<sup>35</sup> Rewriting the law to create an exception (similar to that legislatively enacted for auctioneers) is in the province of the legislature, not the judiciary. See Naquin v. Titan Indem. Co., 00-1585, p. 9 (La. 2/21/01), 779 So.2d 704, 710 (while it is this court’s province “to consider the reason and spirit of a law,” we are “not free to rewrite the law to effect a purpose that is not otherwise expressed.”) (quoting Backhus v. Transit Cas. Co., 549 So.2d 283, 291 (La. 1989)).

<sup>36</sup> Notably, Wal-Mart.com was not required to pay state sales tax on sales made by third-party sellers in connection with an audit by the Department for 2013 and 2014.

the sake of uniformity,<sup>37</sup> the Uniform Local Sales Tax Code (tax code) requires parishes to apply and interpret definitions consistently with state sales tax laws and Department regulations.<sup>38</sup> See **Traigle v. PPG Indus., Inc.**, 332 So.2d 777, 782 (La. 1976) (“[T]he best guide to [the statute’s] meaning ... is the accepted contemporaneous administrative construction given to the statute ... by the agency charged with administering it.”).

Furthermore, payments for retail sales transactions are frequently processed by service providers that, like the marketplace facilitator here, are not parties to the underlying sales transactions and are not responsible for collecting sales tax. The fact that an intermediary transmits the funds to sellers does not relieve the sellers of their tax-collection obligation or cause the intermediary to assume the sellers’ legal obligation to collect taxes. A contrary interpretation of La. R.S. 47:301(4), in light of Louisiana’ general tax scheme, would authorize the imposition of liability for sales tax on **any** intermediary that aids or enables sellers to reach new customers although not selling anything (*i.e.*, payment processors, credit card companies, financial institutions, common carriers, advertisers, and broadcasters). Such an interpretation produces an absurd result as it would impose liability on entities that have very little information about the underlying sales transactions and, thus, have no basis to ascertain what taxes are due or where to remit any sales taxes collected. Additionally, an intermediary may not know whether the actual seller collected the sales tax directly from the purchaser. Furthermore, it would undermine the legislative history

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<sup>37</sup> See **Catahoula Parish School Bd. v. Louisiana Machinery Rentals, LLC**, 12-2504, p 9 (La. 10/15/13), 124 So.3d 1065, 1071 (The primary purpose of the tax code is to “promot[e] uniformity to the extent possible in the assessment, collection, administration, and enforcement of the sales and use taxes imposed by taxing authorities and, by compiling them, making them readily available in one place in the revised statutes.”) (quoting La. 47:337.2(A)(1)(b)).

<sup>38</sup> In its pleadings, Tax Collector did not assert that Department regulations are inconsistent with the applicable statutes.

behind the enactment of La. R.S. 47:304(4)(1) and the current efforts being made by the state and legislature to address the obligations of a marketplace facilitator to collect and remit sales tax.

In summary, auctioneers, like online marketplaces, are not parties to the sales that are the subject of the sales tax; auctioneers, like online marketplaces, simply facilitate sales. As nonparty/facilitators, auctioneers were not obligated under the general statutory tax scheme to collect and remit sales tax. Therefore, legislation was enacted to make auctioneers (instead of sellers) responsible for the collection and remission of sales tax on the sales they facilitate. See La. R.S. 47:303(C); 47:337.15(C). Absent similar legislation for an online marketplace, double taxation could result if both online marketplaces and third party retailers are obligated to collect sales tax on the same transaction. It is not in the province of the judiciary to create an exception (in the context of a retail sale) to the seller's obligation to collect sales tax for a marketplace facilitator, similar to that legislatively enacted for auctioneers.

For these reasons, the lower courts legally erred in finding that Wal-Mart.com is a dealer under La. R.S. 47:301(4)(1) relative to the sales by third party retailers conducted through Wal-Mart.com's online marketplace.

#### Obligation to collection and remit taxes under the Market Retailer Agreement

A contract between parties is the law between them, and the courts are obligated to give legal effect to such contracts according to the true intent of the parties. See La. C.C. arts. 1983, 2045; see also **Peterson v. Schimek**, 98-1712, p. 4 (La. 3/2/99), 729 So.2d 1024, 1028. Moreover, “[e]ach provision in a contract must be interpreted in light of the other provisions so that each is given the meaning suggested by the contract as a whole.” La. C.C. art. 2050.

Pursuant to the Marketplace Retailer Agreement Wal-Mart.com has with third party retailers, it is the third party retailer that is “the seller of record.” Marketplace Retailer Agreement, p. 2, § 6.1 and H-1, § 1. Under the terms of the agreement, purchases from the third party retailers are required to be made through the online marketplace’s checkout system, at which time “all proceeds from such transactions” are to be collected.<sup>39</sup> See Agreement at 2, § 6.1. Although the online marketplace collects related sales taxes (along with the purchase price, shipping and handling)<sup>40</sup> for third party retailers who request that service be provided by the online marketplace,<sup>41</sup> third party retailers are solely responsible under the agreement for any tax liabilities, including sales and use taxes, related to their sales. See Agreement at 7, § 18 and H1, §§ 1, 2, 4, 7 and 8. In fact, not all third party retailers engaged the marketplace facilitator to collect sales tax on their behalf. See Agreement H1, § 2 (“Retailer will have the option of requesting that Wal-Mart.com collect tax on retailer’s behalf”), § 4 (“If Retailer chooses to have Wal-Mart.com collect tax on its behalf . . .”), and § 7 (“If Retailer includes any applicable taxes in the purchase price instead of collecting the taxes separately . . .”). Once collected by Wal-Mart.com, the proceeds and related sales tax, if any, from third-party sales are held in escrow until remitted to third party retailers, after reduction for the referral fee owed for use

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<sup>39</sup> All other aspects of the sales (*i.e.*, filling the order and customer service, including cancellations, returns, and refunds) are handled by third party retailers that are electronically provided by Marketplace with order information “(*e.g.*, Customer name, email address and shipping address).” See Agreement at 2, §§ 6, 7, and 10. Monthly, Wal-Mart.com will report to third party retailers “all taxes, if any, collected by Wal-Mart.com on behalf of Retailer which shall include the Customer name, total sale amount, zip code, total tax collected and the combined rate for that zip code.” Agreement at H1, § 5. This information makes it possible for third party retailers to charge its customers directly for related sales tax.

<sup>40</sup> See Agreement at 2, § 5.1.

<sup>41</sup> To facilitate the collection of sales tax by the online marketplace, third party retailers are responsible for determining the taxability of the sale and designating the jurisdictions in which third party retailers are obligated to collect sales tax. See Agreement at 5-6, section 13.2(f).

of the online marketplace. See Agreement at 2, § 5. According to the agreement, third party retailers are then “solely responsible for remittance of all taxes required to be paid under all applicable Law” to the proper taxing authorities. See Agreement at H1, § 6. There is no evidence that Wal-Mart.com ever remitted sales tax on third-party sales directly to tax collectors.

Clearly, third party retailers are not prohibited from collecting sales tax directly from their purchasers, as the agreement recognizes that third party retailers may “collect[] the taxes separately.”<sup>42</sup> See Agreement at H1, § 7. For this reason, Wal-Mart.com did not contractually assume the obligation of the third party retailers, as dealers, to collect and remit sales tax. The trial court legally erred in finding to the contrary.

### CONCLUSION

Although filed as a rule to collect taxes, this complicated matter did not proceed in the expedited fashion envisioned by La. R.S. 47:337.61. Rather, time was properly afforded during the various stages of this proceeding, without objection by Tax Collector or reservation of its right to proceed as a summary proceeding, to allow the parties to fully develop the facts and their legal arguments. Under the facts of this case, Tax Collector waived its right to enforce strict compliance with the procedural requirements of La. R.S. 47:337.61. Accordingly, Tax Collector’s motion to dismiss Wal-Mart.com’s writ application is denied.

In the context of a retail sale, as nonparty to the underlying sale transaction, a marketplace facilitator is not a “dealer” under La. R.S. 47:301(4)(l) relative to property sold by third party retailers through its online marketplace; therefore, Wal-Mart.com was not obligated under the general statutory tax scheme to collect and

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<sup>42</sup> Wal-Mart.com electronically transmits to third party retailers order information.

remit sales tax. Based on the terms of its agreement with third party retailers, Wal-Mart.com did not contractually assume the tax obligation of third party retailers for their sales made through Wal-mart.com's online marketplace.<sup>43</sup>

**DECREE**

For the foregoing reasons, the motion to dismiss the writ application is denied, and the court of appeals' decision and the trial court's judgment are reversed and vacated. Judgment is rendered in favor of Wal-Mart.com USA, LLC, dismissing the claims of the Sheriff & Ex-Officio Tax Collector for the Parish of Jefferson.

**MOTION TO DISMISS DENIED; REVERSED AND VACATED;  
RENDERED.**

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<sup>43</sup> Based on this holding, consideration of the other issues raised in Wal-Mart.com's writ application is pretermitted.

SUPREME COURT OF LOUISIANA

No. 2019-C-00263

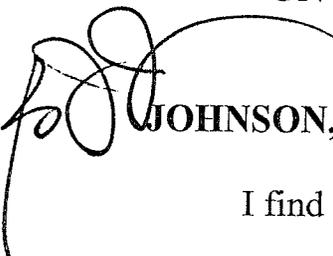
NEWELL NORMAND, SHERIFF & EX-OFFICIO TAX COLLECTOR  
FOR THE PARISH OF JEFFERSON

JAN 29 2020

VS.

WAL-MART.COM USA, LLC

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL,  
FIFTH CIRCUIT, PARISH OF JEFFERSON

 JOHNSON, C.J., dissents and assigns reasons.

I find that Wal-Mart.com is responsible for collecting and remitting the taxes from sales of third party retailer items on its online Marketplace. Therefore, I must respectfully dissent.

Our tax laws put the obligation to collect and remit local sales and use taxes on a “dealer.” *See* La. R.S. 47:337.17(A)(1). La. R.S. 47:301(4) provides numerous expansive definitions of “dealer.” The statutory definition of “dealer” is not limited to a retail “seller” (i.e., one who transfers title or possession of the merchandise to the end customer). A seller is only one type of dealer. Relevant to this case is La. R.S. 47:301(4)(I), which includes in the definition of dealer “[e]very person who engages in regular or systematic solicitation of a consumer market in the taxing jurisdiction by the distribution of catalogs, periodicals, advertising fliers, or other advertising, or by means of print, radio or television media, by mail, telegraphy, telephone, computer data base, cable, optic, microwave, or other communication system.” The legislature clearly chose the term “dealer” rather than “seller” and intended it to encompass a wider group than “seller.” An expansive definition of “dealer” makes sense to address changes and advances in business practices and changing market places beyond the traditional brick and mortar stores, including sale and solicitation by electronic means on the internet. In my view, this definition of dealer clearly applies to Wal-Mart.com’s online Marketplace.

The Marketplace is a single site where Wal-Mart.com sells its own products, as well as those from third-party retailers. Importantly, Wal-Mart.com does not simply supply the Marketplace platform for use by third party vendors, and does not function as a hands-off bystander in these sales transactions. Rather, Wal-Mart.com has exclusive control and enforceable rights relative to each sales transaction. Wal-Mart.com has sole control over the website as well as sole control of marketing of products. Wal-Mart.com owns the transaction information, including the customer's credit card information, none of which is provided to the third party retailer. Purchasers of third party retailer products are required to have a Wal-Mart.com account, and customers are required to purchase Marketplace items through the Wal-Mart.com checkout system. Wal-Mart.com bears the risk of loss due to credit card fraud. Wal-Mart.com collects all proceeds from the sales transactions. As correctly found by the district court: the Marketplace "provides to third-party Marketplace retailers the service of enabling them to reach new customers;" the Marketplace is a service "that brings retailers and customers together, facilitating retailers gaining new customers, providing various services such as facilitates transaction, facilitating payment processing, and taking on risks of fraudulent activity and customers, as well as advising and making sure the retailer's products are found by potential new customers."

I find it concerning that the Marketplace agreement provides Wal-Mart.com will collect sales taxes from the customer *only* when the third party supplier of merchandise asks it to do so. And, even when Wal-Mart.com collects local sales taxes at the request of a third party retailer, it does not remit them to the local tax collector. Instead, Wal-Mart.com transmits those collected taxes to the third party vendor. The duties of a dealer are imposed by La. R.S. 47:337.17, and the fact that the Marketplace Agreement allows the third party retailer the sole discretion to decide whether Wal-Mart.com should collect sales taxes on transactions involving

the sale of third party retailer's products should not exculpate Wal-Mart.com from its obligations as a dealer under La. R.S. 47:337.17 to collect and remit the sales taxes directly to the tax collector.

Furthermore, based on Wal-Mart.com's Marketplace Agreement, it is the only party with the ability and opportunity to collect sales taxes from purchasers for all Marketplace sales transactions because all orders are processed through the Walmart.com checkout system and Walmart.com collects **all** proceeds from the sales transactions. Thus, although the majority states third party retailers are not prohibited from collecting sales tax directly from their purchasers, as a practical matter I find it would be impossible for a third party retailer to collect taxes directly from the consumer and perform the duty of a dealer under the terms of the Marketplace Agreement. Legally, a dealer is responsible for collecting sales taxes from a purchaser. In my view, Wal-Mart.com has clearly acknowledged and accepted this legal responsibility by the terms of the Marketplace Agreement. Wal-Mart.com should not be allowed to refuse to perform the collection duties of a dealer under La. R.S. 47:301(4)(l) by nominally placing that duty on the third party retailer yet eliminating their ability to do so.

It is also troubling to me that the Marketplace Retailer Agreement—created by Wal-Mart.com—operates to promote and facilitate avoidance of tax payments by consumers, all to the detriment of Jefferson Parish. The Agreement places nominal responsibility for the collection and remittance of sales taxes on remote sellers which may be beyond the reach of local sales tax collectors, yet effectively disallows collection of sales taxes by remote sellers. Wal-Mart.com processes all payments and collects all proceeds from the sales, thereby retaining exclusive actual control over the collection of sales taxes from customers for all online market sales transactions, yet refuses to collect those taxes unless expressly requested to do so by the third party seller. Applying the definition of dealer in La. R.S. 47:301(4)(l) to

Wal-Mart.com eliminates this problem and increases compliance with sales/use tax collection and remittance, allowing these tax proceeds to benefit the citizens of Jefferson Parish as intended.

SUPREME COURT OF LOUISIANA

No. 2019-C-0263

NEWELL NORMAND, SHERIFF & EX-OFFICIO TAX COLLECTOR  
FOR THE PARISH OF JEFFERSON

JAN 29 2020

VERSUS

WAL-MART.COM USA, LLC

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL,  
FIFTH CIRCUIT, PARISH OF JEFFERSON

 HUGHES, J., dissenting.

I respectfully dissent from the majority opinion's denial of the motion to dismiss, filed in this court by Newell Normand, Sheriff and Ex-Officio Tax Collector for the Parish of Jefferson (herein "Tax Collector"), as to the writ application filed by Wal-Mart.com USA, LLC (herein "Taxpayer"), since the motion is well-founded and, as discussed below, a proper application of the law reveals the Taxpayer's writ application to have been untimely filed, resulting in a lack of jurisdiction in this court to review the judgment entered against the Taxpayer.

In its motion to dismiss, the Tax Collector contends the Taxpayer filed its writ application outside the jurisdictional delay allowed by Louisiana Supreme Court Rule X, § 5, and contrary to this court's decision in **Caldwell Parish School Board v. Louisiana Machinery Company**, 12-1383 (La. 1/29/13), 110 So.3d 993. Specifically, the Tax Collector asserts that the Taxpayer's writ application was not filed within thirty days of the appellate court's December 27, 2018 decision, contrary to Louisiana Supreme Court Rule X, § 5(a), which provides that an application seeking review of a judgment of the court of appeal "shall be made within thirty days of the mailing of the notice of the original judgment of the court of appeal; however, if a timely application for rehearing has been filed in the court of appeal in those instances *where a rehearing is allowed*, the application shall be made within thirty

days of the mailing of the notice of denial of rehearing or the judgment on rehearing. No extension of time therefor will be granted.” (Emphasis added.) The Tax Collector points out that this action was filed in the district court as a summary proceeding under La. R.S. 47:337.61, which does not allow rehearings. See La. R.S. 47:337.61(3) (“*No ... rehearing ... shall be allowed.*”) (emphasis added). Thus, the Tax Collection asserts that the Taxpayer’s writ application, filed on February 14, 2019, within thirty days of the appellate court’s January 16, 2019 rehearing denial but more than thirty days from the December 27, 2018 appellate court decision, was not timely filed and, therefore, should be dismissed.

In **Caldwell Parish School Board v. Louisiana Machinery Company**, this court considered whether La. R.S. 47:337.61’s rehearing prohibition was applicable to an appellate court, stating that “the only logical conclusion is that the term ‘rehearing’ refers to rehearing in the court of appeal. This reasoning is reinforced by the overall emphasis of the statute on expediting the procedure in both the trial and appellate courts.” **Caldwell**, 12-1383 at p. 7, 110 So.3d at 997-98.

In **Caldwell**, as in the instant case, the tax collector filed summary proceedings to collect unpaid taxes under La. R.S. 47:337.61, on behalf of the taxing authority for Caldwell and Tensas parishes. **Caldwell**, 12-1383 at pp. 3-4, 110 So.3d at 995-96. After partial summary judgments were rendered in favor of the tax collector, the taxpayers appealed. **Id.**, 12-1383 at p. 4, 110 So.3d at 996. The appellate court rendered a decision, on March 16, 2012, in favor of the Caldwell Parish taxpayers and the tax collector sought a rehearing, which was refused on May 31, 2012 by the appellate court, citing La. R.S. 47:337.61. **Id.**, 12-1383 at p. 5, 110 So.3d at 996. Thereafter, the tax collector filed a writ application with this court, as to the Caldwell parish taxpayers, on June 18, 2012, less than thirty days after the appellate court’s rehearing refusal, but more than thirty days after the appellate court’s judgment was rendered. **Id.**

This court ruled, in **Caldwell**, that the La. R.S. 47:337.61 rehearing prohibition is applicable to appellate courts and that a rehearing sought in violation of La. R.S. 47:337.61(3) cannot serve to extend the delay allowed for the filing of a writ application with this court, as such an application for rehearing is not an “instance ... where a rehearing is allowed” under La. Supreme Court Rule X, § 5(a). Thus, the **Caldwell** writ application was found to have been due on June 15, 2012, within thirty days of the appellate court’s March 16, 2012 notice of judgment, making the writ application filed on June 18, 2012 untimely. **Caldwell**, 12-1383 at p. 8, 110 So.3d at 998. When a writ application is not timely filed, “we lack jurisdiction to consider the validity of the decision of the court of appeal.” **Id.**, citing **Thompson v. Bamburg**, 231 La. 1082, 93 So.2d 666 (1957).

We reached a similar result in the case of **State v. Crandell**, 05-1060 (La. 3/10/06), 924 So.2d 122, wherein a defendant filed a writ application with the appellate court, which was denied, and he thereafter applied for a rehearing. The appellate court denied the application for rehearing, stating, “It is the policy of this court not to grant rehearing in cases in which the court has denied a writ application on the merits, pursuant to URCA, Rule 2-18.7, which does not allow for rehearing in such situations.” **State v. Crandell**, 05-1060 at p. 2, 924 So.2d at 124. Thereafter, the defendant filed a writ application with this court, within thirty days of the appellate court’s rehearing denial, but more than thirty days from the date the appellate court denied the writ application. **State v. Crandell**, 05-1060 at p. 3, 924 So.2d at 125. **State v. Crandell** interpreted the provisions of La. Supreme Court Rule X, § 5(a) as requiring an application for review following a court of appeal’s writ denial to be filed within thirty days of the mailing of the notice of the writ denial. **State v. Crandell**, 05-1060 at pp. 2-3, 924 So.2d at 124. However, if a rehearing application is allowed in the appellate court and a rehearing application was timely filed, then a subsequent writ application to this court may be filed within thirty days

of the mailing of the notice of the appellate court's action on rehearing. **Id.**

Consequently, **State v. Crandell** concluded that the thirty-day period for taking writs to this court, provided by Supreme Court Rule X, § 5(a), was not extended in that case by the defendant's application for rehearing in the appellate court because it was not an instance when a rehearing was allowed. **State v. Crandell**, 05-1060 at p. 3, 924 So.2d at 124. Accordingly, it was determined in **Crandell** that the delay for seeking review in this court began to run from the mailing of the notice of the appellate court's writ denial, not from its rehearing denial; therefore, the defendant's writ application, filed within thirty days of the rehearing denial but more than thirty days from the writ denial, was untimely filed and the writ was recalled as improvidently granted. **State v. Crandell**, 05-1060 at pp. 3-4, 924 So.2d at 125.

Likewise, in the instant case, the Taxpayer's writ application was not filed within thirty days of the appellate court's decision on the merits (which affirmed the district court judgment in favor of the Tax Collector), and the filing by the Taxpayer of an application for rehearing in the appellate court, when rehearings are prohibited by La. R.S. 47:337.61(3) ("No ... rehearing ... shall be allowed."), cannot serve to extend the delay within which to timely file the writ application; therefore, the Taxpayer's writ application was not timely filed and "we lack jurisdiction to consider the validity of the decision of the court of appeal." **Caldwell**, 12-1383 at p. 8, 110 So.3d at 998; **Thompson v. Bamberg**, 231 La. 1082, 93 So.2d 666 (1957). See also **State v. Crandell**, 05-1060 at p. 3, 924 So.2d at 125.

In response to the Tax Collector's assertion of an untimely filing in this court, the Taxpayer contends that the failure to strictly adhere to the requirements of La. R.S. 47:337.61 "converted" this summary proceeding into an ordinary proceeding, thereby rendering the La. R.S. 47:337.61(3) rehearing prohibition inapplicable, resulting in the instant writ application being timely filed.

The Taxpayer chiefly relies on **City of New Orleans v. Davis Aviation, Inc.**, 235 La. 992, 106 So.2d 445 (1958). However, **Davis Aviation, Inc.** is not authoritative in this case, since there was no allegation therein that a summary proceeding had been converted into an ordinary proceeding.

An argument *was* made in **Caldwell Parish School Board v. Louisiana Machinery Company**, 12-1383 at p. 12, 110 So.3d at 1000, that the La. R.S. 47:337.61 summary proceedings at issue therein had been “converted” to ordinary proceedings, because the tax collector had filed motions for partial summary judgment (a procedural device the taxpayers argued was not available in a summary proceeding). In **Caldwell**, this court concluded that, because “no law, particularly La. R.S. 47:337.61, precludes the use of summary judgment in a summary proceeding, summary judgments are not precluded in summary proceedings and their use, therefore, does not convert a summary proceeding into an ordinary proceeding.” **Caldwell**, 12-1383 at p. 13, 110 So.3d at 1001, citing La. C.C.P. art. 2596 (“The rules governing ordinary proceedings are applicable to summary proceedings, except as otherwise provided by law.”).

After a thorough review of the facts and procedural steps taken in the district court in this case, it is clear that there is no merit in Taxpayer’s assertion that “[t]he parties - the [Tax Collector] especially - and the courts have instead consistently treated this case as an ordinary proceeding.” To the contrary, the record presented in this case reveals that the actions taken, which the Taxpayer relies on in its assertion that this summary proceeding was converted to an ordinary proceeding, were initiated by either the Taxpayer or the lower courts and did not originate with the Tax Collector.<sup>1</sup> Moreover, during the course of the proceedings in this case, the Taxpayer expressly recognized that the matter was being conducted as a summary

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<sup>1</sup> See **Cepro v. Matulich**, 152 La. 1072, 1073-74, 95 So. 226, 226 (1922) (indicating that the actions of a defendant cannot convert a summary action into an ordinary one).

proceeding pursuant to La. R.S. 47:337.61, as we discuss below.

Nor should this court be persuaded by Taxpayer's contention that, "[i]f the [Tax Collector] desired to treat this case as a summary proceeding, it was incumbent upon it to make that clear at the district court and at the Fifth Circuit, by urging those courts to adhere to the statute's requirements." Rather, any objection to the method of procedure by which a party obtains a judgment is waived if the party proceeded against by summary procedure submits, without objection, to the method of procedure, since an objection made for the first time after the trial of the claim comes too late. **Younger Bros., Inc. v. Spell**, 194 La. 16, 24-25, 193 So. 354, 356-57 (1939). Further, La. R.S. 47:337.61(2) requires that "[a]ll *defenses*, whether by exception or to the merits, made or intended to be made to any such claim, *must be presented at one time* and filed in the court of original jurisdiction *prior to the time fixed for the hearing*, and *no court* shall consider any defense unless so presented and filed." (Emphasis added.) In addition, La. R.S. 47:337.61(2) expressly states that "[t]his provision shall be construed to deny to any court the right to extend the time for pleading defenses, and no continuance shall be granted by any court to any defendant except for legal grounds set forth in the Louisiana Code of Civil Procedure."<sup>2</sup> (Emphasis added.) As set out below, the Taxpayer herein raised no objections in the courts below as to the deviations from the La. R.S. 47:337.61 deadlines and procedures of which it now complains.

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<sup>2</sup> See La. C.C.P. art. 926 ("The objections which may be raised through the dilatory exception include but are not limited to the following: ... (3) Unauthorized use of summary proceeding .... All objections which may be raised through the dilatory exception are waived unless pleaded therein."); La. C.C.P. art. 2593, 1960 Official Revision Comment (d) ("The defendant waives any objection to the improper use of summary procedure if he enters upon the trial without excepting to the summary procedure."); Frank L. Maraist, 1 **La. Civ. L. Treatise**, Civil Procedure § 5:3 "Summary Proceedings" (2d ed.) ("Any exceptions or other opposition to the suit must be filed prior to the time the matter is assigned for trial and disposed of at the trial on the merits. The defendant waives any objection to the improper use of the summary proceeding unless he or she timely files a dilatory exception urging that objection.") (footnotes omitted). See also **Garrett v. Cross**, 41,139, p. 3 (La. App. 2 Cir. 7/18/06), 935 So.2d 845, 847; **Scott v. Scott**, 331 So.2d 523, 525 (La. App. 2 Cir. 1976); **Moses v. American Security Bank of Ville Platte**, 222 So.2d 899, 903-04 (La. App. 3 Cir. 1969); **Nelson v. McCarter**, 212 So.2d 467, 470 (La. App. 2 Cir. 1968).

Furthermore, appellate courts generally will not consider issues raised for the first time on appeal. **Thomas v. Bridges**, 13-1855, pp. 11-12 (La. 5/7/14), 144 So.3d 1001, 1009; **Segura v. Frank**, 93-1271, p. 15 (La. 1/14/94), 630 So.2d 714, 725. See also **Louisiana High School Athletics Association, Inc. v. State**, 12-1471, p. 15 n.13 (La. 1/29/13), 107 So.3d 583, 596 n.13 (“Since these arguments are being raised for the first time on appeal, they are barred from our review.”); **Costello v. Hardy**, 03-1146, p. 16 n.13 (La. 1/21/04), 864 So.2d 129, 142 n.13 (“Because [plaintiff] failed to plead the defense in the trial court and raised the issue for the first time on appeal, we cannot consider it here.”); **Boudreaux v. State, Department of Transportation & Development**, 01-1329, p. 2 (La. 2/26/02), 815 So.2d 7, 9 (per curiam) (“[W]e cannot consider contentions raised for the first time in this Court which were not pleaded in the court below and which the district court has not addressed.”).

The record makes it clear that the Tax Collector *was* proceeding under the summary procedure, authorized by La. R.S. 47:337.61, for the collection of unpaid taxes. Revised Statute 47:337.45(A) provides for the following alternative remedies or procedures that may be used by a tax collector: (1) assessment and distraint, pursuant to La. R.S. 47:337.48 - 47:337.60; (2) summary court proceeding, pursuant to La. R.S. 47:337.61; and (3) ordinary suit, under the general laws regulating actions for the enforcement of obligations. **Catahoula Parish School Board v. Louisiana Machinery Rentals, LLC**, 12-2504, p. 10 (La. 10/15/13), 124 So.3d 1065, 1072. As stated in Paragraph (B)(1) of La. R.S. 47:337.45, “[t]he 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 collector.” **Id.**

Herein, the pleading filed by the Tax Collector to commence this suit was entitled “Rule for Taxes” and, although the rule did not reference La. R.S. 47:337.61,

the prayer for relief asked the court to “issue to the defendant ... an order to appear before the Court and show cause why judgment should not be granted in [the Tax Collector]’s favor....” A summary proceeding ordinarily is commenced by the filing of a contradictory motion or by a rule to show cause; citation and service of the citation are not necessary. Frank L. Maraist, 1 **La. Civ. L. Treatise**, Civil Procedure § 5:3 “Summary Proceedings” (2d ed.). By initially filing a rule for taxes, it is clear that the Tax Collector intended the instant suit as a summary proceeding, pursuant to La. R.S. 47:337.61, rather than either an assessment and distraint, pursuant to La. R.S. 47:337.48 - 47:337.60, or an ordinary suit, under the general laws regulating actions for the enforcement of obligations.

The Taxpayer concedes, in brief to this court, that this matter was “initiated ... as a summary proceeding,” but contends that “it ceased to be one shortly thereafter, long before [the Taxpayer] filed its writ application in this Court.” The Taxpayer states that the following are deviations from the requirements of La. R.S. 47:337.61, which resulted in this summary proceeding being converted into an ordinary proceeding: **(1)** the hearing on the rule was required to be heard “no later than ten days after notice,” as required by La. R.S. 47:337.61(1), but this case was not heard “until nearly six months after [the Taxpayer] was given notice,” and the “trial was not complete for an additional three months”; **(2)** the district court decision was not rendered within forty-eight hours after submission, as required by La. R.S. 47:337.61(3); though “[t]he hearing was complete on October 27, 2017,” “the district court did not issue its judgment and reasons until March 2, 2018, *more than four months after the case was submitted*” (italics original); **(3)** the appellate court did not hear the matter by preference, as required by La. R.S. 47:337.61(1), and granted the parties extensions of time to file appellate briefs; **(4)** the appellate court decision was not rendered within forty-eight hours after submission, as required by La. R.S. 47:337.61(3); though “[b]riefing ... was complete on August 1, 2018 ... oral

argument was held more than two months later, on October 11, 2018 ... and the Fifth Circuit issued its decision more than two months after that, on December 27, 2018”; (5) this case was not “conducted with rapidity,” having been filed on February 16, 2017 but not decided by the district court until March 2, 2018, with “[m]ultiple continuances of trial dates and briefing deadlines ... requested by both parties,” a “three-month recess,” and “extensive discovery.” Although not all of these complaints are documented in the record presented to this court, each is examined below insofar as it is reflected in the appellate record.

Revised Statute 47:337.61(1) provides that “[a]ll such proceedings ... shall always be tried or heard by preference ... at such time as may be fixed by the court, which shall be not less than two nor more than ten days after notice to the defendant or opposing party.” In this case, the Tax Collector’s February 16, 2017 rule to show cause was set by the district court for hearing on May 2, 2017. Though the record presented does not establish the exact date of notice, the Tax Collector states in brief to this court that the Taxpayer was served with notice of the rule on March 6, 2017. Thus, the hearing on the rule, set for May 2, 2017, does not appear to have been set in accordance with La. R.S. 47:337.61(1)’s requirement that a summary tax rule be tried by the court within ten days of notice to the defendant. However, there is no indication in the record that any objection was offered by the Taxpayer to the timeliness of the date set.

In fact, on April 6, 2017, the Taxpayer filed its “Exceptions, Affirmative Defenses, and Answer,” in which no assertion of impropriety was made as to the manner in which the summary proceeding was being conducted. The Taxpayer also filed, on April 6, 2017, a “Motion for Scheduling Conference,” in which the Taxpayer requested “a scheduling conference to set necessary pretrial deadlines and to set this matter for hearing/trial,” further noting: “*This is a summary proceeding.*” (Emphasis added.) The district court signed the Taxpayer’s appended order, setting

a scheduling conference for May 2, 2017 (the same date previously fixed by the district court for a hearing on the Tax Collector's "Rule for Taxes"). Though the Taxpayer clearly recognized that the matter was a summary proceeding, instead of urging the district court to maintain the ten-day hearing timeframe set forth in La. R.S. 47:337.61(1), the Taxpayer sought to upset the May 2, 2017 hearing date in favor of a "scheduling conference."

The district court's minute entry for May 2, 2017 showed counsel for the Tax Collector present in court and Taxpayer's counsel participating by telephone. The May 2, 2017 minute entry further indicated that the Taxpayer-requested scheduling conference was "converted to a status conference" and set for May 17, 2017, and the Tax Collector's rule for taxes was "continued" and "to be reset at the status conference on May 17, 2017." No reason was noted in the district court's May 2, 2017 minute entry for the physical absence of the Taxpayer's counsel from the May 2, 2017 "scheduling conference," which the Taxpayer had requested, though it appears to have occasioned the conversion of the scheduling conference to a status conference and necessitated re-scheduling until May 17, 2017.

The subsequent district court minute entry for May 17, 2017 stated that the status conference was conducted in chambers, that "potential trial dates of August 1st and/or 2nd, 2017" were discussed, and that a "motion to set for trial will follow." On July 21, 2017 the Taxpayer filed the motion to set the trial for August 1, 2017 through August 2, 2017, which was granted by the district court. While the May 17, 2017 minute entry did not give explicit reasons for continuing the hearing/trial date on the Tax Collector's Rule, it is apparent that the Taxpayer's motions for a scheduling conference and to set trial caused the original May 2, 2017 hearing date to be moved to August of 2017. Thus, the lack of compliance with La. R.S. 47:337.61(1)'s requirement that hearing on a rule for taxes be set within ten days of notice to the defendant seems to be directly attributable to the actions of the district

court and those of the Taxpayer, not those of the Tax Collector. Given the Taxpayer's affirmative actions in bringing out the re-setting of the hearing date, it cannot now be heard to complain that the hearing date did not fall within the ten-day hearing timeframe set forth in La. R.S. 47:337.61(1).

On July 26, 2017 the Taxpayer filed a motion for entry of a protective order, to maintain the confidentiality of certain information relative to its online sales transaction data. In addition, on July 27, 2017, the Taxpayer filed a motion to quash a subpoena duces tecum issued by the Tax Collector, by which the Tax Collector sought to obtain detailed transaction data, for the Tax Period, related to all sales made by the Taxpayer through its Internet marketplace on behalf of third party retailers.<sup>3</sup> Both the motion for entry of a protective order and the motion to quash the subpoena duces tecum were set for hearing on the first day of trial, August 1, 2017.

In its July 28, 2017 pretrial memorandum, the Taxpayer recognized that the matter remained a summary proceeding, stating: "This is a local sales tax case in which ... [the] Tax Collector ... filed a Rule for Taxes [in] this summary proceeding." The Taxpayer made no statement, in its pretrial memorandum, asserting lack of compliance with any La. R.S. 47:337.61 requirements.

On August 1, 2017 the Taxpayer's two motions were argued by counsel. During the argument of Taxpayer's counsel and as pertinent to the issue of compliance with La. R.S. 47:337.61 requirements, counsel remarked: "[T]oday we are dealing with ... a rule for taxes.... *The [Tax Collector] has the right to choose the ball that he wants to play with .... [T]hey jumped over to the rule for taxes.*" (Emphasis added.) These comments by Taxpayer's counsel demonstrate that the

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<sup>3</sup> Note **Washington v. Cannizzaro**, 18-0125, pp. 6-7 (La. App. 4 Cir. 11/7/18), 259 So.3d 421, 425 (holding that discovery may be scheduled in a summary proceeding), citing La. C.C.P. art. 2596 ("The rules governing ordinary proceedings are applicable to summary proceedings, except as otherwise provided by law.").

Taxpayer was aware that the matter was proceeding as a rule for taxes pursuant to La. R.S. 47:337.61, a summary proceeding; nevertheless, the Taxpayer offered no objection to the matter going forward as a summary proceeding.

On the motion for entry of a protective order, the district court ruled in favor of the Taxpayer, ordering that the Taxpayer's contracts with third party retailers and all documents disclosed in response to discovery requests be placed under seal. The Taxpayer's motion to quash the Tax Collector's subpoena was denied.

After ruling on the motions, the trial of the rule for taxes commenced. Counsel for the Tax Collector called three witnesses and then rested his case.<sup>4</sup>

During the Taxpayer's counsel's direct examination of his first witness and, upon counsel attempting to introduce its Defense Exhibit No. 5, the Tax Collector's counsel objected to the introduction of the document offered, asserting that it was a summary of sales transaction data and not an original document made at the time each sales transaction at issue occurred. Counsel for the Tax Collector further contended that the failure to allow the Tax Collector access to the original records, when a summation such as Defense Exhibit No. 5 is substituted for an otherwise voluminous exhibit, violated La. C.E. art. 1006.<sup>5</sup> The district court indicated that

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<sup>4</sup> Among the Tax Collector's witnesses was Deputy Jeanine Theriot (Audit Manager for the Tax Collector's Bureau of Revenue and Taxation), whose affidavit was filed in support of, and verified the allegations in, the Tax Collector's rule for taxes, commencing this litigation, along with an "Audit Assessment Report," an exhibit detailing the taxes alleged to be due and owing for the relevant tax period. In her affidavit, Deputy Theriot stated that her position as Audit Manager provided her with personal knowledge, and she had participated in the determination, of the tax debt owed by the defendant Taxpayer; she also verified the truth of the allegations of fact in the Rule for Taxes and attached exhibit filed in this action. This is relevant because Paragraph (4) of La. R.S. 47:337.61 provides: "Whenever the pleadings filed on behalf of the taxing authority, or on behalf of the collector, shall be accompanied by an affidavit of the collector or of one of his assistants or representatives or of the counsel or attorney filing the same, that the facts as alleged are true to the best of the affiant's knowledge or belief, all of the facts alleged in said pleadings shall be accepted as prima facie true and as constituting a prima facie case, and the burden of proof to establish anything to the contrary shall rest wholly on the defendant or opposing party."

<sup>5</sup> Article 1006 states: "The contents of otherwise admissible voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court."

Defense Exhibit No. 5 could not be considered an original record, such that La. C.E. art. 1006's requirement that "[t]he originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place" would be rendered inapplicable. After an off-the-record discussion between counsel, it was agreed that the trial would be recessed in order to allow the Tax Collector full and direct access, by the Taxpayer, to its computerized sales transaction records, for the Tax Period, at its California business premises. The Taxpayer further agreed to pay the expenses of two auditors, hired by the Tax Collector, to audit the computer records at issue, and it was agreed that an additional two Tax Collector employees would be allowed to accompany the other two auditors, at the Tax Collector's expense.

Although the Taxpayer states in brief to this court that "the parties and the district court agreed to a three-month trial recess," the Taxpayer also asserts that the Tax Collector "requested" the recess and cites the alleged Tax Collector-requested recess as an example of the Tax Collector's failure to maintain the rapidity required by La. R.S. 47:337.61 for a summary proceeding. In making this assertion, the Taxpayer quotes the remarks of the Tax Collector's counsel, following the off-record discussion between counsel, stating, in pertinent part:

My client's offer is ... that we recess trial for the purpose of and it's condition[ed] upon [the Taxpayer] giving the [Tax Collector] ... direct access to the OMS [Order Management System] ... [t]hat we get access to the system to conduct an audit of all of the sale's detail data that's in the OMS system without redactions. And that we be allowed to go there [Taxpayer's California headquarters] and do our own audit .... [A]fter that is concluded, we probably ought to have a status conference. That would be up to the Court.

After further discussion between the district court and counsel, the Taxpayer's counsel agreed to the terms detailed by the Tax Collector, including: that the Taxpayer would pay the Tax Collector's expense of two contract auditors' time at the Taxpayer California facility; that an examination of the Taxpayer's OMS records

on its computer database would be allowed; and that, afterward, the Tax Collector would have an opportunity to supplement its case with information gained from the examination of the Taxpayer's original records.

Based on the transcribed colloquy between the district court and opposing counsel, it seems clear that the trial recess was the result of the mutual agreement of counsel for both the Tax Collector and the Taxpayer, and it does not appear that the recess was *requested* by the Tax Collector, as asserted by the Taxpayer.<sup>6</sup> Rather, the Tax Collector's counsel merely recited the agreement discussed off the record between himself and the Taxpayer's counsel. La. R.S. 47:337.61(4) afforded the Tax Collector the presumption of a "prima facie case," since its rule to show cause was "accompanied by an affidavit of the collector or of one of his assistants or representatives ... that the facts as alleged are true to the best of the affiant's knowledge or belief";<sup>7</sup> therefore, "the burden of proof to establish anything to the contrary ... rest[ed] wholly on the defendant" Taxpayer to establish that the allegedly unpaid taxes were not owed. Since the Taxpayer, at that juncture of the trial, was facing a potential ruling by the district court that would exclude the offered Defense Exhibit No. 5, on which the Taxpayer relied to bear his burden of proof, it was clearly within the interest of the Taxpayer to agree to a recess to attempt to satisfy La. C.E. art. 1006, entitling the Tax Collector to access to the original records on which the Taxpayer's summary exhibit was based.<sup>8</sup>

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<sup>6</sup> The Taxpayer's assertion that the Tax Collector "requested" the trial recess also seems to be contradicted by a statement in its post-trial brief, wherein it was stated: "All told, [the Taxpayer] took a three-month recess, paid for multiple [Tax Collector] auditors to conduct an on-site audit in California, incurred additional legal fees, and diverted the attention of several high-ranking employees, all so the [Tax Collector] could corroborate the data [the Taxpayer] originally provided."

<sup>7</sup> See also **Livingston Parish School Board ex rel. Sales & Use Tax Division v. Hwy 43 Cornerstore, LLC**, 12-0103, pp. 5-6 (La. App. 1 Cir. 5/23/12), 93 So.3d 709, 713-14; **Strain v. Tony Crosby's Furniture Gallery**, 08-1807, p. 4 (La. App. 1 Cir. 3/27/09), 9 So.3d 1017, 1019-20; **Parish of East Baton Rouge v. Kosay Enterprises, Inc.**, 368 So.2d 178, 181 (La. App. 1 Cir. 1979).

<sup>8</sup> The evidence in this case shows that, from the time the Tax Collector first began investigating

Thus, a recess of the trial, for the purpose of allowing the Taxpayer to comply with La. C.E. art. 1006, inured more to the benefit of the Taxpayer, than the Tax Collector. That benefit is reinforced by the fact that, upon resumption of the trial in October of 2017, the Tax Collector and the Taxpayer reached a stipulation that the sales transactions at issue totaled \$1,587,641.41, upon which a sales tax amount of \$75,413.00 (as compared to the \$1,896,882.15 in sales taxes sought in its rule for taxes) would be owed if the Taxpayer were found liable for payment of the taxes (though the Taxpayer did not concede liability for the taxes).

After the testimony of the Taxpayer's final witness, counsel for the Taxpayer related to the district court that the Taxpayer had additional documents that would further substantiate that witness's testimony, which were not previously produced as the Taxpayer had been unaware certain evidence (related to alleged underreporting of sales by the Taxpayer) would be introduced by the Tax Collector, and as a result the court left the record open to allow the Taxpayer additional time to submit the documents.

It is in relation to the Taxpayer's supplementation of the record that the only instance of any request for an extension of time, by the Tax Collector, is documented in the record. In a January 4, 2018 scheduling order, indicating the Taxpayer had filed its supplement to the record on November 22, 2017 and noting that "more than thirty days ha[d] passed without an opposition to the additional evidence by the [Tax Collector]," the district court set the filing deadline for the parties' post-trial memoranda for February 5, 2018. On January 8, 2018 the Tax Collector filed a motion to modify the January 4, 2018 scheduling order "to recognize the filing of, and consider, [the Tax Collector]'s response to [the Taxpayer]'s post-trial submittal"

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whether additional tax might be owed by the Taxpayer for its online marketplace third-party sales, the Tax Collector had repeatedly requested access to the Taxpayer's sales records and the Taxpayer repeatedly refused to comply with the Tax Collector's requests to examine the original records at issue, over a period of several years.

since the Tax Collector “did in fact file a response to the exhibits filed by [the Taxpayer] on January 3, 2018” and “[the Taxpayer] agreed to allow [the Tax Collector] to file his response on January 3, 2018.” Attached to the Tax Collector’s January 8, 2018 motion was a copy of an email from the Taxpayer’s counsel to the Tax Collector’s counsel, stating: “We have no objection to allowing [the Tax Collector] an extension of time until January 3, 2018 within which to respond to [the Taxpayer]’s exhibits and memo filed on Wednesday November 22, 2017.” The Tax Collector’s January 8, 2018 motion was granted by the district court. Because the Taxpayer expressly agreed to the extension of time for the Tax Collector to respond to its supplementation of the record, until January 3, 2018, the Taxpayer has no basis for complaint about any deviation from the rapidity required by La. R.S. 47:337.61, on account of the extension of time.

The Taxpayer again recognized that the district court proceeding was being conducted as a La. R.S. 47:337.61 summary proceeding, in its February 5, 2018 post-trial brief, wherein it stated, in pertinent part:

### **III. Legal Background**

#### **A. Summary Proceedings**

A parish may use several different procedures to collect tax allegedly owed. The procedure the [Tax Collector] chose here was to file a “summary proceeding.” La. R.S. 47:337.61. When a parish files a summary proceeding with an affidavit stating the facts alleged in the pleading are true to the best of the affiant’s knowledge, “all of the facts alleged in said pleadings shall be accepted as *prima facie* true and as constituting a *prima facie* case, and the burden of proof to establish anything to the contrary shall rest wholly on the defendant or opposing party.” La. R.S. 47:337.61(4). The [Tax Collector] has a *prima facie* case only for “the facts alleged” in its Rule for Taxes.

If a parish establishes a *prima facie* case in a summary proceeding, it must still present substantive evidence to prove or support its claim if the taxpayer provides evidence disproving the claims....

(Emphasis and italics original.) Additionally, in the “Argument” portion of the Taxpayer’s post-trial brief, the Taxpayer stated, in pertinent part:

Under the summary proceeding statute, the “facts alleged in [the Tax Collector’s] pleadings shall be accepted as *prima facie* true and as

constituting a *prima facie* case” if the [Tax Collector] files a pleading with an affidavit stating that “the facts alleged” in the pleading are true to the best of the affiant’s knowledge or belief. La. R.S. 47:337.61(4). Thus, the [Tax Collector] can establish a *prima facie* case that shifts the burden of proof to [the Taxpayer] only for “the facts alleged” in its Rule for Taxes.

(Italics original.) In this post-trial brief, instead of asserting that the La. R.S. 47:337.61 *prima facie* case provisions were inapplicable (since, as the Taxpayer now alleges to this court, “[t]he Tax Collector and the courts chose not to follow La. R.S. 47:337.61 at every turn”), the Taxpayer argued to the district court only the extent to which the Tax Collector had established a *prima facie* case under La. R.S. 47:337.61, essentially admitting that the matter continued to be a La. R.S. 47:337.61 summary proceeding.

It is also significant that the Taxpayer filed a *suspensive* appeal on March 5, 2018, *within five calendar days* of the district court’s March 2, 2018 judgment, and provided an appeal bond of more than *double* the judgment amount, all in compliance with La. R.S. 47:337.61(3), which provides that “[n]o ... devolutive appeal shall be allowed” and “[s]uspensive appeals ... must be perfected within five calendar days from the rendition of the judgment by giving of bond ... in a sum double that of the total amount of the judgment, including costs.” In contrast, in an ordinary proceeding, a party may take a devolutive appeal *within sixty days* or a suspensive appeal to be filed *within thirty days*, and a suspensive appeal bond cannot exceed *one and one-half times* (150%) the judgment amount. See La. C.C.P. arts. 2087(A), 2123(A), and 2124(D). Further, the Taxpayer herein stated in its motion for appeal, in pertinent part: “[Taxpayer] further moves that, *pursuant to La. R.S. 47:337.61(3)*, the security for the suspensive appeal be provided by posting an appeal bond, with good and solvent security, in a sum double that of the total amount of the judgment, including costs.”<sup>9</sup> (Emphasis added.) This acquiescence by the

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<sup>9</sup> The principle judgment amount awarded in favor of the Tax Collector, against the Taxpayer, herein, was \$137,944.25, while the amount of the suspensive appeal bond posted by the Taxpayer

Taxpayer, in the La. R.S. 47:337.61 requirements for perfecting an appeal in a La. R.S. 47:337.61 summary proceeding, demonstrated that the Taxpayer was cognizant that the matter continued to be a summary proceeding, yet the Taxpayer offered no objection to any deviations from the La. R.S. 47:337.61 requirements.

In addition to statements made in the district court indicating the Taxpayer was aware that the instant proceeding had been maintained as a summary proceeding, counsel for the Taxpayer also stated in brief to the appellate court that the Tax Collector instituted this action as a La. R.S. 47:337.61 summary proceeding. However, the Taxpayer urged no assignment of error and made no argument, in the appellate court, contending that the La. R.S. 47:337.61 summary proceeding had been converted into an ordinary proceeding. It was not until this court granted the Taxpayer's writ application and the Tax Collector filed the motion to dismiss, at issue herein, that the Taxpayer first asserted the La. R.S. 47:337.61 summary proceeding had been "converted" into an ordinary proceeding, contending that "the [Tax Collector], the district court, and the [appellate court] have each chosen not to follow the requirements and expedited procedures for summary proceedings, as required by La. R.S. 47:337.61 and the Code of Civil Procedure."

In response to the Taxpayer's assertions, the Tax Collector counters that, despite the deadlines established by the Legislature and set forth in La. R.S. 47:337.61, courts nevertheless retain inherent power, as an independent branch of government, over the exercise of judicial functions, including the management of court dockets and schedules, citing **Konrad v. Jefferson Parish Council**, 520 So.2d 393, 397-98 (La. 1988).<sup>10</sup>

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was \$316,348.25.

<sup>10</sup> See La. C.C.P. art. 2595 ("The court shall render its decision as soon *as practicable* after the conclusion of the trial of a summary proceeding and, *whenever practicable*, without taking the matter under advisement.") (emphasis added). See also La. C.C.P. art. 191 ("A court possesses inherently all of the power necessary for the exercise of its jurisdiction even though not granted expressly by law."); La. C.C.P. art. 1551 (authorizing pretrial conferences and scheduling orders);

The Tax Collector further points out that in the cases of **Caldwell Parish School Board v. Louisiana Machinery Company**, *supra*, **Catahoula Parish School Board v. Louisiana Machinery Rentals, LLC**, *supra*, and **Washington Parish Sheriff's Office v. Louisiana Machinery Company**, 13-0583 (La. 10/15/13), 126 So.3d 1273, there was a lack of strict compliance with the La. R.S. 47:337.61 deadlines, and those summary proceedings were not deemed to have been converted to ordinary proceedings. While the precise issue in this case (whether the failure to comply with La. R.S. 47:337.61 deadlines converts a summary proceeding into an ordinary proceeding) does not appear to have been raised in these three prior cases, the Tax Collector asserts that the **Caldwell** holding (that the filing of a motion for summary judgment does not convert a summary proceeding into an ordinary proceeding) carries the inference that a lack of compliance with the La. R.S. 47:337.61 deadlines would necessarily occur when a motion for summary judgment is filed, since the legal delays associated with a motion for summary judgment make compliance with the La. R.S. 47:337.61 ten-day hearing deadline impossible.<sup>11</sup> Therefore, the Tax Collector contends that, in order for this court to rule that there must be compliance with the La. R.S. 47:337.61 ten-day hearing deadline, otherwise

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La. C.C.P. art. 1571 (“The district courts shall prescribe the procedure for assigning cases for trial, by rules which shall . . . [p]rescribe the order of preference in accordance with law. . . .”); La. C.C.P. art. 1601 (“A continuance may be granted in any case if there is good ground therefor.”).

<sup>11</sup> Under La. C.C.P. art. 966(B), a motion for summary judgment must be filed and served on all parties not less than sixty-five days prior to the trial, any opposition to the motion must be filed and served not less than fifteen days prior to the hearing on the motion, and any reply memorandum must be filed and served not less than five days prior to the hearing on the motion. Under La. C.C.P. art. 966(C), unless otherwise agreed by all of the parties and the court, a contradictory hearing on a motion for summary judgment must be set not less than thirty days after the filing and not less than thirty days prior to the trial date, notice of the hearing date must be served on all parties not less than thirty days prior to the hearing, and the court must render a judgment on the motion not less than twenty days prior to the trial. It seems clear that the La. C.C.P. art. 966 deadlines (for example, requirements of service of the motion “not less than sixty-five days prior to the trial,” service of an opposition “not less than fifteen days prior to the hearing on the motion,” and the setting of a hearing date “not less than thirty days prior to the trial date”) are nearly all incompatible with La. R.S. 47:337.61’s 10-day hearing-on-the-merits deadline; yet, the **Caldwell** court did not find it necessary to reconcile these conflicts with La. C.C.P. art. 2596 (“The rules governing ordinary proceedings are applicable to summary proceedings, except as otherwise provided by law.”).

a summary proceeding is converted to an ordinary proceeding, **Caldwell** must be overruled. Regardless, it does appear to be implicit within the **Caldwell** decision that the failure to strictly adhere to every restriction or deadline imposed by La. R.S. 47:337.61 does not necessarily result in the conversion of a La. R.S. 47:337.61 summary proceeding into an ordinary proceeding.

Contrary to the Tax Collector's contention that the district court's inherent judicial power over the proceedings before it allows for deviations from the La. R.S. 47:337.61 deadlines when necessary for the management of its docket, the Taxpayer maintains that, since La. R.S. 47:337.61 uses "shall" to mandate the deadlines set forth therein, and the lack of compliance with those deadlines in this case resulted in the suit ceasing to be a summary proceeding governed by La. R.S. 47:337.61.

However, our review of the procedural steps taken in the district court reveals that the continuance of the initial May 2017 hearing date to the August 2017 date was attributable to motions filed by the Taxpayer; the recess on August 1, 2017 was attributable to the failure of the Taxpayer to comply with the Tax Collector's prior requests to review evidence in the Taxpayer's possession that the Tax Collector was entitled to examine; and the delay after the conclusion of trial testimony on October 27, 2017 resulted from the Taxpayer's request to submit additional evidence into the record and the district court's holding the record open for that purpose, as well as, the Taxpayer's agreement with the Tax Collector to allow the Tax Collector additional time, until January 3, 2018, to respond to that supplementation of the record. In addition, given the sheer volume of evidence introduced into the record in this case, involving over \$1.5 million in online sales transactions, it is only logical to assume that more than the ordinary amount of time would be necessary to litigate a taxation dispute over this quantity of sales, even in a summary proceeding, such that concluding the instant matter, filed on February 16, 2017, by March 2, 2018 does not seem wholly unreasonable. Regardless, since the Taxpayer made no

objection or otherwise raised the alleged defects in the district court at the various times when they occurred, as indicated hereinabove, the Taxpayer failed to preserve within the appellate record the basis for its current arguments, and the district court judge was thereby prevented from ruling contemporaneously on, as well as providing crucial context for, these alleged defects. Therefore, this court should find that the Taxpayer waived any objection it may have had to procedural deviations from the La. R.S. 47:337.61 summary proceeding requirements and conclude that the La. R.S. 47:337.61 summary proceeding was not converted to an ordinary proceeding in this case.

A proper application of La. R.S. 47:337.61's rehearing prohibition would result in the Louisiana Supreme Court Rule X, § 5(a) thirty-day period for filing a writ application, in this case, beginning to run from the date the appellate court issued its notice of judgment on December 27, 2018. See Caldwell Parish School Board v. Louisiana Machinery Company, 12-1383 at pp. 7-8, 110 So.3d at 998. Therefore, the Taxpayer's writ application was due in this court on Monday, January 28, 2019 (pursuant to La. C.C.P. art. 5059(A), as the thirtieth day, January 26, 2019, fell on a Saturday). Since the Taxpayer's writ application was received on February 16, 2017, it was untimely and we lack jurisdiction to consider the validity of the decision of the court of appeal. See Caldwell Parish School Board v. Louisiana Machinery Company, 12-1383 at p. 8, 110 So.3d at 998.

**SUPREME COURT OF LOUISIANA**

**No. 2019-C-00263**

**NEWELL NORMAND, SHERIFF & EX-OFFICIO TAX COLLECTOR  
FOR THE PARISH OF JEFFERSON**

**VS.**

**JAN 29 2020**

**WAL-MART.COM USA, LLC**

**ON WRIT OF CERTIORARI TO THE COURT OF APPEAL,  
FIFTH CIRCUIT, PARISH OF JEFFERSON**

**PITCHER, J.,** dissents for the reasons assigned by Justice Hughes.

*P. by J. Pitcher*