

**BOARD OF TAX APPEALS  
STATE OF LOUISIANA**

**BARRON, HEINBERG &  
BROCATO, LLC**  
Petitioner

VS.

**DOCKET NO. 12963C**  
c/w  
**DOCKET NO. 12984C**

**LOUISIANA DEPARTMENT OF REVENUE,  
STATE OF LOUISIANA,**  
Respondent

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**JUDGMENT WITH WRITTEN REASONS**

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On January 12, 2022, this matter came before the Board for hearing on a Declinatory Exception of Lack of Subject Matter Jurisdiction filed by the defendant, Kevin Richard, Secretary, Louisiana Department of Revenue and Taxation (“Department”), with Judge Tony Graphia (ret.)<sup>1</sup>, Chairman, presiding, and Board Members Cade R. Cole and Francis J. “Jay” Lobrano, present. Present before the Board was Greg Upton, attorney for Barron, Heinberg & Brocato, LLC (the “Taxpayer”); John Lynch, a Partner of the Taxpayer entity; and Aaron Long, attorney for the Department. After the hearing, the Board took the matter under advisement. The Board now renders the following Judgment in accordance with the attached written reasons:

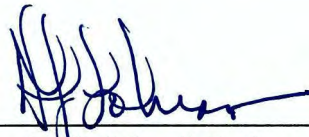
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<sup>1</sup> Following the hearing, Judge Tony Graphia’s term expired and he retired from the Board, and thus is not participating in the rendering of this Judgment and these Reasons for Judgments.

IT IS ORDERED, ADJUDGED AND DECREED that the Declinatory Exception of Lack of Subject Matter Jurisdiction is overruled.

JUDGMENT RENDERED AND SIGNED at Baton Rouge, Louisiana, this 13<sup>th</sup> day of July, 2022.

FOR THE BOARD:



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

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**WRITTEN REASONS FOR JUDGMENT**

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On January 12, 2022, this matter came before the Board for hearing on a Declinatory Exception of Lack of Subject Matter Jurisdiction filed by the defendant, Kevin Richard, Secretary, Louisiana Department of Revenue and Taxation (“Department”), with Judge Tony Graphia (ret.)<sup>2</sup>, Chairman, presiding, and Board Members Cade R. Cole and Francis J. “Jay” Lobrano, present. Present before the Board was Greg Upton, attorney for Barron, Heinberg & Brocato, LLC (the “Taxpayer”); John Lynch, a Partner of the Taxpayer entity; and Aaron Long, attorney for the Department. After the hearing, the Board took the matter under advisement. The Board now renders the foregoing Judgment overruling the Department’s Exception in accordance with these written reasons.

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<sup>2</sup> Following the hearing, Judge Tony Graphia’s term expired and he retired from the Board, and thus is not participating in the rendering of this Judgment and these Reasons for Judgments.

**Facts:**

As established by the testimony and the documents introduced at the hearing of this matter, the Taxpayer is an architectural firm. Beginning with the 1<sup>st</sup> quarter of 2017, and through and including the last quarter of 2019, the Taxpayer filed its employer's quarterly return of Louisiana withholding tax (Form L-1) (the "Return"), with varying amounts reported as withheld. The record is not clear whether the Returns were timely filed. However, as the result of an employee's alleged theft of amounts withheld and set aside for remittance to the Department, Taxpayer did not timely submit payment with the filing of its Returns. The failure to do so generated Notices of Tax Due from the Department to the Taxpayer, most of which were dated in March and April of 2021, with the exception of one of the notices dated in October of 2020. The majority of the notices reflected withholding tax due, together with a delinquent filing penalty and "other penalties", which were collection fees imposed by the Department.

Ultimately, when the owners of the Taxpayer learned of the alleged defalcation, Taxpayer ultimately remitted the withholding tax due, together with interest, as set forth in the notices, but did not remit either category of penalties charged in each notice. Subsequent to the payment of the withholding tax, on or about September 7, 2021, pursuant to correspondence to the Department of that same date, Taxpayer submitted and paid under protest the sum total of Seventeen Thousand Two Hundred Fifty-Eight and 63/100 (\$17,258.63), representing both the penalty and the collection fee imposed by the

Department on the delinquent remittance and possibly the delinquent filing of the Returns. On October 7, 2021, the Taxpayer filed its petition in the instant matter challenging the Department's imposition of the penalty and the collection fee. In response to the Taxpayer's filing, the Department filed its Declinatory Exception of Lack of Subject Matter Jurisdiction, asking for a dismissal of the Taxpayer's case in this matter and claiming that this Board does not have jurisdiction to lessen or remove the penalty and the collection fee. For the reasons that follow, we disagree with the Department and overrule the Exception.

**Reasons:**

The issue presented in the Department's Exception is purely a legal question<sup>3</sup> as to whether the Taxpayer's right to pay under protest was extinguished at the conclusion of the 30 days, beginning with the issuance of the Notices of Tax Due. Under La. R.S. 47:1561(B)(2), the existence of a final assessment prevents the Taxpayer from paying under protest. La. R.S. 47:1568(A) provides for the self-assessment of tax, penalties, and interest by the Taxpayer's filing of a return. La. R.S. 47:1568(B) provides that if the Taxpayer fails to include payment with the return:

[T]he secretary shall immediately send a notice by mail to such person, addressed to the address appearing on the return or to any available address, informing him of the amount due, or the balance of the amount due if a partial payment has been made, and demanding payment of such

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<sup>3</sup> As originally filed, the Department's Exception raised the argument that Taxpayer failed to follow the requisite formalities of the Payment Under Protest procedure. At the hearing, counsel for the Department stated that it would not maintain this basis for the Exception in light of documents produced by the Taxpayer.

amount within thirty calendar days from the date of the notice. If payment has not been received at the expiration of such time, the assessment shall be collectible by distraint and sale as is hereinafter provided.

The Department's authority to seize the Taxpayer's property after expiration of the thirty day period is undisputed. The Taxpayer's position is that the authority to seize property does not necessarily mean that the self-assessment is a "final assessment" within the meaning of La. R.S. 47:1561(B)(2). The authority to collect the amount due by distraint provided for in 47:1568(B) should be read in light of Paragraph (C), which follows immediately thereafter and provides: "Nothing in this Section shall be construed as denying the right of the taxpayer to pay the assessment under protest or to claim a refund of the assessment after payment, all in a manner as is hereinafter set out in this Chapter."

Applying the canons of statutory construction, the Board agrees with the Taxpayer that a self-assessment is not a "final" assessment under La. R.S. 47:1561(B)(2). On its face, the Payment Under Protest procedure in La. R.S. 1576 does not contain a temporal restriction other than the 30 day window to file a Petition with the Board or District Court after giving notice to the Department. La. R.S. 47:1576(A)(2).<sup>4</sup> Further, the legislature did not employ the language of a "final assessment" in La. R.S. 47:1568, but did choose to do so when it provided the process of notice and assessment in La. R.S. 47:1565(B): "If

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<sup>4</sup> There is, however, a specific provision applicable to "income and corporation franchise tax purposes, in instances where the payment of tax under protest is required to be made before the amount of tax due is determinable." See La. R.S. 47:1576(B). In such instances, the taxpayer has 30 days from the due date of the return, or extended due date, to file suit or petition with the Board.

the taxpayer has not filed an appeal with the Board of Tax Appeals within the sixty day period, the assessment shall be **final** and shall be collectible by distraint and sale as hereinafter provided.” [emphasis added]. The authority to collect a self-assessed amount by summary procedure is further decoupled from the existence of a final assessment in La. R.S. 47:1574(5)(a), which authorizes summary proceedings for the “collection of a tax assessment that has become final, **or** to which the provisions of **R.S. 47:1567** or 1568 apply.”

Notably, La. R.S. 47:1568 also provides that a taxpayer, having self-assessed by filing a return, may claim a refund of the assessment after payment. La. R.S. 47:1568(C). In this respect, there is no substantive effect or difference between a refund claim versus a payment under protest. The statute treats both remedies the same way. However, if the Department’s position were to be adopted, the self-assessment would be treated as “final” as to the payment under protest procedure, but not with respect to the refund claim.

For the foregoing reasons, the Board finds that the Taxpayer’s self-assessment did not become a “final” assessment that precluded utilization of the Payment Under Protest procedure. A self-assessment under La. R.S. 47:1568 is not expressly described as a “final assessment.” Application of the canons of statutory construction shows that the legislature did not impliedly intend for such a self-assessment to become a final assessment 30 days after the issuance of a notice of tax due. Finally, the Board notes that its ruling in this matter is limited expressly to the unique facts of this case.

Baton Rouge, Louisiana, this 13<sup>th</sup> day of July, 2022.

FOR THE BOARD:

A handwritten signature in blue ink, appearing to read "F. Lobrano", written over a horizontal line.

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