

BOARD OF TAX APPEALS
STATE OF LOUISIANA
LOCAL TAX DIVISION

BATON ROUGE WATER WORKS COMPANY
AND PARISH WATER COMPANY, INC.,

PETITIONERS

VERSUS

DOCKET NO. L01630

CAPITAL AREA GROUNDWATER CONSERVATION COMMISSION
AND CAPITAL AREA GROUNDWATER CONSERVATION DISTRICT,

DEFENDANTS

JUDGMENT WITH WRITTEN REASONS
ON WATER COMPANIES' MOTION FOR PARTIAL SUMMARY JUDGMENT

On April 12, 2024, this matter came before the Board for hearing by Zoom on the *Motion for Partial Summary Judgment* filed by Baton Rouge Water Works Company (“BRWWC”) and Parish Water Company, Inc. (“PWCI”) (collectively, the “Water Companies”). Presiding at the hearing was Local Tax Judge Cade R. Cole. Appearing before the Board were Brett Furr, attorney for the Water Companies, and Murphy Foster, attorney for the Capital Area Groundwater Conservation Commission (“CAGCC”) and Capital Area Groundwater Conservation District (“CAGCD”) (collectively, the “Commission”). For the reasons stated in the attached Written Reasons, the Board ruled as follows:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Water Companies’ *Motion for Partial Summary Judgment* BE AND IS HEREBY GRANTED IN PART: for purposes of La. Const. Art. VII, § 4(C)’s prohibition against a political subdivision’s levying of a severance tax, the Board finds groundwater to be a natural resource; the Board also finds that the Commission’s pumping charges are assessed on the act of severing a natural resource from the surrounding soil and water; the Board further finds that the CAGCC and the CAGCD are political subdivisions of the State; and therefore, the Board holds that if the pumping charges are taxes, they are unconstitutional severance taxes.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the *Motion for Partial Summary Judgment* BE AND IS HEREBY DENIED IN PART: the question of whether the pumping charges are actually taxes involves unresolved issues of material fact to be decided after a hearing on the merits.

This is a non-final Judgment and does not constitute an appealable Judgment as contemplated by La. R.S. 47:1410 and La. R.S. 47:1434.

JUDGMENT RENDERED AND SIGNED THIS 19TH DAY OF APRIL, 2024.

FOR THE BOARD:



LOCAL TAX JUDGE CADE R. COLE

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Background

The Commission exists to provide for the “efficient administration, conservation, orderly development and supplementation of groundwater resources” in “the parishes of Ascension, East Baton Rouge, East Feliciana, Pointe Coupee, West Baton Rouge, and West Feliciana” (the “District”). La. R.S. 38:3071(B). The Water Companies operate approximately 100 wells within the geographic area of the

District. Through the wells, the Water Companies extract groundwater from the Southern Hills Aquifer (the “Aquifer”). The Aquifer is an underground system covering approximately 14,000 square miles in southeast Louisiana and southwest Mississippi.

The Water Companies pump groundwater by first boring a vertical hole into the subsurface using a drill rig. A pipe, called casing, is then placed into the hole. A screen is inserted at the depth where groundwater will be withdrawn to create a path for the groundwater to enter the casing. Pumps are then used to deliver the groundwater that flows into the casing up to the surface.

The legislature authorized the Commission to collect “pumping charges” within the District “based upon the annual rate of use of each user sufficient to meet costs and expenses of operation.” La. R.S. 38:3076(A)(14)(a). The Water Companies have paid pumping charges for many years. In 2019, the Commission increased the pumping charges from \$10 per million gallons produced to \$20 per million gallons produced. In 2022, the Commission further increased the rate to \$65 per million gallons produced. These rate increases were purportedly made in order to pay for the installation of a groundwater usage monitoring system. The Water Companies initiated litigation, including the present dispute, to contest the rate increases as well as the pumping charges in their entirety.

In their *First Supplemental, Amending and Restated Petition*, the Water Companies alleged that the pumping charges are taxes. The Water Companies claimed that collections from the pumping charges exceeded the cost of regulating groundwater usage and conserving the Aquifer and were intended to raise revenue. The Water Companies asserted that they would show this using the Commission’s budgets. No such documents were submitted in support of their *Motion for Partial Summary Judgment*. On the other hand, the Commission submitted the affidavit of Gary Beard. Mr. Beard is the Executive Director of the Commission. His responsibilities include overseeing finances and expenditures. In his affidavit, he

swears that the pumping charges are utilized only to pay for operational costs and expenses. He also swears that he is not aware of pumping charges being expended for anything other than to implement the Commission's statutory purposes and to further the Commission's legislatively-defined objectives.

According to the Water Companies, their *Motion for Partial Summary Judgment* is concerned exclusively with their alternative claim: that the pumping charges are unconstitutional severance taxes. The Water Companies contend that the fact that the pumping charges are imposed on the act of severance of a natural resource, *ipso facto*, establishes that they are severance taxes. Thus, the Water Companies view Mr. Beard's affidavit as irrelevant to the relief prayed for in their motion. The Commission counters that the pumping charges cannot be deemed to be unconstitutional severance taxes unless they are, in fact, determined to be taxes instead of fees.

Discussion

La. Const. Art. VII, § 4(B) authorizes the State to levy taxes on natural resources severed from the soil or water. However, political subdivisions may not levy a severance tax. La. Const. Art. VII, § 4(C). The Commission is a political subdivision of the State. La. R.S. 38:3072. Thus, the Commission is not allowed to levy a severance tax.

A severance tax is an excise tax imposed upon the right to produce or sever natural resources from the land or water. *See Edwards v. Parker*, 332 So.2d 175, 179 (La. 1976). The State severance tax is levied on "all natural resources severed from the soil or water, including all forms of timber, including pulp woods, turpentine, and other forest products; minerals such as oil, gas, natural gasoline, distillate, condensate, casinghead gasoline, sulphur, salt, coal, lignite, and ores; marble, stone, sand, shells, and other natural deposits; and the salt content in brine." La. R.S. 47:631. Groundwater is not listed as a natural resource for purposes of the State severance tax. Furthermore, our severance tax laws do not provide a rate of tax for

the severance of groundwater, as they do for other natural resources. *See* La. R.S. 47:633.

Whether or not the State taxes a particular natural resource is irrelevant. La. Const. Art. VII, § 4(C) expressly prohibits political subdivisions from levying any kind of severance tax. In *Reed v. City of New Orleans*, 593 So.2d 368 (La. 1992), the Court struck down a sales tax on tobacco products that exceeded the constitutional and statutory maximum rate of 3% applicable to all local sales taxes. The Court stated:

It is of no consequence that the tax targets the sale, use or consumption of only one specific group of commodities. LSA–Const. Art. VI, § 29 regulates the imposition by a municipality of a tax on the sale, use or consumption of any tangible personal property without exception. Nothing in the language of the constitutional article indicates that it is applicable only to a general sales and use tax or that it is not applicable to a tax on the sale or use of a specific commodity or group of commodities.

Id. at 371. Likewise, the prohibition on local severance taxes is not limited to only certain types of natural resources. The constitution prohibits political subdivisions from levying a severance tax on any natural resource. Groundwater is a natural resource. La. R.S. 31:4.

If a tax operates in substantially the same way as a severance tax, then it is a severance tax regardless of how it is named in law. In *City of New Orleans v Scramuzza*, 507 So.2d 215 (La. 1987), the Louisiana Supreme Court stated that “[c]lassification of a tax must be determined by its operational effect The realities of the tax must be examined; its substance, not its form.” The pumping charges are assessed against users of groundwater within the District. For this purpose, La. R.S. 38:3073(12) defines a user as a person who:

[P]roduces groundwater in the district for any beneficial use, in excess of fifty thousand gallons for any day during any calendar year from a well or wells owned or operated by such person or from a well or wells

owned or operated solely for the production of water used by such person.¹

The pumping charges are imposed on the severance of a natural resource. Thus, if the pumping charges are taxes, they are unconstitutional severance taxes.

However, whether the pumping charges are taxes is a threshold issue. The seminal case in this area of our law is *Audubon Ins. Co. v. Bernard*, 434 So.2d 1072 (La. 1983). In *Audubon*, the Court stated that, as a matter of settled law, “not every imposition of a charge or fee by the government constitutes a demand for money under its power to tax.” *Id.* at 1074. If the imposition is not principally intended to raise revenue, but is merely incidental to the making of rules and regulations to promote public order, individual liberty and general welfare, it is an exercise of the police power.” *Id.* The police power also entails the ability to charge special fees to a limited class of persons who receive special benefits that are not shared by other members of society. *Id.* However, if the imposition is primarily intended to raise revenue, or if it “clearly and materially exceeds the cost of regulation or conferring special benefits upon those assessed, the imposition is a tax.” *Id.*

The impositions that were challenged in *Audubon* were assessments on premiums collected by insurers doing business in Louisiana. Originally, the assessments were imposed to pay for the Louisiana Insurance Rate Commission’s (“LIRC”) costs of operations and enforcement. However, additional assessments were added to fund various public employee retirement systems. The Court found these retirement systems to be unrelated to insurance ratemaking and enforcement. The Court further found that robust retirement systems for firefighters and police provided a general benefit to the public, not a specific benefit to insurers. Thus, the

¹ The Water Companies extract sufficient groundwater from the Southern Hills Aquifer to qualify as “users” subject to the pumping charges.

additional assessments were held to be taxes. The result of this holding was invalidation, because the additional assessments were not enacted in compliance with La. Const. Art. 3 § 2's requirements for a new or increased tax.

In *Radiofone, Inc. v. City of New Orleans*, 630 So.2d 694 (La. 1994), the Court struck down New Orleans' additional occupational license tax on telecommunications businesses. La. Const. Art. VI, § 28 prohibits local authorities from levying an occupational license tax in excess of the State's occupational license tax unless authorized by two-thirds majority of the legislature. In 1986, the legislature terminated the State's occupational license tax. However, it also authorized local authorities to continue to collect their occupational license taxes up to a specified maximum rate. The additional tax effectively exceeded that maximum with respect to telecommunications businesses. New Orleans's primary justification for doing this was its authority under its Home Rule Charter. However, the Court held that any such authority was inconsistent with, and superseded by, the 1974 Constitution and La. Const. Art. VI, § 28.

In addressing New Orleans' alternative argument, that the tax was not an occupational license tax, the Court made an observation that is relevant here:

The City also concedes that the additional levy is a form of taxation because it is imposed for purposes of raising revenues. In other words, the assessments are imposed as taxes, not as a manifestation of the police power that commands fees only for defrayal of the costs of administration of a regulatory program, or not substantially in excess thereof.²

The Court expressly pointed out that the question of whether the imposition was a tax or fee was not disputed. Under the Water Companies' rationale, however, the fact

² *Radiofone*, 630 So.2d at 697 (citing *Audubon Ins. Co. v. Bernard*, 434 So.2d 1072 (La. 1983); *City of Lake Charles v. Wallace*, 170 So.2d 654 (La. 1965); *Ewell v. Board of Supervisors, Etc.*, 100 So.2d 221 (La. 1958); 9 McQuillin, *Municipal Corporations* § 26.40 (3d ed. 1984); 4 Cooley, *The Law of Taxation*, § 1784 (4th ed. 1924)).

that the imposition fell on the privilege of doing business, the typical activity subject to an occupational license tax, would have automatically meant that it was a tax.

For the foregoing reasons, the Board finds that there is an unresolved threshold issue of whether the pumping charges are taxes. Not every imposition is a tax. If the pumping charges were not intended to raise revenue and they did not clearly and materially exceed the cost of regulation, then they are fees, not taxes. If they are not taxes, then they cannot be deemed severance taxes. The Commission submitted the affidavit of its Executive Director. Thus, while the Board agrees that water is a natural resource and that the pumping charges fall on the same activity as would a severance tax, the Water Companies are not entitled to summary judgment to the full extent prayed for. The determination of whether the pumping charges were fees or taxes is a factual determination to be resolved after a trial on the merits.

SIGNED THIS 19TH DAY OF APRIL, 2024.

FOR THE BOARD:



LOCAL TAX JUDGE CADE R. COLE