

2018 WL 4963491 (La.Bd.Tax.App.)

Board of Tax Appeals

State of Louisiana

EIU, INC., PETITIONER

v.

DEPARTMENT OF REVENUE, STATE OF LOUISIANA, RESPONDENT

Docket No. 11117B

August 15, 2018

**JUDGMENT ON DEPARTMENT'S EXCEPTIONS OF RES JUDICATA, LACK
OF SUBJECT MATTER JURISDICTION, AND NO RIGHT OF ACTION**

*1 A hearing on the Exceptions of Res Judicata, Lack of Subject Matter Jurisdiction, and No Right of Action filed by the Secretary of the Department of Revenue, State of Louisiana (the "Secretary") was held on July 10, 2018, with Judge Tony Graphia (Ret.), Chairman presiding, and Board Members Cade R. Cole and Francis "Jay" Lobrano present. Participating in the hearing were: Nicole Gould Frey, attorney for EKJ, Inc. (the "Taxpayer") and Miranda Y. Conner, attorney for the Department. After the hearing, the matter was taken under advisement, and the Board now renders its Judgment as follows, for the written reasons issued herewith.

IT IS ORDERED, ADJUDGED, AND DECREED that the Department's Exception of Res Judicata BE AND IS HEREBY DENIED.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Department's Exception of Lack of Subject Matter Jurisdiction BE AND IS **HEREBY DENIED**.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Department's Exception of No Right of Action BE AND IS HEREBY DENIED.

Judgment Rendered and Signed at Baton Rouge, Louisiana this 15 day of August 2018.

**WRITTEN REASONS FOR JUDGMENT ON DEPARTMENT'S EXCEPTIONS OF RES
JUDICATA, LACK OF SUBJECT MATTER JURISDICTION. AND NO RIGHT OF ACTION**

A hearing on the Exceptions of Res Judicata, Lack of Subject Matter Jurisdiction, and No Right of Action filed by the Secretary of the Department of Revenue, State of Louisiana (the "Secretary") was held on July 10, 2018, with Chairman Tony Graphia (Ret.), presiding, and Board Members Cade R. Cole and Francis "Jay" Lobrano present. Participating in the hearing were: Nicole Gould Frey, attorney for EIU, Inc. (the "Taxpayer") and Miranda Y. Conner, attorney for the Department. After the hearing, the matter was taken under advisement, and the Board now renders its Judgment for the following written reasons:

The Taxpayer appeals the Department's denial of a refund claim for the Alternative Fuel Tax Credit ("AFTC") against the Taxpayer's Corporate Income and Franchise Tax ("CIFT") liability for the tax period ending December 31, 2011. The Taxpayer originally claimed the AFTC on its 2011 Louisiana CIFT return. By letter **dated February 5, 2013, the Department denied the credit. The Department then** issued to the Taxpayer a Notice of Proposed Tax Due dated February 14, 2013. The Taxpayer filed a Petition to Review Denial of Refund/Credit with the Board on May 10, 2013, beginning the action *Eiu, Inc. v. Barfield*, No. 8088 (the "First Action").

On February 21, 2014, during the pendency of the First Action, the Department sent a Statement of Account to Petitioner showing a balance due in the amount of \$12,436.09. The Taxpayer sent the Department a check for this amount dated March 6, 2014. The Taxpayer claims that this payment was made erroneously. The Department also filed a number of exceptions in the First Action, including an exception arguing that the Board lacked subject matter jurisdiction. The Board ultimately granted this exception on the grounds that only a Notice of Proposed Tax Due had been issued, the Taxpayer had paid the amount of proposed tax, and no Notice of Assessment had been issued. The Board accordingly dismissed the First Action based on the recommendation of Judge Graphia, who had heard the case alone as hearing officer.¹ The judgment in the First Action was rendered in error, the Board had jurisdiction since an assessment had been issued.

*2 On December 30, 2015, the Taxpayer filed a Claim for Refund or Overpayment based on the alleged erroneous overpayment of tax arising out of the AFTC. The claimed amount had been reduced to \$5,761.00, and a Form R20127 refund request form was submitted. The Taxpayer claims that the Department took no action on that refund claim for one year. Then, on January 19, 2018 the Taxpayer commenced this action (the "Second Action") as an appeal of the Department's inaction of the December 30, 2015 Claim for Refund or Overpayment. The Department responded with the exceptions now under consideration. The Board has jurisdiction over refund inaction or denial pursuant to R.S. 47:1625. In substance, all of the Department's exceptions argue that the Taxpayer's petition is precluded by the Board's judgment in the First Action.² The Taxpayer argues that res judicata does not bar its action because it did not file a claim for a refund until after the dismissal of the first suit, and thus its right to appeal the denial did not exist at the time that the first suit was dismissed. Petitioner also claims that issues raised by the instant action were not litigated in the first action because that action was dismissed due to lack of subject matter jurisdiction. In addition, the Taxpayer contends that a Notice of Assessment was in fact issued by the Department prior to the Board's judgment in the First Action.

The general rule under Louisiana law is that the doctrine of res judicata bars a subsequent action when all of the following elements are satisfied with respect to a prior action: (1) the prior judgment is valid; (2) the prior judgment is final; (3) the parties are the same; (4) the cause or causes of action asserted in the second action existed at the time of the final judgment in the first action; and (5) the cause or causes of action in the second action arose out of the transaction or occurrence that was the subject matter of the first action. *La. R.S. 13:4231; Pointe Coupee Parish Sch. Bd. v. La. Sch. Emp.'s Ret. Sys.*, 2013-1100 (La. App. 1 Cir. 2/14/14), 140 So. 3d 38, 50, writ denied, (La. 4/25/14), 138 So. 3d 648. The purpose of res judicata is to serve the judicial economy by preventing the relitigation of the same issues between the same parties. *La. R.S. 13:4231*, cmt. (b). However, under Louisiana law, courts are directed to allow litigants to have their causes heard, and thus the burden of proof on an exception of res judicata falls on the party urging the exception. See *Kelty v. Brumfield*, 93-1142 (La. 2/25/94), 633 So. 2d 1210, 1215. When deciding an exception of res judicata, the Board construes all facts in the light most favorable to the party opposing the exception. See *id.* *La. R.S. 13:4231(C)* requires that *res judicata* attaches "with respect to any issue actually litigated and determined if its determination was essential to that judgment."

The Taxpayer argues that the fourth and fifth elements of res judicata are not satisfied here. In support of its argument, Taxpayer cites to the Board's decisions in *Wright v. Louisiana Department of Revenue*, No. 9697B (La. Bd. Tax App. Jan. 11, 2016) and *Vidrine v. Barfield*, No. 9698B (La. Bd. Tax App. Jan. 21, 2015). Both *Wright* and *Vidrine* involved taxpayers who had, on previous occasions, brought actions because of the Department's denial of their claims to the AFTC. Both of those earlier actions were dismissed. The reason for this was that the Board found that it lacked subject matter jurisdiction over an appeal from a notice of proposed assessment. However, though their initial attempts were dismissed on jurisdictional grounds, the taxpayers in *Wright* and *Vidrine* again sought to claim the AFTC by submitting claims for refunds to the Department. When the Department denied those requests, the taxpayers appealed to the Board. Just as it has done here, the Department raised the exception of res judicata in the subsequent appeals. In both *Wright* and *Vidrine*, the Board concluded that the right to appeal the denial of a refund did not exist until the refund was actually denied, which did not occur until after the earlier actions had been dismissed. More importantly, the Board held that granting the exception of *res judicata* would be inappropriate because the Board's earlier decisions did not reach the actual substance of the taxpayer's claims.

*3 The Board noted that the purpose of res judicata is to prevent relitigation of the same issues in subsequent cases. However, the substantive issue presented by the taxpayers' appeals in *Wright and Vidrine* was whether or not they were entitled to claim the AFTC. That issue had not been not litigated when the Board rendered its decision as to the absence of subject matter jurisdiction. Because of the distinct issues actually litigated in the cases, the Board overruled the Department's exceptions of res judicata.

The Board reaches the same conclusion in this case. The Board's judgment in the First Action stated that the Board lacked subject matter jurisdiction. The Board did not reach the merits of the taxpayer's right to the credit (now sought via a refund action), therefore the underlying issues were not actually litigated and determined.

The issue presented by the Taxpayer in this Second Action is whether the trucks that it purchased were flex fuel vehicles which qualified for the AFTC. It is evident from the text of the judgment in the First Action that the Board did not reach the merits of the Taxpayer's claim. For this reason, granting the Department's Exception would neither serve the purposes, nor fit within the statutory and jurisprudential scope, of the doctrine of *res judicata*. The Exception therefore will be overruled.

There is no question that the Board has held exclusive original subject matter jurisdiction over the appeals of refund denials/inaction for over seventy years. There is also no question that that this taxpayer is the party with a right to bring a cause of action over their own refund claim. The other exceptions are really just a repeat of the *res judicata* argument. Therefore, because the Department's other exceptions are based on substantially the same premises as explained hereinabove, they too must be overruled.

Baton Rouge, Louisiana this 15 day of August 2018.

FOR THE BOARD

Judge Tony Graphia (Ret.)
Chairman

Footnotes

- 1 The Board received well over 600 flex fuel case appeals at the same time, and attempted to move through them promptly by use of the hearing officer procedure to prevent them from clogging its regular docket.
- 2 The Department argues that the Board lacks subject matter jurisdiction because the judgment in the First Action became final on February 20, 2015 and thereby divested the Board of jurisdiction in this matter. Similarly, the Department argues that the Taxpayer has no right of action because the judgment in the First Action had the effect of removing the Taxpayer from the class of persons who are afforded relief under the AFTC statute.

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