

BOARD OF TAX APPEALS
STATE OF LOUISIANA
LOCAL TAX DIVISION

KELLOGG BROWN & ROOT, LLC
PETITIONER,

DOCKET NO. L01016

VS.

JOSEPH P. LOPINTO, II, SHERIFF AND EX-
OFFICIO TAX COLLECTOR FOR THE PARISH OF
JEFFERSON, AND THE JEFFERSON PARISH
SHERIFF'S OFFICE, BUREAU OF
REVENUE AND TAXATION, SALES AND
USE TAX DIVISION
RESPONDENTS.

JUDGMENT ON COLLECTOR'S EXCEPTION OF LACK OF JURISDICTION,
SUPPLEMENTAL EXCEPTION OF LACK OF JURISDICTION, MOTION TO
QUASH SUBPOENAS AND MOTION TO DISMISS APPEAL
WITH REASONS

On April 7, 2022, this matter came before the Board for hearing on the *Supplemental Exception of Lack of Jurisdiction, Motion to Quash Subpoenas, and Motion to Dismiss Appeal* filed by Joseph P. Lopinto, II, Sheriff and Ex-Officio Tax Collector for the Parish of Jefferson, and the Jefferson Parish Sheriff's Office, Bureau of Revenue and Taxation, Sales and Use Tax Division (collectively referred to as the "Collector"), with Local Tax Judge Cade R. Cole presiding. Present at the hearing were Martin E. Landrieu, Caroline D. Lafourcade, and John P. Leblanc, attorneys for Kellogg, Brown & Root, LLC ("Taxpayer"), and Kenneth C. Fonte, attorney for the Collector. At the conclusion of the hearing, and after previously hearing argument on the Collector's original *Exception of Lack of Jurisdiction*, and taking same under advisement, the Board now renders Judgment as follows.

IT IS ORDERED, ADJUDGED AND DECREED that the Collector's *Exception of Lack of Jurisdiction* and *Supplemental Exception of Lack of Jurisdiction* ARE HEREBY OVERRULED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Collector's *Motion to Quash Subpoenas* and *Motion to Dismiss Appeal* ARE HEREBY DENIED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Taxpayer's Motion to Strike IS HEREBY DENIED.

Judgment Rendered and Signed at Baton Rouge, Louisiana on this 7th day of April, 2022.

FOR THE BOARD:



LOCAL TAX JUDGE CADE R. COLE

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REASONS FOR JUDGMENT
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Background:

Taxpayer filed the instant *Petition for Redetermination* on November 13, 2020. On the same day, the Collector issued an assessment of Jefferson Parish Sales Tax,¹ Occupational License Tax, and Use Tax (the "Assessment"). The Assessment is

¹ The Assessment lists Occupational License Tax and Use Tax. Sales tax is by raised by name in the allegations of the Petition.

directed at the tax periods beginning January 1, 2013, through June 30, 2016 (the “Tax Periods”). The Assessment imposes liability on the Taxpayer for taxes in the amount of \$8,406,847.81, interest in the amount of \$4,980,443.85, penalties in the amount of \$350.00, and audit costs in the amount of \$230,448.42.

Taxpayer is a contractor of Dyno Nobel. Taxpayer, possibly as an agent Dyno Nobel, purchased tangible personal property in connection with its work on or at Dyno Nobel’s Ammonia factory. The Collector audited Taxpayer’s business activity for the Tax Periods at issue. Following the audit, on February 12, 2020, the Collector issued a proposed assessment to Taxpayer. Taxpayer requested an Administrative Protest Hearing (the “Protest Hearing”). The Collector held the Protest Hearing on October 26 and 27, 2020 and November 5, 2020. Taxpayer and Dyno Nobel appeared at the Protest Hearing. Afterwards, the Collector revised his determinations, and proceeded to issue the above-mentioned Assessment.

This case concerns Taxpayer’s appeal from that Assessment. In addition to this case, there are two related matters also active before the Board: Dyno Nobel filed a Petition for Declaratory Judgment against the Collector, docket number L01014. The Collector filed a Petition for Recovery of Delinquent Local Sales and Use Taxes against Dyno Nobel, docket number L01015.

The above Petitions preceded a series of contested procedural motions interlinking the three cases. The Taxpayer here filed a *Petition for Intervention* in L01014. Additionally, the Taxpayer and Dyno Nobel jointly filed a *Contested Motion to Consolidate* all three matters together. The Collector filed a number of exceptions, against on various grounds against the several petitions, and further filed his opposition to consolidation. The Board later ruled on most of the issues by signing the parties’ jointly submitted Judgment on July 26, 2021. However, the jurisdictional exceptions/motions presently under discussion have remained unresolved, until now.

Collector’s Exception of Lack of Jurisdiction and Supplemental Exception of Lack of Jurisdiction

The Collector asserts that the Board’s jurisdiction has been improperly invoked. This assertion is based on the theory that the Board acts as an appellate

court when in deciding an “appeal” for redetermination of an assessment under La. R.S. 47:337.51, when the assessment appealed from was preceded by an administrative protest hearing under R.S. 47:337.49. In enacting, La. R.S. 47:337.51 (the “local assessment appeals”), the legislature copied the operative language of La. R.S. 47:1565 (the “state assessment appeals”). Consequently, La. R.S. 47:337.51 provides the redetermination of assessment procedure to local taxpayers.

The Board’s role in this procedure has always been that of a trial court.² The Louisiana Supreme Court has long held that “the Board acts as a trial court in finding facts and applying the law.” *St. Martin v. State*, 25 So.3d 736, 740 (La. 2009) (quoting *St. Pierre’s Fabrication and Welding, Inc. v. McNamara*, 495 So.2d 1121, 1127-28 (La. 1986)). Our courts have long recognized that, “the only forum which Taxpayer can protest the Notice of Assessment and seek judicial review and potential redetermination without first paying the tax under protest is in the Louisiana Board of Tax Appeals.” *Bliss v. Lafayette Parish Sch. Bd. Sales Tax Div.*, 2019-186, p. 8 (La. App. 3 Cir. 12/18/19); 284 So.3d 703, 708. The role as a trier of fact has existed throughout the board’s more than 80 year history dealing with state assessment

² See e.g., *Ciervo v. Robinson*, 2020-1106 (La. App. 1 Cir. 4/16/21); 323 So.3d 893; *Davis-Lynch Holding Co. v. Robinson*, 2019-1574 (La. App. 1 Cir. 12/30/20); 316 So.3d 1126; *Smith Int’l, Inc. v. Robinson*, 2018-1640 (La. App. 1 Cir. 1/9/20); 311 So.3d 1062, 1064, reh’g denied (June 26, 2020), writ denied, 2020-00982 (La. 11/4/20); 303 So.3d 650; *Zelia, LLC v. Robinson*, 19-372 (La. App. 5 Cir. 12/30/19); 286 So.3d 1268, 1274, writ denied, 2020-00253 (La. 4/27/20); 295 So.3d 948; *Lerner New York, Inc. v. Normand*, 19-350 (La. App. 5 Cir. 12/26/19); 288 So.3d 242, 247, writ denied, 2020-00162 (La. 5/1/20); 295 So.3d 939, and writ denied, 2020-00234 (La. 5/1/20); 295 So.3d 944; *FMT Shipyard & Repair, LLC v. Normand*, 18-292 (La. App. 5 Cir. 5/30/19); 274 So.3d 868; *Am. Multi-Cinema, Inc. v. Normand*, 18-487 (La. App. 5 Cir. 3/27/19); 267 So.3d 197; *Duncan Oil, Inc. v. Calcasieu Parish Sch. Bd.*, 2017-488 (La. App. 3 Cir. 2/28/18); 239 So.3d 367; *City of New Orleans v. Jazz Casino Co.*, 2015-1150 (La. App. 4 Cir. 6/22/16); 195 So.3d 1252, writ denied, 2016-1393 (La. 11/7/16); 209 So.3d 99; *Topshelf Sports, Inc. v. Simpson*, 2015-1111 (La. App. 3 Cir. 3/23/16); 186 So.3d 1288, writ denied, 2016-0751 (La. 6/3/16); 192 So.3d 747; *Hitachi Med. Sys. Am., Inc. v. Bridges*, 2015-0658 (La. App. 1 Cir. 12/9/15), writ denied, 2016-0042 (La. 2/26/16); 187 So.3d 1004; *Viviano v. Bridges*, 2011-1474 (La. App. 3 Cir. 4/4/12); 87 So.3d 1007, writ denied, 2012-1362 (La. 9/28/12); 98 So.3d 847; *Bridges v. Offshore Drilling Co.*, 2010-2214 (La. App. 1 Cir. 7/18/11); 69 So.3d 738; *Am. Moving & Storage of Leesville, Inc. v. Bridges*, 2010-825 (La. App. 3 Cir. 12/8/10); 53 So.3d 581, writ denied, 2011-0047 (La. 3/4/11); 58 So.3d 476; *R & B Falcon Drilling USA, Inc. v. Dep’t of Revenue*, 2009-0256 (La. App. 1 Cir. 1/11/10); 31 So.3d 1083; *CHL Enterprises, LLC v. Dep’t of Revenue*, 2009-487 (La. App. 3 Cir. 11/4/09); 23 So.3d 1000, writ denied, 2009-2613 (La. 2/12/10); 27 So.3d 848; *Chamberlain ex rel. Wilmer J. v. Kennedy*, 2003-0488 (La. App. 1 Cir. 12/31/03); 868 So.2d 753; *Willow Bend Ventures, LLC v. Collector, St. John the Baptist Parish, Sales & Use Tax Office*, 18-660 (La. App. 5 Cir. 8/14/19); 2019 WL 381984; *et. seq.*;

appeals. *See e.g. Bentley's Estate v. Dir. of Revenue*, 199 La. 609, 610; 6 So.2d 705 (La. 1942).

The Louisiana Supreme Court has long recognized that pursuant to La. Const. Art. VII, Sec. 3 “**jurisdiction to resolve tax related disputes is constitutionally and statutorily granted to the Board.**” *St. Martin*, 25 So.3d at 741. The Collector argues that this longstanding role was upturned by the passage of 2019 Act 446 and subsequent amendment of the Louisiana Constitution enacting Article 5, Section 35, which reads:

The remedies required by Article VII, Section 3(A) of this Constitution shall extend to any unconstitutional tax paid by a taxpayer. The Board of Tax Appeals is continued, subject to change by law enacted by two-thirds of the elected members of each house of the legislature. It shall have jurisdiction over all matters related to state and local taxes or fees or other claims against the state as provided by Chapter 17 of Title 47 of the Louisiana Revised Statutes of 1950, as amended, subject to change by law. The legislature may extend the jurisdiction of the Board of Tax Appeals, by a law enacted by a two-thirds vote of the elected members of each house of the legislature, to matters concerning the constitutionality of taxes, fees, or other matters related to its jurisdiction which jurisdiction may be concurrent with the district courts concerning such matters.

However, on its face, Section 35 provides for the Board’s continuity, and explicitly acknowledges the Board’s “jurisdiction over all matters related to state and local taxes or fees or other claims against the state as provided [by the applicable law].”³ Our Courts have held that statutes regulating the collection of tax are *sui generis*, comprising a system to which the general provisions of law hold little relevance.

³ The Board’s plenary jurisdiction over tax matters pre-existed Section 35, the only exception was its inability to hear constitutional questions. Those questions were often inextricably intertwined with the underlying tax cases. The people of Louisiana decided to make a carve out to the traditional rule and explicitly grant to the Board the authority to hear “matters concerning the constitutionality of taxes, fees or other matters related to [our] jurisdiction” and provided that our jurisdiction may be concurrent with the districts courts concerning those matters. This was the entire point of the Constitutional Amendment, there was no discussion of changing or limiting the normal procedures, the focus was on solving the problem that a special grant was required to hear constitutional questions. The Collector’s argument veers into separation of powers concepts. La. Const. art. II, Sec. 2 does provide that “Except as otherwise provided by this constitution, no one of these branches, nor any person holding office in one of them, shall exercise power belonging to either of the others.” Of course, the provisions of section 35 are explicit and clear and provide for the authority over constitutional questions. The Board and its other authority was “continued.”

Mallard Bay Drilling, Inc. v. Kennedy, 2004-1089, p. 22 (La. 6/29/05); 914 So.2d 533, 549; *Normand v. Randazzo*, 11-308, p. 6 (La. App. 5 Cir. 12/28/11); 85 So.3d 707, 710, *writ denied*, 2012-0285 (La. 4/9/12); 85 So.3d 697. Taxpayers seeking judicial review of a collector's assessment must follow the statutory scheme created by the legislature, and may not avail themselves of the general remedies in the Civil Code. *Cheniere Constr., Inc. v. Dep't of Revenue & Taxation*, 2019-1471 (La. App. 1 Cir. 9/18/20, 4-5); 313 So.3d 992, 995-96, *writ denied*, 2020-01194 (La. 12/8/20); 306 So.3d 431. The Board's role in that statutory framework is to act as a trial court. *Int'l Paper, Inc. v. Bridges*, 2007-1151, p. 10 (La. 1/16/08); 972 So.2d 1121, 1129 (quoting *Collector of Revenue v. Murphy Oil Co.*, 351 So.2d 1234, 1236 (La. Ct. App. 1977)); *see also* La. R.S. 47:1412 (requiring the Board to adopt the rules of evidence for district courts).

The Collector claims that no statute specifically authorizes the Board to conduct a trial de novo when hearing an appeal for redetermination of an assessment. The jurisprudence cited above demonstrates that the Board has done exactly that for more than 80 years. The Board's responsibility to act as a trial court is expressed in statute:

La. R.S. 47:1401. Creation of Board of Tax Appeals

In order to provide effect to the provisions of Article V, Section 35 and Article VII, Section 3(A) of the Constitution of Louisiana, a board that will **hear and decide**, at a minimum of expense to the taxpayer, questions of law **and fact** arising from disputes or controversies between a taxpayer and any collector of the state of Louisiana or its political subdivisions in the enforcement of any tax, excise, license, permit or any other tax, fee, penalty, receipt or other law administered by a collector, and to exercise other jurisdiction as provided by law, including jurisdiction as provided for in the Uniform Local Sales Tax Code, the Board of Tax Appeals, hereinafter referred to as the "board", is created as an independent agency for the purposes of this Chapter. The Local Tax Division is created as an independent agency and authority within the board for the purposes of exercising jurisdiction over disputes involving local collectors. (emphasis added).

* * * * *

La. R.S. 47:1401 states that the Board was created with the intention of providing full adjudication of tax disputes, which expressly requires the Board to hear factual disputes and render decisions thereon.

La. R.S. 47:1435(C) governs review of the Board's decisions by higher courts.

In its current form, it provides:

Upon such review, the courts shall have the power to affirm or, if the decision or judgment of the board is not in accordance with law or is manifestly erroneous on the facts considering the record as a whole, to modify, or to reverse the decision or judgment of the board, with or without remanding the case for further proceedings.

This provision contains a manifest error standard of appellate review. This is consistent with how appellate courts generally review the factual findings of other trial courts.

In his *Supplemental Exception of Lack of Jurisdiction*, the Collector asks the Board to declare all or part of 2021 Act 343 unconstitutional. This request is premised on the assumption that the Board needs to rely on that legislation and its amendment to the language of La. R.S. 47:1432(A). The Board rejects that assertion.

The express wording of Article 35 continuing the Board's role, more than eighty years of jurisprudence also holding that the Board acts as a trial court in the redetermination of assessment procedure, and the express statutory mandate that the Board act as an independent trier of fact unless a statutory provision separately limits its role. Well-established guidance from the Supreme Court instructs courts to avoid ruling on constitutional questions when another means of resolution is available. *See, e.g., Smith v. Robinson*, 2018-0728, p. 13 (La. 12/5/18); 265 So.3d 740, 749. Accordingly, the Board does not reach the Collector's constitutional arguments. The Board finds its jurisdiction to hear this assessment appeal existed irrespective of what version of §1432 is in effect.⁴

The jurisdictional exceptions/motions are without merit, and the Board stands ready to adjudicate this matter on the merits of the underlying claim.

Collector's concerns related to Taxpayer's compliance with obligations pursuant to the R.S. 47:337.49 administrative protest hearing.

La. R.S. 47:337.49(A) provides that:

⁴ The Board observes that if applied as pled, the Collector's argument concerning the need to read an entire technical title-- instead of the summary title--in full from the clerk's desk would result in the invalidation of nearly every Act of the Legislature from recent decades.

The taxpayer, within thirty calendar days from the date of the notice provided in R.S. 47:337.48(A) or (B), may protest thereto. This protest shall be in writing and shall fully disclose the reasons, together with facts and figures in substantiation thereof, for objecting to the collector's determination. The collector shall consider the protest, and shall grant a hearing thereon, before making a final determination of tax, penalty, and interest due.

While the jurisdiction of the Board to redetermine an assessment following a full trial on merits is well established, a taxpayer should not wantonly disregard the procedural step of an administrative protest hearing. The protest hearings vary greatly from parish to parish with few as extensive or detailed as the one employed here. In other cases taxpayers have complained about the quality of the protest hearing, and our Courts have held that “no specific format is sacrosanct..[w]hat is required is that the taxpayer be given an opportunity to present his position and that the collector is able to hear and consider this contention.” *Bliss v. Lafayette Parish School Board Sales Tax Division*, 284 So.3d 703 (La. App. 3 Cir. 12/18/19).

Although the Board disagrees with the Collector's jurisdictional approach, the Collector may have alternative grounds for excluding certain evidence in this proceeding. The evidence submitted shows that the Collector subpoenaed Taxpayer pursuant to the Collector's investigatory authority under La. R.S. 47:337.43. The Collector further obtained a Judgment from the 24th Judicial District Court ordering Taxpayer to comply with the Collector's subpoena.

The Collector sought, and was granted, an Order to Compel the production of specific items. The 24th JDC specifically required items 1, 2,3, 8 (1st), 9 (1st), 8 (2nd), 10 and 11 of the Collector's Subpoena Duces Tecum to be produced. Those items are listed in Exhibit H to the Collector's Motion to Compel before Judge Grefer, and the Order to Compel is Exhibit 76 in the Protest Hearing record (all of which were admitted herewith).

If the Collector were to show, after due discovery, that the Taxpayer willfully disobeyed the District Court's Judgment, the Taxpayer would be subject to penalties. *Barrett v. Barrett*, 20-266, p. 17 (La. App. 5 Cir. 2/24/21); 314 So.3d 1023, 1037 (citing La. C.C.P. art. 224). A trial court has wide discretion in imposing penalties for failure to comply with discovery orders. *Bravo v. Borden*, 07-380, p. 4 (La. App. 5 Cir.

12/27/07); 975 So.2d 36. The appropriate sanctions may include holding facts admitted if they are within the ambit of the aforementioned Judgment, or barring the Taxpayer from introducing evidence identified in the Collector's subpoena if the Taxpayer willfully withheld that evidence from the Collector. La. C.C.P. art. 1471(A)(1),(2).

The Board agrees that all taxpayers should take administrative protest hearings seriously, and obviously parties must comply with court ordered discovery. The Board will not employ the more draconian penalties of La. C.C.P. art. 1471 unless it is established that the taxpayer willfully disobeyed Judge Grefer's Order. However, Paragraph C of that Article provides that "the court **shall** require the party failing to obey the order...to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust." If the Collector can establish that it incurred added legal expenses due to Taxpayer's lack of compliance with the foregoing Order to Compel then the Board would be compelled to order the payment of the reasonable amount of those expenses, unless the Taxpayer establishes that its actions were substantially justified or an award is unjust. This issue can be raised in a subsequent Motion after due discovery is had.

The foregoing reasoning and conclusion necessarily resolves the Collector's remaining contentions:

(1) The Collector asserts to have a vested right to obtain the Taxpayer's payment under protest funds. This contention has no basis in law. The appeal for the redetermination of an assessment procedure does not require prepayment of the tax. The *Exceptions* will be denied.

(2) The Collector's *Motion to Quash Subpoenas* is premised on the notion that the Board must exercise appellate jurisdiction in this matter, and that an appellate court cannot issue a subpoena to produce new evidence. The Board is not exercising appellate jurisdiction in this case. The *Motion to Quash Subpoenas* will be denied.

(3) The Collector's *Motion to Dismiss Appeal* assumes that Taxpayer is abandoning an invocation of the Board's so-called appellate jurisdiction in favor of the Board's original jurisdiction. The Petition in this case properly invoked the Board's original jurisdiction at all times. Accordingly, the Motion to Dismiss Appeal will be denied.

Baton Rouge, Louisiana, this 7th day of April, 2022.

FOR THE BOARD:

A handwritten signature in green ink, appearing to be 'C. Cole', written over a horizontal line.

LOCAL TAX JUDGE CADE R. COLE