

**BOARD OF TAX APPEALS  
STATE OF LOUISIANA**

**SCHWAN'S CONSUMER BRANDS, INC.,  
Petitioner,**

**VERSUS**

**No. 11582D**

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

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**JUDGMENT ON EXCEPTION OF LACK OF SUBJECT MATTER  
JURISDICTION**  
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This case came before the Board for hearing on April 11, 2019 on the *Exception of Lack of Subject Matter Jurisdiction* (the "Exception") filed by the Department of Revenue (the "Department") with Judge Tony Graphia (Ret.), presiding, and Board Members Cade R. Cole and Jay Lobrano present. Participating in the hearing were Andre Burvant, attorney for Schwan's Consumer Brands, Inc. (the "Taxpayer") and Miranda Y. Conner, attorney for the Department. At the end of the hearing, the Board overruled the Exception and now unanimously renders Judgment in accordance with the written reasons attached herewith.

**IT IS ORDERED, ADJUDGED AND DECREED that the Exception filed by the Department BE AND IS HEREBY OVERRULED.**

Judgment Rendered and Signed at Baton Rouge, Louisiana this 14 day of August, 2019.

**For the Board:**

  
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**Judge Tony Graphia (Ret.), Chairman  
Louisiana Board of Tax Appeals**

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**WRITTEN REASONS FOR JUDGMENT ON EXCEPTION OF LACK OF  
SUBJECT MATTER JURISDICTION**  
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The Taxpayer appeals from an Assessment of Corporate Income and Franchise Tax ("CIFT") dated November 20, 2018 (the "Assessment"). The Assessment came about after an audit of the Taxpayer for the periods December 31, 2012, through December 31, 2014. The amounts in dispute are: tax in the amount of \$106,302.00; interest in the amount of \$35,785.59 (calculated through December 5, 2018); late payment penalties in the amount of \$26,575.50 (also calculated through December 5, 2018); and understatement penalties in the amount of \$15,945.30, for a total disputed amount of \$184,608.39.

The Department contends that the Board lacks subject matter jurisdiction over the Taxpayer's appeal. The Department's argument is based on Paragraph 25 of the Petition, in which the Taxpayer alleges:

As applied by the Department, the adjustments that result in the Assessment violate: (i) the protections afforded Petitioner by the Commerce Clause of the United States Constitution, the Due Process and Equal Protection Clauses of the United States Constitution and the Due Process and the Equal Protection Clauses of the Louisiana Constitution of 1974, as amended; (ii) the provisions of Louisiana law requiring the levying of equal and uniform taxes as set forth in Article VII, Sec. 4(A) of the Louisiana Constitution of 1974; and (iii) the Income Tax laws. As such, the entire amount of the Assessment is improper, illegal, and null and void and contrary to law.

(citations omitted). The Department contends that the payment under protest procedure outlined in La. R.S. 47:1576(D) provides the *exclusive* remedy of a taxpayer who raises an as-applied constitutional challenge to the Department's actions. R.S. 47:1576(D) provides:

This Section shall be construed to provide a legal remedy in state courts in case such taxes are claimed to be an unlawful burden upon interstate commerce, or the collection thereof, in violation of any Act of Congress or the United States Constitution, or the Constitution of Louisiana.

The quoted provision La. R.S. 47:1576(D) does not say that the payment under protest procedure is the only remedy available to a taxpayer who asserts that the Department has violated a constitutional provision or federal law. The Board's jurisdictional statute, La. R.S. 47:1407, states that the Board's jurisdiction extends to: "[a]ll matters relating to appeals for the redetermination of assessments, or for the determination of overpayments, or payment under protest petitions." When the legislature has decided to limit the Board's jurisdiction over tax matters, it has done so with specific statutory provisions. The Board recognizes that it is explicitly denied jurisdiction to entertain a facial constitutional challenge to a taxing statute. La. R.S. 47:1432(B)(1)(a). However, even that statute includes a transfer provision

(to be used as a last alternative) and an exception and dismissal would not be an appropriate remedy.

The applicable jurisprudence does not support the Department's position. In *Hanover Compressor Co. v. Department of Revenue*, the Third Circuit dismissed an argument similar to the one presented here, stating:

The Department asserts that the Board was without jurisdiction to consider the constitution in the determination of this case. We note that although the Board of Tax Appeals does not have the authority to determine the constitutionality of a statute . . . the Board was not addressing the constitutionality of a statute in this instance. Instead, it referenced *the constitution* and supreme court jurisprudence in determining whether the tax imposed was permissible in this instance.

2002-0925, at n.7 (La. App. 3 Cir. 2/5/03, 12); 838 So.2d 876 (emphasis added) (citations omitted).

In sum, the Department's argument that Subsection D is an exclusive remedy is not supported by the law or jurisprudence. Accordingly, the Exception will be overruled.

Baton Rouge, Louisiana this 14 day of August, 2019.

For the Board:

  
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Judge Tony Graphia (Ret.), Chairman  
Louisiana Board of Tax Appeals