

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2016 CA 0180

WJW

DEPARTMENT OF REVENUE, STATE OF LOUISIANA

VERSUS

JAZZ CASINO COMPANY, LLC

Judgment Rendered: FEB 07 2017

**Appealed from the
Louisiana Board of Tax Appeals
Docket Number 6372**

**Judge Anthony J. Graphia (retired), Chairman, Cade R. Cole,
and Kernan Hand, Presiding**

**Miranda Y. Conner
Antonio Ferachi
Brandea Averett
Debra Morris
Brian DeJean
Baton Rouge, LA**

**Counsel for Appellant,
Department of Revenue, State of Louisiana**

**Jesse R. Adams
Andre B. Burvant
Justin B. Stone
New Orleans, LA**

**Counsel for Appellee,
Jazz Casino Company, LLC**

BEFORE: WHIPPLE, C.J., GUIDRY AND McCLENDON, JJ.

*Guidry, J. Dissents and assigns Reason
McCleendon, J. concurs.*

WHIPPLE, C.J.

In this appeal, the Louisiana Department of Revenue (“the Department”) challenges the judgment of the Board of Tax Appeals (“the BTA”) denying its motion to annul a prior judgment that had ordered the Department to refund Jazz Casino Company, LLC (“Jazz Casino”) \$1,983,315.27 in taxes collected by the Department. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

Jazz Casino operates a land-based casino in New Orleans, Louisiana. In connection with its operations, Jazz Casino rented rooms in various New Orleans hotels during the tax periods of October 1, 1999 through June 30, 2004. Throughout these periods, the Department collected certain taxes on these hotel/motel room rentals (“hotel occupancy taxes”) on behalf of the State of Louisiana (“the State”) and also on behalf of the Louisiana Tourism Promotion District (“LTPD”), the Louisiana Stadium & Exposition District (“LSED”), and the New Orleans Exhibition Hall Authority (“NOEHA”). Arguing that it had been a “permanent” rather than a “transient” guest, and, therefore, subject to exemption from such taxes, Jazz Casino sought a refund of hotel occupancy taxes it paid during the relevant tax periods, requesting a refund of state, LTPD, LSED, and NOEHA hotel occupancy taxes. See Jazz Casino Co, L.L.C. v. Bridges, 2012-1237 (La. App. 1st Cir. 8/9/13) (unpublished), 2013 WL 4039892. By letter dated June 26, 2006, the Department denied the refund claims, advising Jazz Casino that if dissatisfied with the Department’s decision, it could appeal the denial of its refund claims to the BTA.

Jazz Casino then filed a petition for review with the BTA regarding the Department’s denial of its refund claims. After protracted litigation, the

Nineteenth Judicial District Court, in an April 24, 2014 judgment, upheld the BTA's determination that Jazz Casino qualified as a "permanent guest" of the hotels from which it rented rooms during the tax periods at issue, thereby rendering qualifying room rentals non-taxable. The district court further ordered that the matter be remanded to the BTA "for a determination of the amount of hotel occupancy tax overpayment [Jazz Casino] made during the relevant taxable periods and for an Order ordering the Department to refund [Jazz Casino] those amounts, together with applicable statutory interest."

Thereafter, on remand, Jazz Casino and the Department ultimately stipulated that Jazz Casino had "overpaid \$1,983,315.27, exclusive of interest," in hotel occupancy taxes. Of this amount, the parties stipulated 2% was attributable to state general sales taxes, while the remaining 98% was attributable to LTPD, LSED, and NOEHA taxes. As a result of the stipulations made by the parties, the BTA rendered judgment dated October 8, 2014, ordering the Department to refund the entire \$1,983,315.27 to Jazz Casino, together with applicable statutory interest, pursuant to LSA-R.S. 47:1621(D)(1). This judgment was not appealed and became final. See LSA-R.S. 47:1434 and 1438.

Nonetheless, on October 1, 2015, the Department filed with the BTA a motion to annul the October 8, 2014 judgment that had ordered it to refund Jazz Casino the full \$1,983,315.27 in overpaid hotel occupancy taxes, contending that the BTA did not have subject matter jurisdiction to order a refund of taxes the Department had collected and remitted to LTPD, LSED,

and NOEHA.¹ Following a hearing, the BTA denied the Department's motion to annul judgment on January 14, 2016. From this judgment, the Department appeals,² contending that the BTA erred in refusing to recognize its lack of jurisdiction over refunds for hotel occupancy taxes levied and imposed by NOEHA and LSED.³

DISCUSSION

Subject matter jurisdiction is the legal power and authority of a tribunal to adjudicate a particular matter involving the legal relations of the parties and to grant the relief to which the parties are entitled. LSA-C.C.P. arts. 1 & 2; City of Denham Springs v. Perkins, 2008-1937 (La. App. 1st Cir. 3/27/09), 10 So. 3d 311, 318, writ denied, 2009-0871 (La. 5/13/09), 8 So. 3d 568. A judgment rendered by a court without subject matter jurisdiction is an absolute nullity, which may be recognized at any time. LSA-C.C.P. art. 2002(A)(3). Such an attack may include the assertion of the absolute nullity of a judgment by contradictory rule or motion. Leonard v. Reeves, 2011-1009 (La. App. 1st Cir. 1/12/12), 82 So. 3d 1250, 1260.

In the instant case, the Department contends that the BTA lacked subject matter jurisdiction to order it to refund hotel occupancy taxes levied by NOEHA and LSED because the BTA's jurisdiction as set forth in LSA-

¹The Department filed its motion to annul the judgment after Jazz Casino sought and obtained in the Nineteenth Judicial District Court a writ of mandamus directing the Department to comply with the BTA's October 8, 2014 judgment and remit all remaining amounts not previously refunded to Jazz Casino. On subsequent appeal, this court reversed the district court's judgment and recalled the writ of mandamus, concluding that Jazz Casino had failed to meet its burden of showing that the extraordinary remedy of mandamus was warranted. Jazz Casino Company, L.L.C. v. Bridges, 2015-1721 (La. App. 1st Cir. 6/6/16), 2016 WL 3145015 (unpublished). Jazz Casino has filed an application for writ of certiorari, which is pending before the Louisiana Supreme Court.

²The procedure for obtaining judicial review of a judgment of the BTA is set forth in LSA-R.S. 47:1434, which, in subsection (A) now vests appellate jurisdiction for review of BTA decisions or judgments with "the appropriate appellate court."

³On appeal, the Department is no longer arguing that the BTA lacked subject matter jurisdiction to order it to refund the LTPD hotel occupancy taxes.

R.S. 47:1401 and 1407 does not extend to NOEHA and LSED taxes. Specifically, the Department argues that while LSA-R.S. 47:1407 grants the BTA jurisdiction over the determination of overpayments, LSA-R.S. 47:1401 extends the BTA's jurisdiction **only** to taxes "administered" by the Department. It further asserts that LSA-R.S. 47:1502⁴ limits the taxes administered and collected by the Department to those set forth in the provisions of Subtitle II of Title 47, LSA-R.S. 47:21 – 47:1690, and that neither NOEHA nor LSED taxes are found in Title 47.

Rather, the Department asserts that NOEHA and LSED are political bodies that, by levying these taxes, "administer" their own hotel occupancy taxes. The Department further argues that it merely acts as an agent of these political bodies by collecting the taxes on their behalves and remitting them to these entities and that its authority to act on behalf of those political bodies, as established by resolution or ordinance, does not extend to issuing refunds on behalf of NOEHA or LSED. Thus, according to the Department, the taxpayer should have sought refunds directly from NOEHA and LSED.⁵

⁴Louisiana Revised Statute 47:1502 provides that "[t]he collector shall collect and enforce the collection of all taxes, penalties, interest and other charges that may be due under the provisions of Sub-title II of this Title [LSA-R.S. 47:21 – 47:1690] and administer the legislative mandates therein contained." Subtitle II of Title 47 contains provisions relating to income tax, sales tax, additional sales and use taxes, occupational license tax, vehicle registration license tax, taxes on natural resources and petroleum products, taxes on disposal and storage of hazardous waste, tobacco tax, soft drinks tax, and taxes on utilities.

⁵In its Motion to Annul Judgment filed with the BTA, the Department argued that the NOEHA and LSED hotel occupancy taxes were governed by the Uniform Local Sales Tax Code ("ULSTC"), LSA-R.S. 47:337.1, *et seq.*, arguing that LSA-R.S. 47:338.201(A)(1) authorizes the governing authority of Orleans Parish to levy a hotel occupancy tax. Thus, the Department contended that under the provisions of the ULSTC, the taxpayer was required to file a refund claim with the local tax collector and, if that claim was denied, to then appeal to a court of competent jurisdiction. *See* LSA-R.S. 47:337.81 (prior to amendments by 2010 La. Acts, No. 1003, § 2, 2014 La. Acts, No. 640, § 2, and 2015 La. Acts 2015, No. 210, § 1).

However, the taxes at issue herein are levied by NOEHA and LSED, **not** by the Parish of Orleans or the Parish of Jefferson, pursuant to their authority to levy similar taxes under LSA-R.S. 47:338.201(A)(1). On appeal, the Department has abandoned this argument as to the applicability of the appeal provisions of the ULSTC.

Accordingly, the Department contends that, because it does not “administer” the NOEHA or LSED hotel occupancy taxes, but rather merely collects those taxes as an agent of those political bodies, with no authority to issue refunds, the BTA did not have subject matter jurisdiction to order it to refund an overpayment of NOEHA or LSED taxes pursuant to LSA-R.S. 47:1401 and 1407.

The Louisiana Constitution vests the power of taxation in the legislature and mandates that it provide a “complete and adequate remedy” for the recovery of an illegal tax paid by a taxpayer. LSA-Const. art. VII, §§ 1 & 3(A). In carrying out this obligation, the legislature enacted, in addition to other remedies, a procedure for refunds of overpayments, namely, LSA-R.S. 47:1621 et seq., to allow a taxpayer to recover the payment of a tax when none was due.

Moreover, the legislature created the BTA to act as an appeal board to hear and decide questions of law and fact arising from disputes or controversies between taxpayers and the collector of revenue “in the enforcement of any tax, excise, license, permit or any other tax law **administered by the collector.**” LSA-R.S. 47:1401 (emphasis added). Louisiana Revised Statute 47:1407(1) further provides that jurisdiction of the BTA “shall extend to ... [a]ll matters relating to appeals ... for the determination of overpayments ..., as provided in R.S. 47:1431 through 1438 [which form Part II of Chapter 17 of Title 47, entitled ‘Appeals for Redetermination of Assessment or for Determination of Overpayment’].” Additionally, LSA-R.S. 47:1625 provides for appeals from the Department’s denial of a refund claim and vests the BTA with jurisdiction to “determine the correct amount of tax for the period in controversy and to render judgment ordering the refunding or crediting or any overpayment or the

payment of any additional tax, interest, and penalty found to be due.” Thus, jurisdiction to resolve tax-related disputes is constitutionally and statutorily granted to the BTA, which is authorized to hear and decide disputes and render judgments. St. Martin v. State, 2009-0935 (La. 12/1/09), 25 So. 3d 736, 741.

Accordingly, because the legislature, through its constitutionally recognized authority and duty to provide a “complete and adequate remedy” for the recovery of an illegal tax paid by a taxpayer, vested the BTA with jurisdiction to hear and decide disputes or controversies between taxpayers and the Department in the enforcement of any tax “**administered**” by the Department, the question before this court is whether the Department “administers” the NOEHA and LSED hotel occupancy taxes, thereby bringing disputes between the Department and the taxpayer as to these taxes within the jurisdiction of the BTA.⁶

At the outset, we note that, contrary to the suggestion of the Department, there is nothing in the language of LSA-R.S. 47:1502 limiting the Department’s authority to administer only the taxes referred to therein, i.e., those set forth in the provisions of Subtitle II of Title 47, LSA-R.S. 47:21 – 47:1691. While LSA-R.S. 47:1502 mandates that the

⁶Jazz Casino further argues that, pursuant to LSA-C.C.P. art. 2003, the Department is precluded from challenging the October 8, 2014 judgment on the basis that the BTA lacked subject matter jurisdiction because, by stipulating to the fact of the overpayment and the amount of such overpayment, the Department voluntarily acquiesced in the judgment. Louisiana Code of Civil Procedure article 2003 provides that a defendant who voluntarily acquiesced in a judgment may not annul the judgment on any grounds listed in LSA-C.C.P. art. 2002. While it is true that a party may be deemed to have acquiesced in the judgment by agreeing to a consent judgment, see Succession of Wilkinson, 07-1038 (La. App. 5th Cir. 5/27/08), 986 So. 2d 141, 145, a judgment rendered on a stipulation of facts does not equate to a consent judgment. See Hickman v. Enterprise Lumber Co., 159 La. 280, 283-284, 105 So. 343, 344-345 (1925).

Department “shall collect and enforce the collection of all taxes, penalties, interest and other charges that may be due under the provisions of Sub-title II of this Title [LSA-R.S. 47:21 – 47:1691] and administer the legislative mandates therein contained,” there is nothing in this language to suggest that the Department’s authority is thereby restricted or limited to administering **only** those taxes. And, as discussed below, to so hold (even in the absence of any such limiting language in LSA-R.S. 47:1502) would conflict with legislation, ordinances, and resolutions providing otherwise.

With regard to the LSED hotel occupancy tax, article XIV, section 47 of the 1921 Louisiana Constitution, as adopted by constitutional amendment in 1966, created LSED as a body politic and corporate and political subdivision of the State, composed of all territory in the Parishes of Orleans and Jefferson, for the purpose of planning, financing, constructing, developing, maintaining, and operating facilities within its territory, to accommodate sports events, athletic contests, and other events of public interest. 1921 La. Const. art. XIV, § 47(A) & (C).⁷ Moreover, to provide funds for its purpose, LSED was authorized and empowered to levy and collect an occupancy tax on hotel rooms within its territory. Although this provision specifically granted LSED the authority to contract with fiscal agents of Orleans and Jefferson Parishes for the collection of this tax, it also granted LSED the broad power to provide by ordinance “necessary and appropriate rules and regulations for the imposition, collection and enforcement of the tax.” 1921 La. Const. art. XIV, § 47(M).

As reflected in an October 13, 2010 ordinance of the LSED, which was filed into evidence by Jazz Casino and cited by both parties, LSED

⁷Article XIV, section 16(A) of the 1974 Louisiana Constitution continued article XIV, section 47 of the 1921 Constitution as a statute.

levied a tax upon the occupancy of hotel rooms within its district by ordinance adopted on June 27, 1967, and, in providing for the payment, collection, and enforcement of the tax, LSED conferred certain powers and imposed certain duties upon the Department. Thereafter, on April 5, 1994, the Department and LSED entered into a Hotel Occupancy Tax Collection Agreement, through which the Department collected the hotel occupancy tax on behalf of LSED, “in the same manner in which the State general sales and use taxes authorized by R.S. 47:302-321 have been collected.”

Moreover, pursuant to La. 1978 Acts, No. 305, the Louisiana Legislature authorized the creation of NOEHA as a body politic and corporate and political subdivision of the state of Louisiana for the purpose of acquiring, constructing, reconstructing, extending, improving, maintaining and operating convention, exhibition, and tourist facilities within the city of New Orleans. 1978 La. Acts, No. 305, §§ 1 & 4. To provide the funds necessary for its purpose, NOEHA was further authorized to impose, by resolution, a hotel occupancy tax on hotel rooms located within the Parish of Orleans. Additionally, pursuant to this Act, NOEHA was authorized “to contract with the state of Louisiana ... for the collection of the tax, which tax **may be collected in the same manner** and subject to the same conditions **as the hotel occupancy tax now being imposed by the [LSED]** on hotels located in the city of New Orleans.” 1978 La. Acts, No. 305, § 6 (emphasis added).

Thereafter, by resolution adopted February 24, 1988, NOEHA levied a hotel occupancy tax, requiring any person operating a hotel within its jurisdiction to collect the tax and remit it to the Department for the account of NOEHA. With regard to enforcement, the resolution further provided as follows:

The [Department] is hereby authorized to use the procedures established in Chapter 18, Title 47 of the Louisiana Revised Statutes of 1950, as the same now exists or as it may be from time to time amended, to the extent that they are not inconsistent with the terms and provisions of this resolution, to enforce collection of the [hotel occupancy tax].

Notably, the procedures established in Chapter 18, Title 47 of the Revised Statutes include procedures not only for the assessment and collection of a tax, but also for investigations and hearings, imposition of interest and penalties, and the **refund** of the payment of tax when none was due or of the excess of the amount due. See LSA-R.S. 47:1501 – 1691.

While the word “administer” is not defined in LSA-R.S. 47:1401 (granting the BTA jurisdiction to review disputes as to “any tax ... administered” by the Department), it is clear that through these various legislative provisions, ordinances, and resolutions, the Department is authorized to and has been “administering” the LSED and NOEHA hotel occupancy taxes. Words and phrases in a statute shall be read in context and shall be construed “according to the common and approved usage of the language.” LSA-R.S. 1:3; Ogea v. Merritt, 2013-1085 (La. 12/10/13), 130 So. 3d 888, 896. “Administer” is defined as “[t]o have charge of” or “manage,” Webster’s II New College Dictionary 14 (2001), and Black’s Law Dictionary similarly defines “administer” as “[t]o manage or conduct.” Black’s Law Dictionary 41 (6th ed. 1990). The parties do not dispute that the Department is in charge of collecting and enforcing the collection of these taxes. Thus, contrary to the Department’s argument, we are unable to conclude that the Department established that it does not “administer” these taxes merely because NOEHA and LSED **levied** the taxes and provided for certain exemptions, where these bodies also charged the Department with the authority and duty to manage these taxes by collecting them and

enforcing their collection. Indeed, in managing the collection and enforcement of these taxes, the Department has promulgated rules associated with their collection and the assessment *by the Department* of penalties for failure to comply with the rules. See La. Admin. Code tit. 61, part III, § 1517 (regarding electronic filing requirements for LSED and NOEHA hotel occupancy taxes). And while the Department argues that NOEHA and LSED also have responsibilities such as establishing how the tax revenues will be spent, such an argument confuses the duty of “administering the tax” with administering the *proceeds* generated by the tax.

As such, because the Department has failed to establish that it does not “administer” the LSED and NOEHA hotel occupancy taxes at issue, we find no error in the BTA’s conclusion that the Department likewise failed to establish that the BTA did not have subject matter jurisdiction, pursuant to LSA-R.S. 47:1401, to hear and decide the dispute between Jazz Casino and the Department as to the Department’s denial of Jazz Casino’s request for a refund of these taxes. Indeed, to hold otherwise would, in our view, interfere with the legislature’s power and duty to provide a “complete and adequate remedy” for the recovery of an illegal tax paid by a taxpayer. LSA-Const. art. VII, § 3(A).

CONCLUSION

For the above and foregoing reasons, the January 14, 2016 judgment of the Board of Tax Appeals, denying the Louisiana Department of Revenue’s motion to annul its prior October 8, 2014 judgment on the basis

of lack of subject matter jurisdiction, is hereby affirmed. Costs of this appeal in the amount of \$724.00 are assessed against the Louisiana Department of Revenue.

AFFIRMED.

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2016 CA 0180

DEPARTMENT OF REVENUE, STATE OF LOUISIANA

VERSUS

JAZZ CASINO COMPANY, LLC

GUIDRY, J., dissents and assigns reasons.



GUIDRY, J., dissenting.

While statutorily, the NOEHA and the LSED *could* authorize the Department, by contractual agreement, to perform further acts of administration regarding the taxes at issue, including issuing refunds for overpayment of the taxes at issue, the contractual agreements executed with the NOEHA and the LSED simply do not so provide. Instead, the plain language of the contractual agreements, whereby the NOEHA and the LSED authorized the Department *to collect* the subject taxes did solely that – only authorized the *collection* of the taxes. The contracts do *not* expressly authorize the Department to *refund* taxes collected nor do the contracts use broad language or terms such as “administer.” If such additional language or provisions had been included in the contracts whereby the NOEHA and the LSED authorized the Department to collect the hotel taxes on their behalf, then it could be reasonably argued that the Department had been granted the authority to refund the taxes collected, but such is not the case. Rather, the entities solely authorized the Department to “collect” and “enforce collection.”

As “collection” is the opposite of “refunding,” I disagree with the assertion that the authorization to collect granted by the entities includes the authority to

refund. Hence, I believe the BTA lacked subject matter jurisdiction, under the circumstances, to order the Department to refund the taxes that it remitted to the body corporate entities that could have been sued in their own right for the return of those monies. And for these reasons, I respectfully dissent.