

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

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JUDGMENT ON EXCEPTIONS WITH REASONS

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On July 13, 2023, this matter came before the Board for hearing on the Exceptions of Lack of Subject Matter Jurisdiction, *Lis Pendens*, No Cause of Action, and No Right of Action filed by the Board of Commissioners for the Capital Area Groundwater Conservation District (collectively, the "Defendants"). Presiding at the hearing was Local Tax Judge Cade R. Cole. Present before the Board were Justin Mannino, William Patrick, IV, and Brett Furr, attorneys for the Petitioners Baton Rouge Water Works Company ("BRWW") and Parish Water Company, Inc. ("PWI") (collectively, the "Petitioners"), and Nicole Frey and David Cassidy, attorneys for the Defendants. At the conclusion of the hearing, the Board took the matter under advisement. In accordance with the attached Reasons, the Board now rules as follows:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Exceptions of Lack of Subject Matter Jurisdiction, No Right of Action, and *Lis Pendens* BE AND ARE HEREBY OVERRULED.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Exception of No Cause of Action is SUSTAINED IN PART as to the Payment Under Protest Petition with 30 days to amend to make more clear any use of the Board's declaratory judgment jurisdiction and is CONVERTED IN PART TO AN EXCEPTION OF PREMATURITY AND SUSTAINED with respect to Petitioners'

claims for refunds of payments made for which they did not request an administrative refund and those claims are hereby DISMISSED WITHOUT PREJUDICE.

JUDGMENT RENDERED AND SIGNED AT BATON ROUGE,  
LOUISIANA, THIS 20<sup>TH</sup> DAY OF NOVEMBER, 2023.

FOR THE BOARD:



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LOCAL TAX JUDGE CADE R. COLE

BOARD OF TAX APPEALS  
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**Background:**

Petitioners allege that they have made payments of disguised and illegal taxes to the Defendants. The Defendants are political subdivisions created to “provide for the efficient administration, conservation, orderly development and supplementation of groundwater resources...” La. R.S. 38:3071(B). The geographical area administered

by the Defendants encompasses “the parishes of Ascension, East Baton Rouge, East Feliciana, Pointe Coupee, West Baton Rouge, and West Feliciana” (the “District”). *Id.*

The Defendants are authorized to assess a “charge” against “users”:

[W]ithin the district based upon the annual rate of use of each user sufficient to meet costs and expenses of operation. Such charges must be uniform as to all users, being assessed on the basis of units of water used . . . . Further, such charges shall be assessed and income therefrom used only to defray the costs and expenses of operation of the district assessing them.

The Defendants are also authorized to assess:

(b) Costs for capital expenditures assessed to users based on either annual flows or specific costs for wells to individual users based on capital, debt service, and operation and maintenance costs. Costs may include specific systems and technologies to allow for remote monitoring of flows, water levels, water quality, and other parameters considered necessary by the board to conserve and protect groundwater resources and may include but are not limited to monitoring wells, scavenger wells, reclaimed water systems, pressure differential systems, water treatment systems, and other subsurface systems related to the protection of the aquifers.<sup>1</sup>

On January 10, 2022, The Defendants issued Emergency Rule 56:V.1107 (the “Emergency Rule”). The Emergency Rule increased the rate of “charges” for “pumpage” from \$20 to \$65 per million gallons pumped.

After the adoption of the Emergency Rule, Petitioners paid the “charges” under protest and filed the instant Petition. Petitioners claim that Defendants collect “charges” far in excess of their costs of operation. According to the Petitioners, the excess collections are intended to raise revenue. Petitioners maintain that they can prove these assertions with evidence from Defendants’ projected budgets. Further, Petitioners contend that the “charges” were excessive and really disguised taxes even before the Emergency Rule.

In addition, and in the alternative, Petitioners contend that the “charges” are illegal severance taxes. The “charges” are assessed on “users” that produce

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<sup>1</sup> La. R.S. 38:3076(A)(14)(a), (b). The Commission is also authorized to assess late fees and application fees for new or upgraded wells. La. R.S. 38:3076(A)(14)(c), (d). The amount of fees that may be assessed is limited by statute. *Id.*

groundwater within the district and meet certain criteria. Petitioners are producers of groundwater that meet the definition of “users.” Thus, they must pay the “charges” for the privilege of extracting groundwater. Petitioners allege that the “charges” are measured by the rate at which the water is severed from its broader *corpus*. Petitioners point out that as political subdivisions, Defendants are prohibited from levying a severance tax by the Louisiana Constitution.

According to the Petitioners, the Defendants increased “pumpage” rates to fund the development and installation of public works in the form of groundwater usage monitoring systems. The Emergency Rule was not authorized by a majority of voters, nor is it a levy on real property as would be authorized by La. Const. Art. VI, §32 and 36. Petitioners also argue that the increased “charges” are unconstitutional.

### Discussion

Defendants have filed Exceptions of Lack of Subject Matter Jurisdiction, *Lis Pendens*, No Cause of Action, and No Right of Action. The Board addresses each Exception in turn.

#### Subject Matter Jurisdiction

Defendants argue that the Board lacks subject matter jurisdiction over an appeal from their adoption of a rule. An objection to the existence of the Board’s subject matter jurisdiction is raised by a declinatory exception. *See* La. C.C.P. art. 925A(6). Evidence may be introduced to support or controvert the Exception of Lack of Subject Matter Jurisdiction if the grounds for the Exception are not apparent on the face of the Petition. *See* La. C.C.P. art. 930. For purposes of ruling on the Exception, and in the absence of contradictory evidence, the Board accepts the well pled allegations of the petition as true. *State v. Illinois Cent. R.R. Co.*, 2004-1789, p. 13 (La. App. 1 Cir. 12/22/05), 928 So.2d 60, *writ not considered sub nom. State v.*

*Illinois Cent. R. Co.*, 2006-0189 (La. 5/5/06), 927 So.2d 301. However, this rule applies only to properly-pled material allegations of fact and does not apply conclusory allegations or allegations of law. *Beasley v. Nezi, LLC*, 2016-1080, p. 4 (La. App. 1 Cir. 9/8/17), 227 So.3d 308, 312.

La. R.S. 38:3081(A) and the APA provide for judicial review of the Defendants adoption of a rule, regulation, order, and/or for judicial review of other actions taken by the Defendants. Judicial review by a district court of an administrative agency's action is an exercise of a statutory grant of limited appellate jurisdiction. *Louisiana Env'tl. Action Network v. Louisiana Dep't of Env'tl. Quality*, 2011-1935, p. 3 (La. App. 1 Cir. 7/25/12), 97 So.3d 1148, 1150, *writ denied*, 2012-1926 (La. 11/9/12), 100 So.3d 842. Like a district court, the Board may be granted limited appellate jurisdiction by statute.<sup>2</sup> However, the 19<sup>th</sup> JDC, not the Board, has been granted jurisdiction over petitions for judicial review under La. R.S. 38:3081. Thus, Defendants are correct that the Board does not have appellate jurisdiction to hear a petition for judicial review of the rule itself under La. R.S. 38:3081.

However, Petitioners have not petitioned the Board for judicial review of the rule. Petitioners are asking the Board to exercise original jurisdiction. The original jurisdiction of the Board encompasses:

All matters relating to . . . payment under protest petitions . . . . **[a]ll matters related to state or local taxes or fees. . . . [and a] petition for declaratory judgment or other action relating to any state or local tax or fee, concerning taxing districts and related proceeds, or relating to contracts related to tax matters; and including disputes related to the constitutionality of a law or ordinance or validity of a regulation concerning any related matter or concerning any state or local tax or fee.**<sup>3</sup>

Petitioners brought this action to recover payments under protest, to obtain declaratory relief, and to obtain refunds for prior voluntary payments, all in

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<sup>2</sup> Such as in *ad valorem* property tax correctness challenges appealed from the Louisiana Tax Commission. See La. R.S. 47:1407(3)(b), 1856(H), 1998(H).

<sup>3</sup> La. R.S. 47:1407(1), (3)(a), (7) (substitutions added).

relationship to what the Petitioners allege to be taxes and Defendants believe to be valid and chargeable fees.

Petitioners claim that evidence concerning the Defendants' operational expenses will demonstrate that the "charges" were really a means of generating revenue. *See e.g. Audubon Ins. v. Bernard* 434 So. 2d 1072 (La. 1983). (a charge is a tax if is "not an imposition limited to the extraction of fees from persons receiving a special benefit from government not shared by other members of society" or "not just an incident of regulation" but is instead for the purpose of raising revenue). In addition, Petitioners also make factual allegations of the specific activity that they claim is a severance of a natural resource. The allegations and the relief sought fall within the Board's jurisdiction concerning local taxes and fees.

#### No Cause of Action

According to the Defendants, the law provides no cause of action for the recovery of "charges" paid under protest. "The function of an exception of no cause of action is to test the legal sufficiency of the petition by determining whether the law affords a remedy on the facts alleged in the pleading." *Everything on Wheels Subaru, Inc. v. Subaru S., Inc.*, 616 So.2d 1234, 1235 (La. 1993). In the context of this Exception, "cause of action" means the operative facts which give rise to the Petitioners right to judicially assert the action against the Defendants. *Id.* at 1238. No evidence may be introduced in support of or opposition to an exception of no cause of action. La. C.C.P. Art. 931. All well-pled allegations of fact in the petition are taken as true for purposes of ruling on the exception. *Guidry v. Ave Maria Rosary & Cenacle, Inc.*, 2021-507, p. 19-20 (La. App. 3 Cir. 6/1/22, 19-20), 341 So.3d 779, 793; *Phipps v. Chesson*, 96-26, p. 3 (La. App. 3 Cir. 11/6/96), 682 So.2d 935, 937. However, mere conclusory statements are not treated as well-pled allegations of fact. *See Badeaux v. Sw. Computer Bureau, Inc.*, 2005-0612, p. 11 (La. 3/17/06), 929 So.2d 1211, 1219. The exception raises a question of law based solely on the sufficiency of the petition.

*Kendrick v. Estate of Barre*, 2021-00993, p. 3 (La. 3/25/22), 339 So.3d 615, 617.

Therefore, “an exception of no cause of action should be granted only when it appears beyond doubt that the plaintiff cannot prove any set of facts which would entitle him to relief.” *Id.*

A law that imposes a tax is a tax, regardless of how it is labeled. *See Reed v. City of New Orleans*, 593 So.2d 368, 371 (La. 1992). To determine whether a law imposes a tax, the Board examines the incidents, attributes, and operational effects of the law. *See Circle Food Stores, Inc. v. City of New Orleans*, 620 So.2d 281, 284 (La. 1993). In *Audubon Ins. Co. v. Bernard*, 434 So.2d 1072, 1075 (La. 1983), the Court identified the characteristics of a tax:

If the imposition has not for its principal object the raising of 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. In similar fashion, the police power may be exercised to charge fees to persons receiving grants or benefits not shared by other members of society. But if revenue is the primary purpose for an assessment and regulation is merely incidental, or if the imposition clearly and materially exceeds the cost of regulation or conferring special benefits upon those assessed, the imposition is a tax.<sup>4</sup>

Thus, if an examination of the incidents, attributes, and operational effects of the charges show that their primary purpose was to generate revenue, or that collections materially exceeded the cost of regulation, then the “charges” are really taxes. Petitioners have presented well-pled allegations that the “charges” are disguised taxes. However, while there is a payment under protest statute applicable to state taxes, local sales taxes, and local property taxes, there is no statutory basis for payment under protest of these fees/charges. La. R.S. 47:1431(B) spells out the payment under protest actions contemplated by Title 47 of the Revised Statutes. This claim does not fit within the scope of any of the referenced sections so there is not a

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<sup>4</sup> *Audubon*, 434 So.2d at 1074-75 (emphasis added) (citations in original omitted). Classifying the pumping charges as fees would not necessarily place them outside the scope of the Board’s jurisdiction, which extends to “[a]ll matters related to state or local taxes or fees.” La. R.S. 47:1407(3)(a) (emphasis added).



specific procedural mechanism for payment under protest of these charges and fees.<sup>5</sup> The Petitioners do have a cause of action under the Board's declaratory judgment jurisdiction, but The Exception of No Cause of Action is sustained as to the payment under protest claim, with Petitioner granted 30 days to amend to make clear all allegations under the Board's declaratory judgment jurisdiction.<sup>6</sup>

Petitioners also ask for refunds of payments for which they have not administratively requested a refund. Notwithstanding any overall concern about a statutory basis for refund of this charge/fee, the right to petition the Board for a refund never comes into existence until an administrative claim for refund has been denied. *Transcon. Gas Pipe Line Corp. v. Bridges*, 2009-0421 (La. App. 1 Cir. 10/23/09), 28 So.3d 1082, writ denied, 2009-2764 (La. 2/26/10), 28 So.3d 277. An exception based on the failure to file a refund claim before filing a petition with the Board is properly brought as an exception of prematurity. *Id.* The nature of an exception should be determined by its substance, not its caption. *Judson v. Davis*, 04-1699, p. 11 (La. App. 1st Cir.6/29/05), 916 So.2d 1106, 1114, writ denied, 05-1998 (La.2/10/06), 924 So.2d 167. With that in mind, the Board will convert the Exception of No Cause of Action in part to an Exception of Prematurity and sustain it in part with respect to Petitioners' request for refunds of payments made without protest and for which they have not requested administrative refunds.

#### No Right of Action

Defendants assert that under *Krauss Co. v. Develle*, 110 So.2d 104 (La. 1959), an entity that collects a tax from its customers by adding the tax to the customers'

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<sup>5</sup> The Board is mindful of the Supreme Court's admonition of the strict construction of remedies outside of the constitutional process for appropriation of judgments against the state and its political subdivisions. See e.g. *Mellor, et al. v. Parish of Jefferson*, 2021-CA-0858 (La. 2022); 338 So.3d 1138.

<sup>6</sup> Upon request, the Board would be open to schedule a trial on a declaratory judgment concerning this matter in the first quarter of 2024.

bills has no right of action to champion the cause of the consumer, especially when no such consumer has appeared in the proceedings. Defendants additionally point to the Louisiana Supreme Court's decision in *Cox Cable New Orleans, Inc. v. City of New Orleans*, 624 So.2d 890 (La. 1993), holding that a cable company did not have a right of action for a refund of taxes paid by someone else (the cable company's customers). *Id.* At 896. In Louisiana's sales tax law statutory scheme, the customer is responsible for paying the tax. *Vulcan Foundry, Inc. v. McNamara*, 414 So.2d 1193, 1194 (La.1981). The plaintiffs in *Krauss* and *Cox* were merely vendors that collected and remitted the tax. *Cox Cable*, 624 So.2d at 896 (citing *Krauss*, 110 So.2d 104). They had no right to a refund of taxes that they did not pay.

The "charges" in this matter are paid by "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.

Unlike a sales tax, the "charges" are not collected and remitted by a vendor from the customer who pays the tax. The Petitioners extract the groundwater; they are the "users" under the statutory definition. The Defendants' assertion that the Petitioners pass the "charges" along to their customers is irrelevant. Whether passed along or not, the customers have no liability to the Defendants for paying the alleged "tax." The Petitioners paid the "charges" and they are therefore the persons who have the right to challenge that the "charges" were actually disguised and illegal taxes. *Krauss* and *Cox* are legally and factually distinguishable from this matter.

### Lis Pendens

Defendants ask for dismissal of the Petition on the basis of *lis pendens* because of a pending action in the 19<sup>th</sup> JDC challenging the constitutionality of the Emergency

Rule and seeking injunctive relief.<sup>7</sup> Under Article 531 of the Code of Civil Procedure, the doctrine of *lis pendens* applies when: (1) two or more actions<sup>8</sup> are pending in Louisiana courts; (2) on the same transaction or occurrence; and (3) the suits are between the same parties in the same capacities. *Aisola v. Louisiana Citizens Prop. Ins. Corp.*, 2014-1708, p. 4 (La. 10/14/15), 180 So.3d 266, 269. If *lis pendens* applies, Article 531 allows for the dismissal of all but the first action.

The determination of whether two pending suits arise from the same transaction or occurrence is made on a case-by-case basis. *Umbrella Inv. Grp., L.L.C. v. Pedestal Bank*, 2020-0268, p. 8 (La. App. 1 Cir. 2/18/21), 318 So.3d 192, 199. The test is the same as the test for applying *res judicata* to the subsequently filed suit. *Umbrella*, 2020-0268, p. 5-6, 318 So.3d at 197. It does not matter whether the subsequent suit is based on the same cause of action. *Citizens Sav. Bank v. G & C Dev., L.L.C.*, 2012-1034, p. 7 (La. App. 1 Cir. 2/15/13), 113 So.3d 1085, 1089. Any doubt concerning the application of *lis pendens* must be resolved in favor of maintaining the Petition. *See Robbins v. Delta Wire Rope, Inc.*, 2015-1757, p. 7 (La. App. 1 Cir. 6/3/16); 196 So.3d 700, 705.

In the 19<sup>th</sup> JDC, Petitioners seek judicial review of the Emergency Rule under La. R.S. 38:3081. Petitioners do not seek that judicial review with the Board. Nevertheless, Petitioners ask the Board to declare the Emergency Rule invalid by arguing that it is unconstitutional. Petitioners also ask the 19<sup>th</sup> JDC for relief using other legal theories that have not been advanced before the Board. The promulgation

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<sup>7</sup> Defendants introduced a “Petition for Declaratory Judgment” and an “Amended and Restated Petition for Declaratory Judgment, Preliminary and Permanent [sic] Injunction” filed in the 19<sup>th</sup> JDC in Case Number: C-715795 31. Based on the pleadings submitted by Defendants, it seems that PWI is not a party to the 19<sup>th</sup> JDC case. However, Defendants suggest that PWI’s absence is of no consequence because it is the alter ego of BRWW.

<sup>8</sup> Article 531 was amended by 2023 Act 5 to replace the word “suits” with “actions.” Comments to the revision state that the change was in accord with the holding of *Chumley v. LaCour*, 54,499 (La. App. 2 Cir. 5/25/22), 339 So.3d 766, *reh’g denied* (June 23, 2022), *writ denied*, 2022-01129 (La. 12/6/22), 350 So.3d 871. In *Chumley*, the Court read the term “suit” in the pre-amendment version of Art. 531 *in pari materia* with the phrase “civil action” in Article 421. Article 421 establishes that a “civil action” is a demand for the enforcement of a legal right, commenced by the filing of a pleading presenting the demand to a court of competent jurisdiction. In reading the term “suit” as equivalent in meaning to a “civil action,” the Court held that a succession proceeding was a suit for purposes of Article 531.

of the Emergency Rule is an occurrence common to both actions, regardless of the legal theory under which it might be declared invalid.

The people of Louisiana's decided to vest in this Board with jurisdiction over "matters concerning the constitutionality of taxes, fees, or other matters related to its jurisdiction" La. Const. art. V, Sec. 35. The First Circuit has recognized that "as provided by the statute, the BTA is granted jurisdiction over "[a]ll matters related to state or local taxes or fees" and "petition[s] for declaratory judgment or other action[s] relating to any state or local tax or fee... or relating to contracts related to tax matters; and including disputes related to the constitutionality of a law... concerning any related matter, or concerning any state or local tax or fee." *Gross v. Robinson*, 2023-CA-0142, p. 10 (La. App. 1<sup>st</sup> Cir. 9/15/23).

In La. R.S. 47:1432(B), the legislature directed Louisiana's courts to treat an action before the Board as a suit pending in a court of this state for purposes of La. C.C.P. Art. 531. However, while La. R.S. 47:1432(B) provides a rule for the courts it does not itself provide a directive to the Board. Any ambiguity resulting therefrom should be construed in favor of maintaining the Petition. The First Circuit has observed that a lower court's decision to overrule a *lis pendens* exception "on the grounds that the Board is not a 'court' for purposes of La. C.C.P. art. 531," was "technically correct." *Clark v. State*, 2002-1936, p. 5 n. 3 (La. App. 1 Cir. 1/28/04), 873 So.2d 32, 35 n. 3 *writ denied*, 2004-0452 (La. 4/23/04), 870 So.2d 300. The Board finds that maintaining the Petition is both the "technically correct" result and supported by the applicable standard for ruling on an Exception of *lis pendens*.

### **Conclusion:**

Petitioners pray for declaratory relief and the return of payments under protest of alleged taxes. Petitioners have stated causes of action over which the Board has subject matter jurisdiction. Petitioners are the persons who pay the alleged "taxes" and thus they have a right of action to dispute them. Petitioners do not simply

collect and remit payments made by their customers. Finally, this action does not fulfill all the requisites for a *lis pendens* due to the the 19<sup>th</sup> JDC action.

**BATON ROUGE, LOUISIANA, THIS 20<sup>TH</sup> DAY OF NOVEMBER, 2023.**

**FOR THE BOARD:**

A handwritten signature in blue ink, appearing to read 'Cade R. Cole', is written over a horizontal line.

**LOCAL TAX JUDGE CADE R. COLE**