BOARD OF TAX APPEALS

STATE OF LOUISIANA

LUBA CASUALTY INSURANCE COMPANY

VERSUS **DOCKET NO. 9462D, C/W 9496D, 10214D, & 1116D**

SECRETARY, LOUISIANA DEPARTMENT OF REVENUE

****

JUDGMENT

****

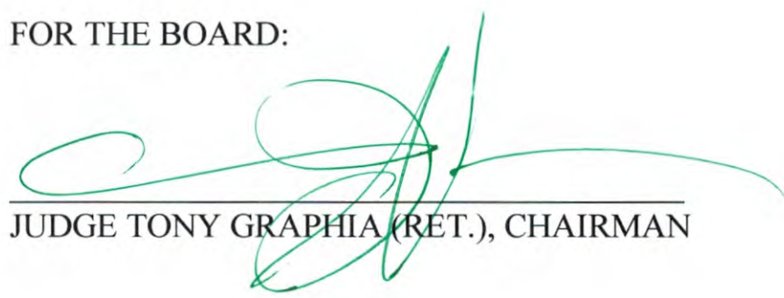
This matter came before the Board on November 6, 2018 for hearing on the merits of the petition of LUBA Casualty Insurance Company (the "Taxpayer"), with Judge Tony Graphia (Ret.), Chairman, presiding, and Board Members Cade R. Cole and Jay Lobrano present. Participating in the hearing were David R. Cassidy and David R. Kelly, attorneys for the Taxpayer, and Miranda Scroggins, attorney for the Secretary, Louisiana Department of Revenue (the "Secretary"). After the hearing, the matter was taken under advisement. The Board now issues Judgment for the written reasons issued herewith.

IT IS ORDERED, ADJUDGED, AND DECREED that the Taxpayer's Petition BE AND IS HEREBY GRANTED, that Judgment BE AND IS HEREBY rendered in favor of Luba Casualty Insurance Company against the Secretary, Louisiana Department of Revenue.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Secretary shall refund to the Taxpayer the amount of $1,480,571.21 that Taxpayer paid under protest, together with interest as provided by law.

JUDGMENT RENDERED AND SIGNED at Baton Rouge, Louisiana this 11th day of December, 2018.

FOR THE BOARD:



JUDGE TONY GRAPHIA (RET.), CHAIRMAN

BOARD OF TAX APPEALS

STATE OF LOUISIANA

LUBA CASUALTY INSURANCE COMPANY

VERSUS **DOCKET NO. 9462D, C/W 9496D, 10214D, & 1116D**

SECRETARY, LOUISIANA DEPARTMENT OF REVENUE

****

WRITTEN REASONS

****

This matter came before the Board on November 6, 2018 for hearing on the merits of the petition of LUBA Casualty Insurance Company (the "Taxpayer"), with Judge Tony Graphia (Ret.), Chairman, presiding, and Board Members Cade R. Cole and Jay Lobrano present. Participating in the hearing were David R. Cassidy and David R. Kelly, attorneys for the Taxpayer, and Miranda Scroggins, attorney for the Secretary, Louisiana Department of Revenue (the "Secretary"). After the hearing, the matter was taken under advisement. The Board now issues Judgment for the written reasons set forth herein.

The Taxpayer is a workmen's compensation insurer doing business in Louisiana. The Taxpayer reported net taxable premiums in 2013, 2014, 2015, and 2016. In calculating its income tax responsibility for those years, the Taxpayer reported a number of credits, including the three credits at issue in this case: (1) municipal "taxes" under R.S. 22:833 (the "Municipal Taxes"); (2) Louisiana Insurance Rating Assessments under R.S. 22:1476 (the "LIR"); and (3) Fraud Assessments under R.S. 22:1931.8 and R.S. 40:1428 (the "Fraud Assessments"). The Taxpayer claimed credits for these payments on its 2013, 2014, 2015, and 2016 Corporate Income and Franchise Tax ("CIFT") returns under R.S. 47:227. The Secretary disallowed the credits and issued notices advising the Taxpayer of the

Secretary's intent to assess tax, penalties, and interest for the resulting underpayments. The Taxpayer paid the proposed assessments under protest and commenced suits to recover for each year (2013, 2014, 2015, and 2016). Those four suits have been consolidated into this action.[1]

The parties dispute whether the Taxpayer is entitled to a credit under La. R.S. 47:227 against its CIFT liability for premium taxes paid. La. R.S. 47:227 provides:

> Every insurance company shall be entitled to an offset against any tax incurred under this Chapter, in the amount of any taxes, based on premiums, paid by it during the preceding twelve months, by virtue of any law of this state.

At the hearing, the Taxpayer conceded the issue of the Fraud Assessments. Only the Municipal Taxes and the LIR remain in dispute. The Board must decide whether the Municipal Taxes and/or the LIR Assessments fit within the scope of La. R.S. 47:227.

The Secretary's position with respect to the Municipal Taxes is that they do not qualify for the credit because they are not paid "by virtue of any of law of this state." According to the Secretary the quoted language means only taxes directly imposed by state statute. The Secretary claims that the Municipal Taxes are not directly imposed by state statute since the decision whether to impose Municipal Taxes is left to the discretion of local governments.

The Taxpayer disagrees with the Secretary's interpretation of La. R.S. 47:227. The Taxpayer points to the language employed on the face of the statute. On its face, La. R.S. 47:227 applies to taxes paid "by virtue of any law of this state." The Taxpayer contends that this language encompasses not only taxes directly imposed by state law, but also taxes imposed by local authorities, so long as the law of the

---

[1] As originally filed, this action (Docket No. 9462) related only to 2013, the consolidated action joins all relevant years.

state provides the basis and authority to impose said taxes. Therefore, according to the Taxpayer, Municipal Taxes imposed by local ordinances are "by virtue of" state law.

The grant of authority to local governments to impose the Municipal Taxes at issue in this case is set forth in La. R.S. 22:833(A), which provides:

> Any municipal or parochial corporation in the state shall have the right to impose a tax on any insurer engaged in the business of issuing any form of insurance policy or contract, which may now or hereafter be subject to the payment of any tax for state purposes . . . .

The question presented is one of statutory interpretation. The starting point in the interpretation of any law is the language of the law itself. *M.J. Farms, Ltd. v. Exxon Mobil Corp.*, 07-2371, p. 13 (La. 7/1/08), 998 So.2d 16, 27; *see also Kelly v. State Farm Fire & Cas. Co.*, 14-1921, p. 10 (La. 5/5/15), 169 So.3d 328, 335. In discerning the intent of the legislature, the Board follows Louisiana's canons of statutory construction as set forth in Chapter 2 of the Preliminary Title of the Louisiana Civil Code (La. C.C. arts. 9-13) and Chapter 1 of Title 1 of the Louisiana Revised Statutes (R. S. 1:1-1:17). La. R.S. 24: 177(A); *Succession of Harlan*, 2017-1132, p. 3 (La. 5/1/18), 250 So.3d 220, 224. When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature. La. C.C. art. 9; *see* La. R.S. 1: 4 ("When the wording of a Section is clear and free of ambiguity, the letter of it shall not be disregarded under the pretext of pursuing its spirit."). Words and phrases are to be construed according to their common and approved usage. La. R.S. 1: 3; *Robinson v. Mantle Oil & Gas, LLC*, 2017-0894 (La. App. 1 Cir. 3/29/10, 5), 247 So.3d 738, 742, *reh'g denied* (Apr. 23, 2018), *writ denied*, 2018-0852 (La. 9/28/18), 252 So.3d 922.

La. R.S. 47:227 states that an offset against income tax is available for premium taxes paid "by virtue of any law of this state." This statute is not ambiguous, the legislature deliberately chose to employ the words used in the statute. Therefore, the Secretary's narrow interpretation is not in accordance with the language of the statute.

A local government's authority to impose Municipal Taxes on insurers is derived from La. R.S. 22:833. La. R.S. 22:833 is a law of this state. When a local government decides to impose Municipal Taxes, it does so by virtue of a "law of this state" allowing it to. An insurer that pays such taxes does so in compliance with a local ordinance which is authorized by virtue of a state law. The Board therefore concludes that Municipal Taxes qualify for the credit against income tax provided by La. R.S. 47:227.

As for the LIR, the Secretary takes the position that these assessments are fees and not taxes. La. R.S. 47:227 provides a credit for "taxes" paid on premiums. La. R.S. 47:227 does not mention fees. The Secretary therefore concludes that the La. R.S. 47:227 does not provide a credit for payment of the LIR. However, the Taxpayer avers that the LIR is a tax under *Audubon Ins. Co. v. Bernard*, 434 So.2d 1072 (La. 1983) and *Security Plan Fire Ins. Co. v. Donelon*, 2016-0814 (La. App. 1 Cir. 5/10/17), 220 So.3d 769. The Secretary responds by contending that the Supreme Court's conclusion in *Audubon* is no longer controlling because the underlying statute establishing the LIR, La. R.S. 22:1476, has been substantially amended since 1983.

In *Audubon*, the Louisiana Supreme Court held that certain amendments to the LIR statutory scheme which purported to impose fees actually imposed taxes. The Court explained that a fee is an imposition by the government with a principal purpose other than the raising of revenue. *Audubon Ins. Co.*, 434 So.2d at 1074. The

Court further stated that revenue raised by a fee is "merely incidental to the making of rules and regulations to promote public order, individual liberty and general welfare." *See id.*

According to the Court, a key identifying characteristic of a fee is that it is imposed on a limited class of individuals who receive a special benefit from the government not shared by other members of society. *See id.* at 1075. A tax, on the other hand, is imposed for the primary purpose of raising revenue; any regulatory impact is merely a secondary consequence. *Id.* at 1074. An item raising revenue that "clearly and materially exceeds the cost of regulation or conferring special benefits upon those assessed" is a tax not a fee. *Id.*

The amendment before the Court in *Audubon* required the Louisiana Insurance Rating Commission ("LIRC") to collect an amount equal to a percentage of an insurers' previous year's premiums in order to fund the Firefighters' Retirement System. Despite the state's arguments to the contrary, the Court found that funding the Firefighters' Retirement System did not provide a special benefit to insurers. *Id.* at 1076. The Court reasoned that although fire insurers could conceivably benefit from a better funded firefighting system, the benefits of such a system were shared by all members of society. *Id.* Further all insurers, not just fire insurers, were required to pay the LIR. *Id.* Thus, the amendment neither imposed a charge on a select class of individuals, nor conferred any special benefits on those particular individuals. The Court also noted that the additional LIR collections were required to be set aside for the Firefighters' Retirement System regardless of whether the LIRC had enough funds available to fund its enforcement and regulatory

activities. *Id.* This indicated to the Court that the revenue raised by the amendment was not limited to only the costs of regulation.[2]

The Secretary strenuously argues that subsequent amendments to the LIR have rendered *Audubon*'s holding obsolete. However, the Board's review of the statute and its legislative history reveal that all of the legally significant provisions considered in *Audubon* remain substantially unchanged. The LIR is still imposed on all insurers doing business in the state. The largest portion of the LIR is still dedicated to the retirement systems, such as the Municipal Police Employees' Retirement System, the Sheriffs' Pension and Relief Fund, and the Firefighters' Retirement System. La. R.S. 22: 1476(A)(3). This portion of the LIR must still be set aside for these funds regardless of the availability of funds for the regulation of insurance. The underpinnings of the holding in *Audubon* are therefore undisturbed. The Board is accordingly bound to follow the clear and express holding of the Supreme Court that the LIR is actually a tax.

Nevertheless, the Secretary asserts that two amendments in particular require a different conclusion. First, the Secretary points out that the LIRC no longer exists-- the LIRC was abolished by Act No. 459 of the 2006 Regular Session. However, the introductory paragraph to Act No. 459 states that all of the LIRC's powers, duties, and functions were transferred to the Secretary of the Department of Insurance (the "DOI"). The DOI now administers and collects the LIR in essentially the same manner as the LIRC once did. Thus, the only discernible change to the

---

[2] The Court's conclusion meant that the tax was unconstitutional. Article 3, section 2, and Article 7, section 2, of our Constitution require that a statute levying a new tax or increasing an existing tax: (1) be enacted by a vote of two-thirds of the elected members of each house; and (2) not be enacted during a regular session held in an odd-numbered year. The tax before the Court in *Audubon* was in fact enacted in an odd numbered year. This constitutional infirmity was cured, however, through subsequent enactment of a virtually identical tax in Act No. 799 of the 1980 regular session.

LIR is that it is now administered by a different entity. A change in the agency that administers the LIR would not have changed the result in *Audubon*.

Second, the Secretary points out that LIR collections, which were once dedicated solely to funding the Firefighters' Retirement System, are now dedicated to funding various systems and operations. La. R.S. 47:1476(A)(2) currently[3] requires a portion of LIR collections to be set aside for the Municipal Fire and Police Civil Service Operating Fund. However, the Board finds no legal significance in this change. Just as was the case in *Audubon*, the LIR is still dedicated to funding civil service retirement plans that generally benefit society. The portion of the LIR alluded to by the Secretary does not fund the operations of agencies that regulate the insurance industry. It funds the support of local civil service examiners.

In sum, the Taxpayer's payments of both the Municipal Taxes and the LIR qualify for the credit provided for by R.S. 47:227. The Taxpayer is entitled to a refund of these amounts along with interest as provided for by law. The issue of the Fraud Assessments has been conceded by the Taxpayer and is not considered by the Board. However, the credit from LIR and Municipal Taxes is mathematically more than sufficient to resolve all liability (the credit from the Fraud Assessment would not have been relevant since the liability paid under protest would be zeroed out by the credit for LIR/Municipal Tax, and this credit is non-refundable). Therefore, the entire amount paid under protest is due to be refunded to the Taxpayer.

---

[3] Act 612 of the 2018 Regular Session amends R.S. 47:1476(A)(2) effective July 1, 2020. When the new law takes effect, Subparagraph (A)(2) will provide that "[f]unding deposited into the account shall be considered fees and self-generated revenues and shall be available for annual appropriations by the legislature." However the "account" referred to is the Municipal Fire and Police Civil Service Operating Account. Money in that account can only be used for operations of the office of state examiner, Municipal Fire and Police Civil Service. Thus, the amounts considered to be fees would still not be used to cover the costs of regulating the payor of those amounts.

Baton Rouge, Louisiana on this 11 day of December, 2018.

FOR THE BOARD:

VICE CHAIRMAN CADE R. COLE