

**BOARD OF TAX APPEALS
STATE OF LOUISIANA**

MAJESTIC MEDICAL SOLUTIONS, LLC

Petitioner

VERSUS

DOCKET NO. 9449C

**SECRETARY, LOUISIANA
DEPARTMENT OF REVENUE**

Respondent

WRITTEN REASONS FOR JUDGMENT

ON RESPONDENTS' EXCEPTIONS

**OF PREMATURETY, LACK OF SUBJECT MATTER JURISDICTION, NO
CAUSE OF ACTION, NO RIGHT OF ACTION, AND PRESCRIPTION**

The Exceptions of the Secretary, Department of Revenue, of the State of Louisiana (the "Secretary"), were heard by the Board on April 11, 2017, with Judge Tony Graphia, Chairman, presiding and with Board Members Cade R. Cole and Francis J. "Jay" Lobrano also present. Present before the Board were: Adrienne Quillen, attorney for the Secretary and Nicole Gould Frey, attorney for Majestic Medical Solutions, LLC (the "Taxpayer"). After the hearing, the matters were taken under advisement, and the Board has now rendered Judgment for the following written reasons.

Taxpayer appeals from the Secretary's refusal to act on its request for a refund. The Secretary sent to Taxpayer a Notice of Assessment for sales tax in the amount of \$56,724.18 plus interest and penalties. The date of the notice was 12/13/2013. The Assessment informed the Taxpayer that it had 60 days from the date of the Assessment to appeal to the Board of Tax Appeals, to pay the tax, or to pay the tax under protest in accordance with La. R.S. 47:1576. The Taxpayer took none of the aforementioned actions; and, pursuant to La. R.S. 47:1565(B), after 60 days the assessment became final and was collectible by distraint.

After issuing the proper notices, on April 1, 2014, the Secretary levied the Taxpayer's checking account in the amount of \$67,676.41. On June 16, 2014, the Taxpayer filed a refund request with the Secretary in the amount of \$48,871.90. (Taxpayer agreed that it did owe taxes in the amount of \$18,804.51, and agreed with satisfaction of this amount from the seized funds). The Secretary neither allowed nor denied Taxpayer's refund request, and on August 20, 2015 the Taxpayer filed this appeal with the Board, as authorized by La. R.S 47:1625.

The question for the Board is whether a taxpayer can seek a refund of tax if the taxpayer did not appeal the Secretary's Notice of Assessment concerning that tax, the assessment of that tax became final, and the assessment of that tax was thereafter in fact satisfied by levy. This specific question is *res nova*.¹

La. R.S. 47:1565(B) states that: "[i]f the taxpayer has not filed an appeal with the Board of Tax Appeals within the sixty day period, the assessment shall be final and be collectable by distraint and sale as hereinafter provided..."

Exceptions of Prematurity and Prescription

The Secretary has filed an Exception of Prematurity, presumably on the erroneous basis that no refund was filed with the Department. This exception is overruled as it is inconsistent with the record evidence.

An Exception of Prescription would be proper if the Taxpayer were filing an untimely challenge to the assessment itself by way of appeal to this Board. However, this Taxpayer has brought forward an argument under a distinct cause of action on a

¹ In *Phylway Construction, LLC v. Barfield*, the Board addressed the question of a right to claim a refund if a taxpayer did in fact pay its tax liability within the 60 days (an action specified in La. R.S. 47:1565(A)), thereby preventing the assessment from becoming final under Subsection B, and the Board therein specifically declined to address the current question presented in the present case stating, "the underlying facts of this case pretermitt the Board from reaching the *res nova* question of whether or not a Taxpayer has a right to a refund following a final assessment (ie. if 60 days passes and a taxpayer only pays thereafter)." BTA Docket No. 9324D (La. Bd. Tax App. 9/13/16) 2016 WL8853741, *writ denied* 2016-CW-1322 (La. App. 1st Cir. 2/6/2017), 2017 WL 476752

separate theory of relief, therefore the exception of prescription is overruled. *See e.g. Shields & Shields, APLC v. State /LA Department of Revenue* 2014-693, *fn. 5* (La. App. 1st Cir. 3/4/2015) 168 So.3d 877.

Exception of Lack of Subject Matter Jurisdiction

Our courts have recognized that jurisdiction over the subject matter is the legal power and authority to hear and determine a particular class of actions or proceedings. *Smith v. Gretna Machine and Iron Works*, 617 So.2d 144, 145 (La. App. 5th Cir. 1993). As with all exceptions, the movant bears the burden of proving the lack of jurisdiction. *Id.*

The Supreme Court has recognized that “the Board acts as a trial court in findings of fact and applying the law.” *St. Martin v. State*, 09-935, p. 6 (La. 12/1/09) 25 So.3d 736, 740. The Supreme Court has also concluded that “jurisdiction to resolve tax related disputes is constitutionally and statutorily granted to the Board which is authorized to heard and decide disputes and render judgments.” *Id.* at p. 8, 25 So.3d at 741.

La. R.S. 47:1407(1) gives the Board jurisdiction to hear “All matters relating to appeals for the determination of overpayments [refunds].” The current Taxpayer appeals for a redetermination of the Secretary’s inaction on its refund. This action is certainly within the scope of the Board’s jurisdiction. *See e.g.* La. R.S. 47:1431 and 1625.

The Board agrees with the First Circuit decision in *Shields & Shields, APLC, supra* that the Board and the Courts all lack jurisdiction to: stop a levy on a final assessment, hear a collateral attack on a levy, or hear a case related to the special

relief allowed pursuant to La. R.S. 47:1565(C).² See e.g. *Matessino v. Barfield*, BTA Docket No. 8939, p.2 (La. Bd. Tax App. 8/13/2015), 2015 WL 10528602.

The present case presents in a different posture since this action clearly falls within this Board's longstanding exclusive original jurisdiction over the appeals from claims for overpayment. The exception of lack of subject matter jurisdiction is overruled.

Exceptions of No Cause of Action and No Right of Action

The Supreme Court explained the standard of review for a peremptory exception of no cause of action in *Fink v. Bryant*, stating that:

The function of the peremptory exception of no cause of action is to question whether the law extends a remedy to anyone under the factual allegations of the petition. The peremptory exception of no cause of action is designed to test the legal sufficiency of the petition by determining whether [the] plaintiff is afforded a remedy in law based on the facts alleged in the pleading.

2001-0987 (La.11/29/01), 801 So.2d 346, 348.

An exception of no right of action is a threshold procedural device used to terminate a suit brought by a person who has no legally recognized right to enforce the right asserted. An exception of no right of action is a peremptory exception designed to test whether plaintiff has a real and actual interest in the action. *Joseph v. Hosp. Serv. Dist. No. 2 of Par. of St. Mary*,

² In *Shields & Shields, APLC v. State/LA Dep't of Revenue*, the First Circuit stated that: "[L]aws regulating the collection of taxes are sui generis and comprise a system to which general provisions of the law have little, if any, relevance." *Mallard Bay Drilling, Inc. v. Kennedy*, 04-1089 (La.6/29/05), 914 So.2d 533, 549. Through enactment of Section 47:1565(C), the legislature has explicitly provided that after the expiration of the sixty-day time period under Section 47:1565(B), the taxpayer's relief relative to assessment errors lies solely within the discretion of the Department secretary, and the courts have no jurisdiction to review the secretary's decisions on matters "relating thereto." See La. R.S. 47:1565(C)(2). To avoid being subject to the sole discretion of the secretary relative to an assessment error, it is the taxpayer's obligation to follow the statutory requirements for either appealing the assessment or paying the assessment under protest, then filing suit. In this case, Shields, the taxpayer, did neither. 2014-0693, p.6 (La. App. 1st Cir. 3/4/15), 168 So.3d 877, 882

2005-2364, p.4 (La. 10/15/06), 939 So.2d 1206, 1210; also stated as whether a plaintiff “has any interest in judicially enforcing the right asserted” *Falco Lime, Inc. v. Plaquemine Contracting Co., Inc.*, 95-1784 (La. App. 1st Cir. 4/4/96), 672 So.2d 356, 359).

Article VII, Sec. 1 of the Louisiana Constitution vests the power of taxation in the legislature, and Art. VII, Section 3 mandates the legislature “provide a complete and adequate remedy for the prompt recovery of an illegal tax paid by a taxpayer.” To fulfill this obligation, the legislature has provided three alternative remedies: (1) the Claims Against the State procedure, La. R.S. 47:1481, *et seq.*; (2) the Payment Under Protest procedure, La. R.S. 47:1576, *et seq.*, and (3) the Overpayment Refund procedure, La. R.S. 47:1621, *et seq.* *Clark v. State*, 2002-1936, p. 8-9 (La. App. 1st Cir. 1/28/04), 873 So.2d 332.

There is no question that the current Taxpayer could not bring a Payment Under Protest case after an assessment has become final. In *Devon Energy Production Co., L.P. v. Bridges* 120 So.3d 303 (La. App. 1st Cir. 6/3/2013) the First Circuit highlighted that the provisions of La. R.S. 47:1561 explicitly prohibit a payment under protest action “when an assessment for the tax in question has become final.” *Id.* Additionally, the present cause of action was not brought pursuant to the Claims Against the State procedure, and no relief has been pled for under the provisions of La. R.S. 47:1481.³

In *Collector of Revenue v. Pioneer Bank & Tr. Co.*, the Louisiana Supreme Court held that:

³ The Supreme Court has held that the Claims Against the State procedure, La. R.S. 47:1481, “was intended to give the Board of Tax Appeals the authority to grant claims for taxes erroneously paid to the state, when principles of justice and equity so require, even though a refund might not otherwise be permitted by law.” *Church Point Wholesale Beverage Co., Inc. v. Tarver*, 614 So.2d 697, 705 (La.1993).

Once an assessment of taxes has been made and has become final, either by reason of the tax debtor's failure to appeal to the Board of Tax Appeals and thereafter to the courts, or as here, by his failure to appeal to the courts from an adverse decision of the Board of Tax Appeals, the 'assessment' of the Collector or the 'judgment' of the Board of Tax Appeals or the court, in the event of appeal, **the tax assessed is no longer a claim but an established liability which may be collected...**

196 So.2d 270, 273 (La. 1967)(emphasis provided).

The Taxpayer has not alleged any procedural impropriety regarding its notice of assessment,⁴ and there is no dispute that the prior assessments are now final. A Taxpayer's due process rights are more than adequately protected by the procedural regime in Louisiana's law of tax collection. *Loe v. McNamara*, 501 So.2d 298 (La. App 1st Cir. 1987). The State has an interest in the finality of a "final assessment" which is the "equivalent of a judgment." La. R.S. 47:1581.

Finally, La. R.S. 47:1565(C)(3) provides:

The remedies of a taxpayer aggrieved by any action of the secretary are by appeal to the board of tax appeals or by payment of the disputed tax under protest and suit to recover as provided in this Subtitle.

It is axiomatic that "[w]hen 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. Civ Code art. 9. In La. R.S. 47:1568(C) the Legislature specifically included a right to claim a refund as a means of redress following a 'self-assessment.' In contrast, a right to seek a refund is specifically absent from the remedies available to a taxpayer aggrieved by an action of the secretary in assessing the taxpayer pursuant to La. R.S. 47:1565. In this matter, it is undisputed that the taxpayer failed to timely pursue the

⁴ La. RS. 47:1565 requires Notice of an Assessment and Notice of Appeal Rights to be issued in a clear and specific format due to the harshness of the remedy of distraint. The Notice issued in this case reiterates in bold at the top "PLEASE DO NOT IGNORE THIS NOTICE AS IT IS THE FINAL NOTICE BEFORE SEIZURE." Ex. B. to Taxpayer's Petition.

remedies available under La. R.S. 47:1565(C)(3) and therefore the claim for refund procedure set forth in La. R.S. 47:1621 is not available.⁵

For the foregoing reasons, the Board finds that the finality of the assessment of the underlying tax at issue in this refund request serves to preclude use of the Overpayment Refund procedure. This action seeks refund of a tax that is already “an established liability” *Pioneer Bank & Tr. Co, supra*, therefore the right is no longer legally recognizable and judicially cognizable. The Secretary’s Exception of No Right of Action should be sustained, and the Secretary’s Exception of No Cause of Action is overruled as moot.⁶

THUS DONE AND SIGNED at Baton Rouge, Louisiana this 10th day of October, 2017.

FOR THE BOARD:



VICE-CHAIRMAN CADE R. COLE

⁵ The Taxpayer failed to pay or appeal, and this assessment thereby became “final” pursuant to R.S. 47:1565(B). *Accord Phylway, supra*, fn. 1.

⁶ Attempts to re-open issues related to final assessments have arisen in a variety of procedural postures, and they have been variously blocked through exceptions of no cause of action, no right of action, or lack of subject matter jurisdiction. *Loe, supra; Devon, supra; Shields & Shields, supra* (citing to *L.D. Brinkman & Co. (Texas), supra*, and *MCI Telecommunications Corp., supra*).

The Board finds that where the face of the petition makes evident that there was a final assessment that was neither appealed nor paid within the applicable 60 day period before it became final, then an exception of no cause of action would be proper.

Conversely, if the face of the petition is silent, but evidence adduced at the hearing of an exception of no right of action supports the finality of the assessment concerning the underlying tax then the Board finds that an exception of no right of action would be proper. The Taxpayer would not have a judicially cognizable and “legally recognized right” to dispute the tax that the Supreme Court has recognized as “an established liability.” *Pioneer Bank & Tr. Co, supra*.

NOTICE OF JUDGMENT
AND APPEAL RIGHTS

ENCLOSED IS A CERTIFIED COPY OF THE JUDGMENT RENDERED ON THE
10th DAY OF October, 2017:

A Judgment of the Board of Tax Appeals may be appealed to the proper Court of Appeal
“within thirty days of the signing of a decision or judgment of the board” in the manner
specified in R.S. 47:1434-38.

Costs for appeal are described in the promulgated rules of the Board (codified pursuant to R.S.
47:1413, found in Louisiana Administrative Code Title 69).

In matters where the Board found that tax was due, the appellant is required to post a security in
the amount of **one and one-half (1 ½) times** the tax, interest and penalty found to be due, prior
to filing the *Motion for Review*. (R.S. 47:1434)

I hereby certify that the above and forgoing notice was mailed with the judgment by me, postage
prepaid, to counsel of record for all parties and to those who were not represented by counsel,
directed to their last known address, on this 10th day of October, 2017.



Ann Faust
Secretary-Clerk
Louisiana Board of Tax Appeals

7017 1070 0000 1104 9116

U.S. Postal Service
CERTIFIED MAIL® RECEIPT
Domestic Mail Only

For delivery information, visit our website at www.usps.com®.

OFFICIAL USE

Certified Mail Fee	
\$	
Extra Services & Fees (check box, add fee as appropriate)	
<input type="checkbox"/>	Return Receipt (hardcopy) \$ _____
<input type="checkbox"/>	Return Receipt (electronic) \$ _____
<input type="checkbox"/>	Certified Mail Restricted Delivery \$ _____
<input type="checkbox"/>	Adult Signature Required \$ _____
<input type="checkbox"/>	Adult Signature Restricted Delivery \$ _____
Postage	
\$	
Total Postage and Fees	
\$	

JD 10/10/17

Postmark
Here

written
949C
Judgment

Sent to	Nicole Gould
Street and Apt. No., or PO Box No.	P.O. Box 3197
City, State, ZIP+4®	Baton Rouge, LA 70821