BOARD OF TAX APPEALS
STATE OF LOUISIANA

E. PIERCE MARSHALL, JR in his capacity as co-trustee of THE PEROXISOME TRUST

Petitioner

Versus **B.T.A. DOCKET NO. 13399D**

SECRETARY OF DEPARTMENT OF REVENUE, STATE OF LOUISIANA

Respondent

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JUDGMENT AND REASONS

****

On May 4, 2023, this matter came before the Board for a hearing on the Exceptions filed by the Secretary of the Department of Revenue, State of Louisiana ("Department"). Presiding at the hearing were Francis J. "Jay" Lobrano, Chairman, Vice-Chairman Cade R. Cole, and Judge Lisa Woodruff-White (Ret.). Present before the Board were Miranda Scroggins, attorney for the Department, and Philip K. Jones., attorney for E. Pierce Marshall, Jr., in his capacity as Co-Trustee of the Peroxisome Trust ("Taxpayer"). At the conclusion of the hearing, the Board took the Exceptions under advisement. The Board now issues Judgment in accordance with the attached Reasons:

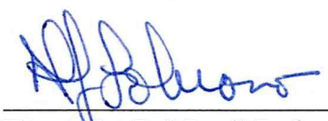
IT IS ORDERED, ADJUDGED AND DECREED that the Department's Exception of Prematurity is SUSTAINED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Department's Exceptions of No Cause of Action, No Right of Action, and Lack of Subject Matter Jurisdiction are DENIED AS MOOT.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be Judgment in favor of the Department and against the Taxpayer that the Petition be and is hereby DISMISSED WITHOUT PREJUDICE.

JUDGMENT RENDERED AND SIGNED at Baton Rouge, Louisiana, this 17th day of August, 2023.

FOR THE BOARD:



Francis J. "Jay" Lobrano, Chairman
Louisiana Board of Tax Appeals

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REASONS FOR JUDGMENT

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Background:

The Taxpayer filed the instant Petition with the Board on September 8, 2022. In his Petition, the Taxpayer alleges that he submitted a Request for Abatement ("Abatement Request") and a Claim for Refund of Overpayment ("Refund Claim") to the Department for the tax periods 2017 through 2019 (the "Tax Periods"). The Taxpayer further alleges that the Department issued a Notice of Disallowance ("Disallowance") dated August 9, 2022, denying the Abatement Request and the Refund Claim.

According to the allegations in the Petition, the Taxpayer sought a refund of interest on Louisiana fiduciary income tax for the Tax Period. The Taxpayer alleges that he made both the Abatement Request and the Refund Claim after paying tax, penalties, and interest on behalf of the Peroxisome Trust pursuant to a Voluntary Disclosure Agreement ("VDA") with the Department. The tax and penalty are not in dispute. The Abatement Request solely concerned the interest. The Refund Claim was intended to provide the means for a return of said interest payment if the Abatement Request was granted.

The Taxpayer claims that the interest results solely from the actions of Co-Trustee Preston Marshall. A diligent effort was allegedly made to compel Preston to perform certain obligations as Co-Trustee, but his refusal to perform said obligations caused the tax, penalty, and interest liabilities to accrue. The Taxpayer asserts that the loss suffered by the Peroxisome Trust will be suffered by its charitable beneficiaries and the recipients of their donations. The Taxpayer accordingly appeals to the equities and asks that the Board order the Department to grant the Abatement Request and Refund Claim.

In its Exception, the Department argues that the Disallowance is a disallowance of the Abatement Request, but not a disallowance of the Refund Claim. Further, the Department contends that the addition of interest is mandatory under the law. The Department maintains that an abatement of interest is only allowed by law when the Department is at fault. In addition, the Department asserts that the equities do not supply a basis for the Board to order an abatement of interest.

Prematurity

The Department argues that the Petition is premature because it did not issue a letter denying the Refund Claim, nor had one year expired since the Refund Claim was filed with the Department when the Petition was filed. The dilatory exception of prematurity is provided for in La. C.C.P. art. 926(1). An Exception of Prematurity "questions whether the cause of action has matured to the point where it is ripe for judicial determination." *Kelleher v. Univ. Med. Ctr. Mgmt. Corp.*, 2021-00011, p. 3

(La. 10/10/21), 332 So.3d 654, 657. Prematurity is determined by the facts existing at the time Petition was filed. *Sevier v. U.S. Fid. & Guar. Co.*, 497 So.2d 1380, 1382 (La.1986); *Blazio v. Ochsner Clinic Found.*, 2019-0753, p. 3 (La. App. 4 Cir. 3/4/20), 294 So.3d 36, *writ denied*, 2020-00732 (La. 10/6/20), 302 So.3d 530; *Gordon v. Pointe Coupee Health Serv. Dist. One*, 2009-2202, p. 4 (La. App. 1 Cir. 8/11/10), 47 So.3d 565, 568, *writ denied*, 2010-2067 (La. 11/12/10), 49 So.3d 894. For purposes of ruling on an exception of prematurity, the Board may consider evidence offered at the hearing as well as the allegations of the petition. La. C.C.P. art. 926; *Thomas v. Reg'l Health Sys. of Acadiana*, LLC, 2019-00507, p. 6 (La. 1/29/20), 347 So.3d 595, 600.

The right to seek review of a disallowance of a refund claim matures at the time established by La. R.S. 47:1625(A)(1):

> If the collector fails to act on a properly filed claim for refund or credit within one year from the date received by him or if the collector denies the claim in whole or in part, the taxpayer claiming such refund or credit may appeal to the Board of Tax Appeals for a hearing on the claim filed. No appeal may be filed before the expiration of one year from the date of filing such claim unless the collector renders a decision thereon within that time, nor after the expiration of sixty days from the date of mailing by registered mail by the collector to the taxpayer of a notice of the disallowance of the part of the claim to which such appeal relates.

In a recent decision interpreting a somewhat comparable provision in the Uniform Local Sales Tax Code[1], the Louisiana Supreme Court held:

> The only "act" required of the collector in that paragraph is to "render a decision" and "mail a notice of disallowance." Applying a plain reading of the statute, we conclude, as did the BTA, that "failed to act" refers to rendering and providing notice of a decision on the refund claim.

Nucor Steel Louisiana, LLC v. St. James Parish Sch. Bd., 2021-01814 (La. 6/29/22), 346 So.3d 272. The plain language of La. R.S. 47:337.81(A) quoted above is essentially identical to the plain language of La. R.S. 47:1625(A). Relying on that language in part[2], the Court in *Nucor* reached the conclusion that the failure to "act" on a refund claim is a failure to allow or deny the claim.

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[1] La. R.S. 47:337.81(A)(2).

[2] La. R.S. 47:337.81(A)(2) limits the time to appeal from the collector's denial through inaction to 180 days after the expiration of one year since the claim was filed. Part of the rationale underpinning the Court's decision in *Nucor* was that this limitation would be meaningless if it could be interrupted by any action at all by the Collector. La. R.S. 47:1625(A)(1) does not impose a similar limitation.

Here, the Department neither granted the Refund Claim nor mailed a notice of disallowance of that claim. The Disallowance does not mention the Refund Claim, much less inform the Taxpayer that the Refund Claim was denied. The Department could not assert that the Disallowance was a denial of the Refund Claim, as it does not satisfy the requirements of La. R.S. 47:1625(B), which state:

> A notice of disallowance, if issued, shall inform the taxpayer that he has sixty days from the date of the certified or registered mailing of that notice to appeal to the Board of Tax Appeals, and that any consideration, reconsideration, or action by the collector with respect to such claim following the mailing of a notice by registered mail of disallowance shall not operate to extend the period within which an appeal may be taken.

On its face, the Disallowance was not sent by registered mail and does not contain the required notice of the claimant's right to appeal.

Additionally, the Refund Claim, which was also introduced into evidence at the hearing, summarizes the reasons for the claim without reference to the Abatement Request. The explanation for the Refund Claim is summarized as, "Simply put, the tax liability was created (to the detriment of the charitable organizations that would have otherwise received the funds) from events other than taxable, for profit transactions." That assertion could be construed as an independent basis for disagreeing the imposition of the underlying tax.

The Department's letter disallowing the Abatement Request is not a denial of the Refund Claim, and there is no other letter or notice alleged or introduced that would suffice as a denial under La. R.S. 47:1625. Thus, the Department has not acted to deny the Refund Claim. In addition, the date of submission shown on the Refund Claim is June 13, 2022, and the Petition was filed on September 8, 2022. Therefore, when the Petition was filed, which is the determinative moment for purposes of an Exception of Prematurity, the Department had not denied the Refund Claim by failing to act on it for a year.

No Cause of Action

The Department argues that the Taxpayer has failed to state a cause of action because the addition of interest to delinquent taxes is mandatory under La. R.S.

47:1601(A). An exception of no cause of action asks whether the law affords a remedy to anyone based on the facts alleged in the Petition. *Everything on Wheels Subaru, Inc. v. Subaru S., Inc.*, 616 So.2d 1234, 1235 (La. 1993). No evidence may be introduced in support of or opposition to an exception of no cause of action. La. C.C.P. Art. 931. For purposes of ruling on the Exception, the Board accepts all well-pleaded allegations of fact in the Petition as true. *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.

La. R.S. 47:1601(A)(1) states that, "[w]hen any taxpayer fails to pay a tax, or any portion thereof, on or before the day where it is required to be paid under the provisions of this Subtitle, interest shall be added to the amount of tax due . . . ." The statute requires that interest "shall not be waived or remitted." The only exceptions to the prohibition against the waiver of interest are those provided for in Title 47.

La. R.S. 47:1601(A)(2)(c) allows the Department to waive interest that is attributable to an unreasonable error or delay by the Department in performing a ministerial or managerial act. La. R.S. 47:1601(A)(2)(c) provides:

> Abatement of interest attributable to unreasonable errors and delays by the department. In the case of any assessment of interest attributable in whole or in part to any unreasonable error or delay by the secretary or her designee (acting in an official capacity) in performing a ministerial or managerial act, the secretary may abate all or any part of such interest for any period. For purposes of the preceding sentence, an error or delay shall be taken into account only if no significant aspect of such error or delay can be attributed to the taxpayer involved and after the department has contacted the taxpayer in writing with respect to such deficiency or payment.

The Taxpayer interprets the third sentence of La. R.S. 47:1601(A)(2)(c) as authorizing the abatement of interest when the error or delay is not attributable to the Taxpayer. The first sentence frames the provision as a grant of authority to abate interest when the Department is at fault. The second sentence defines the scope of delay or error on the part of Department required for the waiver of interest. The third sentence states that it is "[f]or purposes of the preceding sentence" and that purpose is to prevent taxpayers who bear significant fault for the delay from obtaining

abatement and impose a pre-condition of written notice. It is not a distinct and independent line of authority for a waiver. Accordingly, the Petition does not state a cause of action against the Department for an "abatement of interest." However, the exception is denied as moot for the reasons expressed herein.

No Right of Action

The Department argues that the Taxpayer has no right of action to claim a refund because he contracted that right away in Section 2 of the VDA. In support of this argument, the Department introduced the VDA into evidence. However, the Board finds that the Department's Exception of No Right of Action is not supported by the plain language of Section 2. Section 2, on its face, is only a waiver of the right to seek a refund based on lack of nexus or contacts with the State of Louisiana. Section 2 expressly states that this waiver will not be construed as a waiver of the right to seek a refund "on any other basis. . . ." The Taxpayer is asking for a refund on grounds other than a lack of nexus with the State. Therefore, the Section 2 of the VDA does not apply.

While the main demand survives, the Department is correct in asserting that the Taxpayer does not have a right of action to pursue his alternative demand for a compromise of interest. LAC 61:III.2115(B)(7) sets forth a "partial list of circumstances in which interest will not be compromised." That list includes a taxpayer who "is party to a voluntary disclosure agreement for the period in which the interest accrued." LAC 61:III.2115(B)(7)(a). The law does not provide any exceptions to the regulation. The Taxpayer entered into a VDA for the Tax Periods and is therefore barred from obtaining its alternatively pled compromise of interest under the plain language of the regulation. Thus, if it were necessary to do so, the Board would sustain the Department's Exception of No Right of Action with respect to the Taxpayer's alternative demand for a compromise of interest.

Conclusion:

Absent the statutorily required denial notice or requisite one year period of inaction, the Taxpayer's Petition was filed prematurely. The Board will accordingly

sustain the Exception of Prematurity and dismiss the Petition without prejudice. If the Petition were not premature, it would not allege facts that give rise to a cause of action for a "waiver or abatement of interest." Additionally, the Board would find that the Taxpayer has no right of action to demand a "compromise of interest" by entering into the VDA for the Tax Periods. However, because the Board will dismiss the Petition as premature, the Department's exceptions will be denied as moot.[3]

Baton Rouge, Louisiana, this 17th day of August, 2023.

FOR THE BOARD:

Francis J. "Jay" Lobrano, Chairman
Louisiana Board of Tax Appeals

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[3] Thus, the Board will also deny the Department's Exception of Lack of Subject Matter Jurisdiction as moot.