

BOARD OF TAX APPEALS
STATE OF LOUISIANA

SOLAR TURBINES INCORPORATED
PETITIONER

DOCKET NO. 12059D

DEPARTMENT OF REVENUE
RESPONDENT

JUDGMENT ON EXCEPTIONS WITH WRITTEN REASONS

This matter came before the Board on January 13, 2021 for hearing on the *Exception of Prescription, Lack of Subject Matter Jurisdiction* filed by the Department of Revenue (“Department”). Presiding at the hearing were: Judge Tony Graphia (Ret.), Chairman, and Board Members Cade R. Cole and Francis J. “Jay” Lobrano. Present before the Board were Miranda Scroggins, attorney for the Department, and Nicole Gould Frey and Mitchell Andrew Newmark, attorneys for Solar Turbines Incorporated (“Petitioner”). At the conclusion of the hearing, the Board took the matter under advisement. The Board now issues Judgment in accordance with the written reasons attached hereto.

IT IS ORDERED, ADJUDGED, AND DECREED that the Department’s Exceptions be and are hereby OVERRULED.

JUDGMENT RENDERED AND SIGNED at Baton Rouge, Louisiana, on this 10 day of March, 2021

FOR THE BOARD:



CADE R. COLE
VICE-CHAIRMAN
LOUISIANA BOARD OF TAX APPEALS

Chairman Graphia dissents with written reasons.

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DEPARTMENT OF REVENUE
RESPONDENT

WRITTEN REASONS FOR JUDGMENT ON EXCEPTIONS

This matter came before the Board on January 13, 2021 for hearing on the *Exception of Prescription, Lack of Subject Matter Jurisdiction* filed by the Department of Revenue (the “Department”). Presiding at the hearing were: Judge Tony Graphia (Ret.), Chairman, and Board Members Cade R. Cole and Francis J. “Jay” Lobrano. Present before the Board were Miranda Scroggins, attorney for the Department, and Nicole Gould Frey and Mitchell Andrew Newmark, attorneys for Solar Turbines Incorporated (the “Petitioner”). At the conclusion of the hearing, the Board took the matter under advisement. The Board now issues the foregoing Judgment in accordance with the following reasons.

Petitioner appeals from denials of refund claims for corporation income tax for the tax years 2001 through 2006. The Department filed the instant Exceptions claiming that the Petitioner filed its refund claims too late. La. R.S. 47:1623(A) allows for refund claims to be filed within three years from 31st day of December of the year in which the tax became due, or after one year from the date the tax was paid. The Department proved the date on which the Petitioner filed its refund claims by introducing the first pages of Petitioner’s amended returns for all six of

the tax years at issue. On all of the amended returns, the filer's signature is dated beyond the period allowed for by La. R.S. 47:1623(A).

The Petitioner contends that its refund claims were nevertheless timely because prescription was suspended under La. R.S. 47:1623(E). The statute provides that prescription as to refund claims shall be suspended by means of:

(2) For any period from the time of the commencement of an audit of a taxpayer by the United States Internal Revenue Service until one year from the time the secretary of the Department of Revenue is notified by said taxpayer or the federal government of an agreed change to the taxpayer's United States income tax return.

Petitioner alleges in paragraph 11 of the Petition:

Petitioner, an affiliate of Caterpillar Inc. and Subsidiaries, was under an IRS audit for tax years 2000-2006, which reached a final determination in the form of a closing agreement dated December 20, 2012 and had a federal waiver in place keeping those tax years open until the conclusion of the audit (see Exhibit J that indicates a 12/05/2004 start date for the 2000-2004 audit cycle and a 01/02/2008 start date for the 2005-2006 audit cycle and includes a copy of the closing agreement for the tax years 2001 through 2006).

In its Exceptions, the Department states:

1.

On June 25, 2019, the Department issued an Adjustment of Refund letter on the 2001 tax period stating the changes made on their return is limited to the changes made under the federal audit. A Notice of Assessment and Notice of Right to Appeal to the Louisiana Board of Tax Appeals was issued on the same day, assessing tax, penalty and interest due as a result of the refund denial.

2.

On June 25, 2019, the Department issued an Adjustment of Refund letter on the 2002 tax period stating the changes made on their return is limited to the changes made under the federal audit. The refund was adjusted to reflect only the changes made in the federal audit.

3.

On June 25, 2019, the Department issued an Adjustment of Refund letter on the 2003 tax period stating the changes made on their return is limited to the changes made under the federal audit. The refund was adjusted to reflect only the changes made in the federal audit

4.

On June 25, 2019, the Department issued an Adjustment of Refund letter on the 2004 tax period stating the changes made on their return is limited to the changes made under the federal audit. A Notice of Assessment and Notice of Right to Appeal to the Louisiana Board of Tax Appeals was issued on the same day, assessing tax, penalty and interest due as a result of the refund denial.

5.

On June 25, 2019, the Department issued an Adjustment of Refund letter on the 2005 tax period stating the changes made on their return is limited to the changes made under the federal audit. A Notice of Assessment and Notice of Right to Appeal to the Louisiana Board of Tax Appeals was issued on the same day, assessing tax, penalty and interest due as a result of the refund denial.

6.

On June 25, 2019, the Department issued an Adjustment of Refund letter on the 2006 tax period stating the changes made on their return is limited to the changes made under the federal audit. The refund was adjusted to reflect only the changes made during the federal audit.

The Board finds that the Department's statements in its Exceptions amount to a judicial confession of the existence of "the federal audit." A judicial confession is a declaration made by a party in a judicial proceeding. That confession constitutes full proof against the party who made it. La. Civ. Code art. 1853. A judicial confession must be explicit and cannot be implied. *Yesterdays of Lake Charles, Inc. v. Calcasieu Parish Sales and Use Tax Department*, 2015-1676 (La. 5/13/16), 190 So.3d 710, 729. The adverse party must have believed that the fact admitted was no longer at issue or must have relied on it, to his detriment, in order

for the admission to rise to the level of a judicial confession. *State, Dep't of Transp. & Dev. v. Restructure Partners, L.L.C.*, 2007-1745, p. 21 (La. App. 1 Cir. 3/26/08); 985 So.2d 212, 229, *writ denied*, 2008-1269 (La. 9/19/08), 992 So.2d 937. A judicial confession may be made in a pleading, such as an exception. *See C.T. Traina, Inc. v. Sunshine Plaza, Inc.*, 2003-1003 (La. 12/3/03, 5-6), 861 So.2d 156, 159-60.

The Department states in its Exceptions that it made adjustments to the Petitioner's refund claims and even issued assessments for the tax periods at issue. The Board raised the question at the hearing as to how the Department could have made adjustments unless the tax periods were open. The Department stated in response that it made adjustments "based on the audit." The Department's judicial confession references the existence of the audit for each of the relevant years, it states that it made changes based on that audit, and June 25, 2019 is the undisputed date of the Department's changes.

The Department receives information from the IRS that allows the Department to verify the audit information. The Board questioned Counsel as to whether the Department was actually arguing that the audit did not occur. Counsel answered that the Department was not making that argument.

This matter first came before the Board for hearing on the Exceptions on December 5, 2019. At that time, Petitioner was not represented by an attorney and the representative appeared by phone. The Department objected to the Petitioner's attempt to introduce evidence of the audit over the phone and without authenticating

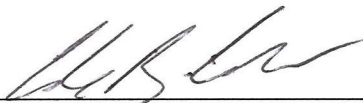
testimony. The Board continued the hearing to allow Petitioner to obtain counsel and properly present its case.

The Board will hold the Department to the contents of its Exceptions. The Department's statements in its Exceptions raise purely legal arguments. The Department did not put in dispute any facts and did not raise any issue about the proof of dates until at the live hearing. Petitioner relied on the Department's statements that it made adjustments and issued assessments based on the existence of an audit, actions that could only occur if the periods were open due to the ongoing audit. Petitioner's expectation was therefore that this issue was not in dispute.

The Department had expressly stated that it issued assessments and made refund adjustments based on the audit. These statements can only logically refer to a federal audit that, as a legal matter, does suspend prescription under La. R.S. 47:1623(E). In short, the Department effectively confessed via its Exceptions that the tax periods at issue were not prescribed. Accordingly, the Exceptions must be overruled.

Baton Rouge, Louisiana, on this 10 day of March, 2021

FOR THE BOARD:



**CADE R. COLE
VICE-CHAIRMAN
LOUISIANA BOARD OF TAX APPEALS**

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**DEPARTMENT OF REVENUE
RESPONDENT**

WRITTEN REASONS FOR DISSENT BY CHAIRMAN GRAPHIA

The Department of Revenue filed an exception of prescription to this appeal. The issue before the Board on the exception is: Did the Petitioner timely file for a refund of taxes paid? One possible answer is yes, provided that prescription was suspended at the time that the refund request was filed. The alternative answer is no, if the applicable prescriptive period had run before the refund request was filed.

La. R.S. 47:1623(E) establishes a timeline; the suspension of prescription begins at one point in time and ends at a subsequent point in time. The beginning date of suspension is the commencement of an audit by the IRS. Once suspension begins, does the tax period remain open? Yes. For how long? One year. One year from when? From the date that the Department is notified by said taxpayer, or the federal government, of an agreed-upon change to the taxpayer's United States income tax return.

The legislative intent to create a "timeline" is evident from the face of the statute itself:

1. The IRS audit commences.
2. Suspension of prescription begins.

3. The taxpayer or IRS notifies the Department of an agreed upon change to the taxpayer's return.
4. Suspension ends one year after the date specified in Item 3; that is, one year after the Department gets the notice specified in Item 3.

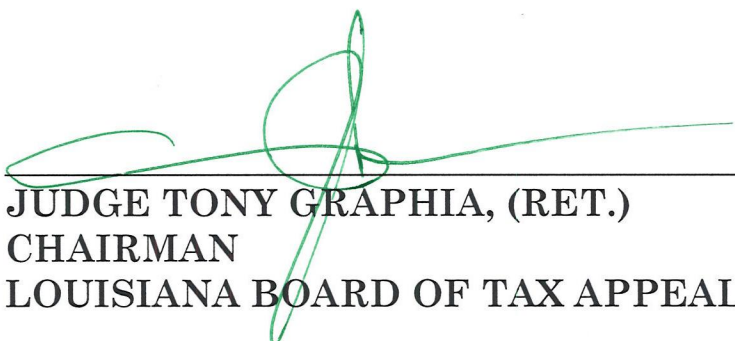
Discussions of prescriptive periods are, by nature, date sensitive. One must know the date when a thing was done in order to determine if it was done "timely." One must also know the date beyond which a thing can no longer be done "timely." Merely establishing the existence of an audit, without also establishing the dates of that audit's existence, does not tell the Board that prescription was suspended on the date that Petitioner filed its refund claims.

The legislature established the four dates in the statute that control the issue in this case. No evidence relevant to the dates that the legislature established was presented at the hearing. In fact, one can only establish any evidence by reading the pleadings in the record. The Department's pleadings may be sufficient to establish that certain acts occurred as required by the statute at issue. However, I do not find anything in the pleadings that establishes the dates of the key acts necessary to begin and end the suspension of prescription.

The Petitioner's request for refund is prescribed on its face. The Petitioner relies on the suspension of prescription. Therefore, Petitioner bears the burden of proving that it is entitled to the benefit of the suspension that the legislature created. The Petitioner has not carried

that burden. Therefore, the exception should be sustained and the appeal dismissed. I respectfully dissent from the Board's ruling.

Baton Rouge, Louisiana on this 10 day of March, 2021.



JUDGE TONY GRAPHIA, (RET.)
CHAIRMAN
LOUISIANA BOARD OF TAX APPEALS