STATE OF LOUISIANA
BOARD OF TAX APPEALS
LOCAL TAX DIVISION

TRUNKLINE LNG COMPANY, LLC,
PETITIONER

VERSUS **DOCKET NO. L00029**

CALCASIEU PARISH SCHOOL SYSTEM
SALES AND USE TAX DEPARTMENT,
RESPONDENT

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JUDGMENT
WITH WRITTEN REASONS

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A hearing was held on the merits of this matter before Local Tax Division Judge Cade R. Cole on August 11, 2015 at the Fourteenth Judicial District Courthouse. Present before the Board-Local Tax Division were: Rusty Stutes, attorney for the Calcasieu Parish School Board ("Collector"), and Nicole Gould, attorney for Trunkline LNG Company, LLC ("Taxpayer"). After the hearing, the Board took this matter under advisement.

The Board is first required to address the parish's asserted defense that the taxpayer's failure to pay under protest precludes the issuance of a refund in this case. The Collector cites to *Kean's Partnership v. Parish of East Baton Rouge* 685 So.2d 1043 (La. 1996). In that case the Court correctly recognized that the East Baton Rouge Parish Ordinances only allowed refunds "where no question of fact or law is involved." *Id. at 1045.*

That case predates the enactment of the Uniform Local Sales Tax Code (Chapter 2-D of Subtitle II of Title 47 of the Louisiana Revised Statutes of 1950, as amended; the "ULSTC" was originally enacted by Act 73 of 2003). In enacting the ULSTC, the Legislature specifically provided that its provisions pre-empted any contrary provisions of local ordinances. R.S. 47:337.2(B)(1).

In adopting R.S. 47:337.77 (the "local refund statute") the Legislature substantially borrowed from R.S. 47:1621 (the "state refund statute"). The state refund statute was expanded considerably by Act 6 of the 2001 1st Ex. Session. Earlier cases focusing on refund relief pursuant to R.S. 47:1576 or 1481 pre-date the current version of R.S. 47:1621.

Among the provisions added to §1621 include the ability to obtain a refund for any "overpayment was the result of an error, omission, or a mistake of fact of consequence to the determination of the tax liability..." *Id.* This provision is also included in the local refund statute.

In enacting the local refund statute the Legislature decided to allow may types of refunds of local sales and use tax outside of the payment under protest regime. The Legislature did enact a restriction in R.S. 47:337.77(F) concerning specific questions of law where the taxpayer is trying to show that the collector's legal interpretation was incorrect. However, the Louisiana Supreme Court in *TIN, Inc. v. Washington Parish Sheriff's Office* 112 So.3d 197, 206 (La. 3/19/13) showed us that there are limits to the reach of Subsection F.

Neither the Board nor the courts have yet ruled on whether the addition to Subsection F made by Act 640 of 2014 granted a further exception to the payment under protest rule.[1] However as a condition precedent to reaching that question in this case, the Board would also be required to determine whether to apply the provisions of that amendment retroactively.

As codified in La. C.C. art. 6, only procedural and interpretive laws may be applied retroactively. A procedural law describes the steps necessary to have an

[1] In *General Electric Capital Services, Inc. v. Barfield* 2013 WL 3465284 (La. Bd. Tax App. 6/19/13), *citing TIN, Inc., supra*, the Board applied the exception found in the last sentence of Subsection F of the state refund statute.

existing right judicially enforced, while a substantive law instead provides a new right or duty. *See e.g., Retroactivity of Laws,* La. Law Rev. Vol. 62, p. 1328-29.

The Board is pretermitted from reaching these questions. The Board finds that the dispute concerning the taxes at issue in this case is actually a mistake of fact covered by the provisions of R.S. 47:337.77(B). The Collector stipulated that the underlying tax dispute was a question of fact.

The Board of Tax Appeals has exercised exclusive original jurisdiction over state tax refunds since 1937.[2] Act 640 of 2014 granted the Board, through its Local Tax Division, jurisdiction over local sales and use tax refunds.[3] This taxpayers right to this refund under §337.77(B) pre-dates Act 640, leaving no question that granting the taxpayers a right to appeal to this Board pursuant to R.S. 47:337.81 is procedural and the Board has jurisdiction under that Section to order any refund that the taxpayer is due under §337.77.

The Board also finds that the calculation of interest is necessarily concomitant to the primary issue of whether a refund is owed and Subsection F does not operate to preclude adjudication of the proper calculation of interest related to a refund request covered by Subsection B.

The underlying substantive issue relates to calculation of interest. The Board has empathy for the taxpayer and its position that in 2013 it paid enough money to cover the taxes due (and then some), so it should receive a refund in the amount that it had overpaid in the aggregate. The distinction comes in whether the payment

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[2] *See e.g., St. Martin v. State,* "the Board acts as a trial court in finding facts and applying the law" 25 So.3d 736, 740 (La. 2009); and "jurisdiction to resolve tax related disputes is constitutionally and statutorily granted to the Board which is authorized to hear and decide disputes and render judgments." *Id.* at 741. A party has access to judicial review through the appeal from the BTA to the courts. Alternatively, the party, at the commencement of the collection dispute, would be required to pay under protest and file a suit to recover pursuant to R.S. 47:1576.

[3] Act 640 of 2014 enacted a compromise between the business community and tax collectors to revise the local refund appeal statute in order for it to mirror the state refund statute.

is viewed as a payment simply attributable to an entire audit period or a payment for a series of sequential monthly tax periods.

While the taxpayer's position may make intuitive sense, we are constrained to apply the applicable laws and ordinances concerning the running of interest. Each month is a separate tax period, each month could be separately audited, assessed and collected. The jurisprudence disfavors offsets or compensation between tax periods. *See e.g. Union Exploration Partners, Ltd. v. Secretary of Dept. of Revenue & Taxation,* (La. App. 1 Cir. 10/16/1992) 610 So.2d 854, 856.[4]

The discovery of misallocated transactions did not occur until after the payment was made. At the time the payment was made it could only be allocated to the monthly tax periods as they were then understood. If you now reallocate the transactions to other months (as reflected in the revised schedules) you will find that the total amount paid in 2013 would have more than satisfied the reallocated liabilities. However, the Collector avers that until issues concerning the disputed periods were actually resolved that it was required to apply the relevant laws applicable to the respective distinct monthly periods.[5]

The taxpayer has not pointed out any statutory or jurisprudential authority for its position that the Collector should re-characterize certain overpayments and allocate them as being made for those monthly tax periods with underpayments. However, the Board's own research uncovered additional cases of interest. In

[4] The Board recognizes the lack of parity, tax collectors are given a right of offset in R.S. 47:337.78 and no comparative right is granted to taxpayers. However, requests for relief from the lack of equity should be directed to the Legislature.

[5] The negative effect on this taxpayer results from the spread between overpayment interest and underpayment interest and the delay in finally resolving this matter. However, one distinctive feature of this case is that the case tried is not reflective of the refund dispute that existed over the last two years. The delays in resolving underlying case involved myriad disputed issues, almost all of which were later dropped by the taxpayer. The Collector had a legitimate basis for disputing the original refund request, as evidenced by the taxpayer's decision to drop the significant portions of its refund claim.

Bridges v. Lyondell Chemical Company, 938 So.2d 786 (La. App. 1 Cir. 6/9/06) and L*yondell II*, 2006 WL 3952568 (La. App. 1 Cir. 12/26/06), the Court amalgamated various periods to determine that no attorney's fees were due since there was no aggregate liability.

The Board notes the complexity of these concepts and observes that Judge (now Supreme Court Justice) Hughes dissented from *Lyondell II* highlighting its contradiction with "the universally accepted (including state, federal, and tax courts) principle that 'each tax year stands on its own.'" *Id.* Similarly, the maxim here could be that 'each tax period (month) stands on its own.'

The Board also finds *Lyondell* distinguishable because attorney fee statutes are exceptional in law and penal in nature, while interest of some amount is almost always applicable and is considered compensatory.[6]

IT IS ORDERED, ADJUDGED, AND DECREED that the taxpayer's request for a refund BE GRANTED IN PART AND DENIED IN PART.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Collector shall pay the Taxpayer a refund in the amount of $14.367.59, together with post-judgment interest as provided by law.

Judgment Rendered and Signed at Baton Rouge, Louisiana this 13th day of August, 2015.

LOCAL TAX JUDGE CADE R. COLE
LOUISIANA BOARD OF TAX APPEALS

[6] In the present case the Collector did not assert that it should receive attorney's fees. The Collector had also agreed to waive penalties when the taxpayer originally made its audit payment, and did not attempt to re-assert those penalties at the hearing of this action.