

STATE OF LOUISIANA
BOARD OF TAX APPEALS

UNITED PARCEL SERVICE OF AMERICA, INC.
PETITIONER

VERSUS

No. 12592D

KIMBERLY ROBINSON, SECRETARY OF THE
LOUISIANA DEPARTMENT OF REVENUE
RESPONDENT

JUDGMENT

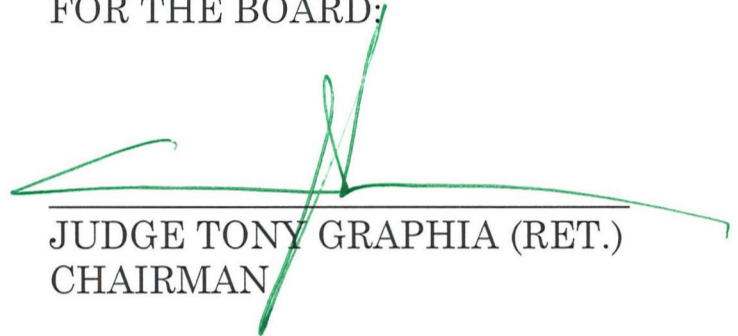
This matter came before the Board of Tax Appeals (the “Board”) for a hearing on an *Exception of Jurisdiction* filed by the Department of Revenue, State of Louisiana (the “Department”) in response to the Petition for Declaratory Judgment filed by United Parcel Service of America, Inc. (the “Petitioner”, “UPS-America”). A hearing on the Department’s Exception was held before the Board on June 2, 2021. Presiding at the hearing were: Judge Tony Graphia (Ret.), Chairman, and board members Cade R. Cole and Jay Lobrano. Participating in the hearing were William J. Kalorik, II and J. Edward Goff, attorneys for UPS-America, and Aaron Long, attorney for the Department. After the hearing the matter was taken under advisement. The Board now issues this judgment in accordance with the written reasons attached herewith.

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IT IS ORDERED, ADJUDGED AND DECREED that the Taxpayer's *Exception of Lack of Subject Matter Jurisdiction* BE AND IS HEREBY DENIED, an Exception of Prematurity BE AND IS HEREBY GRANTED. The Petition for Declaratory Judgment is dismissed, without prejudice.

JUDGMENT RENDERED AND SIGNED at Baton Rouge, Louisiana, this 14th day of July, 2021.

FOR THE BOARD:

A handwritten signature in green ink, consisting of a series of loops and a long horizontal stroke, is written over a horizontal line. The signature is positioned above the printed name and title of the signatory.

JUDGE TONY GRAPHIA (RET.)
CHAIRMAN

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WRITTEN REASONS FOR JUDGMENT

This matter came before the Board of Tax Appeals (the “Board”) for a hearing on an *Exception of Lack of Subject Matter Jurisdiction* filed by the Department of Revenue, State of Louisiana (the “Department”) in response to the Petition for Declaratory Judgment filed by United Parcel Service of America, Inc. (the “Petitioner”, “UPS-America”). A hearing on the Department’s Exception was held before the Board on June 2, 2021. Presiding at the hearing were Judge Tony Graphia (Ret.), Chairman, and Board Members Cade R. Cole and Francis J. “Jay” Lobrano. Participating in the hearing were J. Edward Goff and William Kalorik, II, attorneys for Petitioner, and Aaron Long, attorney for the Department. After the hearing the matter was taken under advisement. The Board now issues the attached judgment for the following written reasons.

I. Facts and Procedural History

The Petitioner was under audit by the Department for the 2012, 2013 and 2014 tax years (the “Tax Periods”) for potential Louisiana Corporate Income (“CIT”) and Corporate Franchise Tax (“CFT”) liability. UPS-America filed a petition with the Board on December 30, 2020,

seeking a Declaratory Judgment that it does not have sufficient minimum contacts to support taxation in Louisiana.

UPS-America's petition states the following: Petitioner is a Delaware holding corporation headquartered in Georgia. Petitioner owns all UPS related intellectual property¹ and is the intermediate parent of the UPS Corporate Group. Petitioner licenses its intellectual property to UPS Market Driver who in turn sublicensed it to various subsidiaries operating in Louisiana. UPS-America asserts that it did not have any employees, payroll, or tangible property in Louisiana during the Tax Periods, and that it did not file Louisiana CIT or CFT returns.

As of the filing of its petition the Department had not issued an assessment for the Tax Periods. The Department filed an *Exception of Lack of Subject Matter Jurisdiction*, arguing the Board lacks subject matter jurisdiction to grant the declaratory judgment as prayed for. The Department subsequently issued an assessment to the Petitioner and the Petitioner has filed two additional actions with the Board:

(1) BTA Docket No. 12781D: UPS-America filed a Petition for Redetermination of the Department's Assessment, dated March 9, 2021, for the CIT periods of December 31, 2013 – December 31, 2014, and for the CFT periods of December 31, 2013 – December 31, 2015. These are substantially the same Tax Periods as the present matter.

(2) BTA Docket No. 12780D: UPS-America filed another Petition for Declaratory Judgment alleging it did not have minimum contacts to

¹ UPS intellectual property includes patents, trademarks, copyrights, algorithms, tradenames, slogans, trade dress, domain names, and other intellectual property.

support taxation in Louisiana for the 2015 – 2017 CIT period and the 2016 – 2018 CFT period. The Petitioner is still under audit for these tax periods and the Department has not issued an assessment.

II. Issues Presented

The Department filed an *Exception of Lack of Subject Matter Jurisdiction* in its answer to UPS-America’s Petition. The Department argues that the Board does not have jurisdiction under La. R.S. 47:1407(7) to hear the Petitioner’s action for Declaratory Judgment as it relates to the Petitioner’s minimum contacts with Louisiana since the Petitioner does not challenge the constitutionality of a specific law or ordinance or the validity of a regulation.

La. Const. art. V, Sec. 35 provides that “[t]he remedies required by Article VII, Section 3(A) of this Constitution shall extend to any unconstitutional tax paid by a taxpayer.”

Louisiana Revised Statute 47:1431 provides a Taxpayer’s right to appeal for redetermination of an assessment or for determination of an overpayment. The statute provides, in relevant part:

(D)(1) In compliance with the provisions of Chapter 2 of Title VI of Book II of the Code of Civil Procedure or other applicable law, an aggrieved party may petition the board concerning a matter authorized pursuant to R.S. 47:1407(7)...

The Jurisdiction of the Board is defined by Louisiana Revised Statute 47:1407, which provides in relevant part:

The jurisdiction of the [B]oard shall extend to the following:

(7) A petition for declaratory judgment or other action related to the constitutionality of a law or ordinance or validity of a regulation concerning any matter relating to any state ... tax.

In its petition for Declaratory Judgment, UPS-America alleges that it did not have the minimum contacts necessary to support jurisdiction for taxation in Louisiana during the Tax Periods. Petitioner argues that the Due Process Clause requires minimum contacts between a state and the person, property, or transaction it seeks to tax, and the Department's actions violate such requirement. In the Petitioner's Memorandum in Opposition to the Department's Exception to the Jurisdiction of the Board, the Petitioner characterizes its argument as a constitutional challenge, arguing that the term "constitutionality" as used in La. R.S. § 47:1407(7) confers jurisdiction on the board to address both facial challenges and as applied challenges to the constitutionality of a law.

The Board notes that both parties failed to address the catchall provision of La. R.S. 47:1431(E) which allows any aggrieved party to file a petition with the board for "all matters related to state or local taxes or fees." La. R.S. 47:1407(3).

III. Discussion

There are two types of constitutional challenges: (1) facial challenges, and (2) as-applied challenges. See *Dixon v. Flournoy*, 247 La. 1067, 176 So.2d 138, fn. 1 (La. 1965) (A tax statute was ruled unconstitutional, as applied). In this matter the Petitioner characterizes its petition as an "as-applied" challenge. The Petitioner's reply memorandum correctly observes that the term "constitutionality" is not qualified by an indicator, thus the plain text presents no reason to distinguish between the Board's jurisdiction to hear a facial challenge or an as-applied challenge.

Further, the legislative history for Acts 278 (HB 516, 2020), 365 (HB583, 2019), and 446 (HB 428, 2019) supports this conclusion. The legislative history reflects the intent to provide the Board with the same power to rule on constitutional questions as a district court, in addition to the Board's existing jurisdiction. The Digest for Act 365 states:

Existing law authorizes state courts to provide a legal remedy in cases where taxes are claimed to be an unlawful burden upon interstate commerce or when the collection of taxes violates any Act of Congress, the U.S. Constitution, or the Constitution of La.

New law retains existing law and extends this jurisdiction to the Board of Tax Appeals (the board) to handle such cases. New law also authorizes state courts and the board to provide a legal remedy for cases where taxes are claimed to be unconstitutional.

Existing law authorizes a court of competent jurisdiction to determine in an action for declaratory judgment the validity or applicability of a rule. New law retains existing law and additionally authorizes the board to make such determination.

Before the 2019 amendments, the Board “certainly lack[ed] jurisdiction to declare a statute or ordinance unconstitutional, but that [did] not prevent consideration of jurisprudence related to federal or state constitutional law as applied to a particular set of facts in a particular case.” *Thomas J. Adamek v. Secretary, Dep’t of Revenue, State of La.*, 2018 WL 2473215 (La. Bd. Tax App. 3/6/2018). The Board was permitted to “apply constitutional provisions and jurisprudence in the handling of its cases.” *Hanover Compressor Co v. Dep’t of Revenue, State of La.*, 2002-0925, p. 12, fn. 7 (La. App. 3 Cir 2/5/03) 838 So.2d 876, 883; See *Schwan’s Consumer Brands, Inc. v. Department of Revenue*, 2019 WL 4571970 (La. Bd. Tax App. 8/14/2019). 2019 Constitutional Amendment No. 3 was

adopted to expand the Board's jurisdiction to a concurrent basis with a district court on tax matters, which would include the jurisdiction to hear both facial and as-applied challenges. La. Const. art. V, Sec. 35.

At the hearing, the Department argued the term "constitutionality," as used in La. R.S. 47:1407(7), strictly means the Board has the power to rule on facial constitutional challenges and not as applied challenges. This interpretation reaches an absurd result. As noted above, the Board retained its then existing jurisdiction under prior law in addition to the new grant of authority to hear constitutional challenges. It is illogical to conclude that under the revised law the Board could apply constitutional principles in the handling of its cases and rule a law factually unconstitutional, but not also have the authority to rule a law's application to a taxpayer to violate the constitution.

However, additional considerations complicate this analysis. A taxpayer does not have the unrestrained right to petition the Board. La. R.S. 47:1575, enacted to implement Louisiana Constitution art. VII, Section 3(A), provides that "[n]o court of this state shall issue process whatsoever to restrain the collection of any tax, penalty, interest, or other charge imposed in this Sub-title."

Prior jurisprudence has addressed a similar issue, holding that La. R.S. § 47:1575 prohibits a taxpayer from bringing a suit for injunction against the Department for an illegal assessment or an assessment based on unconstitutional statute. In *Austin v. Town of Kinder*, 36 So.2d 48 (La. App. 1 Cir. 6/30/1948), and *Walton v. McNamara*, 408 so.2d 1144, 1147 (La. App. 3 Cir. 9/11/1981), the district courts held that a taxpayer could

not seek injunctive relief as an alternative to the procedures outlined in the statutes for appeal to this Board.

Additionally, in *Court Club, Inc. v. McNamara* the First Circuit upheld an injunction prohibiting the Department from seizing a bank account only where the Department did not follow the proper statutory distraint procedure or give the taxpayer proper notice. 509 So.2d 143 (La. App. 1 Cir. 5/27/1987). The Court held that the injunction did not violate La. Constitution art. 7, Sec. 3 as the Department had not proposed or issued an assessment, demanded payment, or given notice of distraint until the accounts were levied upon, and thus was a violation of our statutory regime and could be a violation of due process.

While the present matter is similar to *Court Club* because the Department had not issued an assessment when the petition for declaratory judgment was filed, there are also key distinguishing factors. Namely, the Department is not trying to collect payment without due process. The Petitioner still had the right, **and in fact has exercised its right to appeal to this Board** the Department's assessment by a separate action.

The Department does not possess unrestrained power to exercise its right to use its audit powers to harass a taxpayer or deprive a taxpayer of due process. *See* La. Const. Art. I, Sec. 2; La. R.S. 47:15. However, the facts as currently presented here appear to be following normal procedure and are the first adjudication of this dispute before the Board or courts.

Where the Department has issued an assessment the case is before the Board and the Board has full jurisdiction to resolve the Constitutional questions raised. For the other years, the facts as presented in UPS-America's Petition for Declaratory Judgment show that whether the Department will ultimately issue an assessment is currently purely a theoretical question. The Louisiana Supreme Court stated that a "justiciable controversy" is

[O]ne presenting an existing actual and substantial dispute involving the legal relations of parties who have real adverse interests and upon whom the judgment of the court may effectively operate through a decree of conclusive character.

Louisiana State Bd. of Nursing v. Gautreaux, 2010-C-1957 (La. 11/5/2010) 59 So.3d 806. The Board must refuse an action for a declaration of rights if the issue presented is academic, theoretical, or based on a contingency which may or may not arise. *Am. Waste & Pollution Control Co. v. St. Martin Par. Police Jury*, 627 So.2d 158. 162 (La. 1993). No justiciable controversy exists based on the facts alleged in the petition.

Ultimately, it is the facts and circumstances of each case that dictate whether a petitioner can seek relief from the Board in an "as-applied" challenge to the constitutionality of a tax statute or ordinance or the validity of a regulation. In no way should this holding be construed so as to prevent a taxpayer from petitioning the Board to challenging the facial constitutionality of a law or ordinance or the validity of a regulation under La. R.S. 47:1407(7). As presented, the facts of this matter reflect

that the Taxpayer has not been deprived of due process, and in fact still has opportunity to argue the merits of its case before the Board in the separate action that it has filed with the Board for the Redetermination of the Department's Assessment. *See* BTA Docket No. 12781D. Further, the facts as alleged in the current case's Petition do not present a justiciable controversy. It seeks a declaratory judgment whether or not the Department issues an assessment, and the Petitioner has not specified any additional grounds to show that there is a justiciable controversy for the relief prayed for in the present petition.

The matter will be dismissed without prejudice for lack of a justiciable controversy on the face of the Petition via the grant of an exception of prematurity. The Taxpayer should ensure that it properly raises the relevant arguments in the matter bearing BTA Docket No. 12592(D), which provides the proper procedural vehicle and a ripe cause of action.

For the foregoing reasons, the Department's *Exception of Lack of Subject Matter Jurisdiction* is hereby DENIED, an exception of Prematurity is GRANTED..

Baton Rouge, Louisiana this 14th day of July, 2021.

FOR THE BOARD:



JUDGE TONY GRAPHIA (RET.)
CHAIRMAN