

**BOARD OF TAX APPEALS
STATE OF LOUISIANA**

ZELIA, LLC,
Petitioner,

VERSUS

DOCKET NO. 10430D

**KIMBERLY ROBINSON, SECRETARY,
DEPARTMENT OF REVENUE &
TAXATION, STATE OF LOUISIANA;
DON PIERSON, SECRETARY, LOUISIANA
ECONOMIC DEVELOPMENT, STATE OF
LOUISIANA; AND STEVEN L. WINDHAM,
CHAIRMAN, BOARD OF COMMERCE &
INDUSTRY, STATE OF LOUISIANA,**

Respondents


JUDGMENT

This case came before the Board for hearing on December 11, 2018 on the *Motion for Summary Judgment* filed by Kimberly Robinson, Secretary, Department of Revenue & Taxation, State of Louisiana (the "Secretary") and the *Cross Motion for Summary Judgment* filed by Zelia, LLC (the "Taxpayer"), with Judge Tony Graphia (Ret.), Chairman, presiding and Board Members Cade R. Cole and Jay Lobrano present. Participating in the hearing were Cloyd Van Hook, for the Taxpayer and Miranda Scroggins, attorney for the Secretary. After the hearing, the matter was taken under advisement. A majority of the Board now renders Judgment in accordance with the written reasons attached herewith.

IT IS ORDERED, ADJUDGED AND DECREED that the Secretary's *Motion for Summary Judgment* BE AND IS HEREBY GRANTED, the Taxpayer's *Cross Motion for Summary Judgment* BE AND IS HEREBY DENIED, and that Judgment be rendered in favor of the Secretary and against the Taxpayer.

Judgment Rendered and Signed at Baton Rouge, Louisiana this 10 day of

April, 2019.



Judge Tony Graphia (Ret.), Chairman
Louisiana Board of Tax Appeals



Vice-Chairman Cade R. Cole,
Louisiana Board of Tax Appeals

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WRITTEN REASONS FOR JUDGMENT

This case came before the Board for hearing on December 11, 2018 on the *Motion for Summary Judgment* filed by Kimberly Robinson, Secretary, Department of Revenue & Taxation, State of Louisiana (the “Secretary”) and the *Cross Motion for Summary Judgment* filed by Zelia, LLC (the “Taxpayer”), with Judge Tony Graphia (Ret.), Chairman, presiding and Board Members Cade R. Cole and Jay Lobrano present. Participating in the hearing were Cloyd Van Hook, for the Taxpayer and Miranda Scroggins, attorney for the Secretary. After the hearing, the matter was taken under advisement. A majority of the Board now renders Judgment in accordance with the following written reasons.

The Taxpayer appeals from a Notice of Assessment dated December 1, 2016 for Corporation Income and Franchise tax in the amount of \$223,159.78 plus interest in the amount of \$40,276.73 for the 2013 tax year (the “Assessment”). In issuing the Assessment, the Secretary sought to recoup a refundable Investment Tax Credit (“ITC”) that the Taxpayer received in connection with Louisiana Economic

Development Enterprise Zone Contract No. 20111066-EZ (the “EZ Contract”). The Secretary claims that it issued the Assessment after receiving a copy of a letter from the Louisiana Department of Economic Development (the “LED”), notifying the Taxpayer of the EZ Contract’s cancellation. The Taxpayer appealed from the Assessment by filing its *Petition for Redetermination of Assessment* (the “Petition”) with the Board on January 20, 2017.

The Taxpayer and the LED entered into the EZ Contract with an effective date of October 18, 2011. As a result of the contract, the Taxpayer received a refundable ITC in the amount of \$223,159.78. Later, the LED determined the Taxpayer to be in violation of its new job creation obligations under the EZ Contract. By letter dated April 1, 2015, the LED notified the Taxpayer of its determination and intent to cancel the EZ Contract. The Taxpayer sought administrative review of that determination with the Louisiana Board of Commerce and Industry (the “LBCI”). The basis of the dispute appears to be that the Taxpayer and the LED disagree on the correct formula for the calculating the number of net new jobs created by the Taxpayer during the first year of the EZ Contract.

The Taxpayer’s administrative appeal was ultimately unsuccessful. On December 15, 2015, the LED issued a letter to the Taxpayer (the “Cancellation Letter”), stating:

The Board of Commerce & Industry cancelled the above referenced Enterprise Zone Contract [20111066-EZ] on Tuesday, December 8, 2015 since the program requirements were not met. If you received a State Sales/Use Tax Rebate or a refundable Investment Tax Credit, please contact the Office Audit Division 225.219.2270 to make arrangements for repayment.

The Secretary received a copy of the Cancellation Letter on December 16, 2015. On October 20, 2016, the Secretary informed the Taxpayer by letter that the ITC would

have to be repaid with interest, due immediately. The Taxpayer did not repay the ITC, and the Secretary proceeded to issue the Assessment.

In its Petition, as originally filed, the Taxpayer named the following defendants: the Secretary; the LED; and the LBCI (collectively the “Respondents”). The Petition also contained a prayer for relief asking the Board to order the LED and LBCI to reinstate the EZ Contract. All Respondents filed exceptions of no right of action, no cause of action and lack of subject matter jurisdiction. Respondents essentially argued that the Board lacked jurisdiction over the contractual dispute between the Petitioner and the LED and LBCI. The Board sustained the exceptions in part, specifically finding that the prayer for the Board to order the LED and LBCI to reinstate the EZ Contract went beyond what was necessary to adjudicate the dispute over the Assessment. However, the Board denied the exceptions in all other respects.

All Respondents sought supervisory writs with the First Circuit. The First Circuit granted the writ applications of the LED and LBCI, and reversed the Judgment of the Board. The First Circuit held that the Board lacked subject matter jurisdiction to determine the merits of the underlying contract dispute, “particularly considering the tax assessment issued by the Louisiana Department of Revenue is a secondary issue contingent upon resolution of the contract dispute.” *Zelia, LLC v. Robinson*, 2018-0011, (La. App. 1 Cir. 5/14/18), 2018 WL 2202314. However, the First Circuit simultaneously denied the Secretary’s writ application. *Zelia, LLC v. Robinson*, 2018-0015, (La. App. 1 Cir. 5/14/18), 2018 WL 2202324. As a result, the Secretary is the only remaining defendant in this action.

The Taxpayer and the Secretary have now filed cross motions for summary judgment. The Secretary’s motion essentially argues that, absent jurisdiction over

the underlying contractual dispute, the sole remaining issue as to the correctness of the Assessment is whether the Secretary received notice from the LED that the EZ Contract had been cancelled. The Secretary claims that upon receipt of such notice, it was statutorily required to recoup the ITC under La. R.S. 51:1787(I). If the Board accepts that argument, the only matter left for review would be the correctness of the computation of liability shown in the Assessment. Finding no error in said calculations, the Board must, according to the Secretary, render summary judgment in the Secretary's favor.

The Taxpayer, on the other hand, contends that the Board still has jurisdiction over the contract dispute as it relates to the Secretary. The Taxpayer points out that the First Circuit denied the Secretary's writ application, even though the Secretary was appealing from the same Judgment as the LED and LBCI. Further, the Taxpayer argues that it is entitled to summary judgment because the termination of the EZ Contract was invalid as a matter of law. According to the Taxpayer, the Secretary was required to make its own determination as to whether the EZ Contract should have been cancelled. The Taxpayer also asserts that the Secretary's efforts to recoup the ITC may be reviewed by this Board because they are subject to the statutory provisions applicable to the collection of tax debts.

In support, the Taxpayer offers the affidavit of Maureen Clary as Exhibit 2 to its *Cross Motion for Summary Judgment*. Ms. Clary avers that the Taxpayer had one employee prior to October 18, 2011, the effective date of the EZ Contract, and hired a second employee on August 26, 2012. Both employees have supposedly been employed by the Taxpayer since that date. The Taxpayer's position is that under the EZ Contract, attached as Exhibit 2 to Ms. Clary's affidavit, it was required to add "approximately 1 new employee" within a year of the EZ Contract's effective

date. The Taxpayer believes that it complied with that obligation by hiring a second employee.

The Secretary objected to Ms. Clary's affidavit in a *Motion to Strike and Motion in Limine* filed on November 27, 2018. The Secretary views Ms. Clary's statements as irrelevant under Louisiana Code of Evidence article 402. The Secretary's position is essentially the same as its position on summary judgment. That is, the Secretary claims that Ms. Clary's statements concern the underlying contract dispute, over which the Board has no jurisdiction, and are thus irrelevant to the matter at hand. For the reasons set forth below, the Secretary is correct in asserting that the Board does not have jurisdiction to review the underlying contract dispute in this case. Accordingly, Ms. Clary's statements will not be considered to the extent that they bear on the merits of the contract dispute.

A motion for summary judgment will be granted after an opportunity for adequate discovery, "if the motion, memorandum, and supporting documents show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law." La. C.C.P. art. 966(A)(3). A material fact is one whose existence or non-existence determines the outcome of a cause of action. *Davis v. Hixson Autoplex of Monroe, L.L.C.*, 51,991, p. 5 (La. App. 2 Cir. 5/23/18), 249 So.3d 177, 181. Any doubt as to a dispute regarding a genuine issue of material fact must be resolved against granting the motion and in favor of a trial on the merits. *Orleans Parish Sch. Bd. v. Lexington Ins. Co.*, 2011-1720, p. 9 (La. App. 4 Cir. 8/22/12), 99 So.3d 723, 729. However, once the motion for summary judgment has been properly supported by the moving party, the non-moving party must produce evidence of a material factual dispute or the motion will be granted. *Arceneaux v. Lafayette Gen. Med. Ctr.*, 2017-516, p. 4-5 (La. App. 3 Cir. 7/26/17), 248 So.3d 342, 346.

The Board cannot accept the Taxpayer's jurisdictional argument in this case. It is true that the Board has jurisdiction over all matters related to assessments under La. R.S. 47:1407. However, the Board previously concluded that its jurisdiction under La. R.S. 47:1407 permitted a review of the LED's decision to cancel the contract for the purpose of determining the correctness of the Assessment. The First Circuit ruled that the Board erred in so concluding. According to the First Circuit, La. R.S. 47:1407 does not provide the Board with jurisdiction to determine the merits of the underlying contract dispute in this case. The Taxpayer cannot avoid that ruling by artfully rephrasing the question.

Nevertheless, the Board's jurisdiction does permit it to review the propriety of the Secretary's actions in issuing the Assessment. On that issue, the Taxpayer argues that the Secretary was required to make its own determination as to whether the LED properly cancelled the EZ Contract. The Secretary's counter-argument is that it had a mandatory duty to issue the Assessment under La. R.S. 51:1787(I). La. R.S. 51:1787(I) places responsibility on the Secretary for the recovery of certain rebates or credits granted through an Enterprise Zone contract; it provides:

If the collecting agencies receive notice that the rebate or credit, or any part thereof, has ceased by reason of a violation of the terms of the contract under which it was granted, then the amount of the credit for the year in which the violation occurred and for each year thereafter in which the violation is not remedied shall be considered a tax due as of December thirty-first of the year in which the violation occurred, and for each year thereafter in which a credit is used and the violation is not remedied, and it shall be collected by the collecting agencies in the same manner and subject to the same provisions for the collection of other tax debts.

As set forth in the quoted provision, after receiving notice of the cancellation, the Secretary "shall" treat the amount of the rebate as a tax due, and "shall" proceed to collect the debt. The Secretary's recoupment of a credit or rebate shall be "subject to the same provisions for the collection of other tax debts." La. R.S. 51:1787(I).

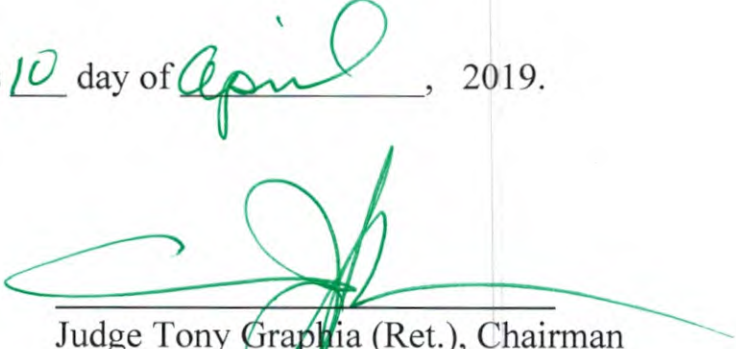
The Secretary's duty to recoup the credit is mandatory. *See* La. R.S. 1:3. The statute does not on its face require the Secretary to make its own determination as to whether the EZ Contract was validly cancelled. The fact that the Secretary's collection of the ITC is subject to the provisions for the collection of other tax debts also does not mean that the Secretary has an independent duty to verify whether the EZ Contract was validly cancelled. It is true that under La. R.S. 47:1562 and 1541, the Secretary is normally charged with the responsibility for examining returns and determining whether additional amounts of tax are due from taxpayers. However, La. R.S. 51:1787(I) provides that upon cancellation of the EZ Contract, the amount of the ITC is considered to be a tax due as of December thirty-first of the year in which the violation occurred. The effect of the statute is to limit the Secretary's normal role in making the determination as to tax due. Rather than make its own examination of the reason for cancelling the contract, the Secretary merely receives notice of the cancellation, and proceeds to recoup the rebate or credit. The basis for the Secretary's determination is the receipt of notice that the contract has been cancelled. Further, the Taxpayer's entitlement to the ITC was tied to the existence of the contract just as much as it was tied to the Taxpayer's qualifications for the ITC. *See* La. R.S. 51:1787(A). Thus, even though the Taxpayer might have met the statutory criteria for the ITC, it was no longer entitled to a credit or rebate once the EZ Contract was cancelled.

It is undisputed that the Secretary received notice of the cancellation of the EZ Contract via the Cancellation Letter. The basis for issuing the Assessment was thereby established. The Secretary was then required to proceed to recoup the ITC. The Secretary did so through assessment and distraint. The means by which the Secretary may recover rebates and refundable tax credits are articulated in La. R.S.

47:1561.2 and 1561. The Secretary may use any of the remedies available for the collection of taxes in recovering said rebates. La. R.S. 47:1561.2. This includes assessment and distraint as provided for in La. R.S. 47:1562 through 1573.

The Taxpayer has not asserted that the Secretary did not comply with the corresponding statutory requirements for assessment and distraint. The Taxpayer also does not argue that the Secretary incorrectly computed the amount of tax due on the Assessment. Thus, the Board perceives no genuine dispute as to the correctness of the Assessment. The Board therefore finds that the Assessment was proper under the law, and factually correct with respect to the computation of liability. Whether the underlying decision to cancel the EZ Contract is not before the Board. Accordingly, the Board must deny the Taxpayer's *Cross Motion for Summary Judgment* and grant the Secretary's *Motion for Summary Judgment*.

Baton Rouge, Louisiana this 10 day of April, 2019.



Judge Tony Graphia (Ret.), Chairman
Louisiana Board of Tax Appeals

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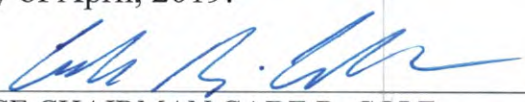
WRITTEN REASONS FOR CONCURRENCE

Vice Chairman Cade R. Cole concurring.

I still agree with the logic of the Board’s prior analysis in *Zelia, LLC v. Secretary, Department of Revenue*, BTA Docket No. 10,430D (La. Bd. Tax App. 11/7/17), 2017 WL 8315358. The Secretary’s collection remedy is directed to be “in the same manner and subject to the same provisions for the collection of other tax debts.” *Id. at. p. 3*. The Secretary has chosen to collect via a mechanism that provides for an appeal to the Board, and it seems logical to apply the applicable law and facts to the procedural remedy that law grants to a taxpayer.

However, we are constrained to follow the mandate of the Court of Appeal finding that “the tax assessment issued by the Louisiana Department of Revenue is a secondary issue contingent upon resolution of the contract dispute.” *Zelia, LLC v. Robinson*, 2018-0001 (La. App. 1st Cir. 5/14/18), 2018 WL 2202314. Considering the decision of the First Circuit, I concur in the Board’s Judgment to grant the Secretary’s Motion for Summary Judgment in this matter.

Baton Rouge, Louisiana this 10th day of April, 2019.



VICE CHAIRMAN CADE R. COLE
LOUISIANA BOARD OF TAX APPEALS

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WRITTEN REASONS FOR DISSENT

Francis J. "Jay" Lobrano dissenting.

For the following reasons, I respectfully dissent from the majority's grant of summary judgment in favor of the Secretary.

La. R.S. 47:1565 states that, after determining an amount of tax to be due, the Secretary of the Louisiana Department of Revenue & Taxation shall send notice to the taxpayer against whom the assessment is imposed, "inform[ing] the taxpayer of the assessment and that he has sixty calendar days from the date of the notice to either pay the amount of the assessment or to appeal to the Board of Tax Appeals for a redetermination of the assessment." In accordance with this statutory mandate, the Notice of Assessment appealed from in this case (like all other notices of assessment issued by the Secretary) advised the Taxpayer that it had three options in responding to the the Assessment:

1. Pay the assessment in full
2. Pay the assessment under protest, pursuant to R.S. 47:1576.

3. File a formal petition with the Louisiana Board of Tax Appeals

Nowhere did the notice advise the Taxpayer that because this assessment was the result of the Louisiana Board of Commerce (“Board of Commerce”) declaring the Taxpayer to be in default of Taxpayer’s contract with the Board of Commerce, the third option was not procedurally available to the Taxpayer. Thus, the Taxpayer elected the third option and filed this appeal. The Secretary now contends, contrary to the instructions on its own Assessment, that the Board does not have jurisdiction over the Taxpayer’s appeal. I do not believe that the Secretary’s position can be reconciled with the legislature’s intent in providing taxpayers with a forum to contest an assessment of tax. *See Sec. Plan Fire Ins. Co. v. Donelon*, 2016-0814 (La.App. 1 Cir. 5/10/17), 220 So.3d 769. Furthermore, in my view, as the purported contract between the Board of Commerce and the Taxpayer merely requires the Taxpayer to comply with the statutory requirements of La. R.S. 51:1787 and the regulations thereunder, this Board maintains jurisdiction to hear this case and resolve the issues under the familiar principles of statutory interpretation applicable to tax credit statutes.

The authority and criteria for receiving a rebate pursuant to an EZ Contract are set forth in La. R.S. 51:1787 *et. seq.* This Board has repeatedly exercised its jurisdiction in interpreting tax credit statutes. *See LUBA Cas. Ins. Co. v. Sec’y, La. Dep’t of Revenue*, Docket No. 9462D (La. Bd. Tax App. 12/11/18) (insurers’ premium tax credit); *Am. Iron Reduction, LLC v. Bridges*, Docket No. 6197 (La. Bd. Tax App. 7/20/05), 2005 WL 3734586 (inventory tax credit); *J.D. Caver and Co., v. Sec’y of Dep’t of Revenue and Taxation*, Docket No. 4732 (La. Bd. Tax App. 5/5/98), 1999 WL 805153. La. R.S. 51:1787 is a credit statute, and the Board is fully capable of determining whether the Taxpayer has complied with its

requirements. However, merely because La. R.S. 51:1787 calls for the incorporation of its provisions into a contract with the Board of Commerce, the majority holds that the Taxpayer is denied its otherwise available procedural right under La. R.S. 47:1565 to challenge the assessment.

In addition, I do not agree with the majority's conclusion that the Secretary's role in issuing the Assessment was merely ministerial. In fact, La. R.S. 51:1787 provides the Secretary with independent authority and responsibility for auditing claims for tax rebates granted pursuant to an Economic Zone ("EZ") contract. La. R.S. 51:1787(A)(1)(a)(iv)(bb) provides that "[w]ithin six months of the date of filing the rebate request, the Department of Revenue shall audit the rebate request. During the six-month period, the Department of Revenue shall disallow items determined to be ineligible for rebate." Moreover, the same provision states that "[a]ny sales and use tax rebate issued pursuant to this Section shall be subject to subsequent audit by the Department of Revenue, and any rebate amount determined to be in excess of that which should have been allowed shall be subject to collection by the Department of Revenue." *Id.* It would surely be within the Board's jurisdiction to consider an appeal of a notice of assessment resulting from such an audit. In effect, the majority holds that the jurisdiction of this Board is dependent not on the substantive law underlying the Notice of Assessment, but rather whether it is the Secretary or the Board of Commerce that claims non-compliance with La. R.S. 51:1787. The result is absurd, and surely our legislature did not intend such a result.

I also note that the effect of the majority's decision is to leave the Taxpayer in this case without a meaningful avenue for challenging the Notice of Assessment. In *Majestic Medical Solutions, LLC, v. Secretary, Louisiana Department of*

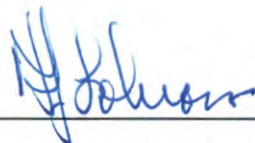
Revenue, Docket No. 9449C (La. Bd. Tax App. 10/10/17) 2017 WL 5985762, this Board recently decided that a taxpayer may not avail themselves of the Refund Overpayment Procedure found in La. R.S. 47:1621 to recoup a tax paid pursuant to a notice of assessment that becomes final due to the passage of the 60 day appeal period. In this case, under the majority's holding, the assessment's finality is no different than a notice of assessment that becomes final due to the passage of the 60 day appeal period. Any attempt by the Taxpayer to pay the tax and seek a refund under the majority's holding will be met with the same arguments and defenses raised by the Secretary in *Majestic Medical Solutions, LLC*, supra, which we as a Board are bound to follow. This leaves the "Claim against the State" procedure as the only possible remedy for the Taxpayer. These concerns are particularly troubling because the Assessment will become final without the Board ever making a substantive determination as to whether the Taxpayer actually owes the tax.

To say that this Board has no jurisdiction because the Board of Commerce unilaterally terminated the EZ contract, thus leaving the Taxpayer without recourse pursuant to La. R.S. 47:1565, but that this Board would have jurisdiction if the Secretary had merely issued a notice of assessment in response to an audit is contrary to common sense and may well run afoul of Article VII, Sec. 3 of the Louisiana Constitution, which requires that the legislature provide a "complete and adequate remedy for the prompt recovery of an illegal tax paid by a taxpayer." In addition, denying the Taxpayer access to a forum in which to challenge the termination may well violate the Taxpayer's fundamental right to seek judicial review. *See* La. Const. Art. 1 § 19 ("No person shall be subjected to imprisonment or forfeiture of rights or property without the right of judicial review based upon a complete record of all evidence upon which the judgment is based."). I fear that

the Board's ruling will deprive the Taxpayer of these constitutionally guaranteed remedies.

For these reasons, I dissent from the majority's grant of summary judgment in favor of the Secretary. I agree with the majority's denial of the summary judgment filed by the Taxpayer, and I believe that the correctness of the Assessment should be determined after trial on the merits. Upholding the Assessment without reaching the real dispute in this case effectively deprives the Taxpayer of judicial relief and is contrary to the intent of the legislature. Thus, I would deny the motions for summary judgment, and proceed to a hearing on the merits.

Baton Rouge, Louisiana this 10 day of April, 2019.



Francis J. "Jay" Loblano
Louisiana Board of Tax Appeals