

**BOARD OF TAX APPEALS
STATE OF LOUISIANA**

**SOUTHWEST AIRLINES CO.,
Petitioner**

VS.

DOCKET NO. 11524D

**KIMBERLY ROBINSON, SECRETARY,
DEPARTMENT OF REVENUE,
Respondent**

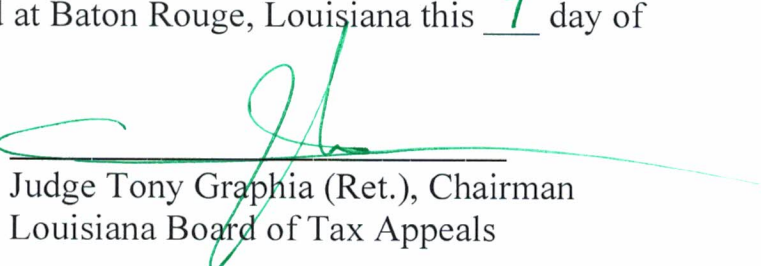
JUDGMENT ON EXCEPTIONS

This matter came before the Board for hearing on the Peremptory Exceptions of No Cause of Action and No Right of Action filed by Kimberly Robinson, Secretary, Department of Revenue (the "Department") on November 6, 2019, and for rehearing on February 12, 2020, with Judge Tony Graphia (Ret.), Chairman, presiding, and Board Members Cade R. Cole and Francis "Jay" Lobrano present. Participating in the hearing were Jeffrey Mullins and Jeffrey Marks, representatives for Southwest Airlines Co. ("Petitioner"), and Christopher Jones, attorney for the Department. At the end of the hearing, the Board took the matter under advisement. The Board now unanimously renders Judgment in accordance with the written reasons attached herewith.

IT IS ORDERED, ADJUDGED AND DECREED that the Department's Peremptory Exception of No Cause of Action BE AND IS HEREBY SUSTAINED and Count I of the Petition IS HEREBY DISMISSED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Department's Peremptory Exception of No Right of Action BE AND IS HEREBY OVERRULED.

Judgment Rendered and Signed at Baton Rouge, Louisiana this 9 day of July, 2020.


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

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REASONS FOR JUDGMENT ON EXCEPTIONS

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Petitioner appeals the denial of a refund claim under La. R.S. 47:1625. Petitioner paid Louisiana sales tax on purchases of aviation fuel from December 1, 2013, through December 31, 2014. On or about December 28, 2017, Petitioner sought a refund from the Department in the amount of \$2,535,280.58. The Department denied Petitioner’s refund claim by notice dated September 12, 2018.

¹ Mr. Mullins appeared in person at the November 6, 2019 hearing. Mr. Mullins and Mr. Marks appeared by phone at the February 12, 2020 rehearing.

Petitioner timely appealed to the Board on November 16, 2018. Petitioner divides its claims into Count I and Count II. The Department raises an exception of no cause of action as to Count I, and an exception of no right of action as to Count II.

I. Exception of No Cause of Action

The Department raises an exception of no cause of action in response to Count I of the Petition. In Count I, Petitioner alleges that its purchases of aviation fuel are exempt from state sales tax under La. Const. Art. 7 § 27(A).

La. Const. Art. 7 § 27(A) states:

Purchases of gasoline, diesel fuel, or special fuels which are subject to excise tax under Chapter 7 of Subtitle II of Title 47 of the Louisiana Revised Statutes of 1950 shall be exempt from the state sales tax and any sales tax levied by a political subdivision as defined by Article VI, Section 44(2).

This constitutional provision prohibits the levy of sales tax on purchases of gasoline and fuels that “are subject to excise tax” under the statutes that comprise the state’s tax on petroleum products. Petitioner alleges that it purchased aviation fuel subject to excise tax under the state fuel tax, specifically citing tax levies found in La. R.S. 47:818.12, 818.17, and 818.20. Those provisions are located in “Chapter 7, Subtitle II of Title 47 of the Louisiana Revised Statutes of 1950.”

However, La. R.S. 47:818.14(A)(3) also establishes a fuel tax exemption for sales of “aviation fuel used for propelling aircraft, including aircraft operated in interstate or foreign commerce under a certificate or permit issued by the Civil Aeronautics Board of the United States or any successor or federal governmental board or agency having similar authority.” Petitioner acknowledges that all of its purchases of fuel were exempt from the all of the fuel tax levies listed above due to this exemption. The Department argues that Petitioner fails to state a cause of action because aviation fuel cannot be both “subject to” and exempt from the excise tax at

the same time. Petitioner's position is that "subject to" tax means merely "governed by" or "subordinate to" taxing statutes. See *Louisiana Land & Expl. Co. v. Texaco, Inc.*, 478 So.2d 926, 928 (La. Ct. App. 1985) (quoting Black's Law Dictionary 1278 (5th Ed. 1979)), *writ granted*, 484 So.2d 130 (La. 1986), and *rev'd*, 491 So.2d 363 (La. 1986).

A peremptory exception of no cause of action tests the legal sufficiency of the petition by determining whether the law affords a remedy based on the facts alleged in the petition. *Vince v. Metro Rediscount Co., Inc.*, 2018-2056, p. 1 (La. 2/25/19); 264 So.3d 440, 441. All well pleaded facts in the petition are presumed to be true. *Maw Enterprises, L.L.C. v. City of Marksville*, 2014-0090, p. 6 (La. 9/3/14); 149 So.3d 210, 215. In this context, a "cause of action" refers to the operative facts that give rise to the plaintiff's right to judicially assert the action against the defendant. *McCarthy v. Evolution Petroleum Corp.*, 2014-2607, p. 7 (La. 10/14/15); 180 So.3d 252, 257. An exception of no cause of action should be granted only when it appears beyond doubt that the plaintiff can prove no set of facts in support of any claim which would entitle it to relief. *Sanctuary Capital, LLC on Behalf of N. Louisiana Bidco, LLC v. Cloud*, 53,157, p. 11 (La. App. 2 Cir. 11/20/19); 285 So.3d 123, 131. No evidence may be introduced in support of, or in opposition to, an exception of no cause of action. La. C.C.P. art. 931.

The meaning of the words "subject to tax" have been litigated in many corporate income and franchise tax disputes. Specifically, some states modify their apportionment calculations for certain multi-state businesses to require that otherwise-deductible expenses paid to related entities when calculating taxable income be included in taxable income. However, these states typically provide an exception for these expenses if the corresponding item of income was subject to

income tax by another state. This leads to disputes over what income is “subject to tax” in other states. *See, e.g. Surtees v. VFJ Ventures, Inc.*, 8 So.3d 950, 975 (Ala. Civ. App. 2008), *aff’d sub nom. Ex parte VFJ Ventures, Inc.*, 8 So.3d 983 (Ala. 2008). Courts in other states, notably Alabama and Virginia, have found that income is ‘subject to tax’ only if tax is actually paid on that income. *Id.*; *Kohl’s Dep’t Stores, Inc. v. Virginia Dep’t of Taxation*, 810 S.E.2d 891 (Va. 2018).

Looking to Louisiana jurisprudence, the Board finds no precedent for the interpretation urged by Petitioner. To the contrary, the sales tax has been held applicable to sales of jet fuel into Louisiana for use in interstate commerce. *Kennedy v. United Airlines, Inc.*, 01-426, p. 6 (La. App. 5 Cir. 10/17/01); 797 So.2d 186, 189, *writ denied*, 2001-3241 (La. 3/8/02); 811 So.2d 882.

An examination of the principles applicable to interpreting tax exemptions do not support the Petitioner’s position. “A tax exemption is a provision which exempts from tax a transaction which would, in the absence of the exemption, otherwise be subject to tax.” *Tarver v. World Ship Supply, Inc.*, 615 So.2d 423, 426 (La. Ct. App. 1993), *writ denied*, 616 So.2d 672 (La. 1993) (quoting Bruce J. Oreck, *Louisiana Sales & Use Taxation* § 3.1 (1992)). According to professor Oreck, and our Supreme Court, if a transaction is exempt from tax, then it is not subject to tax. Aviation fuel is exempt from the fuel tax. Logically, aviation fuel is not subject to the fuel tax.

The constitution prohibits double taxation of fuels under both the fuel tax and the sales tax. However, a prohibition against double taxation is not a complete exemption from only one. Neither logic nor any weight of authority require this an interpretation. Therefore, by acknowledging that its purchases of aviation fuel were actually exempt from the state’s fuel excise tax, Petitioner has failed to state a claim

for relief under La. Const. art. VII, Sec. 27. Accordingly, the Board will grant Department's exception of no cause of action as to Count I of the Petition.

II. Exception of No Right of Action

The Department's exception of no right of action is directed at Count II of the Petition. In Count II, Petitioner originally claimed a partial sales tax refund based on the formula provided for in La. R.S. 47:306.2. That formula is intended for interstate carriers who purchase or import property for use in transporting persons or property from Louisiana to locations offshore, outside the territorial limits of any state. Petitioner is not in the business of offshore transportation. Accordingly, Petitioner amended Count II to cite to La. R.S. 47:306.1. La. R.S. provides a similar partial refund formula, but applies to transportation in interstate or foreign commerce generally. The Department, nevertheless, maintains that Petitioner does not have a right of action under either statute because Petitioner did not properly register as an interstate carrier with Department.

The function of an exception of no right of action is to determine whether the plaintiff "belongs to the class of persons to whom the law grants the cause of action asserted in the petition." *Badeaux v. Southwest Computer Bureau, Inc.*, 2005-0612 (La. 3/17/2006), 929 So.2d 1211, 1217. To prevail, the party raising the exception must show that the claimant does not have a legal interest in the subject matter of the litigation. *State ex rel. Caldwell v. Molina Healthcare, Inc.*, 2018-1768, p. 7 (La. 5/8/19); 283 So.3d 472, 477. It does not matter that the Petitioner may not be able to prevail on the merits of their claim. *Bannister Properties, Inc. v. State*, 2018-0030, p. 10 (La. App. 1 Cir. 11/2/18); 265 So.3d 778, 786, *reh'g denied* (Dec. 7, 2018), *writ denied*, 2019-0025 (La. 3/6/19); 266 So.3d 902. Any doubts are to be resolved

in the Petitioner's favor. *Rebel Distributors Corp., Inc. v. LUBA Workers' Comp.*, 2013-0749, p. 10 (La. 10/15/13); 144 So.3d 825, 833.

La. R.S. 47:306.1, entitled "Collection from interstate and foreign transportation dealers," provides:

Persons, as defined in this Chapter, engaged in the business of transporting passengers or property for hire in interstate or foreign commerce, whether by railroad, railway, automobile, motor truck, boat, ship, aircraft or other means, may, at their option under rules and regulations prescribed by the collector, register as dealers and pay the taxes imposed by R.S. 47:302 A on the basis of the formula hereinafter provided.

Such persons, when properly registered as dealers, may make purchases in this state or import property into this state without payment of the sales or use taxes imposed by R.S. 47:302 A at the time of purchase or importation, provided such purchases or importations are made in strict compliance with the rules and regulations of the collector. Thereafter, on or before the 20th day of the month following the purchase or importation, the dealer shall transmit to the collector, on forms secured by him, returns showing gross purchases and importations of tangible personal property, the cost price of which has not previously been included in a return to the state. The amount of such purchases and importations shall be multiplied by a fraction, the numerator of which is Louisiana mileage operated by the taxpayer and the denominator of which is the total mileage, to obtain the taxable amount of tax basis. This amount shall be multiplied by the tax rate to disclose the tax due.

Each such dealer, at the time of making the return required hereunder, shall remit to the collector the tax due for the preceding calendar month as shown on the return.


The Department's position is that the statute only affords a right of action to a "properly registered" dealer. The Department further maintains that a properly-registered dealer is one who has complied with the application process under LAC 61:I.4353 for registration as an interstate or foreign carrier and has been so registered. The Petitioner argues that it properly registered as a dealer within the meaning of the statute, though not under the regulation, when it registered to collect the state sales tax. Alternatively, Petitioner argues that it is entitled to a partial refund

under the statutory formula by operation of La. R.S. 47:305(E) and/or La. R.S. 47:1621, *et. seq.*

In *Bannister Properties, Inc. v. State*, the First Circuit stated that the existence of a legal bar to relief does not eliminate that claimant's right of action to bring a refund overpayment claim. 2018-0030, p. 10-11 (La. App. 1 Cir. 11/2/18); 265 So.3d 778, 786-87, *reh'g denied* (Dec. 7, 2018), *writ denied*, 2019-0025 (La. 3/6/19); 266 So.3d 902. The claimants in that case sought refunds of overpayments resulting from the Department's erroneous interpretation of law. The Court interpreted La. R.S. 47:1621(F) (Repealed by 2019 Act 367) to completely preclude the claimants from the refunds they sought. In fact, the Court went on to grant summary judgment against the claimants on that issue. Nevertheless, the Court still held that this was not an appropriate basis for granting an exception of no right of action. An exception of no right of action depends "solely on whether the taxpayers have a real and actual interest in their Overpayment Refund Claims." The exception does not depend on the merits of a taxpayer's claims.

In the Board's view, the Department is calling the merits of Count II into question. The parties are in dispute over what constitutes a properly-registered dealer and whether LAC 61:I.4353 is a proper interpretation of the statute. On the merits, Petitioner's alleged failure to comply with the applicable rules and regulations may very well bar to relief. However, this does not determine whether Petitioner has an interest in its refund claim. Accordingly, the Board will overrule the Department's exception of no right of action.

Baton Rouge, Louisiana this 9 day of July, 2020.



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