

**BOARD OF TAX APPEALS  
STATE OF LOUISIANA**

**AGRILELECTRIC POWER PARTNERS, LTD.  
PETITIONER**

**VERSUS**

**B.T.A. DOCKET NO. 7893**

**DEPARTMENT OF REVENUE  
RESPONDENT**

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**JUDGMENT**

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A hearing on this matter was held before the Board on January 22, 2014. Present before the Board were: David R. Cassidy, David R. Kelly and John B. King, attorneys for Agrilelectric Power Partners, Ltd. (Taxpayer) and Johnette Martin, attorney for the Secretary, Louisiana Department of Revenue (Secretary). At the conclusion of the hearing, the matter was taken under advisement, and the parties were given time to provide post-trial memoranda.

Taxpayer appeals the Secretary's denial of its request for a refund of sales taxes in the amount of \$90,476.27. Taxpayer claims that it is entitled to the requested refund because the transaction on which the taxes were paid were not subject to Louisiana sales taxes. Taxpayer asserts that the Property on which the taxes were paid qualified as a pollution control device or system the purchase of which is excluded from taxation under R.S. 47:301(10)(l) and LAC 61:4302. Taxpayer pled, in the alternative, that the Property was purchased by a utility and was, therefore excluded from taxation under the provisions of R.S. 47:301(16)(o).

In the early 1980's, rice husks that were produced in the milling process of rice were sent to landfills and were disposed of as solid waste. Later the rice husks were used as fuel in boilers to produce steam and, ultimately, electricity. In 1978 the U.S. Congress passed the Public Utility Regulatory Policies Act (PURPA) which act encouraged the use of cogeneration facilities using alternative fuels. PURPA established a new class of generating facilities which were to receive special rate treatment. These generating facilities were known as Qualifying Facilities (QF). Under PURPA public utilities were required to buy electricity from QF's. PURPA created a market for the electricity produced by a QF. Taxpayer herein was created as a QF. The only fuel source used by Taxpayer is rice hulls supplied by Farmers Rice Milling Company (Farmer's Rice). Taxpayer's boiler is designed to use rice husks as a fuel source. Taxpayer generates enough electric power to run Farmers Rice and Agrilectric Research Company, an affiliated company, and to sell the excess electricity to Entergy.

The facilities of Taxpayer consist of a boiler in which the rice husks are combusted to create the steam necessary to power the turbine which generates the electricity. The second component of Taxpayer's facilities is known as the "baghouse" which captures the silica created by the combustion of the rice husks in the boiler.

In 2012 Taxpayer refurbished the boiler and the baghouse. Taxpayer filed for a refund of the sales taxes used in the refurbishment of the boiler and the baghouse under the provisions of R.S. 47:301(10)(I). The Secretary allowed a refund of the sales taxes paid on the refurbishing of the baghouse. The Secretary denied the refund request of the sales tax paid on the refurbishing of the boiler. It is the denial of the sales taxes paid on the refurbishing of the boiler that the taxpayer has appealed to the Board.

R.S. 47:301(10)(I) states in pertinent part:

"(I) Solely for purposes of the state sales and use tax, the term "sale at retail" shall not include the sale of a pollution control device or system. Pollution control device or system shall mean any tangible personal property approved by the Department of Revenue and the Department of Environmental Quality and sold or leased and used or intended for the purpose of eliminating, preventing, treating, or reducing the volume or toxicity or potential hazards of industrial pollution of air, water, groundwater, noise, solid waste, or hazardous waste in the state of Louisiana... In order to qualify, the pollution control device or system must demonstrate either: a net decrease in the volume or toxicity or potential hazards of pollution as a result of the installation of the device or system; or that installation is necessary to comply with federal or state environmental laws or regulations."(emphasis supplied)

The question before the Board is whether the Taxpayer's boiler is a "...pollution control device or system. Pollution control device or system shall mean any tangible personal property approved by the Department of Revenue and the Department of Environmental Quality...". The statute expressly states that the "pollution control device or system" must be approved as such by both the Department of Revenue and the Department of Environmental Quality (DEQ).

The testimony revealed that the Department of Revenue does not have the expertise to determine whether the things at issue qualify as a "pollution control device or system" as contemplated by the statute and therefore relies on the expertise of DEQ.

We are sympathetic to the taxpayers' plight, it was initially provided confusing guidance from DEQ. However, as part of the formal evaluation, the DEQ examined the Taxpayer's application and carefully examined the matter and came to the conclusion that the boiler and the refurbishment of it did not qualify as a "pollution control device or system" under the statute.

There was a great deal of testimony produced at the hearing by both parties. There were several items of evidence and testimony that the Board found significant.

One of the exhibits that the Taxpayer introduced was Exhibit J, in globo, included in which was an exhibit that purported to show the difference in pollutants from the use of a land fill as compared to the use of the Taxpayer's boiler. That exhibit and the accompanying testimony purported to show that using the landfill would produce 140,000 tons of pollutant plus, over a period of time, an additional 20,987.4 tons of "methane CO<sub>2</sub>e=methaneX21," plus an additional 2,756 tons of CO<sub>2</sub>, for a total of 127,743.4 tons of pollutants over the time period. If the same amount of rice hulls were burned in the boiler, the exhibits and testimony purported to show, there would be 125,428.8 tons of pollutants. The point of the exhibit was to show that the pollution from the boiler was less than pollution from the landfill. But, testimony of the Secretary's witnesses revealed that a portion of, if not all, the Methane and N<sub>2</sub>O which was included in the total pollution of 127,743.4 was the same as that contained in the original 140,000 tons. Hence, the total pollution from the landfill was overstated.

The Taxpayer asserted that the pollution from the landfill was greater than that from the boiler because the electricity that the boiler produced was more than the Taxpayer needed for its own use and was sold to Entergy and used by Entergy's other customers. The Taxpayer argued that the extra energy produced by Taxpayer, and sold to Energy, alleviated Entergy's need to produce that extra energy and therefore there was less pollution on the whole. The Secretary's witnesses from the DEQ testified that this was not something that they could take into consideration in their calculations. Although the taxpayer put on evidence about the nearest Entergy plant's emissions, there was no evidence about whether or not this was the electricity that would have been foregone due to the Agriletric purchases.

The Board heard the testimony of the Secretary's witnesses: Brijan Sharafkhani, P.E. Civil Engineer; Yanfu Zhao, P.E., Chemical Engineer and Bryan Johnson, Environmental Scientist, all employees of the DEQ. These witness all testified why the Taxpayer's boiler and the refurbishment to it did not qualify as a "pollution control device or system" under the statute. Their testimony was well-founded and credible.

As provided by the statute the legislature mandated, that to qualify as a pollution control device or system the device or system must be approved by the DEQ which has the expertise to make such a determination.

The discretion of a governmental agency will only be set aside if the decision is arbitrary, capricious or an abuse of agency discretion. *Devillier v. State Dept. of Public Safety*

*and Corrections*, 634 So.2d 884 (La. App. 1Cir. 12/29/93). An action by a governmental agency can only be considered “arbitrary and capricious” if there is no rational basis for the action taken. *Wopara v. State Employees’ Group Benefits Program*, 2002-2641 (La.App. 1 Cir. 7/2/03) 859 So.2d 67; *Bowers v. Firefighters’ Retirement System*, 176 (La. 3/17/09), 6 So.3<sup>rd</sup> 173. A governmental agency will not be found arbitrary and capricious when good cause exists for its action. *Magill v. Louisiana State Police Troop G Through Dept. of Public Safety and Corrections*, 30,565 (La. App. 2 Cir. 5/13/98), 714 So.2d 139.

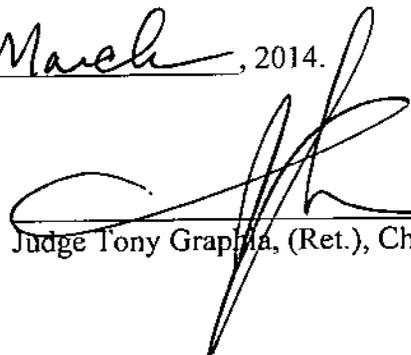
After considering the exhibits, testimony, and argument of counsel, the Board rules that the decision of DEQ to disallow the Taxpayer’s boiler as a qualifying pollution control device was not itself arbitrary, capricious or an abuse of discretion. The taxpayer has failed to establish an element of the exclusion, therefore the Department of Revenue properly denied their refund on these grounds.

The Taxpayer also claims that it is a “utility regulated by the Public Service” under the provisions of R.S. 47:301(16)(o)(1) and therefore not subject to sales tax on the purchase of tangible personal property. The board agrees that the taxpayer meet the definition of a utility (based on its NAICS code).

The taxpayer also contends that it is subject to regulation by the Public Service Commission (“PSC”). This argument is not supported by the evidence since the witness from the PSC testified that its involvement with the Entergy-Agrilectric contract was due to its regulation of Entergy not any purported regulation of Agrilectric. La. Const. art. IV, sec. 21(B) provides that the PSC regulates “common carriers and public utilities.” The evidence shows that Agrilectric is not a public utility regulated by the PSC.

For the foregoing reasons, the Taxpayer’s request for the refund is denied, and its petition is dismissed.

Baton Rouge, Louisiana this 19 day of March, 2014.

  
Judge Tony Grapiglia, (Ret.), Chairman