

**BOARD OF TAX APPEALS
STATE OF LOUISIANA**

BANNISTER PROPERTIES, INC.
Petitioner

VERSUS

DOCKET NOS. 7389 & 7585

STATE OF LOUISIANA
Respondent

C/W

SOUTHOLD PROPERTIES INC.

VERSUS

DOCKET NOS. 7390 & 7584

STATE OF LOUISIANA

JUDGMENT

**ON RESPONDENTS' MOTION FOR SUMMARY JUDGMENT AND
EXCEPTIONS OF LACK OF SUBJECT MATTER JURISDICITON AND
NO RIGHT OF ACTION AND ON
PETITIONER'S CROSS MOTION FOR SUMMARY JUDGMENT**

The Exceptions and a Motion for Summary Judgment of the Secretary, Department of Revenue, of the State of Louisiana (the "Secretary"), together with a Motion for Summary Judgment filed by Bannister Properties, Inc. and Southold Properties, Inc. (the "Taxpayer") were heard by the Board on August 8, 2017, with Judge Tony Graphia, Chairman, presiding and with Board Members Cade R. Cole and Jay Lobrano present. Present before the Board were: Antoino Ferachi and Brandea Averett, attorneys for the Secretary, along with Matt Mantle and Bill Backstrom, attorneys for Bannister Properties, Inc. ("Bannister") and Southold Properties, Inc. ("Southold") (hereinafter referred to together as the "Taxpayer" or "Taxpayers"). After the hearing, the matters were taken under advisement. Considering the law and evidence, and for the written reasons issued herewith, the Board does now render Judgment as follows:

IT IS ORDERED, ADJUDGED AND DECREED that the Secretary's Exceptions of No Right of Action and Lack of Subject Matter Jurisdiction BE AND ARE HEREBY OVERRULED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Secretary's Motion for Summary Judgment BE AND IS HEREBY DENIED.

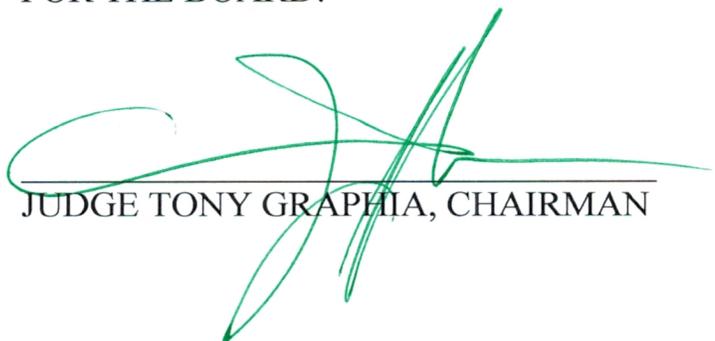
IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Taxpayers' Motion for Summary Judgment BE AND IS HEREBY GRANTED and that the Taxpayers' Petition for Redetermination of an Overpayment Refund BE AND IS HEREBY GRANTED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be Judgment rendered against the Secretary, Louisiana Department of Revenue, in favor of Bannister Properties, Inc. in the amount of \$550,713.00, plus interest as provided by law.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be Judgment rendered against the Secretary, Louisiana Department of Revenue, in favor of Southold Properties, Inc. in the amount of \$164,287.00, plus interest as provided by law.

JUDGMENT RENDERED AND SIGNED at Baton Rouge, Louisiana this 12 day of September, 2017.

FOR THE BOARD:



JUDGE TONY GRAPHIA, CHAIRMAN

**BOARD OF TAX APPEALS
STATE OF LOUISIANA**

BANNISTER PROPERTIES, INC.
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STATE OF LOUISIANA

**WRITTEN REASONS FOR JUDGMENT
ON RESPONDENTS' MOTION FOR SUMMARY JUDGMENT AND
EXCEPTIONS OF LACK OF SUBJECT MATTER JURISDICITON AND
NO RIGHT OF ACTION AND ON
PETITIONER'S CROSS MOTION FOR SUMMARY JUDGMENT**

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The Taxpayer in this case claims that it was not subject to the Louisiana corporate franchise tax because its legal structure was identical to the taxpayer in *UTELCOM, Inc. v. Bridges*, 2010-0654 (La. App. 1 Cir. 9/12/11), 77 So.3d 39.¹ The First Circuit ruled that a regulation of the Secretary was *ultra vires*, which meant that collecting tax on the effected taxpayers was invalid under the law.

The Taxpayers thereafter filed amended returns seeking refunds based on the *UTELCOM* decision. The Secretary denied these refunds on April 2, 2012. Those denials were timely appealed to this Board. The parties entered into a settlement and filed with the Board a set of Joint Stipulations as to confirm the facts and amounts of the Overpayments. The settlement called for the Claim Against the State cases be submitted to the Legislature for payment, and the parties filed a Joint Motion to Stay the Overpayment Refund cases to provide time for the parties to ascertain whether the Claims Against the State would be paid.²

The Claims Against the State (Docket Nos. 7389 and 7390) are not presently at issue since they were previously settled.³ However, the Taxpayer explicitly reserved its right to pursue the otherwise stayed Overpayment Refund cases (Docket Nos. 7584 and 7485) if the Legislature failed to appropriate funds to pay the Claims Against the State.⁴

¹ Act 12 of the 2016 1st Ex. Session changed the law prospectively to add statutory language consistent with the Secretary's prior regulation, therefore the *Utelcom* holding will not have any effect on a going forward basis.

² The Joint Motion to Stay stated that "in the interests of judicial efficiency and to prevent unnecessary expenditure of this Honorable Board's resources, the Parties wish to have additional time to secure payment of the full Overpayment Amount under the Claims Against the State Procedures prior to appearing before this Honorable Board for further proceedings under the Administrative Refund Provisions."

³ The Taxpayer's counsel agreed that if they ultimately receive payment of their refund that they would not seek payment on the Claims Against the State recommendations, and would agree that those recommendations should thereby be vacated.

⁴ The Legislature has historically paid Claims Against the State in the same manner that it had paid Judgments against the state in contract or tort, but in recent years it has not appropriated

The Supreme Court has long recognized that there are three alternative remedies available to taxpayers.⁵ In *Jazz Casino Co. v. Bridges* the Court recently reiterated that:

The legislature has afforded taxpayers the following three remedies to fulfill its obligation under La. Const. art. VII, § 3(A): (1) the “Claims Against the State” procedure, (2) the “Payment Under Protest” procedure, and (3) the “Overpayment Refund” procedure. The procedures for these three remedies are set forth in La. R.S. 47:1481, *et seq.*; La. R.S. 47:1576, *et seq.*; and La. R.S. 47:1621, *et seq.*, respectively. *St. Martin*, 09–0935 at p. 4, 25 So.3d at 738. Only the provisions related to the first of these remedies, that is, the claims against the state procedure, expressly requires an appropriation of funds by the legislature.

Jazz Casino Co., L.L.C. v. Bridges, 2016-1663, p. 6 (La. 5/3/17) ___ So.3d ___.

The Overpayment Refund procedure is a distinct proceeding, and the Secretary agrees that these Taxpayers are entitled to their requested refunds unless the provisions of La. R.S. 47:1621(F) serve to prohibit that refund.⁶

The Board previously overruled similar Exceptions of the Secretary in *General Electric Capital Services, Inc. v. Barfield*, BTA Docket No. 7337 (La. Bd. Tax App. 6/19/2013), 2013 WL 3465284, which decision was not appealed by the Secretary.

Legislative History Issue

The Secretary urges that it has recently discovered legislative history that was not argued in *GE Capital, supra*. The Secretary argues that in 1948 when the

funds for the payment of any judgments or claims. The undersigned was intimately involved with the enactment of La. R.S. 47:1484(C), which was enacted as a limited remedy to provide some relief to pending *Utelcom* claimants with previously settled Claims Against the State.

⁵ This is similar to the longstanding corollary rule that the Collector has three alternative remedies to collection, may choose which to pursue, and may pursue remedies in tandem with each other. *See e.g.* La. R.S. 47:1561; *Collector of Revenue v. Olvey*, 117 So.2d 563 (La. 1959).

⁶ The parties made a Joint Stipulation that the Taxpayers “made overpayments, as defined in La. R.S. 47:1621(A)” and stipulated that the amount of the Overpayment was \$550,713.00 for Bannister, and was \$164,287.00 for Southold.

precursor of La. R.S. 47:1621(F) was first adopted that there was no explicit refund appeal to the Board.

The Board will first observe that it is exceedingly difficult to trace legislative history in the era before the Acts of the Legislature were actually codified. For example, the parties both repeat the erroneous information from Westlaw that the Board was created in 1942.⁷ In fact, the Board was created in the 1934 Income Tax Acts, and still has cases in its possession dating from 1937.

The then existing Board of Tax Appeals was converted into the “Board of Revenue” by Title IV, Section 5 of Act 47 of 1940, which purported to merge the Louisiana Tax Commission, appointive power and administrative oversight over the Collector of Revenue, and the Board of Tax Appeals into one tax super-board. The Constitutional Amendment authorizing the merger of the Tax Commission into this planned super-board failed before the electorate, and the Legislature responded by undoing the merger and re-naming the “Board of Revenue” back to the Board of Tax Appeals. Act 299 of 1942.⁸

The state’s refund statutes were deleted entirely by Act 183 of 1946, but were added back via Act 324 of 1948. The 1948 Act did not mention at all where any appeal from the denial of a refund should go. The parties point out that this anomaly was rectified in the 1950 codification of the Revised Statutes, wherein exclusive jurisdiction over Overpayment Refund disputes was explicitly granted to the Board of Tax Appeals.

⁷ Act 299 of 1942 did reform the Board, and Act 120 of that year transferred to it jurisdiction over Claims Against the State, which had been vested since Act 33 of 1918 in the Board of Public Examiners—which Act 120 also abolished.

⁸ While a specific cause of action for refund in state courts existed in the Income Tax Acts briefly in the 1940s, there was also a plenary grant of authority to appeal any decision, order, finding or assessment of the collector to the board. Section 32 of Act 265 of 1940 explicitly provides for the appropriation of refunds ordered by the board of revenue or any court. There was at least concurrent jurisdiction over refunds between the Board and the Courts in this era.

It is beyond obvious that tax procedure was in great flux during the 1940s. The Board finds this complex legislative history quite interesting, but it is not particularly instructive to the task of discerning the current meaning of La. R.S. 47:1621(F). While the language of that Subsection has been repeated without change since 1948, its current enactment and placement dates from Act 6 of the 1st Extraordinary Session of 2001. The Board finds that the jurisdiction of the Board on the date of the present enactment of the Subsection is more instructive than the jurisdiction of the Board in the 1940s.

At the time of re-enactment there is no dispute that the Board had exercised exclusive original jurisdiction over all refund actions for over fifty years. As the Supreme Court instructed in *M.J. Farms, Ltd. v. Exxon Mobil Corp.*:

It is also well established that the Legislature is presumed to enact each statute with deliberation and with full knowledge of all existing laws on the same subject. Thus, legislative language will be interpreted on the assumption the Legislature was aware of existing statutes, well established principles of statutory construction and with knowledge of the effect of their acts and a purpose in view. It is equally well settled under our rules of statutory construction, where it is possible, courts have a duty in the interpretation of a statute to adopt a construction which harmonizes and reconciles it with other provisions dealing with the same subject matter.

2007-2371 (La. 7/1/08, 13–14), 998 So.2d 16, 27, amended on reh'g on other grounds (La. 9/19/08).

In the present case, the Legislature during its 2001 re-enactment of §1621(F) could have taken the time to delete the exception that the Secretary would prefer were not present. The Legislature was aware of the Board's refund jurisdiction under La. R.S. 47:1625, but decided to leave the exception to the §1621(F) unaltered.⁹

⁹ It is presumed that the legislature's choice of language was intended to produce a result, it is a precept of statutory interpretation that the legislature does not adopt purely superfluous language. *See. e.g. ABL Mgt., Inc. v. Board of Sup'rs of Southern Univ.*, 00-0798 (La. 11/28/00), 773 So.2d 131.

The Secretary has focused on a new argument, but there is nothing about the situation in the 1940s that the Board finds sufficient to depart from its ruling in *GE Capital, supra*. Furthermore, there is nothing to suggest to the Board that the Louisiana Supreme Court was wrong when it concluded that the very exception now in dispute refers to this Board's Overpayment refund jurisdiction. *TIN, Inc. v. Washington Parish Sheriff's Office, et al* 12-2015, p. 7 (La. 3/19/13), 112 So.3d 197, 202 (“instances where such appeal lie’ refers to La. R.S.47:1625.”)

Exception of Lack of Subject Matter Jurisdiction

The Supreme Court has recognized that “the Board acts as a trial court in findings of fact and applying the law.” *St. Martin v. State*, 09-935, p. 6 (La. 12/1/09) 25 So.3d 736, 740. The Supreme Court has also concluded that “jurisdiction to resolve tax related disputes is constitutionally and statutorily granted to the Board which is authorized to heard and decide disputes and render judgments.” *Id.* at p. 8, 25 So.3d at 741.

La. R.S. 47:1407(1) gives the Board jurisdiction to hear “All matters relating to appeals for the determination of overpayments [refunds].” The current Taxpayer appeals for a redetermination of the Secretary’s denial of its refund. This action is certainly within the scope of the Board’s jurisdiction. *See e.g.* La. R.S. 47:1431 and 1625.

The only basis for the Secretary’s exception is based on R.S. 47:1621(F), which states:

F. This Section shall not be construed to authorize any refund of tax overpaid through a mistake of law arising from the misinterpretation by the secretary of the provisions of any law or of the rules and regulations promulgated thereunder. In the event a taxpayer believes that the secretary has misinterpreted the law or promulgated rules and regulations contrary therewith, **his remedy is** by payment under protest and suit to recover, or by **appeal to the board of tax appeals in instances where such appeals lie.** (Emphasis supplied)

The inquiry in the present case is the meaning of the last sentence, the meaning of the exception for “appeal to the board of tax appeals in instances where such appeals lie.”

The Secretary has argued that the sentence in question concerning “appeal to the Board” only refers to “claims against the state” under La. R.S. 47:1481. They have argued that it could not refer to an appeal to the Board of an Overpayment Refund denial under La. R.S. 47:1625. However, all matters under R.S. 47:1481 are “claims” not “appeals,”¹⁰ and the Legislature chose to use the word “appeal.”

As mentioned previously, the Louisiana Supreme Court has also advised that the “instances where such appeals lie” means the appeals to the Board pursuant to the Overpayment Refund procedure--La. R.S. 47:1625. *TIN, Inc.* 112 So.3d at 202.

The Board agrees that the logical construction of R.S. 47:1621(F) allows taxpayer appeals to the Board under R.S. 47:1625.¹¹

For the foregoing reasons the Board rules that the Secretary’s Exception of Lack of Subject Matter Jurisdiction is overruled.

Exception of No Right of Action

An exception of no right of action is a threshold procedural device used to terminate a suit brought by a person who has no legally

¹⁰ As discussed on page 2 hereinabove, *Jazz Casino Co., L.L.C, supra*, recognizes that there are three distinct and concurrent alternative remedies available to taxpayers who have paid an illegal tax.

¹¹ Our Courts have recognized that La. R.S. 47:1481 “was intended to give the Board of Tax Appeals the authority to grant claims for taxes erroneously paid to the state, when principles of justice and equity so require, **even though a refund might not otherwise be permitted by law.**” *Sperry Rand Corp. v. Collector of Revenue*, 376 So.2d 505, 507 (La. App. 1 Cir. 1979). Therefore, the Legislature would not need to write an exception into §1621(F) to continue to allow “claims against the state,” since they would not be restricted by that law anyway.

Any statutory construction that limits you to a §1481 remedy would render the last sentence of §1621(F) meaningless since §1481 claims would not ever be restricted by any part of §1621.

recognized right to enforce the right asserted. An exception of no right of action is a peremptory exception designed to test whether plaintiff has a real and actual interest in the action. *Joseph v. Hosp. Serv. Dist. No. 2 of Par. of St. Mary*, 2005-2364, p.4 (La. 10/15/06), 939 So.2d 1206, 1210; also stated as whether a plaintiff “has any interest in judicially enforcing the right asserted” *Falco Lime, Inc. v. Plaquemine Contracting Co., Inc.*, 95-1784 (La. App. 1st Cir. 4/4/96), 672 So.2d 356, 359).

The Board finds that this taxpayer is the only party to bring this claim, and does not find that §1621(F), when read in its entirety, serves to restrict the Taxpayer’s right of action before the Board. For the reasons explained hereinabove, this exception is also overruled.

Cross Motions for Summary Judgment

The Secretary’s Motion for Summary Judgment is focused solely on the meaning of R.S. 47:1621(F), the Secretary has conceded that the Overpayment refund is otherwise due. The Secretary’s arguments concerning legislative history and textual meaning of that Subsection have been discussed in detail above. The Secretary also argues that some jurisprudence supports the position that this type of case should be brought as a Claim Against the State.

The Board recognizes that cases like *Churchpoint Wholesale Beverage Co. Inc. v. Tarver* 614 So. 2d 697, 706(La. 1993), state that a taxpayer may obtain a refund of an illegal tax by paying under protest or by proceeding under La. R.S. 47:1481 *et seq.* This statement is based upon cases where the underlying procedural posture pointed toward those remedies.¹²

¹² Irrespective of Subsection F, the underlying refund statute (R.S. 47:1621) was narrower in the past, and has been expanded through the years, with Paragraphs (3), (8), and (9) of Subsection B added recently in Act 6 of the 2001 1st Ex. Session of the Legislature. La. R.S. 47:1621(B)(3) in particular provides a basis for certain refunds that did not exist at the time much of the prior jurisprudence was adopted.

In *Jazz Casino, supra*, the Court recently reiterated the independent importance of the Overpayment refund procedure, and the distinct nature of the relief offered therein. The Legislature expanded the scope of the refund statute in the years since the cited jurisprudence, and the cases cited did not have an underlying Board refund case. Those cases presented the issue in a different posture from the present case.

The Secretary has argued that this jurisprudence, by implication, says the last sentence of La. R.S. 47:1621(F) only allows a taxpayer a Claim Against the State under La. R.S. 47.1481. However, as discussed above, the Supreme Court recently defined this exception to La. R.S. 47:1621(F) to mean a an Overpayment Refund appeal to the Board under La. R.S. 47.1625. *TIN, supra*.

The Legislature has provided for two distinct exceptions to the refund limitation in §1621(F), the (1) payment under protest exception, and the (2) appeal to the Board of Tax Appeals exception. The Secretary should direct to the Legislature its concern to the Legislature about the policy implications of the impact of the latter exception. The Board is constrained to apply the text of the statute, and agrees with the Taxpayer that we should not effectively write the last sentence out of the law.

For the foregoing reasons, the Motion for Summary Judgment filed by the Secretary should be denied, and the Cross Motion for Summary Judgment filed by the Taxpayer should be granted.

THUS DONE AND SIGNED in Baton Rouge, Louisiana this 12th day of September, 2017.

FOR THE BOARD:


VICE CHAIRMAN CADE R. COLE