BOARD OF TAX APPEALS
STATE OF LOUISIANA

TERRY J. AND GWENN L. BOLOTTE
PETITIONERS

VERSUS **B.T.A. DOCKET NO. 8007**

TIM BARFIELD, SECRETARY, DEPARTMENT OF REVENUE, STATE OF LOUISIANA
RESPONDENT

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JUDGMENT

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A hearing on this matter was held before the Board on January 23, 2014. Present before the Board were: Terry J. Bolotte and Gwenn L. Bolotte (Petitioners) and Christopher K. Jones and Brandea P. Averett, attorneys for the Secretary, Louisiana Department of Revenue (Secretary). At the conclusion of the hearing, the matter was taken under advisement.

The Petitioners appeal from the Secretary's denial of a claim for a refund in the amount of $3,000.00 reported on the Petitioners' amended 2011 individual income tax return.

The Petitioners purchased a 2011 Ford in November 2011. That vehicle was capable of burning E85 fuel and is a Flex Fuel Vehicle (FFV). The Petitioners filed their 2011 individual tax return and did not claim a credit for the purchase of the vehicle. After the original 2011 return was filed, the Petitioners decided that they were entitled to a credit of $3,000.00 for the purchase of the vehicle in 2011. The amended tax return was filed with the Secretary on June 16, 2012. The Secretary denied the refund in a letter dated March 20, 2013. The Petitioners filed their petition with the Board on April 29, 2013. The Petitioners assert that they are entitled to a credit pursuant to the provisions of R. S. 47:6035.

Act No. 469, Sec. 1, effective July 9, 2009, was written into law by the Louisiana Legislature. It became Section 6035 of Title 47 of the Louisiana Revised Statutes.

The intent of the law was written into the statute itself:

> ".....to provide an incentive to persons or corporations to invest in qualified clean-burning motor vehicle fuel property."

Apparently no controversy arose concerning the Act until 2012. Prior to April 2012, claims for refunds were made and exemptions claimed under the terms of the Act were granted and recognized by the Department of Revenue.

On April 30, 2012, the Secretary of the Louisiana State Department of Revenue promulgated a "Declaration of Emergency".

The Secretary stated in the Declaration that the number of income tax returns filed claiming the alternative fuel tax credit under the Act had "rapidly increased". She noted that the number of questions and concerns about the application of the Act necessitated emergency action ".....to clarify the existing statute and to

provide guidance as to the availability and proper qualification criteria necessary to claim the credit on income tax returns....."

The Declaration provided that the".....credit is also available when a taxpayer purchases a vehicle that its original and only use is to operate on an alternative fuel."

To the Declaration, she attached a list of vehicles which meet or exceed federal clean air standards, and the Declaration provided a "rebuttable presumption" that the vehicles on the list meet the criteria and specifications listed in Act 469 B. (1). (Petitioners' vehicle is on the list.)

As of April 30, 2012, the Department of Revenue believed the Petitioners' vehicle qualified. (Had the Petitioners filed before June 14, 2012, the credit would have been granted by the Department.)

The lists include vehicles that use E85 fuel. E85 fuel is generally a mixture of 85% ethanol and 15% gasoline, although the mixture may vary a few percentage points depending on climates in various parts of the country.

Taxpayers who had already purchased vehicles listed, and those who purchased vehicles listed after the April 30, 2012, Declaration continued to file for the tax credit. The Department of Revenue continued to grant the alternative fuel tax credit.

On June 14, 2012, the newly appointed Secretary of the Revenue Department voided the Ruling as not having been properly procedurally enacted.

On June 19, 2012, the Department of Revenue issued a statement that all requests for the tax credit postmarked on or before June 14, 2012, would be honored and allowed.

Requests for the credit continued to be filed.

Petitioners filed on June 16, 2012, two days after the deadline, and the application for credit was denied by the Revenue Department.

On December 20, 2012, the Revenue Department promulgated another Revenue Ruling: "Alternative Fuel Credit" (LAC 61:I.1913).

It must be noted that between July 9, 2009, and December 20, 2012, no Revenue Ruling existed; only the statute existed to govern the application of the law in this case.

The stated purpose of the December Ruling was to provide guidance ".....for taxpayers who purchase qualified clean-burning motor vehicle fuel property."

The Ruling further states:

> "This Rule.....provides information necessary to determine that certain types of alternative fuel vehicles are not eligible under the provisions of the statute to be treated as 'qualified clean-burning motor vehicle fuel property' because the vehicles have only a single fuel storage and delivery system and retain the capability to be propelled by petroleum gasoline or petroleum diesel."

This new Ruling makes clear that to be qualified for the credit, the vehicle, if capable of operating on gasoline, even if capable of operation on an alternative fuel as listed, must have a ".....separate fuel storage and delivery system for the alternative fuel that is capable of using only the alternative fuel."

Does the Revenue Ruling described above conflict with R. S. 47:6035?

Reading R. S. 47:6035, one will not find any language which requires a vehicle to be equipped with separate fuel tanks and/or separate fuel delivery systems for ethanol and gasoline before the vehicle would qualify for the Alternative Fuel Tax Credit. Therefore, the Ruling may be considered invalid as conflicting with the Statute by placing a significant requirement on taxpayers which is not in the Statute, thereby making the Statute substantially more restrictive than it was when enacted.

The testimony of the Revenue Department's witness qualified, as an expert in the field of Alternative Fuel Technology, is that vehicles operate on either pure gasoline, gasoline containing 10% or 15% ethanol, or E85, which is 15% gasoline and 85% ethanol. He testified 100% ethanol is not available because persons could safely drink it as a substitute for alcoholic beverages. All ethanol contains at least 2% to 5% gasoline to prevent this.

Because there is no pure ethanol sold, one must reasonably assume that the Legislature used the word "ethanol" in the statute to mean ethanol (85% ethanol and 15% gasoline) used to operate vehicles because that is the subject of the law, namely the operation of clean burning vehicles to reduce emissions. R. S. 47:6035 B (1). No vehicles operate on 100% ethanol.

Further, in common usage, when the word "gasoline" is used, by consumers and vendors, it means 85% gasoline with 15% ethanol added; but when the word "ethanol" is used by consumers and vendors, it means 85% ethanol with 15% gasoline added. The Legislators knew what they meant when they included "ethanol" in the statute.

The ethanol, according to testimony, used in the Petitions' vehicle, a 2011 Ford F150 Flex Fuel vehicle, is E85.

The State's expert also testified that ethanol, (E85) use in vehicles ".....results in emissions of oxides of nitrogen,.....carbon monoxide.....which are comparably lower than emissions from gasoline or diesel..." Note that the list of emissions is disjunctive. (The voluminous exhibits also contain statements that ethanol emits reduced levels of carbon dioxide and harmful toxins such as benzene.)

Although the State's expert testified that he believed that, on balance, the 'other' emissions from ethanol may somehow cancel out the reduction of the oxides of nitrogen and carbon monoxide, he had no scientific basis for this opinion except his own opinion, and he admitted his opinion conflicted with a widely recognized study to the contrary.

The State's expert testified that E85 "meets or exceeds federal clean air standards." He also testified that the phrase quoted herein refers to the vehicle and not the fuel. He stated, "It is a disconnect in the Statute." (The vehicle in this case is listed in the federal standards as a vehicle meeting those standards.) Even if one concludes

that the phrase refers to the fuel used, it is clear that E85 meets those standards because the EPA allows its sale and use. The Legislature promotes the use of "ethanol", and it may reasonably be read to mean a mixture of 85% ethanol and 15% gasoline for the reasons stated. It can be assumed that the Legislature would not promote the use of fuel not approved by the EPA.

The State's expert testified that the Petitioners' vehicle meets the Federal Clean Air Standards, explaining that it could not be sold if it did not.

Not all persons claiming the credit did so because of the Legislature's incentive. But that is not a requirement of the statute.

R. S. 47:6035 B. (3) provides:

> "Qualified clean-burning motor vehicle fuel property" shall mean equipment necessary for a motor vehicle to operate on an alternative fuel and shall not include equipment necessary for operation of a motor vehicle on gasoline or diesel."

The Department argues that this sub-section means any vehicle capable of using both gasoline, pure or 85%-15% ethanol, does not meet the definition of a "qualified clean-burning motor vehicle fuel property."

This sub-section obviously refers back to Sections (2) (a), (b), and (c) which provide a definition for the cost of manufacture of alternative fuel burning systems or conversions thereto, and facilities to provide the fuel to customers filling their tanks, commonly referred to as "gasoline stations".

Section B. (3) makes it clear that nothing concerning the gasoline burning features of the dual fuel burning vehicles, or the fueling stations related to gasoline sales may be included in the "cost" computations. The Department seems to rely on this section to argue that two separated fuel tanks and delivery systems must be in the vehicle and/or the capability to also use gasoline for fuel eliminates flex fuel vehicles from consideration. However, there is no such requirement in the relevant statute.

Section B. (3) limits the phrase ".....qualified clean-burning motor vehicle fuel property...." as used in Section B. (2) by excluding "Cost" of ".....equipment necessary for operation of a motor vehicle on gasoline or diesel." Stated another way, no credit for the cost of parts in the vehicle that allow it to use "gasoline" for fuel.

It is noteworthy that the expert used by the state testified that the only way for the vehicle at issue to run at all, was to have special equipment that was modified chemically to tolerate the corrosive effects of ethanol; whereas, had the vehicle at issue merely been a vehicle that ran off of gasoline alone, such chemical modifications would not have occurred. Even though there was no "additional" equipment in the vehicle to allow it to run on ethanol, many of the parts in the vehicle had to be altered at the manufacturer level to accommodate the use of ethanol, and not to accommodate the use of gasoline. In the instant vehicle, the same parts are used, but they are modified. But for the special equipment, the vehicle at issue could not run on ethanol. The cost of that equipment that enables it to run on ethanol qualifies the vehicle for the credit. Of course, under Section D, if the taxpayer elects not to determine the exact cost attributable to the special equipment that enables the vehicle to run on

ethanol, then the taxpayer may claim a credit "equal to ten percent of the cost of the motor vehicle or three thousand dollars, whichever is less". Here, the taxpayer is seeking $3,000.00.

If determining the intent of the Legislature is the crux of the matter, it is logically valid to find that had the Legislature intended to eliminate flex fuel vehicles in 2009, (such vehicles existed then), it would have used the explicit and exact wording it used in the 2013 amendment. (Senator Claitor's Senate Bill 256 which was enacted into law.) Or it could have used the language of the Ruling of December 20, 2013.

One may argue that in seeking the proper interpretation of a statute one must determine what was in the minds of the Legislators; but are not the "written words" of the Legislators the most valid indicators of what was in their minds?

Senate Bill 256 put into the statutory law of this State the same Ruling made by the Revenue Department promulgated on December 20, 2012. Why was this action required if the 2009 Statute required that interpretation? The 2009 Statute did not; that is why the Legislature acted in 2013. Possibly the Department of Revenue on December 12, 2012, and the Legislature in 2013, became concerned with "protection of the state's coffers" as the Department's attorneys argue in the Pre-Hearing Brief.

The Board does not believe that the Legislature may take away the substantive property rights of Petitioners to which they were entitled upon the filing of the amended 2011 return in 2012, by the Department arguing that the new law is retroactive.

"Protection of the state's coffers....." as argued on p. 23 of the Department's Pre-Hearing Brief should not be used as a "rational basis" for depriving the Petitioners of a substantive right previously acquired.

Ruling favorably for Petitioners will not automatically result in favorable rulings in all pending cases. That outcome will be controlled by rulings on the various exceptions the Secretary has filed in each case and whether the Petitioners in those cases carry the burden of proof the statute requires. The Board will decide on a case by case basis.

The vehicle in the case before the Board is capable of consuming gasoline, pure or 85% gasoline-15% ethanol, or a blend of 15% gasoline and 85% ethanol, E85, and therefore is eligible for the Alternative Fuel Tax Credit. There is no requirement of separate fuel storage and delivery systems in the Statute. Further, because there is no such product on the market as "pure ethanol", one cannot reasonable conclude that the Legislature's original intent in enacting R. S. 47:6035 was to require "pure ethanol" to be burned in a vehicle whether the vehicle had a separate fuel tank and separate delivery system or not. Even if the vehicle had separate systems, it would not be using pure ethanol, but 85% ethanol at best.

A reasonable interpretation of the statute, the evidence, and testimony in the case is sufficient justification for a finding by the Board that the Petitioners are entitled to the Alternative Fuel Tax Credit Petitioners seek under law.

The Revenue Department is ordered to issue the tax credit provided by statute to the Petitioners who purchased as 2011 Ford F150 Flex Fuel Vehicle on November 28, 2011, and properly filed an amended 2011 Louisiana State Income Tax Return timely.

Baton Rouge, Louisiana, this 14 day of May, 2014.

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

Board Member Cade Cole dissents with written reasons to be published.

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WRITTEN REASONS
DISSENTING
FROM THE BOARD'S JUDGMENT

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Vice-Chairman Cole, dissenting, assigns written reasons.

The Taxpayers appeal from the Secretary's denial of a claim for a refund in the amount of $3,000.00 reported on the Taxpayers' amended 2011 individual income tax return. This Board has in excess of 600 pending similar cases. This and the other cases deal with Flexible Fuel Vehicles (FFV), and FFV's entitlement to the Alternative Fuel Vehicle tax credit (La. R.S. 47:6035).

In *Harrah's Bossier City Inv. Co., LLC v. Bridges*, the Supreme Court recently restated the long-standing rule that:

> Tax exemptions are strictly construed in favor of the State and "must be clearly and unequivocally and affirmatively established" by the taxpayer

41 So.3d 438, 446, (La. 5/11/10). However, irrespective of whether it is termed an exemption, deduction or credit, when the taxpayer is relieved of a tax burden otherwise imposed, the provision must be interpreted in favor of the State. *Ethyl Corp. v. Collector of Revenue*, 351 So.2d 1290, 1293 (La. App. 1 Cir. 1977), *writ denied*, 353 So.2d 1035 (La.1978).

Thus, when a tax credit is claimed "the taxpayer must clearly demonstrate that they are entitled to tax relief." *Crawford v. Duhon*, 799 So.2d 1273, 1277 (La. App. 4 Cir. 11/07/01).

Tax credits or other exemptions from taxation are "strictly construed against the person claiming the exemption, and <u>any plausible doubt is fatal</u>, and that an exemption being an exceptional privilege, it must be clearly, unequivocally and affirmatively established." *Ethyl Corporation v. Collector of Revenue,* 351 So.2d 1290 (La. App. 1 Cir. 1977). *See also, Sherwood Forest Country Club v. Litchfield,* 2008-0194 (La. 12/19/08), 998 So.2d 56 (tax exemption "must be unequivocally and affirmatively established by the taxpayer."). The

taxpayers' "stringent burden is to overcome the judicial maxim that `to doubt is to deny the exemption'." *Sherwood, Id.* at 61.

The Taxpayers purchased a 2011 Ford truck in November 2011. That vehicle is a FFV capable of burning E85 fuel.[1] The Taxpayers filed their 2011 individual tax return and did not claim a credit for the purchase of the vehicle. After the original 2011 return was filed, the Taxpayers came to believe that they were entitled to a credit of $3,000.00 for the purchase of the vehicle in 2011. The amended tax return was filed with the Secretary on June 16, 2012. The Secretary denied the refund in a letter dated March 20, 2013. The Taxpayers filed their petition with the Board on April 29, 2013.

The current form of the statute under consideration, La. R.S. 47:6035, was adopted in 2009. That statute modified earlier law and provided a credit to individuals and corporations for qualified vehicles in accordance with those provisions (Acts 1060 of 1991 and 169 of 1992).

The 2009 statute was not considered as providing a basis for FFVs to receive the credit until 2012. On April 30, 2012 the then Secretary of the Department of Revenue promulgated an "Emergency Rule" related to the credit provided by R.S. 47:6035. On June 14, 2012, the Governor rescinded the "Emergency Rule" because it had not been properly promulgated and because there were legal questions about the scope of La. R.S. 47:6035. Pursuant to La. R.S. 49:953(B)(4)(b) and (c), that rule then immediately became "nullified...and without effect."

The question before the Board is whether the Taxpayers' vehicle, a FFV, is a vehicle that is entitled to the credit provided in La. R.S. 47:6035.

R.S. 47:6035(A) recites the intention of the statute and states in part:

> "A. The intent of this Section is to provide an incentive to persons or corporations to invest in **qualified clean-burning motor vehicle fuel property**..." (emphasis supplied)

La. R.S. 47:6035(B) (2) states in part:

> "Cost of qualified clean-burning motor vehicle fuel property" shall mean any of the following:
>
> ...(b) The cost to the owner of a new vehicle purchased at retail originally equipped to be propelled by an alternative fuel for the cost of that portion of the motor vehicle which is attributable to the storage of the alternative fuel, the delivery of the alternative fuel to the engine of the motor vehicle, and the exhaust of gases from the combustion of the alternative fuel provided the vehicle is registered in this state."(emphasis supplied)

[1] The petitioners' advised that their vehicle had never been run on E85; they had only run it on gasoline. The Secretary's expert testified that E85 was only available at three stations in the entire state.

Importantly, La. R.S. 47:6035(B)(3) defines "qualified clean-burning motor vehicle fuel property" and states:

> "(3) 'Qualified clean-burning motor vehicle fuel property' shall mean equipment necessary for a motor vehicle to operate on an alternative fuel **and shall not include equipment necessary for operation of a motor vehicle on gasoline or diesel."** (emphasis supplied)

To qualify under the terms of the statute, 'Qualified clean-burning motor vehicle fuel property' means equipment that is necessary to operate the motor vehicle and which equipment is **not** needed when a vehicle runs on gasoline or that runs on diesel. Therefore, if a vehicle uses all the same equipment to also operate on gasoline or diesel and another fuel, then that equipment is not qualified clean burning motor vehicle fuel property and it cannot qualify for the Alternative Fuel Tax Credit.

The Secretary's expert testified that there was no "Qualified clean-burning motor fuel property" as contemplated by R.S. 47:6035 (B) (2) or (3) on the Taxpayers' vehicle nor was there any such equipment in any FFV.

The Taxpayers called no expert, but were given the opportunity to allege what qualified clean-burning motor fuel property was present in their vehicle. They stated, but did not offer proof, that their vehicle had a sensor to determine whether or not it was running on E85 or gasoline. The state's expert testified that this sensor was actually the oxygen sensor, and that the vehicle would not run at all without this sensor. Assuming *arguendo* that E85 is an alternative fuel, the claimed property is also needed to run the vehicle on gasoline, and therefore cannot qualify as "qualified clean-burning motor fuel property" under the law.

The vehicle does not qualify for the tax credit because there is no evidence that their vehicle contained qualified clean-burning motor vehicle property as contemplated in La. R. S. 47:6035(B)(3) (the "Qualified Property").

Statutory Definition of "qualified clean-burning motor vehicle property"

The majority of the Board (Chairman Graphia and Board Member Reitzell) err in their construction of R.S. 47:6035(B)(3). The dual fuel tank issue is a red-herring. The 2009 statute did not explicitly require two fuel tanks, but it did require distinct Qualified Property.[2] There is

[2] Subsection B is a list of definitions, paragraph (1) defines Alternative Fuel, paragraph (2) has multiple subparagraphs and defines the qualified Costs, and paragraph (3) defines Qualified Property. The majority incorrectly believes that the definition of Qualified Property in Paragraph (3) is merely used in determining what is a part of the Cost in Paragraph (2). In my view, if Qualified Property was merely a component of the definition of Cost then it would have been an additional subparagraph under Paragraph (2) dealing with Cost. The fact that the Legislature

no dispute that all property in this FFV is also required for the vehicle to burn on gasoline, therefore there is no distinct Qualified Property.

On the issue of cost, the majority relies on the fact that some of the parts in a FFV have a lining to better enable them to work with alternative fuels. However, there is no dispute that there was no cost for these items.[3] It belies common sense to find that the Legislature has given a $3,000.00 credit for no reason. We know that the stated intent of the law is to "provide an incentive to persons or corporations to invest in qualified clean-burning motor vehicle fuel property." R.S. 47:6035(A). Therefore, a construction of the statute that gives a credit for no such investment contravenes the statute's expressed intent.

The majority has gone out of its way to construe 47:6035(B)(3) in order to give wide effect to the credit. However, it is clear that the Legislature never intended for this credit to have a wide effect. The fiscal note to HB 110 of 2009 was before the Legislature as it considered the definition in Subsection (B)(3). It advised that the bill would have a cost of $164,000 per year (equivalent to approximately 55 vehicles in the entire state). The majority's construction would open up the credit to many tens of thousands (perhaps hundreds of thousands) of vehicles, in contravention of this indicia of legislative intent.

Most importantly, the majority errs by construing the statute in favor of the taxpayer. The ambiguity in the receipt of a tax credit must be strictly construed against the taxpayer.

The action of the Legislature in 2013 to further clarify this issue cannot be harmful to the Secretary. The burden was never on the Secretary to show that the law affirmatively denied the credit (as it does now). The applicable jurisprudence instead requires the taxpayer to meet a high burden in proving their entitlement to the credit under the 2009 law. The taxpayer bears the burden to "clearly, unequivocally and affirmatively" establish their entitlement to the credit by

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made Qualified Property into its own paragraph shows that it is a definition that has independent meaning apart from being a part of the definition of cost of the Qualified Property.

[3] **JONES**: Can you, um, tell me that these documents for these three vehicles, uh, attribute to any costs to the fact that these vehicles are flex fuel vehicles?
EXPERT: Uh no, I see no value assessed as far as an incremental cost.
JONES: In fact, I think, believe flex fuel capability line item indicates that value is 0.00, is that accurate?
EXPERT: Yes
JONES: Does that, um, does these documents support your conclusion that, um, flex fuel capability of flex fuel vehicles has no attributable value?
EXPERT: Yeah, that, uh, my opinion as well as it's been published. Uh, The Department of Energy even indicates there is no incremental cost.
JONES: I ask to offer and file into, introduce into evidence Bolotte 8007 Exhibit E.

proving every element required in the statute, including the fact that their vehicle contained Qualified Property. The 2013 Act did not change the prior law, it merely added a clarifying provision. In any event, the 2013 Act and the LDR regulation do not control my decision. I rely solely upon the text of the statute as enacted in 2009, and the taxpayers' have failed to meet their burden under that Act.

The tax credit is for investment in qualified clean-burning motor vehicle property and these taxpayers have failed to prove that their vehicle contained such property. Therefore, they are not entitled to this credit.

E85 as an Alternative Fuel

I dissent from this portion of the Board's opinion only because I believe the lack of Qualified Property pretermits us from reaching the issue of whether E85 comparably reduces emissions sufficient to qualify as an alternative fuel.[4]

Conclusion

The fact that an erroneous regulation was improperly promulgated after the taxpayers had already purchased their vehicle does not change the law. The fact that some other taxpayers may have been erroneously paid a refund does not change the law. The board is constrained to follow the law enacted by the Legislature. A clear reading of the 2009 law together with the facts of this case show that the taxpayer is not entitled to the claimed credit. The fact that a subsequent enactment further clarified the law does not upset this conclusion.

The majority has acted to expand a tax credit beyond the letter of the law and the intent of the Legislature in direct contravention of the clear jurisprudential rules on the construction of a law granting a tax credit.

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[4] Although the evidence may establish that E85 is an alternative fuel because it comparably reduces emissions, I disagree with the finding that E85 is a presumptive alternative fuel as "ethanol." Ethanol actually exists as a chemical compound, and the fact that it is not routinely sold does not change the fact that ethanol and E85 are not the same. The argument that the "ethanol" commonly available (at 3 locations in the state) is E85 is not persuasive, that portion of the statute dates from Act 1060 of 1991 and E85 was not available in the state at that time. In my view, each taxpayer would bear the burden of showing that E85 comparably reduces emissions as required by the law. I do not find that E85 is presumptively an alternative fuel.

I would deny the taxpayers' refund, and I dissent from the Board's judgment in this matter.

Baton Rouge, Louisiana, this 14th day of May, 2014.

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