

**BOARD OF TAX APPEALS
STATE OF LOUISIANA**

FERGUSON ENTERPRISES, LLC,
Petitioner

VS.

DOCKET NO. 13416C

DEPARTMENT OF REVENUE,
Respondent

JUDGMENT AND REASONS

On March 9, 2023, this matter came before the Board for hearing on the Exceptions of Prescription and Lack of Subject Matter Jurisdiction filed by the Department of Revenue (“Department”). Presiding at the hearing were Francis J. “Jay” Lobrano, Chairman, Vice-Chairman Cade R. Cole, and Judge Lisa Woodruff-White (Ret.). Present before the Board were Miranda Scroggins, attorney for the Department, and James McNiff, appearing by phone on behalf of Ferguson Enterprises, LLC, (the “Taxpayer”). At the conclusion of the hearing, the Board took the matter under advisement. The Board now issues Judgment in accordance with the attached Reasons:

IT IS ORDERED, ADJUDGED, AND DECREED that the Department’s Exception of Prescription be and is hereby SUSTAINED.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that there be Judgment in favor of the Department and against the Taxpayer that the Petition be and is hereby DISMISSED.

JUDGMENT RENDERED AND SIGNED at Baton Rouge, Louisiana,
this 17th day of August, 2023.

FOR THE BOARD:



Francis J. “Jay” Lobrano, Chairman
Louisiana Board of Tax Appeals

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REASONS FOR JUDGMENT

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Background:

The Taxpayer seeks a redetermination of the Department’s denial of Refund Claims for Corporate Income and Franchise Tax (“Refund Claims”) for the Tax Year ended July 31, 2018. The Department responds by raising Exceptions of Prescription and Lack of Subject Matter Jurisdiction based on the Taxpayer’s failure to file the Petition within the 60 day prescriptive period set forth in R.S. 47:1625(A).

The Department denied Taxpayer’s Refund Claims by Notice dated July 26, 2022. Taxpayer’s Petition shows a “FILED” stamp date of October 10, 2022, which was 76 days after the date that the Notice was issued. The envelope that the Petition was mailed in shows a postmark date of October 4, 2022, which was 70 days after the Notice was issued. The 60th calendar day after the Notice was issued was September

25, 2022. That day was a Sunday, so the last day to file the Petition was September 26, 2022.

It appears from the Board's own search of its records that the Board received a copy of the Petition by fax on September 26, 2022. Although there were at least two attempts by the Board to transmit fax receipt confirmation, both failed. Both attempts returned the error message "BUSY/NO RESPONSE." Despite the inability to transmit the confirmation, however, the Board received the original Petition, payment of the applicable fees, and the required copies on October 10, 2022, which was ten days, exclusive of legal holidays, after receipt of the fax.

Discussion:

La. R.S. 47:1625(A) provides:

(1) If the collector fails to act on a properly filed claim for refund or credit within one year from the date received by him or if the collector denies the claim in whole or in part, the taxpayer claiming such refund or credit may appeal to the Board of Tax Appeals for a hearing on the claim filed. No appeal may be filed before the expiration of one year from the date of filing such claim unless the collector renders a decision thereon within that time, nor after the expiration of sixty days from the date of mailing by registered mail by the collector to the taxpayer of a notice of the disallowance of the part of the claim to which such appeal relates.

(2) A taxpayer's proper appeal to the Board of Tax Appeals within sixty days from the date on any notice of disallowance issued shall also establish that the appeal was filed within sixty days from the date of certified or registered mailing of the notice.

As recited above, the last day to timely file the Petition was September 26, 2022.

Thus, the Petition is prescribed unless it is deemed to have been filed on the date that the fax was received.

The Board's fax filing rule is found in LAC 69:I.303, informally numbered as Board Rule 3.1. The rule states:

A. The board will accept pleadings (not exhibits for trial) by facsimile only as provided for herein.

B. Within seven days, exclusive of legal holidays, after the board has received the facsimile transmission, the board must receive all of the following from the party filing by facsimile:

1. the original signed documents that were fax filed, together with the required six conformed copies;

2. the applicable filing fee, if any, under § 329;
3. a fax transmission fee of \$5 per page faxed.

C. If the party complies with all of the requirements of this Rule, the filing shall be deemed complete at the time that the facsimile transmission is received by the board, but if the party fails to comply with all of these requirements then the facsimile filing shall have no force or effect.

The original Petition was received 10 days after receipt of the fax. However, the postmark on the original Petition envelope shows a mailing date within seven days, exclusive of legal holidays, from receipt of the fax. Only if the postmark date is treated as the date that the Board “received” the required documents and payment can the Taxpayer be said to have complied with the Board’s fax filing rule

The Board takes guidance from decisions interpreting the similar fax filing rule applicable to district courts. That rule is found in La. R.S. 13:850. La. R.S. 13:850(B) and (C) provide:

B. Within seven days, exclusive of legal holidays, after the clerk of court receives the facsimile filing, all of the following shall be delivered to the clerk of court:

(1) The original document identical to the facsimile filing in number of pages and in content of each page including any attachments, exhibits, and orders. A document not identical to the facsimile filing or which includes pages not included in the facsimile filing shall not be considered the original document.

(2) The fees for the facsimile filing and filing of the original document stated on the confirmation of receipt, if any.

(3) A transmission fee of five dollars.

C. If the filing party fails to comply with any of the requirements of Subsection B of this Section, the facsimile filing shall have no force or effect. The various district courts may provide by court rule for other matters related to filings by facsimile transmission.

The key word in La. R.S. 13:850 is “delivered.” The Louisiana Supreme Court interpreted this term in *Petit-Blanc v. Charles*, 2021-00094 (La. 4/20/21), 313 So.3d 1245. In *Petit-Blanc*, the plaintiff alleged that she had mailed her petition within the seven days allowed, but could not prove receipt by the clerk within that time. The Court noted that the wording of an earlier version of the statute did not require “delivery” or “receipt.” However, the Court also recognized that the legislature had

deliberately changed the law by substituting the word “delivered.” To ascertain the effect of the change, the Court looked to the dictionary definition of “delivery,” stating:

Black’s Law Dictionary (6th Ed. 1990) defines “delivery” as “[t]he act by which the res or substance thereof is placed within the actual or constructive possession or control of another.” Citing this definition, the court of appeal in *Clark v. Wal-Mart Stores, Inc.*, 18-0052 (La. App. 5 Cir. 10/31/18), 259 So.3d 516, held a petition was “delivered” to the clerk of court when a clerk’s office employee signed a green card for plaintiff’s certified mail.

Id., 2021-00094, p. 3-4, 313 So.3d at 1247. The Court accordingly held that “merely transmitting an original document within the deadline is insufficient,” and equated the new statutory language with actual or constructive possession.

In *Thurman v. Aguilar*, 2021-1513, p. 15 (La. App. 1 Cir. 6/22/22), 343 So.3d 806, 819, the First Circuit used the terms “received” and “delivered” interchangeably when examining *Petit-Blanc*, stating that the “clerk of court did not receive the original petition and filing fees until November 25, 2019, outside the seven day deadline.” *Id.* Additionally, and although not controlling in this case, the Board notes that the term “received” is defined, in part, in Civil Code Article 1938 as the time when an item “comes into the possession of the addressee or of a person authorized by him to receive it” Thus, the term “received,” like “delivered,” generally requires actual or constructive possession. Merely placing the required documents in the mail is insufficient.

Finally, while the Board always attempts to remind parties of their fee obligations in a confirmation, the rule is clear and Taxpayer’s waiting does not excuse compliance with the fax filing rule. La. R.S. 13:850 does “not require that the clerk of court transmit receipt of the fax-filing within a certain time.” *Taylor v. Bayou Fabricators*, 2009-0317, p. 5 (La. App. 1 Cir. 9/11/09), 22 So.3d 186, 188. Rather, the purpose of transmitting confirmation of receipt of the fax is to serve as “an acknowledgment and proof of the time of the fax filing.” *Id.*, 2009-0317 at p.5, 22 So.3d at 189.

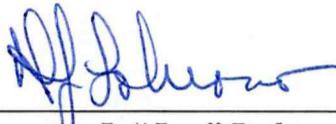
In conclusion, the original Petition was not received within seven business days of receipt of the fax as required by LAC 69:I.303. Therefore, the faxed copy of

the petition is of no effect. Without the fax submission date, the appeal is untimely.

The Petition is prescribed and must be dismissed.

Baton Rouge, Louisiana, this 17th day of August, 2023.

FOR THE BOARD:



**Francis J. "Jay" Lobrano, Chairman
Louisiana Board of Tax Appeals**