

BOARD OF TAX APPEALS  
STATE OF LOUISIANA

SARAH GROSS,  
INDIVIDUALLY, AND ON BEHALF OF  
ALL OTHERS SIMILARLY SITUATED

VERSUS

DOCKET NO. 13677D

KEVIN RICHARD, SECRETARY,  
LOUISIANA DEPARTMENT OF  
REVENUE

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JUDGMENT WITH REASONS  
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On March 14, 2024, this matter came before the Board for hearing on the Exceptions of Prescription, Mootness, Lack of Subject Matter Jurisdiction, No Cause of Action, No Right of Action, Lack of Procedural Capacity, and *Lis Pendens* filed by Richard Nelson, Secretary of the Louisiana Department of Revenue (“Department”).<sup>1</sup> Presiding at the hearing were Chairman Francis J. “Jay” Lobrano, Vice-Chairman Cade R. Cole, and Judge Lisa Woodruff-White (Ret.). Present before the Board were Lawrence R. Centola, attorney for Sarah Gross, Individually, and on Behalf of All Others Similarly Situated (collectively, “Gross”), and Christopher R. Jones, attorney for the Department. At the conclusion of the hearing, the Board took the matter under advisement. In accordance with the attached Written Reasons, the Board now rules as follows:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Exception of Lack of Subject Matter Jurisdiction BE AND IS HEREBY OVERRULED.

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<sup>1</sup> When the original Petition was filed, the Secretary of the Department was Kevin Richard. The current caption of this matter is determined by the original Petition, although the parties have since begun to use the name of the current Secretary in their pleadings.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Exception of No Cause of Action is SUSTAINED, Gross is granted 30 days from this Order to amend or supplement their original Petition.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Exceptions of Prescription, Mootness, No Right of Action, Lack of Procedural Capacity, and *Lis Pendens* are deferred pending any amendment of the Petition.

This is a non-final Judgment and does not constitute an appealable Judgment as contemplated by La. R.S. 47:1410 and La. R.S. 47:1434.

JUDGMENT RENDERED AND SIGNED AT BATON ROUGE,  
LOUISIANA, THIS 2<sup>nd</sup> DAY OF MAY, 2024.

FOR THE BOARD:



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FRANCIS JAY "J." LOBRANO, CHAIRMAN  
LOUISIANA BOARD OF TAX APPEALS

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REASONS FOR JUDGMENT  
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<sup>1</sup> Presiding at the hearing were Chairman Francis J. “Jay” Lobrano, Vice-Chairman Cade R. Cole, and Judge Lisa Woodruff-White (Ret.). Present before the Board were Lawrence R. Centola, attorney for Sarah Gross, Individually and on Behalf of All Others Similarly Situated (collectively, “Gross”), and Christopher R. Jones, attorney for the Department. At the conclusion of the hearing, the Board took the matter under advisement. The Board now issues the foregoing Judgment for the following reasons.

**Background**

Gross prays that La. R.S. 47:6030, and any other post hoc limitation, restriction or requirement on Solar Energy System (“System” or “Systems”) Tax

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<sup>1</sup> When the original Petition was filed, the Secretary of the Department was Kevin Richard. The current caption of this matter is determined by the original Petition, although the parties have since begun to use the name of the current Secretary in their pleadings.

Credits (the "Credit" or the "Credits"), and the application thereof to Gross, to be declared unconstitutional as violations of: Article I, Section 10, Clause 1 (the "Contract Clause") of the United States Constitution; the Fourteenth Amendment to the United States Constitution; and Article I, Section 23 of the Louisiana Constitution.

In addition, Gross prays for consequential damages suffered due to the delayed payment of the Credit because of the State's retroactive application of La. R.S. 47:6030, as amended by 2015 Act 131. Gross alleges that her claims for damages arise in tort and in contract. Gross specifically alleges that withholding the Credit for what amounted to an indefinite period of time constituted the tort of conversion and simple negligence. In addition, Gross claims that by fulfilling of all of the requirements to qualify for the Credit prior to June 19, 2015, they acquired a vested property right to the Credit.

Gross' allegations are primarily concerned with the annual Credit caps imposed by Act 131.<sup>2</sup> Before Act 131 took effect, Louisiana law permitted the Department to issue Credits based on the cost of Systems installed at Louisiana residences. Because the Credits are refundable, Gross maintains that they are in the nature of a government incentive payment or grant. Allegedly, in reliance on said incentive, Gross and similarly situated putative class members contracted with solar panel companies to purchase and install Systems at their residences. The Systems were allegedly installed and placed in service before June 19, 2015.

Act 131 capped the available Credits for the fiscal year 2015-2016 at \$10,000,000.00. Available Credits were to be awarded on a first-come, first-serve basis. According to Gross, on January 6, 2016, the Department announced that the

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<sup>2</sup> Additionally, Act 131 allowed the Department to retroactively withhold payment of the Credit if there were any state or federal liens, pending charges or investigations, or third party claims against the taxpayer or any of its affiliates or related parties. Gross contends that this too was a substantive amendment that potentially modified a taxpayer's vested property right to the Credit.

first day to submit claims for the Credit for the 2015 Tax Year would be January 19, 2016. Gross, individually, submitted her claim on February 8, 2016. On July 1, 2016, the Department issued a press release noting that the claims received through that date had exceeded the statutory cap on available funds. On July 18, 2016, Gross received a Notice that her claim had been received after the cap had been reached for both the 2015-2016 and 2016-2017 fiscal years (the “Deferral Notice”). The Deferral Notice did not state that her claim was being disallowed, only that it was being delayed. On August 25, 2016, the Department issued a second Notice to Gross, verifying priority for the Credit for the fiscal year 2017-2108 and stating that any resulting refund would be issued between August 15, 2017, and September 30, 2017 (the “Verification Notice”). Neither the Verification Notice, nor the earlier Deferral Notice contained a notification of a right to appeal to this Board.

On September 12, 2016, Gross filed a Class Action Petition against the State, through the Department, and the Secretary<sup>3</sup> of the Department in the 19<sup>th</sup> JDC, Docket No. 651320 (the “19<sup>th</sup> JDC Suit”). In the Class Action Petition filed in the 19<sup>th</sup> JDC Suit, Gross prayed for: a declaration that retroactive application of La. R.S. 47:6030 as amended by 2015 Act 131 was unconstitutional; money damages; and for the court to order a refund of the Credit.<sup>4</sup>

Eventually, the Department issued a refund check to Gross, individually, for the Credit dated August 30, 2017, in the amount of \$12,500.00. In the 19<sup>th</sup> JDC Suit, the Department raised several Exceptions. Therein, the Department argued: that Gross lacked a right of action; her claims were premature because the Credit had not been disallowed; and that Gross had failed to appeal to this Board. The Department further argued that, to the extent that Gross alleged that the deferral of the Credit

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<sup>3</sup> At that time, the Secretary was Kimberly L. Robinson.

<sup>4</sup> Ms. Gross also prayed for: class certification of the class; appointment as class representative; legal interest from the date of demand; costs; and all other general and equitable relief deemed appropriated by the Court.

had wrongfully forced her or similarly situated class members to make any overpayments on their 2015 or 2016 returns, they were obligated to pursue either the refund overpayment or claim against the state procedures, and that the 19<sup>th</sup> JDC lacked subject matter jurisdiction over either of those procedures. In addition, the Department argued that Gross and the putative class members lacked a right of action to pursue claims for consequential damages, and that the law afforded no cause of action for said damages. On January 30, 2017, the Court rendered Judgment sustaining the Exceptions of Lack of Subject Matter Jurisdiction and Prematurity as to Gross' claim for payment of the Credit, but overruled the Exceptions as to the remaining claims. The Court's Judgment was signed on March 1, 2017. Neither party applied for supervisory writs from that decision.

The purported class members, as defined in the original Class Action Petition filed in the 19<sup>th</sup> JDC Suit were:

All persons who purchased and installed a solar electric system at a Louisiana residence in compliance with all of the requirements set forth in La. R.S. 47:6030 prior to June 19, 2015 (the "Purchase"), the effective date of the Louisiana Legislature's passage of Act 131 during the 2015 Regular Session amending La. R.S. 47:6030, who thereby obtained a vested right to a solar energy system tax credit as a result of said Purchase and who: (a) filed a tax return, otherwise complied with the tax credit application requirements set forth in La. R.S. 47:6030, and had any portion of their Purchase related tax credit(s) withheld or denied; or (b) who timely file a tax return after the filing of this petition and otherwise complied with the tax credit application requirements set forth in La. R.S. 47:6030, and who have any portion of their Purchase-related tax credit(s) withheld or denied.

On April 25, 2017, the Court certified the class. The Department then sought writs with the First Circuit. The First Circuit granted writs and reversed the class certification because Gross could not represent taxpayers whose claims for the Credit had actually been denied. *Gross v. State Through Louisiana Dep't of Revenue*, 2017-0572 (La. App. 1 Cir. 2/28/19), 273 So.3d 350 ("*Gross I*").

On March 26, 2019, the Louisiana Supreme Court issued its decision in *Ulrich v. Robinson*, 18-534 (La. 3/26/19), 282 So.3d 180. In *Ulrich*, the Court held that the Department's eventual payment of the Credits in full mooted taxpayers' appeals from

the denial of the Credits. However, the Court did not address any claims for consequential or delay damages. The Department subsequently moved for summary judgment in the 19<sup>th</sup> JDC Suit, arguing that Gross' claims were moot on the basis of *Ulrich*. However, the 19<sup>th</sup> JDC denied the Motion.

On September 23, 2021, Gross filed a renewed Motion for Class Certification in the 19<sup>th</sup> JDC Suit. Therein, Gross modified the putative class to exclude taxpayers whose claims for the Credit had been denied. The 19<sup>th</sup> JDC certified the modified class on December 5, 2022. The Department again applied for supervisory writs. This time, the First Circuit granted the Department's application and on September 15, 2023, held that the 2019 amendments to La. R.S. 47:1407 had divested the 19<sup>th</sup> JDC of jurisdiction over all matters related to state taxes and fees. *Gross v. State Through Louisiana Dep't of Revenue*, 2023-0142 (La. App. 1 Cir. 9/15/23), 376 So.3d 151, *reh'g denied* (Nov. 9, 2023) ("*Gross II*"). The Court further held that the amendments retroactively vested said jurisdiction exclusively with this Board. However, prior to the First Circuit ruling, on August 18, 2023 Gross filed the instant Class Action Petition with the Board. The Department has now responded with the Exceptions presently under consideration.

### **Subject Matter Jurisdiction**

The Department asserts that the Board lacks jurisdiction over Gross's claims for consequential damages, attorneys' fees, and costs resulting from a delay in granting the Credit. However, the Board has plenary jurisdiction over "all matters related to state or local taxes or fees." *See* La. R.S. 47:1407; La. Const. art. V, Sec. 35. Moreover, the First Circuit held that:

La. R.S. 47:1407 was amended in 2019 to vest subject matter jurisdiction with the BTA over "[a]ll matters related to state or local taxes or fees" and "petition[s] for declaratory judgment or other action[s] relating to any state or local tax or fee . . . or relating to contracts related to tax matters; and including disputes related to the constitutionality of a law ... concerning any related matter or concerning any state or local tax or fee. . . . **The amended statute herein vests exclusive subject matter jurisdiction for matters such as those brought by Ms. Gross in her class action petition with the BTA.**"

*Gross II*, 2023-0142, p. 11, 376 So.3d at 158–59 [substitutions in original] [emphasis added]. The Court’s decision on jurisdiction is precisely why *Gross* is now before the Board, instead of being before the 19<sup>th</sup> JDC. The Department’s argument that the Board lacks subject matter jurisdiction over the claims before the Board now, which are the very same claims before the Court in *Gross*, is precluded by the First Circuit’s decision.<sup>5</sup>

### **No Cause of Action**

The function of an exception of no cause of action is to test the legal sufficiency of the petition by determining whether the law affords a remedy on the facts alleged in the pleading. *Everything on Wheels Subaru, Inc. v. Subaru S., Inc.*, 616 So.2d 1234, 1235 (La.1993). No evidence may be introduced to support or controvert the objection that the petition fails to state a cause of action. La. Code Civ. Proc. art. 931. Therefore,

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<sup>5</sup> In addition, the Board has jurisdiction over:

(1) All matters relating to appeals for the redetermination of assessments, the determination of overpayments, payment under protest petitions, or other matters within its jurisdiction, as provided in R.S. 47:1431 through 1438 or other applicable law.

(2) All matters relating to the waiver of penalties, as provided in R.S. 47:1451. . . .

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(b) All other jurisdiction otherwise provided by law, including jurisdiction concerning ad valorem taxes pursuant to Subtitle III of this Title, rules to cease business, ordinary collection suits, summary tax proceedings, rules to seek uniformity of interpretation of common sales and use tax law or local sales and use tax law, as provided in R.S. 47:337.101(A)(2), and petitions concerning the validity of a collector’s rules, regulations, or private letter rulings, as provided in R.S. 47:337.102.

(4) All matters relating to claims against the state, as provided in R.S. 47:1481 through 1486.

(5) Incidental demands authorized by law in any action pending before the board in the same manner as in a district court pursuant to Code of Civil Procedure Article 1031.

(6) All matters relating to appeals of administrative hearings, assessments, and refund denials by the Louisiana Sales and Use Tax Commission for Remote Sellers.

(7) A petition for declaratory judgment or other action relating to any state or local tax or fee, concerning taxing districts and related proceeds, or relating to contracts related to tax matters; and including disputes related to the constitutionality of a law or ordinance or validity of a regulation concerning any related matter or concerning any state or local tax or fee.

La. R.S. 47:1407(1), (2), (3)(b) – (7).

the Board reviews the petition and accepts all well-pleaded allegations of fact as true. *See Montalvo v. Sondes*, 1993-2813, (La. 5/23/94), 637 So.2d 127, 131. The issue at the trial of the exception is whether, on the face of the petition, the plaintiff is legally entitled to the relief sought. *Id.*

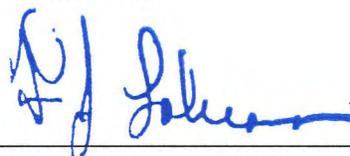
Although La. R.S. 47:1407(3)(a) confers jurisdiction on the Board over all matters related to taxes and fees, it does not establish any cause of action outside the remit of Louisiana's laws related to taxes and fees. Gross purports to assert causes of action under theories of negligence, conversion, and contract. These causes of action arise under civilian principles. Tax laws are *sui generis*, and constitute a system to which the general provisions of the Louisiana Civil Code have little, if any, application. *Church Point Wholesale Beverage Co., Inc. v. Tarver*, 614 So.2d 697, 708 (La. 1993). Therefore, these claims do not arise under the tax code.

Nevertheless, the Board's jurisdiction pursuant to R.S 47:1481(A) does provide that, "Any person who has a claim against the state of Louisiana for [erroneous payments] . . . or for any other claim may present such claim to the Board of Tax Appeals." The parties may also be entitled to relief under the tax code that was not pled. Gross will be afforded the opportunity to amend and supplement their Petition in order to plead a cause, or causes, of action that arise under Louisiana's laws related to taxes and fees or pursuant to the Board's jurisdiction over claims against the state.

Finally, Gross' Motion for Leave to File First Amended and Supplemental Class Action Petition has not been set for hearing and was not before the Board at the March 14, 2024 hearing. The Motion for Leave will be set for hearing unless the parties notify the Board that the request for hearing is moot because of this ruling.

**BATON ROUGE, LOUISIANA, THIS 2<sup>nd</sup> DAY OF MAY, 2024.**

**FOR THE BOARD:**



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**FRANCIS JAY "J." LOBRANO, CHAIRMAN  
LOUISIANA BOARD OF TAX APPEALS**