

**BOARD OF TAX APPEALS
STATE OF LOUISIANA**

**PHYLWAY CONSTRUCTION, LLC
PETITIONER**

VERSUS

DOCKET NO. 9324D

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

JUDGMENT

A hearing on Secretary Department of Revenue's (the "Secretary") Exceptions of Peremption, No Cause of Action and Lack of Subject Matter Jurisdiction and the Secretary's Exception of Prescription were heard by the Board on July 13, 2016 with Judge Tony Graphia (Ret.), Chairman; Board Members Cade R. Cole and Jay Lobrano present, and no member absent. Participating in the hearing were: Robert S. Angelico and Cheryl M Kornick for Philway Construction, LLC (the "Taxpayer"), and Aaron Long, attorney for the Secretary (also appearing by designation as Special Assistant Attorney General on behalf of the State of Louisiana concerning Taxpayer's alternative claims). After the hearing, the case was taken under advisement, the Board now unanimously holds as follows:

Taxpayer appeals the Secretary's refusal to act on its claim for sales tax refunds in the amount of \$76,919.20 for the period December 2010 through July 2011, and its claims for refunds of sales tax in the amount of \$24,774 for June 2012 and in the amount of \$11,046 for October 2012.

The request for the refunds was filed with the Secretary on December 18, 2013.

The Secretary failed to either allow or deny the claims for refund, and on May 20, 2015 Taxpayer filed this petition with the Board as allowed by La. R.S. 47:1625(A)(1).

The Taxpayer's petition also contains an alternative plea claiming that the sales tax it paid was money erroneously paid to the State Treasury under La. R.S. 47:1481, and that it was entitled to have the taxes returned to it under the provisions of that Section.

Taxpayer was audited by the Secretary for sales tax for the period January 9, 2009 through December 31, 2011. As a result of the audit on 5/29/2013, the Secretary sent to the Taxpayer a "Notice of Proposed Tax Due" for the period January 1, 2009 – December 31, 2011 proposing to assess Taxpayer with sales tax in the amount of \$97,939.80 plus interest in the amount of \$15,930.80 plus penalties in the amount of \$24,484.96, a total of \$138,355.56.

On June 13, 2013, Taxpayer paid the Secretary the sum of \$113,870.60 which was the exact amount of the Proposed Tax and interest less the penalty amount of \$24,484.96.

On July 12, 2013, the Secretary sent to the Taxpayer a "Notice of Assessment and Notice of Right to Appeal to the Louisiana Board of Tax Appeals" for the period January 1, 2009 – December 31, 2011 referencing tax liability for the Taxpayer of sales tax in the amount of \$97,939.80 plus interest in the amount of \$15,930.80 plus penalties in the amount of \$24,484.96 less "payments and credits: \$113,870.60" leaving, a "Total amount due and payable: \$24,484.96". The assessment notice stated that: "the Department of Revenue is assessing the above named taxpayer for the tax, interest and penalties (if any) shown above.

On July 13, 2013 Taxpayer paid the Secretary the \$24,484.95, which was the exact amount of the penalties (the 'credit' given had already satisfied the amount of the taxes and interest).

Exception of Lack of Subject Matter Jurisdiction

The Board will first address the Secretary's Exception of Lack of Subject Matter Jurisdiction. Our courts have recognized that jurisdiction over the subject matter is the legal power and authority to hear and determine a particular class of actions or proceedings. *Smith v. Gretna Mach. and Iron Works*, 617 So.2d 144, 145 (La. App. 5 Cir. 1993). As with all exceptions, the movant bears the burden of proving the lack of jurisdiction. *Id.*

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 also concluded that "jurisdiction to resolve tax related disputes is constitutionally and statutorily granted to the Board which is authorized to hear 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 Taxpayer appeals for a redetermination of denied refund. The Secretary's exception of lack of subject matter jurisdiction is without merit and is overruled.

Exceptions of Peremption and No Cause of Action.

The Board will now address the Secretary's Exceptions of Peremption and No Cause of Action. Those exceptions are based on the Secretary's contention that because the Taxpayer did not appeal the Secretary's assessment dated July 12, 2013, that the Board has no jurisdiction to hear the present matter. The Secretary's theory is that because Taxpayer did not appeal that assessment, the failure to appeal has the

same affect as that found in R.S. 47: 1565(B), that is: “the assessment shall be final and shall be collectable by distraint and sale as hereafter provided”. The Board agrees that the failure to appeal an assessment makes it final and collectible, but the Taxpayer in this case is not appealing their assessment. They are seeking relief under the distinct statutory provisions allowing review of a refund denial or inaction, therefore they have stated a valid cause of action that is not preempted.

The notice of assessment and right to appeal informs the Taxpayer that “to avoid the distraint procedure, you must...do one of the following: (1) pay the assessment in full; or (2) pay the assessment under protest pursuant to R.S. 47:1578; or (3) file a petition with the Board of Tax Appeals.”¹ The Taxpayer paid the assessment in full within the applicable time limit. Any appeal to the Board would have been meaningless, our power to stop collection would have been moot since they already paid.

As the Secretary is aware, if (following payment) they had appealed to the Board without first seeking a refund from the Secretary this Board would have been constrained to grant an exception of prematurity since they would have failed to seek a refund administratively (and wait the one year for inaction jurisdiction to attach). Within those initial 60 days from the notice of assessment, there was no issue for the Board to rule on since the Taxpayer had already paid in full.

There is no reason for the taxpayer to believe that payment (in compliance with the Notice it received) would serve to extinguish its rights. In fact, had this taxpayer filed a return shortly before rendering payment (instead of the other way

¹ This comports with the statutory mandate of R.S. 47:1565(A) to give notice that the taxpayer has 60 days to “**either** pay the amount of the assessment **or** to appeal to the Board of Tax Appeals for a redetermination of the assessment.” Of course, a taxpayer may always pay under protest as provided for in R.S. 47:1576 except as restricted by R.S. 47:1561(B).

around) then under La. R.S. 47:1568(C) it would clearly still have a right to a refund—even though the self-assessment would be ‘final’ and itself not appealable.

The underlying facts of this case pretermitted the Board from reaching the *res nova* question of whether or not a Taxpayer has a right to a refund following a final assessment (ie. if 60 days passes and a taxpayer only pays thereafter). The present taxpayer had resolved its tax liability prior to the issuance of the Notice of Assessment and resolved the remaining penalty portion within the 60 days provided.

Exception of Prescription – Refund Claims

The next issue is whether the Taxpayer’s claim for a refund of the \$76,919.20 was timely. R.S. 47:1623 A. provides in part:

“A. After three years from the 31st day of December of the year in which the tax became due or after one year from the date the tax was paid, whichever is later, no refund or credit for an overpayment shall be made unless a claim for credit or refund has been filed with the secretary by the taxpayer claiming such refund or credit before the expiration of said three-year or one-year period...”

On June 13, 2013 the Taxpayer paid the assessed taxes and interest totaling \$113,870.60 and, on July 16, 2013 taxpayer paid the penalties in the amount of \$24,484.96. On December 18, 2013 Taxpayer filed amended sales tax returns with the Secretary and requested a refund in the amount of \$76,919.20. There is no need to consider the three-year period, it is clear that the Taxpayer’s claim for refund was filed within the one-year from payment period provided by La. R.S. 47:1623(A).

In regard to the refund claim of \$24,774 for June 2012 and the refund claim of \$11,046 for October 2012, the claims for refund were filed with the Secretary by December 18, 2013, both well within the three year period allowed by R.S. 47:1623(A).

The Taxpayer’s claims for refund were not prescribed.

Exception of Prescription – §1481 Claims Against the State

The Board will finally resolve the State's exception of prescription pertaining to the Taxpayer's alternative claims under R.S. 47:1481.

As the Supreme Court recognized in *Church Point Wholesale Beverage Co. V. Tarver*, 614 So.2d 697 (La. 1993), "[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."

The Court also found that the prescriptive period of one year from payment or three years from the due date found in R.S. 47:1623 would also be deemed applicable to claims against the state for money erroneously paid into the treasury.

Id.

The action for a claim against the state is against the State not the Secretary and it ordered paid only upon legislative appropriation, whereas a refund action is maintained against the Secretary and is ordered paid from the current collections of the same tax. There is no unity of parties, nor is there a statutory basis for saying that the interruption of prescription that occurs in filing a refund claim with the Secretary serves to interrupt prescription as to a Claim against the State.

Prescription on those claims was only interrupted once the petition was filed with the Board on May 20, 2015. The refund claims for June and October 2012 sales taxes did not prescribe until December 31, 2015 and were therefore timely. The claims for December 2010 through July 2011 prescribed on December 31, 2014 and are therefore barred by prescription.

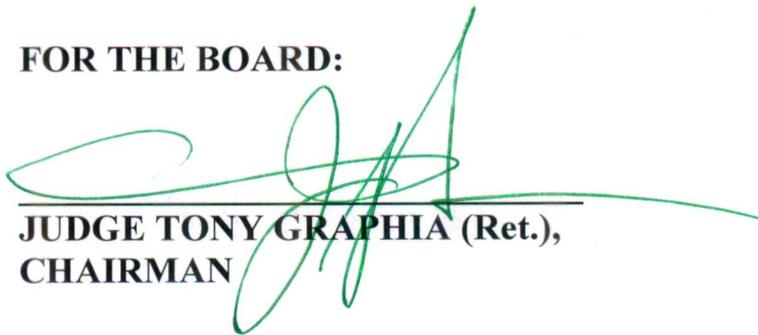
For the foregoing reasons:

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

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the State's Exception of Prescription as to the La. R.S. 47:1481 *et seq.* claim against the state claim BE AND IS HEREBY SUSTAINED.

Judgment Rendered and Signed at Baton Rouge, Louisiana, this 13th day of September, 2016.

FOR THE BOARD:



**JUDGE TONY GRAPHIA (Ret.),
CHAIRMAN**