

**BOARD OF TAX APPEALS
STATE OF LOUISIANA**

DELBERT AND LINDA PUMPHREY

Petitioner

VERSUS

DOCKET NO. 7040

SECRETARY, DEPARTMENT OF REVENUE, STATE OF LOUISIANA

Respondent

JUDGMENT WITH WRITTEN REASONS

A hearing was held before the Board on this matter on October 8, 2014. Present before the Board were Johnette L. Martin, attorney for the Secretary, Department of Revenue (Secretary) and Marvin E. Owen, attorney for Delbert and Linda Pumphrey (hereinafter sometimes referred to as the “Pumphreys”). After hearing the argument of the parties, the matter was taken under advisement.

The Taxpayers appeal the assessments of withholding taxes owed by Triteck Medical for the period 12/31/1998 through 9/30/1999 in the amount of \$7,373.00 plus interest and penalties. The assessment against Delbert Pumphrey mistakenly states that the date of the assessment period is “12/31/1998 -9/30/1998”. This is clearly a clerical mistake and the Board will treat the assessment as being for the period 12/31/1998 through 9/30/1999. The assessment against these Taxpayers is made pursuant to the provisions of R.S. 47:1561.1 as officers of Triteck Medical. The Taxpayers stipulated that they are officers that, as contemplated by the statute, had direct control or supervision of withholding and remitting the withholding taxes in question and were charged with the responsibility of filing the appropriate returns. In order for officer liability to attach the person would also need to have “willfully failed to remit or account for taxes withheld or collected.” *Id.*

The Taxpayers’ defense was that the assessments of the Secretary were not made timely. The taxes for the period 12/31/1998 through 9/30/1999 were all due in 1999. Article VII, Section 16 of the Louisiana Constitution provides:

“Taxes, except for real property taxes, and licenses shall prescribe in three years after the thirty-first day of December in the year in which they are due, but prescription may be interrupted or suspended as provided by law.”

The Secretary contends that it has ten years to assess these petitioners because they were both liable for the taxes of Triteck Medical as officers of the company. The Secretary relies on

the case of *Kennedy v. St. Pierre*, 762 So.2d 170 (La. App. 2000). The *St. Pierre* case held that the ten-year liberative prescription provided by La. Civ. Code art. 3499 is applicable to the personal obligation of officers and directors whose duty is established by R.S. 47:1561.1.

The assessments against the Pumphreys were not made within ten years from the date that the taxes were due. The most recently-occurring tax which the assessment covers is the quarter ending September 30, 1999. Those taxes were due no later than November 30, 1999. Ten years from that date is November 30, 2009. The assessments under consideration are both dated 1/25/2010, outside the ten year period.

The Pumphreys filed a Chapter 7 bankruptcy on April 10, 2001 which case was closed on September 26, 2001 and, on the motion of the Pumphreys, was reopened on March 31, 2006 and again closed on July 24, 2006.

The Secretary contends that it may avail itself of the provisions of R.S.47:1580 (B)(4) which provides in pertinent part:

“...

B. The running of prescription shall also be suspended prior to the lapse of the prescriptive period set out in the Constitution of Louisiana as herein after provided:

...
(4) With respect to bankruptcy, for any period from the time the **taxpayer** files for bankruptcy until six months after the bankruptcy case is closed.”

La. R.S.47:1580 (B), *emphasis supplied*.

The pertinent question is whether the filing of the bankruptcy case suspend the ten year period within which the Secretary could timely assess the Pumphreys under the provisions of R.S. 47: 1580 B.(4). The statute provides that it suspends the period against the “taxpayer”. The Pumphreys are not the “taxpayer” contemplated by that subsection.

More importantly, R.S. 47:1580(B) explicitly states that it suspends the three-year period set out in the Constitution. The ten year period at issue in this case is clearly not the same as the period “set out in the Constitution of Louisiana.” *Id.* The Taxpayer contemplated in R.S. 47:1580 (B)(4) is Triteck Medical which corporation was liable for collecting and remitting the taxes under consideration.

La. R.S. 47:1580 (B)(4) was enacted by the legislature in Act 957 of 1997. The ten-year period announced in the *St Pierre case, supra*, was jurisprudentially established in May 2000. The legislature could not have intended at the time of its enactment that the provisions of R.S.

47:1580 (B)(4) would apply to the ten year period recognized by the court in the *St. Pierre* case several years later.

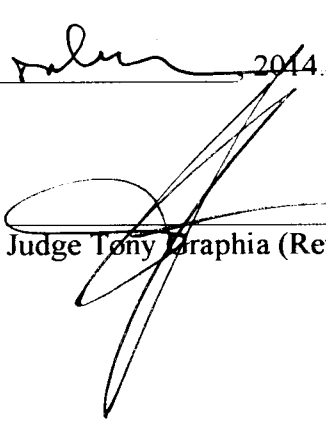
The prescriptive period established in La. C.C. art. 3499 is subject to suspension pursuant to the principles of *contra non valentem*. The Supreme Court has recognized that the doctrine of *contra non valentem* is used to soften the occasional harshness of prescriptive statutes...allowing us “to weigh the ‘equitable nature of the circumstances in each individual case’ to determine whether prescription will be tolled.” *Wells v. Zadeck*, 89 So.3d 1145, 1150 (La. 3/30/12).

The Pumphreys bankruptcy included two short periods many years ago. There was no evidence and no reason to believe that the Secretary had attempted to assess the Pumphreys during either short period where the bankruptcy stay would have been relevant. In this case, their bankruptcy did not act to prevent the Secretary from assessing the Pumphreys within the applicable prescriptive period.

The Secretary had ten years to assess the Pumphreys and failed to do so; consequently the assessments at issue were not timely.

For the foregoing reasons, IT IS ORDERED, ADJUDGED, AND DECREED, that the Pumphreys’ petition for redetermination is hereby GRANTED and the Secretary’s assessments against them are dismissed.

Baton Rouge, Louisiana this 19 day of November 2014.



Judge Tony Graphia (Ret.), Chairman