

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2005 CA 2450

CYNTHIA BRIDGES, SECRETARY OF THE DEPARTMENT OF
REVENUE, STATE OF LOUISIANA

VERSUS

LYONDELL CHEMICAL COMPANY

Judgment Rendered: December 28, 2006.

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On Appeal from the
19th Judicial District Court
In and For the Parish of East Baton Rouge, Louisiana
Trial Court No. 531,059
Honorable Kay Bates, Judge

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BEFORE: PETTIGREW, DOWNING, AND HUGHES, JJ.

Hughes, Jr., dissents with reasons.

RRP

PETTIGREW, J.

This is an appeal by plaintiff, Cynthia Bridges, Secretary of the Department of Revenue for the State of Louisiana, from a judgment in favor of defendant, Lyondell Chemical Company, granting exceptions raising the objections of improper venue, prematurity, and prescription. The trial court's judgment granting the exceptions dismissed with prejudice plaintiff's demand for attorney fees pursuant to La. R.S. 47:1512. For reasons other than enumerated by the trial court, we affirm.

FACTS AND PROCEDURAL HISTORY

This litigation regarding attorney fees pursuant to La. R.S. 47:1512 arises out of a multi-year dispute over corporate income and corporate franchise taxes between the Department of Revenue for the State of Louisiana ("Department") and Lyondell Chemical Company ("Lyondell"). The dispute between the Department and Lyondell focused on a span of tax years between 1987 and 1999. The Department retained private counsel in 1999 to assist with collection from Lyondell. Collection proceedings ensued at the administrative level and also through litigation in Orleans Parish and in East Baton Rouge Parish. These disputes were resolved through a global settlement finalized on October 10, 2003. The settlement covered eleven tax years and resulted in a net refund from the Department to Lyondell in the amount of \$152,094.26. In **Bridges v. Lyondell Chemical Company**, 2005-1535 (La. App. 1 Cir. 6/9/06), 938 So.2d 786, writ denied, 2006-2196 (La. 11/17/06), ___ So.2d ___, a companion case arising out of the same global settlement of October 10, 2003, this court noted that to facilitate a settlement of the primary dispute, the parties mutually agreed to defer resolution of their dispute as to attorney fees. **Lyondell**, 2005-1535 at 7, 938 So.2d at 790.

The parties subsequently failed to resolve the issue of attorney fees, and the Department instituted this litigation on April 6, 2005. On April 26, 2005, Lyondell filed exceptions raising the objections of improper venue, prematurity, and prescription. Following a hearing, the trial court granted all of Lyondell's

exceptions and thereafter signed a judgment of dismissal on August 22, 2005.

From this judgment, the Department has appealed.

LAW AND ANALYSIS

This case reaches us on exceptions raising the objections of improper venue, prematurity, and prescription. Before addressing these exceptions, we note that the Department bases its claim on La. R.S. 47:1512, which provides as follows:

The collector is authorized to employ private counsel to assist in the collection of any taxes, penalties or interest due under this Sub-title, or to represent him in any proceeding under this Sub-title. If any taxes, penalties or interest due under this title are referred to an attorney at law for collection, an additional charge for attorney fees, in the amount of ten per centum (10%) of the taxes, penalties and interest due, shall be paid by the tax debtor.

This statute is normally utilized with respect to claims for attorney fees that are raised incidentally to collection or refund litigation. **Simons Petroleum, Inc. v. Falgout**, 2003-0610, p. 16 (La. App. 1 Cir. 2/23/04), 873 So.2d 65, 74-75 (*rev'd on other grounds*). Although the tax dispute between the Department and Lyondell gave rise to actions for collection (two judicial proceedings and one administrative proceeding, involving tax returns over an eleven year period), the present appeal arises independently as a claim for attorney fees. It is based on the October 10, 2003 settlement that resolved those three proceedings.

In connection with its appeal in this matter, the Department contends that La. R.S. 47:1512 does not require litigation for the collection of taxes in order for legal fees to be due, and further that no bar exists to the bringing of a claim independently under the statute. Lyondell argues in response that suit pursuant to La. R.S. 47:1512 cannot possibly be valid as no collection has taken place; in fact, Lyondell points out that it ultimately received a net refund from the Department.

This court's previous decision in **Lyondell** addressed corporate taxes and attorney fees allegedly owed by Lyondell as a result of the second audit. The audit dealt with alleged corporate income tax in the amount of \$113,677.00 for

the years 1991 and 1992, and alleged corporate franchise taxes in the amount of \$72,910.00 for the years 1992, 1993, 1994, and 1995. **Lyondell**, 2005-1535 at 2, 938 So.2d at 787. In that dispute, Lyondell received a net refund of taxes and interest of \$69,723.09. Just as in that case, the present dispute involves a net refund due to Lyondell for the years in question.

In its earlier opinion in **Lyondell**, this court interpreted the meaning of the term "due" under the authority of La. R.S. 47:1561, and held as follows:

We thus construe the term "due," as descriptive of the principal amount or basis upon which the attorney fee percentage is calculated, to refer to the net amount of "taxes, penalties, and interest" *ultimately* determined to be due in this multi-year action. No taxes, penalties, and interest were ultimately found to be due in this cause, so there is no basis upon which to impose the additional penalty representing attorney fees. In so holding, we do not mean to imply that the Department's private counsel did not render substantial and valuable services contributing to the amicable resolution of the complex disputes between the parties. To the contrary, the evidence does seem to support the amount of the award made by the trial court, but it is unnecessary for us to consider Lyondell's assignment of error on that point. Our conclusion simply accords with the strict construction required of penalty statutes which serve to shift attorney fees from prevailing parties to their opponents, and the ultimate result is a common risk inherent in the nature of a contingent fee agreement. (Emphasis in original; footnote omitted.)

Lyondell, 2005-1535 at 9-10, 938 So.2d at 791-792.

Louisiana Code of Civil Procedure article 927(B), provides that a plaintiff's failure to disclose a cause of action to institute the suit may be noticed by either the trial or appellate court on its own motion. **Capital City Towing & Recovery, Inc. v. City of Baton Rouge**, 97-0098, p. 5 (La. App. 1 Cir. 2/20/98), 709 So.2d 248, 251. The function of the peremptory exception raising the objection of no cause of action is to question whether law extends a remedy against the defendant under the factual allegations of the petition. **Hoag v. State**, 2004-0857, p. 9 (La. 12/1/04), 889 So.2d 1019, 1025.

In the present case, Lyondell received a refund from the Department; and therefore, we are compelled to follow this court's earlier decision in **Lyondell**, *supra*. After a thorough review of the pleadings and the record in this matter, this court hereby grants, *ex proprio motu*, a peremptory exception of no cause of

action against the Department in favor of Lyondell, and holds that the State is not entitled to recover attorney fees against Lyondell pursuant to La. R.S. 47:1512 under the unique facts of this case.

Based upon the foregoing holding, we deem it unnecessary to address the assignments of error put forth by the Department, and therefore, pretermitt further discussion of same.

For the reasons assigned herein, we affirm the judgment of the trial court dismissing the Department's petition and assess appeal costs in the amount of \$119.70 against the Department.

AFFIRMED.

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VERSUS

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HUGHES, J., dissenting.

I respectfully dissent. With all due respect, I believe the present decision and the court's previous decision in **Bridges v Lyondell Chemical Company**, 2005-1535 (La. App. 1 Cir. 6/9/06), 938 So.2d 786, ignore the universally accepted (including state, federal, and tax courts) principle that "each tax year stands on its own."

The claim for attorneys fees herein is not based on the "global settlement" but rather on specific tax years for which counsel was retained and succeeded in obtaining an acknowledgment that taxes were due. These figures were then combined with other tax years to accomplish the "global settlement" in which the state and the defendant agreed to "defer" the issue of attorneys fees.

If the government and the defendant can cut a deal and cut out the attorney after his fees have been earned, the legislative intent of the statute is thwarted and attorneys willing to take on such work will be scarce.