

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2008 CA 1403

MICHAEL X. ST. MARTIN, LOUIS ROUSSEL, III,
WILLIAM A. NEILSON, ET AL.

VERSUS

STATE OF LOUISIANA; AND CYNTHIA BRIDGES, IN HER CAPACITY AS
SECRETARY OF THE LOUISIANA DEPARTMENT OF REVENUE

Judgment Rendered: MAR 27 2009

Appealed from the
Thirty-Second Judicial District Court
In and for the Parish of Terrebonne, Louisiana
Trial Court Number 147,826

Honorable George J. Larke, Jr., Judge

Michael X. St. Martin
Joseph G. Jevic, III
Houma, LA
and
Deborah M. Sulzer
A. Albert Ajubita
New Orleans, LA

Attorneys for
Plaintiffs – Appellees
Michael X. St. Martin,
Louis Roussel, III,
William A. Neilson, et al.

Nykeba R. Walker
Shone T. Pierre
Joe F. Stevenson
Elroy A. James
Baton Rouge, LA

Attorneys for
Defendant – Appellant
Cynthia Bridges, Secretary,
Dept. of Revenue, State of
Louisiana

Anthony C. Dupre
Ville Platte, LA

Attorney for
State of Louisiana Board of
Tax Appeals

BEFORE: PARRO, McCLENDON, AND WELCH, JJ.

*Parro, J., concurs with reasons.
McCleendon, J. concurs and assigns reasons.*

JW

WELCH, J.

The Louisiana Department of Revenue (LDR) appeals a judgment decreeing that the Louisiana Board of Tax Appeals (Board) has jurisdiction to utilize a class action procedure to adjudicate taxpayer claims. We affirm the Board's dismissal of this class action petition, but on the basis that the taxpayers do not have a cause of action to seek recovery of tax overpayments on behalf of other taxpayers before the Board.

FACTUAL AND PROCEDURAL BACKGROUND

On January 9, 2004, Michael X. St. Martin, Louis Roussel III, and William Neilson (hereafter collectively referred to as "petitioners") filed a "Class Action Petition for Damages" with the Board, naming LDR and its secretary as defendants. Therein, petitioners alleged that LDR failed to pay interest on tax refunds of overpaid State income taxes as mandated by La. R.S. 47:1624 and averred that as a result, they had been denied a portion of their refund claims. Petitioners further alleged that LDR was liable to them for damages equal to the interest authorized by La. R.S. 47:1624, plus interest on the total amount due from the date of the filing of the petition.

In the petition, petitioners averred that they were initiating this class action pursuant to the provisions of Article 591 of the Louisiana Code of Civil Procedure on their own behalf and as members of a class of persons and entities who are or were entitled to refunds and/or credits for overpayment of Louisiana State income taxes and were not paid interest as required by La. R.S. 47:1624. They asked for judgment in an amount sufficient to compensate the named plaintiffs and all persons and entities similarly situated for the damage each sustained, together with legal interest, costs, attorney fees, and expert witness fees. They also sought a judgment enjoining LDR from failing to pay interest as mandated by law and ordering LDR to pay interest as mandated by and in accordance with La. R.S.

47:1624.

Subsequently, petitioners amended the petition to identify the class of persons and entities sought to be represented in their refund demand as follows:

All persons and entities who are or were entitled to refunds and/or credits for overpayment of Louisiana State taxes and were not paid interest as allowed by LA R.S. 47:1624, including but not limited to, income, excise, franchise, sales and use and inheritance taxes.

LDR filed a motion to dismiss the petitioners' request for a class action, contending that the Board lacked authority and jurisdiction to maintain a class action. The Board agreed, concluding that it did not have express or implied authority from the legislature to certify or hear a class action or a class of claims. To the contrary, the Board found, its authority was specifically limited to hear the claim of "a taxpayer" or "the taxpayer." The Board granted LDR's motion to dismiss the petitioners' request for a class action, but reserved the petitioners' individual rights and claims. Additionally, the Board referred the merits of LDR's other exceptions and motions filed with respect to the individual claims to a hearing on the merits of the claims.

Thereafter, on March 20, 2006, petitioners sought judicial review of the Board's ruling in the district court. The district court reversed the Board's determination that it lacked jurisdiction to maintain a class action. In so doing, the court noted that the only issue before it was whether the Board has the ability to certify a class action, not whether the instant claim was appropriate for resolution through the class action procedure. The court observed that a class action is merely a procedural device allowed by the Code of Civil Procedure, that the Board had utilized procedural devices found in that code in the past, and significantly, the Board had in fact certified a class action in the past in a tax refund claim similar to the present one. The court found implied authority for the Board to hear a class action in La. R.S. 47:1432, which requires that the Board make a decision "as

quickly as practicable” in proceedings involving redetermination of an assessment or a tax overpayment.

This appeal, taken by LDR, followed. The Board filed an amicus brief in support of its ruling that the Board lacks authority to hear a class action.¹

AUTHORITY OF THE BOARD TO HEAR A CLASS ACTION

In this appeal, LDR insists that the Board lacks authority to resolve disputes by the use of a class action procedure because certification of a class action is a “judicial” function that can be exercised exclusively by a trial court. Thus, it contends, the doctrine of separation of powers precludes the Board from granting petitioners’ request for a class action. LDR also submits that the Board is without express or implied authority from the legislature to certify a class action or to make the determinations necessary in evaluating whether class certification requirements, as provided for in Article 591 of the Code of Civil Procedure, are met by the potential representatives of the class. The Board echoes LDR’s position that it lacks express or implied authority to hear a class action, stressing that the Administrative Procedure Act and the Board’s promulgated rules contain no provision authorizing the Board to hear class actions.

It is well settled that an administrative board or agency has only the power and authority expressly granted by the constitution or statutes. Nevertheless, some power and authority may be implied as necessary or appropriate to effectuate the express powers granted to, or imposed upon, such board or agency. **Realty Mart, Inc. v. Louisiana Board of Tax Appeals**, 336 So.2d 52, 54 (La. App. 1st Cir. 1976). There is no express legislative grant of power to the Board to utilize a class action proceeding in taxpayer disputes before it. The question thus becomes whether the authority to conduct a class action may be implied from the express powers granted to or imposed on the Board.

¹ We deny petitioners’ motion to strike the amicus brief filed by the Board.

In making this determination, LDR urges this court to defer to the Board's policy determination that it does not have authority to utilize the class action procedure to resolve taxpayer disputes. LDR points to two other instances where it determined it did not have authority to certify a class: **Clark v. State of Louisiana**, BTA Docket No. 6143, and **Dalton v. Kennedy**, BTA Docket No. 4664. In **Dalton**, the Board noted that it had "serious reservations" regarding its capacity to actually conduct a class action proceeding and stressed that the Board lacked the economic and human resources to manage a class action proceeding.

In support of its deference argument, LDR relies heavily on this court's decision in **Casse v. Department of Health and Hospitals**, 592 So.2d 1366 (La. App. 1st Cir. 1991), wherein this court upheld the authority of the Civil Service Commission to deny a request to certify an appeal of a departmental lay-off decision as a class action. The Civil Service Commission determined that its rules did not provide for class actions and that the class action procedure was inconsistent with the Civil Service Rules. In affirming the ruling of the Civil Service Commission, this court applied the general rule that an administrative agency may interpret its own policy. See **Hill v. Department of Health and Human Resources, Office of Mental Health and Substance Abuse**, 457 So.2d 781, 785 (La. App. 1st Cir. 1984) (stating that administrative agencies may interpret their own rules, and such interpretations become part of the agency's rules).

While it is true that courts generally defer to an administrative agency in the interpretation of its own rules and policies, we believe this principle underlying the **Casse** decision is inapplicable in the instant case because the Board has engaged in inconsistent interpretations of its authority to utilize the class action procedure. Although the Board has denied that it has such authority on three occasions, in 1989, the Board certified a class action in **Ponthier v. Broussard, Secretary Department of Revenue and Taxation, State of Louisiana**, BTA Docket No.

3396. Therein, the Board authorized a class action to be brought on behalf of all recipients of federal civil service or military retirement annuities who paid income taxes to the State of Louisiana on their annuities from January 1, 1979, through the present. In so doing, the Board made specific findings that: (1) there were questions of law and fact common to the members of the class that predominated over questions affecting only individual members of the class; (2) there were common characteristics among the members of the class; (3) certifying the proceeding as a class action would achieve the economies of time, effort, and expense and promote uniformity of decisions; and (4) the petitioner was an adequate representative of the class. These considerations are elements for class certification outlined in Article 591 of the Code of Civil Procedure.

The fact that the Board has utilized the class action procedure in the past to resolve a taxpayer refund dispute is a strong indication that the Board's rules and its adjudicative capabilities are in fact consistent with the class action procedural device. This factor, however, does not end the inquiry. Instead, we shall look to the Board's express powers to determine whether it has implied authority to utilize a class action procedure in taxpayer disputes.

Louisiana Constitution article VII, § 1 vests the power of taxation in the legislature. The legislature is constitutionally mandated to "provide a complete and adequate remedy for the prompt recovery of an illegal tax paid by a taxpayer." La. Const. art. VII, § 3. To fulfill this constitutional mandate, the legislature provided three remedies to taxpayers: (1) the "Claims Against the State" procedure, La. R.S. 47:1481 *et seq.*, (2) the "Payment Under Protest" procedure, La. R.S. 47:1576 *et seq.*, and (3) the "Overpayment Refund" procedure, La. R.S. 47:1621 *et seq.* **Clark v. State**, 2002-1936, p. 5 (La. App. 1st Cir. 1/28/04), 873 So.2d 32, 35, writ denied, 2004-0452 (La. 4/23/04), 870 So.2d 300.

In 1942, the Louisiana legislature created the Board of Tax Appeals to hear

and decide, at minimum expense to the taxpayer, questions of law and fact arising from disputes or controversies between a taxpayer and LDR in the enforcement of any tax law administered by the collector. La. R.S. 47:1401. The legislature vested jurisdiction in the Board over, among other things, all matters relating to the determination of overpayments. La. R.S. 47:1407.

Louisiana Revised Statute 47:1431 gives “a taxpayer” who is aggrieved by the collector’s action or failure to act on a claim for a refund of an overpayment a right to appeal to the Board for a determination of the alleged overpayment by filing a petition with the Board. The Board is obligated to give the taxpayer and the tax collector an opportunity to be heard and to make a decision or judgment “as quickly as practicable.” La. R.S. 47:1432.

In the exercise of its power to adjudicate taxpayer disputes, the Board has full and complete power to conduct hearings of a nature not unlike a judicial trial. **Richardson v. Parish Council of Parish of East Baton Rouge**, 53 So.2d 458, 459 (La. App. 1st Cir. 1951). The Board has the power to administer oaths, take affidavits, and subpoena the appearance of witnesses and production of records. La. R.S. 47:1408. The Board is obligated to follow the rules of evidence followed in Louisiana district courts. La. R.S. 47:1412. In all other matters regarding the conduct of its hearings, the Board is authorized to prescribe and promulgate rules and regulations consistent with law. La. R.S. 47:1413.

In **Clark v. State**, 2002-1936, 873 So.2d 32, taxpayers filed a class action proceeding with the Board against LDR seeking a refund of State sales taxes. The following year, the same parties filed a lawsuit in the district court as representatives of a class of taxpayers seeking virtually the identical relief sought in the claim instituted with the Board. LDR filed a declinatory exception urging the objection of lack of subject matter jurisdiction in the district court proceeding. This court held that the district court lacked jurisdiction to determine the merits of

the taxpayers' claims, as the Board had exclusive jurisdiction over the merits of the claims, whether those claims were brought under the refund for overpayment procedure or the procedure for claims against the State set forth in La. R.S. 47:1621. **Clark**, 2002-1936 at pp. 8-9, 873 So.2d at 36-37.

It is clear that for claims brought under the refund for overpayment procedure, pursuant to which the instant class certification is being requested, the Board has primary exclusive jurisdiction to adjudicate the merits of the claims. In adjudicating the merits of taxpayer disputes, the Board essentially functions as a trial court. It is equally clear that there is no provision in the law prohibiting the Board, in the exercise of this exclusive jurisdiction, from utilizing a class action procedure to adjudicate taxpayer claims. A class action simply is a non-traditional litigation procedure permitting a representative with typical claims to sue on behalf of a class of persons, when the question is one of common or general interest to persons so numerous as to make it impractical to bring them all before a court. **Carr v. GAF, Inc.**, 97-0838, pp. 4-5 (La. App. 1st Cir. 4/8/98), 711 So.2d 802, 805, writ denied, 98-1244 (La. 6/19/98), 721 So.2d 472.

The Board is statutorily obligated to litigate taxpayer disputes at a minimum expense to the taxpayer. La. R.S. 47:1401. Moreover, the Board is required to render a decision or judgment as quickly as practicable. La. R.S. 47:1432. From this express authority, the Board has implied authority to conduct taxpayer proceedings before it in a manner that will achieve the economies of time, effort and expense. The fundamental objective of the class action procedural device is the achievement of economies of time, effort and expense. **McCastle v. Rollins Environmental Services of La., Inc.**, 456 So.2d. 612, 619 (La. 1984). This objective is consistent with the Board's implied powers. For these reasons, we conclude that the Board, which has exclusive primary jurisdiction over all taxpayer claims for refunds of overpayments and which has previously certified a class

action to effectuate taxpayer refunds, has implied legislative authority to hear taxpayer disputes for refunds for tax overpayments as a class action.

Because certification of a class action is not beyond the scope of legislative authority granted to the Board, we find that the district court correctly ruled that the Board has jurisdiction to hear taxpayer disputes as a class action. However, to the extent that the district court's judgment may be construed as an order to the Board to consider the merits of petitioners' class action demand, we reverse on the basis that the petitioners do not have a cause of action to assert tax refund claims on behalf of other taxpayers in proceedings before the Board.

The peremptory exception raising the objection of no cause of action tests the sufficiency in law of the petition, and questions whether the law extends a remedy to anyone under the factual allegations of the petition. La. C.C.P. art. 927; **Adams v. Owens-Corning Fiberglas Corporation**, 2004-1296, p.3 (La. App. 1st Cir. 9/23/05), 921 So.2d 972, 975, writ denied, 2005-2501 (La. 4/17/06), 926 So.2d 514; **Capital City Towing & Recovery, Inc. v. City of Baton Rouge**, 97-0098, p. 5 (La. App. 1st Cir. 2/20/98), 709 So.2d 248, 250-251. Failure to disclose a cause of action may be noticed by the Court of Appeal on its own motion. Id.

Although the legislature required the Board to adopt the rules of evidence followed by Louisiana district courts in La. R.S. 47:1412, there is no similar requirement with respect to provisions of the Louisiana Code of Civil Procedure. Thus, there is no requirement in the law that the Board hear a class action pursuant to Article 591 of the Code of Civil Procedure, which is the precise relief the petitioners are seeking. Rather, “[i]n all other matters regarding the conduct of its hearings,” the legislature vested the Board with broad authority to prescribe and “promulgate rules and regulations” that are consistent with the law and other provisions of the tax law relating to the Board. La. R.S. 47:1413. Louisiana Revised Statute 47:1413 further provides that such rules and regulations, when

prescribed, adopted and promulgated by the Board, shall be binding upon parties in any cause over which the Board has jurisdiction. It is undisputed that the Board has not exercised its authority to prescribe, adopt, and promulgate a procedure for the advancement of a class action by a group of taxpayers in proceedings held before it. We hold that because the Board has not formally promulgated or adopted rules authorizing taxpayers to assert claims on behalf of other taxpayers, petitioners do not have a cause of action to seek refunds for overpayment of taxes on behalf of other taxpayers in proceedings before the Board.

CONCLUSION

For the foregoing reasons, the judgment of the district court is reversed, and the Board's decision dismissing petitioners' class action demands is reinstated. All costs of this appeal are assessed to appellees.

MOTION TO STRIKE DENIED; REVERSED.

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

BEFORE: PARRO, McCLENDON, AND WELCH, JJ.

 **PARRO, J., concurring.**

I agree with the result reached by the majority, but for different reasons. The Louisiana Constitution vests the judicial power in the courts. LSA-Const. art. V, § 1. In general, the district court has original jurisdiction of all civil and criminal matters. LSA-Const. art. V, § 16. Article II, Section 2 of the Louisiana Constitution limits the authority of the three branches of government, stating that no one branch may exercise power belonging to either of the others. Any grant of "quasi-judicial" power to an administrative agency is limited to the authority **specifically authorized** by the constitution or a law enacted pursuant to its authority. See ANR Pipeline Co. v. Louisiana Tax Comm'n, 01-2594 (La. App. 1st Cir. 3/20/02), 815 So.2d 178, 184. Such grants are an exception to the general rule that district courts have original jurisdiction over all civil matters and, as such, must be narrowly construed. See Louisiana Horsemen's Benev. and Protective Ass'n 1993, Inc. v. Fair Grounds Corp., 95-1702 (La. App. 1st Cir. 4/4/96), 672 So.2d 340, 341, writs denied, 96-1163 and 96-1125 (La. 6/7/96), 674 So.2d 968 and 969. Also, an agency to which certain powers have been granted pursuant to the constitution or statutes may

not itself enlarge its authority beyond what is specifically granted. Realty Mart, Inc. v. Louisiana Bd. of Tax Appeals, 336 So.2d 52, 54 (La. App. 1st Cir. 1976). Because the use of a class action procedure is not specifically granted to the Louisiana Board of Tax Appeals, it has no authority to use this procedure, nor may it expand its authority by choosing to use this procedure. Such expansion would run afoul of the separation of powers doctrine provided in Article II, Section 2.

Moreover, the mechanism established for a taxpayer to claim a refund of an overpayment or, as in this case, interest on such overpayments, has limiting language, in that it only gives the Board of Tax Appeals authority to hear and decide questions of law and fact arising from disputes or controversies between "a taxpayer" and the collector of revenue of the State of Louisiana. See LSA-R.S. 47:1401. With regard to the subject matter in this case, its jurisdiction extends only to matters relating to appeals for the redetermination of assessments or for the determination of overpayments. See LSA-R.S. 47:1407. The procedure for filing such appeals is set out in LSA-R.S. 47:1431, which refers to the appeal of grievances brought by "a taxpayer." There is nothing in the statutory provisions related to the Board of Tax Appeals that authorizes a taxpayer to assert grievances on behalf of himself and others. Strictly construing these statutory provisions, the Board of Tax Appeals has no authority to handle class actions.¹ Therefore, I disagree with the majority opinion insofar as it concludes that the Board has "implied legislative authority" to hear taxpayer disputes for refunds of tax overpayments as a class action.

However, because I believe the result reached by the majority is correct, I concur with the decision.

¹ Moreover, the class action procedure set forth in LSA-C.C.P. arts. 591, *et seq.* is very complicated from a legal point of view. The Board of Tax Appeals is composed of three members who are qualified electors of the state; there are no other qualifications required. See LSA-R.S. 47:1402. Therefore, it is not necessary to be a practicing attorney to be a member of the Board, and I believe the class action procedure, if authorized, would severely handicap the efficiency of the Board.

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McCLENDON, J., concurs and assigns reasons.

I agree with the result reached by the majority. The clear language of LSA-R.S. 47:1401 limits the authority of the Board of Tax Appeals to hear and decide questions of law and fact arising from disputes or controversies between "a taxpayer" and the collector of revenue of the State of Louisiana. Therefore, I respectfully concur.