

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 1508

CYNTHIA BRIDGES,
SECRETARY OF THE LOUISIANA DEPARTMENT OF REVENUE

VERSUS

CITIMORTGAGE, INC.

Judgment Rendered: MAY 24 2012

APPEALED FROM THE NINETEENTH JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA
DOCKET NUMBER C597770

THE HONORABLE KAY BATES, JUDGE

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BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.

McDONALD, J.

This is an appeal from a judgment dismissing a petition to collect taxes filed by the Secretary of the Louisiana Department of Revenue, pursuant to the taxpayer's exceptions of prematurity and no cause of action. For the following reasons, we reverse and remand.

FACTUAL AND PROCEDURAL BACKGROUND

Citimortgage, Inc., a New York corporation with its principal place of business in Missouri, is in the consumer loan business. Citimortgage is licensed to do business in Louisiana and has a registered agent here but has no offices or regular employees in the state. (R3) The Louisiana Department of Revenue conducted an audit of Citimortgage's Louisiana corporate franchise tax liability for the tax periods 2004 through 2006 (the audited tax periods). For each audit period, the Department adjusted the taxable franchise base to include loans receivable and interest income. The Department's auditor determined Citimortgage owed over \$2 million in franchise taxes and interest for the audited tax periods.

On May 4, 2009, the Department issued a Notice of Proposed Tax Due to Citimortgage under La. R.S. 47:1562(A). On July 6, 2009, Citimortgage responded to the Notice with a written protest.¹ The Department did not respond to the protest. On December 23, 2010, pursuant to La. R.S. 47:1561(3), Cynthia Bridges, in her official capacity as the Secretary of the Department, filed a petition to collect franchise taxes from Citimortgage for the audited tax periods. On March 2, 2011, Citimortgage responded by filing a dilatory exception of prematurity and a peremptory exception of no cause of action. The trial court held a hearing on the exceptions and, on June 6, 2011, signed an order granting both exceptions and

¹ According to Citimortgage's memorandum in support of its exceptions, the Department's Notice of Proposed Tax Due provided Citimortgage 30 days to respond, but the parties mutually agreed to an extension of that time period until July 10, 2009.

dismissing the Department's petition without prejudice. The Department appeals from this adverse order, contending the trial court erred in granting Citimortgage's exceptions.

DILATORY EXCEPTION OF PREMATURITY

An exception raising the objection of prematurity is a dilatory exception intended to retard the progress of the action, not to defeat it. La. C.C.P. arts. 923 and 926. The objection of prematurity contemplates that the plaintiff has filed his action prior to some procedure or assigned time, and it is usually utilized in cases where the applicable law or contract has provided a procedure for one aggrieved by a decision to seek administrative relief before resorting to judicial action. Generally, all administrative remedies or specified procedures must be exhausted before the right to judicial review may be exercised. **Transcontinental Gas Pipe Line Corporation v. Bridges**, 09-0421 (La. App. 1 Cir. 10/23/09), 28 So.3d 1082, 1086, writ denied, 09-2764 (La. 2/26/10), 28 So.3d 277.

The defendant who files an exception of prematurity has the initial burden of showing that an administrative remedy is available, by reason of which the judicial action is premature. Once the existence of the administrative remedy is established, the burden then shifts to the plaintiff to show that administrative remedies have been exhausted or that the situation is one in which the plaintiff is entitled to judicial relief because any administrative remedy is irreparably inadequate. An exception of prematurity raises a question of law, which is subject to a *de novo* standard of review on appeal. See La. C.C.P. art. 926; **Bridges v. Smith**, 01-2166 (La. App. 1 Cir. 9/27/02), 832 So.2d 307, 310, writ denied, 02-2951 (La. 2/14/03), 836 So.2d 121.

Thus, Citimortgage had the initial burden of showing it was entitled to further administrative response from the Department before the Department filed

this suit. Citimortgage contends that, once the Department issued the Notice of Proposed Tax Due under La. R.S. 47:1562(A), and Citimortgage timely protested under La. R.S. 47:1563, that Citimortgage was “entitled to administrative review by the Department, and ultimately, issuance of a final determination in accordance with La. R.S. 47:1563 through La. R.S. 47:1565” before the Department filed suit. The Department contends that its choice to file an ordinary suit to enforce the collection of taxes did not require that it first respond to Citimortgage’s protest or that it make a tax assessment against Citimortgage.

A review of the applicable Louisiana tax assessment and collection procedure reveals the Department’s position is correct. Louisiana Revised Statute 47:1561 authorizes the tax collector,² in his discretion, to proceed to enforce the collection of taxes through any of three alternative procedures: (1) assessment and distraint, (2) summary court proceeding, or (3) ordinary suit.³ The statute not only provides discretion to the collector to choose which of the three methods to pursue, but it also provides that the remedies and delays afforded to the taxpayer are only those that are not inconsistent with the method selected by the collector. The statute specifically provides further “the fact that the collector has initiated proceedings under the assessment and distraint procedure will not preclude him from thereafter proceeding by summary or ordinary court proceedings for the enforcement of the same tax obligation.” La. R.S. 47:1561. And, contrary to Citimortgage’s argument, the fact that Citimortgage filed a protest does not afford it additional rights, nor limit the Department’s ability to proceed in a manner different than that initiated. In other words, nothing in La. R.S. 47:1561 prohibits

² The “collector” means the secretary of the Department of Revenue for the State of Louisiana. La. R.S. 47:1501(A).

³ The “assessment and distraint” procedure is found in La. R.S. 47:1562 through 47:1563; the “summary court proceeding” procedure is found in La. R.S. 47:1574; and, the “ordinary suit” procedure is found “under ... the general laws regulating actions for the enforcement of obligations.”

the Department from changing its collection remedy or procedure during the tax collection process. **Bridges**, 832 So.2d at 311-313; accord **West Baton Rouge Parish Revenue Department v. Louisiana Machinery Rentals, L.L.C.**, 2011-0711 (La. App. 1 Cir. 3/9/12), ___So.3d___, 2012 WL 786668 *7 (interpreting a similar statutory tax scheme, the Uniform Local Sales Tax Code, this court noted the tax collector's initiation of one enforcement procedure, without completion, does not preclude the collector from following with another statutorily available enforcement procedure).

Thus, we conclude that Citimortgage failed to carry its burden of demonstrating it was entitled to any type of administrative procedure within the Department before the Department filed the instant suit. The trial court erred in granting Citimortgage's exception of prematurity, and we reverse the trial court's order in this regard.

EXCEPTION OF NO CAUSE OF ACTION

The peremptory exception of no cause of action is designed to test the legal sufficiency of the petition by determining whether plaintiff is afforded a remedy in law based on the facts alleged in the pleading. No evidence may be introduced to support or controvert the objection that the petition fails to state a cause of action. La. C.C.P. art. 931. The exception is triable on the face of the papers and, for purposes of determining the issues raised by the exception, the well-pleaded facts in the petition must be accepted as true. A trial court's ruling sustaining an exception of no cause of action is subject to *de novo* review on appeal. A petition should not be dismissed for failure to state a cause of action unless it appears beyond doubt that the plaintiff can prove no set of facts in support of any claim that would entitle him to relief. **Fink v. Bryant**, 01-0987 (La. 11/28/01), 801 So.2d 346, 348-349. Every reasonable interpretation must be accorded the language of the petition in favor of maintaining its sufficiency and affording the

plaintiff the opportunity of presenting evidence at trial. **Industrial Companies, Inc. v. Durbin**, 02-0665 (La. 1/28/03), 837 So.2d 1207, 1213, citing **Jackson v. State ex rel. Dept. of Corrections**, 00-2882 (La. 5/15/01), 785 So.2d 803, 806.

The parties agree that the applicable substantive law herein is contained in La. R.S. 47:606(A)(2)(e) and 47:606(A)(1)(i). Under the former provision, for tax allocation purposes, loans receivable “shall be allocated to the state in which they have their business situs, or in the absence of a business situs, to the state in which is located the commercial domicile of the taxpayer.” La. R.S. 47:606(A)(2)(e). And, under the latter provision, interest income “shall be attributed to the state in which the securities or credits producing such [interest] have their situs, which shall be at the business situs of such securities or credits, if they have been so used in connection with the taxpayer’s business as to acquire a business situs, or, in the absence of such a business situs[,] shall be at the commercial domicile of the corporation.” La. R.S. 47:606(A)(1)(i).

In its petition, the Department alleges that Citimortgage’s taxable franchise base was adjusted to include loans receivable and interest income; that loans receivable and interest income are allocated to Louisiana based on customer location, in accordance with La. R.S. 47:606(A)(2)(e) and 47:606(A)(1)(i), respectively; that loans receivable are considered to have acquired a Louisiana business situs when the mortgaged property is located in Louisiana; and, that the Department considers a portion of the interest income to be earned from Louisiana sources based on customers located in Louisiana.

Accepting these allegations as true, and giving the above language “every reasonable interpretation” in maintaining its sufficiency, as we must when considering an exception of no cause of action, we conclude the Department’s petition sufficiently sets forth facts that may afford it a remedy against Citimortgage for franchise taxes owed for the audited tax periods at issue. It

appears the Department may ultimately be able to factually prove that Citimortgage's loans receivable and interest income for the relevant tax periods are at least partially allocable to Louisiana. However, we note that Citimortgage retains the right to fully litigate the merits or lack thereof of any amount the Department claims is due. See Bridges, 832 So.2d at 313 (Whipple, J., concurring.) Thus, we conclude the trial court erred in granting Citimortgage's exception of no cause of action under the facts as alleged. We reverse the trial court's order in this regard.

CONCLUSION

For the foregoing reasons, the trial court's order granting Citimortgage's dilatory exception of prematurity and peremptory exception of no cause of action, and dismissing the Department's petition without prejudice, is reversed. This matter is remanded to the trial court for further proceedings consistent with this opinion. Costs of this appeal are assessed to Citimortgage, Inc.

REVERSED AND REMANDED.