

Act 367 Supplements the Procedures Available to Aggrieved Louisiana Taxpayers

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The Louisiana legislature recently erased any doubt as to the ability of Louisiana taxpayers to obtain a refund for taxes overpaid pursuant to an unconstitutional law, invalid or unenforceable rule or regulation, or the Department of Revenue's misinterpretation of any law, rule or regulation that causes a mistake of law. Act 367 of 2019 amended the overpayment-refund procedure in La. R.S. 47:1621 ("Section 1621") in response to the interpretation of that procedure adopted by the court in *Bannister Properties, Inc. v. State*, 2018-0030 (La. App. 1 Cir. 11/2/2018), 265 So. 3d 778, writ denied, 19-0025 (La. 3/6/2019), --- So. 3d ---.

Bannister involved plaintiff-taxpayers that, like many other corporate taxpayers, had voluntarily paid franchise taxes consistent with former regulation LAC 61:1.301(D). After those payments, the court in *UTELCOM, Inc. v. Bridges*, 2010-0654 (La. App. 1 Cir. 9/12/2011), 77 So. 3d 39, declared LAC 61:1.301(D) invalid, reasoning that the Department of Revenue had lacked statutory authority to promulgate the regulation.

The *Bannister* plaintiffs sought to recover for their overpayments through the overpayment-refund procedure in Section 1621. That procedure calls for the Department of Revenue to issue refunds to taxpayers that overpaid taxes in specified factual circumstances set out in Subsection (B) of Section 1621. It also contains a catch-all Subsection (C) providing that, "where it is determined that there is clear and convincing evidence that an overpayment has been made, the secretary shall make a refund, subject to conditions or limitations by law." A separate statute, La. R.S. 47:1625, allows the taxpayer to appeal to the Board of Tax Appeals (the "BTA") where the Secretary denies a refund claim.

In light of the *UTELCOM* ruling invalidating LAC 61:1.301(D), the Department of Revenue did not dispute that the *Bannister* plaintiffs had overpaid taxes. It took the position, however, that Subsection (F) of Section 1621 prohibited a refund under the circumstances. Subsection (F) provided:

This Section shall not be construed to authorize any refund of tax overpaid through a mistake of law arising from the misinterpretation by the secretary of the provisions of any law or the rules and regulations promulgated thereunder. In the event a taxpayer believes that the secretary has misinterpreted the law or promulgated rules and regulations contrary therewith, his remedy is by payment under protest and suit to recover, or by appeal to the Board of Tax Appeals in instances where such appeals lie.

The Department reasoned that it was not authorized to refund the plaintiffs because the plaintiffs had overpaid the tax through a mistake of law (payment consistent with the invalid regulation) arising from the misinterpretation by the secretary of the provisions of a law (issuing a regulation that was not authorized by statute).

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The taxpayers appealed to the BTA. Their argument was that because La. R.S. 47:1625 authorizes appeal to the BTA in instances where the Department denies a refund, the second sentence of La. R.S. 47:1625 contemplated that the BTA could order a refund even if the Department was not authorized to issue a refund in the first instance.

The BTA sided with the *Bannister* plaintiffs. The First Circuit overruled the BTA, however, adopting the Department's interpretation of Subsection (F). The Louisiana Supreme Court denied writs, thereby allowing the First Circuit's decision to stand.

The legislature responded to *Bannister* in its next session by passing Act 367. Among other provisions, Act 367 added new Subsection (B)(10) to Section 1621. The new subsection specifically requires refunds where "[t]he tax was overpaid due to payment pursuant to an unconstitutional law, invalid or unenforceable rule or regulation, or because of a mistake of law arising from the misinterpretation by the collector of the provisions of any law or of any rule or regulation." Act 367 also eliminated any lingering doubt by repealing Subsection (F).

Act 367 may have come too late to help the *Bannister* plaintiffs, whose cases became final when the Louisiana Supreme Court denied writs. Its effect on other UTELCOM-affected taxpayers (some of whom still have cases before the BTA that were stayed pending the outcome in *Bannister*) may depend on whether Act 367 is interpreted as having prospective effect only, or both retroactive and prospective effect. Regardless of the outcome in those cases, future taxpayers know that a procedure is available to obtain a refund of taxes paid in reliance on an invalid or misinterpreted law, rule, or regulation.