

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2008 CA 1616

**CLYDE A. "ROCK" GISCLAIR,
ASSESSOR FOR ST. CHARLES PARISH**

VERSUS

W/M
**LOUISIANA TAX COMMISSION, ELIZABETH GUGLIELMO,
CHAIRMAN OF THE LOUISIANA TAX COMMISSION, ENTERGY
LOUISIANA, INC., ENTERGY LOUISIANA LLC & ENTERGY
LOUISIANA PROPERTIES**

Judgment Rendered: October 31, 2008

*B/C
By P/S*
**Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Docket Number 559,132
The Honorable Timothy E. Kelley, Judge Presiding**

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Properties, LLC**

BEFORE: CARTER, C.J., WHIPPLE AND DOWNING, JJ.

*Downing, J. concurs and assigns
reasons*

WHIPPLE, J.

In this case, plaintiff, Clyde A. “Rock” Gisclair, the Assessor for St. Charles Parish (“the Assessor”), appeals from judgments of the district court maintaining peremptory exceptions of lack of subject matter jurisdiction and no right of action urged by defendants, the Louisiana Tax Commission and Elizabeth Guglielmo, Chairman of the Commission (collectively referred to as “the Commission”), and Entergy Louisiana, L.L.C., Entergy Louisiana, Inc., and Entergy Louisiana Properties, L.L.C. (collectively referred to as “Entergy”). For the following reasons, we reverse and remand.

FACTS AND PROCEDURAL HISTORY

On September 12, 2007, the Assessor filed a petition seeking to appeal the Commission’s August 16, 2007 assessment of Entergy’s public service properties in St. Charles Parish. Therein, the Assessor challenged the legality of the criteria, methodologies, and practices by which the Commission determined the value and taxable value of Entergy properties in St. Charles Parish as of January 1, 2007.

Specifically, the Assessor contended that the Commission erred in its determination by: (1) valuing Entergy property under the “Cost Approach” by allowing an incorrect and excessive deduction for decommissioning costs; by allowing a deduction from cost as an “income shortfall;” and by granting both exemption deductions and depreciation deductions on the same properties, effectively allowing the depreciation to be deducted twice on the same assets; (2) valuing Entergy property under the “Income Approach” by utilizing an excessively high capitalization rate; by allowing deductions for both depreciation and tax exemptions on the same assets, allowing the same deduction to be taken twice; and by allowing a deduction for nuclear plant decommissioning costs; (3) improperly subtracting various exemptions at a “depreciated” cost (or net book value) from the system value of Entergy property; (4) improperly allocating too

little of Entergy's system value to St. Charles Parish; and (5) making other additional errors in its 2007 valuation of Entergy property. The Assessor further contended that he is entitled to seek judicial review of the Commission's determination pursuant to LSA-R.S. 47:1989(D), LSA-R.S. 47:1998, and LSA-R.S. 49:964.

In response, Entergy and the Commission filed peremptory exceptions raising the objections of lack of subject matter jurisdiction and no right of action, contending that the district court has neither original nor appellate jurisdiction to review what they contend is a "correctness" challenge to the Commission's central assessment of Entergy's properties and further, that the Assessor has no right of action to challenge the Commission's central assessment at issue.

The exceptions were argued before the district court on April 21, 2008, after which the district court rendered oral reasons maintaining the exceptions. Two separate written judgments maintaining Entergy's exceptions of lack of subject matter jurisdiction and no right of action were signed by the district court on May 12, 2008. Also, two judgments maintaining the Commission's exceptions of lack of subject matter jurisdiction and no right of action were signed on May 22, 2008, by the district court. The Assessor filed the instant appeal from the judgments.

DISCUSSION

Lack of Subject Matter Jurisdiction

The Louisiana Constitution vests district courts with original jurisdiction over all "civil and criminal matters" except as otherwise authorized by the constitution. LSA-Const. art. V, § 16(A). This court has previously found that the regulation and control of *ad valorem* tax exemptions are matters constitutionally delegated to the Board and the governor. Bunge North America, Inc., v. Board of Commerce & Industry and Louisiana Department of

Economic Development, 2007-1746, 2007-1747, 2007-1705 (La. App. 1st Cir. 5/2/08), ___ So. 2d ___, ___. As such, these matters are outside the subject matter jurisdiction of the district courts because they are matters traditionally handled by the executive branch and were not considered “civil matters” within the grant of original jurisdiction by LSA-Const. art. V, § 16(A). See Boeing Co. v. Louisiana Department of Economic Development, 94-0971 (La. App. 1st Cir. 6/23/95), 657 So. 2d 652, 659.

However, the right to judicial scrutiny exists when there is a claim of deprivation of a constitutionally protected right, an assertion that an agency has exceeded constitutional authority, or an allegation that an administrative agency has exceeded its legislative grant of authority. See Boeing, 657 So. 2d at 657; Bunge North America, Inc., v. Board of Commerce & Industry and Louisiana Department of Economic Development, ___ So. 2d at ___.

Challenges to property tax assessments are categorized in the jurisprudence as challenges to the “correctness of the assessments” or challenges to the “legality of assessments.” ANR Pipeline Company v. Louisiana Tax Commission, 2002-1479 (La. 7/2/03), 851 So. 2d 1145, 1148-1149. Although correctness challenges are subject to review under LSA-Const. art. 7, § 18(E) by the parish governing authority and the Commission before being reviewed by the district courts, legality challenges may be filed directly in the district court pursuant to the provisions of LSA-Const. art. 7, § 3 and LSA-R.S. 47:2110(B). ANR Pipeline Company v. Louisiana Tax Commission, 851 So. 2d at 1149.

Correctness challenges are directed at issues of regularity or correctness of an assessment, such as overvaluation and misdescription. A claim for an assessment that is “void for radical defects” or is “inherently invalid,” however, presents a “legality challenge” over which the courts enjoy original jurisdiction. Triangle Marine, Inc. v. Savoie, 95-2873 (La. 10/15/96), 681 So. 2d 937, 939-

941. Moreover, challenges to both the validity of the law itself and the constitutionality of the administration of an otherwise valid law present legality issues that may be reviewed directly by the district court. ANR Pipeline Company v. Louisiana Tax Commission, 851 So. 2d at 1149.

In this case, the Assessor specifically contends that the “Commission did not use the proper method of determining the fair market value of the property of Entergy for ad valorem tax purposes, or when applying various exemptions, or when allocating the share of Entergy’s property to St. Charles Parish.” The Assessor further contends that the “Commission committed errors of law, and issued factual findings that are not supported by the evidence.” Overall, the Assessor contends that these allegations challenge the legality of the Commission’s “criteria, methodologies, and practices” employed in its valuation of Entergy’s properties. The Assessor alleges that the Commission utilized appraisal techniques that were so flawed and tainted by error that they failed to meet the minimally acceptable requirements for a legal “cost approach” valuation and a legal “income approach” valuation as required by LSA-R.S. 47: 1853, LSA-R.S. 47:2321, and LSA-Const. art. VII, § 18(D). The Assessor further argues that any resulting change in Entergy’s property value would be a consequence and result of the judicially required application of lawful “criteria, methodologies, and practices” by the Commission.

Moreover, the Assessor contends that LSA-R.S. 47:1998(C) clearly confers subject matter jurisdiction and a right of action for his legal challenge. Louisiana Revised Statute 47:1998(C), entitled, “Judicial review; generally,” provides as follows:

The assessor shall bring suit, when necessary to protect the interest of the state, and shall also have the right of appeal and such proceedings shall be without cost to him or the state.

The Assessor contends that LSA-R.S. 47:1998(C) provides Louisiana assessors with an express, independent and direct right of action to challenge Commission decisions, regardless whether the Commission action involves public service property or non-public service property.

The Assessor further contends that participation by assessors in judicial determinations of the value of public service properties is favored in law, citing LSA-R.S. 47:1903.3 and LSA-R.S. 47:1856(G). Louisiana Revised Statute 47:1903.3, provides as follows:

Notwithstanding any other law to the contrary, in any cause of action brought under the provisions of R.S. 47:1856, 1857, 1998, or 2110, the assessor of the parish or district where the property is located may intervene in such suit and become a party thereto.

The Assessor contends that LSA-R.S. 47:1903.3 permits the assessor of any parish in which a taxpayer's public service property is located to intervene and become a party in any "court appeal" from the Commission's determination of the value of its public service property brought by the company taxpayer. The Assessor further notes that LSA-R.S. 47:1856(G), which permits a company taxpayer to file suit contesting the constitutionality of any law affecting the valuation or assessment of public service properties, expressly provides that the Commission and "all affected assessors" shall be made parties to the suit.

The Assessor further notes that in previous years (2005 and 2006), he has challenged the Commission's assessment of public service properties in St. Charles Parish pursuant to Rule §2907 of the Commission. Rule §2907, however, which was the rule in effect on January 1, 2007, at the time the assessments at issue were made, was subsequently repealed by the Commission in March of 2007. However, prior to its repeal, Rule §2907 provided:

A. On or before September 15 or within 15 days after the commission has certified the assessed value of a company to an assessor, whichever is later, an assessor may file an exception to the assessed value of the company, or to the allocation of the assessed

value to one or more parishes, in writing, with the commission together with evidence in support of the exception. If, in the exception, a hearing is requested, it shall be held in accordance with the administrative procedure act.

B. Notwithstanding the fact that an exception has been filed to the valuation or allocation of public service property, the assessment shall be entered on the rolls as it was originally reported to the assessor until or unless a change order is issued by the commission.

The Assessor contends that the Commission's repeal of Rule §2907 effectively prompts the filing of a lawsuit in district court without the need to first pursue an administrative appeal.

In support of their exceptions of lack of subject matter jurisdiction, Entergy and the Commission argue that the Assessor's challenge is to the valuation of the Entergy properties, which constitutes a correctness challenge.¹ Moreover, Entergy and the Commission argue that LSA-R.S. 47:1998(C), the statute relied upon by the Assessor, is limited to appeals of locally assessed property only, and that the general relief granted therein does not apply to public service properties. They further contend that in a correctness challenge to the valuation of public service property, LSA-R.S. 47:1856, which provides for appellate jurisdiction over an appeal by the taxpayer company, but does not provide for appellate jurisdiction over a challenge by the local assessor, is controlling.² Thus, they

¹For purposes of this appeal, the Commission, in brief, adopted the arguments and positions set forth by Entergy.

²Louisiana Revised Statute 47:1856(A) provides as follows:

A. (1) The Louisiana Tax Commission shall give notice of the initial determination of the assessed valuation in writing to the company. This notice shall be delivered by certified mail, return receipt requested addressed to, or by personal service upon, the officer or authorized agent of the company responsible for the filing of the annual report. Except as provided in R.S. 47:1856(G), in the event that the company objects to the initial determination by the Louisiana Tax Commission, it may, within thirty days after receipt of the notice of that initial determination, file a protest in writing to the Louisiana Tax Commission which protest shall fully disclose the reason for protesting the initial determination.

(2) The initial determination by the Louisiana Tax Commission shall become final if no protest is filed with the Louisiana Tax Commission within

argue, because LSA-R.S. 47:1856 does not provide for the local assessor to assert a challenge to the Commission's determination, the district court does not have original jurisdiction herein.

We disagree. At the outset, we find the allegations set forth by the Assessor herein specifically challenge the legality of the Commission's "criteria, methodologies, and practices" employed in its valuation of Entergy's properties, which constitute a legal challenge reviewable by the district court.

Further, we find no merit to the narrow argument advanced by the defendants that LSA-R.S. 47:1856 is the only statute that avails review of public service property assessments by the Commission; that review pursuant to LSA-R.S. 47:1856 can only be invoked or initiated by the company taxpayer; and that all other general statutory authority that allows assessors to bring suit excludes public service property assessments. The crux of the defendants' argument is basically that, since the Commission's repeal of Commission Rule §2907, the parish assessor no longer has any right to challenge the Commission's assessment of a public service property before the Commission or the district court, and that the company taxpayer is the only entity that can bring a challenge to the Commission's assessment. If we were to accept this argument, there would be no recourse for the citizen taxpayer or local assessor, who is specifically charged with the duty and responsibility of "protecting the interest of the state." See LSA-R.S. 47:1998(C). If district courts do not have jurisdiction to review allegations of the illegal application of lawful "criteria, methodologies, and practices" by the

thirty days after receipt by the company of the notice of the initial determination.

(3) In the event that a protest is filed, the Louisiana Tax Commission shall grant a full and complete hearing to the company at a time and place to be determined by the Louisiana Tax Commission, but in no case shall the hearing be scheduled more than one hundred eighty days from the date the company filed its written protest in the case of public service property. Such hearing shall not be consolidated with any other hearing with respect to any other protest filed in a different tax year by the taxpayer or by any other taxpayer of an initial determination of assessed valuation by the Louisiana Tax Commission.

Commission in public service property assessments, there is no judicial review or recourse of any nature to challenge assessments that are “void for radical defects” or are “inherently invalid” and unfair, which could potentially create a windfall for the company taxpayer or otherwise disproportionately favor the company taxpayer. See Bunge North America, Inc. v. Board of Commerce & Industry and Louisiana Department of Economic Development, ___ So. 2d at ___.

Moreover, reading LSA-R.S. 47:1998 in its entirety, we disagree with defendants’ claim that the provisions of LSA-R.S. 47:1998 are only applicable to local assessments and are dispositive of the right of the Assessor to seek review on the bases alleged herein. Louisiana Revised Statute 47:1998(A)(1)(b)(ii) provides that if a judgment of the district court is appealed, taxes paid by a public service company taxpayer pursuant to LSA-R.S. 47:1856(E) shall remain segregated and the public service company taxpayer shall not be required to post a bond. Further, LSA-R.S. 47:1998(D) provides that “[i]n all suits relating to property taxes the judge shall hear and try such cases without delay ... [and] without cost to the reviewers or assessors.” In sum, we agree with the Assessor’s contention that the “jurisdictional trigger” that provides an assessor access to the courts is not the public service company’s decision to contest the Commissioner’s assessments.

For these reasons, we find that the district court erred in maintaining the exceptions of lack of subject matter jurisdiction. Accordingly, the May 12, 2008 judgment of the district court maintaining Entergy’s peremptory exception of lack of subject matter jurisdiction is reversed and the May 22, 2008 judgment of the district court maintaining the Commission’s peremptory exception of lack of subject matter jurisdiction is reversed.

No Right of Action

District court rulings on peremptory exceptions raising the objection of no right of action are reviewed *de novo* on appeal because they involve questions of law. Bunge North America, Inc. v. Board of Commerce & Industry and Louisiana Department of Economic Development, ___ So. 2d at ___. Generally, an action can only be brought by a person having a real and actual interest that he asserts. LSA-C.C.P. art. 681. The peremptory exception pleading the objection of no right of action is designed to test whether the plaintiff has any interest in judicially enforcing the right asserted. See LSA-C.C.P. art. 927(A)(5). When considering the exception, the court questions whether the plaintiff belongs to a particular class for which the law grants a remedy for a particular grievance. Falcon v. Town of Berwick, 2003-1861 (La. App. 1st Cir. 6/25/04), 885 So. 2d 1222, 1224. The exception does not raise the question of the plaintiff's ability to prevail on the merits, nor the question of whether the defendant may have a valid defense. Duplessis Cadillac, Inc. v. Creative Credit Services, Inc., 597 So. 2d 1155, 1158 (La. App. 1st Cir. 1992). Evidence supporting or controverting an objection of no right of action is admissible. Falcon v. Town of Berwick, 885 So. 2d at 1224. The party raising a peremptory exception bears the burden of proof. Falco Lime, Inc. v. Plaquemine Contracting Company, Inc., 95-1784 (La. App. 1st Cir. 4/4/96), 672 So. 2d 356, 359. To prevail on a peremptory exception pleading the objection of no right of action, the defendant must show that the plaintiff does not have an interest in the subject matter of the suit or legal capacity to proceed with the suit. Jackson v. Slidell Nissan, 96-1017 (La. App. 1st Cir. 5/9/97), 693 So. 2d 1257, 1261. Accordingly, Entergy and the Commission, as the exceptors, had the burden of showing that the Assessor did not have an interest in the subject

matter of the suit. On appeal, we must determine whether Entergy and the Commission satisfied their burden.

For the reasons discussed above, we find LSA-R.S. 47:1998(C) affords the district court with subject matter jurisdiction and further specifically affords the Assessor with a right of action to assert his legal challenge of the Commission's assessment herein. We additionally find that the Assessor's right to intervene is further supported by the jurisprudence. See Hester v. Louisiana Tax Commission, 81 So. 2d 381 (La. 1955) and Williams v. Belle of Orleans, L.L.C., 2003-1203 (La. App. 4th Cir. 12/1/04), 890 So. 2d 670. In Hester, the Louisiana Supreme Court held that pursuant to LSA-R.S. 47:1998(C), the Madison Parish Assessor could bring suit against the Commission in the district court concerning the Commission's assessment of a toll bridge that the Commission classified and valued as public service property. See Hester v. Louisiana Tax Commission, 81 So. 2d at 386. The Court recognized that LSA-R.S. 47:1998(C) specifically and independently permitted an assessor to bring suit against the Commission, stating:

[Louisiana] Revised Statutes 47:1998 does not say that the action of the Tax Commission is final. On the contrary, it includes the provision that the Assessor shall bring suit to protect the interest of the State of Louisiana, which we have heretofore observed in the prior laws.

Hester v. Louisiana Tax Commission, 81 So. 2d at 386.

Moreover, in Williams, the court recognized that the Assessor is conferred the right to institute suit on behalf of the state pursuant to LSA-R.S. 1998(C) where the collection of *ad valorem* taxes affect state public bodies. Williams v. Belle of Orleans, L.L.C., 890 So. 2d at 675. In doing so, the Williams court held "pursuant to LA. R.S. 47:1998C, we find that the assessor has standing to bring suit on behalf of the state, to protect that interest." Williams v. Belle of Orleans, L.L.C., 890 So. 2d at 675. The Williams court further held, "Affected

tax-recipient bodies have a right to procedural review of administrative decisions that cannot be denied by statute.” Williams v. Belle of Orleans, L.L.C., 890 So. 2d at 677.

Herein, the Assessor sets forth in his petition that he is the bona fide representative of the St. Charles Parish Assessor’s Office, which is the tax-recipient body of all *ad valorem* property taxes assessed and collected in St. Charles Parish. Clearly, the Assessor herein has a right to question the assessments made by the Commission where these assessments affect public state bodies.

On review, for the reasons set forth above, we find that Entergy and the Commission, as the exceptors, failed to meet their burden of showing that the Assessor did not have an interest in the subject matter of the suit. Accordingly, we find merit to this assignment of error.

CONCLUSION

Based on the above and foregoing reasons, the May 12, 2008 judgment of the district court, maintaining Entergy’s exceptions of lack of subject matter jurisdiction, is reversed. The May 12, 2008 judgment of the district court, maintaining Entergy’s exception of no right of action, is also reversed.

The May 22, 2008 judgment of the district court, maintaining the Commission’s exception of lack of subject matter jurisdiction, is reversed. The May 22, 2008 judgment of the district court, maintaining the Commission’s exception of no right of action, is also reversed, and the matter is remanded to the district court for further proceedings in accordance with our ruling herein.

Costs of this appeal in the amount of \$1,198.32 are assessed equally against the appellees, Entergy and the Commission.

JUDGMENTS REVERSED AND REMANDED.

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT

NUMBER 2008 CA 1616

CLYDE A. "ROCK" GISCLAIR,
ASSESSOR FOR ST. CHARLES PARISH
VERSUS

LOUISIANA TAX COMMISSION, ELIZABETH GUGLIELMO,
CHAIRMAN OF THE LOUISIANA TAX COMMISSION, ENTERGY
LOUISIANA, INC., ENTERGY LOUISIANA LLC & ENTERGY
LOUISIANA PROPERTIES

DOWNING, J., concurs and assigns reasons.

COA
I generally agree with the majority's analysis and conclusions. At the beginning of the section entitled, "No Right of Action," however, the majority makes an overbroad generalization that is much repeated in the jurisprudence and is wrong, unless no factual question is at issue. The majority states, "District court rulings on peremptory exceptions raising the objection of no right of action are reviewed *de novo* on appeal because they involve questions of law," *citing* Bunge North America, Inc. v. Board of Commerce & Industry and Louisiana Department of Economic Development, 07-1746 p.8 (La.App. 1 Cir. 5/2/08), ___ So.2d ___, ___.

Even so, the majority notes in the same paragraph that "[e]vidence supporting or controverting an objection of no right of action is admissible. A mixed question of fact and law should be accorded great deference by a reviewing court under the manifest error standard of review. *Cosmar Co. v. Slaughter*, 03-1310, p. 5 (La.App. 1 Cir. 4/2/04), 871 So.2d 646, 648-49. An appellate court may not set aside a trial court's finding of fact in the absence of "manifest error" or unless it is "clearly wrong." *Rosell v. ESCO*, 549 So.2d 840, 844 (La.1989).

Obviously, where there are no factual issues in dispute, as here, the court does a *de novo* review to see if the objection of no right of action should be maintained or overruled. But the majority's statement, as set forth above and in the opinion, is an overgeneralization that can lead to legal error (which we would review *de novo*).