

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2009 CA 2047

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

VERSUS

THE LOUISIANA TAX COMMISSION

Judgment Rendered: February 12, 2010

Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 579,264

Honorable Timothy E. Kelley, Judge

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BEFORE: WHIPPLE, HUGHES, AND WELCH, JJ.

*Hughes, Jr., concurs = "Correctness" is arithmetic,
"legality" is methodology.*

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WELCH, J.

Plaintiff, Clyde A. “Rock” Gisclair, the Assessor for St. Charles Parish (Assessor), appeals a judgment maintaining a peremptory exception raising the objection of lack of subject matter jurisdiction raised by defendant, the Louisiana Tax Commission (Commission). We reverse and remand.

BACKGROUND

This is the second round of litigation between the same parties involving an attack by the Assessor of St. Charles Parish on the Commission’s criteria, methodologies, and practices in determining the value and taxable value of properties belonging to Entergy Louisiana, Inc. and its affiliates (Entergy) located in that parish for *ad valorem* tax purposes. The background forming the basis for the first lawsuit can be gleaned in the opinions of this court and the Supreme Court in **Gisclair v. Louisiana Tax Commission**, 2008-1616 (La. App. 1st Cir. 10/31/08)(unpublished), rev’d, 2009-0007, 2009-0008 (La. 6/29/09), 16 So.3d 1132 (referred to herein as **Gisclair I**).

In **Gisclair I**, the Assessor sued both the Commission and Entergy, challenging the Commission’s August 16, 2007 assessment of Entergy’s public service properties in St. Charles Parish. The Assessor alleged that the Commission erred in: (1) valuing Entergy’s property under the “Cost Approach” by allowing an incorrect and excessive deduction for decommissioning costs, allowing a deduction as an “income shortfall,” and 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’s property under the “Income Approach” by utilizing an excessively high capitalization rate, allowing deductions for both depreciation and tax exemptions on the same assets, allowing the same deduction to be taken twice, and allowing a deduction for nuclear plant

decommissioning costs; (3) improperly subtracting various exemptions at a “depreciated cost” from the system value of Entergy; (4) allocating too little of Entergy’s system value to St. Charles Parish; and (5) making other not yet identified additional errors in its 2007 valuation of Entergy. The Assessor asked the court to: render a judgment overturning the decision of the Commission and ordering the Commission to value and assess the assets of Entergy in the manner requested by the Assessor; correctly determine and apply the exemptions from Entergy’s *ad valorem* taxes; properly determine Entergy’s system value allocable to St. Charles Parish; and grant any relief to which the Assessor may be entitled to by law. **Gisclair**, 2009-0007 at pp. 3-4, 16 So.3d at 1134-1135.

In response, the Commission and Entergy filed peremptory exceptions raising the objections of lack of subject matter jurisdiction and no right of action, urging that the district court lacked authority to review the claims raised by the Assessor. The jurisdictional issue presented by the motion was whether the Assessor’s petition set forth a challenge to the “correctness” of the tax assessment, over which the district court did not have original subject matter jurisdiction, or whether the petition asserted a “legality” challenge to the assessment, over which the court did have original jurisdiction. The district court agreed with the Commission’s characterization of the Assessor’s lawsuit as a correctness challenge to a tax assessment and found that it lacked original subject matter jurisdiction to hear the lawsuit. On appeal, this court reversed, concluding that the Assessor levied a legality challenge to the Commission’s assessment, as the petition specifically attacked the Commission’s criteria, methodologies, and practices in the valuation of properties, and therefore, the district court had original jurisdiction to hear the dispute. **Gisclair**, 2008-1616 at p. 8.

In **Gisclair I**, the supreme court reversed this court’s ruling, finding that

the Assessor was seeking an adjustment to the valuation of Entergy's properties, which constitutes a correctness challenge over which district courts do not have original jurisdiction. The court stressed that the Assessor repeatedly and expressly challenged the value placed on Entergy's properties by the Commission, the method by which the Commission arrived at that value, and sought to correct the value the Commission placed on Entergy's taxable properties, to correct the value it placed on Entergy's tax exempt properties, and to increase the percentage of value allocated to St. Charles Parish. **Gisclair**, 2009-0007 at p. 9, 16 So.3d at 1138. In characterizing the Assessor's petition as a correctness challenge, the court focused on what the petition **did not** allege.

The court stated:

Significantly, the assessment itself is complained of and attacked for undervaluation. The challenge does not seek to draw into question the existence of any valid assessment or the constitutionality of the tax provision or LTC's administration of the provisions. Rather, according to the allegations of the petition[;] a valid assessment does exist which can be calculated with a proper application of valuation[,] methodology, techniques, and criteria; the LTC just rendered the wrong assessment by a misapplication of the various approaches for determining value and taxable value. Clearly, plaintiff does not seek to attack the assessment as having no legal existence; he simply seeks to adjust the assessment by an increase in valuation. Any claim that leaves the assessment intact, but seeks to have the valuation adjusted, is a correctness challenge.

Moreover, despite the appellate court's holding to the contrary, the fact the valuation challenged in this case was premised on an alleged erroneous application of methodology as well as flawed criteria does not turn this challenge into a legality challenge. To be a legality challenge, plaintiff must seek to void the assessment in toto, contesting the validity *of* the ad valorem tax itself, or challenge the constitutionality of the tax provisions or the administration of the tax provisions.

Simply stated, the petition does not seek to void the assessment, contest the validity of the ad valorem tax itself, challenge the constitutionality of the assessment, allege the assessment is beyond the LTC's statutory authority, or that LTC's valuation methodologies or techniques are unconstitutional. Plaintiff simply disputes the valuation placed on Entergy's properties by the LTC, and as seen through our discussion of pertinent jurisprudence, our constitutional and statutory laws do not

grant district courts original jurisdiction over such disputes.
(Citations omitted.)

Gisclair, 2009-0007 at pp. 9-11, 16 So.3d at 1138-1139.

On June 10, 2009, prior to the date on which the supreme court's opinion in **Gisclair I** was handed down, the Assessor filed this petition for a declaratory judgment and preliminary and permanent injunctions against the Commission in the district court. Therein, he alleged that his office collects *ad valorem* taxes from Entergy and that a substantial share (45% or more) of Entergy's property is located within St. Charles Parish. The Assessor charged that the Commission's administrative practices exceeded its legislative and constitutional grant of authority and that its valuation methodologies or techniques are unconstitutional. The Assessor did not challenge a specific tax assessment, but levied his challenges to a future tax assessment based on the Commission's historical practices in valuing Entergy's property for *ad valorem* tax purposes.

The Assessor alleged that the Commission's historical exemption practices are unlawful, unconstitutional, and in excess of the Commission's constitutional and legal authority. The Assessor charged that the Commission had a practice of giving Entergy and other public service taxpayers additional *ad valorem* tax exemptions constitutionally prohibited by La. Const. Art. VII, § 21(F), which sets forth the exclusive list of allowable tax exemptions. With respect to the Commission's appraisal practices, the Assessor urged that the Commission systematically and unlawfully exceeded its authority and violated appraisal and valuations standards, methodology, and practices required by law. He alleged that while La. R.S. 47:1853(B) requires the Commission to employ nationally recognized techniques of appraisal, the Commission systematically violated that provision by employing some other "self-created" appraisal methodology. He also attacked various deductions given to Entergy as

exceeding the scope of the Commission's grant of authority and as tax exemptions that are constitutionally prohibited. Specifically, the Assessor identified the following instances in which the Commission violated statutorily mandated appraisal violation standards: (1) allowing a deduction for nuclear plant decommissioning costs; (2) allowing a deduction for "AFUDC," (3) including only a portion of "CWIP" as an asset; (4) utilizing an incorrect capitalization rate; (5) failing to adjust Entergy's income to take into account "CWIP;" and (6) granting Entergy an "income shortfall deduction." The deductions and exclusions, the Assessor alleged, operated as *de facto* tax exemptions which are unconstitutional because they are not among the exclusive list of allowable tax exemptions under La. Const. Art. VII, § 21(F).

The Assessor alleged that based on the its historical practices, the Commission intended to employ the same unlawful exemption practices and the same unlawful cost and income approaches in valuing and assessing Entergy's property as of January 1, 2009. The Assessor averred that the Commission's unlawful exemption practices and unlawful valuation approaches are enforced by the Commission with the authority of a rule as they are uniformly incorporated by the Commission with respect to all public service property appraisals. Additionally, the Assessor averred that the Commission's unlawful exemption and unlawful appraisal practices will cause the loss of *ad valorem* revenues to the Assessor that will cause great and irreparable injury for which no adequate remedy exists at law.

In his request for relief, the Assessor asked the court to issue a preliminary injunction, to be followed by a permanent injunction, prohibiting the Commission from determining the value of Entergy's property by subtracting the book value of Entergy's tax exempt property from the fair market value of Entergy's property that is subject to taxation by St. Charles Parish, as well as

prohibiting the Commission from unlawfully allowing certain exemptions and deductions, utilizing incorrect capitalization rates, and making improper income adjustments in valuing Entergy's property pursuant to the cost and income approaches. Finally, the Assessor asked for a declaratory judgment decreeing that the Commission's exemption practices, cost approach practices, and income approach practices are unlawful and in excess of the Commission's authority.

The Commission filed a peremptory exception raising the objections of lack of subject matter jurisdiction and no cause of action. It urged that **Gisclair I** is dispositive of this case, insisting that the Assessor returned to the district court with the exact claims asserted in the 2007 lawsuit. The Commission argued that the instant petition represented a challenge to the way the Commission values Entergy's property, even though the supreme court clearly held in **Gisclair I** that such claims challenging the value of Entergy's public service property for *ad valorem* tax purposes are outside the scope of the district court's original jurisdiction. The only difference in the two cases, the Commission contended, is the fact that in **Gisclair I**, the Assessor attacked the valuation for the 2007 tax year, while the Assessor is currently attacking a future valuation before the Commission did the valuation. The Commission insisted that the mere fact that the Assessor is now seeking to challenge the valuation of Entergy before it is done does not place his claims outside the supreme court's holding in **Gisclair I**. In its peremptory exceptions of no cause of action, the Commission asserted that: (1) the Assessor does not have a cause of action for injunctive relief because the Commission's appraisal methodologies fall within its discretionary powers, and (2) the Assessor does not have a cause of action for declaratory relief because the petition did not present a justiciable controversy, but sought an advisory opinion on the correctness of the Commission's future tax assessments.

The district court reviewed the allegations of the new petition and concluded it did not present a legality challenge as set forth by the parameters of the supreme court's decision in **Gisclair I**. The court found that the Assessor was essentially attacking the correctness of the Commission's calculation, a matter over which the court did not have original jurisdiction. This appeal, taken by the Assessor, followed.

DISCUSSION

The only issue in this appeal is whether the district court has original jurisdiction to hear and determine the Assessor's challenge to the Commission's tax assessment of public service property based on the allegations in the Assessor's petition. For the reasons which follow, we conclude that the petition presents a legality challenge to the Commission's long-standing practices and methodologies in assessing Entergy's property for *ad valorem* tax purposes, over which the district court does have original 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. La. Const. Art. V, § 16(A). The Constitution vests the Commission with the authority to determine the fair market value of public service properties and with original jurisdiction to review the "correctness" of the assessment. La. Const. Art. VII, § 18(D) and (E). The nature of the challenge to a property assessment by the Commission dictates the body in which the constitution grants jurisdiction to hear and resolve the dispute. The Commission has original jurisdiction over challenges to the "correctness of assessments," while a district court has original jurisdiction over challenges to the "legality of assessments." **Gisclair**, 2009-0007 at pp. 5-6, 16 So.3d at 1135-1136.

In **Gisclair I**, the supreme court analyzed the jurisprudence distinguishing

between correctness and legality challenges. In so doing, the court observed that there were certain challenges falling under the category of legality challenges, specifically, those challenges which: seek to void the assessment itself, contest the validity of the *ad valorem* tax itself, challenge the constitutionality of the assessment, allege that the assessment is beyond the Commission's statutory authority, or that the Commission's valuation methodologies or techniques are unconstitutional. **Gisclair**, 2009-0007 at p. 10, 16 So.3d at 1139. The Assessor's first petition failed to fall into any of these categories, the court concluded, because the Assessor repeatedly disputed the value placed on Entergy's properties by the Commission and attempted to have that value corrected, but did not challenge the assessment as having no legal existence, the constitutionality of the tax provisions, or the Commission's administration of the provisions. In short, the court found, the Assessor simply disputed the valuation placed on Entergy's properties and sought an adjustment to the valuation of those properties, which constitutes a correctness challenge to the assessment over which the district court lacked jurisdiction. **Gisclair**, 2009-0007 at pp. 9-11, 16 So.3d at 1138-1139.

The Assessor contends that the district court erred in characterizing the allegations of his petition as a correctness claim. He cites multiple instances in which he alleged that the Commission systematically employs administrative valuation practices when it values Entergy that exceed the Commission's legislative and constitutional authority. He submits that he is asking the district court to declare these practices unlawful and to prohibit their use by the Commission when it conducts future valuations of Entergy. The Assessor contends that the claims raised in the petition provide the district court with original subject matter jurisdiction under La. Const. Art. V, § 16(A).

The Commission argues that this court is bound by the **Gisclair I**

decision, which, it insists, held that a challenge to valuation and methodology is a correctness challenge. It argues that the Assessor is levying the same valuation complaints in the instant petition as those that were raised in the petition in **Gisclair I**, namely, deductions for decommissions and “AFUDC,” exclusions for “CWIP,” complaints about income shortfall, and the valuation of exempt property. The Commission submits that the Assessor has “dressed up” his earlier valuation complaints with claims that the Commission’s appraisal practices exceed its constitutional authority and that it employs valuation methodologies or techniques that are unconstitutional. The only other difference, the Commission claims, is that the Assessor asks this court to order the Commission to use his preferred valuation methods for future assessments that have not yet been done by the Commission. The Commission urges that the instant petition presents nothing more than an attempt to force the Commission to change its valuation method with respect to the property of a particular taxpayer, which, unquestionably, is a correctness challenge. It also insists that in **Gisclair I**, the court made it clear that a valuation challenge, whether based on the Constitution, the law, expert opinion, or anything else, is a correctness challenge.

We disagree. We do not read the supreme court’s decision in **Gisclair I** to require that a challenge to a tax authority’s appraisal methods and exemption practices be raised before the Commission prior to seeking judicial review irrespective of the legal basis on which the challenge is based. In **ANR Pipeline Company v. Louisiana Tax Commission**, 2002-1479, pp. 7-8 (La. 7/2/03), 851 So.2d 1145, 1150, the supreme court specifically rejected the Commission’s argument that all public service taxpayers had to present all objections to an initial determination of assessed valuation, including legality and constitutionality challenges, to the Commission before challenging *ad valorem*

tax assessments in district court. In that case, the supreme court held that because district courts have original jurisdiction over constitutional questions, a protest to a tax assessment based solely on a constitutional challenge was not prematurely filed in the district court, even though the Commission had not yet issued a final determination of assessed value. **ANR Pipeline Company**, 2002-1479 at p. 1, 851 So.2d at 1146. Furthermore, it has long been held that the right to judicial scrutiny exists when there is a claim of deprivation of a constitutionally protected right, an assertion that an agency exceeded its constitutional authority, or an allegation that an administrative agency exceeded its legislative grant of authority. **Bunge North America, Inc. v. Board of Commerce & Industry and Louisiana Department of Economic Development**, 2007-1746, 2007-1747, 2007-1705, p. 22 (La. App. 1st Cir. 5/2/08), 991 So.2d 511, 526, writ denied, 2008-1594 (La. 11/21/08), 996 So.2d 1106.

Instead, we believe that the holding of **Gisclair I** is very narrow and fact specific. There were specific deficiencies in the Assessor's petition which led to the conclusion that the allegations contained therein constituted a correctness challenge. First, the court defined a correctness challenge as a claim that leaves an assessment intact, but seeks to have the valuation adjusted. **Gisclair**, 2009-0007 at p. 10, 16 So.3d at 1139. In his initial petition, the Assessor attacked the Commission's 2007 assessment of Entergy and sought to invoke the jurisdiction of the district court to adjust the assessment. The court found that petition presented a correctness challenge because the Assessor sought an adjustment to the valuation of Entergy's properties. The instant petition does not seek to review the correctness of any particular assessment and does not seek to have a valuation made by the Commission adjusted. Instead, the Assessor challenges the Commission's long-standing assessment practices and seeks to prevent the

Commission from continuing to engage in appraisal and exemption practices he charges run afoul to the constitution and statutory law.

Secondly, the court found that because the petition in **Gisclair I** did not seek to void the assessment, contest the validity of the *ad valorem* tax itself, challenge the constitutionality of the assessment, allege the assessment is beyond the Commission's statutory authority, or that the Commission's valuation methodologies or techniques are unconstitutional, none of the traditional bases for invoking the original jurisdiction of a district court were present. The court read the petition as a challenge to the valuation placed on Entergy's properties by the Commission, a matter over which the Commission, not a district court, has original jurisdiction. In contrast, the instant petition does allege that the Commission's appraisal practices are beyond the scope of its statutory and constitutional authority. In his petition, the Assessor alleges that the Commission's practice of granting Entergy exemptions not allowed by law, coupled with the use of certain valuation practices, violates the constitution and exceeds the statutory authority granted to the Commission. Specifically, the Assessor avers that the Commission's valuation methodologies operate to give Entergy tax exemptions that are unconstitutional because they are not among the exclusive list of allowable *ad valorem* tax exemptions under La. Const. Art. VII, § 21(F). According to the Assessor, the Commission has decided that entire classes of property owned by Entergy will not be taxable and its practice of granting Entergy deductions, exclusions, and exemptions from *ad valorem* taxes represents an attempt by the Commission to legislate what classes of property will be exempt from *ad valorem* taxation.

Our courts have consistently held that district courts have jurisdiction to consider claims attacking the constitutionality of the administration of the tax laws and that an administrative agency's practice or decision exceeded its

legislative or constitutional grant of authority. See **ANR Pipeline Company** 2002-1479, 851 So.2d 1145; **Triangle Marine, Inc. v. Savoie**, 95-2873, 95-2885, 95-2899, 95-2904 (La. 10/15/96), 681 So.2d 937; **Bunge**, 2007-1746 at p. 22, 991 So.2d at 526; **Boeing Company v. Louisiana Department of Economic Development**, 94-0971, p. 8 (La. App. 1st Cir. 6/23/95), 657 So.2d 652, 657. The Commission's jurisdictional authority is limited by the Constitution to those claims presenting a correctness challenge to a tax assessment. The "correctness of assessment" is merely a term of art, referring to the right of the taxpayer to seek adjustments to the valuation of taxable property. **Traigle Marine Inc.**, 95-2873 at pp.6-7, 681 So.2d at 940. The logic behind the dichotomy between correctness and legality challenges is that claims challenging the correctness of an assessment should go to the forum more suited to hearing them. While the Commission is the appropriate forum in which to seek an adjustment to a particular assessment, it is not the appropriate forum to determine whether its exemption and valuation practices exceed the scope of its constitutional and statutory authority. Thus, it makes little sense to require the Assessor to present these claims to the Commission prior to seeking judicial review of those practices, where the Assessor does not challenge a particular assessment and does not seek an adjustment to an assessment.

Accordingly, we find that the petition does not present a correctness claim because the Assessor is not seeking to adjust the valuation of any current or prior assessment. Instead, the Assessor is seeking a determination that the Commission's valuation practices are unconstitutional and exceed the scope of the Commission's constitutional and statutory authority. These allegations present a legality challenge to the Commission's administration of the tax laws over which the district court has original subject matter jurisdiction under La. Const. Art. V, § 16(A). Therefore, we conclude that the district court erred in

granting the exception of lack of subject matter jurisdiction and we reverse that ruling.

In this appeal, the Commission urges that the Assessor does not have a cause of action for any form of relief, is not entitled to preliminary injunctive relief as a procedural matter, cannot make a showing that he will suffer irreparable injury, and is not entitled to enjoin the Commission from performing a discretionary function in calculating Entergy's *ad valorem* tax assessment. Because of the district court's ruling on the jurisdictional issue, none of these claims were heard in the district court and are not properly before us for review. We remand the case for consideration of these claims in the district court.

CONCLUSION

For the foregoing reasons, the judgment granting the peremptory exception of lack of subject matter jurisdiction is reversed. The case is remanded for proceedings consistent with this opinion. Costs in the amount of \$1,879.50 are assessed to the appellee, Louisiana Tax Commission.

REVERSED AND REMANDED.