

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 CA 1781

SIMONS PETROLEUM, INC.

VERSUS

DANE FALGOUT, SALES TAX COLLECTOR, FOR THE SALES &  
USE TAX DEPARTMENT OF THE POINTE COUPEE PARISH  
POLICE JURY

Consolidated With

2006 CA 1782

THE POINT COUPEE PARISH POLICE JURY, THROUGH ITS  
SALES AND USE TAX DEPARTMENT

VERSUS

SIMONS PETROLEUM, INC.

Judgment Rendered: SEP 19 2007

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On Appeal from the Eighteenth Judicial District Court  
In and For the Parish of Pointe Coupee  
State of Louisiana  
Docket Nos. 35,283 and 37,270

Honorable J. Robin Free, Judge Presiding

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\*\*\*\*\*

BEFORE: PARRO, GUIDRY, AND McCLENDON, JJ.

*Handwritten initials:*  
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**McCLENDON, J.**

Simons Petroleum, Inc. (Simons) has appealed a judgment dismissing its motion for a refund of sales taxes. For the reasons that follow, we affirm the judgment of the trial court.

### **FACTS AND PROCEDURAL HISTORY**

This suit arises out of an assessment for sales and use taxes issued to Simons for its sale of “off-road” diesel fuel during the audit period of January 1, 1997, through March 31, 1999.<sup>1</sup> Simons paid the original assessment amount of \$86,135.50, under protest, to the Point Coupee Parish Police Jury through its Sales and Use Tax Department (Police Jury). Within thirty days of making the payment under protest, Simons filed suit (the recovery suit), pursuant to LSA-R.S. 47:1576, asserting that the taxes were not due and seeking a refund of the amount paid.<sup>2</sup> Thereafter, the Police Jury filed a supplemental and amending reconventional demand asserting a miscalculation of the tax owed and asking for \$18,080.42 in additional taxes, together with penalties and interest.<sup>3</sup> In the alternative, the Police Jury requested a judgment confirming the assessment of \$86,135.50. On October 15, 2002, a judgment was signed confirming the assessment in the amount of \$86,135.50, and awarding to the Police Jury additional taxes in the amount of \$18,080.42, plus applicable interest. Simons devolutively appealed the judgment, which was affirmed by this court on February 23, 2004, in **Simons Petroleum, Inc. v. Falgout**, 03-0610 (La.App. 1 Cir. 2/23/04), 873

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<sup>1</sup> The background of this entire matter is more fully described in two earlier opinions of this court. See **Simons Petroleum, Inc. v. Falgout**, 03-0610 (La.App. 1 Cir. 2/23/04), 873 So.2d 65, and **Simons Petroleum, Inc. v. Falgout**, 03-2600, 03-2601 (La.App. 1 Cir. 3/4/04), 874 So.2d 847.

<sup>2</sup> Said proceeding was assigned docket number 35,283 of the Eighteenth Judicial District Court for the Parish of Pointe Coupee.

<sup>3</sup> Simons’ motion to strike the original reconventional demand of the Police Jury was granted by the trial court in a judgment signed on January 7, 2002.

So.2d 65, and thereafter reversed by the Louisiana Supreme Court, which held the parish tax to be unconstitutional.<sup>4</sup> **Simons Petroleum, Inc. v. Falgout**, 04-0695 (La. 11/24/04), 888 So.2d 213.

However, as the \$18,080.42 in additional taxes had never been paid, the Police Jury, on March 18, 2003, while Simons' appeal was pending, filed a separate summary proceeding with a rule to show cause why Simons should not be enjoined from the further pursuit of business until the taxes were paid.<sup>5</sup> On July 29, 2003, this proceeding (the sales tax rule) filed by the Police Jury was transferred to Division B and made a part of the proceeding instituted by Simons.

Following the filing of several exceptions by Simons and a hearing on September 16, 2003, the trial court denied the exceptions and granted judgment in favor of the Police Jury. Judgment was signed on September 16, 2003, enjoining Simons from the pursuit of business until the \$18,080.42 delinquent tax amount, plus applicable interest, was paid. Simons filed a suspensive appeal of this judgment. On March 4, 2004, this court affirmed the judgment of the trial court. **Simons Petroleum, Inc. v. Falgout**, 03-2600, 03-2601 (La.App. 1 Cir. 3/4/04), 874 So.2d 847. Simons did not apply for a rehearing of said appellate court judgment or seek writs with the supreme court. On March 10, 2004, Simons paid the total amount due of \$42,840.94 (the \$18,080.42 amount, plus penalties and interest).

Thereafter, and following the decision of the supreme court declaring the parish tax unconstitutional, Simons filed a "Motion and Order for

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<sup>4</sup> In its decision, the supreme court determined that the Louisiana Constitution prohibits the taxation by political subdivisions of off-road diesel fuel. Upon the supreme court's reversal, the Police Jury refunded to Simons only the amount of the original assessment paid under protest, with applicable interest, which totaled \$106,403.62.

<sup>5</sup> This summary proceeding was filed pursuant to LSA-R.S. 47:314 and LSA-R.S. 47:1574, made applicable through LSA-R.S. 33:2841, and was assigned docket number 37,270 in Division A of the Eighteenth Judicial District Court for the Parish of Pointe Coupee.

Refund of Taxes Paid Under Protest.”<sup>6</sup> In response to this motion, the Police Jury filed several exceptions, including the dilatory exception raising the objection of unauthorized use of summary proceedings, the declinatory exception raising the exception of *lis pendens*, and the peremptory exceptions raising the objections of *res judicata*, no right of action, and no cause of action. Following a hearing on August 9, 2005, judgment was rendered sustaining the exceptions and dismissing Simon’s motion, with prejudice. Judgment was signed on September 8, 2005. Thereafter, Simons filed a “Motion for Rehearing,” which was denied on October 11, 2005. Subsequently, Simons filed a timely devolutive appeal.

### OUTSTANDING MOTIONS

Initially, we address the outstanding motions filed in this matter. On December 1, 2006, the Police Jury filed a motion to dismiss the appeal for lack of jurisdiction. On December 19, 2006, Simons filed a motion for leave of court to file a reply brief and, on January 29, 2007, filed a memorandum in opposition to the motion to dismiss. In response thereto, on February 8, 2007, the Police Jury filed a motion to strike the memorandum as untimely. The above motions were referred to the appeal panel.

We grant Simons’ motion for leave of court to file a reply brief and allow the filing of the memorandum in opposition to the motion to dismiss. We further deny the Police Jury’s motion to strike. And as more fully explained hereinafter, we find that Simons did not acquiesce in the October 15, 2002 judgment, which awarded the additional taxes, when it paid the

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<sup>6</sup> Although the same motion was filed in each of the original separate proceedings, this court held in its previous opinion that the proceeding involving the sales tax rule to show cause was “transferred to and prosecuted in the same proceeding which yielded the October 15, 200[2] judgment.” See **Simons Petroleum, Inc. v. Falgout**, 874 So.2d at 850. Furthermore, in reviewing Simons’ objection of *lis pendens*, this court observed that “[b]ecause ‘two or more suits’ are not pending, the trial court correctly denied the exception of *lis pendens*.” **Id.**

additional taxes. Accordingly, we deny the Police Jury's motion to dismiss this appeal for lack of jurisdiction.<sup>7</sup>

### DISCUSSION

In its appeal, Simons initially argues that the trial court erred in failing to find that its payment of the additional taxes due was a timely payment under protest. Simons urges that in timely challenging the original assessment, by paying the assessment under protest and then filing suit for its recovery, it also challenged any other taxes found to be due and owing for the same sales transactions during the same audit period and arising from the same assessment. Based on the unique facts of this case, we agree. The challenge to the assessment for the audit period in question was already pending by the filing of the recovery suit. The award of the additional sales taxes by the trial court on October 15, 2002, derived from the very same sales tax transactions for the very same audit period as the amount originally assessed and was simply a recalculation of the amount owed. The recovery suit contested the validity of the sales taxes imposed during the audit period in question.<sup>8</sup> The trial court determined that when Simons paid the additional delinquent tax amount, for the same sales transactions for the same audit period, that its payment was also made under protest. We find no manifest error in this factual finding of the trial court.

The trial court determined, however, that the payment was untimely and it therefore could not order the refund of the additional tax amount.

However, Simons followed the procedures set forth in LSA-R.S. 47:1576 for

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<sup>7</sup> The Police Jury also contends that the appeal of the judgment denying Simons' motion for a refund should be dismissed as unauthorized and untimely. The Police Jury argues that pursuant to certain tax provisions, the time delays therein prevent this appeal. However, LSA-R.S. 47:1574, cited by the Police Jury, refers to summary proceedings for the collection "of all claims . . . by or on behalf of the collector, for taxes . . . due." Simons is seeking a refund of taxes already determined and paid.

<sup>8</sup> Of course, when suit was filed, Simons could only ask for a refund of the \$86,135.50, plus applicable interest, as that was the only amount in dispute at that time.

the recovery of taxes paid under protest, but at the time the initial payment of the assessed taxes was made by Simons, Simons was unaware of the miscalculation by the parish.

Simons also asserts that the trial court erred in holding that the sales tax rule judgment was a final non-appealable judgment, since Simons did not appeal from this court's decision on the sales tax rule. We find no error in the trial court's determination. That judgment simply enjoined Simons from the further pursuit of business until the additional taxes were paid. Specifically, the September 16, 2003 judgment provided:

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, pursuant to La. R.S. 47:314 and comparable provisions in the local ordinances, Simons be enjoined from the further pursuit of business until such time as it has paid to the Parish delinquent taxes in the amount of \$18,080.42 plus applicable interest, **as shown in the judgment signed on October 15, 2002 in this matter, or until the reversal of said judgment**, with Simons paying all court costs in connection with this Sales Tax Rule. (Emphasis added.)

The sales tax rule judgment specifically referenced the October 15, 2002 judgment, which awarded the additional tax amount, and which was already under review by the supreme court to determine the validity of the taxes. The sales tax rule judgment did not award the additional taxes or address the legality of the taxes. Rather, the October 15, 2002 judgment awarded the \$18,080.42 in question and Simons properly appealed said judgment.

At the hearing on Simon's motion for a refund of the additional taxes collected by the Police Jury, the trial court initially heard and sustained several exceptions filed by the Police Jury. In its peremptory exception raising the objection of *res judicata*, the Police Jury contended that Simons expressly released the Police Jury from any and all further claims with respect to the recovery suit when it refunded the original assessment paid under protest. We agree.

A transaction or compromise is an agreement between two or more persons, who, for preventing or putting an end to a lawsuit, adjust their differences by mutual consent. LSA-C.C. art. 3071. Transactions have, between the interested parties, a force equal to the authority of things adjudged. LSA-C.C. art. 3078. Thus, a valid release bars litigation on compromised issues contemplated by the parties in the release. **Hoover v. Livingston Parish School Board**, 00-1293, p. 3 (La.App. 1 Cir. 6/22/01), 797 So.2d 730, 733. A valid compromise is appropriately raised as a bar to litigation through the defense of *res judicata*. **Five N Company, L.L.C. v. Stewart**, 02-0181, p. 14 (La.App. 1 Cir. 7/2/03), 850 So.2d 51, 60.

The “Receipt and Satisfaction of Judgment” signed by Simons on December 29, 2004, provided in part:

Appearer acknowledges that said payment represents a full and complete refund of all sales and use taxes paid under protest in a refund claim filed in the Eighteenth (18<sup>th</sup>) Judicial District Court bearing Docket No. 35,283; Division “B,” for sales tax paid during the taxable audit period January 1, 1997 through March 31, 1999, together with the appropriate interest thereon.

Appearer further declares that he does hereby accept said check as payment [in] full satisfaction of any and all claims asserted by Simons Petroleum, Inc. in those proceedings recently pending in the Eighteenth (18<sup>th</sup>) Judicial District Court styled *Simons Petroleum, Inc. v. Dane Falgout, Sales Tax Collector for the Sales & Use Tax Department of the Pointe Coupee Parish Police Jury*, Docket No. 35,283, Division “B,” and in the Louisiana Supreme Court under Docket No. 2004-C-0695, and hereby declares that Simons Petroleum, Inc. does hereby release and discharge Dane Falgout, in his above stated official capacity, and all of his agents, employees, attorneys, and other taxing authorities located in Pointe Coupee Parish, Louisiana, from any and all further claims, damages, or causes of action with respect to that judicial proceeding.

In its “Motion and Order for Refund of Taxes Paid under Protest” and throughout this appeal, Simons has consistently argued that its right to a refund of the additional taxes is based on its assertion that the additional tax

amount was timely paid under protest, based on its timely filing of the recovery suit. However, by the plain language of the receipt, Simons acknowledged that the refund of the \$106,403.62 amount represented “a full and complete refund of all sales and use taxes paid **under protest**” in the recovery suit. Simons did not include any reservation of rights for its claim for the additional taxes it asserts were paid under protest, and specifically, Simons released **any and all claims** asserted by Simons “in those proceedings recently pending in the Eighteenth (18<sup>th</sup>) Judicial District Court styled *Simons Petroleum, Inc. v. Dane Falgout, Sales Tax Collector for the Sales & Use Tax Department of the Pointe Coupee Parish Police Jury*, Docket No. 35,283, Division “B,” and in the Louisiana Supreme Court under Docket No. 2004-C-0695,” which is the recovery suit. We can only conclude that Simons released its claim for a refund of the additional taxes paid.<sup>9</sup> Accordingly, the trial court correctly sustained the Police Jury’s exception raising the defense of *res judicata*.<sup>10</sup>

In conclusion, we affirm the judgment of the trial court dismissing Simons’ motion for a refund of the additional taxes it paid to the Police Jury.

### CONCLUSION

For the above and foregoing reasons, the September 8, 2005 judgment is affirmed. Costs of this appeal are assessed against Simons Petroleum, Inc.

**MOTION FOR LEAVE TO FILE REPLY BRIEF GRANTED;  
MOTION TO STRIKE DENIED; MOTION TO DISMISS APPEAL**

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<sup>9</sup> Furthermore, with respect to any claim that Simons might have for a refund of the additional taxes based on the sales tax rule, we again note that Simons did not appeal or seek writs from this court’s opinion on the sales tax rule, and that judgment became a final non-appealable judgment. Nor did the appeal of the recovery suit judgment somehow effect an appeal of the sales tax rule judgment. A consolidation of cases does not result in a “merger” of the cases, as each retains its separate procedural status and attributes. F. Maraist and H. Lemmon, *Louisiana Civil Law Treatise, Volume 1, Civil Procedure*, § 10.8 (1999).

<sup>10</sup> Finding that the trial court correctly granted the exception of *res judicata* and thereby correctly dismissed Simons’ motion for a refund of taxes, it is not necessary to address the remaining exceptions filed by the Police Jury.



**FOR LACK OF JURISDICTION DENIED; SEPTEMBER 8, 2005  
JUDGMENT AFFIRMED.**