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July 8, 2020

Hon. John P. Asiello
Chief Clerk and Legal Counsel to the Court
New York State Court of Appeals
20 Eagle Street
Albany, NY 12207

Re: *Matter of Vignone (Peregrine Enterprises)*

Dear Mr. Asiello:

Respondent Commissioner of Labor submits this letter in response to the Court's May 20, 2020 letter, inquiring whether a substantial constitutional question is directly involved to support an appeal as of right. Because the constitutional question raised by appellant Peregrine Enterprises is neither substantial nor directly involved, appellant's direct appeal should be dismissed.

BACKGROUND

This action arises out of appellant's failure to pay unemployment insurance contributions for claimant Amanda K. Vignone and other similarly situated employees. After an investigation, the Department of Labor assessed appellant for additional unemployment insurance contributions in the amount of $660,573.40 and imposed a 50% fraud penalty of $330,286.70. An Administrative Law Judge (ALJ) overruled appellant's objections on August 27, 2013. Appellant then appealed the ALJ's decisions to the Unemployment

Insurance Appeal Board. The Board affirmed the ALJ's decisions on June 6, 2017.

Appellant sought judicial review of the Board's decision by appealing to the Appellate Division, Third Department. *See* Labor Law § 624. Before taking this appeal, appellant was required to file an undertaking, or deposit a sum, in the amount of unpaid contributions and penalties assessed, together with accrued interest. *See id.* § 625. Because the undertaking requirement is a statutory prerequisite to appeal a decision by the Board to the Third Department, an appellant's failure to satisfy the requirement deprives the Third Department of jurisdiction. *See Matter of Empire State Ballet Theatre of W. N.Y. (Hudacs)*, 186 A.D.2d 839 (3d Dep't 1992); *Matter of PNS Agency (Roberts)*, 110 A.D.2d 1008 (3d Dep't 1985); *see also Matter of Morris v. Tax Appeals Trib. of State of N.Y.*, 171 A.D.2d 961, 962 (3d Dep't 1991) (holding that appellant's failure to comply with analogous requirement under Tax Law § 1138[a][4] deprived court of jurisdiction).

Appellant failed to file the required undertaking. Appellant argued it could not afford the undertaking and thus that § 625, as applied, violated its rights to due process and equal protection. The Third Department rejected this argument and dismissed the appeal for lack of jurisdiction. *See Matter of Vignone (Peregrine Enters., Inc.—Commissioner of Labor)*, 182 A.D.3d 870 (3d Dep't 2020). Appellant then purported to take a direct appeal to this Court under C.P.L.R. § 5601(b)(1) and/or (b)(2).

NO SUBSTANTIAL CONSTITUTIONAL QUESTION IS DIRECTLY INVOLVED

The Court should dismiss this appeal for lack of jurisdiction. To establish jurisdiction under C.P.L.R. § 5601(b)(1)—the appropriate provision to invoke here—appellant has the burden of establishing that the constitutional question at issue is both substantial and directly involved.[1] Appellant can satisfy neither requirement. The constitutional question appellant raises—whether § 625's prepayment requirement violates appellant's due process and equal protection rights—is not substantial. And appellant's as-applied constitutional challenge is not directly involved because appellant failed to

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[1] Subsection (b)(1) governs appeals from the Appellate Division, including proceedings commenced in the Appellate Division, while subsection (b)(2) governs appeals from lower courts. *See* Karger, *The Powers of the New York Court of Appeals*, § 7:7 (rev. 3d ed.) (citing *Matter of Ingoglia*, 23 N.Y.2d 685 [1968]; *Moss Estate, Inc. v. Town of Ossining*, 266 N.Y. 667 [1935]).

establish a necessary threshold claim, namely that it is in fact unable to pay the required undertaking.

I. Appellant's Constitutional Argument Is Insubstantial

Appellant complains that § 625's undertaking requirement as applied here violates the Due Process and Equal Protection Clauses of the New York State and U.S. Constitutions. But it is well settled, under state and federal law, that prepayment requirements for taking appeals from judgments imposing taxes or other assessments are constitutional.

New York courts have repeatedly rejected constitutional challenges to undertaking requirements for tax appeals.[2] *See Matter of Top Tile Bldg. Supply Corp. v. N.Y. State Tax Commn.*, 94 A.D.2d 885, 885 (3d Dep't 1983) (upholding Tax Law § 1138[a][4]), *appeal dismissed*, 60 N.Y.2d 653 (1983); *see also Matter of Vinter v. Commr. of Taxation & Fin.*, 305 A.D.2d 738, 739 (3d Dep't 2003) (upholding Tax Law § 478); *Matter of Fazkap Assoc. v. Commr. of N.Y. State Dept. of Taxation & Fin.*, 232 A.D.2d 747, 748 (3d Dep't 1996) (upholding Tax Law § 1444[1]); *Matter of Davis v. State Tax Commn. of N.Y.*, 155 A.D.2d 743 (3d Dep't 1989) (upholding Tax Law § 1138[a][4]), *lv. denied*, 75 N.Y.2d 707 (1990); *Matter of Massa v. N.Y. State Tax Commn.*, 102 A.D.2d 968, 968-969 (3d Dep't 1984) (same); *Matter of R & G Outfitters v. Bouchard*, 101 A.D.2d 642, 643 (3d Dep't 1984) (same). In *Matter of R & G Outfitters*, for example, the Third Department upheld Tax Law § 1138(a)(4), which imposes an undertaking requirement for an appeal from a sales and use tax assessment made by the Tax Commission. The court relied on federal law holding that "the principle of 'pay first and litigate later' is constitutionally permissible as a precondition to the review of the determinations of taxing authorities." *Matter of R & G Outfitters*, 101 A.D.2d at 643 (quoting *Flora v. United States*, 357 U.S. 63 (1958)).

Notably, this Court denied jurisdiction over a taxpayer's appeal challenging the constitutionality of a prepayment requirement in *Matter of Top Tile Building Supply Corp.* There, a taxpayer had sought judicial review of a

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[2] Case law pertaining to undertaking requirements in the Tax Law is equally applicable here because "[c]ontributions to the State Unemployment Insurance Fund are taxes imposed upon employers." *Matter of Jamestown Lodge 1681 Loyal Order of Moose (Catherwood)*, 31 A.D.2d 981, 982 (3d Dep't 1969); *see also Guar. Trust Co. of N.Y. v. State of New York*, 299 N.Y. 295, 301 (1949) ("[I]n making the unemployment insurance contributions in question this claimant was simply paying an excise tax."); *Chamberlin, Inc., v. Andrews*, 271 N.Y. 1 (1936) (treating unemployment insurance contributions as taxes imposed on employers).

Tax Commission determination but failed to file the undertaking required by § 1138(a)(4). Supreme Court, Special Term, dismissed on jurisdictional grounds and the Third Department affirmed, notwithstanding the taxpayer's argument that the undertaking requirement violated its due process rights. This Court dismissed the taxpayer's appeal, holding that no substantial constitutional question was directly involved. *Matter of Top Tile Bldg. Supply Corp.*, 60 N.Y.2d 653. The Court should do the same here.

Federal courts have reached the same conclusion as New York courts on the constitutionality of prepayment requirements. Indeed, the U.S. Supreme Court has long upheld the principle of "pay first and litigate later." *Flora*, 357 U.S. at 75 (citation omitted); *see also Bob Jones Univ. v. Simon*, 416 U.S. 725, 746 (1974); *Phillips v. Commr. of Internal Revenue*, 283 U.S. 589, 595 (1931). So long as "adequate opportunity is afforded for a later judicial determination of the legal rights," the Court reasoned in *Phillips*, "summary [administrative] proceedings to secure prompt performance of pecuniary obligations to the government have been consistently sustained." 283 U.S. at 595. This is because "[p]roperty rights must yield provisionally to governmental need"; although a taxpayer may experience hardship by having to file a bond in order to appeal a tax determination, "the right of the United States to exact immediate payment and to relegate the taxpayer to a suit for recovery is paramount." *Id.* at 595, 599.

Thus, federal courts have rejected due process challenges to prepayment requirements—even when the taxpayer is unable to pay the judgment. The Second Circuit noted in *Larson v. United States*, 888 F.3d 578 (2d Cir. 2018), that it was aware of no case supporting the view that Congress's failure to provide prepayment review "when the penalty is beyond the taxpayer's resources" violates due process. *Id.* at 586; *accord Kahn v. United States*, 753 F.2d 1208, 1218 (3d Cir. 1985) ("In the tax context, the constitutionality of a scheme providing for only post-assessment judicial review is well-settled."); *Johnston v. Commr. of Internal Revenue*, 429 F.2d 804, 806 (6th Cir. 1970) (holding that while "the payment of taxes as a precondition to sue for their return places a burden on the taxpayer," it does not "deny him the fundamental processes of fairness required by" the Due Process Clause).

The Second Circuit's decision in *Larson* is instructive. The taxpayer in that case, much like appellant here, argued that he would be "unconstitutionally deprived of due process by application of the full-payment rule because he cannot pay the imposed penalties and cannot seek review without paying those penalties." *Larson*, 888 F.3d at 585. The Second Circuit rejected this due process argument. Applying the balancing test set forth in

Mathews v. Eldridge, 424 U.S. 319 (1976),[3] the Second Circuit noted that "[t]here is a strong governmental interest in the efficient administration of the tax system as crafted by Congress." *Larson*, 888 F.3d at 585. In light of that interest, "adequate summary or administrative prepayment review of tax assessment—with adequate post-payment judicial review—provides the required constitutional procedural protections." *Id.* The Second Circuit found that the administrative prepayment procedures in Larson's case were adequate, and thus rejected his constitutional claim. *Id.* at 586-587.

Below, appellant did not grapple with this well-established body of law upholding prepayment requirements. Nor did it challenge the Department of Labor's prepayment procedures. Rather, appellant below focused on general principles guaranteeing court access to indigent litigants. *See, e.g.*, *Lindsey v. Normet*, 405 U.S. 56, 77 (1972); *Mayer v. City of Chicago*, 404 U.S. 189, 193 (1971); *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Adsani v. Miller*, 139 F.3d 67, 77 (2d Cir. 1998). At most, the cases stand for the proposition that when an avenue for appellate review is provided, "it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause." *Lindsey*, 405 U.S. at 77. The undertaking requirement at § 625 is not arbitrary and capricious; it is tied to the unemployment contributions assessed and penalties imposed on a delinquent taxpayer. Indeed, the Court recognized in *Lindsey* that "a State may properly take steps to insure that an appellant post adequate security before an appeal to preserve the property at issue." 405 U.S. at 77. Section 625 does precisely that, and no more. *Cf. id.* at 77-79 (striking down Oregon statute imposing "double-bond requirement" on tenants appealing adverse judgments in eviction suits).

Appellant below sought to distinguish cases upholding prepayment requirements by pointing out that those cases addressed tax law provisions. But appellant did not put forth any reasoned basis on which to distinguish tax law cases. Nor is there any. As noted above (n. 2), unemployment contributions are merely taxes by another name. And the undertaking requirements in the Tax Law operate in the same way as the undertaking requirement here: the State assesses a deficiency and orders payment, and the litigant must post a

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[3] That test involves consideration of three factors: "(1) 'the private interest that will be affected by the official action'; (2) 'the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards'; and (3) 'the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.'" *Larson*, 888 F.3d at 586 (quoting *Mathews*, 424 U.S. at 335).

bond to obtain judicial review of the State's order. Because the constitutionality of this kind of prepayment requirement is well-established, appellant's challenge to § 625 is not substantial.

II. The Constitutionality of Labor Law § 625 Is Not Directly Involved

The appeal should be dismissed for the additional reason that the constitutional question raised is not directly involved. For a constitutional question to be directly involved, "[i]t must clearly appear that the constitutional question was decisive of the Appellate Division's determination, in the sense that such determination could not be independently supported on some other ground of a nonconstitutional nature if that court's decision of the constitutional question was erroneous." Karger, *The Powers of the New York Court of Appeals*, § 7:8. Failure to establish a threshold fact destroys jurisdiction under § 5601(b)(2). *See Matter of Weis (Catherwood—General Motors Corp.)*, 28 N.Y.2d 267, 273 (1971) (holding that no constitutional question was directly involved and dismissing appeal for lack of jurisdiction because constitutional claim was based on factual assumption that was not established below).

Appellant asserted an *as-applied* challenge to Labor Law § 625: it asserted that it was unable to post the required undertaking, and therefore the undertaking requirement deprived it of its right to judicial review of the State's unemployment contribution assessment. Appellant's ability to pay is central to this as-applied challenge; if appellant was in fact able to obtain an undertaking, then its constitutional claim necessarily fails.

Yet appellant failed to establish the threshold fact of its inability to pay, and the Third Department did not address it. Appellant Peregrine Enterprises, Inc. is a subsidiary of RCI Entertainment (NY), Inc., which is a subsidiary of RCI Hospitality Holdings, Inc.—a NASDAQ-listed public corporation with nearly $200 million of revenue in 2019. Appellant's counsel was careful to note in an affidavit that *Peregrine* could not obtain a bond from a surety company "with the indemnity of *solely Peregrine*." Rutigliano Aff. ¶ 6 (emphasis added). Counsel did not address whether any surety company was willing to provide a bond to appellant on affordable terms with the financial backing of its parent corporation. Absent such evidence, appellant's inability-to-pay assertion rings hollow and its as-applied challenge fails regardless of how this Court would decide the constitutional question. Thus, no constitutional question is directly involved.

For these reasons, the appeal should be dismissed *sua sponte* for lack of jurisdiction.

Respectfully submitted,

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