SUPREME COURT
STATE OF LOUISIANA

DOCKET NO. 2021-OC-00552

CALCASIEU PARISH SCHOOL BOARD
SALES AND USE TAX DEPARTMENT, *et al.*
Plaintiffs/Appellants

VERSUS

NELSON INDUSTRIAL STEAM COMPANY
Defendant/Appellee

CIVIL PROCEEDING

On Application for Writ from the Third Circuit Court of Appeal
Judgment on Remand, No. CA 19-315, from Judgment of the
14th Judicial District Court for the Parish of Calcasieu, State of Louisiana,
No. 2017-1373, the Honorable Ronald F. Ware, Presiding

ORIGINAL BRIEF ON THE MERITS ON BEHALF OF APPELLANTS, CALCASIEU PARISH SCHOOL BOARD SALES AND USE TAX DEPARTMENT, *et al.*

Respectfully submitted,

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MAY IT PLEASE THE COURT:

This Original Brief on the Merits is submitted on behalf of the Appellants, Calcasieu Parish School Board Sales and Use Tax Department and Kimberly Tyree, in her capacity as Administrator of the Calcasieu Parish School Board Sales and Use Tax Department (the "Collector"). Appellee is Nelson Industrial Steam Company ("NISCO").

I. STATEMENT OF THE CASE

The Collector conducted an audit of NISCO for sales and use tax liability for the periods of January 1, 2013, through December 31, 2015 (the "Audit Period"). As in previous audits, the Collector found that NISCO produces electricity for its own use and for sale to Entergy; steam for resale to Sasol; and an ash by-product for resale to Louisiana Ash. The process NISCO uses is simple. It fuels boilers with petcoke to generate steam, which, in turn, pushes turbines and manufactures electricity. To comply with EPA regulations, however, NISCO must mix limestone with petcoke to limit the emission of sulfur into the atmosphere. The burnt residue of the chemical reaction between petcoke and limestone is ash. NISCO sells ash as byproduct.

NISCO failed to pay and accrue tax on its purchases of limestone during the Audit Period and claimed those purchases were excluded from sales tax under La. R.S. 47:301(10)(c)(i)(aa). Due to Act 3 of the 2016 Second Extraordinary Session of the Louisiana Legislature, which became effective on June 23, 2016, and is expressly applicable to the Audit Period, the Collector disagreed with NISCO's position; gave NISCO a credit for its sales of ash during the Audit Period; and assessed NISCO with the appropriate tax liability. The Collector filed suit to collect, and the trial court determined that NISCO's purchases of limestone during the Audit Period are taxable, subject to a credit for its sales of ash in accordance with Act 3.

NISCO appealed the trial court's decision and offered a smorgasbord of arguments, including constitutional challenges, procedural deficiencies, and statutory interpretation arguments asserting the legislature was out to "fool"[1] Louisiana. Specifically, NISCO incorrectly alleged that: (1) Act 3 of the 2016 Second Extraordinary Session ("Act 3") violates La. Const. art. VII, § 2; (2) Act 3 violates the Separation of Powers Doctrine of the United States and Louisiana Constitutions; (3) Act 3 violates the Due Process Clauses of the United States and Louisiana Constitutions; (4) Act 3 violates the Equal Protection Clauses of the United States and Louisiana Constitution; (5) Act 3 only amends the "further processing exclusion" for sales tax

[1] See NISCO's Original Brief filed with the Third Circuit Court of Appeal at p. 21, fn. 52.

and does not apply to use tax; (6) the ash is not an "incidental" product as defined in Act 3; and (7) that the Collector's claim is prescribed. At bottom, the heart of NISCO's argument has been to create controversy and ambiguity where decades-old principles of law control.

On April 7, 2021, the Third Circuit Court of Appeal embraced one of NISCO's many arguments and issued a written opinion and judgment on remand declaring that Act 3 levied a new tax; was enacted in violation of Louisiana Constitution, Article VII, Section 2; and, thus, is unconstitutional (the "Judgment").[2] As a result of such Judgment, the trial court's grant of summary judgment in favor of the Collector was reversed; NISCO's Exception of No Cause of Action raised in its Cross Motion for Summary Judgment was granted, dismissing the Collector's claims with prejudice; and the Collector was taxed with court costs in the amount of $12,242.09 on appeal and $14,946.14 in the trial court.[3]

Considering the foregoing, the Collector, pursuant to Article V, Section 5(D) of the Louisiana Constitution, appealed the Judgment to this Court, as the Third Circuit ignored the legislative purpose, the plain wording of Act 3, and the fact that sales and use tax has been levied for decades.

II. ASSIGNMENT OF ERRORS

The Third Circuit erred in holding that Act 3: (i) imposes a new tax; (ii) was enacted in violation of Louisiana Constitution, Article VII, Section 2; and (iii) is unconstitutional.

III. SUMMARY OF THE ARGUMENT

In rendering Act 3 unconstitutional due to the levy of a new tax, the Third Circuit failed to consider the fact that Act 3 did not alter the sales tax scheme of taxing the ultimate consumer of a product. The tax at issue is a sales and use tax. The decades-old tax is applicable to all sales and uses unless an express exclusion or exemption excuses the sale or use at issue. Absent applicability of the further processing exclusion, these purchases of limestone are subject to the Collector's sales and use tax, just like any other sale, of which millions take place in Louisiana every day. This is hardly a new tax. Sales tax and use tax has been levied since the 1940s, and their levy has been expressly codified in discrete acts of the legislature. See La. R.S. 47:302, 321, 321.1 and 331. Act 3 merely serves to conform the existing levies of sales and use tax by ensuring that self-consumption of materials found solely in a byproduct cannot completely escape taxation.

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[2] See Appendix A at pp. 21 – 40.
[3] See Appendix A at p. 34.

The Third Circuit also failed to consider the legislative purpose and the plain wording of Act 3. It is undisputed that the legislature expressly implemented Act 3 as a response to the *NISCO I* decision.[4] All of the legislative hearings regarding Act 3 indicate it was introduced as a proclamation of the legislature's original purpose or intent with respect to the further processing exclusion set forth in La. R.S. 47:301(10)(c)(i)(aa). In fact, Section 2 of Act 3 expressly provides: "This Act is intended to clarify and be interpretative of the original intent of La. R.S. 47:301(10)(c)(i)(aa)." Act 3 simply amended the language of further processing exclusion for purposes of clarification; it did not levy a new tax. Neither the wording nor the intent of Act 3 can be construed otherwise.

The Louisiana Supreme Court expressly held in *NISCO I*[5] that the further processing exclusion is just that, an exclusion, not an exemption. The clear and plain provisions of Article VII, Section 2 of the Louisiana Constitution have no application to the clarification of the further processing exclusion set forth in Act 3.

Finally, the Collector discusses NISCO's other challenges at the trial and appellate courts in an abundance of caution considering this Court's broad jurisdiction under La. Const. art. V, § 5(F).

IV. LAW AND ARGUMENT

A. The Language and Legal Effect of Act 3

The Louisiana legislature enacted Act 3 during the 2016 Second Extraordinary Session. The act amended the language of La. R.S. 47:301(10)(c)(i)(aa) to read:

> (c)(i)(aa) The term "sale at retail" does not include sale of materials for further processing into articles of tangible personal property for sale at retail when all of the criteria in Subsubitem (I) of this Subitem are met...
>
> > (I)(aaa) The raw materials become a recognizable and identifiable component of the end product.
> >
> > (bbb) The raw materials are beneficial to the end product.
> >
> > (ccc) The raw materials are material for further processing, and as such, are purchased for the purpose of inclusion into the end product.
> >
> > ...
> >
> > (III)(aaa) If the materials are further processed into a byproduct for sale, such purchases of materials shall not be deemed to be sales for further processing and shall be taxable. For purposes of this Subitem, the term "byproduct" shall mean any incidental product that is sold for a sales price less than the cost of materials.

[4] See e.g., *Bridges v. Nelson Indus. Steam Co.*, 15-1439 (La. 05/03/2016), 190 So. 3d 276 ("*NISCO I*")..
[5] Id. at 280-281.

> (bbb) In the event a byproduct is sold at retail in this state for which a sales and use tax has been paid by the seller on the cost of the materials, which materials are used partially or fulling in the manufacturing of the byproduct, a credit against the tax paid by the seller shall be allowed in an amount equal to the sales tax collected and remitted by the seller on the taxable retail sale of the byproduct.
>
> . . .
>
> Section 2. This Act is intended to clarify and be interpretative of the original intent and application of R.S. 47:301(10)(c)(i)(aa). Therefore, the provisions of this Act shall be retroactive to all refund claims submitted or assessments of additional taxes due which are filed on or after the effective date of this Act. Notwithstanding the foregoing, the provisions of this Act shall not be applicable to any existing claim for refund filed or assessment of additional taxes due issued prior to the effective date of this Act for any tax period prior to July 1, 2016, which is not barred by prescription.

The legislature enacted the amendment prior to this Court's final judgment in "*NISCO I.*[6]" Act 3 accomplished two goals of the legislature: (1) adopting and codifying a long-standing jurisprudential test to determine whether certain raw materials meet the "further processing exclusion," and, as clearly written into the act; (2) a proclamation of the legislature's original purpose and intent of the exclusion. Consistent with the latter goal, the act makes plain that byproducts are not entitled to the further processing exclusion, but the sale of the byproduct would reduce the tax through a credit.

Thus, Act 3 conformed La. R.S. 47:301(10)(c)(i)(aa) to fit into the overall scheme of the sales and use tax system—the imposition of a tax "upon the sale at retail, use, **consumption**, distribution, or storage for use in consumption, of materials sold or used in Louisiana.[7]"

B. Constitutional Standard of Review

This Court reviews constitutional challenges under a *de novo* standard of review and gives no deference "to the lower court in interpreting the constitutionality of a statute."[8] "All statutory enactments are presumed constitutional, and every presumption of law and fact must be indulged in favor of legality."[9] The party seeking to have a statute declared unconstitutional bears "a heavy burden."[10] This burden may only be met when it is "shown clearly and convincingly that it was the constitutional aim to deny the legislature the power to enact the

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6 *NISCO I*, supra. Act 3 became effective two months prior to the Louisiana Supreme Court's remand order becoming final on September 7, 2016. The instant matter was filed many months after the effective date of Act 3.

7 *Traigle v. PPG Industries, Inc.*, (La. 5/17/76), 332 So. 2d 777, 780 (citing La. R.S. 47:302(A)).

8 *Carver v. La. Dep't of Pub. Safety*, 17-1340 (La. 01/30/18), 239 So. 3d 226, 230.

9 *Id.*

10 *Id.*

statute."[11] "[T]his Court has repeatedly stated that it is not the court's 'duty to determine the wisdom behind the enactment of [the] legislation."[12] The presumption of constitutionality is "especially forceful in the case of statutes enacted to promote a public purpose, *such as statutes relating to public finance*." [*emphasis added*][13] Finally, if a statute is susceptible of two constructions, one of which would render it unconstitutional, or raise grave constitutional questions, the court will adopt the interpretation of the statute that, without doing violence to its language, will maintain its constitutionality.[14]

C. Act 3 does not violate La. Const. art. VII, § 2.

Article VII, Section 2 of the Louisiana Constitution provides: "[t]he levy of a new tax, an increase in an existing tax, or a repeal of an existing tax exemption shall require the enactment of a law by two-thirds[15] of the elected members of each house of the legislature." Act 3 passed without a supermajority in the house (but did in the senate), because it did not levy a new tax, increase an existing tax, or repeal an existing exemption. Despite the plain language of the statute, NISCO and the Third Circuit erroneously posit that Act 3 imposes a new tax.

Article VII, Section 2 requires a supermajority approval only if Act 3: (1) levies a new tax; (2) increases an existing tax; or (3) repeals an existing tax exemption. Quite obviously, Act 3 does none of these. It does not levy a new tax, as the Louisiana sales tax has been in existence for decades, and the levies of tax are discrete and separately codified in La. R.S. 47:302; 321, 321.1 and 331. Act 3 does not alter the sales tax scheme of taxing the ultimate consumer of a product. It does not increase a tax, as Act 3 did nothing to change the rates of tax. Finally, Act 3 did not repeal anything. In fact, Section 2 of Act 3 expressly provides: "This Act is intended to clarify and be interpretative of the original intent of La. R.S. 47:301(10)(c)(i)(aa)." Further, the Louisiana Supreme Court in NISCO expressly held that the "further processing" exclusion is just that, an exclusion, and not an exemption.[16] The clear and plain provisions of Article VII, Section 2 have no application to the clarification of the "further processing" exclusion set forth in Act 3. Thus, Act 3 does not violate Article VII, Section 2 of the Louisiana Constitution because it does not levy a new tax, increase an existing one, or repeal an exemption.

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[11] *Id.*
[12] *Id.* at 230-31.
[13] *Id.* at 230 (citing *Polk v. Edwards*, 93-0362 (La. 08/06/93), 626 So. 2d 1126, 1132).
[14] *Beer Indus. League v. City of New Orleans*, 18-0280, 0285, p.10 (La. 6/27/18), 251 So. 3d 380, 387.
[15] Frequently referred to as a "supermajority."
[16] *Bridges v. Nelson Indus. Steam Co.*, 2015-1439, pp. 6-7 (La. 5/3/16), 190 So. 3d 276, 280-281.

i. The Court's Jurisprudence Regarding La. Const. art. VII, § 2

This Court addressed constitutional claims arising under Article VII, Section 2 on several occasions. Yet, the Third Circuit's majority opinion failed to cite to a single authority from this Court on the issue prior to its conclusion that Act 3 imposed a new tax. Regardless, this Court's jurisprudence provides the framework to determine whether a new tax is imposed.

In *Audobon*, this Court addressed whether Act 434 of 1979 constituted a new tax when it provided for an additional .2% collection payable to the Louisiana Insurance Rating Commission on the prior-year premiums collected by insurers.[17] Explaining the legislatures taxing power, the Court aptly wrote:

> It is well settled generally and in Louisiana that not every imposition of a charge or fee by the government constitutes a demand for money under its power to tax. If the imposition has not for its principal object the raising of revenue, but is merely incidental to the making of rules and regulations to promote public order, individual liberty and general welfare, it is an exercise of the police power. . . . But if revenue is the primary purpose for an assessment and regulation is merely incidental, or if the imposition clearly and materially exceeds the cost of regulation or conferring special benefits upon those assessed, the imposition is a tax.[18]

This framework led the Court to find the .2% levy an unconstitutional new tax because its primary object was for raising revenue.[19] It was aided in this conclusion by finding that Act 434 "sought to amend a pre-existing statutory scheme."[20]

Next, *Dow Hydrocarbons* determined whether the significant reclassification of dividend income from allocable to apportionable rendered Act 690 unconstitutional.[21] Act 690 made previously untaxable dividend income from foreign subsidiaries taxable.[22] This reclassification made an entire corporate income source taxable where it was previously not taxable. Thus, the Court found that Act 690 was unconstitutional because it significantly modified the scheme of corporate taxes.[23]

Palmer is the most recent decision directly dealing with La. Const. Art. VII, § 2.[24] The Louisiana Forestry Commission ("LFC") is a government agency tasked with the "execution of laws relating to forestry."[25] In this particular case, the LFC reclassified a product known as "chip and saw" from the "pulpwood" category into the "trees and timber" category" due to

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17 See e.g., *Audubon Ins. Co. v. Bernard*, 82-2744 (La. 06/27/83), 434 So. 2d 1072.
18 *Id.* at 1074.
19 *Id.* at 1075.
20 *Id.*
21 *Dow Hydrocarbons & Resources v. Kennedy*, 96-2471 (La. 05/20/97), 694 So. 2d 215, 217.
22 *Id.*
23 *Id.* The Court declined to say whether Act 690 was a new tax or increase in existing tax. Instead, it found that it was one of them and ruled accordingly.
24 See e.g., *Palmer v. Louisiana Forestry Commission*, 97-0244 (La. 10/21/97), 701 So. 2d 1300.

technological changes in the timber industry.[26] This resulted in heavy resistance from parish taxing authorities because products in the pulpwood category are subject to a 5% severance tax while those in the trees and timber category are taxed at a lower 2.25%.[27] The parishes relied on *Dow Hydrocarbons* for their argument that the reclassification resulted in a new tax.[28] The Court ruled that the agency's reclassification did not result in the levy of a new tax after a thorough navigation of legal authority.[29]

The Court's decision found that the reclassification "was a fair reflection of the statutory scheme as a whole"[30] and that "it was 'reasonably foreseeable'[31] that the product would be taxed at the trees and timber rate."[32] Thus, it is clear from the *Palmer* decision that governmental action does not levy a new tax when it fits into the overall scheme of the tax structure.

This Court's jurisprudence dictates that Act 3 is constitutional if: (1) the legislature did not implement Act 3 as a revenue raising measure; and (2) Act 3 fits the overall scheme of taxing self-consumption.

Of note, *Audubon, Dow* and *Palmer* all involved cases where numerous plaintiffs were claiming significant revenue impact from the subject legislation.

ii. Act 3 is constitutional under Article VII, Section 2.

This Court should find Act 3 constitutional after an application of its jurisprudence. Act 3 is not a revenue raising measure and easily fits within the Louisiana's application of its sales and use tax scheme to self-consumption; a taxing principle which has been acknowledged by this Court for decades.[33]

a. *Act 3 is not a revenue raising measure.*

On its face, the legislature states that the purpose of Act 3 is to clarify and interpret the intent of the legislature when enacted the former La. R.S. § 47:337(10)(c)(i)(aa).[34] Diving deeper, the fiscal note to Act 3 shows that the legislature found the state would receive **zero**

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25 *Id.* at 1303.
26 *Id.*
27 *Id.*
28 *Id.* at 1306.
29 *Id.* at 1307
30 *Cox Cable New Orleans, Inc. v. City of New Orleans*, 92-2311 (La. 9/3/93), 624 So. 2d 890, *reh'g denied*, (La. 10/7/93) (where levy of a new tax was found when a city ordinance altered the definition of "production" to include "audiovisual production." The Court found that the critical inquiry was whether the new definition fell within the term as used in the state enabling statute and the original ordinance. The intent of the enabling statute was to tax live entertainment, not entertainment via cable or satellite television).
31 *Furlong v. Commissioner of Internal Revenue*, 93-3668 (7 Cir. 9/19/94), 36 F.3d 25 (where the Court held that a loan from a tax-deferred pension was held to be includable in gross income because the taxable inclusion was not wholly new in the overall scheme, the tax was reasonably foreseeable at the time the loan was made, and the tax furthered the intent of Congress to protect retirement accounts).
32 *Id.*
33 *Traigle v. PPG Industries, Inc.*, (La. 5/17/76), 332 So. 2d 777, 780 (citing La. R.S. 47:302(A)).

additional revenue when enacting it.[35] Thus, it is clear from the plain wording and supporting documentation accompanying Act 3 that was not enacted to raise revenue.

NISCO will likely rely on *Dow Hydrocarbons* to reach the incorrect conclusion that Act 3 is unconstitutional. However, *Dow Hydrocarbons* is readily distinguishable, conceptually and factually. Conceptually, *Dow Hydrocarbons* did not engage in a thorough review of whether Act 690 constituted the levy of a new tax or an increase in an existing one and simply found that either is unconstitutional when passed in an odd-numbered year under Article III, Section 2(A) of the Louisiana Constitution—not Article VII, Section 2 at issue in this case.[36] Factually, Justice Lemmon noted in his concurring opinion that the fiscal note to Act 690 evidenced the legislature's intent to raise revenue. As shown in the record of this matter, the fiscal note to Act 3 shows zero increase in state revenue. Therefore, *Dow Hydrocarbons* provides no shelter for NISCO's assertions.

Finally, NISCO is the first taxpayer to come forward and claim the further processing exclusion on a byproduct. Act 3, however. applies in broad strokes to all taxpayers and NISCO is not the sole entity or individual within its purview. The legislative history of Act 3 shows that the LDR understood other manufacturers did not claim exclusion for materials which did not appear in its products, only a byproduct. For all such taxpayers, the credit Act 3 grants for sales of the byproduct will reduce their taxes. For those manufacturers, who are not parties to NISCO's efforts herein for obvious reasons, Act 3 reduces their taxes by providing a credit for materials found solely in their byproducts via Subsubitem (bbb). This means Act 3 likely reduces overall revenue to Louisiana via application of its credit in Subsubitem (bbb). The Court cannot view NISCO in isolation when ruling on the constitutionality of Act 3 as the Third Circuit did. The Third Circuit simply found that a new tax exists because NISCO, and NISCO alone, paid more tax than it previously paid after Act 3's enactment.[37] This myopic view results in an extremely narrow interpretation of the statute that derogates from the compelling deference in favor of constitutionality of Act 3 mandated by this Court. Thus, the conclusions of NISCO and the Third Circuit are not sustainable when the statute is applied in its full context and not in isolation to NISCO.

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[34] See Act 3, §2.
[35] R. 368.
[36] *Dow Hydrocarbons*, at 218.
[37] *Calcasieu Parish Sch. Bd. Sales & Use Dep't v. Nelson Indus. Steam Co.*, 19-315 (La. App. 3 Cir. 04/07/21), 2021 La. App. LEXIS 480, p. 19 ("*NISCO II*").

The law and evidence show that the Act 3 is not a revenue raising measure. This conclusion is bolstered further when considering this Court's strong presumption of constitutionality.

b. *Act 3 fits within Louisiana scheme of taxing self-consumption.*

This Court's decision in *Palmer* holds that government action levies a new tax when it alters the overall scheme of the taxing authority. Louisiana's sales and use tax scheme has always taxed self-consumption. Act 3 merely serves to conform the statute with the overall scheme of the sales and use tax by ensuring that self-consumption of materials cannot avoid tax.

The overall scheme of the sales and use tax is to impose the tax on the "ultimate consumer" of a product.[38] The byproduct rule in La. R.S. 47:301(10)(c)(i)(aa)(III) fits naturally and comfortably into the scheme of taxing the ultimate consumer. For example, NISCO receives a tax credit from its ash sales against its taxable purchases of limestone. The result is NISCO only being taxed for the limestone it self-*consumes* in its process—not for the limestone it later re-sells in the form of ash.

Finally, this has always been the legislature's purpose and intent in the further processing exclusion as plainly stated in Section 2 of Act 3. Thus, Act 3 falls within the overall scheme of taxing the ultimate consumer of a product and is not a new tax under the *Palmer* decision.

c. *Act 3 is not a "levy" of a new tax.*

Article VII, § 2 prohibits a "levy" of a new tax without a supermajority. Generally, a levy is a statute that actually imposes and/or enacts a tax. In Louisiana, La. R.S. § 47:302, 321, 321.1 and 331 all provide levy of sales and use tax in Louisiana. Those levies of sales and use tax remain unchanged by Act 3. Each of those statutes provide that, "there is hereby levied a tax" or "there is hereby levied an additional tax." These are levies of a tax requiring a two-thirds (2/3) supermajority under La. Const. art. VII, §2. On the other hand, La. R.S. § 47:301 merely provides the definitions for the words used in the Louisiana Tax Code—like "sales at retail" and materials for further processing. Clarifying a definition in 47:301 is not the "levy of a new tax". This distinction is critical to NISCO's challenge and the Third Circuit decision as both assert Act 3 is an unconstitutional levy of a new tax.

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[38] *NISCO I*, at 280 (citing *BP Oil Co. v. Plaquemines Par. Gov't*, 93-1109, p. 12 (La. 9/6/94), 651 So. 2d 1322, 1330, *on reh'g* (Oct. 13, 1994)); *Vulcan Foundry, Inc. v. McNamara*, 80-1824 (La. 5/17/82), 414 So. 2d 1193, 1198.

This Court has ruled on this distinction on multiple occasions. In *Morton v. Xeter Realty*, an individual sought to annul a tax sale.[39] The Court invalidated the sale and found that the sale was being made for the charge of a tax that was never actually levied by the parish ordinances even though all other requirements were met.[40] In the present matter, Act 3 further defines sales at retail and the further processing exclusion but does not levy a tax as do La. R.S. §47:302, 321, 321.1 and 331. This pivotal distinction requires reversal of the Third Circuit, because Act 3 does not "levy" a new tax as necessary to implicate Article VII, § 2 of the Louisiana Constitution.

D. Act 3 does not violate the Separation of Powers Doctrine.

In Louisiana and the United States, governmental power is divided between the executive, legislative, and judicial branches.[41] One branch may not exercise the power of the other branch.[42] The Louisiana Constitution vests the legislature with the power of taxation.[43] Additionally, "the Legislature is free, within constitutional confines, to give its enactments retroactive effect,"[44] and Act 3 is specifically made retroactive to *non-pending* cases. Thus, the power to tax lies with the legislature.

In *Unwired*, this Court restated the legal principle that the judiciary holds the power of statutory construction and interpretation.[45] However, it clearly noted an exception when it subsequently wrote that "[t]he legislature may enact remedial legislation shortly following a court's decision that highlights an ambiguity or conflict in a statutory provision.[46]" In *Unwired*, the legislature attempted to apply Act 85 to a pending case wherein a judgment already had been entered prior to the enactment of Act 85. Act 85 did more than just clarify an ambiguity highlighted by this Court, Act 85 sought to adjudicate and reverse a pending judgment. This Court found that "[t]he principle of separation of powers leaves no room for the adjudication of cases by the legislature.[47]

Conversely, this case was not instituted until almost a year after Act 3 was enacted, and this Court affirmed that: "The Legislature may enact remedial legislation *shortly following a court's decision that highlights an ambiguity or conflict in a statutory provision...it is the*

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39 (La. 12/11/1911), 56 So. 883, 129 La. 775, 776.

40 *Id.* See also *Washington Parish Police Jury v. Washington Parish Hospital Service Dist.*, No. 46070 (La. 11/05/62), 146 So. 2d 157, 243 La. 671 (where the Court has no appellate jurisdiction under Article VII, § 10(1) when a parish resolution failed to levy a tax under the parish ordinances).

41 *Unwired Telecom Corp. v. Parish of Calcasieu*, 03-0732 (La. 1/19/05), 903 So. 2d 392, 403.

42 *Id.*

43 *Id.* at 402.

44 *Id.* at 403.

45 *Id.*

46 *Id.* at 404.

47 *Id.* at 405.

province of the Legislature to clarify the law when the courts indicate the necessity of doing so [emphasis added].[48]"

> This Court in *NISCO I* invited the clarification provided in Act 3 when it wrote:
>
> However, the jurisprudential test created over the last few decades, which was necessitated by litigation concerning the exclusion's scope, and the regulation promulgated by the Louisiana Department of Revenue, which was drafted to aid in deciphering the meaning of the "further processing" exclusion," **clearly evidence inherent ambiguity in the provision. [emphasis added]**[49]

Act 3 provided the legislature's clarification for the ambiguities this Court highlighted. In fact, Representative Broadwater expressly referred to that clarifying purpose in his closing summary of Act 3:

> We provided in the bill that the intent of this is to clarify existing law, so that as the courts evaluate it, that they understand what our intent of the existing law is.[50]

Thus, the legislature clearly enacted Act 3 to clarify the Court-declared ambiguity in the existing law highlighted by the Supreme Court in *NISCO I*, and it did so within weeks of this Court's original holding in NISCO I.

Finally, the holdings in *Unwired* and *Mallard Bay*[51] can easily be reconciled here. In both of those cases, the act purported to legislatively overrule judgments in litigation which was pending when the acts were enacted.[52] Of course, application to a pending case would clearly usurp the judiciary's power to interpret the law. On the other hand, Act 3 explicitly does *not* apply to pending cases. Thus, Act 3 has no ability to impact cases other than those filed after July 1, 2016 and does not implicate the same issues raised in *Unwired* and *Mallard Bay*.[53]

E. Act's retroactivity does not violate constitutional due process.

The United States Supreme Court analyzed the Due Process implications of a retroactive tax in *U.S. v. Carlton*.[54] There, a taxpayer challenged a retroactive tax statute under the Due Process Clause.[55] Speaking for a unanimous Court, Justice Blackmun wrote that "[t]his Court repeatedly has upheld retroactive tax legislation against a due process challenge."[56] Retroactive

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48 *Id.* at 404.
49 *NISCO I*, at 279.
50 House Floor debate on June 19, 2016 at 1:41:08.
51 *Mallard Bay Drilling, Inc. v. Kennedy*, 04-1089 (La. 6/29/05), 914 So. 2d 533.
52 See *Mallard Bay*, 914 So. 2d at 540-541; *Unwired*, 903 So. 2d at 397-398. Both Act 85 and Act 40 of 2002 contained language which specifically applied the legislation to pending cases. See §3 of Act 85 and §2 of Act 40. In fact, every case relied upon by NISCO dealt with a statute attempting to apply to a pending case. *Crooks v. Metropolitan Life Ins. Co.*, 00-0947 (La. App. 3 Cir. 1/17/01), 779 So. 2d 966.
53 Notably, it had no effect on *NISCO I*.
54 512 U.S. 26 (1994).
55 *Id.* at 30.
56 *Id.*

application survives Due Process when it is "supported by a legitimate legislative purpose furthered by rational means."[57]

The Court found that retroactive tax laws serve the legitimate legislative purpose of preventing fiscal losses.[58] Following the *Carlton* precedent, courts in Michigan,[59] Washington,[60] Arizona[61] and Kentucky[62] reached the same conclusion.

The second prong requires that the legislative purpose be supported by "rational means."[63] The Court in *Carlton* stated that the rational means test may be established by a "modest period of retroactivity."[64] It also noted that "Congress 'almost without exception' has given general revenue statutes effective dates prior to the dates of actual enactment."[65]

Prior courts around the United States upheld periods of retroactivity longer than the one present here.[66] Act 3 imposed a period limited to non-pending cases that were not prescribed. Thus, the period only applies to cases that are filed after the effective date and are not prescribed,[67] but does not apply to pending cases or any period which had prescribed. Most importantly, it does not disturb any vested rights or contractual obligations as prohibited by the Due Process Clause.

It is well established that a taxpayer has no vested right in a tax statute.[68] This fact alone is dispositive of the issue because an individual must have a vested right in the cause of action to bring a due process challenge.[69] Justice Stone aptly summarized this principle:

> Taxation is neither a penalty imposed on the taxpayer nor a liability which he assumes by contract. It is but a way of apportioning the cost of government among those who in some measure are privileged to enjoy its benefits and must

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57 *Id.* (citing *Pension Benefit Guaranty Corporation v. R. A. Gray & Co.*, 467 U.S. 717, 733 (1984).

58 *Id.* at 31-32.

59 *IBM v. Dept. of Treasury*, 496 Mich. 642 (2014); *Gillette v. Dept. of Treasury*, 878 N.W.2d 891, 901 (Mich. 2016).

60 *In re Estate of Hambleton*, 181 Wash.2d 802 (2014).

61 *Enterprise Leasing Co. of Phoenix v. Arizona Dept. of Revenue*, 221 Ariz. 123 (2008).

62 *Miller v. Johnson Controls*, 296 S.W.3d 392 (Ky. 2009).

63 *Carlton*, at 30-31.

64 *Id.* at 32.

65 *Id.* at 32-33 (citing *United States v. Darusmont*, 449 U.S. 292, 296 (1981)).

66 *Canisius College v. United States*, 86-6065 (5th Cir. 8/20/86), 799 F.2d 18 (affirming a 4-year retroactivity period); *Temple Univ. v. United States*, 84-1416 (3rd Cir. 7/22/1985), 769 F.2d 126 (affirming a 4-year retroactivity period); *Licari v. Comm'r*, 90-70358 (9th Cir. 9/7/91), 946 F.2d 690 (affirming a 4-year retroactivity period for a tax statute); *GMC v. Dep't of Treasury*, Docket No. 291947 (Mich. App. 1 Cir. 10/28/10), 803 N.W.2d 698 (upholding a 5-year period of retroactivity **when the period is consistent with the applicable statute of limitations**).

67 Generally, tax cases are subject to a three-year prescriptive period. NISCO's assertion that this period is essentially infinite is a gross mischaracterization of the act given the stated language.

68 *Id.* at 33 (citing *Welch v. Henry*, 305 U.S. 134, 146-47 (1994); *Commonwealth Edison Co. v. Mont.*, 453 U.S. 609, 622-23 (1981); See also *Enterprise Leasing Co.*, 221 Ariz. at 127; *Gillette Commer Operations N. Am. & Subsidiaries v. Dept. of Treasury*, 878 N.W.2d 981, 902; *Estate of Hambleton*, 181 Wash. 2d 802, 829.

69 *Cole v. Celotex*, 91-2531 (La. 5/28/1992), 599 So. 2d 1058, 1063-64 (stating "statutes enacted after the acquisition of such a vested property right . . . cannot be retroactively applied so as to divest the plaintiff of his vested right in his cause of action because such a retroactive application would contravene the due process guaranties." It follows that if there is no vested right, due process is not infringed.).

> bear its burdens. Since no citizen enjoys immunity from that burden, its retroactive imposition does not necessarily infringe due process . . .[70]

NISCO simply cannot contend that it has a vested right in a tax statute in light of the plainly stated law. Its alleged reliance on a tax statute is insufficient to sustain a Due Process challenge because it is abundantly clear that a taxpayer "should be regarded as taking his chances of any increase in the tax burden which might result from carrying out the established policy of taxation."[71] Thus, the period of retroactivity provided for in Act 3 is "modest" and passes NISCO's due process challenge because the act does not disturb any vested right of the taxpayer.

F. Act 3 does not violate the Equal Protection Clause.

NISCO hinges its Equal Protection challenge and disparate treatment arguments based on its incorrect assertion that Act 3 only modified the sales tax and not the use tax. This directly contradicts the statutory language and complementary nature of the two taxes.

NISCO's flawed argument arises out of the definition of items for further processing in La. R.S. 47:301(10)(c)(i) and the definition of "use" provided in La. R.S. 47:301(18)(d)(i). The pertinent statutes provide:

> (10)(c)(i)(aa)—The term "sale at retail" does not include sale of materials for further processing into articles of tangible personal property for sale at retail when all of the criteria in Subsubitem (I) of this Subitem are met. . . .
>
> (III)(aaa)—If the materials are further processed into a byproduct for sale, such purchases of materials shall not be deemed to be sales for further processing and shall be taxable. For purposes of this Subitem, the term "byproduct" shall mean any incidental product that is sold for a sales price less than the cost of the materials.
>
> (18)(d)(i)—Notwithstanding any other provision of law to the contrary . . . "use" means and includes the exercise of any right or power over the tangible personal property incident to the ownership thereof, except that it shall not include the further processing of tangible personal property into articles of tangible property for sale.

These statutes are symbiotic. Subitem (10)(c)(i)(aa) defines an item of tangible personal property that is further processed for sale. Subsubitem (III)(aaa) excludes from the definition of "sales for further processing" those materials that are further processed into a byproduct for sale. This provision would clearly subject NISCO's purchases of limestone to tax and would not allow such purchases to qualify for the further processing exclusion.

Similarly, clause (18)(d)(i) would subject NISCO's uses of limestone to tax (if no sales tax were paid upon purchase) because the definition in clause (18)(d)(i) only excludes from use tax those items used for "further processing of tangible personal property into article of tangible

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[70] *Welch v. Henry*, 305 U.S. 134, 146-47 (1994).

property for sale." That language in clause (18)(d)(i) incorporates the definition and applicable exclusions of items used for further processing as used in Subitem (10)(c)(i)(aa) and Subsubitem (III)(aaa). Subsubitem (III)(aaa) expressly excludes byproducts from the definition of items from further processing by stating "such purchases of materials shall not be deemed to be sales for further processing and shall be taxable." Thus, NISCO's purchases of limestone are subject to sales tax because they are not sales for further processing, and, if it doesn't not pay sales tax on such sales, the limestone is subject to use tax under 47:301(18)(d)(i), because the purchase is not a transaction that meets the definition of the further processing exclusion.

NISCO's circular argument to the contrary distorts the application of the legislature's interpretation of the further processing exclusion set out in Act 3 and results in an inconsistent application of Louisiana's symbiotic and complimentary sales and use tax scheme.

The legislature contemplated the exact inconsistency NISCO attempts to fabricate when they enacted La. R.S. § 47:301(19)(b). That statute provides:

> (19) "Use tax" includes the use, the consumption, the distribution, and storage as herein defined. No use tax shall be due or collected by...
>
> (b) [a]ny political subdivision on tangible personal property used, consumed distribution, or stored for use or consumption in such political subdivision if the sale of such property would have been exempted or excluded from sales tax.

This statute expressly forbids collection of use tax on any item exempted or excluded from sales tax. NISCO's argument that there is a separate further processing test for sales and use tax under the statute is just wrong because it would create an inconsistent application of those taxes in violation of Subitem (19)(b). Thus, there can be no disparate application of a use tax exclusion to a transaction which is clearly subject to sales tax, or vice-versa. The statutory scheme mandates that taxation and/or exclusion be applied symmetrically to sales and use tax. As shown above, Subitem (18)(d)(i) defines use to include "the exercise of any right or power over tangible personal property," except when the material is excluded as a material for further processing under La. R.S. 47:301(10)(c)(i). This application of the law is consistent with the express language of the statutes and the consistent with the complimentary structure of sales and use tax.

Act 3, textually and expressly, applies to use taxes in addition to sales taxes. NISCO's assertions that the "old" further processing test applies only to use taxes defies the plain meaning of the statutes and results in an inconsistent application of sales and use taxes in violation of La.

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[71] *Milliken v. United States*, 283 U.S. 15, 23 (1931).

R.S. 47:301(19)(b). Because the statutes demand uniform application, NISCO's Equal Protection challenge similarly fails.

The Equal Protection Clause requires laws to treat similarly-situated persons similarly. Long-standing jurisprudence holds that sales and use taxes are complementary and constitutional.[72] Sales and use taxes apply based on where the taxable transaction occurs.[73] Sales taxes apply when the taxable transaction occurs within the state while use taxes apply when the taxable transaction occurs outside of the state.[74]

Historically, use taxes developed as a response to the competitive struggles of in-state merchants. Buyers would make purchases out of state to take advantage of low or zero sales tax states rather than buying in-state.[75] This eroded the sales tax base and led to the enactment of use taxes.

Originally, use taxes faced many constitutional hurdles and the statutes were overturned or modified repeatedly.[76] After this tumultuous beginning, use taxes found the firm approval of the United States Supreme Court in 1937. The Supreme Court recognized the underlying philosophy of use taxes is *equality* between local and foreign merchants.[77] Louisiana followed suit in 1957, following those same principles of equality. This Court held that the purpose of the use tax is to remove the buyer's temptation to place foreign orders to escape the sales tax.[78] The sales and use tax statutes ensconce these cases in their application today.

The separate and distinctness of the use tax are set forth in the Louisiana Constitution itself. Louisiana Constitution article VI, § 29(A) provides, in part:

> [T]he governing authority of any local governmental subdivision or school board may levy and collect a tax upon the sale at retail, the use, the lease or rental . . . and on the sales of services...

The sale is taxed at the "sales price" as set forth in La. R.S. 47:302(A)(1) as defined in La. R.S. 47:301(13) while the use is taxed at the "cost price" as set forth in La. R.S. 47:302(A)(2), as defined in La. R.S. 47:301(3).

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72 *Henneford v. Silas Mason Co.*, 300 U.S. 577, 585 (1937); *Chicago Bridge & Iron Co. v. Cocreham*, 317 So. 2d605, 608 (La. 1975).

73 *Word of Life Christian Ctr. v. West*, 936 So. 2d 1226, 1233 (La. 4/17/2006).

74 *Id.*

75 *Id.*

76 *Helson v. Commonwealth of Kentucky*, 279 U.S. 245 (1929); *St. Louis-S.F. Ry. v. Public S.C. of Missouri*, 261 U.S. 369 (1923).

77 *Henneford v. Silas Mason Co.*, Inc., 300 U.S. 577, 583 (1937).

78 *Fontenot v. S.E.W. Oil Corporation*, 95 So. 2d 638, 640 (La. 1957).

The only difference between those who pay the sales tax and those who pay the use tax is where the taxable transaction occurs.[79] The taxes are complimentary. If a taxpayer pays one, it will not pay the other. The taxes do not discriminate against any particular class of person. Their application merely turns on where the taxable transaction occurs. As explained, Courts emphatically hold this complimentary nature between the taxes to be constitutional and rooted in principles of equality and fairness. Ironically, NISCO contends applying the taxes in a complimentary manner results in inequality, despite their history.

NISCO's claim that Act 3 violates the Equal Protection Clause hinges on its faulty belief that a separate further processing definition applies to the sales tax and the use tax. Clearly, there is only one further processing test, and it applies to sales and use taxes uniformly. Use tax only applies when sales tax does not apply, but the substance of their application is the same, and La. R.S. 47:301(19) expressly requires the same. The only difference in the application of the two taxes is the moment of taxation.

Therefore, NISCO's claim that Act 3 violates the Equal Protection Clause stems from a faulty premise and is meritless.

G. The Collector's claim for taxes owed in 2013 is not prescribed.

NISCO asserts that the Collector's claims for the collection of sales tax for the period January 1, 2013, through December 31, 2013, are prescribed. In accordance with La. Civ. Code art. 3462 and La. R.S. 47:337.67(B)(3), the Collector's filing of the Amended Answer and Reconventional Demand in the Consolidated Suit on December 29, 2016, interrupted prescription until it was dismissed on June 29, 2017.[80] Since the Collector's Petition to Collect Taxes for the same tax period—the instant matter—was filed in this suit on April 4, 2017, while the prescriptive period was still interrupted, prescription did not lapse.

The Louisiana Civil Code provides the framework for determining whether prescription is interrupted and the duration of that interruption. Specifically, Articles 3462 and 3463 provide:

> [Article 3462] Prescription is interrupted when the owner commences action against the possessor, or when the obligee commences action against the obligor, in a court of competent jurisdiction and venue.
>
> [Article 3463] An interruption of prescription resulting from the filing of a suit in a competent court and in the proper venue or from service of process within the prescriptive period continues as long as the suit is pending. Interruption is considered never to have occurred if the plaintiff abandons, voluntarily dismisses the action at any time either before the defendant has made any appearance of record or thereafter, or fails to prosecute the suit at the trial.

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79 *Word of Life*, supra.
80 La. Civ. Code art. 3463.

This Court applied these articles in its factually similar decision, *Batson v. Cherokee Beach & Campgrounds, Inc.*[81] In *Batson*, the plaintiff filed a suit that was subsequently dismissed without prejudice for failure to file an amended petition.[82] The plaintiff subsequently filed the second suit and the defendant filed an exception of prescription.[83] After an analysis of articles 3462 and 3463, the Court rejected the defendant's prescription argument.[84]

The Court held that when a suit is filed in a court of competent jurisdiction, the "interruption of prescription continues as long as the suit is pending and is only considered to have never occurred if the plaintiff abandons, voluntarily dismisses, or fails to prosecute the suit at trial."[85] NISCO conveniently omits that the interruption is nullified *only* if the plaintiff abandons, voluntarily dismisses, or fails to prosecute the suit.[86] In fact, the lone case NISCO cited to, *Juengain* v. *Tervalon*,[87] is a case that dealt with a suit dismissed for abandonment. Thus, *Batson* dictates that interruption occurred if the Reconventional Demand was filed in a court of competent jurisdiction.

The Collector's Amended Answer and Reconventional Demand was filed with the 14th Judicial District Court in this division. The 14th JDC is undeniably a court of competent jurisdiction to resolve this tax dispute.[88] Judge Ware agreed and denied NISCO's exception of prescription. He found that while he lacked authority to cumulate the Reconventional Demand with pending matters from the *NISCO I* remand, he certainly did not lack subject matter jurisdiction over the substantive claim set forth in the Reconventional Demand.[89] Thus, NISCO's prescription argument has no basis in fact or law and should be denied.

V. CONCLUSION

For the reasons set forth above, this Court should reverse the decision of the Third Circuit and reinstate the trial court's judgment.

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81 88-0194 (La. 9/12/88), 530 So. 2d 1128.
82 *Id.* at 1130.
83 *Id.*
84 *Id.* at 1131.
85 *Id.* at 1130.
86 See Appellant's Brief, p. 39-40.
87 2017-0155 (La. App. 4 Cir. 7/26/17), 223 So.3d 1174, 1178.
88 La. R.S. 47:337.45(3) and (4).
89 See R. 5:1225-1235. Of particular note, defendants never filed an exception for lack of subject matter jurisdiction despite now substantively claiming the Court lacked subject matter jurisdiction.

Respectfully submitted,

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STATE OF LOUISIANA

AFFIDAVIT OF VERIFICATION AND SERVICE

BEFORE ME, the undersigned Notary Public, duly authorized and commissioned in and for the Parish of Calcasieu, personally came and appeared RUSSELL J. STUTES, JR., who stated that:

1.

I hereby certify that the allegations set forth in the accompanying Original Brief on the Merits filed on behalf of the Collector are true and correct to the best of my knowledge.

2.

I hereby certify that a copy of this Original Brief on the Merits has been delivered to the Third Circuit Court of Appeal, the presiding trial judge for Division H in the 14th Judicial District Court, and to all parties, through their below-named counsel, via email and/or U.S. Mail, postage pre-paid and properly addressed, on this 25th day of June, 2021:

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THUS DONE AND SIGNED before me, Notary Public, in Lake Charles, Louisiana, on this 25th day of June, 2021.

ANA LISE STICKELL
NOTARY PUBLIC
LA Commission No. 156994
My commission expires at death.

SUPREME COURT
STATE OF LOUISIANA

DOCKET NO. 2021-OC-00552

CALCASIEU PARISH SCHOOL BOARD
SALES AND USE TAX DEPARTMENT, *et al.*
Plaintiffs/Appellants

VERSUS

NELSON INDUSTRIAL STEAM COMPANY
Defendant/Appellee

CIVIL PROCEEDING

On Application for Writ from the Third Circuit Court of Appeal
Judgment on Remand, No. CA 19-315, from Judgment of the
14th Judicial District Court for the Parish of Calcasieu, State of Louisiana,
No. 2017-1373, the Honorable Ronald F. Ware, Presiding

APPENDIX A

THIRD CIRCUIT COURT OF APPEAL
JUDGMENT ON REMAND

STATE OF LOUISIANA

COURT OF APPEAL, THIRD CIRCUIT

19-315

CALCASIEU PARISH SCHOOL BOARD SALES & USE DEPARTMENT, ET AL.

VERSUS

NELSON INDUSTRIAL STEAM COMPANY

Judgment rendered and mailed to all parties or counsel on April 7, 2021. Applications for rehearing may be filed within the delays allowed by La. Code Civ. P. art. 2166 or La. Code Crim. P. art. 922.

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ON REMAND FROM THE LOUISIANA STATE SUPREME COURT
FOURTEENTH JUDICIAL DISTRICT COURT,
PARISH OF CALCASIEU, NO. 2017-1373
HONORABLE RONALD F. WARE, DISTRICT JUDGE

****

SYLVIA R. COOKS
JUDGE

****

SRC
BHE

Court composed of Sylvia R. Cooks, Chief Judge, Billy H. Ezell and John E. Conery, Judges.

CONERY, J., concurs and assigns reasons.

REVERSED.

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COOKS, Judge.

PROCEDURAL HISTORY

The Louisiana State Supreme Court reversed this court's prior decision in this case noting in its non-unanimous "Per Curiam" opinion that "[a]sh is an incidental byproduct under the statutory definition [now] set forth by Louisiana Revised Statutes 47:301(c)(i)(aa)(III)(aaa), as recently amended by the legislature." *Calcasieu Parish School Board Sales & Use Department v. Nelson Industrial Steam, Co.*, 20-724, p. 1 (La. 10/20/20), 303 So.3d 292 (*NISCO II*). In its previous decision addressing whether this same product produced by NISCO's operation was excluded from taxation the supreme court held, under the statute as it read at that time, that the ash produced by burning limestone with petcoke (to create steam to produce electricity) is *an intentionally planned end product* for which only the ultimate consumer was to be taxed. The supreme court did not say it was overruling its decision in *NISCO I*.

> The "further processing exclusion" simply seeks to ensure that double taxation is avoided by only taxing the ultimate consumer. To determine the rightful taxpayer of the raw material's sales tax, only the manufacturing process (and the physical and chemical components of the materials involved therein) is germane to the "purpose" test. Thus, the only question to ask is whether the limestone was purchased with the purpose (although not necessarily the *primary* purpose) of inclusion in the final product of ash. We find the record undeniably supports an affirmative answer to this inquiry.

Bridges v. Nelson Indus. Steam Co., 15-1439, p. 12 (La. 5/3/16), 190 So.3d 276, 284, (*NISCO I*).

In the present case, however, the supreme court found that under the provisions of newly enacted Act 3, La. R.S. 47:30(c)(i)(aa)(III)(aaa), the ash produced by NISCO's operation "is an incidental byproduct" which is "secondary to the electricity," with a sales price "less than the cost of the limestone" used to make the ash. *NISCO II*, 303 So.3d 292-93. "As such, the purchase of limestone,

which is a material further processed into ash, 'shall not be deemed to be sales for further processing and shall be taxable.'" *Id.* At 293.

In its Per Curiam opinion in *NISCO II*, the supreme court further said that this court:

> too narrowly construed the meaning of "incidental," limiting the amendment's application only to those products that were unintentional or unplanned. However, within the broader context of the statute, it is clear the legislature included within the scope of the term "byproduct" *any* product that is secondary to a primary product when it is sold for a price less than the cost of its materials.

Id. At 292-93.

Nelson Industrial Steam Company (NISCO) produces electricity by burning petcoke to create steam that turns turbines to generate electricity for its own use and for resale. The steam generated is also a product for resale. In order to meet Environmental Protection Agency regulations when burning petcoke, NISCO must mix limestone with the petcoke and thereby limit production of sulfur into the atmosphere. The ash produced by this chemical reaction is also an end product for resale. NISCO's plant was designed with all three products in mind as revenue producing products in its overall operation. These facts are not in dispute and are the same facts presented as evidence in both *NISCO I* and *NISCO II* by the same witnesses.

On April 4, 2017, the Calcasieu Parish School Board Sales and Use Tax Department (CPSB) and Kimberly Tyree, in her capacity as administrator of the Department, filed suit against NISCO alleging "NISCO failed to pay and accrue use tax on its purchases of limestone." The Department based its suit on an audit of NISCO "for sales and use tax liability for the periods of January 1, 2013 through December 31, 2015." The Department alleged that NISCO's "taxable limestone purchases for the Audit Period total[ed] $17,785,725.58." It further alleged in the

suit that NISCO's limestone purchases during the audit period were made subject to taxation by Act 3 of the 2016 Second Extraordinary Session of the Louisiana Legislature, which became effective on June 23, 2016:

> If the materials are further processed into a byproduct for sale, such purchases of materials shall not be deemed to be sales for further processing and shall be taxable. For purposes of this Subitem, the term "byproduct" shall mean any *incidental product* that is sold for a sales price less than the cost of the materials.

La.R.S. 47:301(10)(c)(i)(aa)(III)(aaa) (emphasis added).

The Department also alleged in its lawsuit, and again maintains here, that "Section 2 of Act 3 provides that it is intended to clarify the original intent and application of R.S. 47:301(10)(c)(i)(aa)[1] and is, therefore, retroactive and applicable to the Audit Period." We conclude the statute was enacted in violation of Louisiana Constitution, Article VII, Section 2, which provides:

> The levy of a new tax, an increase in an existing tax, or a repeal of an existing tax exemption shall require the enactment of a law by two-thirds of the elected members of each house of the legislature.

The supreme court in its Per Curiam opinion in *NISCO II*, held that which was excluded from taxation before Act 3 amended La.R.S. 47:301(10)(c)(i)(aa) are now subject to taxation. Thus, Act 3 imposes a new tax. There is no dispute here that Act 3 was not passed by the required two-thirds vote of the legislature.

NISCO asserts "Act 3 violates multiple fundamental principles of constitutional law, including the Tax Limitation Clause of the Louisiana Constitution, the Separation of Powers Doctrine embodied in the Louisiana Constitution, and the Due Process and Equal Protection Clauses of the Louisiana and United States Constitutions." NISCO filed exceptions of lis pendens, prescription, no cause of action, and a motion for summary judgment as a matter of law based on the allegation that the enactment of Act 3 was "in violation of the Tax Limitation

Clause of the Louisiana Constitution." CPSB filed a motion for summary judgment. NISCO filed a cross motion for summary judgment re-urging its exceptions and its motion for summary judgment. NISCO also asserted that "Act 3 has no application to use tax" and in the alternative it asserted "Act 3's application to NISCO's use of

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(c)(i)(aa) The term "sale at retail" does not include sale of materials for further processing into articles of tangible personal property for sale at retail when all of the criteria in Subsubitem (I) of this Subitem are met.

(I)(aaa) The raw materials become a recognizable and identifiable component of the end product.

(bbb) The raw materials are beneficial to the end product.

(ccc) The raw materials are material for further processing, and as such, are purchased for the purpose of inclusion into the end product.

(II) For purposes of this Subitem, the term "sale at retail" shall not include the purchase of raw materials for the production of raw or processed agricultural, silvicultural, or aquacultural products.

(III)(aaa) If the materials are further processed into a byproduct for sale, such purchases of materials shall not be deemed to be sales for further processing and shall be taxable. For purposes of this Subitem, the term "byproduct" shall mean any incidental product that is sold for a sales price less than the cost of the materials.

(bbb) In the event a byproduct is sold at retail in this state for which a sales and use tax has been paid by the seller on the cost of the materials, which materials are used partially or fully in the manufacturing of the byproduct, a credit against the tax paid by the seller shall be allowed in an amount equal to the sales tax collected and remitted by the seller on the taxable retail sale of the byproduct.

La.R.S. 47:301(10), in pertinent part.

limestone violates the Equal Protection Clauses of the Louisiana and United States Constitutions; and NISCO's purchases of limestone for further processing into its ash product are not taxable under Act 3, because NISCO's ash product is not an 'incidental' product, and therefore does not meet the definition of 'byproduct' under Act 3."

The trial court found NISCO's production of ash is "incidental" to its manufacturing of electricity thus, the ash "fits the definition of byproduct in Act 3 and it doesn't qualify NISCO for the tax exemption." The trial court also found that Act 3 "is not a levy of a new tax [and] it's not a repeal of a tax exemption [, but] it's a close call [as to] whether or not it's an increase of an existing tax." (We note that the previous statute provided an *exclusion* from tax not an *exemption.*) Ultimately, the trial court also ruled that Act 3 is not an increase of an existing tax. The trial court further found Act 3 constitutional because NISCO did not overcome the presumption of constitutionality as regards its equal protection argument. It denied all NISCO's exceptions, denied its motion for summary judgment and its cross motion for summary judgment, and granted CPSB's motion for summary judgment. NISCO appealed asserting seven assignments of error:

1. The District Court erred in denying NISCO's Motion for Summary Judgment and Cross Motion for Summary Judgment because Act 3 meets the Louisiana Supreme Court's three-pronged test for legislation that levies a new tax or increases an existing tax, and was enacted without the supermajority vote of both houses of the Legislature required for such legislation under the Tax Limitation Clause of the Louisiana Constitution.

2. The District Court erred in denying NISCO's Peremptory Exception of No Cause of Action and Cross Motion for Summary Judgment because Act 3 is retroactive substantive law enacted under the guise of interpretive legislation, and targets and attempts to "legislatively overrule" prior Louisiana Supreme Court jurisprudence, thus impinging on the judicial authority in violation of the Separation of Powers Doctrine embodied in the Louisiana Constitution.

3. The District Court erred in denying NISCO's Peremptory Exception of No Cause of Action and Cross Motion for Summary Judgment

because Art 3 is a retroactive new tax; or alternatively, its retroactive application is not supported by a legitimate purpose furthered by rational means, is not for a modest period of time, and divests NISCO of vested rights.

4. The District Court erred in denying NISCO's Cross Motion for Summary Judgment because Act 3 created disparate treatment of purchasers of materials further processed into byproducts for sales tax purposes and use tax purposes, and that disparate treatment has no rational basis, in violation of the Equal Protection Clauses of the Louisiana and United States Constitutions.

5. The District Court erred in denying NISCO's Cross Motion for Summary Judgment because Act 3 does not amend the further processing exclusion in the definition of "use" for use tax purposes, and thus does not apply to CPSB's suit to collect use tax.

6. The District Court erred in denying NISCO's Cross Motion for Summary Judgment because NISCO purchases limestone for further processing into an ash product that is not an "incidental" product, and thus not a "byproduct" for which raw material purchases are subject to tax under Act 3.

7. The District Court erred in denying NISCO's Peremptory Exception of Prescription and Cross Motion for Summary Judgment because the suit seeks to collect taxes becoming due before December 31, 2013 and was not filed until April 4, 2017, more than three years from December 31st of the year in which those taxes became due, and because a prior action filed before December 31, 2016 was (i) filed in an action in which the district court had been divested of jurisdiction, and (ii) dismissed without prejudice.

LEGAL ANALYSIS

We previously addressed only the issue of whether the limestone NISCO purchased for use in the production of electricity was excluded from taxation because the ash produced by it and resold was not an "incidental" product and thus not a "byproduct" whose raw material (limestone) purchases would be taxed under Act 3. The supreme court held that our application of the new statutory provisions was flawed and found that the term "byproduct," as now defined in Act 3, means "*any* product that is secondary to a primary product when it is sold for a price less than the cost of the materials." *NISCO II*, 203 So.3d at 293 (emphasis in original). The supreme court remanded the case to this court for consideration of issues

pretermitted by our previous ruling with instruction to address those issues, specifically "including an analysis of whether the amendment is a new tax or an increase in a tax." *Id.* Based upon the supreme court's instruction in *NISCO II*, we now find it necessary to address only the issues of whether this is a new tax and whether the new tax created by Act 3's removal of a prior *exclusion* from taxation was enacted in accordance with the Louisiana Constitution. We find it is a new tax and the enactment was not in accordance with the Louisiana Constitution. There is no dispute here on summary judgment that Act 3 was passed without the requisite two-thirds vote of the legislature. Applying the supreme court's rationale articulated in its Per Curiam opinion in *NISCO II*, we find Act 3 sought to tax that which was previously *excluded* from taxation. It is, therefore, a new tax. We further find it is not necessary to address any other issues presented.

> Appellate courts review summary judgments de novo, using the same analysis as the trial court in deciding whether summary judgment is appropriate. *Smith v. Our Lady of the Lake Hosp., Inc.*, 93-2512 (La. 7/5/94), 639 So.2d 730. A motion for summary judgment must be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the mover is entitled to judgment as a matter of law. La.Code Civ.P. art. 966(B).

Terrell v. Town of Lecompte, 18-1004, p. 4 (La.App. 3 Cir. 6/5/19), 274 So.3d 605, 608.

> The interpretation of a statute is a question of law that may be decided by summary judgment. When addressing legal issues, the appellate court gives no special weight to the findings of the trial court, but exercises its constitutional duty to review questions of law de novo, after which it renders judgment on the record. ***Bannister Properties, Inc. v. State***, 2018-0030 (La. App. 1st Cir. 11/2/18), 265 So.3d 778, 788, writ denied, 2019-0025 (La. 3/6/19), 266 So.3d 902.

> The fundamental issues in all cases of statutory interpretation are legislative intent and the ascertainment of the reason or reasons that prompted the legislature to enact the law. The rules of statutory construction are designed to ascertain and enforce the intent of the legislature. Legislation is the solemn expression of legislative will and, therefore, interpretation of a law involves primarily a search for the legislature's intent. *Montgomery v. St. Tammany Par. Gov't*, 2017-1811 (La. 6/29/18), —— So.3d ——, ——. But when a law is clear and

> unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature. *Id.* See La. C.C. art. 9. This principle applies to tax statutes. ***Tarver v. E.I. Du Pont De Nemours & Co.***, 634 So.2d 356, 358 (La. 1994). It is only when the language of the law is susceptible of different meanings that it must be interpreted as having the meaning that best conforms to the purpose of the law, and the words of law must be given their generally prevailing meaning. See La. C.C. arts. 10 and 11; ***Bannister Properties, Inc.***, 265 So.3d at 790.
>
> Legislative language will be interpreted on the assumption that the legislature was aware of existing statutes, well-established principles of statutory construction, and with knowledge of the effect of their acts and purpose in view. ***M.J. Farms, Ltd. v. Exxon Mobil Corp.***, 2007-2371 (La. 7/1/08), 998 So.2d 16, 27. A statute that imposes a tax should be liberally construed in favor of the taxpayer. ***Bannister Properties, Inc.***, 265 So.3d at 791. And if the statute can reasonably be interpreted more than one way, the interpretation less onerous to the taxpayer is to be adopted. ***Entergy Louisiana. Inc. v. Kennedy***, 2003-0166 (La. App. 1st Cir. 7/2/03), 859 So.2d 74, 78, writ denied, 2003-2201 (La. 11/14/03), 858 So.2d 430.

Jazz Casino Co., L.L.C. v. Bridges, 19-1530, pgs. 8-9, (La. App. 1 Cir. 7/29/20), ___So.3d___, *reversed in part on other grounds*, 20-1145 (La. 2/9/21), ___So.3d___.

The trial court erred as a matter of law in concluding that the tax provision at issue was a tax exemption rather than, as we and the state supreme court have found, it was a tax exclusion.

The factual backdrop of this case as set forth above is not in dispute. In support of its cross motion for summary judgment NISCO provided affidavits of Shelley G. Hacker (Hacker) and Gary Livengood (Livengood). Hacker and Livengood both testified in *NISCO I*. In addition to the information contained in their affidavits in support of NISCO's motions and exceptions both attached their trial testimony in the previous case. The affidavits of Hacker and Livengood are uncontradicted. In *NISCO I* the supreme court, applying the statutory language in effect at that time, found that NISCO's production of ash *is not an incidental*

byproduct but is in fact an *end product* "produced and sold to LA Ash, making it an 'article of tangible personal property for sale at retail.'" *NISCO I*, 190 So.3d at 282.

In *NISCO I* the state supreme court found that La.R.S. 47:301(1)(a)(i)(c)(1)(aa) ***statutorily excluded*** "sales of materials for further processing into articles of tangible personal property" from the term "sale at retail." *NISCO I*, 190 So.3d at 279. The supreme court explained that this statutory provision was a tax *exclusion*, differentiating it from a tax *exemption*. We agree with that reasoning. While a *tax exemption* makes a transaction that would otherwise be taxable exempt from such taxation, **a *tax exclusion* renders a transaction not taxable *ab initio*.** "Transactions excluded from the tax are those which, by the language of the statutes, are defined as beyond the reach of the tax." *NISCO I*, 190 So.3d at 280 "(quoting Bruce J. Oreck, *Louisiana Sales and Use Taxation* (2d ed. 1996) §3.1.")".

> Although the "further processing exclusion" is deemed neither an exclusion nor an exemption in the statute itself, as we stated in *Harrah's Bossier City* [*Inv. Co., LLC v. Bridges*, 09–1916, pp. 9–10 (La.5/11/10)], 41 So.3d [438],at 450:
>
> > There are no "magic words" necessary to create an exemption or an exclusion; *the determining factor is the effect of the statute:* "the words and form used legislatively in granting an exemption are not important if, in their essence, the Legislature creates an exemption." *Wooden v. Louisiana Tax Commission*, 94–2481 (La.2/20/95), 650 So.2d 1157, 1161, citing *Meyers v. Flournoy*, 209 La. 812, 25 So.2d 601 (1946). [Emphasis added].
>
> This court has determined the "further processing exclusion" was designed "to eliminate the tax on the sale of a material purchased for further processing into finished products and to place the tax on the ultimate consumer of the finished product processed from the raw material." This court's findings regarding the purpose of the provision, together with this provision's placement in the definition section, rather than in La. R.S. 47:305 with many clear "exemptions," indicate that the legislature meant this provision to be a limitation *ab initio* on the definition of "sale at retail." Thus, it seems the "further processing provision" is an exclusion. Indeed, this conclusion follows logically from the underlying principle that "sales at retail" are subject to sales tax but sales "for resale" including, by extension, sales of materials for

> further processing *before* resale, are categorically not considered "sales at retail," because the buyer is not the ultimate consumer. Thus, we find the provision at issue is an exclusion and will be liberally construed in favor of the taxpayer, NISCO.

NISCO I, 190 So.3d at 280–81(third alteration in original) (footnote omitted).

The new statutory definition of "sale at retail" enacted by Act 3 provides:

> (c)(i)(aa) The term "sale at retail" does not include sale of materials for further processing into articles of tangible personal property for sale at retail when all of the criteria in Subsubitem (I) of this Subitem are met.
>
> (I)(aaa) The raw materials become a recognizable and identifiable component of the end product.
>
> (bbb) The raw materials are beneficial to the end product.
>
> (ccc) The raw materials are material for further processing, and as such, are purchased for the purpose of inclusion into the end product.

La.R.S. 47:301(10), in pertinent part.

In *NISCO I*, the supreme court determined the production of ash by NISCO was an *intentional, planned, end product of their manufacturing process.* NISCO's witnesses in the present case testified in their affidavits in support of summary judgment that nothing has changed since *NISCO I* was decided regarding the manufacture of electricity, steam, and ash at its facility, and their testimony would be the same in this case.

> The purpose to produce and sell ash is evidenced in the "Partnership Agreement's" language that NISCO would (1) conduct "any activities related" to the manufacture of electricity and steam, (2) construct substantial "New Facilities", which contemplated the handling and sorting of the ash, and (3) receive income from the ash sales. Undisputed testimony established that NISCO actively purchased equipment specifically designed for the production of ash and sought a buyer for its ash. For the last twenty-two years, NISCO has sold one hundred percent of its ash product. NISCO's current contract with its limestone supplier recognizes that the limestone will be used for the two-fold purpose of absorbing sulfur released by the petcoke *and* producing ash as a saleable product. As stated earlier, the ash brings in roughly $6.8 million in revenue. . . . The fact that the ash profit contributes to NISCO's bottom line and acts as a cost offset, rather than the company's principal income, does not change the fact that the ash

> is still an article of tangible personal property that will be resold to another consumer, who will bear the ultimate burden of taxation. Accordingly, we find NISCO's purposeful decisions related to engineering, infrastructure, and marketing lead to the only possible conclusion that the limestone was purchased with the purpose—perhaps not the sole or primary purpose, *but the purpose nonetheless—of making a saleable end product of ash.* Since the limestone is a recognizable, identifiable, beneficial material bought for the purpose of inclusion in the ash product, we find it qualifies for the "further processing exclusion."

NISCO I, 190 So.3d at 284–85 (second emphasis added);(footnote omitted).

In *NISCO I*, the supreme court said this language did not render NISCO's purchase of limestone taxable because the ash product *manufactured* by burning limestone with sulfur was *not an incidental byproduct* within the meaning of the statutory provisions as they read in the statute at that time. But, under the statutory provisions enacted by Act 3, the high court explains that a proper application of Act 3's revisions to the statute now render NISCO's purchases of limestone taxable and no longer excluded from taxation. Clearly, under the prior statute, according to the supreme court, *the ash was not an incidental byproduct* and therefore the limestone used to make it was excluded from taxation. Now, under the supreme court's interpretation of the current statute, what was excluded from taxation is now subject to tax.

In our prior opinion in this case, we found the new provisions added by Act 3, did not impose a new tax or increase a tax but merely codified the prior jurisprudence, thereby making the *International Paper v. Bridges, 07-1151 (La. 1/16/08)*, 972 So.2d 1121, three-pronged-test the statutory test for determining whether materials used in further processing that result in the production of a by-product are excluded from sales and use taxation. This concept of incidental byproduct versus intentional end-product had long been jurisprudentially recognized in Louisiana courts' prior determinations regarding "further processed goods" of material needed to make that byproduct. Under this court's previous interpretation

of Act 3, the tax burden would continue to be appropriately placed on the end-user, and as the state supreme court noted in *NISCO I*:

> [T]he existing ... legislative intent encourages courts and the Louisiana Department of Revenue to adhere to the exclusive three-prong test set forth by the courts. Particularly, the legislature recognized that many other states do not tax *any* raw materials used in the manufacturing of products for resale. Deviation from this three-prong test, as warned by the legislature could "undermine the efforts of Louisiana to attract additional investment dollars in the state." Accordingly, we find the conclusion reached herein best comports with the legislative intent regarding taxation of materials further processed into articles of tangible personal property.

NISCO I, 190 So.3d at 286-87(footnote omitted).

But, under the supreme court's interpretation of the language of Act 3 here in *NISCO II*, the statute now defines NISCO's ash product as an "incidental byproduct" making "the purchase of limestone . . . a material further processed into ash," no longer excluded from taxation, but now subject to taxation because it is no longer "deemed to be sales for further processing." *NISCO II*, 303 So.3d at 293.

DECREE

For the reason stated, we reverse the trial court's grant of summary judgment in favor of the Calcasieu Parish School Board Sales and Use Tax Department and we hereby grant Nelson Industrial Steam Company's Exception of No Cause of Action, raised in its Cross Motion for Summary Judgment, dismissing Plaintiff's claims with prejudice. Court costs in the amount of $12,242.09 on appeal and $14,946.14 in the trial court are assessed against the Calcasieu Parish School Board Sales and Use Tax Department.

REVERSED.

STATE OF LOUISIANA

COURT OF APPEAL, THIRD CIRCUIT

NUMBER 19-315

CALCASIEU PARISH SCHOOL BOARD SALES & USE DEPARTMENT, ET AL.

VERSUS

NELSON INDUSTRIAL STEAM COMPANY

CONERY, J., concurs and assigns reasons.

With regard to the legislature's taxing authority, La.Const. art. 7, § 2 mandates that "[t]he levy of a new tax" or "an increase in an existing tax," be enacted "by two-thirds of the elected members of each house of the legislature." Act 3 was not, as the House of Representatives passed the measure by simple majority. It is clear that the amendment of La.R.S. 47:301(10)(c)(i)(aa)(III)(aaa) constitutes a "new tax."

In *Bridges v. Nelson Indus. Steam Co.*, 15-1439 (La. 5/3/16), 190 So.3d 276 (*NISCO I*), the supreme court reviewed "the jurisprudential test created over the last few decades" in discussing the "further processing exclusion" of La.R.S. 47:301(10)(c)(i)(aa) and before finding NISCO's purchase of limestone subject to that exclusion from taxation. The statute thus provided taxing authorities with no basis for the collection of tax revenue from that product.

Before *NISCO I* became final, the legislature indicated its intent to "clarify ... the original intent and application of R.S. 47:301(10)(c)(i)(aa)." 2016 La. Acts No. 3, § 2. The amendment, however, was not applicable to the facts and audit periods involved in *NISCO I*, as the legislature made "the provisions of this Act ... retroactive and applicable to all refund claims submitted or assessments of

additional taxes due which are filed *on or after the effective date of this act.*" *Id.* (emphasis added). Continuing, the legislature indicated that Act 3 "shall not be applicable to any existing claim for refund filed or assessment of additional taxes due issued prior to the effective date of this Act for any tax period prior to July 1, 2016, which is not barred by prescription." *Id.*

While the parties dispute whether Act 3 can be treated as a mere clarification or interpretive measure, and thus given retroactive effect since *NISCO I* was not final at the time of its enactment, that dispute is of no consequence in the analysis of whether the measure levied a "new tax" or increased "an existing tax" for purposes of validity under La.Const. art. 7, § 2. In operation, it imposed a tax on materials previously determined to be excluded only after it's effective date. Further, Act 3, § 2 specifically indicates that it is inapplicable to the claim involved in *NISCO I*. That ruling, along with the determination regarding the excluded material, is now final.

With regard to the issue of whether Act 3 involved a new tax, the supreme court addressed a similar scenario in *Dow Hydrocarbons & Res. v. Kennedy*, 96-2471 (La. 5/20/97), 694 So.2d 215. In *Dow*, the supreme court addressed 1993 La. Acts No. 690, which reclassified certain corporate income from "allocable income" to "apportionable income" and considered whether the legislation enacted a "new tax" or "increased an existing tax." The query was critical given Dow's challenge to the 1993 legislation under La.Const. art. 3, § 2, which, at that time, prohibited the legislature from levying a new tax or increasing an existing tax during a regular session held in an odd-numbered year.

The supreme court explained that, prior to the enactment of Act 690, "a corporation was not subject to tax on dividends received from a subsidiary

provided that the subsidiary earned all of its income outside of Louisiana," but that Act 690 "changed the classification of dividend income from allocable income to apportionable income." *Id.* at 217. "Consequently, the previously untaxed income received from such sources is now subject to Louisiana corporate tax." *Id.* Given that change, the supreme court found no difficulty in the initial determination of whether Act 690 constituted a tax as moneys collected by the State via the Louisiana Corporate Income Tax statutes are taxes, and moneys paid pursuant to the statutes modified by Act 690 are taxes. *Id.* 2016 La. Acts No. 3 operates in the same way, providing for the payment of taxes.

Continuing, the supreme court further explained in *Dow* that the secondary determination of "whether Act 690 is more appropriately characterized as a new tax versus an increase to an existing tax is somewhat difficult," but "that it is one of the two is easily discernable." *Id.* Notably, prior to Act 690, certain corporations did not pay the subject money to Louisiana, whereas after the reclassification, they did. The supreme court found, however, that although arguably a new tax, "it matters not whether Act 690 is characterized as a new tax or an increase to an existing tax as both are violative of [La.Const. art. 3, § 2]" which then prohibited any measure levying a new tax or increasing an existing tax during a regular session held in an odd-numbered year. Enacted in 1993, an odd-numbered year, the supreme court therefore maintained the trial court's determination that Act 690 was unconstitutional under Article 3, § 2.

Although La.Const. art. 7, § 2 is at issue in this case, rather than Article 3, § 2 as in *Dow*, both Articles address the legislative framework for passage of matters involving a new tax or an increase to an existing tax. Like Act 690 in *Dow*, Act 3 resulted in the assessment of taxes not formerly paid. Whether that former lack of

taxation was due to judicial interpretation or legislative will is of no consequence as the legislature addressed the situation by ultimately assessing the contested tax via the amended language contained in Act 3. As the supreme court explained, "[w]here the collected moneys at issue are clearly taxes, there is no need to digress into an analysis of legislative intent." *Dow*, 694 So.2d at 217, n.6 (citing La.Civ.Code art. 9). Further consideration of the legislature's intent to clarify its earlier language is inconsequential given the taxation realm in which Act 3 was enacted.

CPSB advances *Palmer v. Louisiana Forestry Comm'n*, 97-0244 (La. 10/21/97), 701 So.2d 1300 for the proposition that Act 3 did not impose a new tax but that it fit within the overall scheme of taxing the ultimate consumer of a product rather than altering the overall scheme of a taxing authority. *Palmer* is distinguishable however, as it questioned the actions of the Louisiana Tax Commission's reclassification of "chip and saw" forestry product from a pulp wood subgroup to a "trees and timber" subgroup for purposes of assessment of severance taxes. The reclassification resulted in lesser tax collections for the plaintiff police juries.

Although the *Palmer* plaintiffs asserted that the reclassification constituted a "new tax" and therefore permitted the Commission to encroach on the legislature's power to levy a tax, the supreme court rejected that argument. The "chip and saw" product *had instead always been taxable* under the statute and, as the supreme court remarked, the reclassification from the higher taxed group to the lower taxed group was obviously not for the purpose of *raising* revenue. *Id.* In fact, the supreme court distinguished the matter in *Palmer* from *Dow* on that basis noting that the reclassification in *Dow* related to income that "had *not* been subject to the

tax" before the amendment. *Id.* at 1307 (emphasis in the original). In contrast to *Dow*, the reclassification in *Palmer*, the supreme court concluded, was merely a fair reflection of the statutory scheme. Additionally, developments in "chip and saw technology" indicated that it was reasonably foreseeable that the product would be taxed at the lesser "trees and timber" tax rate. *Id.* at 1307.

The same cannot be said in this case. Act 3 clearly raised revenue by bringing into the taxable ambit items previously excluded from taxation under La.R.S. 47:301. That new inclusion is reflected in the supreme court's interpretation of Act 3 in its per curiam, wherein the supreme court explained that "[a]sh is an incidental byproduct under the statutory definition set forth by Louisiana Revised Statutes 47:301(c)(i)(aa)(III)(aaa), *as recently amended by the legislature.*" *Calcasieu Par. Sch. Bd. Sales & Use Dep't*, 20-724 (La. 10/20/20), 303 So.3d 292 (emphasis added).

The purpose of Act 3, the amendment addressed by the supreme court, was patently to raise revenue, with portions of the legislation identifying time periods to which its designated assessments were applicable. Those identified time periods were not applicable to *NISCO I* by the specific temporal parameters of the legislation itself and thus its finality at the time of the new legislative pronouncement is not determinative in this case.

The tax burden identified in Act 3 was thus a new one, assessing taxes on items previously excluded and requiring enactment by two-thirds of both legislative houses. The June 19, 2016 Roll Call of the House of Representatives reflects Final Passage in the House of Representatives with 54 "Yeas" and 47 "Nays." Four members were absent. That simple majority fell short of the

constitutional mandate, requiring that 2016 La. Acts No. 3, § 2 be found violative of Article 7, § 2.

With the additional reasons, I concur with the lead opinion to reverse the trial court's grant of summary judgment and find that CPSB's case must be dismissed upon granting of NISCO's cross motion for summary judgment.