

SUPREME COURT OF LOUISIANA
DOCKET NO. 2021-OC-00552

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

VERSUS

NELSON INDUSTRIAL STEAM COMPANY
Respondent/Defendant

BRIEF

CIVIL ACTION

ON THE DECISION OF THE LOUISIANA THIRD CIRCUIT COURT OF
APPEAL, DOCKET NO. 2019-CA-315,
REVERSING JUDGMENT OF 14TH JUDICIAL DISTRICT COURT DOCKET
NO. 2017-1373, JUDGE RONALD F. WARE PRESIDING

**MOTION FOR LEAVE TO FILE MEMORANDUM OF *AMICUS CURIAE* OF
LAFOURCHE PARISH SCHOOL BOARD, EX OFFICIO SALES AND USE TAX
COLLECTOR FOR THE PARISH OF LAFOURCHE AND ST. JOHN THE BAPTIST
PARISH SCHOOL BOARD, EX OFFICIO SALES AND USE TAX COLLECTOR FOR
THE PARISH OF ST. JOHN, IN SUPPORT OF APPLICANT**

By Attorneys:

LAW OFFICE OF PATRICK M. AMEDEE

/s/ Patrick M. Amedee
PATRICK M. AMEDEE (#2448)
CATHERINE MASTERSON (#32575)
627 Jackson Street, Suite B (70301)
P. O. Box 1092
Thibodaux, LA 70302-1092
(985) 446-4811 Telephone
(985) 446-4846 Facsimile
Attorney for Amicus Curiae, Lafourche Parish
School Board and St. John the Baptist Parish School
Board

SUPREME COURT
OF LOUISIANA

2021 JUN 28 PM 1:17

CLERK
OF COURT

MAY IT PLEASE THE COURT:

NOW COME St. John the Baptist Parish School Board, Sales and Use Tax Collector for the Parish of St. John, and Lafourche Parish School Board, Sales and Use Tax Collector for the Parish of Lafourche who submit their *Amicus Curiae* Brief in support of the Appellant, Calcasieu Parish School Board, Sales and Use Tax Collector for the Parish of Calcasieu (hereinafter “CPSB” or “the Collector”), to wit:

I. STATEMENT OF THE CASE

NISCO generates electricity via the use of steam. To create the steam that creates the electricity, it uses petcoke as a fuel source. To inhibit or eliminate the toxic sulfur created by the burning of petcoke, NISCO adds sand and limestone in the fueling process to lower the pollutant emissions to acceptable levels. The sand and limestone absorb the toxic sulfur reducing or eliminating the emission. The consumption of the sand and limestone and petcoke in the creation of the steam/electricity leaves a residual ash. The petcoke is entirely consumed leaving no residual byproduct. The limestone and sand is practically consumed, as it is reduced to ash. NISCO then sells the byproduct ash.

Following this Court’s ruling in *Bridges v. Nelson Indus. Steam Co.*, 190 So.3d 276 (La. 2016), the Legislature enacted Act 3 in an attempt to clarify the law related to the “further processing” exclusion under law attempting to limit what sales are “excluded” as a result of a sale of a byproduct. At the heart of this appeal is the Third Circuit’s determination that Act 3 levied a “new tax”, was enacted in violation of Louisiana Constitution, Article VII, Section 2 and is thus unconstitutional.¹ The Third Circuit’s reasoning was wrong.

II. ADDITIONAL BACKGROUND AND SUMMARY OF THE ARGUMENT

The Supreme Court’s analysis in *Bridges v. Nelson Indus. Steam Co.*, 190 So.3d 276 (La. 2016) (“NISCO I”) essentially focused upon what it described as the third prong of the

¹ NISCO presented a variety of arguments on appeal, ranging from constitutional challenges to procedural deficiencies. Specifically, NISCO 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 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.

International Paper analysis.² At the heart of the case was the anomalous circumstance where NISCO purchased limestone for \$45 million, selling it for \$6.8 million. After all, NISCO sold electricity, not ash, as its principal business as argued by the State. Nevertheless, the majority Court found the language of the statute sufficiently ambiguous to permit the further processing exclusion to apply to the entire \$45 million purchase because there was no language in the statute that required the purchase of the limestone to be “primarily” for the manufacture of the ash.³ The inequity created by the majority opinion was clearly and immediately apparent as pointed out by Justice Knoll in her dissent,

Endless creative “sales” of residual waste materials or recyclables for the purpose of evading taxes are likely if not inevitable under the majority's holding. As one amicus brief pointed out, contractors could escape tax on all of their purchase of materials by selling scrap wood as mulch or particleboard, claiming they really purchased all of their lumber for “the purpose of” selling mulch and particleboard. Even the tobacco industry could be transformed, as Calcasieu Parish's brief quipped, if the industry could dream up a way for their customers to sell cigarette ash. at 287.

Responding to this loophole created by the ambiguity in the law, the Legislature acted, immediately passing Act 3 of the 2016 Second Extraordinary Session of the Louisiana Legislature. The intent of Act 3 was to clarify the law, to close the loophole which could result in “endless creative ‘sales’ of residual waste material” as noted by Justice Knoll. Such an amendment did not constitute a “double taxation” but was intended to prevent “tax avoidance” for similar circumstances as characterized by (Chief) Justice Weimer in his dissenting opinion.⁴

Hardly a “new tax”, Act 3 sought to provide an equitable allocation of the “further processing” tax exclusion for the “raw materials” purchased and then sold in the form of a secondary “byproduct”. The provisions of the amendment provided for a dollar for dollar offset

² “The crux of this matter lies in the third prong (of *International Paper v. Bridges*, 07–1151 (La.1/16/08), 972 So.2d 1121...)”, which seeks to ascertain whether the raw materials are purchased for the purpose of inclusion in the end product.” *Bridges v. Nelson Indus. Steam Co.*, 190 So.3d 276 (La. 2016).

³ “Moreover, under a proper “purpose” test, the third prong of the three-part inquiry enunciated in *International Paper* is satisfied, as evidenced by NISCO's choice of manufacturing process and technology, its contractual language utilized in its purchasing of the limestone, and its subsequent marketing and sale of the ash.” *Bridges v. Nelson Indus. Steam Co.*, 190 So.3d 276 (La. 2016), at 287.

⁴ “This case does not involve an issue of double taxation, rather it involves an issue of tax avoidance as to the portion of the limestone that is consumed by Nelson.” *Bridges v. Nelson Indus. Steam Co.*, 190 So.3d 276 (La. 2016) at 298.

to the cost of the raw materials (and hence a sales tax exclusion) for the sales price of the byproduct if the cost of the raw material exceeded the sales price.⁵

Notably, the offset *did not* require an allocation for “manufacturing” labor, or energy or other taxable consumables usually incurred in a manufacturing process, nor for mark-up (profit). All of these indirect costs and profit margin are usually part of a final sales price of manufactured goods. One-hundred percent (100%) of the sales price of the byproduct (the ash in this instance) could be used to offset the purchase of the limestone to reduce the taxable value of the limestone consumed in the process. If anything, NISCO benefits more than the ordinary manufacturer with no byproduct to sell, who currently only receives an exclusion on the purchase of identifiable “raw materials” in its manufacture of a finished product for sale, being required to pay sales taxes on items consumed in the manufacturing process.

It appears rather clear that the Legislature intended the differential in the purchase price and sales price of the byproduct (of the limestone and ash in this instance) to be considered the value of *taxable manufacturing consumables* incurred by the manufacturer. In all respects, it appears to be an attempt by the Legislature to put all Louisiana manufacturers on an equal footing for purposes of the “further processing” exclusion – an area of sales tax law which has long existed in the sales tax statutes and has well-settled jurisprudential interpretation by this Honorable Court.

The Third Circuit in the instant matter ignored the legislature’s clear intent to equitably close this loophole. It is very respectfully submitted that the Legislative Branch should have the final word ensuring that the correct interpretation and application of this law is consistent with the Legislature’s intent so as to treat *all* manufacturers fairly. As pointed out by Ascension, Rapides and St. James Parish Collectors in their *Amici* brief, the Legislature amended the law in response to this Court’s *NISCO I invitation*, which is now unjustifiably restrained by the Third Circuit’s decision. Accordingly, this Honorable Court should vacate and remand this matter to Third Circuit consistent with the legislative intent and history of Act 3.

⁵ 47:301(10)(c)(i)(aa)(I)(bbb) - (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.*

III. LEGAL ARGUMENT IN SUPPORT OF THE COLLECTOR

A. Standard of Review

This matter involves a constitutional challenge to Act 3. 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.”⁶ “All statutory enactments are presumed constitutional, and every presumption of law and fact must be indulged in favor of legality.”⁷ The party seeking to have a statute declared unconstitutional bears “a heavy burden.”⁸ 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 statute.”⁹ “[T]his Court has repeatedly stated that it is not the court’s ‘duty to determine the wisdom behind the enactment of [the] legislation.’”¹⁰ 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*]¹¹ 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.¹²

B. The Language of Act 3

The language of Act 3 is clear and unambiguous and expressly states the legislative intent behind the act: “This Act is intended to clarify and be interpretative of the original intent of La. R.S. 47:301(10(c)(i)(aa).”¹³ The amendments (*italicized*) merely add clarification to the already existing “further processing exclusion”:

(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 Subitem (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.

⁶ *Carver v. La. Dep’t of Pub. Safety*, 17-1340 (La. 01/30/18), 239 So. 3d 226, 230.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 230-31.

¹¹ *Id.* at 230 (citing *Polk v. Edwards*, 93-0362 (La. 08/06/93), 626 So. 2d 1126, 1132.

¹² *Beer Indus. League v. City of New Orleans*, 2018-CA-0280, 0285, p.10 (La. 6/27/18), 251 So. 3d 380, 387.

¹³ See Act 3, Section 2

(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.

(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.

...

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.

C. Act 3 Does Not Create a New Tax and is Constitutional

Article VII, Section 2 of the Louisiana Constitution, 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." Act 3 did not serve to do any of the foregoing; therefore, it was passed without a supermajority in the house.

This Honorable Court in its initial remand, instructed the Third Circuit to specifically address whether Act 3 created a new tax or an increase in a tax. The appellate court found that Act 3 "sought to tax that which was previously excluded from taxation" and that it is therefore a new tax"¹⁴ and thus, unconstitutional. Act 3 can hardly be considered to have created a new tax or to have removed an exemption. Sales and use taxes have been levied on articles of tangible personal property in Louisiana since the 1940's and are codified in in La. R.S. 47:302, 321, 321.1 and 331. La. R.S. 47:302 provides: "There is hereby levied a tax upon sale at retail, the use, the

¹⁴ *Calcasteu Parish Sch. Bd. Sales & Use Dep't v. Nelson Indus. Steam Co.*, App. Ct 3rd Cir.

consumption, and the storage for use or consumption in this state, of each item or article of tangible personal property, as defined herein...”.

Formerly, and prior to Act 3, the “further processing exclusion” stated that a “sale at retail” does not include “sales of materials for further processing into articles of tangible personal property”. The plain reading of the prior law left open the potential for abuse. As recognized by the Legislature, as pointed out by Justice Knoll, taxpayers could create “sales” of residual waste materials as a means to avoid tax on the original consumed materials. Therefore Act 3 was presented to codify a list of requirements that must be met for purchases to qualify for the “further processing” exclusion in order to avoid the over extension of the exclusion, as we saw in *NISCO I*.

In keeping with the tax scheme of the State of Louisiana, the law was amended and clarified to ensure that taxes remain due on what is *consumed* by the purchaser, but not on raw materials purchased for further processing. The effect of the Act – specifically, to tax the “ultimate consumer” of a product¹⁵ – fits cleanly within Louisiana’s well-established sales and use tax scheme. It also provided a degree of equity between manufacturers who already pay sales and use taxes on tangible personal property which is consumed in the manufacturing process.

As noted in the argument summary above, the provisions of the amendment provided for the “further processing exclusion” to apply as a dollar for dollar offset of the sales price of the byproduct to the cost of the raw materials. The offset did not require an allocation for “manufacturing” labor, or energy or other taxable consumables usually incurred in a manufacturing process, or mark-up (profit). All of these indirect costs and the manufacturer’s profit margin are usually part of a final sales price of manufactured goods. If anything, *NISCO* benefits more than the ordinary manufacturer, who only receives an exclusion on the identifiable “raw materials” in its sale of a finished product, having had paid sales taxes on items consumed in the manufacturing process.

¹⁵ *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’ (Oct. 13, 1994)); *Vulcan Foundry, Inc. v. McNamara*, 80-1824 (La. 5/17/82), 414 So. 2d 1193, 1198.

Act 3 only creates the inverse valuation/definition of what is considered “consumed” in the manufacturing process, i.e., the differential value of the cost of the limestone (in this instance) for the sales price of the ash as a taxable consumable value when a byproduct sale occurs. Act 3, if nothing else, put these types of transactions on an equal footing with other manufacturers’ consumable purchases (such purchases have always been subject to tax under Louisiana law) who do not have a byproduct to sell.

Furthermore, formulaic calculation of tax liability is also widely used and accepted in Louisiana sales tax law.¹⁶ In all respects, it appears to be an attempt by the Legislature to put all Louisiana manufacturers on an equal footing for purposes of the “further processing” exclusion which has long existed in the sales tax statutes and having well settled jurisprudential interpretation. The Act does not increase a tax, change the rate of a tax, or repeal anything. Section 2 of Act 3 clearly states “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 merely serves to conform the existing levies of sales and use tax by ensuring that self-consumption of materials cannot wholly escape taxation.

In sum, tangible personal property consumed in the manufacturing process has always been taxable to the end user in the State of Louisiana. NISCO aims to create ambiguity where well-established principles of law control. NISCO is not burdened with a new tax. Through the remarkable creativity of its CPAs and tax attorneys, it found a loophole in the longstanding “further processing” exclusions under Louisiana law, which the Louisiana Legislature sought to close with Act 3. This in no way is a “new” tax or a removal of a previous exclusion, and the Third Circuit’s reasoning is flawed. Accordingly, the passing of Act 3 would not trigger the voting provisions provided in La. Const. Art. VII, Section 2, and is therefore a constitutional provision of the law.

D. Legislative Intent

Amici herein, is well aware of the voluminous arguments of Calcasieu Parish and as filed by Ascension, Rapides, and St. James, and adopts those arguments herein.

¹⁶ See, e.g., La. R.S. 47:§306.1 and §306.2, regarding collection from interstate and foreign transportation dealers; see also La. R.S. 47:337.35(C) which permits sampling for the purposes of tax liability calculation.

IV. CONCLUSION

For the foregoing reasons, the findings of the trial court in favor of the Collector should be reinstated, reversing the Third Circuit Court's decision.

Respectfully Submitted,

LAW OFFICE OF PATRICK M. AMEDEE

/s/ Patrick M. Amedee

PATRICK M. AMEDEE (#2448)
CATHERINE MASTERSON (#32575)
627 Jackson Street, Suite B (70301)
P. O. Box 1092
Thibodaux, LA 70302-1092
(985) 446-4811 Telephone
(985) 446-4846 Facsimile
Attorney for Amicus Curiae Lafourche Parish
School Board and St. John the
Baptist Parish School Board

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of June 2021, that I am the attorney for amicus curiae Lafourche Parish School Board and St. John the Baptist Parish School Board, who verifies that this Motion for Leave and Notice of Conditional Filing of Original Amicus Curiae Brief in Opposition to Appellee, NISCO, has been filed this date with the Louisiana Supreme Court and the same has been e-mailed and mailed by U.S. Mail, properly addressed and postage prepaid to the following counsel of record:

Russell Stutes
Stutes & Lavergne, LLC
600 Broad Street
Lake Charles, LA 70601
rusty@stuteslaw.com
rjs3@stuteslaw.com

Linda S. Akchin
Angela W. Adolph
Jason R. Brown
KEAN MILLER, LLP
400 Convention St. Suite 700
Baton Rouge, LA 70802

H. Alan McCall
STOCKWELL, SIEVERT, VICCELLIO
CLEMENTS & SHADDOCK
Post Office Box 2900
Lake Charles, LA 70602

Kelly McNeely, Clerk of Court
Louisiana Third Circuit Court of Appeal
1000 Main Street
Lake Charles, LA 70615

Honorable Ron Ware
14th Judicial District Court
1001 Lakeshore Drive
Lake Charles, LA 70601

Certified this 28th day of June, 2021.

/s/ Patrick M. Amedee
PATRICK M. AMEED (02448)