STATE OF LOUISIANA

SUPREME COURT

DOCKET NO. 2021-OC-00552

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,

Plaintiffs-Appellants

VERSUS

NELSON INDUSTRIAL STEAM COMPANY,

Defendant-Appellee

CIVIL ACTION

On Appeal from Judgment after Remand of the Third Circuit Court of Appeal, Docket No. 19-00315-CA, On Appeal from Judgment of the 14th Judicial District Court for the Parish of Calcasieu, State of Louisiana, Case No. 2017-1373, the Hon. Ronald F. Ware (Ret.), Presiding

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ORIGINAL BRIEF ON THE MERITS ON BEHALF OF DEFENDANT-APPELLEE, NELSON INDUSTRIAL STEAM COMPANY

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I. INTRODUCTION

Defendant-Appellee, Nelson Industrial Steam Company ("NISCO"), submits this Original Brief on the Merits in response to the Original Brief on the Merits of Appellant, Calcasieu Parish School Board Sales and Use Tax Department and its Director ("CPSB"). The primary constitutional issue presented, and on which the appellate court decision is based, is whether a 2016 amendment to the definition of "retail sale" in the Louisiana Sales Tax Law (La. Acts No. 3 (2016 2nd Ex. Sess.) ("Act 3")) is legislation that levies a new tax or increases an existing tax, requiring a two-thirds vote of both houses of the Louisiana Legislature for purposes of LA. CONST. art. VII, § 2 (the "Tax Limitation Clause").

More than 20 years ago, this Court interpreted the meaning of the words "levying a new tax" or "increasing an existing tax" as used in another provision of the Louisiana Constitution also restricting the Legislature's power to tax. The Court held that an amendment to a definition in income tax law that made non-taxable transactions taxable was either a new tax or an increase in an existing tax. *Dow Hydrocarbons & Res. v. Kennedy*, 96-2471 (La. 5/20/97), 694 So.2d 215. Here, the Third Circuit recognized that NISCO's purchases of limestone were not taxable before Act 3, and became taxable as a result of Act 3. Consistent with the rule of *Dow Hydrocarbons*, the court correctly found that Act 3 was a new tax that required (but did not garner) a two-thirds favorable vote of both houses of the Legislature. CPSB would have this Court ignore, and implicitly overrule, its prior precedent.

Act 3 was enacted with the intent by the Legislature to "legislatively overrule" – retroactively – this court's interpretation of the further processing exclusion from sales tax in *Bridges v. Nelson Industrial Steam Co.*, 15-1439 (La. 5/3/16), 190 So.3d 276 ("*NISCO I*"), and in those cases relied upon by this Court in *NISCO I*.[1] Though never expressly admitted, the underlying premise of CPSB's argument – that Act 3 is not a substantive change in the law imposing a new tax, but rather merely clarifying legislation – is CPSB's contention that *NISCO I's* comprehensive interpretation of seventy-year-old statutory language, decades-old regulatory language, and decades of jurisprudence interpreting and applying the further process exclusion is wrong. To accept CPSB's argument, this Court will also have to overrule its prior decision in *NISCO I*.

II. STATEMENT OF THE CASE

This is a suit to collect tax, retroactively, on NISCO's purchases of limestone for the period January 1, 2013 through December 31, 2015 under Act 3, which became effective on June 23, 2016. NISCO raised many defenses by declinatory and peremptory exceptions, and by a motion for summary judgment, all of which were denied by the District Court.[2] CPSB then filed a motion for summary judgment, which NISCO opposed. NISCO also filed a

[1] This Court explained in *St. Paul Fire & Marine Ins. Co. v. Smith*, 609 So.2d 809, 819 (La. 1992), that "[t]o say that a judicial decision was legislatively overruled is a descriptive or shorthand, but not literal, expression for the legislature changing the law as previously interpreted by the court."

[2] NISCO filed a Declinatory Exception of *Lis Pendens*, a Peremptory Exception of Prescription, and a Peremptory Exception of No Cause of Action (on grounds that Act 3 violates the Separation of Powers Doctrine and the Due Process Clauses of the Louisiana and United States Constitutions). (R. 1:7-10). NISCO also filed a Motion for

Cross-Motion for Summary Judgment in which it re-urged its Exceptions and Motion for Summary Judgment and added additional defenses or grounds for dismissal.[3] The District Court subsequently granted CPSB's Motion for Summary Judgment and denied NISCO's Cross-Motion for Summary Judgment. (R. 6:1407-1409).

The Third Circuit Court of Appeal found that NISCO's purchases of limestone were not taxable under Act 3 because ash is not an "incidental product" (and thus, not a "byproduct") of NISCO's manufacturing operations. The court pretermitted ruling on NISCO's other defenses, most (but not all) of which were constitutional challenges. *See CPSB v. NISCO*, 19-315, pp. 7-9 (La. App. 3 Cir. 3/18/20), 297 So.3d 790, 795-796.[4]

CPSB filed an application for writ of *certiorari* with this Court, which this Court granted. The Court reversed and remanded "for consideration of remaining assignments of error, which were pretermitted, including an analysis of whether the amendment is a new tax or an increase in an existing tax because the court of appeal's holding thereon was based on an erroneous interpretation of Act 3." *CPSB v. NISCO*, 20-724 (La. 10/20/20), 303 So.3d 292.

On remand, the Third Circuit held that Act 3 is unconstitutional because it is a new tax enacted without the requisite supermajority vote required by the Tax Limitation Clause.[5] *CPSB v. NISCO*, 19-315, p. 8 (La. App. 3 Cir. 4/7/21) 318 So.3d 271. CPSB has appealed to this Court.

III. LAW AND ARGUMENT

A. The applicable standard of review on summary judgment is *de novo*.

The standard of review is *de novo*. Where cross motions for summary judgment are involved, the court "will determine whether either party has established there are no genuine issues of material fact and it is entitled to judgment as a matter of law." *Gray v. American National Property & Casualty Co.*, 07-1670, pp. 6-7 (La. 2/26/08), 977 So.2d 839, 844. "There is no dispute here that Act 3 was not passed by the required two-thirds vote of the legislature." *CPSB v. NISCO*, p. 4, 318 So.3d 271. Thus, the issue presented is purely legal: Does Act 3 constitute a new tax or an increase in an existing tax for purposes of the Tax Limitation Clause?[6]

B. The rules relating to constitutional interpretation are broader than stated by CPSB.

Summary Judgment (on grounds that Act 3 was enacted in violation of the Tax Limitation Clause of the Louisiana Constitution). (R. 1:10-11).

[3] NISCO added the following defenses: (1) Act 3 has no application to use tax; (2) alternatively, Act 3's application to sales tax – and not use tax – violates the Equal Protection Clauses of the Louisiana and United States Constitutions; and (3) NISCO's purchases of limestone for further processing into ash 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. (R. 2:398-406).

[4] For brevity, all citations to Opinions or Rulings in this case, entitled *Calcasieu Parish School Board Sales & Use Tax Dep't v. Nelson Industrial Steam Company*, are abbreviated to "*CPSB v. NISCO.*"

[5] It states: ". . . we hereby grant Nelson Industrial Steam Company's Exception of No Cause of Action, raised in its Cross Motion for Summary Judgment . . . ." *CPSB v. NISCO*, 19-315, p. 15(La. App. 3 Cir. 4/7/21), 318 So.3d 271. In its cross-motion for summary judgment, NISCO did not base its defense under the Tax Limitation Clause on a "no cause of action" theory. Instead, it argued that there is no genuine issue of material fact that Act 3 was not enacted with a two-thirds favorable vote in both houses, and that as a matter of law, Act 3 is legislation that levies a new tax or increases an existing tax. Accordingly, not having garnered the requisite number of favorable votes, Act 3 is unconstitutional in violation of the Tax Limitation Clause. (R. 2:407-411).

[6] Other legal and constitutional issues are raised by NISCO's additional defenses, and argued below.

CPSB's statement of "The Constitutional Standard of Review" is incomplete, omitting important rules of construction that have particular application in this case. At the outset, this Court recognizes that the Legislature's power to tax is not unfettered. It is limited by the Constitution. *See Comeaux v. Louisiana Tax Com'n*, 20-01037, p. 19 (La. 5/20/21), ---So.3d---, 2021 WL 2023073, *19. And, the limitation may be either express or implied. *See World Trade Center Taxing Dist. v. All Taxpayers, Property Owners*, 05-0374, p. 12 (La. 6/29/05), 908 So.2d 623, *632. Moreover, the courts, not the Legislature itself, determine the limits of the legislative power. When a constitutional provision unambiguously places a prohibition or express limitation on the power of the legislature to pass law, and it does not reserve to the legislature the power to define the limits of its own powers, this Court, as the final arbiter of the meaning of the constitution and laws, will interpret and mark the contour of that limitation on the legislative power. *See, Succession of Lauga*, 624 So.2d 1156, 1160, 1165 (La. 1993).

Moreover, because a constitutional provision is the solemn expression of not only the legislative will, but also the will of the people who adopted it, any interpretation is ***primarily the search for how the people who adopted it understood it***, and not only how the drafters understood it. *City of New Orleans v. Board of Directors of Louisiana State Museum*, 98-1170, p. 16 (La. 3/2/99), 739 So.2d 748, 761 (Knoll, J., concurring) (emphasis added). More than 100 years ago, this Court laid down the rule that the object of construction, as applied to a written constitution, is to give effect to the intent of the people in adopting it. *State v. American Sugar Refining Co.*, 138 La. 1005, 1027, 71 So. 137, 145 (1916). In addition, the Court may consider the spirit and reason for a constitutional provision where a literal meaning would defeat the clear purpose of the redactors and the people. *Louisiana Municipal Association v. State*, 00-0374, p. 10 (La. 10/6/00), 773 So.2d 663, 669. Further, in construing a constitutional provision, the courts may consider the object sought to be accomplished by its adoption, and the evils, if any, sought to be prevented or remedied, in light of the history of the times and the conditions and circumstances under which the provision was framed. *Succession of Lauga*, 624 So.2d at 1160.

Lastly, laws on the same subject matter must be interpreted in reference to each other. La. Civ. Code art. 13. When two provisions of the constitution are identical or very similar to one another, they must be interpreted to guarantee the same constitutional rights and principles, and to have the purpose of furthering the same interests. *Succession of Lauga*, 624 So.2d at 1160. Accordingly, this Court should give the terms "levy a new tax" and "increase in an existing tax" in LA. CONST. art. VII, § 2 the same construction and interpretation given those same terms in another provision limiting the Legislature's power to impose a new or increased tax – LA. CONST. art. III, § 2. *See Dow Hydrocarbons, supra.*

CPSB avers that 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 the constitutionality. CPSB's reliance on that rule is inappropriate because Act 3 is not ambiguous – it clearly and unambiguously, for the first time in the history of Louisiana's sales tax law, imposes a tax on purchases of material for further processing into a byproduct.

C. Irrefutably, Act 3 constitutes a substantive change in the law.

CPSB's defense to multiple constitutional challenges by NISCO is based on the erroneous premise that Act 3 is not a substantive change in the law, but rather, is merely clarifying. This premise is in direct conflict with this Court's interpretation of the law in *NISCO I.*

1. Before Act 3, purchases of material for further processing into tangible personal property for sale at retail were excluded from, and outside the scope of, the sales tax law for seventy years.

In *NISCO I*, this Court held that NISCO's purchases of limestone were excluded from sales tax under the "further processing exclusion" in the sales tax law: "The term 'sale at retail' does not include sale of materials for further processing into articles of tangible personal property for sale at retail." La. R.S. 47:301(10)(c)(i)(aa). Critical to the Court's analysis here is this Court's determination in *NISCO I* that the further processing provision is not a tax exemption, but rather, is an exclusion from tax. As such, it "relates to a transaction that is not taxable," not because there has been a statutory decision not to tax a transaction that is within the ambit and authority of the taxing statutes to tax (a tax exemption), but rather because the transaction falls outside the scope of the statute giving rise to the tax *ab initio* (an exclusion from tax). *See NISCO I*, p. 5, 190 So.3d at 279-280.

This Court applied the jurisprudentially-created three-pronged test for application of the further processing exclusion.[7] The Louisiana Department of Revenue ("LDR") and CPSB argued that the third prong of the test – purpose of inclusion in the end product – was not met because NISCO's primary business was the manufacture of electricity, and ash was a byproduct that was sold for less than the cost of the limestone. This Court expressly rejected LDR's and CPSB's arguments that Louisiana law relating to the further processing exclusion included any "primary business," "primary product," or "economic" test of any type. *NISCO I*, pp. 4, 8-12, 190 So.3d at 279, 282-284. It found that the limestone purchases met the third prong of the test because NISCO's purposeful decisions led 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 ash product. *NISCO I*, p. 13, 190 So.3d at 285.

The most pertinent and important conclusion of law in *NISCO I*, critical to understanding the substantive change to the further processing exclusion component of the definition of taxable "retail sales" created by Act 3, is this Court's determination that the characterization of ash as a "byproduct" was irrelevant under the pre-Act 3 further processing exclusion. This Court reasoned:

> We find nothing in the law that requires the end product to be the enterprise's primary product. The plain language of the statute makes the exclusion applicable to "articles of tangible personal property." There simply is no distinction between primary products and secondary products. . . . Thus, we find the lower courts committed legal error in not beginning their analysis with the ash as the end product, regardless of its nature as a by-product or a secondary product. At the end of the day, the ash is produced and sold to LA Ash, making it an "article of tangible personal property for sale at retail." *NISCO I*, pp. 8-9, 190 So.3d at 282.

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[7] The test requires that the materials (1) become recognizable and identifiable components of the end products; (2) are beneficial to the end products; and (3) are purchased with the purpose [but not necessarily the primary purpose] of inclusion in the end products. *Bridges v. Nelson Indus. Steam Co.*, 15-1439, pp. 8, 11 (La. 5/3/16), 190 So.3d 276, 281, 283.

Thus, this Court has expressly recognized the broad breadth and scope of the further processing exclusion as originally enacted in 1948. It was enacted to apply to ***all*** purchases of ***any*** material for further processing into ***any*** articles of tangible personal property for sale at retail – without regard to whether the material is further processed into tangible personal property that is a primary or secondary product of a manufacturing operation. The broad and plain language of the exclusion remained unchanged for almost 70 years before Act 3. Reliance on this Court's reasoning in *NISCO I* is critical to understanding the unconstitutionality of Act 3 because in *NISCO I*, the Court explains what the law was at the time the transactions sought to be tax occurred (January 1, 2013 through December 31, 2015 – before Act 3), and in doing so, proves that Act 3 is not a mere interpretation or clarification of existing law, but is substantive new law that imposes a new tax or an increase in an existing tax.

2. Act 3 substantively narrowed the further processing exclusion from sales tax.

CPSB admits that "the legislature expressly implemented Act 3 as a response to the *NISCO I* decision." *CPSB's Original Brief on the Merits*, p. 3. Act 3 amends the further processing exclusion, narrowing its scope by expressly "carving out" of the exclusion, and making expressly taxable, materials purchased for further processing into a byproduct. Act 3 is new substantive law because it establishes new rules, rights, and duties, and changes existing ones.[8] The following contains the pertinent text, underlining new statutory language and highlighting new substantive law:

> (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 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. Acts No. 3 (2016 2nd Ex. Sess.) (R. 1:19-23).

Subsubitem (c)(i)(aa)(I) merely codifies the long-established jurisprudential three-pronged test for application of the further processing exclusion. Subsubitem (c)(i)(aa)(III)(aaa) (highlighted in yellow) provides that if the materials purchased are further processed into a byproduct for resale, such purchases shall ***not*** be deemed to

[8] *Anderson v. Avondale Indus.*, 00-2799, pp. 3-4 (La. 10/16/01), 798 So.2d 93, 97.

be sales for further processing and ***shall be taxable***. Act 3 reclassifies certain purchases for further processing, previously excluded from tax, as taxable "sales at retail," by default, and it does so by narrowing the exclusion and expressly making previously non-taxable transactions taxable. This is new substantive law directly contrary to this Court's interpretation in *NISCO I. See NISCO I*, pp. 8-9, 190 So.3d at 282. This substantive change makes Act 3 a "new tax" or an "increase in an existing tax."

That same subsubitem defines "byproduct" to mean any incidental product that is sold for a sales price less than the cost of the materials. The introduction of a previously non-existent economic "cost-versus-revenue" or "economic" analysis or test is likewise new substantive law. *See NISCO I*, pp. 12, 15, 190 So.3d at 284, 286. Subsubitem (c)(i)(aa)(III)(bbb) is also new law, providing a credit equal to the sales tax collected and remitted on the taxable retail sale of the byproduct. CPSB refers to it as an apportioned sales tax.[9] Apportionment is a concept that this Court rejected when it explained in *NISCO I* that "no majority opinion has ever adopted," "nor is there any statutory authority to support" a divisible approach to taxation or an apportioned approach to the application of the further processing exclusion. The Court held that "[b]ecause there is no requirement that the identical composition exist in the end product, there is no basis to put a value on certain elements that remain in the end product versus other elements that are used up in the process." *Id.*, pp. 14-15, 190 So.3d at 285-286.[10] *See also Graphic Packaging Intern., Inc. v. Lewis*, 50,371, p. 13 (La. App. 2 Cir. 2/3/16), 1187 So.3d 499, 508 (rejecting a "divisible sales approach" that would tax that portion of the chemical materials that is ***not*** further processed into the end product).[11] Act 3 changes the law by imposing (1) economic criteria for application of the exclusion and (2) apportionment. Thus, Act 3 is unmistakably a substantive change in the tax law, utilizing express tax-imposition language.

D. Act 3 is unconstitutional under the Tax Limitation Clause of the Louisiana Constitution because it is legislation levying a new tax or increasing an existing tax without the requisite supermajority vote.

The Tax Limitation Clause provides in pertinent part: "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

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[9] CPSB argues that due to the "credit" provision in Act 3 applying to NISCO's sales of ash, NISCO is only being taxed for the limestone it "self-consumes," and Louisiana has always taxed self-consumption. NISCO does not "consume" the limestone. It processes it into ash for sale. That not every atom in a molecule of limestone ends up in the ash is irrelevant to the application of the exclusion. *See International Paper, Inc. v. Bridges*, 07-1151, p. 18 (La. 1/16/08), 972 So.2d 1121, 1133; *NISCO 1*, pp. 13-14, 190 So.3d at 285; and *Graphic Packaging Intern., Inc. v. Lewis*, 50,371, pp. 13-14 (La. App. 2 Cir. 2/3/16), 187 So.3d 499, 508-509.

[10] There is no statutory or jurisprudential support for apportionment. CPSB relies on Justice Marcus's sole and unsupported 40-year-old dissent in *Traigle v. PPG Industries, Inc.*, 332 So.2d 777, 783 (La. 1976). NISCO acknowledges that Chief Justice Weimer, concurring in part and dissenting in part in *NISCO I* (with Justice Hughes joining), wrote that he "believed" an apportionment approach is the "better approach." The Justice did not opine that apportionment was the existing law. With respect, NISCO submits that regardless of what the litigants and the courts believe tax policy should be, our civilian roots compel the conclusion that Act 3's attempt at creating such an apportioned approach constitutes "new substantive law."

[11] Limestone is a mixture of Calcium Carbonate ($CaCO_3$) and Calcium Oxide (CaO). In NISCO's process, the calcium (Ca) and oxygen (O) components of limestone react with sulfur emissions from petcoke (a fuel or energy source) and end up in the ash (calcium sulfate or $CaSO_4$). The carbon component is the only component that does not end up in the ash. The carbon has no economic value as evidenced by the fact that it is released into the atmosphere, rather than trapped and sold or further processed. The ash is sold and used for recognized and undeniably beneficial commercial and industrial applications.

of each house of the legislature." The provision's obvious purposes are to (1) protect taxpayers by insuring that they will not be exposed to new and increased taxes without a supermajority vote of the Legislature; (2) avoid "tax and spend" legislation in response to fiscal woes by limiting the taxing power of the Legislature; and (3) encourage well-thought out tax policies, only approved by a supermajority of the Legislature. The people, in approving this provision, did not intend that the Legislature could avoid the limitations of the two-thirds vote requirement by imposing disguised new and increased taxes through legislative amendment of statutory definitions in the tax laws. The jurisprudence of this Court evidences that this Court has not taken a superficial approach to determining if legislation is a "new tax" or an "increase in an existing tax," but rather, examines the substantive change in the law to determine if income, property or transactions that were not previously subject to tax, are now made taxable by the legislation.

1. This Court's prior decisions in *NISCO I* and in this case are the best evidence that Act 3 represents a new tax where none existed before.

In *NISCO I*, interpreting the prior language of the further processing exclusion, this Court found that NISCO's purchases of limestone were not taxable. In its recent *Per Curiam* Opinion, *supra*, this Court found that purchases of the same limestone material for the same purposes are taxable under the revised, amended language of Act 3. That is clear evidence of a change in the law, and more particularly, the creation of a new tax.

2. The express language of Act 3 – "shall be taxable" – evidences intent to impose a new tax or increase an existing tax.

Act 3 contains important language that the amendments at issue in *Dow Hydrocarbons*, *Cox Cable* and *Radiofone*, *infra*, did not contain – new, express language providing that certain transactions "shall be taxable." This language serves as a red flag to indicate that Act 3 creates a new tax. Had Act 3 merely amended the definition of "sale at retail" to provide that if the materials are purchased for further processing into byproducts, they shall not be deemed sales for further processing, and stopped there, that alone would have been sufficient to implicate the Tax Limitation Clause. But Act 3 does more. It interjects express tax imposition language: "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***." La. R.S. 47:301(10)(c)(i)(aa)(III)(aaa) (emphasis added). The Legislature's use of this tax imposition language stands out as clear and convincing evidence of a legislative intent to levy a new tax.

3. *Dow Hydrocarbons* is the controlling precedent and establishes the rule of law to be applied.

In *Dow Hydrocarbons*, this Court considered the meaning of the terms "levying a new tax" or "increasing an existing tax" for purposes of former LA. CONST. art. III, § 2(A) (amended 1993), which at the time provided that "no measure levying a new tax or increasing an existing tax shall be introduced or enacted during a regular session held in an odd-numbered year."[12] This provision of the constitution and the Tax Limitation Clause (1) were

[12] Currently, LA. CONST. art. III, § 2(A)(3)(b) provides that "[n]o measure levying or authorizing a new tax . . . increasing an existing tax . . . shall be introduced or enacted during a regular session held in an even numbered year."

contemporaneously ratified as part of the Louisiana Constitution of 1974; (2) contain virtually identical language relating to levying a new tax and increasing an existing tax; and (3) both impose procedural restrictions on the Legislature's power to tax.[13] The rules of constitutional construction inform that when two provisions of the constitution are very similar to one another, they must be interpreted to guarantee the same constitutional rights and principles of public policy, and to have the purpose of furthering the same interests. *See Succession of Lauga*, 624 So.2d at 1160. It follows that, for purposes of interpreting and applying constitutional limitations on the Legislature's power to tax, the terms "levy a new tax" and "increase an existing tax" must be interpreted here consistently with this Court's interpretation in *Dow Hydrocarbons.*

Moreover, both cases involved amendments to definitional exclusions in the tax law. Thus, the two cases are virtually legally indistinguishable one from the other, and the rule of law established in *Dow Hydrocarbons* has equal application to Act 3. *Dow Hydrocarbons* involved a constitutional challenge to La. Acts No. 690 (Reg. Sess. 1993) ("Act 690") on grounds that it was legislation levying a new tax or increasing an existing tax in a regular session in an odd-numbered year. Act 690 amended the definition of "allocable income" in the income tax law. Before Act 690, dividend income received by a corporation from an out-of-state controlled subsidiary that earned no Louisiana income was included in the definition of "allocable income" and "allocated," or taxable, ***not in Louisiana***, but in the state in which "the securities or credits producing such income have their situs." Act 690 removed such dividends from the definition of "allocable income," and as a result, the dividends fell into the default category of "apportionable income." *See* La. R.S. 47:287.92(C) (defining "apportionable income" as "all items of gross income which are not properly includable in allocable income . . ."). "Apportionable income" is subject to Louisiana income tax on an apportioned basis. *See* La. R.S. 47:287.94-95. Thus, Act 690 made previously non-taxable income proportionally or partially taxable.

Act 690 did not create a wholly new type or category of tax, as the income tax was already in existence, and had existed for decades.[14] It did not raise any of the income tax rates.[15] Nonetheless, taking a broader interpretation of the words "levying a new tax" and "increasing an existing tax," this Court found that the Act was such a measure. The Court reasoned: (1) the Act dealt with taxes; (2) monies paid pursuant to the Act were taxes; and (3) income not subject to tax before the Act, was taxable after the Act was enacted. Thus, this Court concluded:

> While a determination as to whether Act 690 is more appropriately characterized as a new tax versus an increase to an existing tax is somewhat difficult, that it is one of the two is easily discernable. . . . Simply put, prior to Act 690, corporations did not pay this tax to Louisiana. Under Act 690, they must pay this tax to Louisiana. This is an increase to corporate income tax. Although paying taxes on income previously not taxed is arguably a new tax, it matters not whether Act 690

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[13] *See Audubon Ins. Co. v. Bernard*, 434 So.2d 1072, 1074 (La. 1983) (stating that the 1974 Louisiana Constitution places limitations on the power of taxation vested in the Legislature, and that among these are LA. CONST. art. VII, § 2 and LA. CONST. art. 3 § 2).

[14] A legislature does not have to enact a "wholly new" category or type of tax to levy a new tax. A new tax can be levied by other means, including by expanding the scope of the existing tax law to include transactions or items previously not subject to tax by narrowing an exclusion (as in this case).

[15] A legislature does not have to raise a tax rate to increase an existing tax. It may do so by other means, including by repealing (or narrowing the scope) of an exemption.

is characterized as a new tax or an increase to an existing tax as both are violative of Article III, Section 2. *Dow Hydrocarbons*, 694 So.2d at 217.

Act 3 deals with taxes because it amends a definition in the sales tax law, just as Act 690 amended a definition in the income tax law. The monies that CPSB seeks to collect in this action pursuant to Act 3 are taxes, just as the monies sought to be collected under Act 690 were taxes. And, transactions not subject to tax before Act 3 – purchases of material for further processing into a byproduct – are taxable after Act 3, just as certain dividend income not taxable in Louisiana before Act 690 became taxable after Act 690. Because Act 3 meets the *Dow Hydrocarbons* test, it matters not whether this Court categorizes it as a new tax or an increase in an existing tax, because both violate the Tax Limitation Clause where, as here, a two-thirds favorable vote of both houses of the Legislature is not obtained.

In its majority opinion, the appellate court implicitly adopted the reasoning of this Court in *Dow Hydrocarbons*, stating: ". . . 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***.'" *CPSB v. NISCO*, 19-315, pp. 13-14 (La. App. 3 Cir. 4/7/21), 318 So.3d 271(emphasis added).

In his six-page concurrence and assigned reasons, Judge Conery began his analysis by expressly citing the reasoning and holding of, and directly analogizing to, *Dow Hydrocarbons*. He reasoned that although LA. CONST. art. VII, § 2 is at issue in this case, rather than LA. CONST. art. III, § 2 as in *Dow Hydrocarbons*, both articles address the legislative framework for passage of matters involving a new tax or an increase to an existing tax. *Id.* (Conery, J., concurring). Judge Connery explained that under the first two prongs of the *Dow Hydrocarbons* test, Act 3 clearly deals with taxes and monies paid pursuant to Act 3 are taxable: "Further consideration of the legislature's intent to clarify its earlier language is inconsequential ***given the taxation realm*** in which Act 3 was enacted." He also found that the third prong of the *Dow Hydrocarbons* test is met by Act 3: "Act 3 brought "into the taxable ambit items previously excluded from taxation under La. R.S. 47:301." Judge Conery expressly quotes this Court's statement in *Dow Hydrocarbons* that "[w]here the collected moneys at issue are clearly taxes, there is no need to digress into an analysis of legislative intent." *Id.* Thus, the intent of the Legislature, in Act 3, to impose a new tax or increase an existing tax with the purpose of raising revenue is obvious.

4. CPSB's attempts to narrow the holding of and distinguish *Dow Hydrocarbons* are unsuccessful.

CPSB contends that the Third Circuit found that Act 3 was a new tax for NISCO and NISCO alone, and, argues that this "myopic view" derogates from the compelling deference in favor of the constitutionality of Act 3. *CPSB's Original Brief on the Merits*, p. 8. This interpretation of the appellate court's holding as being narrow-minded is pure hyperbole and not supported by a fair reading of the decision. The appellate court first recognized this Court's interpretation of the pre-Act 3 exclusion, then noted the changes imparted by Act 3, and ultimately concluded that under this Court's interpretation of "incidental product," Act 3 constitutes a new tax. Whether

NISCO's ash was an "incidental product" may have been a narrow issue specific to NISCO, but the treatment of such "incidental products" – for all taxpayers – both before and after Act 3 was fairly and correctly addressed by the appellate court. And, as Judge Conery cogently explained in his concurrence, Act 3 "imposed a tax on materials previously determined to be excluded" – applicable to all taxpayers, not just NISCO. Thus, the appellate court's determination of unconstitutionality of Act 3 as enacted is not limited to NISCO's peculiar facts.

Unable to narrow the statutory interpretation of the Third Circuit to only one taxpayer in one particular case, CPSB desperately seeks to distinguish *Dow Hydrocarbons*, arguing that in that case, the court found that Act 690 was unconstitutional because "it significantly modified the scheme of corporate tax." No such finding exists in the decision.[16] Nonetheless, to the extent CPSB argues that (1) Act 690 made previously untaxable dividend income taxable; (2) the "reclassification" of dividend income in Act 690 made an entire category of income, or an entire corporate income source, taxable where it was previously not taxable; and (3) thus, Act 690 significantly modified the scheme of corporate taxes, these assertions are not distinguishable from this case. First, just as Act 690 made previously excluded non-taxable income taxable, Act 3 makes previously excluded non-taxable purchases taxable. Second, just as 690 re-defined "allocable income," to re-classify previously non-taxable allocable dividend income as taxable "apportionable income," Act 3 re-defines "materials for further processing into tangible personal property" to re-classify previously non-taxable purchases of materials for further processing into byproducts as taxable "retail sales." Third, just as Act 690, according to CPSB, "modified the scheme" of corporate income tax by making an "entire category" of income – dividend income from out-of-state subsidiaries – taxable for the first time in Louisiana, under CPSB's rationale, Act 3 also "modified the state sales tax scheme" (which taxes only retail sales) by making an entire category of purchases for further processing – purchases of materials for further processing into a byproduct for resale – taxable for the first time. Simply put, in both cases, previously non-taxable transactions under the existing tax scheme become taxable under the amendment to the tax law.

5. Other decisions of this Court inform that Act 3 constitutes a new tax.

Because we begin with the well-settled principle that the further processing provision is an exclusion, a legislative measure, like Act 3, that narrows the exclusion so that it no longer applies to purchases of materials for further processing into a byproduct expands the scope of the tax law and is a new tax.[17] Two prior decisions of this Court establish a rule of law that amendments that expand the scope of taxable transactions constitute a new tax.

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[16] The word "significant" is not in the decision. The word "modified" appears once, for a different proposition altogether: "The moneys paid to Louisiana pursuant to the statutes modified by Act 690 are taxes." And the only reference to "tax schemes" is in the concurring opinion of Justice Kimball, in connection with yet another different proposition: a general discussion of "protectionist schemes or measures" to protect in-state interests over the interests of out-of-state competitors in violation of the Commerce Clause of the United States Constitution.

[17] Similarly, an increase in an existing tax is created when an exemption provision is narrowed by amendment, causing some transaction to lose their exempt status under the sales tax law and become taxable. Because Act 3 narrows an exclusion, and the subject transactions were outside of the tax law, *ab initio*, it is more accurately categorized as a "new tax." However, like the narrowing of an exemption, it also increases existing tax revenues by expanding the scope of transactions that can be taxed. Thus, as understood by this Court in *Dow Hydrocarbons*, while it might be arguable whether a measure is a new tax or an increase in an existing tax, that it is one or the other

In *Cox Cable New Orleans, Inc. v. City of New Orleans*, 624 So.2d 890 (La. 1993), this Court considered an amendment to the amusement tax imposed on ". . . any theater, motion picture house, athletic contest, exhibition, pageant, ***production . . .*** where a fee is charged for admission or entrance." (Emphasis added). The amendment to the law defined "production" to include "audiovisual production, wherever shown, which is obtained by payment of a rental fee, subscription, or similar charge, including but not limited to cable or satellite TV subscriptions." The City of New Orleans argued that this amendment was merely intended to "clarify" existing law. This Court rejected that argument and categorized the amendment broadening the scope of the pre-existing amusement tax to include cable television subscriptions as a new sales tax. The new tax was subject to a constitutional limitation requiring legislative and voter approval for sales taxes exceeding a certain combined rate.

Similarly, in *Radiofone, Inc. v. City of New Orleans*, 616 So.2d 1243 (La. 1983), this Court classified an amendment to a 1968 ordinance that expanded the scope of a telecommunications tax as a new tax. The pre-amendment law imposed a tax on subscribers of intrastate telecommunications services provided by South Central Bell of rental telephones, teletypewriter local service and private line services located within the City of New Orleans. The amended law imposed the tax on subscribers of telecommunications services, more broadly defined to include "local telephone service, private communication service and toll telephone service, as well as teletypewriter or computer exchange service, cellular mobile telephone or telecommunications service, specialized mobile radio or paging service, and any other form of mobile or portable one-way or two-way communication." The amendment was a new tax because it was imposed on "previously untaxed telecommunications services and providers," and because it imposed taxes "neither authorized nor contemplated" by the original ordinance. As such, the tax was in violation of a constitutional requirement that a municipal ordinance levying a new tax be approved by a majority vote of the electors.

Cox Cable and *Radiofone* involve the exclusion of certain transactions from the definitional scope of the tax. These cases instruct that amendments to tax laws that narrow an exclusions from tax expand the scope of taxable transactions and make previously untaxed transactions taxable. Thus, they constitute a new tax. No matter the effort taken to disguise it, because Act 3 expanded the scope of taxable transactions, it is a new tax that requires a favorable vote of two-thirds of both houses of the Legislature.

6. The case relied on by CPSB is easily distinguishable and not controlling.

CPSB cites *Palmer v. Louisiana Forestry Comm'n*, 97-0244 (La. 10/21/97), 701 So.3d 1300, for the proposition that Act 3 is not "revenue raising legislation."[18] *Palmer* involved the Louisiana severance tax law,

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(or both) is easily discernible – and each is unconstitutional if the constitutionally-mandated procedures and formalities are not followed.

[18] Notably, the Tax Limitation Clause does not use the term "revenue raising." Thus, it does not require an inquiry into the overall effect of Act 3 on tax revenues. It is recognized, however, that the Clause deals with legislation imposing tax, and it is well-settled that the principal object and primary purpose of all taxes is to raise revenue. *See Audubon Ins. Co. v. Bernard*, 434 So.2d at 1074. Thus, although not articulated by CPSB, it appears that CPSB is

pursuant to which the Legislature set forth six categories of timber, and tax rates for each, and delegated to the Louisiana Forestry Commission the authority to determine into which category a timber product falls. The case involved an amendment to the agency regulations that changed the classification of chip and saw wood products from the "pulpwood" category (5% tax) to the "trees and timber" category (2.5% tax). *Palmer* is distinguishable on its facts and in law from the instant case in multiple respects:

- **The legal issue presented in *Palmer* is different from the issue presented here.** Because the amendment involved an agency regulation, not a statute, the Tax Limitation Clause was not at issue. The only issue was whether the agency action was consistent with the tax law, or an unauthorized imposition of tax by an agency in violation of LA. CONST. art. VII, § 1.

- ***Palmer* did not involve the imposition of tax on previously non-taxable transactions.** In *Palmer*, chip and saw was taxable before the regulation at issue was amended, and remained taxable after the amendment. Here, purchases of materials for further processing into a byproduct became taxable only after the amendment.

- **The amendment in *Palmer* lowered, rather than increased, the existing tax on the transactions at issue.** In *Palmer*, the amendment lowered the tax rate on the "chip and saw" product. Thus, there was no increase in the tax. Here, a new tax is created.

In the appellate court, Judge Conery, concurring, distinguished *Palmer* on the same grounds. In addition, he noted that this Court "distinguished the matter in *Palmer* from *Dow*"[19] on the basis that the regulatory amendment in *Palmer* was not for the purpose of raising revenue, "noting that the reclassification in *Dow* related to income that 'had not been subject to the tax' before the amendment." *CPSB v. NISCO*, 19-315 (La. App. 3 Cir. 4/7/21) (Conery, J. *concurring*). Judge Connery also explained that the amendment to the tax law in *Palmer* lowering the tax rate for the chip and saw product, "resulted in lesser tax collection for the plaintiff police juries," and that "as the supreme court remarked, the reclassification of chip and saw products from the higher taxed group to the lower taxed group was obviously not for the purpose of raising revenue." *Id.* Judge Conery was correct in his analysis that NISCO's case, like the *Dow Hydrocarbons* case, presents the opposite situation from *Palmer*. Unlike the regulatory amendment in *Palmer* that did not raise revenue and was neither a new tax nor an increase in an existing tax, Act 3 raises revenue and is either a new tax or an increase in an existing tax. And, as in *Dow Hydrocarbons*, it matters not which, because both are unconstitutional.

In reliance on *Palmer*, CPSB argues that Act 3 was not a new tax because it fits into the overall scheme of the tax structure, which it avers is to tax the ultimate consumer. *CPSB's Original Brief on the Merits*, p. 9. This is a repeat of the same, tired argument CPSB made in *NISCO I* that applying the exclusion to a byproduct does not "fit" into the sales tax purpose of taxing the ultimate consumer, because when a byproduct is sold for less than the cost of its materials, the full cost of the materials is not passed through to the consumer for taxation. The argument

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attempting to argue that Act 3 is not a "new tax" if it is not first considered "revenue raising" legislation. CPSB puts the cart before the horse. Because Act 3 is first and foremost a new tax, it is "revenue raising" legislation.

[19] *Dow Hydrocarbons* was cited favorably in *Palmer*, but the Court clearly noted the important distinction between the two cases – that while the chip and saw product in *Palmer* had always been subject to tax, in *Dow Hydrocarbons*, the dividend income that had not been subject to the tax became taxable. This case is analogous to *Dow Hydrocarbons*, and non-analogous to *Palmer*.

was not persuasive then, and it is not persuasive now. What Act 3 actually does is create a situation for repetitive taxation of the manufacturer and the end consumer.[20] Consider a manufacturer who makes multiple products from the same material, all of which are sold for less than the cost of the material at issue, but in the aggregate meet or exceed the cost of the material. In such a case, under CPSB's argument, the manufacturer pays tax on the material and passes these costs on to its purchasers. The end consumers pay tax on the purchases of the end product, including the manufacturer's costs and the tax paid by the manufacturer. That type of repetitive taxation is not the intent of the sales and use tax law. Further, although one of the purposes of the sales and use tax law is to tax the end consumer, there are numerous retail sales to end consumers that are exempt from taxation – thus there is no guarantee in the sales tax law that the tax collectors will recover any sales or use tax on all retail sales.

CPSB ignores that the overall scheme of the sales tax structure is to tax ***only*** "sales at retail," and expressly ***not*** to tax purchases of materials for further processing into tangible personal property for resale – because they are not "sales at retail." Moreover, the overall, historical sales tax scheme is that the purchase of a raw material is either taxable or it is not, depending on application of the three-pronged test – without any recognition of a divisible sale or proportionate tax approach for materials that do not completely end up in the end product. Act 3 is contrary to that scheme because it imposes a new divisible sale or proportionate tax approach that the majority of this Court rejected in *NISCO I* because it (1) had never been adopted by any majority opinion, (2) was not supported by any statutory theory, (3) from a practical standpoint lacked clear guidelines on how to divide the tax, and (4) the unique manufacturing process of each product prevents the articulation of a precise test by which to measure the exclusion's [proportional] applicability. *NISCO I*, pp. 13-14, 190 So.3d at 285.

E. CPSB's arguments that Act 3 does not violate the Tax Limitation Clause are as incredulous as they are untenable.

1. CPSB's contention that Act 3 is merely clarifying is not supportable in the law.

The only support for CPSB's proposition that Act 3 is merely clarifying is the statement in Section 2 of the Act that it is intended to clarify the original intent of the Legislature in enacting the further processing exclusion. At the time, HB 27, which became Act 3, was under consideration, the Legislature was dealing with what had been described as the worst budget deficit in a generation.[21] After this Court's decision in *NISCO I* on May 3, 2016, "Item No. 48: To legislate with regard to sales of items of tangible personal property for further processing" was added as the very last item on the May 27, 2016 Governor's Call for the 2016 Second Extraordinary Session.[22] LDR and local tax collectors were actively promoting HB 27, claiming (incorrectly) that this Court's interpretation of the law in *NISCO I* expanded the further processing exclusion beyond what the law provided. This scenario is

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[20] "Repetitive taxation" is used here to include other terms sometimes used in the case law, such as "double taxation," "multiple taxation," or "tax pyramiding" – a common concern in all sales and use tax regimes.

[21] The Guardian, 'It's madness': Louisiana grapples with worst budget crisis in a generation (Wed. 9 Mar. 2016), available at https://theguardiancom/us-news/2016/mar/09/louisiana-budget-deficit-crisis-hospitals-higher-education.

[22] Available at https://legis.la.gov/LegisDocs/162ES/call.htm.

illustrative of one of the purposes for the Tax Limitation Clause – to assure considered, rather than knee-jerk or rushed, decision-making relating to taxation. It also gives reason to the rule of law that the courts, not legislatures, determine whether a statute enacted by the Legislature consists of substantive or interpretive law.[23] It matters not what the Louisiana Legislature said, it matters what it did. And here, it imposed a new tax. Moreover, it is pure speculation for the 2016 Legislature to assume it knows what the Legislature in 1948 intended.[24] Only this Court, not the Legislature, can determine what the intent of the law was in 1948 and whether Act 3 is clarifying of original intent, or a substantive change in the law.

Further, this Court did not, as CPSB avers, invite the Legislature to clarify any ambiguity in the law. CPSB points to a statement by this Court in *NISCO I* that the jurisprudentially-created three prong test was necessitated by an "inherent ambiguity" in the further processing provision. That test addresses the requirements for constituting a material "for further processing." ***Thus, any "inherent ambiguity" in the words "for further processing" has been cured by the creation of the three-pronged test over 40 years of jurisprudence, beginning in 1976.*** Indeed, the Court explained that over the decades this court had added a judicial gloss to aid in the understanding by what is contemplated by the statutory language "material further process[ed] into articles of tangible personal property." But that "gloss" relates to any ambiguity in determining what it means to be "further processed." That ambiguity, and whether NISCO's limestone is further processed because it meets the three-pronged test, is not at issue here. It has already been determined in NISCO's favor.

At issue here is the substantive change created by Act 3 that the exclusion is no longer applicable to all materials further processed into any "tangible personal property," an unambiguous, broadly-defined term.[25] The statutory language clearly states that the exclusion applies to "tangible personal property," which unambiguously encompasses tangible personal property that is a byproduct. The regulations likewise refer to "tangible personal property" and "end product," another unambiguous term that encompasses any end product that is a byproduct.[26] In *NISCO I*, this Court made it clear that there was ***never any ambiguity*** regarding the scope of the exclusion applying to all tangible personal property for resale: "We find nothing in the law that requires the end product to be the enterprise's primary product. The plain language of the statute makes the exclusion applicable to 'articles of tangible personal property.' There is simply no distinction between primary products and secondary products." *NISCO I*, pp. 8-9, 190 So.3d at 282. Thus, the portion of Act 3 that redefines the exclusion as not applying to a byproduct

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[23] *Unwired Telecom Corp. v. Parish of Calcasieu*, 03-0732, p. 17 (La. 1/19/05), 903 So.2d 392, 406.

[24] *See Federal Express Corp. v. Skelton*, 265 Ark. 187, 199, 578 S.W.2d 1, 7-8 (1979), reviewing retroactive tax legislation labeled by the Arkansas Legislature as interpretive and holding: "The 1975 legislature cannot state what the 1949 legislature intended when it enacted Act 487 of 1949; such interpretation falls exclusively within the province of the judicial branch. For the 1975 legislature to declare the intent of a prior legislature and make the declaration retroactive so as to affect an interpretation already rendered by the courts is an abuse of legislative power which violates the Separation of Powers Doctrine."

[25] "Tangible personal property" means "personal property which may be seen, weighed, measured, felt or touched, or is in any other manner perceptible to the senses." La. R.S. 47:301(16)(a).

[26] LAC 61:1.4301(10).

does not clarify an ambiguity noted by this Court. To the contrary, it substantively changes plain, unambiguous language interpreted by this Court after considering decades of statutory, regulatory, and jurisprudential history.

Further, this Court did not "invite" the Legislature to ***clarify*** whether the further processing exclusion extended to byproducts. To the contrary, it made it clear that if the Legislature wanted to make the further processing exclusion ***not applicable*** to byproducts, and if it wanted to impose any economic based considerations (such as defining byproduct as any incidental product sold for less than the costs of its materials), it would have to ***substantively change – not clarify – the law***:

> At this point, we feel compelled to note that if the legislature chooses to narrow the "further processing exclusion" by way of requiring a profit, or writing into law a new test that embodies a "primary product" or "primary purpose" factor, or otherwise adding an economy-based consideration, we will adhere to our constitutionally delineated role of applying that ***new*** law. *NISCO I*, p. 16, 190 So.3d at 286 (emphasis added).

Thus, Act 3 is ***new*** substantive law, and a ***new*** tax. Notably, Justice Clark, in so writing, did not imply that the Legislature could constitutionally change the tax law without the necessary two-thirds vote, or retroactively.

2. CPSB's contention that prior to *NISCO I*, taxpayers historically paid tax on purchases of materials for further processing into byproducts is wholly unsupported.

As part of its desperate attempt to pigeonhole Act 3 as "clarifying" legislation, CPSB argues that manufacturing taxpayers have always paid tax on purchases of materials further processed into byproducts and that NISCO was the first taxpayer to ever not pay tax on such purchases. The argument is not supported in the law or the record of this case. Nothing in the further processing exclusion statute, regulations, or jurisprudence over the last seventy years signaled to taxpayers that they should pay tax on purchases of materials further processed into a byproduct. It would not be normal taxpayer behavior to pay tax on something that is not taxable on the face of the law. If CPSB's contention has support, one would expect that after seventy years, there would have been at least one court or Board of Tax Appeals decision addressing a dispute over whether a material was processed into something that qualified as a "byproduct." The record, however, is devoid of any such example.

In addition, NISCO did not raise the issue – the LDR and CPSB did. For over a decade NISCO operated without accruing, reporting, or paying tax on its limestone purchases – because the three-pronged test was met. During that period NISCO was audited three times – once by LDR and twice by CPSB. Both understood NISCO's process and its end products. Both had access to NISCO's accounting records evidencing the cost of limestone and the revenues from sales of ash. Neither took the position that the limestone was taxable because ash was a byproduct sold for less than the cost of the limestone until an audit conducted in 2008. Indeed, the LDR even told NISCO that it was treating its purchases of limestone ***absolutely correctly*** by not accruing tax.[27] CPSB's contention is wholly unsubstantiated. To the contrary, it appears that NISCO is the first instance of LDR and CPSB trying out a new theory of taxation.

3. CPSB's contention that Act 3 is not "revenue raising" legislation is both incredulous and untenable.

[27] R. 3:1511-1512 (Testimony of Gary Livengood, NISCO business manager at the time of audit) (emphasis added).

Incredulously, CPSB argues that Act 3 is not "revenue raising," and therefore cannot be a new tax or increase in an existing tax, despite the fact that it originated in the House (where all bills for raising revenue must originate) and was enacted in an extraordinary session (the only type of session in which the Legislature can levy a new tax or increase an existing tax in an even numbered year). LA. CONST. art. III, §§ 16(B); 2(A)(3)(b); and 2(B). Further, it ignores that the primary purpose of taxes is to raise revenue, and Act 3 expressly provides that transactions not previously within the ambit of the sales tax "shall be taxable." NISCO has already established that Act 3 was not merely "clarifying." It cannot be credibly posited that it decreases revenue because it neither creates nor expands an exclusion or exemption. It also cannot be credibly posited that Act 3 merely maintain the *status quo ante*, because it expands the scope of taxable transactions. The only logical conclusion is that Act is revenue raising.

CPSB resorts to reliance on Fiscal Notes to support its contention that Act 3 is not revenue raising. The argument is misplaced on two levels: (1) Fiscal Notes are inadmissible;[28] and (2) the Fiscal Notes do not support CPSB's contention, because they are based on a false premise: that *NISCO I* was wrongly decided and inconsistent with existing law. Reliance on the Fiscal Notes is inappropriate because as a matter of law, fiscal notes are inadmissible as evidence of legislative intent: "Fiscal and actuarial notes provide the legislature with an analysis of the potential fiscal impact of a bill ***based on presumption*** made by the legislative fiscal officer, actuary, economist, or analyst preparing the note and ***shall not constitute proof or indicia of legislative intent***." La. R.S. 24:177(E)(2) (emphasis added). Thus, even the Legislature does not consider the fiscal notes made by the Fiscal Office to be competent evidence of whether they intend to raise revenue. CPSB argues that Justice Lemmon referred to the fiscal note to Act 690 in his ***concurring*** opinion in *Dow Hydrocarbons*, but disingenuously fails to point out that La. R.S. 24:177(E)(2) was not enacted until 2006, nine years after Justice Lemmon's concurring opinion in *Dow Hydrocarbons*. Moreover, the fiscal note was neither relied on nor mentioned by the *Dow Hydrocarbons* majority in reaching their conclusion. The majority was able to reach the conclusion that Act 690 was a new or increased tax without reliance on the fiscal note. The court noted that where the collected moneys at issue are clearly taxes, there is no need to digress into an analysis of legislative intent regarding the intent to raise revenue.

Alternatively, the Fiscal Notes do not support the contention that Act 3 is not revenue raising. The Fiscal Note to the Original HB 27 (which became Act 3) unequivocally states in all capital letters "INCREASE" for the State General Fund and Local Funds for 2016-2021. (R. 2:365-370). The Fiscal Notes for the Engrossed, Reengrossed, and Enrolled versions substitute for "INCREASE," "SEE BELOW," a reference to the Revenue Explanation. The Revenue Explanations given in the Fiscal Notes to the Original, Engrossed, Re-engrossed and Enrolled versions of the Bill all state that "***[a]ccording to the Department of Revenue,*** the legislation is expected to mitigate the state and local exposure regarding a recent decision [*NISCO I*] ***providing a broader interpretation***

[28] In the District Court, NISCO objected to the admissibility of Fiscal Notes as evidence of legislative intent. R. 2:337-338; and R. 2:373-375.

of further processing by ***allowing the dual purpose use of raw materials to qualify for the exclusion.***" *Id.* (emphasis added). Each version of the Fiscal Note for each version of the Bill also states in some fashion that without the bill "many items previously considered taxable may be excluded due to the recent decision [*NISCO I*]." *Id.* These statements made by LDR to the Fiscal Office are inaccurate and self-serving.[29] *NISCO I* did not provide a broader interpretation of the exclusion. It did not for the first time "allow" dual-purpose materials to qualify for the exclusion. To the contrary, this Court rejected the LDR's "primary purpose" requirement for the exclusion in *International Paper, Inc. v. Bridges*, 07-1151 (La. 1/16/08), 972 So.2d 1121, and reinforced in *NISCO I* that "primary purpose" had never been a requirement of the exclusion. *NISCO I*, pp. 10-11, 190 So.3d at 283. The rule of inadmissibility protects against a situation like this, where the Fiscal Office's conclusions are insupportable.

Notably, in addition to the initial reference to an INCREASE in funds resulting from Act 3, one other true and correct statements regarding the fiscal impact of Act 3 is found in the Original Fiscal Note, and was later omitted. It states: "Further, if the bill makes taxable additional raw material purchases currently excluded due to purpose, ***increase to the general fund and local funds could be substantial.***"[30] As Judge Conery correctly noted in his concurring opinion, "Act 3 clearly raised revenue by bringing into the taxable ambit items previously excluded from taxation under La. R.S. 47:301. . . . The purpose of Act 3, the amendment addressed by the supreme court, was patently to raise revenue . . . ." *CPSB v. NISCO*, 19-315 (La. App. 3 Cir. 4/7/21) (Conery, J., dissenting).

For these reasons, the Third Circuit's ruling that Act 3 violates LA. CONST. art. VII, § 2 should be affirmed.

F. Act 3 does not apply to use tax, and alternatively, Act 3 violates the Equal Protection Clauses of the United States and Louisiana Constitutions.

Because Act 3 amends the definition of taxable "retail sales" for sales tax purposes, but does not amend the definition of "use" for use tax purposes, it applies only to sales tax. Alternatively, it creates a disparate treatment between taxpayers who purchase their materials outside of Louisiana and those that purchase their materials within Louisiana. This disparity has no rational basis, and as such, constitutes a denial of equal protection in violation of the United States and Louisiana Constitutions. CPSB can point to no rational basis for the Legislature's treating sales of materials further processed into a byproduct differently under sales tax and use tax, implicitly conceding that such a disparity is violative of equal protection. Instead of addressing the constitutional defect head on, CPSB makes an evasive and circular argument that the definition of "use" for use tax purposes, which remained unchanged from 1948 until 2016, incorporates the 2016 change to the definition of "retail sale." The argument is insupportable.

1. Act 3 does not apply to use tax.

The Petition filed by CPSB alleges that NISCO has "failed to pay and accrue ***use tax*** on its purchases of limestone." Petition, ¶ 6 (emphasis added) (R. 1:3-6). Applicable use tax law defines a taxable use as follows:

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[29] At the time, LDR was a party in the *NISCO I* case.

[30] R. 2:366 (emphasis added). No explanation is provided for the subsequent omission of this correct statement from the other Fiscal Notes.

> Notwithstanding any other provision of law to the contrary, and except as provided in Item (iii) of this Subparagraph, for purposes of state and political subdivision sales and use tax, "use" means and includes the exercise of any right or power over 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 personal property for sale.*** La. R.S. 47:301(18)(d)(i) (emphasis added).

The emphasized words are the same language that appeared in the further processing exclusion from the definition of "sales at retail" for sales tax purposes for almost seventy years. Thus, NISCO's use of limestone in its process is not a "taxable use." CPSB would have this Court read those words out of the statute and replace them with language from Act 3. In Act 3, the Legislature imposed a new sales tax on materials further processed into a byproduct; but the Legislature has made no such imposition of use tax on materials purchased outside of Louisiana, but used in Louisiana for further processing into a byproduct. CPSB seeks to enforce Act 3's new ***sales tax*** against NISCO for its alleged failure to "pay and accrue ***use tax***" on its purchases of limestone. In that regard, CPSB cannot rely on Act 3.

In an attempt to "bootstrap" Act 3 into the use tax statute, CPSB argues that the language of Act 3 that removes purchases of materials for further processing into a byproduct from the further processing exclusion must be applied to the definition of "use." For this proposition, CPSB relies solely on La. R.S. 47:301(19). Pursuant to that statute, no use tax can be imposed "if the sale of such property would have been exempted or excluded from sales tax." This provision addresses the situation where a transaction is exempt or excluded from sales tax, but not from use tax. It does not address the situation where the transaction is ***not*** exempt or excluded from sales tax. Here, the operative language in Act 3 – "[i]f 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" – makes the transactions at issue taxable, not exempt or excluded. Therefore, La. R.S. 47:301(19) has no application to the operative provision of Act 3, because it is a tax imposition provision, not an exclusion.

That the Legislature knows how to make a change in the sales tax law applicable to both the sales tax and use tax is exemplified by the amendment at issue in *Unwired Telecom Corp. v. Parish of Calcasieu*, 03-0732 (La. 1/19/05), 903 So.2d 392. In that case, the Legislature amended the law to provide for the tax treatment of cell phones furnished to customers either for free or at a discounted price when they also contracted cellular telecommunications services. To make the changes applicable to the sales tax and the use tax, the Legislature amended not only the definition of "retail sale," but also the definition of "use," La. R.S. 47:301(18), and the definition of "sales price" (La. R.S. 47:301(13)). The amendments expressly provided that they applied "for purposes of the imposition of sales ***and*** use taxes." Other examples exist in the law. Compare the provisions defining "sales price" for calculating sales tax and parallel provisions defining cost price for calculating use tax for (1) refinery gas; (2) natural gas; and (3) free news publications for which payments are made to third parties to print the publications.[31] Here, no change to the definition of "use" provides that use tax shall now apply to materials further processed into byproducts. Nor

[31] *See* La. R.S. 47:301(3)(f), (j), and (h)(i); and 47:301(13)(d), (i)(i) and (m).

does Act 3 provide for a similar "credit" for sales tax received on sales of the byproduct in the definitions of "use" or "cost price" for use tax purposes. The Legislature made the new tax on purchases of materials for further processing into a byproduct applicable to sales tax, but not to use tax. It made the credit provision applicable to sales tax, but not to use tax. Act 3 has no application to CPSB's claim that NISCO failed to accrue and pay use tax.

2. Alternatively, Act 3 violates the Equal Protection Clauses of the United States and Louisiana Constitutions.

Alternatively, to the extent CPSB argues it seeks to collect sales tax, the application of Act 3 to sales tax is unconstitutional, in violation of equal protection guarantees. Under LA. CONST. art. I, § 3, "[n]o person shall be denied the equal protection of the laws." Pursuant to the U.S. Const. Amend. XIV, § 1, "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." "The equal protection clause of the Fourteenth Amendment to the United States Constitution protects a taxpayer from any state action which discriminates against him by subjecting his property to taxes not imposed on others in the same class. The right thus protected is the privilege of receiving equal treatment under law." *See Bussie v. Long*, 286 So.2d 689 (La. App. 1 Cir. 1973). The standard for determination of a violation of equal protection is whether the classification created by legislation bears a rational relationship to a legitimate state purpose. *See R.J. D'Hemecourt Petroleum, Inc. v. McNamara*, 444 So.2d 600, 602-603 (La. 1983); and *Acorn v. City of New Orleans*, 377 So.2d 1206, 1214 (La. 1979). Here, there is no reasonably conceivable state of facts that could provide a rational basis for treating in-state purchases of materials for further processing into byproducts (taxable) differently from out-of-state purchases for the same purpose (non-taxable). The disparate treatment created by Act 3 is overtly, palpably, and manifestly arbitrary and unreasonable.

When the taxable transaction is consummated within the State, the sales tax applies. In contrast, the use tax applies when the transaction is consummated outside the State and the goods are subsequently imported and used in the taxing jurisdiction. *See Word of Life Christian Center v. West*, 04-1484, p. 8 (La. 4/7/06), 936 So.2d 1226, 1232. This Court has made it clear that disparate treatment (discrimination) between similarly-situated taxpayers who pay use tax and those that pay sales tax on the same types of transactions is prohibited. In *Chicago Bridge & Iron Co. v. Cocreham*, 317 So.2d 605 (La. 1975), this Court considered a disparity between the taxation of shop overhead and freight charges for sales and use tax purposes. At the time, "cost price" for use tax purposes was defined to mean the actual cost of the articles of tangible personal property ***without any deductions therefrom on account of the costs of materials used, labor or service costs, transportation charges or any other expense whatsoever.*** The definition of "sales price" contained no similar language relating to prohibiting the deduction of such expenses. Thus, the LDR included labor and shop overhead and freight charges in the "cost price" tax base; but not in the "sales price" tax base. This Court held that labor and shop overhead expenses and transportation costs were includable elements of added value in determining the tax basis of the use tax as applied to the out-of-state manufacturer-user; and that as so applied, the tax was unconstitutional, since neither sales nor use tax was imposed on labor and shop overhead and transportation costs of an in-state manufacturer-user. In *Pensacola Construction*

Co. v. McNamara, 558 So.2d 231 (La. 1990), this Court again considered the disparate definitions of "cost price" and "sales price," the former including freight charges, and the latter not. This Court held that the use tax imposed on transportation or freight charges was unconstitutional for lack of parallel inclusion in the sales tax.

While *Chicago Bridge & Iron* and *Pensacola Construction* involve disparate treatment that discriminates against out-of-state taxpayers in favor of in-state taxpayers (discrimination against interstate commerce) they provide guidance in this case of discrimination against similarly situated taxpayers within Louisiana. Discrimination is unconstitutional, whether or not it involves disparate treatment of taxpayers in interstate commerce, or disparate treatment of similarly situated taxpayers within the state. The former discrimination, at issue in *Chicago Bridge & Iron* and *Pensacola Construction* violates the Commerce Clause of the United States Constitution; and the latter, at issue here, violates the Equal Protection Clauses of the Louisiana and United States Constitutions. As the law now stands, a manufacturer who purchases materials outside of Louisiana and uses them in Louisiana for further processing into a byproduct (use tax) would owe no tax on those purchases. In contrast, a manufacturer who purchases the same materials within the state for further processing into the same byproduct (sales tax) would owe tax on those purchases. Further, there is no parallel "credit" in the definitions of "use" or "cost price" for use tax purposes. This disparate treatment of similarly-situated taxpayers provides an economic advantage for any manufacturer who purchases raw materials out of state, over its competitors who purchase raw materials in Louisiana. This disparate treatment of similarly situated taxpayers serves no legitimate state interest and has no rational basis.[32] To the contrary, it encourages out-of-state purchases to the economic detriment of suppliers of raw materials within Louisiana. To the extent CPSB may argue that NISCO owes sales tax (which has not been alleged), the application of Act 3 to NISCO would constitute a denial of equal protection of the laws.

CPSB fails to establish that Act 3 can be interpreted as amending the definition of a taxable "use." And, it fails to present any rational basis for the disparate treatment of taxpayers who purchase their raw materials within Louisiana and those that purchase their raw materials out-of-state for use in Louisiana. Accordingly, CPSB's defenses to NISCO's challenges to Act 3 based on inapplicability to use tax and denial of equal protection fail.

G. The retroactive application of Act 3 violates the Separation of Powers Doctrine.

Even if Act 3 were constitutional (which is denied), the tax cannot be imposed in this case because its retroactive application is unconstitutional. Act 3 became effective June 23, 2016, R. 1:19-23, but it is being unconstitutionally applied to transactions that occurred years before. The Legislature provided that Act 3 "shall be 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" – without regard to when the alleged taxable transaction took place, or when

[32] A tax classification creating disparate treatment of taxpayers violates the Equal Protection Clauses of the Louisiana and United States Constitutions if there is no reasonably conceivable state of facts that could provide a rational basis for the classification. *See Armour v. City of Indianapolis, Ind.*, 566 U.S. 673, 680-681 (2012). *See also Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 70 (1963) ("equal treatment for in-state and out-of-state taxpayers similarly situated is the condition precedent for a valid use tax on goods imported from out-of-state"); *accord Williams v. Vermont*, 472 U.S. 14, 23 (1985).

the alleged taxes became due. La. Acts No. 3 (2016 2nd Ex. Sess.). While the Legislature carved out pending cases, it did not prohibit retroactive assessments. Thus, the Legislature provided that Act 3 would apply retroactively to all tax periods (not prescribed) for which no assessment had yet been issued or claim for refund filed as of June 23, 2016, regardless of when the alleged tax became due.

1. Act 3 violates the Separation of Powers Doctrine because it retroactively changes the law and impermissibly, legislatively overrules *NISCO I.*

The United States Constitution vests the legislative, executive, and judicial powers in congress, the president, and the federal courts, respectively. The federal courts have recognized that the concept of separation of powers is inherent in the constitution and that "[t]he very structure of the articles delegating and separating powers under Arts. I, II and III exemplify the concept of separation of powers." *I.N.S. v. Chadha*, 462 U.S. 919, 946 (1983). But the rules governing those situations in which the actions of one branch reach over into the realm of one of the other branches are jurisprudentially-created, in the federal common law tradition. In contrast, Louisiana's Constitution, in keeping with the State's civilian roots, does more than merely establish the three branches of government. It expressly codifies a Separation of Powers Doctrine, stating that ". . . no one of these branches, nor any person holding office in one of them shall exercise power belong to either of the others." LA. CONST. art. III, § 2. Thus, the Louisiana Constitution is more explicit in its provision for separation of powers, and has as its express goal, not just separation of the branches of government, but a prohibition against interference by any one branch with the authority of another. Louisiana courts have added gloss to this express constitutional prohibition:

- The judicial power to interpret what the law is vests in the judiciary, not the legislature. It is emphatically the province and duty of the judicial department to say what the law is.[33]
- Legislation, even interpretive legislation, may not be applied retroactively if the legislative change violates the principles of separation of powers and independence of the judiciary.[34]
- While the principle of separation of powers does not exclude the authority of the legislature to enact clearly interpretive laws, clarifying the meaning of previously enacted texts ***outside the context of litigation***, it is a different matter when the legislature actually amends previously enacted legislation by laws designated as interpretive. This may be an improper exercise of power tending to attribute, contrary to constitutional guarantees, retroactive effect to new legislation.[35]
- ***After*** the judicial branch performs its constitutional function of interpreting law, and the Legislature disagrees with that interpretation, a *new* legislative enactment is a substantive change in the law and is not an interpretive law, because the original law as interpreted by the judicial branch, no longer applies.[36]
- The usual purpose of a special interpretive statute is to correct a judicial interpretation of a prior law which the legislature considers inaccurate. When such statutes are given any effect, the effect is prospective only. Any other result would make the legislature a court of last resort. . . .[37]

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[33] *Bourgeois v. A.P. Green Indus., Inc.*, 00-1528, p. 11 (La. 4/3/01), 783 So.2d 1251, 1260.

[34] *Unwired*, p. 15, 903 So.2d at 404; *Mallard Bay Drilling, Inc. v. Kennedy*, 04-1099, pp. 14-15 (La. App. 6/29/06), 914 So.2d 533, 543-545.

[35] *St. Paul Fire & Marine Ins. Co.*, 609 So.2d at 819 (emphasis added).

[36] *Bourgeois*, 783 So.2d at 1261, fn. 2 (Lemmon, J., concurring) (emphasis in original).

[37] *Id.*, citing 1A Norman J. Singer, Sutherland Statutory Construction § 27.04 (5th ed. 1993).

There is no room for debate that legislation labeled "interpretive" can infringe on judicial powers when used to adjudicate a case or alter existing rights and obligations. For these reasons, the Legislature is not permitted to declare what an earlier law "should have said" and then give such a revised "interpretation" retroactive effect. The power to construe the law has been uniformly observed by Louisiana courts to be exclusively reserved to the judicial branch of government.[38] Not only that, but the rationale behind the principle that interpretation of law is not a legislative, but a judicial function, based on the Separation of Powers Doctrine, is even "more compelling where [as here] the earlier enactment is not couched in doubtful phraseology and is ***at the time of the Legislature's declaration of intent involved in litigation***." *Smith v. Division of Administration,* 362 So.2d 1101, 1106-07 (La. 1978) (emphasis added). At the time Act 3 was enacted, this Court had rendered its decision in *NISCO I*, and an Application for Rehearing, filed by the taxing authorities was pending. Moreover, this Court had already rendered its Opinion, interpreting the further processing exclusion as it has existed from 1948 to the date of the Opinion, and the retroactive application of Act 3 disturbs this Court's ruling as it relates to the tax treatment of purchases of materials for further processing into by products for all years from 1948 until the date of its decisions (regardless of whether or not an assessment had yet been made or a refund claim filed).

Act 3 is a blatant attempt by the Legislature to usurp the judicial function, and make itself a court of last resort. In effect, the Legislature gave LDR and CPSB the rehearing that this Court denied. But, "[t]he legislative and governor's office are not the judicial branch, and it is the duty of the courts to make certain that they keep to their proper functions." *Crooks v. Metropolitan Life Ins. Co.,* 2000-0947 (La. App. 3 Cir. 1/17/00), 779 So.2d 966, 975, *judgment vacated on other grounds by Crooks v. Metropolitan Life Ins. Co.*, 01-0466 (La. 5/25/01), 785 So.2d 810). Further,

> Inherent problems with interpretive legislation are particularly brought to the fore in a situation like the one before this court where the legislature has expressly overruled a supreme court decision by professing to interpret a statute and thus reach its "original" meaning, that is, the one intended by the authors of the civil code. Such legislation effectively constitutes the adjudication of cases and micromanagement of the court system.
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> . . . ***But in no circumstances shall the legislature interpret legislation after the judiciary has already done so.*** We find that this is in blatant violation of the separation of powers by overzealous public officials because under our system of government, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803). The interpretation of the law belongs to the judiciary, not the legislature. . . . *Crooks*, 779 So.2d at 973-4 (emphasis added).

The retroactive application of Act 3 directly impinges on this Court's interpretation of the further processing exclusion as it applies to all sales tax transactions up to and as of the date of the *NISCO I* decision in violation of the Separation of Powers Doctrine.

2. The *Unwired* and *Mallard Bay* cases inform that retroactive substantive tax legislation in the guise of interpretive law violates the Separation of Powers Doctrine.

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[38] *State Licensing Board for Contractors v. State Civil Service Com'n,* 240 La. 331, 337, 123 So.2d 76, 78 (La. 1960) (It is "emphatically the province and duty of the judicial department to say what the law is.").

In *Unwired supra*, p. 19, this Court considered a 2002 legislative amendment to the definitions of "retail sale," "sale at retail," "sales price" and "use" to legislatively overrule a 2000 decision of the Third Circuit holding that telephones furnished to customers for free (or for a nominal price) when they also contracted for cellular telecommunication services would be subject to the local sales/use tax. The Court held that the retroactive application of the changes to those definitions (making the "free cell phones" taxable), violated the Separation of Powers Doctrine, holding:

> [T]he Legislature sought to change the *Mercury Cellular* decision. By passing 2002 La. Acts 85 in order to abrogate the appellate court's interpretation and application of a long-standing revised statute, the Legislature clearly assumed a function more properly entrusted to the judicial branch of government. *INS v. Chadha,* 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983) (Powell, J., concurring). It is the duty of the judiciary to make certain the Legislature remains true to its proper governmental function. As was earlier held in *Bourgeois,* 783 So.2d at 1260, statutory construction and interpretation of legislative acts is solely a matter of the judicial branch of government. Accordingly, even though the Legislature had the authority to change the law after the *Mercury* decision became final, the changes could only have prospective application regardless of the Legislature's indication to the contrary. *Unwired*, 903 So.2d at 406.

Similarly, *Mallard Bay Drilling, Inc. v. Kennedy*, 04-1089 (La. 6/29/05), 914 So.2d 533, involved a 2002 statutory amendment to the definition of "foreign or interstate coastwise commerce" in a sales tax exemption for materials and supplies purchased by the owners or operators of ships or vessels operating exclusively in foreign or interstate coastwise commerce. The amendment to the statutory definition of the term was contrary to this Court's interpretation of that same term in the same statute in 2001.[39] Applying the rule of law set forth in *Unwired*, the Court held that retroactive application of the amendment violated the Separation of Powers Doctrine.

Unwired and *Mallard Bay* illustrate this Court's policy of curtailing constitutional violations committed when the Legislature abuses its power by passing substantive legislation under an interpretive guise for the purpose of receiving retroactive application contrary to prior interpretations of the law by the courts, and in derogation of the vested rights and settled expectations of the litigants. This Court has heretofore flushed out such "wolves in sheep's clothing," and exposed them for what they are: impingements on the authority of the judiciary.

3. CPSB's arguments that Act 3 does not violate the Separation of Powers Doctrine are unavailing.

CPSB's response to NISCO's Separation of Powers Doctrine challenge to Act 3 is twofold. First, CPSB argues that because Act 3 is clarifying legislation, it falls within an exception to the Separation of Powers Doctrine for remedial legislation enacted shortly following a court's decision that highlights an ambiguity or conflict in a statutory provision.[40] This exception has been criticized as creating opportunities for Separation of Powers Doctrine

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[39] *Archer Daniels Midland Co. v. Parish School Bd. of Parish of St. Charles*, 01-0511 (La. 11/28/01), 802 So.2d 1270.

[40] Nor is this a situation where a mistake by the Legislature creating a loophole is discovered and cured shortly after the enactment of a law. *See United States v. Carlton*, 512 U.S. 26 (1994) ("There is little doubt that the 1987 amendment to § 2057 was adopted as a curative measure." ". . . Congress acted promptly n proposing the amendment with a few months of § 2057's original enactment . . . ."). Act 3 is substantive, not curative. Moreover, the further process exclusion was enacted in 1948, with broad language applying to all tangible personal property, and remained unchanged for almost 70 years.

violations.[41] It has also been recognized by the courts as applying only ***outside the context of litigation***.[42] That is emphatically not the case here, where the *NISCO I* matter was pending in this Court on Application for Rehearing filed by the LDR and CPSB, and there was no question the Court's interpretation of what the law was would inform the tax implications of NISCO's purchases of limestone up to the date of the decision. In addition, Act 3 is not "remedial," but rather, substantive in nature. Moreover, with respect to the operative language at issue, this Court has never expressed any ambiguity that the further processing exclusion applies to all tangible personal property without any distinction between primary and secondary products. The exception CPSB relies on does not apply in this case.

Second, CPSB argues that two seminal opinions of this Court, *Unwired* and *Mallard Bay*, *supra*, are distinguishable because in those cases (1) the amendment to the law was enacted while the cases were already pending and (2) the appellate court judgment that the Legislature was seeking to address had become final. Those are distinctions without a difference because, it is no less an impingement on this Court's authority and integrity that CPSB had not yet sued to collect tax for the years 2013-2015, or that this Court's judgment, though final, was not yet definitive (because an Application for Rehearing, subsequently denied, was pending) when Act 3 was enacted. This is because Act 3 nonetheless legislatively overrules this Court's statement of what the law relating to the further processing exclusion had been over the period from its enactment in 1948 up to and including the date of the *NISCO I* Opinion.

Notably, in both *Unwired* and *Mallard Bay*, the enactment expressly stated that the amendment was purely interpretive and was intended to legislatively overrule a decision of the appellate courts. Here, Act 3 says it is interpretive, but no mention is made of intent to legislatively overrule *NISCO I*, although that was clearly the intent. In both *Unwired* and *Mallard* Bay, the enactment is expressly stated to apply retroactively not only to pending cases but also to ***all claims existing*** at the time of the enactment, regardless of whether or not a formal claim or case was pending. Here, Act 3 does not apply to formal claims or cases pending before the date of the enactment, but like *Unwired* and *Mallard Bay*, it applies retroactively to ***claims existing*** before the date of the enactment. Nothing in the Courts' *Unwired* and *Mallard Bay* Opinions indicate that the decision that the enactments violated the Separation of Powers Doctrine turned solely on the fact that the amendments retroactivity applied to pending cases. It is no less an impingement on the authority of this Court – after it has stated what the law is – for the legislature to change the law and retroactively apply it to ***existing claims***, even though no formal claim has yet been made.[43]

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[41] H. Alston Johnson, Legislation, Procedure and Interpretation, 45 La. L. Rev. 341, 344 (1984) ("There is serious doubt about the validity of this exception in any event . . . because 'interpretive' enactment begins to give the legislature judicial power.").

[42] *Unwired*, p. 17, 903 So.2d at 405, *citing* Yiannopoulos, Validity of Patents Covering Navigable Waterbottoms – Act 62 of 1912, Price, Carter, and All That, 32 La. L. Rev. 1, 16 (1971) and 1 M. Planiol [Civil Law Treatise Nos. 249-252 (La. St. L. Inst. Trans 1. 1959)] § 251.

[43] Because the tax liabilities at issue, if owed, accrued between January 1, 2013 and December 31, 2015, they were "existing claims" when Act 3 was enacted.

There is no substantive difference between the enactments at issue in *Unwired* and *Mallard Bay* and Act 3. For the same reason that the retroactive tax enactments at issue in *Unwired* and *Mallard Bay* were unconstitutional, Act 3 is unconstitutional.

In addition, the Legislature is presumed to know the law, and should have known that it was retroactively abrogating an interpretation of law by this Court that has retroactive effect itself. Generally, unless a decision of this court specifies otherwise, it is given both retroactive and prospective effect. *Bush v. National Health Care of Leesville*, 05-2477, pp. 5-6 (La. 10/17/06), 939 So.2d 1216, 1219. "[A] judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 216 (1995), *quoting Rivers v. Roadway Express, Inc.*, 511 U.S. 298 (1994). *NISCO I* does not specify otherwise, and thus has retroactive effect. Applying the three factors recognized by this Court in *Bush* for determining whether its decision should be applied retroactively leads to only one conclusion. *NISCO I* has retroactive effect because (1) it does not establish a new principle of law, overrule clear past precedent on which CPSB may have relied, nor does it decide an issue of first impression whose resolution was not clearly foreshadowed; (2) the decision is consistent with the historical interpretation of the further processing exclusion, and retroactive application of *NISCO I* is consistent with the objectives of the exclusion and will not retard its operation; and (3) no inequity is created by retroactive application of a broad further processing exclusion, applying to all tangible personal property, that has been the law of Louisiana for over seventy years. To the contrary, to not give the decision retroactive effect would be inequitable. The Legislature is presumed to have known of the retroactive effect of the *NISCO I* decision, and nonetheless, it impinged upon the authority of this Court by making Act 3 applicable to tax years falling within the ambit of this Court's decision.

Further, CPSB's interpretation and application of the Separation of Powers Doctrine creates an absurd result in which, for the years 2013-2015, those taxpayers who had already filed refund claims, or been assessed or sued for the collection of tax for the years 2013-2015, as of June 23, 2016 are treated favorably under the pre-Act 3 law, and those taxpayers who had existing claims but had not yet filed refund claim or had not yet been assessed or sued for the collection of tax as of that date are penalized with the imposition of tax liability on the same type of transactions for the same years for which their fellow taxpayers (including competitors) owed no tax. CPSB would have this Court rule that the retroactive aspect of Act 3 does not impinge upon this Court's authority simply because CPSB made a conscious decision to wait to sue NISCO for collection of tax for 2013-2015 until after LDR and the local collectors were successful in getting the law changed in June of 2016. It would make the application of the Separation of Powers Doctrine dependent on the tax collectors' whims.

For these reasons, the retroactive Application of Act 3 violates the Separation of Powers Doctrine.

H. The retroactive application of Act 3 violates the Due Process Clause of the Louisiana Constitution.

The state and federal due process analyses are different, and are discussed separately. In Louisiana, this Court has adopted Planiol's formula for identifying the only two situations in which a law operates retroactively: a

law is retroactive when it goes back to the past either to (1) evaluate the conditions of the legality of an act; or (2) modify or suppress the effects of a right already acquired. *See Church Mut. Ins. Co. v. Dardar*, 2013-2351, pp. 9-10 (La. 5/7/14), 145 So.3d 271, 278-279 (*citing* 1 M. Planiol, *Treatise on the Civil Law*, §243 (La. St. L. Inst. Trans. 1959)); *Landry v. Avondale Industries, Inc.*, 03-0719, p. 6 (La. 12/3/03), 864 So.2d 117, 124 (same). And, the Court has ruled that La. Civ. Code art. 6 prohibits retroactive application of new legislation that alters obligations or remedies. *Aucoin v. State through DOTD*, 97-1938, p. 9 (La. 4/24/98), 712 So. 2d 62, 67. Thus, "[w]hen a party acquires a right, either to sue for a cause of action ***or to defend himself against one***, that right becomes a vested property right and is protected by constitutional due process guarantees." *Falgout v. Dealers Truck Equipment, Co.*, 98-3150, p. 12 (La. 10/19/99), 748 So. 2d 399, 407 (emphasis added). Moreover, a property interest or benefit must have some ascertainable monetary value. *Denham Springs Econ. Dev. Dist. v. All Taxpayers, Prop. Owners Citizens of Denham Springs Econ. Dev. Dist.*, 05-2274, p. 16 (La. 10/17/06), 945 So. 2d 665, 682. Obviously, there is a significant monetary value in not being taxed on purchases of certain raw materials, as well as in the amount of penalties and interest sought by CPSB. NISCO clearly has satisfied the property interest requirement.

In *Cole v. Celotex,* 599 So.2d 1058 (La. 1992), this Court explained that the determinative point in time separating prospective from retroactive application of an enactment is generally the date the cause of action accrues. Once a party's cause of action accrues, it becomes a vested property right that may not constitutionally be divested. *Id.*, 599 So.2d at 1063. Sales tax is a transactional tax, *i.e.*, the obligation to pay the tax and the right to collect it are tied to the transaction itself. The date the tax is due is the operable date for sales tax purposes.[44] The right of a taxing authority to audit past sales transactions is also tied to the date the tax becomes due and is limited to a three-year prescriptive period. LA. CONST. art. VII, § 16; and La. R.S. 47:337.67(A). Thus, the date the tax became due is the date on which "vested rights" in the tax obligation (or defense thereto) must be determined.

The purchases at issue occurred before the amendment to the law. If tax is owed (which is denied), NISCO's obligation to pay accrued when its taxes became due and payable – on the first of the month following the month in which the sale occurred. At that time, NISCO's right to assert the exclusion as a defense to any attempt to collect tax on its purchases of limestone vested. Retroactive application of Act 3 would deny NISCO the benefit of the further processing exclusion in effect at the time of its purchases and the time the tax became due. Thus, it would divest NISCO of its vested rights in violation of the Due Process Clause of the Louisiana Constitution.

CPSB argues that NISCO has no "vested right" in the tax laws. The argument is off-base. NISCO is not claiming a vested right in a continuation of current law or the expectation of the further processing exclusion. NISCO is claiming a vested right in a defense to CPSB's claim to collect tax. While there is no vested right in the continuation of a current law, it is recognized that "[o]nce the right to enjoyment, present or prospective, has become

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[44] *See* La. R. S. 47:337.18(A)(1)(a) (". . . the taxes levied . . . shall be due and shall be payable monthly on the first day of the month. For the purpose of ascertaining the amount of tax payable, all dealers shall transmit, on or before the twentieth day of the month . . . returns showing the gross sales . . . arising from all taxable transactions during the preceding calendar month.").

the property of some particular person or persons as a present interest, the right is vested and thus protected by due process guarantees." 16B Am. Jur.2d Const. Law § 740 (July 2021), Absence of vested rights in existing law, *citing Church Mut. Ins. Co.*, *supra*, in which this court applied the rules of law that the Legislature's power to enact retroactive laws is limited by due process, and that the determination of whether a statute is being retroactively applied to vested rights requires that the court ". . . determine whether [the party claiming the right] had a cause of action that accrued prior to the statute's effective date . . . ." 145 So.3d at 281.

This Court has applied this same standard to determine vested rights in taxes. In *Hilton Hotels Corp. v. Jefferson Parish*, 258 La. 709, 247 So.2d 843 (1971), this Court recognized the Louisiana Stadium and Exposition District's ("District") vested right in the collection of a hotel tax that it had levied years earlier. The tax was levied with Jefferson Parish approving an exemption from their own local parish hotel tax for hotel tax paid to the District. Subsequently, Jefferson Parish rescinded and set aside the exemption. Hilton and other taxpayers were notified that the tax was to be paid to the Parish. State officials demanded that the tax be paid to the State (for the District). Not knowing which entity was legally entitled to the tax, the taxpayers filed a concursus proceeding. This Court found that "the District has acquired absolute and complete control of and right to the tax for at least five years," and explained: "While all retrospective laws are not invalid, those which divest vested rights fail constitutionally. We have recognized that 'rights once legally established cannot be divested by the repeal of the law authorizing their creation.'" 247 So.2d at 718. The District had a right to collect the tax, and the taxpayers had a right in the exemption. Here, similar to the situation in *Hilton Hotels*, ***after*** NISCO qualified for a tax exclusion, the Legislature took it away. If CPSB has a right to collect sales tax that vested at the time the tax became due, it follows that the taxpayer (NISCO) has a corollary vested right in any defense to the tax that existed at the time the tax became due.

Further, CPSB ignores that the due process guarantees under the Louisiana constitution may be more robust than those under the federal jurisprudence relied on by CPSB. While the Due Process Clause of the Louisiana Constitution is *in haec verba* with the United States Constitution's Due Process Clause, the Louisiana courts have not only the right, but also the duty to construe the Louisiana Constitution's Due Process Clause in accordance with what it conceives to be its plain meaning – the protection of interests in "property" – and in accordance with established ***civil law principles*** of what constitutes "property" in Louisiana law.[45] The question for this Court is not whether a right to a statutory tax exclusion is a "property right" under federal law, but whether it is a "property right" under Louisiana law. CPSB has not cited any Louisiana jurisprudence holding that a cause of action, or a defense thereto, based on a statutory exclusion from tax is not a property right if it involves tax.

As Justice Brennan explained over fifty years ago, a state court's interpretation of its state's due process guarantees may diverge from that of federal due process, because our system of federalism, "tolerates such divergence where the result is greater protection of individual rights under state law than under federal law." "State

[45] *See* William J. Brennan, Jr., State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489, 500 (January, 1977).

courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections ***often extending beyond those required by the Supreme Court's interpretation of federal law***;" and "state courts can breathe new life into the federal due process clause by interpreting their common law, statutes and constitutions to guarantee a 'property' and 'liberty' that even the federal courts must protect."[46] Here, the retroactive application of Act 3 violates Louisiana constitutional principles of due process.[47]

I. The retroactive application of Act 3 violates the Due Process Clause of the United States Constitution.

The United States Supreme Court has recognized that "for centuries our law has harbored a singular distrust of retroactive statutes." *Eastern Enterprises v. Apfel*, 524 U.S. 498, 547 (1998) (Kennedy, J. *dissenting in part, and referencing the plurality opinion*). The United States Supreme Court recognized in *United States v. Carlton*, 512 U.S. 26 (1994), relied on by CPSB, that the retroactive imposition of a wholly new tax violates due process.[48] After determining the retroactive tax legislation at issue (limiting an income tax deduction) was not a new tax, the Court expounded on the due process test applicable to retroactive tax legislation that does not involve a wholly new tax. The test is whether the retroactive application of the statute is supported by a legitimate, non-arbitrary legislative purpose furthered by rational means. *Carlton*, 512 U.S. at 32. In determining whether a statute is supported by rational means, the courts consider whether the period of retroactivity is a modest one. *Id.*

1. Applying *Carlton's* limitations on retroactivity to Act 3 leads to the inescapable conclusion that Act 3 is unconstitutional in violation of due process.

In *Carlton* the majority opinion does not explain what constitutes a "wholly new" tax, simply stating that the amendment limiting a deduction from tax was not a "wholly new tax." Carlton involved a transaction falling within the scope of the income tax, but for which deductions could be made in the income tax calculation. In contrast, here, the transactions at issue are wholly excluded from the scope of the sales tax, so the amendment bringing those transactions into the realm of the sales tax law is a wholly new tax. The instant case exemplifies what was meant by Justice O'Connor, who in her concurring opinion stated that a tax statute that taxes a transaction that was not subject to tax at the time the taxpayer entered the transaction is a "wholly new tax" for purposes of this due process analysis.[49] She reasoned that "[b]ecause the tax consequences of commercial transactions are a relevant,

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[46] *Id.* at 500, 503 (emphasis added).

[47] *See Ulrich v. Robinson*, 18-0534 (La. 3/26/19), 282 So.3d 180 (district court declared retroactive cap on income tax credits unconstitutional on due process grounds; this Court reversed, on mootness grounds and did not reach due process issue).

[48] The amendment at issue in *United States v. Carlton*, was not a "wholly new tax," but the Court recognized that it had previously declared unconstitutional the retroactive application of a wholly new tax. 512 U.S. at 34. Cases in which the United States Supreme Court struck down retroactive legislation imposing a wholly new tax on due process grounds include *Blodgett v. Holden*, 275 U.S. 142, 147 (1927); and *Untermyer v. Anderson*, 276 U.S. 440, 445 (1928).

[49] Justice O'Connor's reasoning indicates that she would have concurred with this Court's test in *Dow Hydrocarbons* for determining if an amendment levies a "new tax" – was the income or transaction taxable before the amendment, and is it taxable after the amendment?

and sometimes dispositive, consideration in a taxpayer's decisions regarding the use of his capital, it is arbitrary to tax transactions that were not subject to taxation at the time the taxpayer entered into them." 512 U.S. at 38. As already established, under Louisiana Law, Act 3 taxes a transaction that was not subject to tax at the time the taxpayer entered into the transaction, and is a wholly new tax.

Even if Act 3 were not a "wholly new tax" (as CPSB argues because the "sales tax" has existed for decades), the retroactive application of Act 3 nonetheless offends due process. Under *Carlton*, retroactive application of the statute must be supported by a legitimate, non-arbitrary legislative purpose. Here, the purpose of Act 3 was to completely abrogate this Court's interpretation of the law in *NISCO I*, legislatively and retroactively – a clearly illegitimate purpose in violation of the Separation of Powers Doctrine. As Justice O'Connor explained, the U.S. Supreme Court "has never intimated that Congress possesses unlimited power to 'readjust rights and burdens . . . and upset otherwise settled expectations,'" and "[t]he governmental interest in revising the tax laws must at some point give way to the taxpayer's interest in finality and repose." 512 U.S. at 37.

While the Supreme Court did not establish a bright-line rule regarding what constitutes a "modest" period of retroactivity, it did note that the "'customary congressional practice' generally has been 'confined to short and limited periods required by the practicalities of producing national legislation,'" and that it had previously stated that "'recent transactions' to which a tax law may be retroactively applied 'must be taken to include the receipt of income during the year of the legislative session preceding that of its enactment.'" *Id.* Justice O'Connor, concurring, stated that "[a] period of retroactivity longer than the year preceding the legislative session in which the law was enacted would raise, in [her] view, serious constitutional questions." *Id.*, 512 U.S. at 38. Since *Carlton,* at least two state appellate courts have held that retroactivity periods of greater than one year violated due process.[50]

In *Carlton*, the period of retroactivity was only slightly greater than one year. Here, the minimum period of retroactivity is three and one-half years.[51] Further, the modest periods of retroactivity discussed in *Carlton* relates to annual federal income (reported and collected annually) and estate tax returns (reported and collected upon death). In contrast, sales and use tax is reported and remitted monthly. Thus, the appropriate "modest period of

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[50] *See e.g. Rivers v. State*, 327 S.C. 271, 490 S.E.2d 261 (S.C. 1997) (invalidating legislation reducing capital gains tax refunds with a retroactivity period of two to three years); and *City of Modesto v. National Med, Inc.*, 128 Cal. App.4th 518, 27 Cal. Rptr.3d 215 (Cal. App. 5th Dist. 2010) (retroactive period of eight years for revenue apportionment amendment and guidelines found to have violated the modesty doctrine).

[51] Act 3 applies retroactively to "all refund claims submitted or assessments of additional tax due which are filed on or after the effective date," which is June 23, 2016. Louisiana law states that taxes prescribe three years after the thirty-first day of December in the year in which they are due. LA. CONST. art. VII, § 16; La. R.S. 47:1579; La. R.S. 47:337.67(A). Sales and use tax refunds and credits prescribe after three years from the thirty-first day of December of the year in which the tax became due or after one year from the date the tax was paid, whichever is the later. La. R.S. 47:1623(A) (for state sales and use taxes) and La. R.S. 47:337.79(A) (for local sales and use taxes). Sales and use tax returns are due on the twentieth day of the month following the month in which the taxable transaction occurs. La. R.S. 47:306(A) and La. R.S. 47:338.26. Thus, Act 3's period of retroactivity improperly extends to purchases that occurred in December 2012 (tax due on January 20, 2013), a period of three years and six months.

retroactivity" for Act 3 is limited to transactions that occurred on or after June 1, 2016, the first day of the most recent sales tax period before the Act 3's effective date for which a sales or use tax return was not yet due.

All of the tax decisions upholding retroactive tax legislation cited by CPSB (including *Carlton*) involved a retroactivity period of two years or less, and four of the seven cases involved a retroactivity period of less than one year.[52] In no case were more than two tax periods at issue. In two of the cases, the amendment to the law was enacted before the return was required to be filed.[53] In three of the cases the tax obligation accrued or the returns were due the same year as the amendment.[54] In one case it was determined that the taxpayer was no worse off than he would have been under the pre-amendment law.[55] Here, the minimum retroactivity period is three and one-half years, or ***forty-two sales tax periods***. The tax obligation, if owed, would have accrued six months to three and one-half years before Act 3 was enacted. There is surely nothing modest about that retroactivity period. Moreover, none of the cases cited in *Carlton* involved a transactional tax (like the sales tax) in which tax liability accrues at the time of the transaction, and must be reported and paid on the twentieth of each month. Considering the nature of the tax at issue here, under the "modesty doctrine" a one-month look back period would be the constitutional limit.

One state court has explained that "[t]he important factors in determining whether a retroactive tax transgresses the constitutional limitation are (1) 'the taxpayer's forewarning of a change in the legislation and the reasonableness of . . . reliance on the old law,' (2) 'the length of the retroactive period,' and (3) 'the public purpose for retroactive application.'" *James Square Associates LP v. Mullen*, 970 N.Y.2d 888, 898, 993 N.E.2d 374, 380 (App. Ct. N.Y. 2013). Here, manufacturers like NISCO have reasonably relied on the application of the further processing exclusion to all "tangible personal property" for almost seventy years. Under the plain language of Act 3, the minimum retroactivity period is three and one-half years and the maximum retroactivity period is unlimited and indeterminate due to suspensions of prescription.[56] Clearly, the length of the retroactive period is open-ended and excessive. In addition, the legislative purpose for retroactive application of Act 3 – to retroactively abrogate

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[52] *United States v. Hemme*, 476 U.S. 558 (1986) (one month); *United States v. Darusmont*, 449 U.S. 292 (1981) (10 months), *United States v. Hudson*, 299 U.S. 498 (1937) (one month); and *Cooper v. U.S.*, 280 U.S. 409 (1930) (10 months). In *Welch v. Henry*, 305 U.S. 134 (1938), the retroactive period was two years, but the court stressed that the legislature met only biannually, and the revision was made at the first opportunity.

[53] *See e.g. United States v. Carlton*, *supra* fn. 39; and *Milliken v. United States*, 283 U.S. 15 (1931).

[54] *See e.g. United States v. Darusment*; *Welch v. Henry*; and *Cooper v. U.S.*, *supra* fn. 46. *See also United States v. Hudson*, 299 U.S. 498 (1936), involving amendment to Silver Purchase Act tax effective June 19, 1934 applied to purchases made and resales in May 1934.

[55] *See e.g. United States v. Hemme*, *supra* fn. 46.

[56] Because tax claims and tax refund claims have a three-year prescriptive period (running from December 31st of the year in which the tax becomes due), the minimum retroactivity period for application of Act 3 is three and one-half years – back to taxes becoming due in January 1, 2013. It is not uncommon, however, for tax collectors to enter into agreements with large manufacturing taxpayers to suspend the running of prescription for a year or multiple, successive years. *See* La. R.S. 47:1580(B)(1) and (2); and La. R.S. 47:337.67(C)(1), allowing for such agreements. As a practical matter, some taxpayers will have "open tax years" extending more than three years. Thus, Act 3 may be applied retroactively for longer and indefinite periods in cases where there are agreements in place to suspend the running of prescription.

this Court's decision in *NISCO I* – is illegitimate. Lastly, the purpose of Act 3 is to impose a new tax, and it is well-established that a retroactive new tax offends due process.

2. Factual distinctions between *Carlton* and the instant case warrant a finding of due process violation in this case.

Furthermore, CPSB's reliance on the facts of *Carlton* to support the proposition that Act 3 does not violate due process is misplaced because *Carlton* is factually distinguishable in many respects. First, in *Carlton*, the purpose for enacting the amendment was neither illegitimate nor arbitrary, and there was no plausible contention that Congress acted with an improper motive. Here, the purpose for Act 3 – to overrule *NISCO I* legislatively and retroactively – is clearly an unconstitutional and illegitimate purpose. Second, in *Carlton*, there was "little doubt" that the amendment was a curative measure. Here, Act 3 is not curative, but rather, a substantive change in the breadth and scope of a long-established exclusion from the sales tax. Third, in *Carlton*, Congress acted promptly in proposing the amendment within a few months of the original enactment. Here, the further processing exclusion had been the law of this State for almost seventy-years when it was amended by the Legislature in 2016. Fourth, in *Carlton*, when Congress initially enacted the original legislation, it estimated a revenue loss from the deduction of approximately $300 million over a five-year period, and it became evident shortly after passage that the expected revenue loss could be as much as $7 billion – over 20 times greater than anticipated. Here, Act 3 does not close an unanticipated loophole for the avoidance of tax, but rather creates a new tax liability that did not exist before. Further, the Louisiana Legislature has never estimated any purported decrease in revenue resulting from Act 3, and NISCO has explained that the result can only be an increase in revenue because Act 3 expands the base of taxable transactions. Fifth, in *Carlton*, without the amendment's retroactive application, taxpayers could qualify for the deduction by engaging in essentially sham transactions. That is not a concern with Louisiana's pre-Act 3 further processing exclusion, because in order to qualify for the further processing exclusion, the taxpayer must prove, often through qualified expert testimony or testimony of an engineer, chemist, or chemical engineer familiar with the process, that the material at issue is in fact further processed into tangible personal property for resale, by meeting a three-pronged test established by the courts. Sixth, as explained above, in *Carlton* the period of retroactivity was modest, and that is not the case here.

3. CPSB's argument that NISCO has no federally-recognized vested right in its further processing defense to CPSB's claim to collect tax fails.

Lastly, CPSB argues that NISCO has no vested right recognized under the federal due process jurisprudence in the tax law's definition of taxable "retail sale," and the further processing exclusion from that definition. In fact CPSB argues that no taxpayer has any right in any tax legislation. In support of this proposition, CPSB cites *Carlton*, which involved an estate tax deduction for half of the proceeds of any sale of employer securities by the executor of an estate to an employee stock ownership plan. It involved an amendment affecting a deduction against an ***already taxable transaction***. *Welch v. Henry*, 305 U.S. 134 (1938), also cited by CPSB, involved an amendment to state income tax on ***already taxable*** corporate dividends at rates different from those applicable in that year to other types

of income, and without deductions that were allowed in computing tax on other income. Thus, in *Carlton* and *Welch*, the issue was ***not whether the taxpayer had a vested right in whether the transaction was taxable, but rather whether he had a vested right in how much the tax would be.*** Likewise, two other cases cited by CPSB involved a retroactive amendment affecting the taxation of an ***already taxable transaction***.[57] Here, purchases of materials for further processing into a byproduct were ***not already taxable*** when Act 3 was enacted. CPSB has not cited a single case from any federal or state jurisdiction that sanctions the retroactive application of an amendment to a definitional exclusion from tax that operates to narrow that exclusion and make previously nontaxable transactions taxable, creating a new tax.

For these reasons, the retroactive application of Act 3 violates federal notions of due process.

J. In the further alternative, CPSB's claims for taxes becoming due in 2013 are prescribed.

All taxes, except real property taxes, "shall prescribe in three years after the thirty-first day of December in the year in which they are due . . . ." LA. CONST. art. VII, § 16. Also, pursuant to La. R.S. 47:337.67(A), "[s]ales and use taxes levied by any political subdivision shall prescribe as of three years from the thirty-first day of December of the year in which such taxes became due." The general rule of law that if the face of the petition shows that the prescriptive period has already lapsed, the party opposing the exception of prescription has the burden of establishing that suspension, interruption, or renunciation of prescription has occurred applies in tax cases. *See e.g. Cajun Industries, LLC v. Vermilion Parish Sch. Bd.*, 14-22, (La. App. 3 Cir. 5/14/14), 139 So.3d 706, 710; *City of New Orleans v. Jazz Casino Co., LLC*, 15-1150, p. 6 (La. App. 4 Cir. 6/22/16), 195 So.3d 1252, 1256. CPSB seeks to collect use tax for the periods January 1, 2013 through December 31, 2015. Its Petition was filed on April 4, 2017. *See* Petition (R. 1:3-6). On the face of the CPSB's Petition, the claims for collection of taxes becoming due between January 1, 2013 and December 31, 2013 prescribed as a matter of law on December 31, 2016, more than three months before the Petition was filed. NISCO is entitled to judgment dismissing those claims.

CPSB contends that its filing of an Amended Answer and Reconventional Demand in the *NISCO I* matter in December 2016 operated to interrupt prescription. CPSB is wrong. When that Reconventional Demand was filed, this Court's Judgment in *NISCO I* was final, and the District Court had been divested of subject matter jurisdiction

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[57] *See e.g. Enterprise Leasing Co. of Phoenix v. Arizona Dept. of Revenue*, 221 Ariz. 123, 211 P.3d 1 (involving income tax credits against income ***already taxable*** for the cost of emission control equipment integrated into motor vehicles); and *Gillette Commercial Operations North America & Subsidiaries v. Dep't of Treasury*, 312 Mich. App. 394, 878 N.W.2d 891 (2015) (involving a challenge to the retroactive rescission of Michigan's membership in the Multistate Tax Compact, precluding foreign corporations from utilizing a three-factor apportionment formula under the Compact to calculate ***already taxable*** income). The other two cases cited are also inapposite. *In re Estate of Hambleton*, 181 Wash.2d 802, 335 P.3d 398 (Wash. 2014), involved a new tax created by the amendment of a definition in Washington's Estate and Transfer Act that permitted the state to tax qualified terminable interest property as part of a surviving spouse's estate, but the plaintiffs had no vested right in the trust property until the death of the surviving spouse, and thus had no property right when the retroactive law was passed. *Commonwealth Edison Co. v. Mont.*, 453 U.S. 609 (1981), involved a commerce clause and supremacy clause challenge to a new state severance tax law, but no due process challenge, and did not involve retroactive tax legislation.

over the *NISCO I* action. The District Court found, and the Third Circuit affirmed, that the District Court did not have subject matter jurisdiction to consider the claim made in the Reconventional Demand. *See* R. 5:1225-1235; *Bridges v. Nelson Indus. Steam Co.*, 17-981 (La. App. 3 Cir. 5/2/18), 246 So.3d 841. As a Reconventional Demand, CPSB's claim was not filed in a court of competent jurisdiction. Furthermore, the amended pleading was dismissed without prejudice. A dismissal without prejudice has the same effect as if the action were never filed. *See e.g. Juengain v. Tervalon*, 17-0155, p. 17 (La. App. 4 Cir 7/26/17), 223 So.3d 1174, 1186 (stating that a dismissal without prejudice is considered as if the suit has never been filed; hence any new suit that the Plaintiff might file would be barred by prescription). Therefore, it must be considered that the filing of the amended pleading in the *NISCO I* matter never occurred. It could not have interrupted prescription, and CPSB's claims for 2013 prescribed.

K. In the final alternative, penalties are not owed.

In addition to tax and interest, CPSB sued to collect late payment penalties. (R. 1:5). After the briefs were filed at the Third Circuit, the Louisiana Court of Appeal for the First Circuit ruled that a taxing authority may not assess late payment penalties when a taxpayer timely files its tax returns and timely remits the amount due reflected on the face of the returns. *Smith International v. Robinson*, 18-1640 (La. App. 1 Cir. 1/9/2020), 311 So.3d 1062, *writ denied* 20-00982 (La. 11/4/2020), 303 So.3d 650.[58] The relevant portion of the Local Penalty Statute, La. R.S. 47:337.70, is identical to the State Penalty Statute, La. R.S. 47:1602(A), providing that "[w]hen any taxpayer fails to make and file any return required to be made . . . or ***when any taxpayer fails to timely remit to the collector the total amount of tax that is due on a return which he has filed***, there shall be imposed . . . a specific penalty to be added to the tax." La. R.S. 47:337.70(A)(1) (emphasis added).[59] In *Smith International*, the First Circuit held that the phrase "when any taxpayer fails to timely remit to the secretary of the [Louisiana] Department of Revenue the total amount of tax that is due on a return which he has filed. . . ." refers to the amount of tax reported as due on the face of a taxpayer's return, and rejected LDR's assertion that a late payment penalty may be applied to amounts later determined to be due as a result of an audit. As a result, the First Circuit held that, under the law in effect during the audit period, LDR lacked the authority to assess a late payment penalty when a taxpayer timely paid the amount due shown on the face of its return.

The State Penalty Statute applies to all tax types enforced by LDR, including Louisiana sales and use tax.[60] The State Penalty Statute and the Local Penalty Statute contain the same language. As explained in the First Circuit's well-reasoned decision, the plain language of the penalty statute makes clear the legislature intended the

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[58] *See also Smith International v. Secretary, Department of Revenue*, No. 10498D (Judgment and Reasons for Judgment), 2018 WL 4608117 (La. Bd. Tax. App. 4/10/2018).

[59] La. R.S. 47:1602(A) was amended, effective January 1, 2021, and a new penalty was added that applies to instances where a taxpayer timely remitted the amount due shown on the face of its return but fails to pay the full amount of tax actually due. Acts 2020, No. 348, Sec. 1, eff. Jan. 1, 2021. A similar penalty **was not** added to La. R.S. 47:337.80(A) for local sales and use tax.

[60] *See* La. R.S. 47:1502. The administrative provisions, including the penalty statutes, contained in Title 47, Subtitle II, Chapter 18 apply to all taxes collected and administered by the LDR.

late payment penalty to apply only when a taxpayer is alleged to and is proven to have failed to timely remit the payment due with its return. *Smith International v. Robinson*, 311 So.3d at 1069.

Here, CPSB has not alleged that NISCO failed to timely file Calcasieu Parish sales and use tax returns for the periods at issue, or that NISCO failed to timely remit the tax reported on the face of those returns, and because no evidence was submitted by the Plaintiff, CPSB, that NISCO failed to timely file its sales and use tax returns and timely remit the amount shown as due on those returns, CPSB has no right to recover penalties.

L. Issue Preclusion

To the extent CPSB, as a party in *NISCO I*, argues that this Court's *NISCO I* decision is wrong as a matter of law, it should be precluded or estopped from making this argument under the issue preclusion element of Louisiana's law of *res judicata.* La. R.S. 13:4231: "Except as otherwise provided by law, a valid and final judgment is conclusive between the same parties, except on appeal or other direct review, to the following extent: . . . (3) A judgment in favor of either the plaintiff or the defendant is conclusive, in any subsequent action between them, with respect to any issue actually litigated and determined if its determination was essential to that judgment."

IV. CONCLUSION AND PRAYER FOR RELIEF

For reasons stated, NISCO prays that the Third Circuit Court of Appeal's Judgment is affirmed; CPSB's suit to collect tax is dismissed with prejudice; and CPSB is cast with all costs of these proceedings, including court costs in the amount of $12,242.09 on appeal and $14,946.14 in the trial court, and costs of this Court.

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AFFIDAVIT OF VERIFICATION AND CERTIFICATION

STATE OF LOUISIANA

PARISH OF EAST BATON ROUGE

BEFORE ME, the undersigned authority, personally came and appeared Linda S. Akchin, who deposed and stated that she is an attorney for Defendant-Appellee, Nelson Industrial Steam Company; that all of the allegations in the foregoing Original Brief on the Merits on Behalf of Defendant Appellee, Nelson Industrial Steam Company, are true and correct to the best of her knowledge; and that copies of this Brief have been delivered to the Clerk of the Louisiana Third Circuit Court of Appeal, the Presiding Judge in the Fourteenth Judicial District Court, Calcasieu Parish, by overnight mail; to the Louisiana Attorney General by overnight mail, and to all counsel of record, including *Amicus* counsel, by electronic mail and overnight mail, as follows:

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Baton Rouge, Louisiana, this 9th day of August, 2021.

Angela W. Adolph

SWORN TO AND SUBSCRIBED before me, Notary, this 9th day of August, 2021.

Notary Public
(My Commission is for Life)

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