

BRIEF

SUPREME COURT OF LOUISIANA

Docket No. 2021-OC-00552

CALCASIEU PARISH SCHOOL BOARD SALES AND USE DEPARTMENT, ET AL
Plaintiffs/Appellants

VERSUS

NELSON INDUSTRIAL STEAM COMPANY
Defendant/Appellee

ON APPLICATION FOR A WRIT OF CERTIORARI FROM
THE THIRD CIRCUIT COURT OF APPEAL, JUDGMENT ON REMAND, NO. CA-
19-315, FROM THE JUDGMENT OF THE 14TH JUDICIAL DISTRICT COURT FOR
THE PARISH OF CALCASIEU, STATE OF LOUISIANA,
NO. 2017-1373, THE HONORABLE RONALD F. WARE, PRESIDING

MOTION FOR LEAVE TO FILE PARTY IN INTEREST OR AMICUS CURIAE
BRIEF SUBMITTED BY SHERIFF AND TAX COLLECTOR, TONY MANCUSO,
TAX COLLECTOR FOR THE CALCASIEU LAW ENFORCEMENT DISTRICT
SALES TAX IN SUPPORT OF THE APPLICATION FOR WRIT OF CERTIORARI
FILED BY THE LOUISIANA DEPARTMENT OF REVENUE AND THE
CALCASIEU PARISH SCHOOL BOARD SALES AND USE TAX DEPARTMENT

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SUPREME COURT
OF LOUISIANA

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CLERK
OF COURT


**PARTY IN INTEREST OR AMICUS CURIAE BRIEF
OF SHERIFF AND TAX COLLECTOR, TONY MANCUSO,
TAX COLLECTOR FOR THE CALCASIEU
LAW ENFORCEMENT DISTRICT SALES TAX**

MAY IT PLEASE THE COURT:

NOW INTO COURT, through undersigned counsel comes the Sheriff and Tax Collector, Tony Mancuso, Tax Collector for the Calcasieu Law Enforcement District Sales Tax (hereinafter referred to as "CPSO"), a real party in interest in the above captioned cause who respectfully and emphatically urges this Honorable Court to reverse as follows:

**THE INTEREST OF THE SHERIFF AND TAX COLLECTOR,
TONY MANCUSO, TAX COLLECTOR FOR THE
CALCASIEU LAW ENFORCEMENT DISTRICT SALES TAX**

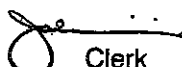
The CPSO is a taxing jurisdiction within Calcasieu Parish who is the potential recipient of a portion of the total tax paid under protest by NISCO (Nelson Industrial Steam Company) in the instant matter. Although the tax is collected by the Calcasieu Parish School System Sales and Use Tax Department, the Calcasieu Parish Sheriff Office's Law Enforcement Districts #1 and #2 are entitled to receive a portion of the sales and use tax proceeds at issue here. Consequently, the CPSO is not merely an "interested party" (as a taxing authority subject to the significant and potentially devastating adverse ramifications of the Majority Opinion in this case), but is a real party in interest in the instant case. The CPSO therefore requests that this Honorable Court permit the filing of the instant brief as either a real party in interest, or, in the alternative an amicus curiae brief.

**THE LEGISLATIVE RESPONSE TO THIS HONORABLE
COURT'S DECISION IN NISCO 1**

In *Bridges v. Nelson Industrial Steam Co.*, 190 So.3d 276 (La. 2016) ("NISCO I"), this Honorable Court in a 4-3 decision, allowed NISCO to avoid paying *all* sales tax on its purchase of limestone under the "sale at retail" definition contained in La. R.S. 47:301(10)(c)(i)(aa). This Court concluded that so long there is *any* resale of an end product (regardless of how minimal), such as the minimal amount of limestone containing ash sold by NISCO, the *entire* purchase of limestone was excluded from sales tax including the portion of the limestone NISCO consumed and did not sell.

SUPREME COURT OF LOUISIANA
Filed

JUN 25 2021


Clerk

In immediate response to this Court's decision in NISCO I, the Louisiana legislature passed Act 3 of the 2016 Second Extraordinary Session in an effort to clarify the legislative intent of the "sale at retail" definition to make clear that while a re-seller is not subject to sales tax, the end or ultimate consumer or user is. Act 3 simply incorporates the concept of "use tax" already included in La. R.S. 47:302(A) to provide that a purchaser is required to pay sales tax on all products in consumes (or uses) and receives a credit for any portion of the product that it later resells. The legislature made clear in Act 3 that it was never the intent of the sales tax scheme that a purchaser who uses and consumes the purchased item may avoid *all tax* on the purchase by merely reselling *any portion* on the purchased product regardless of how tiny that portion may be.

In order to avoid any implication that the legislature would be impinging on the judiciary's role as the interpreter of legislation, see *Mallard Bay Drilling, Inc. v. Kennedy*, 914 So.2d 533 (La. 2005), Act 3 expressly does not apply to NISCO I or any other litigation which was pending at the time of its enactment in 2016. This suit, (NISCO II) was initiated nearly a year *after* the NISCO I decision was handed down and Act 3 of 2016 was enacted.

Act 3 makes clear that the legislature never intended to allow a purchaser who uses and consumes a product to avoid *all* sales tax simply by reselling a small portion of the purchase as a by-product. Consequently, the legislature made clear that the Act was intended to clarify the definition of "sale at retail" to include sales tax on all portions of a purchased product which are consumed or used (and *not* resold) by purchaser. In other words, the legislative intent of Act 3 is set forth in Act 3 itself.

**THE LOWER COURT'S INTERPRETATION OF ACT 3 AS A "NEW TAX"
IGNORES THE EXPRESS LEGISLATIVE INTENT EMBODIED IN ACT 3 AND
CONSEQUENTLY VIOLATES THE RULES OF STATUTORY CONSTRUCTION
SET FORTH BY THIS HONORABLE COURT**

The Louisiana legislature expressly determined that it was not passing a "new tax" when it simply clarified the definition of "sale at retail" in connection with an existing tax, and said so in the legislation itself. Moreover, the Louisiana legislature expressly determined that Act 3 did not constitute a "new tax" when it determined that a simple majority vote was needed to pass the legislation. As this Court has reiterated time and time again, the rules of statutory

construction are designed to ascertain and enforce the intent of the legislature. See *Red Stick Studio Development, L.L.C. v. State ex rel. Department of Economic Development*, 56 So.3d 181 (La. 2011) and *M.J. Farms, Ltd. v. Exxon Mobile Corp.*, 998 So.2d 16 (La. 2000). The intent of the legislature is easy to ascertain in this case because the intent of the legislature is specified in the legislation itself.

Moreover, even if the Louisiana legislature had failed to specify the intent of Act 3 in the Act itself (it did not), the modification to the definition of “sale at retail” could still not be considered a new tax. To the extent that Act 3 clarifies (or even changes) an exclusion from an existing sales tax, Act 3 cannot, by definition constitute a “new tax” as an exclusion necessary pre-supposes an already existing tax. Of course, Act of 2016 does not impose any new tax (the sales tax long predates the enactment of Act 3) and does not increase any existing tax (and does not purport to do so). In order to determine that the Louisiana legislature *intended* to pass a new tax one must ignore *everything* the legislature did in this case and arrive at an *opposite* conclusion. The legislature expressly stated it was *clarifying* the existing definition of “sale at retail”, found that Act 3 would not raise additional revenue and expressly determined that a mere majority vote was necessary to pass its clarifying and interpretive legislation.

This Honorable Court has found that the legislature is free to pass interpretive legislation in response to judicial interpretations which the legislature believes run afoul of legislative intent. See *Mallard Bay Drilling, Inc. v. Kennedy*, 914 So.2d 533 (La. 2005) and *Unwired Telecom Corp. v. Parish of Calcasieu*, 903 So.2d 392 (La. 2005). Such is precisely what the legislature did here in order to clarify the intent of the statute in the wake of NISCO I. Any statutory interpretation which is the polar opposite of that which the Louisiana legislature expressly states is intended, necessarily runs afoul of the basic tenets of statutory construction spelled out in *Red Stick Studio Development* and *M.J. Farms*, *supra*.

**ACT 3 CANNOT BE DEEMED A “NEW TAX” AS IT MERELY
MIRRORS THE “USE TAX” IMPOSED BY LA. R.S. 47:302(A)**

Sales and use taxes in Louisiana are complimentary. In fact, the last sentence of Section 2 of La. R.S. 47:302(A) (the “use tax”) specifically states “provided there be no duplication of the tax.” Clearly, a use tax is not owed if a sales tax is paid instead and visa-versa. The corollary to this, of course, is that La. R.S. 47:302(A) read as a whole, clearly contemplates that all retail sales be taxed and that all sales not deemed “retail sales” be taxed if the product purchased is used or consumed as opposed to being re-sold (the “use” portion of the tax). This is expressly embodied within the definition of “use” found in La. R.S. 47:301(18)(a)(i).

Nothing in Act 3 of 2016 changes any of this. This “use tax” portion of the sales and use tax is a pre-existing tax. Act 3 of 2016 merely incorporates into the definition of “sale and retail” additional clarification of this concept which already existed by virtue of the use tax provision. The complimentary structure between sales and use tax both implicitly and explicitly authorizes payment of a use tax where no sales tax is paid but the purchased product is used or consumed instead of being resold. Consequently, since Act 3 of 2016 merely reiterates this already existing concept, it cannot be said that Act 3 created a “new tax” at all.

CONCLUSION

In the wake of Hurricane Laura, and the shrinking tax base that has resulted therefrom, the Calcasieu Parish Sheriff’s Office (and other public bodies rendering essential public services) can ill afford to forgo collection of any sales and use taxes from the ultimate consumer. Act 3 of 2016 of the Louisiana legislature was designed to close an unintended and unforeseen loophole (never intended by the legislature) which allowed a manufacturing end user to avoid *all* sales and use tax even when it was the ultimate consumer and user of most of the product.

While it was understood that Act 3 of 2016 does not apply to NISCO I and any litigation pending when Act 3 was passed, Act 3 should not be judicially repealed going forward. For all the reasons set forth above, as well as those set forth by Appellants/Applicants, the Calcasieu Parish Sheriff’s Office respectfully urges this Honorable Court to apply Act 3 of 2016 to this instant case and REVERSE the judgment of the Court of Appeal.

Respectfully submitted,

COX, COX, FILO, CAMEL & WILSON, L.L.C.

By:



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ENFORCEMENT DISTRICT SALES TAX**

AFFIDAVIT VERIFYING SERVICE

STATE OF LOUISIANA

PARISH OF CALCASIEU

BEFORE ME, the undersigned authority, personally came and appeared Thomas A. Filo, who deposed and stated that he is an attorney for the **SHERIFF AND TAX COLLECTOR, TONY MANCUSO, TAX COLLECTOR FOR THE CALCASIEU LAW ENFORCEMENT DISTRICT SALES TAX**; that all of the allegations in the foregoing are true and correct to the best of his knowledge; that copies of the foregoing have been emailed and mailed to all counsel of record and the respondent judge, on this 25 day of June, 2021, by placing copies addressed to each of them in the United States mail, postage prepaid and properly addressed as follows:

Honorable Ronald F. Ware
14th Judicial District Court Judge
P.O. Box 3210
Lake Charles, LA 70601
Respondent Judge

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THOMAS A. FILO

SWORN TO AND SUBSCRIBED before me, Notary Public, this 25 day of June, 2021.


NOTARY PUBLIC

Amy Maynard
Notary ID #82767