SUPREME COURT OF LOUISIANA

No. 96-C-0716

consolidated with

No. 96-C-2218

STATE OF LOUISIANA AND BEN MORRISON, AS SUCCESSOR TO RALPH SLAUGHTER, SECRETARY, DEPARTMENT OF REVENUE AND TAXATION, STATE OF LOUISIANA

versus

BP EXPLORATION & OIL, INC.

consolidated with

STATE OF LOUISIANA AND BEN MORRISON, AS SUCCESSOR TO RALPH SLAUGHTER, SECRETARY, DEPARTMENT OF REVENUE AND TAXATION, STATE OF LOUISIANA

versus

STAR ENTERPRISE

ON WRITS OF CERTIORARI TO THE COURT OF APPEAL,
FOURTH CIRCUIT, STATE OF LOUISIANA

KIMBALL, J., concurring in result only.

I concur in the majority's determination that La. R.S. 47:305(D)(1)(h) is a valuation provision and not an exemption, such that refinery gas may only be taxed at the value specified in that statute. However, due to the particular factual circumstances existing in these cases, I concur only in the result reached by the majority regarding the taxation of coke-on-catalyst.

Both the majority and concurring opinion acknowledge that this court determined coke-on-catalyst, when consumed by a refinery as an energy source, is subject to a use tax. *Ante* at 11-12, concurring opinion at 1-2; *see also BP Oil Company v. Plaquemines Parish Government*, 93-1109 (La. 9/06/94), 651 So.2d 1322; La. R.S. 47:302. However, despite the fact that this court has previously determined the consumption by refineries of coke-on-catalyst for energy production purposes constitutes a *taxable event*, both the majority and the concurring opinion conclude, for different reasons, that coke-on-catalyst has no *taxable value* for use tax purposes under the applicable statutory and regulatory scheme. In my view, both the majority and the concurring opinion err in this

conclusion.

La. R.S. 47:302A provides that use taxes can be imposed on the use of tangible personal property based on the "cost price" of the property. La. R.S. 47:301(3)(a), in pertinent part, defines "cost price" as "the actual cost of the articles of tangible personal property..., or the reasonable market value of the tangible personal property at the time it becomes susceptible to the use tax, whichever is less." The Department, in accordance with the Administrative Procedures Act, has, in Regulation 4301, construed "reasonable market value," as that phrase is used in the statute, to mean "the amount a willing seller would receive from a willing buyer in an arms-length exchange of similar property at or near the location of the property being valued." La. Admin. Code 61:I.4301(3). Contrary to the majority, I do not find the definition of "reasonable market value" contained in Regulation 4301 to be inconsistent with La. R.S. 47:301(3)(a).[1] In my view, the regulation does not, as the majority asserts, attempt to "tax tangible personal property based on the value of `similar property.'" *Ante* at 14. Instead, Regulation 4301 employs a method long accepted in other valuation contexts to determine the reasonable market value of property upon which a tax has been levied by statute. In fact, in other contexts, such as an expropriation, this court has not only upheld, but strongly advocated the use of "comparables," *i.e.*, what a willing buyer would pay a willing seller for similar property, as the proper method for the determination of the "fair market value" of the property being expropriated. *See, e.g., West Jefferson Levee District v. Coast Quality Constr. Corp.*, 93-1718, pp. 15-16 n.23 (La. 5/23/94), 640 So.2d 1258, 1272, and cases cited therein. In my view, no significant distinctions between "*reasonable* market value" and "*fair* market value" exist. Instead, the legislature's use of "reasonable" as opposed to "fair" indicates nothing more than an acknowledgment by the legislature that the cost price of property for use tax purposes might well have to be determined in the absence of an actual market. There is, therefore, no valid reason for discarding this method of determining the "reasonable market value" of coke-on-catalyst as inconsistent with La. R.S. 47:301(3)(a)'s requirement that the use tax be levied upon the "reasonable market value of the tangible personal property at the time it becomes susceptible to the use tax," when we have long held the "fair market value" of expropriated property is determined through

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1 The concurring opinion asserts that "it is not necessary to reach Rule 4301 to conclude that coke-on-catalyst has no reasonable market value." Concurring opinion at 4. For reasons discussed *infra*, I disagree.

examination of comparable properties. In essence, the majority's reasoning leads to the absurd result of the Department's Regulation being declared invalid for following a methodology for determining the "reasonable market value" of property long accepted by this court. With such reasoning I cannot agree.

Having erroneously and unnecessarily invalidated the Department's Regulation, the majority declares "the Department produced no evidence of the reasonable market value of coke-on-catalyst." *Ante* at 14.[2] However, while the trial courts' determinations of the reasonable market value of coke-on-catalyst are clearly wrong such that the Department in these particular cases *may* be held to have failed to prove, as it is required to do, the reasonable market value of coke-on-catalyst, the majority has gone much further and decided "coke-on-catalyst is not subject to use taxes because it has no reasonable market value." *Ante* at 15. In my view, there is a great deal of difference between deciding the trial courts' valuations are erroneous such that the Department failed to prove the reasonable market value of coke-on-catalyst in these particular cases and both the majority and concurring opinion's determinations that, under the applicable statutes and regulations, coke-on-

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[2] The concurring opinion correctly notes there is no "actual market" for coke-on-catalyst, and then incorrectly relies on this state of affairs to conclude:

> It is simply illogical to assert that there is a market for the sale of a property to a `willing buyer' under circumstances in which the property, due to technological and economical constraints, can only be consumed by its manufacturer. Thus, it must follow that a property cannot be found to have a reasonable market value where no market does--or even **can**--exist. Accordingly, because there is no current (nor, at least on this record, possible) actual market for coke-on-catalyst, I agree with the majority that coke-on-catalyst has no reasonable market value.

Concurring opinion at 6. However, as explained *supra*, the "willing buyer" formulation is nothing more than an expression of a methodology employed to determine the value of property, such as coke-on-catalyst, for which no market exists. Clearly, an actual market exists for *energy*. In this regard, I doubt anyone would dispute the fact that if a refiner used the coke-on-catalyst to generate steam and spin a turbine to produce electricity, the refiner's consumption of that electricity would be taxed. The only difference between that use of coke-on-catalyst and the use to which these refiners have actually put coke-on-catalyst is that coke-on-catalyst, until it is converted into measurable energy units, is difficult to value. It is, therefore, not at all "illogical" to determine the reasonable market value of coke-on-catalyst by comparing it to other energy sources, taking into account, much as is done with "comparables" in the appraisal of real estate for expropriation purposes, the differences between the various sources of equivalent amounts of energy to derive the relative value of each type of energy source. This, in fact, is what the "free market" does every day to determine the relative values of the various forms of energy available to consumers. As such, it is simply not necessary for an actual, or even possible market to exist for coke-on-catalyst to have a use tax value to the consuming refiner or to be valued under the "reasonable market value" formulation, and it certainly does not, as the concurring opinion asserts, follow that because an actual market does not exist, coke-on-catalyst has no reasonable market value.

catalyst has and, more importantly, can have, no reasonable market value.

The Department has the burden in these cases of producing evidence of the "reasonable market value" of coke-on-catalyst. Once the Department has done so, the taxpayer, should he believe the Department's "reasonable market value" to be too high, has the burden of proving a lower value. In the instant cases, the Department acquiesced in these taxpayers' assertions that the "actual cost" of coke-on-catalyst is far higher than its "reasonable market value." However, the Department then proved to the satisfaction of these trial courts that the *reasonable* market value of coke-on-catalyst is natural gas on an energy equivalent basis. In my view, these determinations are clearly wrong. According to the evidence adduced, natural gas is the ideal fuel for these refiners. In contrast, the evidence shows coke-on-catalyst suffers from several problems not associated with the use of natural gas. The failure to account for these differences in determining the reasonable market value of coke-on-catalyst is no different than a failure to adjust the value of property being valued in an expropriation case to reflect differences in the "comparables" by which it is being valued, and renders the trial courts' determinations in these cases manifestly erroneous. As such, the majority should have conducted a *de novo* review of the record evidence to determine whether the Department had adduced other evidence sufficient for this court to determine the reasonable market value of coke-on-catalyst instead of erroneously declaring coke-on-catalyst simply has, and can have, no reasonable market value.

Therefore, though I would hold the trial courts' determinations of the "reasonable market value" of coke-on-catalyst in these particular cases is manifestly erroneous, I would not, as the majority and concurring opinions do, hold that coke-on-catalyst has, and can have, no reasonable market value whatsoever.