

Supreme Court of Louisiana

No. 96-C-0716

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.

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
FOURTH CIRCUIT COURT OF APPEAL

CALOGERO, C. J. concurring

I agree with the majority that coke-on-catalyst has no reasonable market value, but for reasons that are somewhat different than those expressed by the majority, as discussed hereinafter.

In *BP Oil Company v. Plaquemines Parish Government*, 93-1109 (La. 9/06/94), 651 So. 2d 1322 (“*BP Oil I*”),¹ this Court determined that coke-on-catalyst, when consumed by a refinery as an energy source, is subject to a use tax.²

¹Pursuant to Rule IV, Part 2, § 3, Chief Justice Calogero was not on panel in *BP Oil I*.

²LSA-RS 47:302 levies a tax upon the sale, use, or consumption of tangible personal property in Louisiana. LA. REV. STAT. ANN. § 47:302 (West 1990). “Tangible personal property” is

By an "order amending decision on denial of rehearing" in *BP Oil I*, this Court remanded to the district court, instructing that court to determine the taxable value of coke-on-catalyst in accordance with LSA-RS 47:301 through 318. *Id.* at 1336. Thus, although this Court in *BP Oil I* concluded that the refinery's consumption of coke-on-catalyst as an energy source was a *taxable event*, this Court expressed no opinion as to its *taxable value*.

To resolve the question of what the taxable value of coke-on-catalyst is in the consolidated cases before us, we must first look to LSA-RS 47:302(A)(2), which reads as follows:

A. There is hereby levied a tax upon the sale at retail, the use, the consumption, the distribution, and the storage for use or consumption in this state, of each item or article of tangible personal property, as defined herein, the levy of said tax to be as follows:

(2) At the rate of two per centum (2%) of the cost price of each item or article of tangible personal property when the same is not sold but is used, consumed, distributed, or stored for use or consumption in this state; provided there shall be no duplication of the tax.

LA. REV. STAT. ANN. § 47:302 (West 1990). Thus, LSA-RS 47:302(A)(2) requires that the amount of the use tax be calculated as a percentage of the "cost price" of the tangible personal property. "Cost price" is defined in LSA-RS 47:301(3)(a) as the *lesser* of the "actual cost" or the "reasonable market value" of the tangible personal property. *Id.* § :301(3)(a). Therefore, in order to determine the taxable value of coke-on-catalyst, both its "actual cost" *and* its "reasonable market value" must be determined.

defined as "personal property which may be seen, weighed, measured, felt or touched, or is in any other manner perceptible to the senses." *Id.* § :301(16). Coke-on-catalyst, a solid by-product of the crude oil refining process, is "tangible personal property" and is, thus, taxable, unless exempted from taxation by statute. No such exemption is applicable in the instant cases.

Actual Cost.³ The “actual cost” of coke-on-catalyst can be ascertained by reference to, on a proportionate basis, the actual cost of the raw material from which it is produced: crude oil.⁴ As recognized by this Court in *BP Oil I*, coke-on-catalyst is a by-product of the process of refining crude oil. Coke-on-catalyst is a solid, and crude oil is a liquid. Thus, to determine the actual cost of coke-on-catalyst on a proportionate basis to the crude oil from which it was produced, the amount of coke-on-catalyst used by the refinery must be converted to the fuel oil equivalent barrels (“FOEBs”) of crude oil, which is accomplished as follows: Both crude oil and coke-on-catalyst produce BTUs when burned. On average, crude oil has about 6 million BTUs per barrel. Thus, to determine the FOEBs of crude oil to the coke-on-catalyst used by the refinery, the total BTUs of coke-on-catalyst used by the refinery for a given period of time must be divided by 6 million to convert the coke-on-catalyst BTUs to FOEBs of crude oil. Finally, the number of FOEBs of crude oil is multiplied by the price of a barrel of crude oil, valued at the time of the purchase of the crude oil from which the coke-on-catalyst was produced. The result is the actual cost of coke-on-catalyst.⁵ As noted above, however, “actual cost” of the

³In this section of my concurrence, I express my view of how the "actual cost" of coke-on-catalyst could be calculated. In doing so, I am cognizant of the fact that this discussion is essentially dicta, as the majority and I reach the conclusion that the use of coke-on-catalyst is beyond taxation because it has no reasonable market value. Nonetheless, given that this is a concurring opinion, I include this discussion of the actual cost because it expresses my view.

⁴*Mobil Oil Corp. v. Johnson*, 442 N.E.2d 846 (Ill. 1982) is the only reported decision from another state to address the issue of determining the actual cost of coke-on-catalyst for the purpose of assessing use taxes. Therein, the Illinois Supreme Court concluded that the price of crude oil from which the coke-on-catalyst was produced was the proper basis upon which to calculate the actual cost of coke-on-catalyst.

⁵An illustration of the formula given above is as follows: If the refinery used 27 million BTUs of coke-on-catalyst over a given period of time, the first step would be to divide the 27 million BTUs of coke-on-catalyst by 6 million, the number of BTUs in a barrel of crude oil, to determine the number of fuel oil equivalent barrels ("FOEBs") of crude oil. In this example, the result would be 4.5 FOEBs of crude oil (27 million divided by 6 million). In other words, 4.5 barrels of crude oil would contain the same number of BTUs as the coke-on-catalyst used by the refinery in this example. To determine the actual cost of the coke-on-catalyst used in dollars, simply multiply the number of FOEBs of crude oil, in this example 4.5, to the actual cost of a single barrel of crude oil. For example, if the actual cost of a single barrel of crude oil was \$30.00, then the actual cost

coke-on-catalyst is but part of the equation for determining the “cost price” of coke-on-catalyst. The “reasonable market value” must also be determined, as earlier noted, for the statute calculates the use tax as a percentage of the "cost price," which, in turn, is defined as the lesser of "actual cost" or "reasonable market value."

Reasonable Market Value. Although LSA-RS 47:301(3)(a) directs us to determine the “reasonable market value” of the tangible personal property to be taxed, the statute gives no guidance as to the proper method of determining the reasonable market value. The Department of Revenue and Taxation has promulgated, in accordance with the Administrative Procedures Act, Rule 4301, which reads, in pertinent part, as follows:

[T]he reasonable market value of tangible personal property is 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. The amount which would be realized from a “forced” sale is not acceptable as the market value for this purpose.

LA. ADMIN. CODE tit. 61, § I.4301(3) (1987).

Both district courts in the consolidated cases before us applied the above-quoted definition in Rule 4301 and concluded that the reasonable market value of coke-on-catalyst was the readily ascertainable value of natural gas on an energy equivalent basis, finding that natural gas was a “similar property” to coke-on-catalyst. The majority concludes that “[t]o the extent that the tax regulation [Rule 4301] attempts to tax tangible personal property based on the value of 'similar property,' that regulation is inconsistent with La. R.S. 47:301 and thus invalid under La. R.S. 47:1511.” Slip op. at 14-15. For the reasons that follow, I believe that it is not necessary to reach Rule 4301 to conclude that coke-on-catalyst has no reasonable market value.

of the coke-on catalyst used by the refinery would be \$135.00 (4.5 multiplied by \$30.00).

Like the majority, I agree that no _____ is necessary to determine reasonable market value for the purpose of assessing a use tax.⁶ that the existence of--or, at the very least, the possibility of--an _____ for the property to be taxed is a necessary prerequisite to determining a property's *marketable* product, that is, a product that one person would be willing and able to understand, presuppose the existence of a market for the property at issue.

In the instant cases, the evidence is uncontroverted that there is at present no record to support the proposition that it would be technologically *impossible* create an actual market for coke-on-catalyst, as there is no known method to separate the coke-on-catalyst from the catalyst other than by burning it off of the

⁷ The State presented no evidence to

Rather, the State argues that coke-on-catalyst has a reasonable market value because the refinery creates its _____ market. Such an interpretation strains the words "reasonable market value" beyond their "generally prevailing meaning" and

⁶ In fact, a use tax is imposed only in the absence of an actual sale. If an actual sale did exist,

The physical characteristics of coke-on-catalyst make it impractical, if not impossible, to extract it from the catalyst in order to sell it as a fuel to another party. As noted above, coke-on-catalyst is a by-product of the crude oil refining process that consists of very fine thread-like catalytic cracking unit, coke-on-catalyst is formed inside the tiny pores of the catalyst. To further complicate attempts to extract the coke-on-catalyst, only a minute amount of coke-on-catalyst is surface area of a hundred square meters with only five-hundredths of a gram--about a drop--of coke-on-catalyst spread out over that enormous surface. Moreover, the life span of coke-on-

construed in favor of the taxpayer. *See Tarver v. E.I. Du Pont De Nemours & Co.*, 93-1005 (La. 3/24/94), 634 So. 2d 356, 358; *Cox Cable New Orleans v. City of New Orleans*, 624 So. 2d 890, 895 (La. 1993); *McNamara v. Central Marine Serv.*, 507 So. 2d 207, 208 (La. 1987); *see also* LA. CIV. CODE ANN. art. 11 (West 1993). 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. Further, because the relevant statute directs us to use only the lesser of actual cost or reasonable market value as the "cost price" of the tangible personal property to be taxed, coke-on-catalyst, having a reasonable market value of zero, has no taxable value for use tax purposes. Of course, the legislature, if it so chooses, can amend the appropriate taxing statute to provide a statutory valuation formula for coke-on-catalyst or amend the definition of "cost price" to permit greater leeway in valuing coke-on-catalyst for use tax purposes.⁸

For the reasons given above, I respectfully concur.

⁸By our assessment--the majority's and mine, there is admittedly a void: a tangible substance, the use of which, in theory, creates a taxable event, yet because of the present statutory method for valuing it, is beyond taxation. This void, however, can only be filled by the legislature, as suggested above. Of interest, the only change that the legislature did make, concerning the taxing of coke-on-catalyst following this Court's decision in *BP Oil I* and the commencement of the instant suits, was to prospectively exclude coke-on-catalyst from use taxes. *See* 1996 La. Sess. Law Serv. 444 (West) (to be codified at LSA-RS 47:301(18)(d)(ii)).