Supreme Court of Louisiana

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FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **10th day of December, 2021** are as follows:

BY Crichton, J.:

2021-OC-00552 ***CALCASIEU PARISH SCHOOL BOARD SALES & USE DEPARTMENT, ET AL. VS. NELSON INDUSTRIAL STEAM COMPANY (PARISH OF CALCASIEU)***

AFFIRMED. SEE OPINION.

Weimer, C.J., dissents and assigns reasons.
Hughes, J., dissents for the reasons assigned by Weimer, C.J.

SUPREME COURT OF LOUISIANA

No. 2021-OC-00552

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

VS.

NELSON INDUSTRIAL STEAM COMPANY

On Supervisory Writ to the 14th Judicial District Court, Parish of Calcasieu

CRICHTON, J.

In this matter Calcasieu Parish School Board Sales & Use Tax Department and Kimberly Tyree, in her capacity as Administrator thereof (collectively, "CPSB") appeal the Third Circuit Court of Appeal's declaration that 2016 Act No. 3 ("Act 3") is unconstitutional for violating La. Const. Art. VII, § 2 (the "Tax Limitation Clause").[1] The Third Circuit held that Act 3 is a "new tax" and therefore unconstitutional under the Tax Limitation Clause for failure to garner a two-thirds (*i.e.*, supermajority) vote in each house of the Legislature. For the reasons set forth herein, we affirm.

FACTS AND PROCEDURAL HISTORY

Nelson Industrial Steam Company ("NISCO"), appellee, owns and operates an electrical power generating facility in Lake Charles in which it produces multiple products: electricity, steam, and ash. NISCO introduces limestone into its process for the dual purposes of inhibiting its sulfur emissions and producing saleable ash that is generated by the chemical reaction of the limestone and sulfur.[2] NISCO sells

[1] La. Const. Art. VII, § 2 provides: "The levy of a new tax, an increase in an existing tax, or a repeal of an existing tax exemption shall require the enactment of a law by two-thirds of the elected members of each house of the legislature."

[2] NISCO employs "circulated fluidized boilers" (CFB) technology, which uses petroleum-coke as fuel to produce steam and, in turn, electricity. NISCO mixes limestone with the petroleum-coke to

the ash to Louisiana Ash for an amount that is less than the cost of the limestone and thereby generates income that subsidizes its operations.[3]

After not taxing NISCO for its limestone purchases for many years, the Louisiana Department of Revenue ("LDR") and CPSB sued NISCO to collect unpaid taxes for its limestone purchases between 2005 and 2012. The suit came before this Court in *Bridges v. Nelson Indus. Steam Co.*, 2015-1439 (La. 5/3/16), 190 So. 3d 276 ("*NISCO I*"), in which we determined the limestone purchases were excluded from sales tax of sales at retail under the "further processing exclusion" as then set forth in La. R.S. 47:301(10)(c)(i)(aa).[4]

Before *NISCO I* was final – *i.e.* before this Court denied rehearing – Act 3 was passed into law in the 2016 Second Extraordinary Session with less than a two-thirds favorable vote of the members of both houses of the Legislature.[5] Whereas the pre-Act 3 "further processing exclusion" simply provided "[t]he term 'sale at retail' does not include sale of materials for further processing into articles of tangible personal property for sale at retail," Section 1 of Act 3 amended La. R.S. 47:301(10)(c)(i)(aa) to read:

> (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.

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inhibit the production of sulfur in an effort to comply with regulations promulgated by the Louisiana Department of Environmental Quality and the U.S. Environmental Protection Agency.

[3] In prior years NISCO sold approximately 200,000 tons of ash annually to Louisiana Ash. The revenue generated from the sale of ash in 2013 was $904,185, in 2014 was $911,479, and in 2015 was $936,030.

[4] Justice Knoll dissented. Then-Associate Justice Weimer dissented in part, and Justice Hughes concurred in part and dissented in part for the reasons assigned by Justice Weimer.

[5] While a supermajority (31 of 39) of the Senate voted in favor of its passage, only a simple majority (54 of 105) of the House of Representatives supported Act 3.

> (II) For purposes of this Subitem, the term "sale at retail" shall not include the purchase of raw materials for the production of raw or processed agricultural, silvicultural, or aquacultural products.
>
> (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.

(Emphasis added.)

Section 2 of Act 3 provides that it is "intended to clarify and be interpretative of the original intent and application of R.S. 47:301(10)(c)(i)(aa)" and accordingly directed that the Act "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." The Legislature thus provided Act 3 would be made retroactive but was not to be applied to *NISCO I* or other pending litigation.[6]

Following these legislative amendments, CPSB brought the underlying lawsuit against NISCO to collect sales taxes on its limestone purchases, retroactively, for the tax periods of January 1, 2013 through December 31, 2015. CPSB alleged therein that NISCO's total tax liability for its purchases of limestone during the relevant periods was $809,776.54 and prayed for a judgment against NISCO in that amount plus interest and penalties.

On August 7, 2017, CPSB filed a motion for summary judgment seeking a ruling from the district court that its limestone purchases from January 1, 2013 through December 31, 2015 are taxable under La. R.S. 47:301(10)(c)(i)(aa)(III). NISCO filed a cross-motion for summary judgment on July 2, 2018, asserting it was

[6] The amendment became effective on June 23, 2016, but CPSB alleges that because it is interpretative it may be applied retroactively to the audit period.

entitled to judgment dismissing CPSB's suit as a matter of law for the following reasons: (1) Act 3 disparately treats sales tax and use tax purchases and is thus an unconstitutional denial of equal protection under La. Const. Art. I, § 3 and U.S. Const. Amend. XIV, § 1, (2) the ash NISCO produces is not an "incidental product" under Act 3 and, accordingly, NISCO's limestone purchases are not taxable thereunder, (3) Act 3 was unconstitutionally enacted in violation of the Tax Limitation Clause, (4) Act 3 unconstitutionally violates the separation of powers doctrine, (5) Act 3 unconstitutionally violates due process under U.S. Const. Amend. XIV, § 1 and La. Const. Art. I, § 2, and (6) CPSB's claim for collection for the 2013 tax year is prescribed.

On November 20, 2018, the district court granted summary judgment in favor of CPSB and denied NISCO's cross-motion for summary judgment, finding NISCO's production of ash is "incidental" to its manufacturing of electricity and thus "fits the definition of byproduct in Act 3 and it doesn't qualify NISCO for the [further processing exclusion]." The court of appeal reversed, citing *NISCO I* for the proposition that NISCO's ash is not incidental because it is "a well-planned intentional end product that was part and parcel of its manufacturing operation from day one." *Calcasieu Par. Sch. Bd. Sales & Use Dept. v. Nelson Indus. Steam Co.*, 2019-315 (La. App. 3 Cir. 3/18/20), 297 So. 3d 790, 797.

In a per curiam opinion, this Court reversed the court of appeal, holding the ash NISCO produces from the limestone is an incidental byproduct under the statutory definition set forth in La. R.S. 47:301(10)(c)(i)(aa)(III)(aaa) such that the limestone purchases are taxable under Act 3. *Calcasieu Par. Sch. Bd. Sales & Use Dept. v. Nelson Indus. Steam Co.*, 2020-724 (La. 10/20/20), 303 So. 3d 292 ("*NISCO II*"). Because NISCO's remaining assignments of error were pretermitted by the court of appeal's erroneous holding that the ash was not a byproduct, *NISCO II* remanded to the court of appeal "for consideration of remaining assignments of error

. . . including an analysis of whether the amendment is a new tax or an increase in a tax." *Id*.

On remand from *NISCO II*, the court of appeal found that Act 3 unconstitutionally violated the Tax Limitation Clause. *Calcasieu Par. Sch. Bd. Sales & Use Dept. v. Nelson Indus. Steam Co.*, 2020-724 (La. 10/20/20), 303 So. 3d 292. Because the judgment declaring a legislative act unconstitutional is reviewable under our appellate jurisdiction, we granted CPSB's application and ordered the matter lodged as an appeal. *See* La. Const. Art. V, § 5(D)(1).

ANALYSIS

The primary issue before this Court is whether Act 3 violates the Tax Limitation Clause for failure to garner a supermajority vote despite levying a new tax or increase in tax. The Tax Limitation Clause provides:

> *The levy of a new tax*, *an increase in an existing tax*, or a repeal of an existing tax exemption *shall require the enactment of a law by two-thirds of the elected members of each house of the legislature*."

La. Const. Art. VII, § 2 (emphasis added). The obvious purpose of this constitutional limitation on legislative authority is to guaranty that taxpayers will not be subjected to new or increased tax liability without a strong consensus in the Legislature.

It is undisputed that Act 3 did not garner support of two-thirds of the Louisiana House of Representatives. Accordingly, to determine whether Act 3 violates the Tax Limitation Clause, we must address whether the amendments to the "further processing exclusion" constitute a "new tax" or an "increase in an existing tax." Because this legal question arises in the context of cross-motions for summary judgment, the appropriate standard of review is *de novo*. *Gray v. American National Property & Casualty Co.*, 07-1670, pp. 6-7 (La. 2/26/08), 977 So. 2d 839, 844; *see also Comeaux v. La. Tax Comm'n*, 2020-01037 (La. 5/20/21), 320 So. 3d 1083, 1093 (La. 6/29/21) ("[T]his Court conducts a *de novo* review of a judgment that declares a statute unconstitutional.").

It is well-established that statutes are presumed to be valid. *Polk v. Edwards*, 626 So. 2d 1128, 1132 (La. 1993). The presumption of constitutionality is particularly forceful in the case of statutes enacted to promote a public purpose, such as statutes relating to public finance. *Id*. The Legislature's right to tax is limited, however, as the Constitution is the supreme law of this state to which all legislative instruments must yield. *Id*. at 1096. "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." *Succession of Lauga*, 624 So. 2d 1156, 1160 (La. 1993). Again, the apparent object of the Tax Limitation Clause is to limit the Legislature's ability to subject taxpayers to new or increased tax liability unless there is supermajority approval from both houses.

This Court has reviewed the constitutionality of amendments to the definitional sections of tax legislation similar to those effectuated by Act 3 and consistently held that, where something becomes taxable due to a legislative amendment, such amendment constitutes a new tax or increase in existing tax. *See Dow Hydrocarbons & Res. v. Kennedy*, 96-1471 (La. 5/20/97), 694 So. 2d 215 (finding reclassification of certain income as "allocable," which was only sometimes taxed, to "apportionable," which was always taxed at an apportioned rate, was either a new tax or increase in tax); *Cox Cable New Orleans, Inc. v. City of New Orleans*, 624 So. 2d 890 (La. 1993) (finding ordinance enacted a new tax by broadening the scope of a pre-existing amusement tax and rejecting City's argument that ordinance was clarifying the applicability of the tax to new technology); *Radiofone, Inc. v. City of New Orleans*, 616 So. 2d 1243 (La. 1983) (rejecting argument that pertinent ordinance was merely clarifying existing law and finding the definition amendments expanded the scope of taxable items and therefore constituted a "new tax").[7]

[7] Although these cases interpret varying constitutional limitations on the Legislature's authority to enact legislation that levies a new tax or increases an existing tax, we give the terms "levy a new tax" and "increase in an existing tax" in La. Const. Art. VII, § 2 the same construction and

In *Dow Hydrocarbons*, the Court set forth that a legislative amendment clearly constitutes a new tax or increase in tax where taxpayers are liable for taxes post-amendment for which they were not liable pre-amendment:

> 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 is characterized as a new tax or an increase to an existing tax as both are violative of [Louisiana Constitution] Article III, Section 2.

Dow Hydrocarbons, 697 So. 2d at 217. While *Dow Hydrocarbons* involved the scope of income tax and the present matter affects the exclusion of certain transactions from sales tax, the analysis is the same.

In *NISCO I* this Court reviewed the applicability of the further processing exclusion to NISCO's purchases of limestone. The Court indicated that because the further processing exclusion is an *exclusion* from tax – as opposed to a tax exemption – the transactions to which it applies are not taxable because they "fall[] outside the scope of the statute giving rise to the tax, *ab initio*" and are "beyond the reach of the tax." *NISCO I*, 190 So. 3d at 280 (quoting Bruce J. Oreck, *Louisiana Sales & Use Taxation* (2d ed.1996), § 3.1.).

The Court determined that the characterization of ash as a "byproduct" was irrelevant under the pre-Act 3 further processing exclusion, reasoning:

> 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.

Id. at 282. NISCO purchases the limestone, the Court found, "with the *purpose of inclusion*" in its saleable ash product such that the sales qualify for the further

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interpretation as those same terms in another constitutional provision limiting the Legislature's power to impose a new or increased tax, such as La. Const. Art. III, § 2. *See Dow Hydrocarbons*, *supra*; La. C.C. art. 13 ("Laws on the same subject matter must be interpreted in reference to each other.").

processing exclusion even if the purpose of inclusion in ash is merely the secondary purpose for which the limestone is acquired. *Id*. at 285; *see also Int'l Paper, Inc. v. Bridges*, 2007-1151 (La. 1/16/08), 972 So. 2d 1121, 1134 ("[W]e recognize that raw materials "further processed" into end products are excluded from the sales and use tax provisions when . . . (3) the raw materials are *materials for further processing,* and as such, are purchased with the *purpose of inclusion* in the end products") (emphasis in the original). The *NISCO I* court "decline[d] to adopt a compromise approach espoused by [CPSB and LDR] . . . apportioning the tax exclusion based upon the percentage of the material that ends up in the final product." *Id*. at 285. The Court noted that "[n]o majority opinion has ever adopted this approach, nor is there any statutory authority to support this divisible taxing theory." *Id.* at 285 (collecting cases, highlighting that in earlier cases a percentage of the raw materials did not end up in the end product).

The *NISCO I* majority expressed no ambivalence in its conclusion that incorporation of an economic test excluding sales of raw materials for further processing into byproducts would require a legislative change:

> 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.* Until then, we note the existing expression of legislative intent in SCR 136 (2007 Reg. Sess.), which encourages courts and the Louisiana Department of Revenue to adhere to the exclusive three-prong test set forth by the courts. Particularly, the legislature recognized that many other states do not tax *any* raw materials used in the manufacturing of products for resale. Deviation from this three-prong test, as warned by the legislature, could "undermine the efforts of Louisiana to attract additional investment dollars in the state." Accordingly, *we find the conclusion reached herein best comports with the legislative intent regarding taxation of materials further processed into articles of tangible personal property.*

NISCO I, 190 So. 3d at 286–87 (emphasis added). This Court's interpretation of the pre-Act 3 further processing exclusion was clear: NISCO's limestone purchases

were outside the scope of the pre-Act 3 sales tax regime, *ab initio*, regardless of the end product's relative profitability.

In contrast, the Act 3 amendments to the further processing exclusion do include an economic consideration, directing that materials further processed into a byproduct "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). A byproduct is defined by the statute as "any incidental product that is sold for a sales price less than the cost of the materials." *Id*.

Reviewing these changes to La. R.S. 47:301(10)(c)(i)(aa), this Court in *NISCO II* determined that the same limestone purchases that were not taxable under the pre-Act 3 sales tax have been rendered taxable by Act 3. In support of this holding, the Court reasoned:

> It is clear the legislature included within the scope of the term "byproduct" any product that is secondary to a primary product when it is sold for a price less than the cost of its materials. The ash at issue is plainly secondary to the electricity, and the sales price of the ash is less than the cost of the limestone. As such, the purchase of limestone, which is a material further processed into ash, "shall not be deemed to be sales for further processing and shall be taxable."

Id. (quoting La. R.S. 47:301(10)(c)(i)(aa)(III)(aaa)) (emphasis added). *NISCO II* thus recognized that the very same transaction that was found not to be subject to taxation in *NISCO I* was subject to taxation pursuant to La. R.S. 47:301(10)(c)(i)(aa) *as amended by Act 3* because the amendments incorporated an economic test that the law previously did not recognize. In narrowing the further process exclusion to exclude purchases of materials that are further processed into a byproduct, the Act subjected NISCO's purchases of limestone, which were "beyond the reach of tax" before Act 3, to a new tax.[8]

[8] Subsection (III)(bbb) provides the purchaser of raw materials that are further processed into byproducts with a credit "in an amount equal to the sales tax collected and remitted by the seller on the taxable retail sale of the byproduct." Effectively, Act 3 thus attempts to apportion a tax credit for the raw materials (here, the limestone) further processed into the byproduct (here, the

The arguments CPSB advances are unpersuasive. CPSB relies on *Palmer v. Louisiana Forestry Comm'n*, 97-244 (La. 10/21/97), 701 So. 3d 1300, in support of its argument that Act 3 is not a new tax because it fits into the overall scheme of the tax structure. In *Palmer* the Court addressed the validity of an amendment to agency regulations that reclassified chip and saw wood products from the "pulpwood" category (5% tax) to the "trees and timber" category (2.25% tax). *Palmer* did not involve the Legislature's constitutional authority to levy a new tax but instead reviewed whether the agency exceeded its authority as delegated by the Legislature or otherwise unconstitutionally infringed on the Legislature's power to tax. *Id*. at 1306. In finding the reclassification of chip and saw was within the agency's statutory authority, the Court determined the regulatory amendment did not result in an imposition of a "new tax" because chip and saw "had always been a taxable item." Unlike in *Palmer*, however, NISCO's limestone purchases had not always been taxable; in fact, they have never been taxed.

CPSB also erroneously cites *Audubon Ins. Co. v. Bernard*, 434 So.2d 1072 (La. 1983), for the proposition that Act 3 is not a new tax if it is revenue neutral and, in doing so, asks this Court to create a new jurisprudential test to identify a "new tax." In *Audubon*, this Court distinguished legislation imposing taxes, which are intended to raise revenue, with legislation imposing regulatory fees, for which revenue may be raised incidentally to a different intent. *Id*. at 1074. The Court provided: "If the imposition has not for its principal object the raising of revenue, but is merely incidental to the making of rules and regulations to promote public order, individual liberty and general welfare, it is an exercise of police power." *Id*.

In the instant case, there is no dispute that La. R.S. 47:301(10)(c)(i)(aa) both pre- and post-Act 3 is legislation involving *a tax*, not a fee, on "sales at retail." By

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ash). In any case, *all* of the limestone purchases were deemed excluded from tax under *NISCO I*, so tax liability for *any* of the limestone purchases is new.

expanding the scope of taxable transactions thereunder, the only logical conclusion is that Act 3 imposes a tax liability on new transactions, as discussed above. *Audubon* is therefore inapposite and does not mandate the application of a "revenue neutral" exception to the Tax Limitation Clause.

Moreover, adoption of CPSB's proposed "revenue neutral" test would undermine the clear language of the Tax Limitation Clause, as it would permit the Legislature to "levy a new tax" if, in the same act, the Legislature provided a tax credit to offset the revenue raised. The plain language of the Tax Limitation Clause does not carve out any such exception.[9]

In a final effort to circumvent Act 3's failure to garner a supermajority vote, CPSB argues that Act 3 was interpretative and provides the original intent and purpose of the further processing exclusion. In essence, this argument asserts that *NISCO I* misconstrued the further processing exclusion and that Act 3 merely clarified its correct interpretation. CPSB asserts such clarifying amendments were

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[9] Further, even if a "revenue neutral" exception were to apply, CPSB presented no competent evidence that Act 3 is revenue neutral. CPSB's argument for revenue neutrality is premised on the theory that revenue raised by Act 3 is offset by a credit granted to taxpayers in La. R.S. 47:301(10)(c)(i)(aa)(III)(bbb). However, the plain language of Act 3, including this credit, does not inhibit our finding that Act 3 imposes a new tax. *See* Note 8, *supra*. In light of this, CPSB's argument necessarily assumes that pre-Act 3 taxpayers were paying taxes on materials further processed into byproducts without receiving the credit created in subsection (III)(bbb). The notion that taxpayers were paying a tax not due prior to Act 3 is unsubstantiated by any evidence in the record.

The only materials upon which CPSB relies in support of this argument is the fiscal note to Act 3, to which CPSB cites for its reference that "ZERO" additional revenue would result from its enactment. Assuming, *arguendo*, that these legislative materials should be considered as "evidence" that Act 3 is revenue neutral, the referenced fiscal note is entirely devoid of reliability. CPSB fails to recognize that the initial fiscal note to the original HB 27 (which became Act 3) stated that there was an "INCREASE" in revenue. The June 10, 2019 version of the fiscal note substitutes "INCREASE" for "SEE BELOW," where a "Revenue Explanation" provides in pertinent part: "[T]his legislation is expected to mitigate the state and local exposure regarding a recent decision . . . 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." This referenced increase to funds is made evident here where CPSB brought suit to recover $809,776.54 in taxes due to Act 3 making NISCO's limestone purchases taxable. The Act 3 legislative materials cannot overcome the fact that Act 3 *by its plain language* makes certain transactions taxable that were previously not taxable, thereby imposing a new tax.

In any event, revenue neutrality is not relevant to the Court's analysis of whether Act 3 violates the Tax Limitation Clause. It is well-established that the principle object of all taxes is to raise revenue. *See Audubon*, *supra*.

upon invitation by this Court because *NISCO I* indicated that the further processing exclusion was ambiguous. This argument fails for several reasons.

While we recognized in *NISCO I* that the "inherent ambiguity" in the further processing exclusion necessitated development of a jurisprudential test for its interpretation, *see also Int'l Paper*, *supra*, as stated above this Court unequivocally rejected the so-called interpretation of the further processing exclusion set forth in La. R.S. 47:301(10)(c)(i)(aa)(III). We found "nothing in the law" to support a primary product distinction in the exclusion, including "[t]he plain language of the statute," which we found contains "no distinction between primary products and secondary products." *NISCO I*, 190 So. 2d at 282. Instead, we expressly concluded that this interpretation finding the limestone purchases were excluded from tax *ab initio* "best comport[ed] with the legislative intent regarding taxations of materials further processed into articles of tangible property" and that any taxation of materials further processed into secondary products would require legislative changes to the current tax scheme. *Id*. at 286–87. Stated simply, we did not invite the Legislature to redefine the exclusion as it was interpreted by this Court.

Even if *NISCO I* had somehow invited the Legislature to correct its interpretation, CPSB's argument erroneously relies on *Unwired Telecom Corp v. Parish of Calcasieu*, 2003-732 (La. 1/19/05), 903 So. 2d 392, for the proposition that "it is the province of the Legislature to clarify the law when the courts indicate the necessity of doing so." *Id*. at 404 (citing *Grubbs v. Gulf Int'l Marine*, *Inc.*, 625 So. 2d 495 (La. 1993)). While the *Unwired* decision did indicate the Legislature may clarify the law when courts indicate it is necessary to do so, the Court did not find such facts were presented. To the contrary, the Court held that "statutory construction and interpretation of legislative acts is solely a matter of the judicial branch of government" and the Legislature's power to change the law does not include the power to legislatively overrule a Louisiana court, reasoning:

> 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 targeted an appellate court decision by professing to explain and interpret a statute and thus reach its "original" meaning, that is, the one the authors of the revised statute intended. *Such legislation effectively constitutes the adjudication of cases in contravention of LA. CONST. ANN. Art. II, § 2* [separation of powers]. (Emphasis added.)

Id. at 404–05; *see also* H. Alston Johnson, *Legislation – Procedure and Interpretation, Developments in the Law*, 1983–84, 45 La. L. Rev. 341, 344 (1984) (citing La. Const. Art. 2, §§ 1-2 for the proposition that "[t]here is serious doubt about the validity of [an interpretive] exception [to the rule of prospectivity] . . . because an 'interpretive' enactment begins to give the legislature judicial power.")); *St. Paul Fire & Marine Ins. Co. v. Smith*, 609 So. 2d 809, 818 (La. 1992) ("[I]nterpretive enactment begins to give the legislature judicial power."); *Mallard Bay Drilling, Inc. v. Kennedy*, 2004-1089 (La. 6/29/05), 914 So. 2d 533.[10]

Finally, although both *Unwired* and *Mallard Bay* analyzed whether legislation unconstitutionally impinged on separation of powers through retroactive application, the question there, as here, is whether the legislation unconstitutionally abrogated the judicial interpretation of the law:

> [I]t is not within the province of the Legislature to interpret legislation after the judiciary has already done so. 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*.

[10] Moreover, *Grubbs* – the case relied upon by *Unwired* for this proposition that the Legislature may clarify the law upon invitation by a court – is inapposite. In *Grubbs*, the Legislature's "interpretative" amendments were in response to the observation by a *federal* district court that the statute under review was ambiguous. 625 So. 2d 495, 503. This distinction is critical because the Louisiana Constitution does not expressly limit the ability of the Legislature to clarify the law following a ruling of a federal court. The Louisiana Constitution does, however, expressly prohibit each of the three branches of the *state* government from exercising power belonging to the other *state* branches. *See* La. Const. Art. II, § 2 ("Except as otherwise provided by this constitution, no one of these branches, nor any person holding office in one of them, shall exercise power belonging to either of the others."); La. Const. Art. V, § 1 ("The judicial power is vested in a supreme court, courts of appeal, district courts, and other courts authorized by this Article.").

Unwired, 903 So. 2d at 405 (emphasis added); *Mallard Bay*, 914 So. 2d at 544 (quoting same).[11] As in *Unwired* and *Mallard Bay*, Act 3 represents new substantive law passed under the guise of interpretative legislation. The amendments therein unquestionably legislatively overruled *NISCO I*'s interpretation of the further processing exclusion. Regardless of whether designated as "interpretative," a legislative enactment cannot abrogate this Court's interpretation of the tax code in order to increase tax liability without garnering sufficient support of the legislators pursuant to the Tax Limitation Clause. It matters not what the Legislature said, it matters what it did. And here, it imposed a new tax.

In sum, Act 3 rendered taxable the very purchases of limestone deemed excluded from tax by *NISCO I*. *See NISCO II*, *supra*. Because it thus created a "new tax" on these purchases, its failure to garner supermajority support violates the Tax Limitation Clause and renders the legislation unconstitutional thereunder.[12]

CONCLUSION

For the foregoing reasons, we find that Act 3 is a "new tax" and therefore unconstitutional under the Tax Limitation Clause for failure to garner a two-thirds (*i.e.*, supermajority) vote in each house of the Legislature. Accordingly, we affirm the ruling of the court of appeal dismissing CPSB's claims with prejudice.

AFFIRMED.

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[11] The Court recognized that in some cases the Legislature does have the authority to enact "*clearly* interpretive laws" clarifying the meaning of texts "outside the context of litigation" but warned that designations of legislative amendments "may be an improper exercise of power tending to attribute, contrary to constitutional guarantees, retroactive effect to *new* legislation." *Unwired*, 903 So. 2d at 405 (emphasis added) (quoting *St. Paul Fire & Marine Ins. Co. v. Smith*, 609 So.2d at 819); *see also Mallard Bay*, 914 So. 2d at 543 (citing *Unwired* for the proposition that the Legislature "clearly assume[s] a function more properly entrusted to the judicial branch of government" when abrogating a court's interpretation and application of a long-standing revised statute).

[12] Although NISCO challenged the constitutionality of Act 3 on numerous grounds, our finding that the Act violates the Tax Limitation Clause pretermits the remaining arguments related to its invalidity. Similarly, while ordinarily constitutional avoidance requires addressing non-constitutional challenges first, the principle of judicial restraint renders any discussion of NISCO's prescription argument, which relates only to the 2013 tax year and would not pretermit the constitutional question, unwarranted. *See Ring v. State, Dept. of Transp and Dev.*, 2002-1367 (La. 1/14/03), 835 So. 2d 423, 426.

SUPREME COURT OF LOUISIANA

NO. 2021-OC-00552

CALCASIEU PARISH SCHOOL BOARD SALES AND USE DEPARTMENT, ET AL.

VERSUS

NELSON INDUSTRIAL STEAM COMPANY

On Supervisory Writ to the 14th Judicial District Court, Parish of Calcasieu

WEIMER, C.J., dissenting.

While the well-written majority decision provides an excellent analysis of the authority of the judiciary to determine what the law means and of the supremacy of the judiciary in determining the meaning of the Louisiana Constitution, I very respectfully dissent.

In **Bridges v. Nelson Indus. Steam Co.**, 15-1439, pp. 6-7 (La. 5/3/16), 190 So.3d 276, 280-81 (a 4-3 decision) (**NISCO I**), the majority found that the limestone purchases were excluded from sales and use tax under the further processing exclusion in La. R.S. 47:301(10)(c)(i)(aa). While I agreed with the majority that the further processing exclusion applied to NISCO's purchases of limestone, I disagreed that the entirety of the limestone costs were excluded from sales tax under the further processing exclusion. Rather, I found that the use to which the limestone was put must be considered. In both **NISCO I** and this matter, a portion of the limestone was consumed during NISCO's fuel production process to inhibit sulfur emissions and a portion of it was further possessed into ash that was sold. Accordingly, in deciding the applicability of the exclusion to NISCO's limestone purchases, allocation of the costs of the limestone is approriate based on its use. The exclusion is designed to apply only to those materials that are "further process[ed] into articles of tangible

personal property for sale at retail;" here, the portion of the limestone that was further processed into ash.

I continue to believe that the legislature never intended for the further processing exclusion to apply to that portion of the limestone that was consumed during the fuel production process (the calcium carbonate), which was not further processed into the ash. Based on my belief that prior to the 2016 amendments to La. R.S. 47:301(10)(c)(i)(aa), sales tax was owed on that portion of the limestone that was not incorporated into the ash, I do not believe that the 2016 amendments to La. R.S. 47:301(10)(c)(i)(aa) by Act 3 resulted in the creation of a new tax. Accordingly, the corrective action urged by the majority of this court in **NISCO I**[1] that was taken by the legislature, simply clarified the prior law and is, therefore, interpretative in nature.

As the majority correctly recognizes:

> It is well-established that statutes are presumed to be valid. The presumption of constitutionality is particularly forceful in the case of statutes enacted to promote a public purpose, such as statutes relating to public finance.

Bridges v. Nelson Indus. Steam Co., 25-0052 (La. 12/__/21), slip op. at 6 (citations omitted).

The error in the interpretation in **NISCO I**, which in my opinion misconstrued the further processing exclusion, led to the legislative effort, requested by this court, to clarify the law. A majority of the Louisiana House of Representatives and a

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[1] See **Nelson Indus. Steam Co.**, 15-1439 at 16 ,190 So.3d at 286, in which the majority of this court felt "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."

supermajority of the Louisiana Senate responded with legislation which nets no additional income for the state according to the fiscal note attached to the legislation.

Accordingly, I believe that the passage of Act 3 of 2016 did not require a two-thirds vote of the legislature. For these reasons, I respectfully dissent from the majority's determination that Act 3 is unconstitutional.