

## Four Interesting Developments Out of Louisiana

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David R. Cassidy is of counsel with Breazeale, Sachse & Wilson LLP in Baton Rouge, Louisiana.

In this installment of Bonne Lecture, Cassidy reviews two constitutional amendments (one approved by voters and one rejected) on the Louisiana ballot in 2021, as well as two key state tax cases, *NISCO* and *Nucor Steel*.

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There were four developments in Louisiana taxes at the close of 2021 that will impact future years. Two dealt with proposed changes to the state's tax laws, while the other two involved the courts' interpretation of the existing laws. The following are my predictions (aka wild guesses) as to what will result from these developments.

### Proposed Changes to the Law

My last article<sup>1</sup> discussed two constitutional amendments the voters were asked to approve. The first proposal, an effort to meet the *Wayfair* guidelines by centralizing local tax collection at the state level,<sup>2</sup> was defeated. The second, which — among other things — lowered the top personal income tax rate from 6 percent to 4.75 percent, passed.

<sup>1</sup>David R. Cassidy, "Review of the Tax Acts of the 2021 Louisiana Legislature," *Tax Notes State*, Aug. 9, 2021, p. 653.

<sup>2</sup>*South Dakota v. Wayfair Inc.*, 138 S. Ct. 2080, 201 L.Ed.2d 403 (2018).

The *Wayfair* proposal's main opponent was New Orleans Mayor LaToya Cantrell, who viewed the Legislature's effort as a "naked power grab" — with the power grabbed being hers. Her opposition was effective: The amendment was defeated by 16,000 votes statewide, and 15,000 of those nays came from New Orleans.

The mayor's triumph may be short-lived, however, because within a week of the election, an out-of-state vendor, Halstead Bead, filed suit in the federal district court in New Orleans — claiming that under *Wayfair*, Louisiana's local tax collection system violates the U.S. Constitution's commerce clause. Several tax collectors, including the state and Orleans Parish, were named as defendants and have filed several exceptions to the suit. Speedy judicial resolution of the litigation is doubtful, so taxpayers have to look to the Legislature if they want a quick fix. In fact, H.B. 681, which calls for centralized collection of local taxes, was prefiled for the legislative session starting March 15. I think it is likely that the legislature and the mayor will work out their differences and centralized collection will be in place within the next two to three years.

Although the second proposal passed, the vote was closer than one might expect, with only 54 percent voting for it. Perhaps the voters' enthusiasm for a rate reduction was tempered by the fact that it also eliminated most of the personal itemized deductions (a deduction for medical expenses remains) and eliminated the deduction for federal income taxes. It will be interesting to see the voters' reactions when they file their tax returns and note the absence of their usual deductions — because many look on their deductions as a birthright. I think that some of these "lost" deductions will start creeping back into the law either outright or in the form of rebates or credits.

### Case Law

Two rather unusual decisions were rendered late in 2021. In *Nelson Industrial Steam Co. (NISCO II)*, the Louisiana Supreme Court found that the Legislature's attempt to negate the impact of one of the court's previous decisions was unconstitutional.<sup>3</sup> In *Nucor Steel*, Louisiana's Fifth Circuit Court of Appeal gave a very liberal reading to a prescription statute while invoking the doctrines of collateral estoppel and detrimental reliance (which are equivalent to the doctrine of equity used in other jurisdictions) to preserve a taxpayer's right to request a refund.<sup>4</sup>

#### The *NISCO* Cases

In 2016 Nelson Industrial Steam Co. (NISCO) was sued for sales taxes on its purchases of limestone.<sup>5</sup> NISCO uses the limestone as a scrubbing agent to reduce pollution resulting from its production of electricity. A byproduct of the scrubbing process is an ash, which is sold by NISCO to a third party that in turn sells it to its customers. NISCO realizes little, if any, profit from its sale of the ash.

NISCO claimed that since the ash came from the limestone, the limestone was in effect a raw material, so its purchase was tax free under Louisiana's further processing exclusion set forth in R.S. 47:301(10)(c)(i). The tax collectors — the state of Louisiana and Calcasieu Parish — disagreed, claiming that the further processing exclusion was only applicable to the purchase of those materials purchased for the primary purpose of resale. The collectors argued that NISCO's primary purpose for purchasing the limestone was for use in pollution control, not for processing it into a salable item. The court agreed with the taxpayer.<sup>6</sup>

In anticipation of the court's decision, the Legislature amended the further processing

exclusion to retroactively clarify its meaning and to conform it to the collectors' position (Act 3 of the 2nd Extraordinary Session of 2016). The act excluded nonprofitable byproducts from the scope of the reprocessing exclusion. (The act defined a nonprofitable byproduct as one sold for less than the cost of producing it.) Act 3 was made applicable to all open periods.

The collector for Calcasieu Parish later sued NISCO for the taxes that would have been owed on the limestone if Act 3 was retroactively applied to tax years 2013-2015. An appellate court found that even under the law as amended, the limestone was still excludable from tax.<sup>7</sup> The supreme court granted writs and in a per curiam decision, found that under the amended law, the ash was a nonprofitable byproduct and was therefore taxable.<sup>8</sup> The supreme court remanded the case to the appellate court.

On remand, the court of appeal found that Act 3 violated Article VII, section 2 (the tax limitation clause) of the Louisiana Constitution, which requires that any act that levies a new tax, increases an existing tax, or repeals an existing tax exemption be approved by a supermajority in each chamber.<sup>9</sup> Although the court's opinion was somewhat vague as to whether Act 3 constituted a new tax, an increase in an existing tax, or the repeal of an exemption, the concurring opinion thought it was clearly a new tax. Since the decision declared the statute unconstitutional, review by the state supreme court was mandatory.<sup>10</sup>

The collector made several arguments at the supreme court. Although not clearly set out in the opinion, one appeared to be that Act 3 was not a new tax since both before and after its passage, only items meant for further processing were excluded from tax. Under Act 3, the purchase of limestone was, by definition, deemed not to be for further processing because it was not profitable. The court disregarded this

<sup>3</sup> *Calcasieu Parish School Board Sales & Use Department v. Nelson Industrial Steam Co.*, 2021-00552 (La. 2021) (*NISCO II*).

<sup>4</sup> *Nucor Steel Louisiana LLC v. St. James Parish School Board*, 20-247 (La. App. 5 Cir. 2021), writ granted, 2021-01814 (La. 2022).

<sup>5</sup> *Bridges v. Nelson Industrial Steam Co.*, 190 So.3d 276, 2015-1439 (La. 2016) (*NISCO I*).

<sup>6</sup> *NISCO I*, 190 So.3d at 276.

<sup>7</sup> *Calcasieu Parish School Board Sales & Use Department v. Nelson Industrial Steam Co.*, 2019-315 (La. App. 3 Cir. 2020).

<sup>8</sup> *Calcasieu Parish School Board Sales & Use Department v. Nelson Industrial Steam Co.*, 303 So. 3d 292, 2020-00724 (La. 2020).

<sup>9</sup> *Calcasieu Parish School Board*, 2019-315 (La. App. 3 Cir. 2021).

<sup>10</sup> *NISCO II*.

bit of sophistry, stating that since limestone was not taxable before Act 3 but was afterward, Act 3 was a new tax.<sup>11</sup>

The collector also argued that Act 3 was not a tax because it was revenue neutral. (This argument was based on a line of cases finding that some charges constituted fees, not taxes, because the purpose of the charges was to offset expenses, not raise revenue.) According to the court, the collector presented “no competent evidence” that Act 3 was revenue neutral, and in any event, Act 3 taxed items that were not previously taxed and therefore was a tax.<sup>12</sup>

Finally, the collector argued that Act 3 was not a new tax because the court in *NISCO I* had “misconstrued the further processing exclusion” and Act 3 merely clarified the correct interpretation. The court rarely looks kindly on legislative efforts to clarify the law in wake of a supreme court decision, and its reaction in this case was no different. The court, citing previous cases as justification, stated 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.” The court then ruled that Act 3 was a “new tax” and therefore unconstitutional under the tax limitation clause since it failed to garner a two-thirds vote in each house of the Legislature.<sup>13</sup>

The result of the *NISCO* saga is that *NISCO I* is still good law, and there is no primary purpose test associated with the further processing exclusion. The Legislature could, of course, nullify *NISCO I* by passing legislation similar to Act 3 by the required two-thirds vote. (Any new statute could only have a prospective effect, however.) That probably won’t happen in 2022, because Article III, section 2(A) of the Louisiana Constitution places certain restrictions on the enactment of taxes, exemptions, and exclusions in a regular session held in an even-numbered year such that although the exclusion could be amended for the purposes of Calcasieu’s tax, it

could not be amended for purposes of the state tax — and it is unlikely that lawmakers would call a special session to raise taxes when the state is flush with cash. But Calcasieu was recently devastated by two hurricanes and could use the money. I expect the Legislature to revisit the issue in 2023.

### The *Nucor Steel* Case

In Louisiana, a taxpayer generally has three years from December 31 of the year when the taxes were due or one year from the date they were paid — whichever is later — to recover sales or use taxes paid to a local collector.<sup>14</sup> The collector then has one year from date of receipt to accept or deny the claim.<sup>15</sup> If the collector denies the claim, the taxpayer has 90 days to appeal to the Board of Tax Appeals. If the collector has “failed to act” within that one-year period, then the taxpayer has 180 days from the end of that year to appeal to the board.<sup>16</sup> If the taxpayer fails to timely file an appeal with the board, then the claim is prescribed.

Nucor timely filed its claim with the collector on January 26, 2016. Over the next two years, the collector asked for and received additional information from Nucor. The parties even discussed a possible settlement; however, on February 23, 2018, the collector issued a letter denying the refund. The letter stated that Nucor had 30 days to ask for a hearing with the collector to review the decision or 90 days to file an appeal with the board.

Nucor asked for and got a hearing. As a result of the hearing, the collector amended its findings but still denied a portion of the claim. On May 24, 2018, Nucor filed its appeal with the board.

The collector filed a motion asking that the board dismiss Nucor’s suit on the grounds that under 337.81, Nucor had until only July 25, 2017 (that is, one year plus 180 days from the date the refund claim was filed) to file an appeal with the board. In a well-written decision, the board granted the collector’s motion.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> R.S. 47:337.79.

<sup>15</sup> R.S. 47:337.81.

<sup>16</sup> *Id.*

The board ruled that the “failure to act” mentioned in 337.81 means the failure of the collector to render a decision on the refund claim.<sup>17</sup> The board said it was necessary to designate an act as the one that triggers the running of the period in 337.81 because to hold otherwise would mean that the applicable prescriptive period would have to be determined case by case.

The board also held that the collector was not precluded by judicial estoppel from asserting prescription. Judicial estoppel (aka, detrimental reliance) is when a party’s conduct precludes it from asserting rights against another who has “justifiably relied upon such conduct and changed his position so that he will suffer injury if the former is allowed to repudiate the conduct.”<sup>18</sup> The board said that in order to invoke the defense of detrimental reliance, Nucor had to show that it received unequivocal advice from the collector as to its appeals rights and that such a showing was not made.

The court of appeal concluded that based on the statutory language, the board’s decision was wrong.<sup>19</sup> The court first found that the word “any” meant “any,” so a taxpayer has a 90-day window to appeal from *any* notice of disallowance — not just the notice the collector is supposed to send within one year of receiving a refund claim. So even though a notice of disallowance was issued two years after the collector received the refund claim, Nucor still had 90 days from its issuance to file an appeal.

As to the running of the 180-day filing period following a year of inaction by the collector, the court stated that the term “failed to act” means the failure to do anything at all and not, as the board argued, the failure to perform a specific act (that is, rendering a decision). The court held that if a collector does something, anything, regarding the claim within that year, the 180-day period is inapplicable, and the taxpayer will have 90 days

from the collector’s notice of disallowance to file an appeal with the board.

The court also found that Nucor had relied — to its detriment — on representations made by the collector that Nucor would have the opportunity to appeal the collector’s determination, and on the statement in the notice of disallowance that Nucor had 90 days from the date of the notice to file an appeal. Because the purpose of the detrimental reliance doctrine is to prevent injustice, the court determined that the collector was precluded from raising prescription as a defense against Nucor’s claim. Based on the foregoing, the court held that Nucor’s appeal to the board was timely.

The court’s decision seems fair, because Nucor appeared to have been lulled into a false sense of security about its right to appeal. The decision also makes practical sense because taxpayers and tax collectors should be encouraged to work out their differences extrajudicially.

But the decision also raises questions. For instance, is there a *de minimis* level of activity that an act must exceed before it is considered doing something relative to the claim so as to toll the one-year inaction period? Under a literal reading of the court’s decision, a collector’s casual review of a refund claim would constitute doing “something” relative to the claim and would therefore toll the running of the one-year inaction period. This would mean that a taxpayer loses its right to appeal to the board if, after perusing the claim, the collector just sits on it. Surely that was not the intent of the authors of this provision. Further, if the taxpayer has the right to appeal to the board under the 90-day provision statute, why did the court bother with its analysis of the one-year inaction provision? For that matter, why did the court address the detrimental reliance, or judicial estoppel, defense? One gets the sense that the court was throwing a plate of legal rationales against the wall, hoping one of them would stick if the state supreme court granted writs — which it did.<sup>20</sup>

There is a legal bromide that the supreme court does not grant writs to confirm. I think that is true in this case and that the court will reverse

<sup>17</sup> *Nucor Steel Louisiana LLC v. St. James Parish School Board*, 2020 WL 8473319.

<sup>18</sup> *Showboat Star Partnership v. Slaughter*, 789 So.2d 554, 2000-1227 (La. 2001).

<sup>19</sup> *Nucor Steel Louisiana LLC v. St. James Parish School Board*, 20-247, p. 10 (La. App. 5 Cir. 2021).

<sup>20</sup> *In Re Nucor Steel Louisiana LLC v. St. James Parish School Board*, 2021-01814 (La. 2022).

in part and affirm in part. The court of appeal's decision, while fair, raises too many legal questions and creates too much uncertainty as to the refund procedures applicable to local taxes. I predict that the supreme court will reverse the appellate court's holdings as to the interpretation of 337.81's provisions but affirm the appellate court's decision as to Nucor's detrimental reliance on the collector's representations, thereby allowing Nucor to pursue its claim.

Those are my predictions. Of course, I admit that although I am rarely uncertain, I am sometimes wrong. ■

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