

**BOARD OF TAX APPEALS  
STATE OF LOUISIANA**

**ST. JOHN THE BAPTIST PARISH  
SCHOOL BOARD, EX OFFICIO  
SALES AND USE TAX COLLECTOR  
FOR ST. JOHN THE BAPTIST  
PARISH,  
Petitioner**

**VERSUS**

**DOCKET NO. L00166**

**RANDY "COUNTRY" SEAL, SHERIFF  
AND EX OFFICIO TAX COLLECTOR  
FOR WASHINGTON PARISH,  
Respondent.**

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**JUDGMENT**

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On August 15, 2018, this matter came before Local Tax Judge Cade R. Cole for hearing on a Motion for Summary Judgment related to a Rule for Uniformity. Participating in the hearing were Patrick M. Amedee on behalf of Petitioner, St. John the Baptist Parish School Board, Ex Officio Sales and Use Tax Collector for St. John the Baptist Parish ("St. John"), and Ross F. Lagarde on behalf of Respondent, Randy "Country" Seal, Sheriff and Ex Officio Tax Collector for Washington Parish ("Washington Parish"). After the hearing, the matter was taken under advisement. The Board now issues Judgment in accordance with the enclosed written reasons.

IT IS ORDERED, ADJUDGED AND DECREED that the Motion for Summary Judgment filed by St. John BE AND IS HEREBY DENIED IN PART AND GRANTED IN PART, for the written reasons issued herewith;

**Judgment Rendered and Signed at Baton Rouge, Louisiana this 15<sup>TH</sup>  
day of October, 2018.**

**A TRUE COPY:**

**For the Board:**

*Sharon G. Moore*  
SECRETARY-CLERK  
BOARD OF TAX APPEALS  
STATE OF LOUISIANA

*Cade R. Cole*

**LOCAL TAX JUDGE CADE R. COLE**

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**WRITTEN REASONS FOR JUDGMENT**

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This is a petition for uniformity brought by St. John under La. R.S. 47:337.101(A)(2) against Washington Parish, arising out of a sales tax dispute in a prior action before the Board, *Barriere Construction Co., LLC v. Washington Parish*, Docket No. L00056. Although that matter has been settled and resolved, the parties in this case remain in dispute over the proper taxing authority with respect to certain purchases of liquid asphalt by Barriere Construction Co., LLC (“Barriere”) from Marathon Petroleum Company LP’s (“Marathon”) refinery in St. John the Baptist



Parish. Barriere collected and remitted Washington Parish sales and use tax on these purchases. Washington Parish asserts that Barriere was correct to do so because the liquid asphalt was subject to first use in Washington Parish, and because the “further processing exclusion” applies to any sales that occurred in St. John.

St. John issued a Notice of Examination to Barriere on February 20, 2013, and a Notice of Proposed Assessment on September 18, 2013. After an administrative protest hearing, Barriere agreed to request a refund of tax paid to Washington Parish. Washington Parish denied the refund request by letter dated March 10, 2014. On October 2, 2015, St. John commenced the instant action by filing a Rule for Uniformity of Interpretation of Local Sales Tax Law Pursuant to La. R.S. 47:337.101.

St. John now moves for summary judgment. St. John claims that the point of sale for the taxable sale of the liquid asphalt was at the Marathon refinery, in St. John’s jurisdiction. St. John further claims that these sales were not excluded from tax under the further processing exclusion. St. John takes the position that the exclusion does not apply because Barriere was a contractor and used the liquid asphalt itself in its own road rehabilitation projects.

Both parties attach the deposition testimony of Barriere’s corporate representative to their memoranda. Upon being deposed, Heath D. Wahden, Barriere’s Chief Financial Officer, explained the blending process that the liquid asphalt undergoes. Mr. Wahden stated that Barriere purchases certain grades of raw liquid asphalt from Marathon’s refinery. At its asphalt plant in Franklinton, Louisiana, Barriere blends the liquid asphalt with stone and sand. The mixture is then heated to create roadway asphalt. Barriere uses the majority of the roadway asphalt in its various road rehabilitation projects.

Mr. Wahden testified that Barriere rehabilitates roadways for Washington Parish. Barriere performs this work both as a contractor and as a subcontractor. In either capacity, Barriere's typical scope of work is the same. Barriere first mills the existing roadway. Once the roadway has been milled, Barriere lays the roadway asphalt that was produced at its Franklinton plant. The rehabilitation process also entails some utility work, water line work, sewer line installation, soil treatment (which is soil stabilization using cement mixed within the roadway), and a minor amount of concrete paving. Mr. Wahden estimated that roughly five to ten percent of Barriere's business involves selling at retail the roadway asphalt manufactured at the Franklinton plant, but that the remainder of the roadway asphalt is used by Barriere itself in its own projects.

Several contracts, discussed by Mr. Wahden, between Barriere and Washington Parish, specify that Barriere had care and custody of its road rehabilitation worksite while performing road rehabilitation services. Mr. Wahden stated that Barriere retained custody of the worksites until the work was substantially completed. Mr. Wahden also stated that during the relevant tax periods, to his knowledge, Barriere did not possess any documents authorizing it to act as a purchasing agent for Washington Parish. Mr. Wahden qualified his statements by saying that other contracts could have different terms. However, in opposing the motion for summary judgment, Washington Parish did not present anything confirming any different terms.

A motion for summary judgment will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that mover is entitled to judgment as a matter of law." A material fact is one whose



existence or non-existence determines the outcome of a cause of action. *Davis v. Hixson Autoplex of Monroe, L.L.C.*, 51,991 (La. App. 2 Cir. 5/23/18), 249 So.3d 177, 181. Any doubt as to a dispute regarding a genuine issue of material fact must be resolved against granting the motion and in favor of a trial on the merits. *Orleans Parish Sch. Bd. v. Lexington Ins. Co.*, 2011-1720 (La. App. 4 Cir. 8/22/12), 99 So.3d 723, 729. However, once the motion for summary judgment has been properly supported by the moving party, the non-moving party must produce evidence of a material factual dispute or the motion will be granted. *Arceneaux v. Lafayette Gen. Med. Ctr.*, 2017-516 (La. App. 3 Cir. 7/26/17), 248 So.3d 342, 346

The “further processing exclusion” is found in R.S. 47:301(10)(c)(i)(aa)(emphasis provided), which provides:

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.

Washington Parish claims that Barriere’s purchase of liquid asphalt qualifies for the further processing exclusion under the Louisiana Supreme Court’s decision in *Bridges v. Nelson Industries Steam Co. (“NISCO”)*, 2015-1439 (La. 5/3/16), 190 So.3d 276. In that case, our Supreme Court explained that an analysis of the further processing exclusion must begin with the end product being sold, regardless of its nature as a by-product or a secondary product. *Id.* at 292.

In *NISCO*, the Court stated that the further processing exclusion applies to “sales of materials for further processing **before resale.**” *Id.* at 280, 282 (emphasis

provided). Nothing in *NISCO* suggests that the further processing exclusion is not an “extension” of the sale for resale exclusion. *Id.* at 280-81. Washington Parish vigorously, and correctly, asserts that the asphalt was purchased for the purpose of inclusion in blended asphalt. However, for the further processing exclusion to apply, the end product must be produced “for sale at retail.” R.S. 47:301(10)(c)(i)(aa); accord La. Admin. Code, 61:4301(C)(Cost Price)(h)(i)(a) (“The manufacturing process ends when the final product for sale has been placed into the packaging that will normally be delivered to the final consumer.”). For example, the limestone in *NISCO* was used to produce a marketable product, namely ash, which was then resold on the market.

St. John argues that the end product, in this case roadway asphalt, was not produced for resale, but rather used by Barriere in its own work as a contractor. Under longstanding jurisprudence, a contractor who purchases materials for use in a building contract is itself liable for sales tax, because the contractor is the end user and final consumer of the materials. *Claiborne Sales Co., Inc. v. Collector of Revenue*, 233 La. 1061 (La. 1957); *State v. J. Watts Kearny & Sons*, 181 La. 554, 160 So. 77; *Bill Roberts, Inc. v. McNamara*, 539 So.2d 1226 (La. 1989).

Under Louisiana law, the materials are purchased for use by the contractor in performing its obligation to deliver a completed project, and not for resale as an item of tangible personal property. Unlike a contractor, a true reseller habitually and constantly, as a business, deals in and sells any given commodity. *Claiborne Sales*, 233 La. at 1066-67.

The evidence is undisputed that Barriere purchased the overwhelming majority of the liquid asphalt in this case as a contractor, not a reseller. Mr. Wahden’s testimony establishes that Barrier purchased liquid asphalt for further



processing into roadway asphalt for use in Barriere's road rehabilitation projects. Only 5-10 percent of Barriere's business entailed selling roadway asphalt at retail.

St. John stipulated that its Rule for Uniformity would not apply to the asphalt purchased and processed by Barriere for sale to third parties. Therefore, St. John's evidence concerning the remaining materials demonstrated that the materials in question were purchased for use in its own construction projects. The burden then shifted to Washington Parish to raise a genuine dispute of material fact. Washington Parish has pointed to no countervailing evidence on the terms of this use by Barriere.

The parties agree that 5 to 10 percent of Barriere's business arose from the sale to third parties of roadway asphalt produced at the Franklinton plant. These sales comprise "articles of tangible personal property for sale at retail." The further processing exclusion applies to the purchases of liquid asphalt attributable to this portion of Barriere's business. The end product of the manufacturing process satisfies the three-pronged test articulated in La. R.S. 47:301(10)(c)(i)(aa)(I). The liquid asphalt is identifiable in the roadway asphalt; it is the recognizable black material holding together the sand and rocks that form the road. The liquid asphalt is beneficial to the final product; without it, the process would create an unusable mass of rocks and sand. The liquid asphalt is also purchased for inclusion in the final product; it is a key ingredient necessary to bring the others together and create roadway asphalt.

With respect to the liquid asphalt for which the further processing exclusion does not apply (the large majority used by Barriere), the Board must now determine if the point of sale occurred in St. John Parish or Washington Parish. La. R.S. 47:301(12) defines a sale as receiving or giving consideration in return for the transfer of title or ownership of tangible personal property. At deposition, Mr.

Wahden testified that Barriere purchased the liquid asphalt from Marathon's refinery in St. John Parish. Barriere picked up the liquid asphalt from the refinery itself or arranged for a contractor to truck it to the Franklinton plant. Barriere assumed the risk of loss from the moment of its receipt and all during this transportation. Mr. Wahden could not recall any time when Marathon delivered the liquid asphalt to Barriere. Based on these facts, the Board finds that possession and title of the liquid asphalt transferred in St. John Parish, when Barriere took delivery of the liquid asphalt at Marathon's refinery. Therefore, the point of sale and related taxable moment occurred in St. John the Baptist Parish.

In conclusion, the Board will grant St. John's motion in part as to the purchases of liquid asphalt attributable to roadway asphalt used in Barriere's road rehabilitation projects. These purchases were not for resale and are therefore not subject to the further processing exclusion. These purchases occurred in, and are properly taxable by, St. John.

The Board will also deny the motion in part as related to the purchases of liquid asphalt attributable to the five to ten percent of Barriere's business that comprised the sale of roadway asphalt at retail. These purchases were for resale, and the end product created by the manufacturing process meets the three-pronged test required for the further processing exclusion to apply.

**Baton Rouge, Louisiana this 15<sup>TH</sup> day of October, 2018.**

**For the Board:**



**LOCAL TAX JUDGE**

**A TRUE COPY:**



SECRETARY-CLERK  
BOARD OF TAX APPEALS  
STATE OF LOUISIANA