

SOUTHEASTERN ASSOCIATION OF TAX ADMINISTRATORS

52ND ANNUAL CONFERENCE

BIRMINGHAM, ALABAMA

JULY 23, 2002

**JURISPRUDENTIAL DEVELOPMENTS
IN SALES AND USE TAX**

by

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JURISPRUDENTIAL DEVELOPMENTS

This outline summarizes significant sales and use tax cases handed down by the various member state courts during the period July 1, 2001 through June 30, 2002. No significant sales and use tax cases were handed down by the courts in Mississippi or South Carolina during this time period.

I. ALABAMA

A. Hoover, Inc. v. State Department of Revenue, 2002 WL 598869 (Ala. 2002).

This case addressed the issue of whether Alabama could impose sales tax on sales made to governmental entities of other states, while, at the same time, exempting from the sales tax sales made to Alabama's own governmental entities.

Hoover, a Tennessee corporation, sold crushed stones and other products in the southeastern United States. From 1996 through 1999 Hoover made sales from its Alabama facility to certain Mississippi governmental entities. It did not collect Alabama sales tax on these transactions. On October 11, 2000, Alabama's Department of Revenue entered a final assessment against Hoover in the amount of \$159,520.27 on the sales to the Mississippi governmental entities.

Hoover appealed the assessment in circuit court, claiming that the practice of exempting instrumentalities and municipalities of Alabama from the payment of the sales tax, while imposing the same tax on the governmental entities of other states violated the Commerce Clause of the United States Constitution. Hoover cited as support for its argument Alabama Code section 40-23-4(a)(17) which exempted from sales tax any sales which the state is prohibited from taxing under the Federal or the State Constitutions. Essentially, Hoover argued that the Department treated ostensibly similarly situated transactions disparately.

The Department filed for summary judgment, arguing that the above statute did not apply to Hoover's sales to Mississippi governmental entities but rather, was meant to apply only to those sales to the State of Alabama, to counties within the State, and to incorporated municipalities within the State. The Department relied on a 1974 Alabama Supreme Court case styled *State v. Leary & Owen Equipment Co.*, 304 So. 2d 604, which held that the imposition of the tax on sales of repair parts to county governments of a neighboring state was valid, where the transactions were conducted entirely within Alabama, despite the contention that the out-of-state entities were exempt from Alabama tax. The Department also relied on the presumption of the

practice of exempting Alabama's governmental entities while taxing other states, to be unconstitutional.

Citing the United States Supreme Court's opinion in *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996), the appellate court first noted that state laws discriminating against interstate commerce on their face are virtually per se invalid. Thus, the court rejected the presumption of correctness of a final assessment and concluded that the Department had the burden of establishing a defense to a facially discriminatory tax scheme. Because the Department had the burden of proof and had failed to offer any evidentiary justification for the statute's discriminatory impact, the appellate court found that the trial court had erred in granting summary judgment. The court thus reversed the trial court's decision and remanded the matter.

B. State of Alabama v. Lewis d/b/a Big Boys Automotive, 2002 WL 539090 (Ala. Civ. App. 2002)

The State appealed a trial court order calling for the taxpayer to satisfy its past due tax liability by making equal monthly installment payments of the delinquent sales taxes to the State over a three year period and refusing to grant the State an immediate injunction against the taxpayer's continuation of business. The concept of an installment plan in return for dropping the injunction action was essentially the same as a settlement offer made by the taxpayer during the hearing, which the State rejected. The trial court order also enjoined the State from taking collection actions against the taxpayer concerning the delinquent taxes unless the taxpayer failed to make the monthly payments called for by the court order. While the appellate court found that the trial court had jurisdiction to enjoin the State from its collection efforts, it reversed, finding that the trial court did not have jurisdiction to enforce the installment payment plan. The appellate court also granted the State an injunction against the taxpayer's continuation of business until the taxpayer paid the past due taxes.

The State argued that the trial court did not have jurisdiction to enjoin the State from taking collection actions against the taxpayer citing the 1953 Alabama Supreme Court decision styled *State v. Maddox Tractor & Equipment Co.*, 69 So.2d 426 which held that "the doctrine of estoppel cannot be applied against the State acting in its governmental capacity in the collection of taxes duly levied by the legislature of the State." The appellate court held that the trial court *did* have jurisdiction, since the State was not estopped from collecting past due taxes, nor was the amount of past due taxes diminished; the order merely restricted the State in the manner it could collect the tax. However, the appellate court held that the trial court did not have jurisdiction to force the State to accept the installment payout plan or to enforce the plan even if the State

Finally, the appellate court held that the State was entitled to an injunction restraining the taxpayer from operating his business until the delinquent taxes were paid, since the taxpayer offered no excuse for not paying the taxes and admitted liability for them.

II. ARKANSAS

A. Mississippi River Transmission Corp. v. Weiss, 65 S.W.3d 867 (Ark. 2002).

In this case Mississippi River Transmission Corporation (MRT) challenged the Arkansas Department of Finance Administration's (DFA) assessment of a use tax for natural gas diverted from its pipelines in Arkansas to power compressors located on the pipelines. The trial court rendered summary judgment in favor of the DFA and MRT appealed.

MRT is a natural gas pipeline company incorporated in Delaware with its principal place of business in St. Louis, Missouri. It owned and operated four pipelines that passed through Arkansas. Almost all of the gas transported by these lines originated outside of Arkansas. At eight points along the Arkansas lines, MRT had compressor stations that compressed the gas and pushed it through the pipelines. These stations were fueled by natural gas diverted from the pipeline. The gas remained in constant motion until it reached a combustion chamber in the compressor station, where it was immediately ignited to fuel the engine. The residue from the gas used was discharged into the air as exhaust. The gas not used as fuel was thereby pressurized at the compressor station and then sent back into the pipeline.

Prior to deregulation taking place in the early 1990's, MRT owned the natural gas running through its Arkansas pipelines, and the DFA taxed the gas used in the compressor stations as a gross receipts or sales tax predicated on MRT's gas ownership. However, pursuant to Federal Energy Regulatory Commission regulations, after November 1, 1993, MRT was prohibited from transporting its own natural gas through its pipelines. After deregulation, MRT contracted with its customers to provide gas shipping services through MRT pipelines. The customers provided gas to be used in the compressor stations in kind, the cost of which was deducted from their shipping contracts with MRT.

Because MRT no longer owned the gas that was being consumed at the compressor stations, the DFA decided it could no longer tax the gas used in the compressor stations as a sales tax. DFA then began taxing the MRT's customers- the actual owners of the gas that was being used in the compressor stations- for a use tax. In 1996, the Arkansas Supreme Court in a case

compressor stations had sufficiently “come to rest” within the meaning of Arkansas’s use tax statute. The Arkansas Supreme Court applied a literal interpretation of the statute and held that the use tax statute’s requirements were not met, as the diverted natural gas did not cease movement before it was consumed by the compressor units. Consumption of a product was not the equivalent of its coming to rest. The Court reversed the trial court’s grant of summary judgment and remanded the case with directions that the court enter judgment in favor of MRT.

III. FLORIDA

A. Department of Revenue v. Daystar Farms, Inc., 803 So.2d 892 (Fla. Dist. Ct. App. 2002).

This case involved two issues, one substantive and one procedural. The substantive tax issue was the proper application of Florida’s lease tax statute which provides an exclusion from the lease tax in certain situations. The procedural issue was whether the corporate lessor collecting and remitting the Florida tax on lease payments or the lessee who ultimately bore the tax had standing to demand a refund for the taxes paid.

In 1990, a Florida law firm, Dean & Dean, purchased certain real property in Florida. The firm subsequently secured a loan for the construction of an office building on the property. The mortgage and note were signed by the firm as principal, and its individual members as guarantors. In an effort to protect its assets from any possible future malpractice liability, the firm’s members subsequently formed a corporation they named Daystar Farms, Inc. (Daystar), to which they individually and as a firm transferred the property subject to two existing mortgages, which were subsequently consolidated. In a shareholders’ meeting it was agreed that Daystar would assume and pay on the existing mortgages, and lease space in the building to Dean & Dean and to another company, IDS. The act which consolidated the two mortgages was signed by all the parties, including Daystar, and specifically referred to the signatories as “[w]e, the Guarantors...”. Apparently, there was no evidence that Daystar ever signed an express guaranty agreement which set forth its obligations for the consolidated loans.

Daystar charged and collected sales taxes on the lease payments received from its lessees and then remitted the sales taxes to the State Department of Revenue. Daystar subsequently requested a refund for the portion of Dean & Dean’s lease tax it remitted based upon its interpretation of the Florida lease tax statute. The statute provides in pertinent part that:

legally necessary to amortize a debt owned by the related corporation and secured by the real property occupied, or used, and even though the consideration is ultimately used to that debt. *However, such consideration is not rent but the payment of a debt if the corporation furnishing the consideration is equally liable on the debt secured by the real property as the related corporation ...* (Emphasis added). This exemption was repealed in 1995.

Draystar argued that Dean & Dean was equally liable with Daystar for the mortgage, and that, the payments made to Daystar were not rent, but rather, the payment of a debt. Alternatively, Dean & Dean, and Daystar contended that the firm was paying Daystar for management services, not rent.

The circuit court entered a final judgment concluding that the two entities were equally liable on the debt secured by the property at issue and that payments made by Dean & Dean for the use of the property were not rent but rather were the payment of a debt. The court granted Daystar the tax refund. On appeal, the Department argued that, because Daystar did not actually pay the tax, it did not have standing to demand a refund. It contended that Dean & Dean should have sought the refund. The court of appeal agreed, noting that, under the tax statutes, a refund could only be paid to the taxpayer who actually paid the tax. Dean & Dean had actually paid the sales tax obligation through its lease payments to Daystar. Daystar had then segregated the sales tax amount from the lease payment and remitted the tax to the Department of Revenue. Thus, Dean & Dean had the right to collect a refund from the Department, and had never assigned this right to Daystar. The court noted that unfortunately, the time for Dean & Dean to bring the refund claim had prescribed. Therefore, the circuit court's order directing a refund was reversed.

B. Hale v. Department of Revenue, State of Florida, 2002 WL 63407 (Fla. Dist. Ct. App. 2002).

The Hales leased apartments on a month-to-month basis and claimed a sales tax exemption for rentals collected from these leases based on section 212.03 of the Florida Statutes. The section provides in pertinent parts:

The tax levied by this section shall not apply to or be imposed upon or collected on the basis of rental to any person who resides in any building or group of buildings intended primarily for lease or rent to persons as their permanent or principal place of residence. It is the intent of the Legislature that this subsection

injunctive relief and a declaratory judgment that they were not subject to audit or sales taxes pursuant to Chapter 212 of the Florida Statutes.

The trial court entered summary judgment in favor of the Department. On appeal, the court rejected the trial court's legal analysis. The appellate court first noted that there was no requirement of a written lease exceeding six months in the statute itself. The court also emphasized the intent of the Legislature as stated clearly in the statute- to tax only those lodging facilities that primarily served transient guests. The court thus ruled that a six-month written lease was not required to qualify for an exemption.

The court next gave guidelines for determining whether lodgings are intended primarily for lease to transient persons or to persons as their permanent or principal place residence. Both the landlord's and the tenant's intent to lease premises as a permanent or principal place of residence are relevant factual determinations. The court found that, while the existence of only a month-to-month lease should factor into a court's weighing of the facts, it is not decisive. After instructing the trial court on the proper interpretation of the tax exemption statute, the court remanded the matter for further proceedings to determine whether the Hales were entitled to the exemption provided.

**C. Florida Department of Revenue v. Florida
Municipal Power Agency, 789 So.2d 320
(Fla. 2001).**

In this case, two municipally owned utilities, Florida Municipal Power Agency and Florida Municipal Electric Association, sought a statement from the Florida Department of Revenue declaring that section 212.08(6), Florida Statutes, exempted from sales taxation those materials purchased by municipally owned utilities for use in the repair, replacement, or refurbishment of their existing electric energy transmission or distribution systems. The exemption statute in question was amended in 1996 to strike language carving out from the exemption a certain pre-1973 transmission and distribution expansion project that was subject to dedicated revenue bonds, but, in so doing opened the door for the argument that the above named transactions were now exempt. The utilities also sought the initiation of proceedings to amend a separate administrative rule to bring it into conformity with their interpretation of Section 212.08(6) since the 1996 amendment. The Department refused, concluding from the legislative history of the statute that there was no indication that the legislature had intended to exclude the utilities' purchase of this type of materials from sales taxation.

On appeal by the utilities, the First District Court of Appeal reversed, finding that the Department's interpretation was contrary to the plain language of the statute and directed the

clause providing a sales tax exemption for materials used for transmission or distribution expansion. On review, the Florida Supreme Court found that the wording of the statute clearly on its face created a sales tax exemption in this area. The Legislature had had four years to correct the alleged “clear error” and had not done so. Further, legislative history could not be used to change the plain and clear language of the statute. Thus, by the clear language of the statute, the court held that section 212.08(6) entitled municipally owned utilities to a sales tax exemption on those materials purchased for use in the repair, replacement, or refurbishment of their existing electric energy transmission or distribution systems.

**D. New Sea Escapes Cruises v. Florida
Department of Revenue, 2002 WL
1369559 (Fla. App. 4 Dist.).**

New Sea Escape Cruises (Sea Escape) operates “cruises to nowhere” on which a vessel leaves Florida, travels outside Florida waters where passengers gamble, and then returns to Florida. The court addressed four sales and use tax issues: 1) whether a full or prorated Florida sales and use tax should be imposed on the taxable transactions involving the vessel; 2) whether the gaming equipment was “used” in Florida; 3) whether the gambling operator had a taxable lease or a non taxable service provider contract; and 4) whether the food and beverage provider sold the food to Sea Escapes or was a non taxable service provider.

First the court considered whether the taxes owed should be prorated. The Department of Revenue (the Department) imposed the tax on the taxable vessel transactions as though they took place entirely in Florida; the Department argued that there should be no pro-ration of the tax based on the mileage within and without the state because the vessel did not stop in a foreign port. The court disagreed, stating that the gambling did not occur “in the state” and therefore the taxes imposed by section 212.05, Florida Statutes (1997) must be prorated under section 212.08(8)(a), Florida Statutes (1997).

Second, the court considered whether the gaming equipment was “used” in Florida. Sea Escapes argued that since no gambling took place in Florida at all, no tax should be assessed for the use of the gambling equipment. However, the court held that Sea Escapes’ activities with respect to the equipment fell within the definition of “use” in section 212.02(20), Florida Statutes (1997). That definition includes “the exercise of any right or power over tangible personal property incident to the ownership thereof.” The court noted that the equipment was maintained in Florida, and the slot machines were emptied in Florida. The court stated that the use of the gambling equipment in this case was parallel to the use of tissues and party supplies in *Klosters Rederi A/S v. Department of Revenue*, 348 So.2d 656. In *Klosters*, the party supplies were not

to Tropical owned and was using its own equipment. The court found that the concession agreement was a lease or license, because Sea Escapes owned the gambling equipment, not Tropical Gaming. The court stated that “the vessel and the gaming equipment are tangible personal property, possession of which was transferred to Tropical for consideration.” Thus, it was a lease or license subject to tax under section 215.05, Florida Statutes.

Finally, the court considered whether the food and beverage concession agreement was a taxable lease/license or a non taxable service contract. The Department argued that Sea Escapes purchased food from a caterer and such sale would be taxable. Sea Escapes argued that its contract with the caterer was a service contract not subject to tax. The court agreed with Sea Escapes, finding that *Warning Safety Lights* applied on these facts because the food “did not go from the possession of the caterer to the possession of Sea Escape” but instead went to the passengers and crew directly for a per person fee. Thus, no tax was due on the food and beverage concession contract.

IV. GEORGIA

A. Ciba Vision Corp. v. Jackson, 548 S.E.2d 431 (Ga. Ct. App. 2001).

Ciba Vision Corporation (Ciba) manufactured and packaged contact lenses in Georgia. The company also warehoused in Georgia ophthalmic drugs purchased out of state. As part of its marketing strategy, Ciba gave free samples of both contact lenses and ophthalmic drugs to licensed dispensers throughout the world. For a period of four years, Ciba paid Georgia sales and use tax on these items totaling \$2,558,234. Subsequently, the company requested a refund, claiming that the distribution of free samples is exempt from the sales and use tax. The trial court granted summary judgment in favor of the State, holding that, as a matter of law, the transactions were taxable. On appeal, the court held that the samples were properly taxed under a state statute which provided that manufacturers of goods have to pay sales tax on those goods that are used for purposes other than retaining, demonstrating, or displaying the good for sale.

Contact lenses that were to be used for samples were labeled ‘not for resale’ and were generally mailed directly to eye-care professionals who requested them. The samples were then used by the professionals to demonstrate the product for patients, to test their fit on patients, and to test the patients’ tolerance. At times, Ciba sales representatives used samples during sales calls to demonstrated the product’s characteristics. Similarly, the ophthalmic drugs given away by Ciba were labeled as samples. These however were usually not mailed. Rather sales

displays the product for sale. In this case, the contacts lenses given away by Ciba were found by the court to be simply a marketing scheme designed to promote the sale of its product and thus qualified to be deemed retail sales. The court acknowledged, however, that those lenses used and opened by sales representatives to demonstrate the product's characteristics should not be deemed retail sales and thus, were exempt. The drugs purchased out-of-state by Ciba for delivery in state were also found by the court to be taxable because Ciba did not purchase the drugs for resale and, therefore, owed the state use tax upon purchasing the drugs. Under Georgia law, a transaction is taxable if it is the last of a possible series of sales.

Ciba argued that the give-aways qualified for a sales and use tax exemption under OCGA §48-8-3(47) providing that sales and use tax shall not apply to sales of drugs dispensed by prescription and prescription eyeglasses and contact lenses. The court first noted that the taxable event at issue was the transfer of free items from Ciba to the eye-care professionals. Although the free samples were deemed to be retail sales, they were in reality no more than a use by Ciba of its product to further marketing of the product. The court next determined that it was required to construe exemptions against the taxpayer and, doing so, it found that the ambiguous prescription language in the exemption statute applied only to transaction involving a sale pursuant to a prescription.

The court concluded that it was not anomalous to tax prescription lenses and drugs when they are used as a part of a marketing strategy of promoting sales, but not when they are sold. It also rejected a Fourteenth Amendment Equal Protection argument made by Ciba because the manufacturer failed to show how the tax statute or regulations would tax any similarly situated entity differently.

V. KENTUCKY

A. Western Kentucky Coca-Cola Bottling Company, Inc., WL 1635602 (Ky. Ct. App. 2001).

This case addressed whether a military post exchange can properly be classified as an instrumentality of the United States and therefore qualify for the Buck Act exception which preserves immunity from state taxation for instrumentalities of the federal government. The taxes at issue were levied as a result of a contract between Western Kentucky Coca-Cola Bottling Company, Inc. (Coca-Cola) and the Army and Air Force Exchange Service (Exchange) under which Coca-Cola sold soft drinks to the Exchange for resale from vending machines at a

The appellate court determined that the secondary transactions between the Exchange and authorized customers were not the proper transactions to focus on for tax purposes. Rather, this court focused on the initial sale from Coca-Cola to the Exchange, and considered whether the post Exchange was an instrumentality and, therefore, qualified for the tax exception. The court found that an attempt to separate the military Exchange from the military forces would require ignoring features which distinguished it from private enterprise and disregarding the long-established views of Congress, the Executive Branch and the judiciary on the subject. The Exchange and the armed forces it served were so intertwined as to clearly make it an instrumentality of the federal government and thus exempt from state taxation. The court thus held that the tax assessment against Coca-Cola, based on sales to the Exchange, was improper.

**B. Woodward, Hopson & Fulton, LLP, 2002
WL 253800 (Ky. Ct. App. 2002).**

Woodward, Hopson & Fulton, LLP (Woodward), a Kentucky law firm, appealed a circuit court decision affirming the assessment of a use tax on Woodward's acquisition of copies of medical records from out-of-state physicians, hospitals, and other health care providers. The Kentucky Board of Tax had assessed the taxes, after finding that, in these transactions, the health care providers were not simply rendering medical services. Rather, the Board determined that the transactions were purchases of tangible property used by the law firm to provide legal services to clients and that use tax must therefore be imposed. The circuit court agreed, concluding that Woodward was seeking the property produced by the service—the medical records. The court found that the essence of this transaction was not a service but the transfer of possession of personal property. Therefore, the circuit court found it was proper to impose a use tax on the transaction.

On appeal, Woodward argued that photocopies of medical records obtained from doctors and hospitals are not subject to a use tax because they are obtained from persons in the business of rendering services—not retailers—and are incident to the total services provided.

The relevant statute provides that “[p]ersons rendering professional services are consumers, not retailers, of the tangible personal property which they use incidentally in rendering their services. Examples of such persons would be lawyers, architects, engineers, and accountants.”

The appellate court was persuaded by Woodward's argument, and found that providing copies of medical records is merely incidental to the service rendered. A patient's medical records do not exist independently of the service rendered and thus have no intrinsic value themselves. The court also noted that certain statutes required medical providers to furnish

C. Revenue Cabinet v. LWD, Inc., 2001 WL 1817995 (Ky. Ct. App. 2001).

This case addressed whether LWD, a company that was solely in the business of leasing equipment to a dozen sister corporations, qualified under the Kentucky occasional sales exemption. The statute provides in pertinent parts that:

(1) “Occasional sale” includes:

(a) A sale of property not held or used by a seller in the course of an activity for which he is required to hold a seller’s permit, provided such sale is not one (1) of a series of sales sufficient in number, scope, and character to constitute an activity requiring the holding of a seller’s permit....

(b) Any transfer of all or substantially all the property held or used by a person in the course of such an activity when after such transfer the real or ultimate ownership of such property is substantially similar to that which existed before such transfer.

(2) For the purposes of this section, stockholders, bondholder, partners, or other persons holding an interest in a corporation or other entity are regarded as having the real or ultimate ownership of the property of such corporation or other entity.

LWD argued that it met the criteria set forth above because it leased every piece of equipment that it bought to a sister corporation and because the same person owned both LWD and all of the sister corporations. Therefore, the ultimate owner of the property after the transfer was substantially similar (or identical) to the owner before the transfer.

The Kentucky Revenue Cabinet argued that the exemption was only intended to apply to situations where property was transferred from one form of ownership to another- for example, when a partnership reorganized itself as a corporation. According to the Cabinet, the exemption did not apply to continuous and ongoing activity, but that all or substantially all of the taxpayer’s property must be transferred in one transaction. The Cabinet also argued that the transfer of ownership requirement of the statute had not been satisfied because LWD never actually transferred the property. Rather LWD Holding continually held ownership of the property before and after the transactions.

VI. LOUISIANA

A. Louisiana v. Quantex Microsystems, Inc., 2000-0307 (La. App. 1st Cir. 7/3/01); 809 So.2d 246.

In this case the Court of Appeal reversed a decision of the District Court and sent the matter back to the District Court for further proceedings. The Court of Appeal reversed a summary judgment that had been granted in the taxpayer's favor stating that genuine issues of material fact existed.

The taxpayer was a New York corporation with its principal place of business in New Jersey. It sold computer products via the mail, the telephone, and the internet. It solicited business through national publications and on the internet but did not specifically direct any advertisements to Louisiana. The taxpayer had no offices, property, bank accounts or direct employees in Louisiana. In the years at issue, the taxpayer made computer sales of a significant amount for delivery in Louisiana, and as part of the limited warranty provided with the purchase of its computer products, it represented to its customers, that it may, at its sole discretion, provide on-site service to its customers for the replacement of defective hardware parts for one year from the date of purchase. The taxpayer noted, however, that this warranty service was provided by the manufacturer of the computer products and not by the taxpayer.

The Louisiana Department of Revenue sought from the taxpayer the uncollected sales and use tax. The Department alleged that the taxpayer had established a physical presence in the State of Louisiana by providing for repairs, service, and/or support for products purchased for use in Louisiana through the use of agents, employees, and/or independent contractors operating in Louisiana. The taxpayer, of course, denied that it had a physical presence in Louisiana and, therefore, did not have sufficient nexus such that it could be forced to collect Louisiana sales and use tax.

From discovery responses, a majority of the Court of Appeal determined that there were disputed factual issues regarding whether the taxpayer itself provided on-site service during the relevant tax periods, or whether the on-site service was provided by a third party entity. The court noted that further factual issues remain regarding the extent of the on-site service actually performed during the relevant period and whether that activity was significantly associated with the taxpayer's ability to establish and maintain a market in Louisiana. The court also noted that a review of federal and state jurisprudence indicated that the parameters of the "physical presence"

had sufficiently proved the case that it did not have the required physical presence in Louisiana and that it was entitled to the summary judgment.

B. Elevating Boats, Inc., v. St. Bernard Parish, et al., 795 So.2d 1153 (La. 2001).

In this case the Supreme Court of Louisiana granted the writ application of the Sheriff of St. Bernard Parish to review a Court of Appeal decision regarding the local sales/use and occupational license tax liability of a company whose founder and president happened to be the former St. Bernard Parish President and a current member of the Louisiana Legislature. Originally operating in a building solely within Plaquemines Parish, beginning in 1967 the company expanded its facilities within neighboring St. Bernard Parish. During the years in question, all of the operational activities of the business (managerial, sales, manufacturing, etc.) occurred at the plant facilities within St. Bernard Parish, while the company's only activity in Plaquemines Parish was the docking of elevating boats. The substantive sales/use tax issue in the case was whether the company intentionally paid sales/use tax to Plaquemines Parish to take advantage of its lower rate, and in so doing fraudulently deprived St. Bernard Parish of its tax revenue.

In July, 1994 the St. Bernard Parish Sheriff's Office, Occupational License Division wrote to the company advising that they did not hold a St. Bernard Parish occupational license tax although it was required by law to do so. In August 1994 the company replied with an application for a license indicating its gross sales for the prior year. Upon receipt of the application for the occupational license tax, the information was forwarded to the St. Bernard Parish Sheriff's Sales and Use Tax Department, which compared the figures reported for occupational license tax to the sales and use tax return for the company for the prior year. This comparison triggered an audit for the tax years 1991 to 1994.

On December 30, 1994 the St. Bernard Sheriff filed a Rule for Taxes against the company alleging that the company had failed and refused to pay the proper sales and use taxes to the Parish of St. Bernard for the years 1991 through August 31, 1994. The Rule for Taxes further alleged that the company had not paid occupational license taxes for the same period. On March 1, 1995 the company paid the entire amount alleged to be due under protest and filed a petition for refund of taxes the following day. During discovery, officers of the company admitted to having been aware of the location of the St. Bernard Parish/Plaquemines Parish boundary line with respect to the company as far back as the 1960's. As a result, the St. Bernard Sheriff assessed the company additional taxes for the years 1984 to 1990. The company again paid the additional amounts under protest and filed a separate petition for refund. The two

all sales and use taxes to neighboring Plaquemines Parish. He also testified that he was aware that the occupational license taxes were due St. Bernard Parish and were not being paid.

The manager testified that the Louisiana Legislator instructed him to pay only the Plaquemines sales taxes because they were lower than those in St. Bernard Parish. The current manager of the company, the Legislator's son, testified that he knew the location of the St. Bernard/Plaquemines Parish line as far back as the 1970's. He further testified that at all tax years at issue in the suit, almost all of the manufacturing services and repairs occurred within St. Bernard Parish and that there were no longer buildings in Plaquemines Parish capable of the work.

An accountant for the company testified that when she worked for the company from the years 1980 through 1988, under the supervision of the Louisiana Legislator's daughter, she became curious as to why the company would pay property taxes to St. Bernard Parish, but sales and use taxes to Plaquemines Parish. When she took her concerns to the Legislator's daughter, she was told that such reasons were none of her business and that it was just the way it had always been done. She further testified that when she filed the sales and use tax returns with St. Bernard Parish, she knew that they were fraudulent, but did so at the direction of the Legislator's daughter. For her part, the Legislator's daughter denied making the statements attributed to her. She did admit that she knew her father claimed the company's address in St. Bernard Parish as his domicile for purposes of the St. Bernard Parish election, but denied having any knowledge that the plant was located in St. Bernard Parish until the Rule for Taxes was filed in late 1994.

The District Court determined that the company owed St. Bernard Parish the past due taxes, interest and attorneys fees and denied the company's request for an inter-parish credit. The court found that the Louisiana Legislator, in order to gain an economic advantage, intentionally, willfully, and fraudulent defrauded the citizens of St. Bernard Parish of critical tax revenue. The court found the Louisiana Legislator's statements denying knowledge of taxes due to St. Bernard Parish to be totally ludicrous and that the Louisiana Legislator lacked credibility on the stand. The District Court also found that the testimony of the former manager was honest, trustworthy and credible. The District Court further found that the accounting manager had no reason to lie and that her testimony was believable. The District Court ruled that the company had intentionally defrauded St. Bernard Parish out of sales and use taxes as well as occupational license taxes for the years 1984 to 1994.

Both parties appealed the District Court's decision and the Court of Appeal reversed the District Court judgment in part, affirmed the judgment in part and remanded the case for further proceedings. The Court of Appeal found that (1) the sales and use taxes for the years 1984 to

The Sheriff of St. Bernard Parish filed a writ application that was granted by the Supreme Court on the following four issues:

- (i) The prescriptive period for sales and use taxes owed by the company for tax years 1984-1990;
- (ii) Use taxes on certain fixed assets of the company unreported to either St. Bernard or Plaquemines Parish for the years 1984-1990;
- (iii) The prescriptive period and classification for occupational license taxes owed by the company for the tax years 1988-1994; and
- (iv) The inter-parish credit owed, if any, to the company for sales and use tax payments made to Plaquemines Parish.

With respect to the prescription of sales and use taxes for the years 1984 to 1994, the Supreme Court focused on La. R.S. 33:2718.4. That statute provides in pertinent part that the prescriptive period running against any local sales and use tax shall be interrupted by the filing of a false or fraudulent return. The statute itself was enacted with an effective date of August 1, 1985, which brought into focus the question of whether or not St. Bernard Parish could use the statute back to January 1, 1984.

The Supreme Court noted that consistent with earlier decisions of courts in the state, the general notion is that when a law modifies the duration of a prescription, either to lengthen it or to shorten it, prescriptions already accrued are not disturbed by it, but those which are running are affected by the change. Accordingly, the court held that La. R.S. 33:2718.4, effective August 1, 1985 was applicable to all sales and use tax obligations not prescribed on the effective date of the act. In the particular case the earliest tax obligation sought by the Parish of St. Bernard was January of 1984 which had not prescribed as of the effective date of the statute, thus, all the sales and use tax periods in the suit were subject to the provisions of La. R.S. 33:2718.4. The Supreme Court went on to affirm the trial court's finding of fraud, sufficient to interrupt prescription under La. R.S. 33:2718.4(B)(4). The Supreme Court held that the filing of a fraudulent tax return interrupts the prescriptive period running on sales and use taxes that should have been reflected on that return, had it not been fraudulent and that the interruption continues until the taxpayer cures the fraud. Since the company took no action to cure the fraud that caused the interruption, the obligations had not prescribed when the Sheriff of St. Bernard filed the assessment for the years 1984 through 1990 in June 1995.

Turning to the issue of the use tax on fixed asset purchases not reported to any parish, the

With respect to the unpaid occupational license taxes, the Supreme Court noted that unlike sales and use taxes, the revised statutes regarding occupational license taxes provide no counterpart to La. R.S. 33:2718.4's interruption of prescription period on the filing of fraudulent sales and use tax returns. Accordingly, the general provisions of the Louisiana Constitution with respect to prescription applied. Article 7, Section 16 of the Louisiana Constitution provides that taxes and licenses shall prescribe in three years after the thirty-first day of December in the year in which they are due, but prescription may be interrupted or suspended as provided by law. Since the initial Rule for Taxes covered the years 1991 through 1994, the Supreme Court held that the occupational license taxes sought in the rule were not prescribed when it was filed in December, 1994. However for the tax years 1988 to 1990, the occupational license taxes for those years were prescribed when the assessment was made in June, 1995. Reviewing the evidence concerning the proper classification of the company as either a wholesaler or a retailer the Supreme Court could not find manifest error in the finding of the District Court that the company was a retailer.

The Supreme Court also reviewed the company's claim that it should be entitled to receive a credit for the taxes it paid to Plaquemines Parish during the same period covered by the lawsuit. La. R.S. 33:2718.2 provides that a credit shall be granted to a taxpayer who paid monies, whether or not paid in error, absent bad faith. The statute further provides a specific procedure which must be followed for an applicant seeking to obtain the credit. The Supreme Court noted that the record was devoid of any evidence indicating that the company followed the procedural requirements of the statute. Based on the fact that the procedures were not followed, the Supreme Court denied the company's request for an inter-parish credit against sales and use tax indebtedness to St. Bernard Parish. The Supreme Court also questioned without deciding whether R.S. 33:2718.2 would apply since the company would not be able to satisfy the "absent bad faith" requirement of the statute.

Finally, the Supreme Court reviewed the interest, penalties and attorneys fees assessed by St. Bernard Parish. The St. Bernard Parish ordinances provided for a six percent per annum delinquency interest rate, a five percent delinquency penalty for each thirty day period not to exceed twenty-five percent in the aggregate of the tax due and attorneys fees at the rate of ten percent of the aggregate tax, interest and penalty. The Supreme Court noted that in contrast, La. R.S. 33:2746 pertaining to penalties for unpaid local government sales and use tax, provided for an interest penalty of one and a quarter percent per month on the amount of tax due. In *B.P. Oil Co. v. Plaquemines Parish Government*, 93-1109 (La. 9/6/94), 651 So. 2d 1322 the Supreme Court held that a state statute primes a local ordinance and a parish tax refund ordinance could not be less beneficial to the taxpayer than state law required. Applying that notion to the instant case the Supreme Court found that the parish's combined interest, penalty and attorneys fees

C. Wyescos of Louisiana, LLC v. East Feliciana Parish School Board, 2000-CA-1322 (La. App. 1st Cir. 9/28/01).

This case involved the question of whether a company that repaired tangible personal property at a facility in East Feliciana Parish was responsible for collecting the parish sales tax on these repairs considering that a large majority of the tangible personal property repaired had come from outside Louisiana and was returned to its owners outside Louisiana once the repairs were completed. The taxpayer had argued that its repair activity constituted bona fide interstate commerce and as such was fully excluded from any local sales tax by the Commerce Clause of the United States Constitution.

The taxpayer was specifically engaged in the business of repairing equipment utilized in the pulp and paper industry, principally chip feed equipment, thick stock pumps, and other large rotating equipment. The opinion indicates that approximately 90% of the equipment repaired by the taxpayer was shipped to the parish facility from out of state locations and that a typical repair job took two to three weeks to complete. Once the repair was completed, the tangible personal property was returned to its out of state point of origination.

The Court of Appeal reviewed the parish's taxing authority and indicated that the tax in question was authorized under the category of taxable sales of services. The court then referenced the state interstate commerce exclusion, La. R. S. 47:305E, and also noted that the parish sales and use tax ordinance contained a similar exclusion for bona fide interstate commerce. The court also noted, properly, that the interstate commerce exclusion must be construed liberally in the taxpayer's favor.

The parties agreed that there were no issues of fact, and the decision of the trial court on cross motions for summary judgment was that the repair activity exclusion. The Court of Appeal concluded that a clear reading of the taxing statutes left no doubt that it was the intention of both the state and the parish to levy and collect a tax on the repair services performed by the taxpayer at its East Feliciana Parish facility. The repair services provided by the taxpayer were expressly intended to be included under the tax.

The court reasoned that the taxpayer's arguments had incorrectly focused on the nature of the property rather than on the transaction of the repairs as being taxable services. The repair service itself was performed solely within the borders of East Feliciana Parish, and the fact that the equipment had arrived from another state and was returned to that other state once repaired was irrelevant.

D. Archer Daniels Midland Company v. St. Charles Parish, 802 So.2d 1270 (La. 2001).

This case involved the issue of whether a vessel must in fact leave the State of Louisiana to qualify for the sales and use tax exemption for purchases of supplies and repairs used in support of vessels operating exclusively in foreign or interstate coastwise commerce. The facts of the case involve a taxpayer who operated a fleet of tugboats exclusively in St. Charles Parish that rendered fleeting and shifting services in connection with the movement of grain from outside Louisiana to foreign destinations.

The taxpayer relied on *Cooper Stevedoring Co., Inc. v. Secretary of Louisiana Department of Revenue and Taxation*, 555 So.2d 32 (La. App. 1st Cir. 1989) for its position that the vessels are engaged in interstate commerce even if they do not leave state waters, provided they facilitate the stream of interstate commerce. In *Cooper Stevedoring Co., Inc.* the First Circuit concluded that vessels providing stevedoring services entirely within the state of Louisiana to vessels engaged in interstate commerce are themselves considered to be engaged in interstate commerce, and therefore qualify for the Louisiana sales tax exemption. Citing several United States Supreme Court cases, the court noted that certain activities, including those performed entirely within one state, have been considered interstate or foreign commerce “if the activity is part of or facilitates the stream of interstate or foreign commerce.”

The Supreme Court overruled the 1989 First Circuit Court of Appeal *Cooper Stevedoring* decision, finding that the appeals court misinterpreted earlier jurisprudence which implied that Louisiana adopted the federal standard for determining when a vessel was engaged in foreign or interstate commerce for purposes of the exemption. The Supreme Court noted that for purposes of determining eligibility of vessels for the exemption, the focus is on the movement of the vessels, not the cargo that vessels carry.

The Louisiana Supreme Court held that the state and parish sales tax exemption for fuel and supplies purchased by the owners or operators of ships and vessels operating exclusively in foreign or interstate coastwise commerce does not apply to ships and vessels that operate wholly within Louisiana waters.

E. Kennedy v. United Airlines, Inc., (La. App. 5th Cir. 10/17/01); 797 So.2d 186; writ denied, (La. 4/8/02), 2002 WL 460070.

The facts stipulated in the case indicate that each flight would normally be on the ground only 30 or 40 minutes during which time passengers would disembark, cargo would be unloaded, the plane would be cleaned, outbound passengers would board the plane, new cargo would be placed on the plane, and any catering items would be stocked. Fuel would be purchased if necessary.

The taxpayer was arguing that Louisiana's interstate commerce exclusion, La. R. S. 47:305E, excluded the purchase and use of jet fuel from taxation in Louisiana. The Department of Revenue argued that the taxable event was the "sale" of the jet fuel that had occurred in the State of Louisiana and that the interstate commerce exclusion could not exclude the taxation of such a discrete sale.

Both parties relied on the 1995 La. First Circuit Court of Appeal decision in *Tigator, Inc. v. Police Jury of West Baton Rouge* for support. The issue in *Tigator* was whether an interstate trucking company's purchases of tractors, trailers, and repair parts were excluded from parish sales/use tax because of Louisiana's interstate commerce exclusion found in La. R.S. 47:305E. In the *Tigator* it was determined that the purchase of new tractors in Louisiana were subject to sales tax because title passed before interstate commerce began and represented discrete transactions outside the realm of interstate commerce; but, the purchase of trailers and repair parts out of the jurisdiction were not subject to a use tax because the ultimate use of the items were in interstate commerce and the items never sufficiently came to rest in the jurisdiction to be out of interstate commerce. The Court of Appeal here agreed with the *Tigator* reasoning with regard to the existence of a discrete transaction occurring in intrastate commerce. That is, the Court of Appeal equated the purchase of the jet fuel with the purchase of the tractors made by *Tigator* in West Baton Rouge Parish. The Court of Appeal noted that the issue here was the sales tax, and not a use tax, and, thus, a retail sale occurring in Louisiana was subject to tax regardless of whether the purchaser was engaged in interstate commerce or whether the tangible personal property being purchased was something to be used in the furtherance of the interstate commerce activity.

**F. School Board of the Parish of St. Charles
v. Quala Systems, 00-2894, 2001 WL
1346325 (E.D. La. Oct. 31, 2001).**

The School Board brought this action against Quala to collect sales taxes it claimed were due under the St. Charles Sales Tax Ordinance. The ordinance provided that the term "Sale" included the "Sales of Service" which included the furnishing of repairs to tangible property. By way of illustration, the ordinance specifically refers to the repair and servicing of automobiles

contamination with future loads. If repairs were needed on damaged parts, Quala sent them to a separate business next door.

St. Charles Parish alleged that Quala's services from 1997 to 1999 were taxable as repairs under the Parish's sales tax ordinance. In response, Quala claimed that none of its tank cleaning services were taxable as a repair because it did not fix anything that was broken- rather, it merely cleaned something that was dirty. Quala emphasized the fact that any damaged parts were sent elsewhere for repair.

In determining whether Quala's services constituted "the furnishing of repairs to tangible personal property" under La. R.S. 47:301(14)(g) the court found the facts at hand to be strikingly similar to those of a 1990 case interpreting the same statute. In *Intracoastal Pipe Services Co. v. Assumption Parish Sales and Use Tax Department*, 558 So. 2d 1296 (La. App. 1st Cir. 1990), the District Court held that the cleaning of oil field drilling tubing was not a "repair" within the meaning of the statute. Intracoastal provided internal and external cleaning of pipe using brushes, high pressure sands and waterblast machines, and pneumatic scraping methods to remove rust and dirt that had accumulated during drilling operations. If left uncleaned, this rust and dirt would have caused corrosion. The First Circuit defined the term "repair" as "to restore by replacing a part or putting together what is torn or broken." The court noted that, like washing dishes, the removal of external impurities in no way repaired the pipes, or mended anything that was broken. And, while one could use pipes that had not been cleaned, it would be both unsafe and undesirable to do so, as it would be with dirty dishes.

The Quala court noted that, uncertainty in the language of a statute must be resolved against the government and in favor of the taxpayer, and that words defining things to be taxed should not be extended beyond their clear import. The court adopted the Intracoastal definition of the term "repair" and concluded that Quala's services in cleaning and washing tank trucks to prevent cross contamination among chemicals and deterioration did not constitute repairs. Therefore, the company did not owe taxes to St. Charles Parish from its washing and cleaning services.

G. F. Miller & Sons, Inc. v. Calcasieu Parish School Board, 2002 WL 987274 (La. App. 3 Cir.)

F. Miller and Sons (Miller) entered into a contract with the Lake Charles Harbor and Terminal District (The Port) to make repairs and enlarge the dock. The Port, as a political subdivision of the State of Louisiana, is exempt from sales tax on its purchases of materials. The contract between the Port and Miller included specific language making the contractor the

In *Roberts*, a private contractor bought materials to be used on projects for tax-exempt entities. The taxpayer argued that he was an agent of the tax-exempt entity and therefore no sales tax was due. Roberts attempted to establish its mandate solely through bid forms and purchase orders; the supreme court held that it failed to establish an agency relationship. Thus, the taxpayer in *Roberts* was found to be the ultimate consumer of the materials and therefore owed sales tax. In *Roberts*, the supreme court noted that if an agency relationship had been established, then no sales tax would have been due. The appellate court distinguished *Roberts* from the instant case because the trial court specifically found an agency relationship. Miller, acting on the Port's behalf, did not owe sales taxes on the materials purchased for the Port repairs.

H. Way v. Andries, 2002 WL 1204422 (La. App. 3 Cir.)

The tax collector for Rapides Parish filed tax liens in the mortgage records against three members of an LLC for parish sales and use taxes owed by the LLC. The members filed suit to cancel the liens. The court held that the recent amendment to a state sales and use tax collection statute making members personally liable for delinquent taxes of the LLC, without a concurrent amendment to a similar parish revenue statute, indicated legislative intent to allow only the state (and not parishes) to pursue members of an LLC for the tax liability of the LLC.

I. Stowe-Woodward Company v. Lincoln Parish School Board, 2002 WL 1300766 (La. App. 2 Cir.)

Stowe-Woodward Company (SW) sued for a refund of sales taxes paid to the Lincoln Parish School Board. SW accepts rolls used in the paper industry at its plant in Lincoln Parish, manufactures and installs custom roll covers, and returns the newly covered roll to its customers outside of Lincoln Parish. SW argued that it manufactures and sells roll covers outside of Lincoln Parish; as such, no sales taxes are due. The Lincoln Parish School Board argued that SW repairs the rolls, and therefore, sales taxes on the sale services (the repairs) are due. The court held that neither the uncovered rolls nor the roll covers have utility by themselves, and that the “preponderance of testimony supports the conclusion that the covered roll is one unit and that re-covering the roll is a repair of the covered roll.” Thus, the court denied SW's request for refund.

SW also argued that the award of attorney's fees was in excess of the 15% allowed by La

VII. NORTH CAROLINA

A. American Ripener Co. v. Offerman, 554 S.E.2d 407 (N.C. Ct. App. 2001).

American Ripener Company (American Ripener) manufactured ethylene, a plant growth regulator which controls the speed of the ripening of fruits and vegetables. American Ripener also manufactured, sold and leased generators used to control the release of the ethylene gas. The Secretary of Revenue assessed sales tax against the company for the sale of ethylene, and use tax for its generators. American Ripener paid the taxes under protest, claiming that the taxed activities were excluded under a statute exempting plant growth inhibitors, regulators, or stimulators from North Carolina's sales and use tax. Subsequently, the trial court ordered the Secretary of Revenue to refund the assessed amounts to the company and the Secretary appealed.

Two statutes were applicable to the audit period at issue in this case (January 1, 1990-November 30,1995). Until August 1, 1995, North Carolina G.S. §105-164.13(2) was in effect and provided:

The sale at retail, the use, storage or consumption in this State of the following tangible personal property is specifically exempted from the tax imposed by this Article: ...(2) ... Plant growth inhibitors, regulators, or stimulators for agriculture including systemic and contact or other sucker control agents for tobacco and other crops.

During the following four month period G.S. 105-164.13(2a)d applied, stating:

The sale at retail, the use, storage, or consumption in this State of the following tangible personal property is specifically exempted from the tax imposed by this Article: (2a) Any of the following when purchased for use in the commercial production of animals or plants, as appropriate: ... (d) plant growth inhibitors, regulators, stimulators, including systemic and contact or other sucker control agents for tobacco and other crops.

The Secretary of Revenue argued that the plaintiff's sale of ethylene was not for a purpose falling under the exemption statutes. For the sale of ethylene to fall under the first statute it must be sold "for agriculture," and the second statute required that it be sold "for the commercial production of animals or plants." The defendant failed, however, to present any

In contrast, the court found that American Ripener provided uncontradicted evidence showing that the generators were used to control the release of ethylene and to regulate the speed of ripening fruits and, therefore, were “plant growth inhibitors, regulators, or stimulators,” which were specifically exempted from North Carolina’s sales and use tax.

VIII. TENNESSEE

A. **TomKats Catering, Inc. v. Johnson, No. M2000-03107-COA-R3-CV, slip op., 2001 WL 1090516 (Tenn. Ct. App. Sept. 19, 2001).**

TomKats Catering, Inc. (TomKats), a catering business, charged its customers a fixed, per unit price for food, but provided optional services such as waiters, bartenders, show chefs, and valets, for an additional price. Additionally, customers could order one server to be available at each table. The cost of these particular table servers was included in an increased per unit price for the food. Thus, TomKats, by collecting money on food, also collected on its table servers’ services. However, the services of waiters, bartenders, and other optional services were billed on invoices separately from the cost of food. TomKats charged sales tax on its food costs that included the increased price of individual table servers. Tax was not charged however, on all of TomKats’ other optional services such as bartending and valet parking.

Following an audit, the Tennessee Tax Commissioner ruled that all optional services offered by TomKats were “part of a sale,” and assessed a tax deficiency. After paying, TomKats sought a refund of this amount. The trial court found that TomKats decision to bill separately for optional waiters who performed essentially the same functions as table servers was an unwarranted distinction between taxable and non-taxable functions and denied the refund sought. On appeal, TomKats sought review of the issue of whether the court erred in holding that separately invoiced charges for optional services were subject to sales tax.

TomKats argued that its optional services were not taxable under the statutory scheme because those particular service contracts were severable from catering contracts. The Commissioner argued that such optional services were a part of the sale of tangible personal property and could not be meaningfully separated from the sale of catered food.

The appellate court agreed with Tomkats, finding that the catering contracts were separable and divisible. The optional services were genuinely so and food was sold by TomKats

B. Lockheed Martin Energy Systems, Inc. v. Johnson, No. 99-CH-7799, slip op., 2002 WL 126284 (Tenn. Ct. App. Jan. 31, 2002).

In this case, the Tennessee Department of Revenue assessed and collected a use tax on computer software fabricated by Lockheed Martin Energy Systems, Inc. (Energy Systems). Energy Systems then sought a refund of \$861,813.00, claiming that the software was exempt from the use tax under T.C.A. § 67-6-102(25)(B), as software fabricated by it for its own use or consumption. The software was developed by Energy Systems' employees for its own use in performing a contract for the United States government for a fee. Title to the software immediately vested in the federal government pursuant to the contract and possession remained with the government after termination of the contract.

The Tennessee Revenue Commissioner contended that, because title remained with the government, and because Energy Systems developed the software solely to carry out its contract with the government, the software was not for its own use and consumption and did not qualify for the exemption under T.C.A. § 67-6-102(25)(B). The trial court disagreed with this view and found that the software did qualify for the use tax exemption.

On appeal, the court affirmed, finding that Energy Systems' business involved providing the service of operating facilities owned by the United States. In carrying out its business activities pursuant to contract, Energy Systems "used" personnel and property, including software fabricated *by it*, to do *its* business. In the court's judgment, this fit within the ordinary and usual meaning of the words "software for [its] own use or consumption" of the use tax exemption.

C. BellSouth Advertising v. Johnson, No. 99-2643-II, slip op., 2002 WL 417344 (Tenn. Ct. App. Mar. 19, 2002).

In this case, BellSouth appealed the refusal of the Tennessee State Commissioner of Revenue to grant it a credit for sales taxes it already paid in Alabama. In producing its Tennessee directories, BellSouth compiled all of the information to be included. An Alabama company, TechSouth, then completed page layouts to produce "photocompositions," which were later used to transfer the text to printing plates. BellSouth paid Alabama sales tax when it purchased the completed photocompositions from TechSouth. BellSouth later included the cost of the photocompositions as part of the cost price of the directories for purposes of paying Tennessee use tax.

required to be included in the total cost price. The court found that the use tax in Tennessee was not ‘like’ the sale tax assessed in Alabama. Alabama had not taxed the distribution of the directories, nor had it taxed the whole cost of the directories. The court also concluded that it was not double taxation for Tennessee to tax the whole cost of the directories because the Tennessee itself had not taxed the photocompositions separately.

On appeal, BellSouth argued that it was double taxation for Tennessee to tax the whole cost of the directories when a portion of them (the photocompositions) had already been taxed in Alabama. The appellate court first referred to Tenn. Code. Ann. § 67-6-203, which provides that a tax is levied at the rate of six percent of the cost price of each item or article of tangible property when the same is not sold but is used, consumed, distributed, or stored for use or consumption in the state. The cost price is defined as the actual cost of articles of tangible personal property without any deductions therefrom on account of the cost of materials used, labor, or service costs, or transportation charges, or any expenses whatsoever. However, when an individual has paid a ‘like tax’ in another state on tangible personal property, there is no tax due for the use, consumption, or storage of tangible personal property.

The appellate court agreed with the trial court that BellSouth was not entitled to a credit for the sales tax paid in Alabama because a ‘like tax’ had not been assessed on *the directories as a whole* in another state. To come within the exemption the property must be the same property on which a tax was paid in another state. The directories were not considered to be the same as the photocompositions. Therefore, the use tax was not a duplication of the tax assessed in Alabama.

BellSouth also argued that Tennessee’s use tax violated the Commerce Clause because it discriminated against out-of-state vendors. The court rejected this argument also, stating that the Commerce Clause requires that a state not charge more tax or give extra exemptions to in-state vendors over out-of-state vendors. In this case, both in-state vendors and out-of-state vendors were charged the same use tax based on the cost price of the tangible personal property. Also, an out-of-state vendor purchasing photocompositions in Tennessee is exempt from sales or use tax just like an in-state vendor. Thus, the fact that Alabama imposed an additional tax not imposed in Tennessee did not amount to discrimination against out-of-state vendors by Tennessee.

IX. VIRGINIA

A. Chesapeake Hospital Authority v. Commonwealth of Virginia Department

court found the Department's assessment to be erroneous and awarded the hospital a correction plus interest.

On appeal, the Virginia Supreme Court affirmed, finding that the hospital was entitled to a use tax exemption on the food at issue. The court found that the exemption statute was unambiguous, leaving no room for interpretation. Therefore, the Tax Commissioner had no foundation for the requirement he added that, to qualify for the political subdivision and nonprofit hospital exemptions, the food must be used or consumed in connection with the provision of medical services. By adding this requirement the Commissioner had in fact amended the statute, an act which was beyond his authority. Therefore, the Court found that the hospital had satisfied the requirement that the food be used or consumed by an exempt entity, and was entitled to a refund.

The court further noted that the hospital had exercised the necessary degree of control over the food to qualify for the exemption because it purchased the food raw and controlled it until the very moment it was consumed by the chosen recipients. Therefore, the food had been "used" in the sense contemplated by the exemption statutes.

X. WEST VIRGINIA

A. CB&T Operations Company, Inc. v. Tax Commissioner of the State of West Virginia, No. 29560, 2002 WL 334697, (W.Va. Ct. App. Sept. 19, 2001).

The appellants in this case, CB& T Operations, and its parent company, CB&T Financial, challenged the circuit court's ruling upholding assessments against them for use tax imposed by the Tax Commissioner of the State of West Virginia. CB&T Financial was a bank holding company that provided administrative and other services to its numerous subsidiary banks. In an effort to allow CB&T Financial to more accurately track the cost of data-processing with respect to each of its bank affiliates, and to make more efficient decisions regarding the provision of these services, CB&T Financial set up a separate subsidiary, CB&T Operations, to handle these functions. CB&T Operations leased property already owned by another subsidiary, CB&T Bank, including data-processing equipment and related software, and office furniture. In addition to lease payments, CB&T Operations was also required to bear the full cost of all expenses incurred in connection with the leased property, including taxes, insurance, repairs, and maintenance.

provided by commonly controlled business enterprises as set forth in W.Va. Code sections 11-15A-3(a)(4) and 11-15-9(a)(24), finding that the transactions did not involve the “dispensing of a service, but rather a sale.” The appellants later sought judicial review of this decision in the circuit court and this court upheld the tax commissioner’s decision.

On appeal, the appellants first argued that the transactions in question were not subject to tax because CB&T Bank was not “in the business” of leasing data processing equipment. Rather, the transactions were merely to allow more accurate accounting of data-processing costs within the larger organization and were never intended to realize a profit for any of the firms involved.

W. Va. Code sections 11-15A-2(a) and (b) impose a tax on the use of, “tangible personal property,” which encompasses “tangible goods, wares, and merchandise when sold by a retailer for use in this state.” The term “retailer” is defined as “every person engaging in the business of selling, leasing or renting tangible personal property for use within the meaning of the statute.” Finally, “business” has been defined as “any activity engaged in by a person ... with the object of direct or indirect economic gain, benefit or advantage, and includes any purposeful revenue generating activity in this state.”

The court noted that it was not required for a “profit” to be realized to fit under the use tax statute. Rather, it was enough if there was an economic gain or benefit—a much broader term than profit. In this case, the court found that CB&T Bank clearly received an economic gain or benefit from the leases in question. Not only were the appellants charged actual costs on the leased property, but the lease also required the payment of an interest charge on the book value of the equipment. The interest was imposed to allow CB&T Bank to capture a profit on the transactions equivalent to what it could otherwise obtain by selling the data processing equipment and lending the proceeds at prevailing market rates.

The appellants also argued that in determining whether any gain or benefit was realized from the lease transactions the activities undertaken by CB&T Financial and its wholly owned subsidiaries should be considered as a whole. They contended that there had been no net financial impact on the larger corporate group. The court rejected this argument also, finding that, having taken advantage of the benefits of incorporation, a corporation cannot later decline to accept the liabilities of the corporate form to reduce the incidence of taxation. Further, the appellants and CB&T Bank each clearly qualified as separate “persons” under the use tax statute, and the use tax statute was imposed upon *every person* using tangible personal property or taxable services within the state.

The appellants next argued that, even if the transactions were taxable under the state’s

the provision of services, but rather, were the “sale” of tangible personal property and therefore not eligible for exemption.

The term “service” as used in the exemption statute is defined in section 11-15-2(s) as including “all nonprofessional activities engaged in for other persons for a consideration which involved the rendering of a service as distinguished from the sale of tangible personal property, but shall not include contracting, personal services, or the services rendered by an employee to his or her employer or any service rendered for resale.” A “sale” is then defined to include “any transfer of the possession or ownership of tangible personal property for a consideration, including a lease or rental, when the transfer or delivery is made in the ordinary course of the transferor’s business and is made to the transferee or his or her agent for consumption or use or any other purpose.”

The court found that the transactions at issue, although referred to as “leases,” were actually more appropriately placed under the rubric of services, rather than sales of tangible personal property. The record indicated that the “leased” equipment continued to be operated by the same employees of CB&T Bank who had previously done such work, at the same location. Aside from the formal lease agreements, nothing changed. Because there was no transfer of possession the subject property, the transactions more closely approximated the provision of services and thus qualified under the exemption statute. The court therefore reversed the circuit court’s decision and remanded the matter for further proceedings.

B. CNG Transmission Corp. v. Craig, Tax Commissioner of the State of West Virginia, No. 29996, 2002 WL 737875 (W.Va. Ct. App. April 26, 2002).

The appellant in this matter, CNG Transmission Corp. (CNG), challenged the circuit court’s ruling upholding assessments against CNG for consumer sales taxes imposed by the Tax Commissioner of the State of West Virginia. The appellate court reversed the circuit court’s ruling and found that the statutes in effect at the time of CNG’s purchases exempted the purchase of goods and services used in the transmission of natural gas from the consumer sales tax, whether or not CNG owned the natural gas that was being transmitted.

CNG was in the business of transmitting its customers’ natural gas through its pipelines both within and outside of West Virginia. CNG also purchased gas from some suppliers and later made wholesale sales of this “company-owned” natural gas. This company-owned gas was also transmitted by CNG through its pipelines.

assessed taxes. This ruling was later affirmed by the Circuit Court of Harrison County and CNG appealed.

Several statutes were in effect during the relevant time period. The first, effective between January 1, 1986, and June 30, 1987, exempted from consumer sales tax

[S]ales of property or services to persons engaged in this state in the business of ... transmission ... Provided, that the exemption herein granted shall apply only to services, machinery, supplies and materials used or consumed in the businesses or organization named above, and shall not apply to purchases of gasoline or special fuel.

This statute failed to define the term “transmission.” Effective January 1, 1987, the statute was amended to provide:

The following sales and services shall be exempt [from the consumer sales tax]:

(g) Sales of property or services to persons engaged in this state in the business of ... transmission ... Provided ... the exemption provided in this subsection shall apply only to services, machinery, supplies and materials directly used or consumed in the activities of ... transmission ... in the businesses or organizations named above and shall not apply to purchases of gasoline or special fuel.

Additionally, the Legislature defined the term transmission as the act or process of causing natural gas to pass or be conveyed from one place or geographical location to another, through a pipeline, for commercial purposes.

These statutes, and the regulations enacted by the Tax Commissioner pursuant to them, were silent concerning the transportation of company-owned natural gas by the owner of the transmission business. On May 1, 1992, the Tax Commissioner promulgated regulations that addressed the issue of company-owned gas for the first time. The regulations defined transmission as the act of causing natural gas to pass or be conveyed *for others* for consideration from one place to another through a pipeline, but transmission does not include the passage or conveyance of natural gas by the owner thereof.

The tax commissioner argued that the tax exemption at issue applied only to companies

The appellate court found that the statutory provisions were clear and plainly exempted purchases directly used to support the act of ‘ transmission’ from sales taxes. In the absence of a definition of the intended words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used. Because the common meaning of transmission is to send or transfer from one person or place to another, the court concluded that the Legislature intended to exempt from the consumer sales tax any purchase of goods or services made to support the act of sending or transferring natural gas from one place to another—regardless of who owns the gas. By adding the requirement that the exemption only apply where the transmission was for another, the commissioner had ignored the plain meaning of the statute.

The court concluded that any purchase used in the business of transmission of natural gas- regardless of who owns the gas being transmitted- was intended to be exempt from the consumer sales tax. The Commissioner’s 1992 regulation was held to be contrary to legislative command, and thus, unenforceable against CNG. The order of the circuit court was reversed and remanded.