STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2019 CA 1574

DAVIS-LYNCH HOLDING COMPANY, INC.

VERSUS

KIMBERLY ROBINSON, SECRETARY, DEPARTMENT OF REVENUE, STATE OF LOUISIANA

DATE OF JUDGMENT: DEC 3 0 2020

ON APPEAL FROM THE LOUISIANA BOARD OF TAX APPEALS
NUMBER 9586, PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

TONY GRAPHIA, CHAIRMAN
CADE R. COLE, VICE CHAIRMAN
FRANCIS "JAY" LOBRANO, MEMBER

* * * * * *

Jason R. Brown
William J. Kolarik
Baton Rouge, Louisiana

Counsel for Plaintiff-Appellee
Davis-Lynch Holding Co., Inc.

Miranda Y. Scroggins
Antonio Ferachi
Debra Morris
Brian DeJean
Baton Rouge, Louisiana

Counsel for Defendant-Appellant
Kimberly Robinson, in her capacity
as Secretary of the Department of
Revenue, State of Louisiana

* * * * * *

BEFORE: MCDONALD, THERIOT, AND CHUTZ, JJ.

Disposition: AFFIRMED.

CHUTZ, J.

Defendant-appellant, Kimberly Robinson, Secretary, Department of Revenue, State of Louisiana ("the Department"), appeals a judgment of the Louisiana Board of Tax Appeals (the "Board") rendered in favor of Plaintiff-appellee, Davis-Lynch Holding Co., Inc. ("Davis-Lynch"), granting Davis-Lynch's Petition for Redetermination of Corporate Income Tax Assessment and ordering the Department's assessment against Davis-Lynch be vacated. For the following reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND

Davis-Lynch is a Texas Corporation doing no business in Louisiana. Davis-Lynch's only business activities consisted of holding its interest in Davis-Lynch, LLC, a Texas limited liability company authorized to do business in Louisiana of which Davis-Lynch was the sole member. Davis-Lynch, LLC manufactured float and cementing equipment and had a warehouse in Louisiana to sell its products to businesses drilling oil wells in Louisiana and in the Gulf of Mexico.

On July 29, 2011, Davis-Lynch sold its entire interest in Davis-Lynch, LLC to Forum Energy Technologies, Inc. Davis-Lynch concedes the sale was not made in the regular course of business. The proceeds of the sale resulted in a gain ("the Gain") to Davis-Lynch. It is undisputed the Gain is apportionable income, under La. R.S. 47:287.92(C).

On Schedule P – "Computation of Louisiana Net Income" – of its 2011 Louisiana State Income Tax Return ("the 2011 Return"), Davis-Lynch reported gross receipts of $60,863,753 less cost of goods sold and/or operations of $28,925,689, resulting in a gross profit of $31,938,064. Additionally, Schedule P reflected gross royalties of $205,109 and total "other income" of $254,762,452. In particular, Statement 14 to the 2011 Return reflected "other income" of $289,717,

capital gain net income of $245,720,068, net gain/loss from federal corporate income tax Form 4797 reporting sales of business property of $8,752,667, which totaled the $254,762,452 reflected as "other income" in Schedule P. Thus, Davis-Lynch reported its total income as $286,905,625. Subtracting deductions totaling $28,786,020 from its total income, Line 28 of Schedule P reflected Davis-Lynch's net income from all sources subject to apportionment as $258,119,605 and included the Gain.

In Schedule Q – "Computation of Income Tax Apportionment Percentage" – Davis-Lynch calculated its apportionment percentage, using the three-factor formula set forth in La. R.S. 47:287.95(F)(1)(a)-(c). Under La. R.S. 47:287.95(F)(1)(c) and pertinent to the instant matter, one of the factors in determining the apportionment percentage is "[t]he ratio of net sales made in the regular course of business and other gross apportionable income attributable to this state to the total net sales made in the regular course of business and other gross apportionable income of the taxpayer" (the "Revenue Ratio"). Davis-Lynch included Louisiana sales of manufacturing equipment from Davis-Lynch, LLC totaling $10,536,544 in the numerator of the Revenue Ratio. Davis-Lynch did not include the Gain in the numerator of the Revenue Ratio. Instead, Davis-Lynch included the Gain in the denominator of the Revenue Ratio within "other gross apportionable income" of $254,472,735. Along with its "other gross apportionable income," Davis-Lynch also included its sales in the amount of $60,863,753 in the denominator of the Revenue Ratio. Dividing the numerator by the total of the denominator, Davis-Lynch calculated a percentage of 3.34% representing the Revenue Ratio. Taking the arithmetical average of the Revenue Ratio and the other two ratios set forth in La. R.S. 47:287.95(F)(a)-(b), Davis-Lynch calculated an apportionment percentage of 1.11%. Multiplying 1.11% by its net income

subject to apportionment of $258,119,605, Davis-Lynch allotted $2,865,128 as net income apportioned to Louisiana.

The Department audited the 2011 Return. On its first audit, the Department adjusted the apportionment percentage upward, claiming the "[t]axpayer has included income that is not in the [t]axpayer's regular course of business in the [R]evenue [R]atio" as "[t]he other [i]ncome reported on Schedule Q represents a gain from the sale of Davis-Lynch, LLC. A gain from a sale of a business entity is not considered in the regular course of business for this entity." In particular, the Department excluded the Gain from the Revenue Ratio entirely, pursuant to Louisiana Administrative Code, Title 61, pt. 1, § 1134(D), as it consisted of sales not made in the regular course of business.

On November 19, 2015, Davis-Lynch was issued a Notice of Assessment and Right to Appeal to the Louisiana Board of Tax Appeals ("the Assessment") for the December 31, 2011 filing period ("Taxable Period"). The Assessment alleged a total corporate income tax deficiency for the Taxable Period of $1,446,776.67, including $961,621.00 in tax, $244,750.42 in interest, and $240,405.25 in penalties.

On January 15, 2016, Davis-Lynch filed a Petition for Redetermination of Corporate Income Tax Assessment with the Board, disputing the taxes, interest, and penalties identified in the Assessment and sought to be collected by the Department. Davis-Lynch alleged Louisiana Administrative Code, Title 61, pt. 1, § 1134(D) exceeds the scope of the relevant taxing statute, concerning the inclusion of "other gross apportionable income" in the denominator of the Revenue

Ratio, and is void and unenforceable. Accordingly, Davis-Lynch asked that the Assessment be voided and for all other general and equitable relief.[1]

On October 9, 2018, a trial was held before the Board, where evidence and testimony were adduced. At the commencement of the trial, the Department made an oral motion in limine to exclude Davis-Lynch's exhibits and witnesses on the basis that Davis-Lynch did not timely comply with the terms for disclosure of witness lists and issuance of subpoenas in the Board's scheduling order. The Board denied the motion in limine.

On December 11, 2018, the Board signed a judgment, granting Davis-Lynch's Petition for Redetermination of Corporate Income Tax Assessment and ordering the Department's assessment against Davis-Lynch to be vacated. In its written Reasons for Judgment, the Board found "the clear meaning of La. R.S. 47:287.95(F)(1)(c) requires that the 'other gross apportionable income' be included in the ratio, and as defined by La. R.S. 47:287.92, **all** items of gross income are either 'allocable' or 'apportionable'. The Secretary's interpretation would exclude entirely the income recognized by Davis-Lynch on the sale of the LLC from the three factor ratio, a result clearly not contemplated by the statute." The Board reasoned that, adopting the Department's interpretation of La. R.S. 47:287.95(F) in the context of Louisiana Administrative Code, Title 61, pt. 1, § 1134(D), would impermissibly render the phrase "other gross apportionable income" meaningless. Thus, the Board found the Gain was properly included in the denominator of the Revenue Ratio.

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[1] Thereafter, the Department conducted a second audit of the 2011 Return and further increased Davis-Lynch's tax liability by $2,381,663. The Department concluded that, instead of using the three-factor formula of La. R.S. 47:287.95(F)(1)(a)-(c), Davis-Lynch should have used a single factor formula. This adjustment resulted in a second Notice of Assessment, which Davis-Lynch also appealed by petition to the Board. Nevertheless, prior to the trial of this matter, Davis-Lynch and the Department resolved the second assessment, which was withdrawn. Davis-Lynch's petition arising therefrom was dismissed.

The Department now appeals, assigning as error the Board's overruling of its motion in limine, not applying Louisiana Administrative Code, Title 61, pt. 1, § 1134(D) to this case, and vacating the Department's Assessment against Davis-Lynch.

DISCUSSION

Our review of a decision of the Board is rendered on the record made before the Board and is limited to facts on the record and questions of law. The Board's factual findings should be accepted where there is substantial evidence in the record to support them and should not be set aside unless they are manifestly erroneous in view of the evidence in the entire record. With regard to questions of law, the judgment of the Board should be affirmed if it has correctly applied the law and adhered to the proper procedural standards. However, if the Board's judgment is not in accordance with law, it may be reversed or modified with or without remanding the case. **Quest Diagnostics Clinical Laboratories, Inc. v. Barfield**, 2015-0926 (La. App. 1st Cir. 9/9/16), 2016 WL 4719894, *5.

There are no contested issues of fact in this case. The issue is solely one of law, namely, whether the Board erred in denying the Department's motion in limine and in vacating the Assessment.

In its first assignment of error, the Department argues that the Board's ruling allowing Davis-Lynch to present evidence at trial erroneously goes against its prior decision in **Succession of Anthony Ciervo, Jr. v. Department of Revenue, State of Louisiana**, BTA Docket 10832D, (La. Bd. Tax App. 9/11/18), 2018 WL 5793328, *2-3. In response, Davis-Lynch argues the Board has wide discretion in enforcing scheduling orders which was not abused, there was no prejudice resulting from Davis-Lynch's good faith mistake in disclosing its witness and

exhibit list late, and the Department also did not disclose its witnesses and exhibits timely.

The Board's Rules of Practice and Procedure, Rule 9, as adopted by the Board, states: "The Board may issue a Scheduling Order for each case set for hearing before it. ... Failure to adhere to the provisions of the Scheduling Order, without the written permission of the Board, may result in the dismissal of the appeal or other sanctions." When a court determines the appropriate penalty for disobedience of or disregard for court orders relating to pre-trial procedures, one important consideration is whether the misconduct was by the attorney or the client, or both. **Benware v. Means**, 99-1410 (La. 1/19/00), 752 So.2d 841, 847. Courts seldom invoke the most extreme sanctions except when there is a gross disregard for the authority and the efficient operation of the court and for the attorney's professional obligation to his or her client. Each case must be decided upon its own facts and circumstances, and the trial judge is vested with much discretion in determining the penalty for violation of pre-trial orders. **Id.** On review, the appellate court must determine whether the trial court abused its great discretion in ruling on a motion in limine. **Boucher v. Gautreaux**, 2017-1338 (La. App. 1st Cir. 4/11/18), 2018 WL 1755329, *2, *writ denied*, 2018-1126 (La. 10/15/18), 253 So.3d 1308.

The Board signed a scheduling order, setting the hearing on Davis-Lynch's Petition for October 9, 2018 and specifying "[p]arties shall submit their Prehearing Memoranda and disclose all witnesses, including expert witnesses at least: **15 days prior to the hearing.**" Thus, September 24, 2018 was the deadline for the parties to submit their pre-hearing memoranda and disclose all witnesses. On September 24, 2018, Davis-Lynch filed its pre-hearing memorandum with the Board; however, no witnesses were identified. On September 25, 2018, the Department

filed its pre-hearing memorandum with the Board, identifying its witnesses and exhibits. Davis-Lynch filed its witness and exhibit list on October 2, 2018, and a supplemental and amending witness and exhibit list on October 8, 2018.

Counsel for Davis-Lynch stated he made a "clerical error" when filing Davis-Lynch's pre-hearing memorandum, as they neglected to file it with a witness and exhibit list. Davis-Lynch's counsel represented the witness and exhibit list was filed on October 2, 2018, which was the date they discovered the error. Counsel for the Department stated he placed the Department's pre-hearing memorandum in the mail on September 24, 2018, which counsel for Davis-Lynch received on September 27, 2018.

In denying the motion in limine, the Board determined the critical date is when counsel receives the disclosures, as the purpose is to give notice of what witnesses are going to appear. The Board found each party should have received notice "at least 15 days" prior to the hearing, yet neither party complied with the rule as both witness lists were late. The Board correctly noted that its decision in **Succession of Anthony Ciervo, Jr.**, 2018 WL 5793328, is distinguishable, as the witnesses therein never were disclosed prior to trial. Conversely herein, upon discovering its error, Davis-Lynch disclosed its witnesses and exhibits in advance of the trial. Although the Department claimed it was prejudiced in the delayed disclosure as it did not know what witnesses to prepare for, the Department could have sought a continuance in advance of the morning of the trial, which it failed to do. Considering the foregoing and the discretion afforded to the Board in enforcing its own scheduling order, we find the Department's first assignment of error lacks merit.

In its second and third assignments of error, the Department argues Louisiana Administrative Code, Title 61, pt. 1, § 1134(D) is applicable, operates

with the full force and effect of law, and mandates that sales not made in the regular course of business such as the Gain should be excluded from the Revenue Ratio. In response, Davis-Lynch argues La. R.S. 47:287.95(F)(1)(c) requires the Gain to be included in the denominator of the Revenue Ratio, and Louisiana Administrative Code, Title 61, pt. 1, § 1134(D) exceeds the scope of the statute because the legislative history of La. R.S. 47:287.92 and La. R.S. 47:287.95 reflects that the Legislature intended to include sales not made in the regular course of business in gross apportionable income.

Under Louisiana corporate income tax law, all items of gross income, not otherwise exempt, are to be segregated by the taxpayer into two general classes designated as allocable income and apportionable income. **BP Products North America, Inc. v. Bridges**, 2010-1860 (La. App. 1st Cir. 8/10/11), 77 So.3d 27, 30, *writ denied*, 2011-1971 (La. 11/14/11), 75 So.3d 947 (*citing* La. R.S. 47:287.92(A)). The classification of income determines the method of taxation for such income. Allocable income is allocated for tax purposes directly to the state where the income is earned or derived, while apportionable income is subject to taxation in Louisiana based on an apportionment percentage regardless of where such income is derived. **Id.** (*citing* La. R.S. 47:287.93 and 47:287.94). Therefore, Louisiana taxes allocable income only if earned in Louisiana, whereas Louisiana taxes a percentage of all apportionable income without regard to its geographic source. **BP Products North America, Inc.**, 77 So.3d at 30. Apportionable income is the default category, inasmuch as it includes all items of gross income not properly included in allocable income. **Id.** (*citing* La. R.S. 47:287.92(C)). As noted, the Gain herein undisputedly is apportionable income.

Both parties have agreed Davis-Lynch's corporate income tax liability is controlled by Louisiana's apportionment formula statute, La. R.S. 47:287.95, and

Davis-Lynch was required to apportion a percentage of its income to Louisiana utilizing the appropriate formula in La. R.S. 47:287.95 in order to determine its annual Louisiana corporate income tax liability. La. R.S. 47:287.95 sets forth specific formulas to determine the appropriate apportionment percentage "for air, pipeline, other transportation businesses, and certain service enterprises," as well as a general formula "for manufacturing, merchandising[,] and any other business for which a formula is not specifically prescribed." **Quest Diagnostics**, 2016 WL 4719894 at *2 (*quoting* Louisiana Administrative Code, Title 61, pt. 1, § 1134(A)).

While the Department and Davis-Lynch agreed La. R.S. 47:287.95 was controlling, they disagree as to its proper interpretation and application. Specifically, they solely dispute whether the Gain could be included in the denominator of the Revenue Ratio of La. R.S. 47:287.95(F). Accordingly, we must determine whether the Board's application and interpretation of La. R.S. 47:287.95(F) was legally correct. The proper application and interpretation of a statute presents a question of law which we review *de novo*, without according any deference to the legal conclusion of the Board. **Quest Diagnostics**, 2016 WL 4719894 at *6.

La. R.S. 47:287.95(F) states, in pertinent part, as follows:

> **Manufacturing, merchandising, and other business.** (1) Except as provided in this Subsection, the Louisiana apportionment percent of any taxpayer whose net apportionable income is derived primarily from the business of transportation by pipeline or from any business not included in Subsections A through E of this Section shall be the arithmetical average of three ratios, as follows:
>
> (a) The ratio of the value of the immovable and corporeal movable property owned by the taxpayer and located in Louisiana to the value of all immovable and corporeal movable property owned by the taxpayer and used in the production of the net apportionable income.
>
> (b) The ratio of the amount paid by the taxpayer for salaries, wages, and other compensation for personal services rendered in this state to the total amount paid by the taxpayer for salaries, wages, and other

> compensation for personal services in connection with the production of net apportionable income.
>
> (c) The ratio of net sales made in the regular course of business and other gross apportionable income attributable to this state to the total net sales made in the regular course of business and other gross apportionable income of the taxpayer.

At no time during the Taxable Period was Davis-Lynch's income derived primarily from a business included in Subsections (A) through (E) of La. R.S. 47:287.95, including air transportation, pipeline transportation, other transportation, service enterprises, and oil and gas. Thus, Davis-Lynch used the three-factor apportionment formula described in La. R.S. 47:287.95(F)(1)(a)-(c) to determine its apportionment percentage.

The various formulas in La. R.S. 47:287.95(F) involve ratios based on three factors—property, payroll, and revenue. **Quest Diagnostics**, 2016 WL 4719894 at *3. In simple terms, the property factor is the ratio of the taxpayer's in-state property to its property everywhere; the payroll factor is the ratio of the taxpayer's in-state payroll to its payroll everywhere; and, the revenue factor is the ratio of taxpayer's in-state revenues to its revenues everywhere. The formulary factors are intended to generally reflect the activity of a business within the state. **Id.** At issue herein is the interpretation and application of Revenue Ratio described in La. R.S. 47:287.95(F)(1)(c).

In all cases of statutory construction or interpretation, legislative intent is the fundamental question. **Quest Diagnostics**, 2016 WL 4719894 at *6. The Supreme Court explained in **M.J. Farms, Ltd. v. Exxon Mobil Corp.**, 2007-2371 (La. 7/1/08), 998 So.2d 16, 26-27, as follows:

> The function of statutory interpretation and the construction given to legislative acts rests with the judicial branch of the government. The rules of statutory construction are designed to ascertain and enforce the intent of the Legislature. Legislation is the solemn expression of legislative will and, thus, the interpretation of legislation is primarily the search for the legislative intent. We have

> often noted the paramount consideration in statutory interpretation is ascertainment of the legislative intent and the reason or reasons which prompted the Legislature to enact the law.
>
> The starting point in the interpretation of any statute is the language of the statute itself. When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature. However, when the language of the law is susceptible of different meanings, it must be interpreted as having the meaning that best conforms to the purpose of the law. Moreover, when the words of a law are ambiguous, their meaning must be sought by examining the context in which they occur and the text of the law as a whole.
>
> It is also well established that the Legislature is presumed to enact each statute with deliberation and with full knowledge of all existing laws on the same subject. Thus, legislative language will be interpreted on the assumption the Legislature was aware of existing statutes, well established principles of statutory construction and with knowledge of the effect of their acts and a purpose in view. It is equally well settled under our rules of statutory construction, where it is possible, courts have a duty in the interpretation of a statute to adopt a construction which harmonizes and reconciles it with other provisions dealing with the same subject matter. [Internal citations and quotation marks omitted.]

We further note taxing statutes are to be interpreted liberally in favor of the taxpayer and against the taxing authority. If the statute can reasonably be interpreted more than one way, the interpretation less onerous to the taxpayer is to be adopted. Furthermore, the words defining a thing to be taxed should not be extended beyond their clear import. Absent evidence to the contrary, the language of the statute itself must clearly and unambiguously express the intent to apply to the property in question. **Quest**, 2016 WL 4719894 at *7. Unless the words imposing the tax are expressly in the statute, the tax cannot be imposed. **Cleco Evangeline, LLC v. Louisiana Tax Commission**, 2001-2162 (La. 4/3/02), 813 So.2d 351, 355.

Applying these principles of statutory construction, we find the Legislature did not intend to exclude sales not made in the regular course of business from "other gross apportional income" in the denominator of the Revenue Ratio. La.

R.S. 47:287.61, which is also contained in the Louisiana Corporation Income Tax Act, defines "gross income" of a corporation as "the same items and the same dollar amount required by federal law to be reported as gross income on the corporation's federal income tax return for the same taxable year, subject to the modifications specified in this Part, whether or not a federal income tax return is actually filed." In this regard, the Gain herein was reported as gross income on Davis-Lynch's federal tax return.

As to the Department's argument that Louisiana Administrative Code, Title 61, pt. 1, § 1134(D) excludes the Gain from the Revenue Ratio formula altogether as it undisputedly consisted of sales not made in the regular course of business, Louisiana Administrative Code, Title 61, pt. 1, § 1134(D) states in part as follows:

> Revenue Ratio. This ratio is generally composed of sales, charges for service, and other gross apportionable income. Neither allocable income nor income excluded from gross income, such as interest and dividends, is included in the ratio. For all formulas except that provided by R.S. 47:287.95(F), the revenue ratio consists of the ratio of the gross apportionable income of the taxpayer from Louisiana sources to the total gross apportionable income of the taxpayer. For the formula provided by R.S. 47:287.95(F), the revenue ratio consists of the ratio of net sales made in the regular course of business and other gross apportionable income attributable to this state to the total net sales made in the regular course of business and other gross apportionable income of the taxpayer. Sales not made in the regular course of business are not included in the formula provided by R.S. 47:287.95(F).

It is true the Secretary of the Department has the authority to prescribe rules and regulations to carry out the purposes of Title 47 of the Louisiana Revised Statutes, and such rules and regulations will have the full force and effect of law if promulgated pursuant to the Administrative Procedure Act. *See* La. R.S. 47:1511. However, tax regulations cannot extend the taxing jurisdiction of the statute, as taxes are imposed by the legislature, not the Department. **GameStop, Inc. v. St. Mary Parish Sales & Use Tax Department**, 2014-0878 (La. App. 1st Cir. 3/19/15), 166 So.3d 1090, 1096, n.6, *writ denied*, 2015-0783 (La. 6/1/15), 171

So.3d 929. An administrative agency's construction of its own regulation cannot be given effect where it is contrary to or inconsistent with the legislative intent of the applicable statute. **Barfield v. Bolotte**, 2015-0847 (La. App. 1st Cir. 12/23/15), 185 So.3d 781, 789, *writ denied*, 2016-0307 (La. 5/13/16), 191 So.3d 1058. Thus, it must be determined whether Louisiana Administrative Code, Title 61, pt. 1, § 1134(D) is a reasonable interpretation of La. R.S. 47:287.95(F) or inconsistent with or a prohibited expansion of the scope of the statute.

The current version of La. R.S. 47:287.95 makes no mention of sales not made in the regular course of business. However, in 1993 La. Acts, No. 690 (hereinafter "Act 690"), the Legislature enacted Paragraph I of La. R.S. 47:287.95, which read as follows:

> Gross apportionable income. For purposes of this Section, **gross apportional income shall not include income from profits or losses from sales or exchanges of property, including such items as stocks, bonds, notes, land, machinery, and mineral rights not made in the regular course of business** nor shall it include income from interest income, other than interest income apportioned under the provisions of R.S. 47:287.95(E), or dividends from corporate stock. [Emphasis added.]

However, Act 690 was declared unconstitutional, as it resulted in a tax increase in an odd-numbered year. *See* **Dow Hydrocarbons & Resources v. Kennedy**, 96-2471 (La. 5/20/97), 694 So.2d 215, 218. Furthermore, La. R.S. 47:287.95(I) was repealed in its entirety by 2002 La. Acts, No. 16. Thereafter, the Legislature did not attempt to reintroduce similar language into La. R.S. 47:287.95 in any subsequent amendment.

As further evidence of the Legislature's intent with regard to income from sales not made in the regular course of business, 2002 La. Acts, No. 16, additionally, added "[p]rofits or losses from sales or exchanges of property, including such items as stocks, bonds, notes, land, machinery, and mineral rights not made in the regular course of business" to the list of allocable income under

La. R.S. 47:287.92(B). However, in 2005 La. Acts, No. 401, the Legislature removed "[p]rofits or losses from sales or exchanges of property, including such items as stocks, bonds, notes, land, machinery, and mineral rights not made in the regular course of business" from the list of allocable income, rendering such income apportionable by default. *See* La. R.S. 47:287.92(C); **BP Products North America**, 77 So.3d at 30.

Legislation is the superior source of law in Louisiana. **Eagle Pipe and Supply, Inc. v. Amerada Hess Corp.**, 2010-2267 (La. 10/25/11), 79 So.3d 246, 256. Where the Legislature expressly repealed the provision of La. R.S. 47:287.95 stating "gross apportional income shall not include income ... not made in the regular course of business" and the language was not reintroduced in subsequent amendments, we find the Legislature's intent was not to include this language in La. R.S. 47:287.95.

Louisiana Administrative Code, Title 61, pt. 1, § 1134(D) echoes the provisions of the Revenue Ratio as set forth in La. R.S. 47:287.95(F)(1)(c); however, the regulation adds "[s]ales not made in the regular course of business are not included in the formula provided by R.S. 47:287.95(F)," which is contrary to the clear wording of La. R.S. 47:287.95(F) as well as the legislative history excluding similar language from La. R.S. 47:287.95. Instead of strictly excluding income from sales not made in the regular course of business from the numerator of the Revenue Ratio as provided in La. R.S. 47:287.95(F)(1)(c), the above regulation also would prohibit entities from including said income from "other gross apportionable income" in the denominator of the Revenue Ratio. This impermissibly expands the scope of La. R.S. 47:287.95. Therefore, the Department's reliance on Louisiana Administrative Code, Title 61, pt. 1, §

1134(D) is misplaced and its second and third assignments of error are without merit.

In sum, we find the current version of La. R.S. 47:287.95 does not exclude income from sales not made in the regular course of business from gross apportional income, and the Board did not err in finding the Gain was properly included in the denominator of the Revenue Ratio of La. R.S. 47:287.95(F)(1)(c).

DECREE

For these reasons, the Board's judgment, granting Davis-Lynch's Petition for Redetermination of Corporate Income Tax Assessment and ordering the Assessment against Davis-Lynch be vacated, is affirmed. Appeal costs in the amount of $1,137.00 are assessed against the Department.

AFFIRMED.