

*Tax Litigation***Materials for Fuel Tank Installation Taxable:  
North Carolina Court**

A North Carolina-based petroleum fuel equipment installer must pay use tax on materials it purchased for such jobs.

First Petroleum Services, Inc. challenged an audit finding the company failed to pay a use tax for the building materials that it purchased and used to perform contracts for the installation of fuel storage and delivery systems on property owned by governmental entities.

In a Feb. 23 ruling, the state Superior Court found that the transactions at issue were used by First Petroleum Services to fulfill its contracts and therefore were taxable. Reversing a decision by an administrative law judge (ALJ), the court rejected the company's argument that the tax assessment was improper because the contracts involved retail sales of equipment, not taxable uses of building materials.

"The interpretive difficulty here arises from the fact that First Petroleum uses construction materials by incorporating them into large-scale improvements on real property but also transfers title to the completed job to the property owner," the opinion said. "First Petroleum views these transactions for consideration as retail sales. The Department, on the other hand, contends that the use of construction materials in the performance of contractual obligations makes First Petroleum a consumer of those materials, not a retailer."

"Here, under both the plain language of the statute and the governing regulations, the undisputed evidence shows that First Petroleum's activities fall on the use side of the line," according to the opinion. The ALJ had

reached a different conclusion based on an erroneous interpretation of Sales and Use Tax Technical Bulletin 31-1, the Superior Court determined.

**Statutes Amended** The case is noteworthy because at the time the ALJ rendered his decision, the applicable statute only allowed taxpayers to appeal an adverse administrative decision, appearing to leave the Department of Revenue without recourse, William W. Nelson, a partner with Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan LLP in Raleigh, told Bloomberg Tax Feb. 26.

However, he said, the DOR appealed anyway and before the court decided on the matter, the state Legislature amended the statute at issue to retroactively allow any party to appeal such a decision.

However, Nelson said, the precedential value of the decision may be limited as it involved transactions from 2009 until 2012, during which time there were no statutory definitions of key terms. Since then, the state's sales and use tax provisions have been changed to provide definitions of "real property contract" and "real property contractor."

"These definitions should avoid some of the uncertainties that gave rise to the First Petroleum litigation," Nelson told Bloomberg Tax.

The case is *N.C. Dep't of Revenue v. First Petroleum Servs., Inc.*, N.C. Super. Ct., No. 17 CVS 1663, 2/23/18.

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Text of the ruling is at <http://src.bna.com/wD7>.

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