U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
**ENTERED**
TAWANA C. MARSHALL, CLERK
THE DATE OF ENTRY IS
ON THE COURT'S DOCKET

**The following constitutes the order of the Court.**

**Signed June 21, 2005** **United States Bankruptcy Judge**

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**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE NORTHERN DISTRICT OF TEXAS**
**DALLAS DIVISION**

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| **IN RE:** | § | |
| | § | |
| **Aviva America, Inc.,** | § | **CASE NO. 03-81855-BJH-11** |
| | § | |
| **Debtor.** | § | **Chapter 11** |
| | § | |

**Memorandum Opinion and Order**

Before the Court is the Objection to Claim ##8 and 32 (the "Objection") filed by Aviva America, Inc. (the "Debtor" or "Aviva") on December 30, 2004. The claimant, the Louisiana Department of Revenue (the "Department"), filed a response on January 27, 2005 and a supplemental response on February 21, 2005. A hearing was held on the Objection on February 23, 2005 (the "Hearing"). After the close of the evidence, the parties requested the following post-hearing settlement and briefing schedule: (i) the parties would attempt to settle this dispute by March 25, 2005; (ii) the parties would file a joint stipulation by March 24, 2005, calculating the amount of the

Department's claim depending on how this Court would rule on each of the contested issues (the "Joint Stipulation"); (iii) in the event no settlement was reached, the parties would file simultaneous briefs by April 15, 2005; (iv) the parties would file simultaneous reply briefs by April 25, 2005; and (v) this Court would take this matter under advisement on April 25, 2005. No settlement was reached and, after the parties filed the Joint Stipulation and their briefs, the Court took the Objection under advisement.

The Court has jurisdiction over the Objection in accordance with 28 U.S.C. §§ 1334 and 157(b). For the reasons set forth below, the Court concludes that the Objection should be granted in part and denied in part.

**Factual Background**

The Debtor is involved in oil and gas exploration and production, and part of its business is carried on in Louisiana. On July 21, 2000, the Debtor filed a voluntary petition under Chapter 11 of the Bankruptcy Code (the "Prior Case"). A plan of reorganization was confirmed in the Prior Case on November 7, 2000, a final decree was entered on March 29, 2001, and the Prior Case was closed on May 23, 2001. Along with its federal income tax returns, the Debtor filed Louisiana franchise tax returns for the years 2001 and 2002. As a result of the implementation of its plan of reorganization in the Prior Case, the Debtor recorded $37,660,596 in debt forgiveness for tax year 2000. The vast bulk of this debt forgiveness was derived from intercompany debt owed to the Debtor's affiliate, Aviva Petroleum, Inc.[1]

On its 2001 Louisiana franchise tax return (the "2001 Return"), the Debtor recorded a total

[1] The Debtor is a subsidiary of Aviva Petroleum, Inc.

franchise taxable base of $41,471,326.[2] *See* Debtor's Exhibit 4-2, p. 2 of 13, sch. A, line 32. This base included -$4,009,080 in earned surplus and undivided profits. *See id.* at line 30. The earned surplus and undivided profits included $36,624,049 in net book income.[3] *See id.* at sch. C, lines 1-2. Though somewhat unclear from the testimony and the 2001 Return, at least $34,652,014 of this $36,624,049 of net book income was derived from a reduction in amounts owed to Aviva Petroleum, Inc.[4] *See id.* at sch. A, line 24. In short, the 2001 Return included substantial amounts of debt forgiveness in the total franchise taxable base.

For purposes of computing its franchise tax apportionment ratio (the "Volume of Business Ratio"), the Debtor included this debt forgiveness as "other revenue." *See id.* at p. 5, sch. N, line 1, item C(iv). An attachment to the 2001 Return explains the Debtor's "other revenue" calculation:

> Aviva America, Inc. went through reorganization during 2000 under Chapter 11 of the U.S. Bankruptcy Code. Aviva America, Inc.'s total debt forgiveness income during 2000 for GAAP books is shown below. The majority of the debt forgiveness income is from our commercial domicile in the absence of notes originating in Louisiana.

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[2] Under Louisiana's corporate franchise tax statutes, the total amount of taxes due is calculated as follows. First, the total taxable base must be calculated. This base includes assets, etc., from all of the taxpayer's operations. Second, two ratios must be computed: (i) "[t]he ratio that net sales made to customers in the regular course of business and other revenue attributable to Louisiana bears to the total net sales made to customers in the regular course of business and other revenue," and (ii) "[t]he ratio that the value of all the taxpayer's property and assets situated or used in Louisiana bears to the value" of all the taxpayer's property and assets. *See* LA. REV. STAT. § 47:606(A)(1), (2). These two ratios are averaged; the total taxable base is then multiplied by the average of these ratios to determine the total taxable base apportioned to Louisiana. The total taxable base apportioned to Louisiana is then used to determine the amount of tax due: Louisiana imposes a tax of $1.50 for each $1,000 up to the first $300,000 of the total taxable base apportioned to Louisiana, followed by a tax of $3.00 for each $1,000 over $300,000. *See id.* § 47:601(A), (D).

[3] The balance at the beginning of the year was -$40,633,129. The $36,624,049 in net book income brought the end of the year balance to -$4,009,080, which was then recorded as earned surplus and undivided profits.

[4] On Aviva Petroleum, Inc.'s consolidated 2001 U.S. Corporate Income Tax Return (Form 1120), Aviva Petroleum, Inc. notes that the Debtor recorded $37,660,596 in debt forgiveness resulting in book gain. Of this amount, $36,354,309 was from intercompany debt forgiveness. *See* Department's Exh. 9-2, Form 1120, sch. M-1, line 7 attached statement. This Court has been unable to determine why the 2001 Return only reflects $34,652,014 in intercompany debt forgiveness. But, the parties appear unconcerned about this difference as it is not raised in the Joint Stipulation or briefs.

*See id.* at p. 8 of 13. The attachment goes on to reflect $37,660,596 in debt forgiveness income, of which $167,692 was allocated to Louisiana.

As a result of including its debt forgiveness in the Volume of Business Ratio, the Debtor was able to record $39,255,611 of total net sales and other revenues, of which $1,233,276 was attributed to Louisiana. *See id.* at p. 5, sch. N, line 1, item D. The division of the Debtor's Louisiana revenue by its total revenue (the required calculation), resulted in a ratio of 3.14%. *See id.* at p. 5 of 13, sch. N, lines 1-2. Under a second calculation required by Louisiana's franchise tax statutes, the Debtor calculated the ratio of its total property and assets to those attributed to Louisiana at 2.85% (the "Franchise Tax Property Ratio"). *See id.* at sch. M, line 26. The resulting average of these two ratios was 3.00%. By multiplying the total taxable base of $41,471,326 by 3.00%, the Debtor derived a franchise taxable base of $1,244,140. Apparently, the Debtor paid its franchise tax on this franchise taxable base.[5]

The Department commenced an audit of the Debtor on February 3, 2003. As a result of the audit, the Department made several changes to the 2001 Return. First, the total taxable base was increased from $41,471,326 to $41,839,535. *See* Department's Exh. 3, sch. A, p. 1. This increase resulted largely from the inclusion of $311,579 in contingent liabilities that the Department believed the Debtor was required to include in accordance with LA. REV. STAT. § 47:605.[6] *See id.* at sch. A, p. 2. Second, the Department substantially increased the Volume of Business Ratio from 3.14% to 96.21%. This increase was largely due to the fact that the Department excluded both the

[5]While there is no direct evidence on this point in the record, the Proof of Claim is solely based on claims derived from the additional tax assessment and not on claims for previously unpaid taxes.

[6] The Department also audited the Debtor's 2002 franchise tax return and adjusted the total taxable base in that return to reflect $324,824 in contingent liabilities. These contingent liability adjustments are at the heart of the abandonment fund liability issue, which is discussed at pp. 16-20.

$37,660,596 in total debt forgiveness and the $167,692 in debt forgiveness attributable to Louisiana from the Volume of Business Ratio. The Department also included $468,917 of oil and gas revenues from the Debtor's Main Pass platform in the Debtor's gross receipts attributable to Louisiana. The Department partly justified the adjustment to the Volume of Business Ratio on the following grounds:

> An adjustment is made to exclude certain items of "other revenue" from the volume of business ratio. R.S. 47:606(A) provides that the ratio shall be based on sales made in the normal course of business and other revenues. The items excluded were found to be either reductions to taxpayer's expenses or revenue not made in the normal course of business.

*See id.* at sch. B, p. 5. The Department also concluded that the revenues from the Main Pass platform were "delivered into Louisiana," and thus were taxable under LA. REV. STAT. § 47:606(A)(1)(a) (which states that sales of carried goods are taxable at the place the goods are ultimately received by the purchaser). *Id.*

As a result of the adjustments to the Volume of Business Ratio, the Department calculated $1,595,015 in total sales and other revenue by the Debtor, of which $1,534,501 was attributed to Louisiana. The ratio of these two totals resulted in a Volume of Business Ratio of 96.21%. *See id.* at sch. A, p. 3. The Department also adjusted the Franchise Tax Property Ratio from 2.85% to 2.68%. *Id.* The resulting average of these two ratios was 49.45%. By multiplying the total taxable base of $41,839,535 by 49.45%, the Department derived a franchise taxable base of $20,689,650. *See id.* at sch. A, p. 1. As a result, the Debtor was assessed $58,338.00 in additional 2001 franchise taxes plus $21,147.53 of interest for a total additional liability of $79,485.53. *See id.* at Summary. The Debtor was also assessed $1,233.00 in additional 2002 franchise taxes and $262.01 in interest on that amount. The Department issued a Notice of Proposed Tax to the Debtor on September 4, 2003.

On November 18, 2003, the Debtor filed this Chapter 11 case. On January 20, 2004, the Department filed Proof of Claim #8. On June 10, 2004, the Department filed Proof of Claim #32 (the "Proof of Claim"), amending Proof of Claim #8.[7] In the Proof of Claim, the Department asserts an unsecured priority claim of $81,445.68 based on the additional franchise taxes due for 2001 and 2002 along with interest on those taxes. No supporting documentation was attached to either proof of claim. After the Debtor filed the Objection – *i.e.*, objecting to the Department's claim on the ground that no supporting documentation was attached to substantiate the proofs of claim, the Department responded and attached its supporting documentation to that response.

At the Hearing, the Court heard evidence on whether the Department properly assessed additional franchise taxes for 2001 and 2002. Following the Hearing, the parties agreed that only three issues remain outstanding: (1) the debt forgiveness issue – *i.e.*, is debt forgiveness properly excluded from the Volume of Business Ratio under LA. REV. STAT. § 47:606 because it does not constitute "other revenue;" (2) the Main Pass revenue issue – *i.e.*, did the Debtor's revenue from its Main Pass platform constitute income allocatable to Louisiana under the Volume of Business Ratio; and (3) the abandonment fund liability issue – *i.e.*, was the Debtor's abandonment fund liability properly included in the Debtor's total taxable base. *See* Joint Stipulation at p. 1.

**Legal Analysis**

In *In re Armstrong*, 320 B.R. 97 (Bankr. N.D. Tex. 2005), the court articulated the evidentiary standard to be applied to an objection to a proof of claim:

> Sections 501 and 502 of the Bankruptcy Code and Bankruptcy Rule 3001 provide that "a party correctly filing a proof of claim is deemed to have established a prima facie case against the debtor's assets." *In re Fidelity Holding Co., Ltd.*, 837 F.2d 696,

[7] Proof of Claim #8 incorrectly listed the amount of 2002 franchise taxes due at $12,333.00 instead of $1,233.00. Proof of Claim #32 corrects this typographical error.

> 698 (5th Cir. 1988). The claimant will prevail unless a party who objects to the proof of claim produces evidence to rebut the claim. *Id.* Upon production of this rebuttal evidence, the burden shifts to the claimant to prove its claim by a preponderance of the evidence. *Id.* However, the ultimate burden of proof lies with the party who would bear the burden if the dispute arose outside of the bankruptcy context. *Raleigh v. Illinois Dep't of Revenue*, 530 U.S. 15 (2000).

*Id.* at 102-03. Under this standard, once supplemented, the Proof of Claim constituted prima facie evidence of the validity of the Department's claim (on all three issues). Thus, this Court must initially decide whether the Debtor met its burden of producing evidence on each issue sufficient to rebut the Department's claim. If the Debtor did so, then the Court must decide if the Department proved its claim by a preponderance of the evidence. Each of the three issues raised by the Proof of Claim will be addressed in turn.

**1. The Debt Forgiveness Issue**

Turning first to the debt forgiveness issue, the Court notes that the relevant facts are not in dispute. The parties simply disagree on the correct interpretation of the Louisiana franchise tax statutes. In short, to decide this issue the Court must determine the scope of "other revenue" under LA. REV. STAT. § 47:606(A)(1).[8]

LA. REV. STAT. § 47:606 governs the allocation of taxable capital under the Louisiana Franchise Tax Code. In part, section 47:606(A)(1) defines the Volume of Business Ratio as follows:

> [t]he ratio that the net sales made to customers in the regular course of business and *other revenue* attributable to Louisiana bears to the total net sales made to customers in the regular course of business and *other revenue*.

LA. REV. STAT. § 47:606(A)(1) (emphasis added). The Debtor contends that the term "other

[8] All references are to the 2001 version of the LA. REV. STAT., which was in effect at the time the Department assessed the additional taxes. The 2001 version has been amended twice since 2001. The 2002 amendment added a new subsection (e) and designated former subparagraphs (e) through (k) as subparagraphs (f) through (l). The 2004 amendment (effective January 1, 2006) made no changes relevant to the issues discussed herein.

revenue" as used in § 47:606(A)(1) should be broadly construed to include revenue derived outside the regular course of business. In contrast, the Department contends that "other revenue" should be narrowly construed to include only revenue generated in the regular course of the taxpayer's business. While the statute states how "other revenues attributable to Louisiana" are to be determined when dealing with certain types of revenues, *see* LA. REV. STAT. § 47:606(A)(1)(a)-(j), the term "other revenue" is not defined in the Louisiana Franchise Tax Code, and there are no Louisiana cases[9] or revenue rulings available that offer any guidance on its interpretation here. The Court must therefore turn to Louisiana principles of statutory construction to discern the scope of the term "other revenue" as applied to the facts of this case.

Under Louisiana principles of statutory construction, "[t]he fundamental question . . . is legislative intent and the reasons that prompted the legislature to enact the law. When a law is clear and unambiguous and its application does not lead to absurd consequences, it shall be applied as written, with no further inquiry made in search of the legislative intent. However, when a law is susceptible of different meanings, it must be interpreted as having the meaning that best conforms to the purpose of the law." *Palmer v. La. State Bd. of Elementary and Secondary Educ.*, 842 So.2d 363, 367 (La. 2003) (citations omitted). The *Palmer* court advised as follows:

The meaning and intent of a law is determined by considering the law in its entirety

[9] The one case cited by both parties, *Crawford v. American National Petroleum Co.*, 805 So.2d 371 (La. Ct. App. 2001), is not on point. In that case, the parties (including the Department) agreed that a punitive damage award for tortious interference with a contract constituted apportionable income under the Louisiana Franchise Tax Code. *See id.* at 375. The disagreement in that case was on how to properly apportion the punitive damage income. *See id.* Here, the parties disagree on the more fundamental question not addressed by the *Crawford* court – *i.e.*, is debt forgiveness considered "other revenue" subject to apportionment? The Debtor essentially urges this Court to hold the Department to its position in *Crawford* and find that, since the Department agreed that punitive damages from a tortious interference award constitute apportionable income, the Department should be compelled to agree that debt forgiveness derived from a bankruptcy proceeding is apportionable income. This Court disagrees. The Department's prior position is not binding here. And, since the *Crawford* court did not speak to the issue raised here, it is not relevant precedent.

> and all other laws concerning the same subject matter and construing the provision in a manner that is consistent with the express terms of the statute and with the obvious intent of the lawmaker in enacting it. The statute must therefore be applied and interpreted in a manner that is logical and consistent with the presumed fair purpose and intention the legislature had in enacting it. Courts should give effect to all parts of a statute and should not adopt a statutory construction that makes any part superfluous or meaningless, if that result can be avoided. Furthermore, the object of the court in construing a statute is to ascertain the legislative intent and, where a literal interpretation would produce absurd consequences, the letter must give way to the spirit of the law and the statute construed so as to produce a reasonable result.

*Id.* The Louisiana Supreme Court has provided further guidance on judicial interpretation of tax statutes:

> In interpreting the statutes, we begin from the well-settled premise that taxing statutes must be strictly construed against the taxing authority. Where a tax statute is susceptible of more than one reasonable interpretation, the construction favorable to the taxpayer is adopted. However, exemptions from taxation are strictly construed and must be clearly, unequivocally and affirmatively established.

*Goudchaux/Maison Blanche, Inc. v. Broussard*, 590 So.2d 1159, 1161 (La. 1991) (citations omitted). Accordingly, this Court must begin its analysis by looking at the text of the statute itself. *See Palmer*, 842 So.2d at 368.

Section 47:606(A), while lengthy, can be readily subdivided into the following parts. The head of the provision (or the chapeau) begins by stating that

> [f]or the purpose of ascertaining the tax imposed in this Chapter, every corporation subject to the tax is deemed to have employed in this state the proportion of its entire issued and outstanding capital stock, surplus, undivided profits and borrowed capital, computed on the basis of the ratio obtained by taking the arithmetical average of [in most cases, two ratios.]

*See* LA. REV. STAT. § 47:606(A). Section 47:606(A)(1) then provides the first ratio – what is referred to in this Memorandum Opinion and Order as the Volume of Business Ratio. As noted previously, this ratio is defined to be

> [t]he ratio that the net sales made to customers in the regular course of business and

> other revenue attributable to Louisiana bears to the total net sales made to customers in the regular course of business and other revenue.

LA. REV. STAT. § 47:606(A)(1). Section 47:606(A)(1) is then further subdivided into subsections (a)-(j), whose purpose is to determine "net sales and other revenues attributable to Louisiana." *Id.* The subsections are often industry specific. *See, e.g.*, *id.* §§ 47:606(A)(1)(b) (revenues from air transportation), 47:606(A)(1)(d) (revenues from transportation other than aircraft or pipeline), 47:606(A)(1)(f) (revenues from rental property). Subsection (a) bears particular notice here as it provides an exclusion under the statute: "Revenue derived from the sale of property not made in the regular course of business shall not be considered." *Id.* § 47:606(A)(1)(a).

Section 47:606(A)(2) then provides the second ratio to be used in computing the taxable base attributed to Louisiana – what is referred to in this Memorandum Opinion and Order as the Franchise Tax Property Ratio. *See id.* § 47:606(A)(2). Section 47:606(A)(3) then concludes by providing an additional ratio to be used by corporations engaged in a manufacturing business. *Id.* § 47:606(A)(3). Since these later two ratios are not relevant to the interpretation of the term "other revenue," this Court will limit its analysis to § 47:606(A)(1) and its subsections.

For the reasons explained more fully below, the Court concludes that § 47:606(A)(1) is susceptible to two reasonable interpretations. Turning first to the Debtor's interpretation of the term "other revenue" in § 47:606(A)(1), the Debtor focuses on the first sentence in § 47:606(A)(1) (cited above). The Debtor notes that "regular course of business" grammatically modifies only "net sales made to customers." The term "other revenue" simply follows the construction "net sales made to customers in the regular course of business." From a purely grammatical point of view, this Court agrees that since the phrase "in the regular course of business" does not modify "other revenue," it is reasonably possible that the Louisiana legislature did not intend the term "other revenue" to be

limited by the phrase "in the regular course of business."

The Debtor further argues that this reading of § 47:606(A)(1) is supported by the legislative history. Prior to 1954, this provision read as follows: "The ratio that the net sales and other revenues attributable to Louisiana bears to the total net sales and other revenues." *See* Section 2 of Acts 1954, No. 294 (La. 1954). When the legislature amended this provision, it chose to add the modifying phrase "made in the regular course of business" only to "net sales." *Id.* Further amendments by the Louisiana legislature did not address this issue.[10]

This narrow grammatical reading of § 47:606(A)(1), while reasonable on its face, is not without certain arguable difficulties. For example, the Department argues that an unmodified reading of "other revenue" is pointless – *i.e.*, why would the Louisiana legislature continue to narrow the definition of "net sales" if all transactions excluded from the narrower "net sales" definition are simply picked up again by the term "other revenue?" Or, why would the Louisiana legislature have provided the specific exclusion in § 47:606(A)(1)(a) that "[r]evenue derived from the sale of property not made in the regular course of business shall not be considered"? *See* LA. REV. STAT. § 47:606(A)(1)(a). Did the Louisiana legislature really intend to have "other revenue" include revenue from all transactions including those not in the regular course of business while excepting only sales of property not made in the regular course of business? While the Department raises several potential inconsistencies raised by the language of the statute taken as a whole, the Court notes that the Louisiana legislature, when drafting the exclusion in § 47:606(A)(1)(a) could just as easily have stated that "revenue derived outside of the regular course of business shall not be considered." Yet the

[10] In 1964, the Louisiana legislature added the words "made to customers" after "net sales." While this addition continued to narrow the definition of "net sales," the term "other revenue" remained unmodified. Further amendments in 2002 and 2004 likewise left the term "other revenue" unmodified.

legislature did not do so, opting instead to specifically exclude only that revenue derived from the sale of property outside the regular course of business.

In summary, this Court concludes that an unrestrained reading of the term "other revenue" does not result in absurd consequences or a meaningless statutory provision. On its face, the unmodified reading makes grammatical sense and seems to be supported by the legislative history. Thus, the Court concludes that the Debtor's reading of the statute is reasonable. In fact, in most cases this reading of the statute would maximize tax revenues for the state of Louisiana, since it provides a vehicle for Louisiana to tax any "other revenues" not specifically addressed by the statute.[11]

In contrast, the Department argues that a better reading of the statute limits the term "other revenue" to that revenue derived from the regular course of business. The Department further argues that such a reading makes more sense when the statute is considered as a whole. According to the Department, most of the examples of revenues provided in subsections (a)-(k) can logically be seen to derive from the regular course of a taxpayer's business. *See, e.g.*, LA. REV. STAT. §§ 47:606(A)(1)(b) ("Revenues attributable to this state from air transportation shall include all gross receipts derived from passenger journeys and cargo shipments originating in Louisiana."), 47:606(A)(1)(e) ("Revenues from services . . . shall be attributed within and without Louisiana on the basis of the location at which the services are rendered."), 47:606(A)(1)(i) ("Royalties or similar revenue from the use of patents . . . shall be attributed to the state or states in which such rights are used."). Thus, the Department argues that when the statute is viewed as a whole, the Louisiana legislature seems to have intended that § 47:606(A)(1)(a)-(k) provide for the revenues derived from

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[11]Ironically, under the unique facts of this case, the Department is advancing a reading of the statute that would, in most cases, serve to limit Louisiana's tax revenues.

every conceivable regular business arrangement to be included in the Volume of Business Ratio. Consequently, the Department reasons that the term "other revenue" when first used in the statute – *i.e.*, LA. REV. STAT. §§ 47:606(A)(1), should be read as being restricted to that derived from the regular course of business. The Department finds this reading more reasonable because it avoids the puzzling incongruities of the broader reading – *i.e.,* when the Louisiana legislature narrows the definition of net sales, the definition of other revenue does not become proportionally larger, while fitting within the spirit of the statute as a whole.[12]

But, this narrower reading of the statute has problems of its own, the primary problem being that this reading is grammatically unsound. Furthermore, there is no guarantee that this interpretation properly construes the Louisiana legislature's intent. The Louisiana legislature may have intended to tax only the sales and revenues derived from the regular course of business, thereby limiting the

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[12]The Department also argued that since the statute does not provide a definition of "other revenue," this Court should look to other sources, and particularly to the Generally Accepted Accounting Principles ("GAAP") to provide a definition. The Department argued that under GAAP, revenue is limited to cash inflows (or the equivalent) resulting from an entity's major or central operations. Under this reading, debt forgiveness derived from a bankruptcy filing would not meet the definition of revenue, since such debt forgiveness does not result from an entity's major or central operations. The Debtor argued that if the Court were to look to an outside source to define "other revenue," then this Court should look rather to the Statement of Financial Accounting Concepts No. 6, Section 78. The definition of revenue under the Statement of Financial Accounting Concepts is slightly broader than GAAP's definition, since it encompasses all inflows or settlements of liabilities – and not just cash inflows – arising from an entity's major or central operations. *See* Debtor's Exh. 9 at 3. Furthermore, the Statement of Financial Accounting Concepts suggests that there is a great deal of play in the definitions of revenue versus gains. *See id.* at p. 5.

This Court is not inclined to look to either GAAP or the Statement of Financial Accounting Concepts to derive a definition for "other revenue." First, there is no statutory requirement that the franchise tax return is to be prepared according to GAAP. Second, GAAP deals with different issues not necessarily applicable to tax. As the Debtor's expert witness testified at the Hearing, bringing either GAAP or the Statement of Financial Accounting Concepts into the Court's analysis is "mixing apples and oranges." *See* Transcript at 56-57. As the United States Supreme Court stated in *Thor Power Tool Co. v. Commissioner*:

> Finally, a presumptive equivalency between tax and financial accounting would create insurmountable difficulties of tax administration. Accountants long have recognized that "generally accepted accounting principles" are far from being a canonical set of rules that will ensure identical accounting treatment of identical transactions. "Generally accepted accounting principles," rather, tolerate a range of "reasonable" treatments, leaving the choice among alternatives to management. Such, indeed, is precisely the case here. Variances of this sort may be tolerable in financial reporting, but they are questionable in a tax system designed to ensure as far as possible that similarly situated taxpayers pay the same tax.

439 U.S. 522, 544 (1979).

tax base (and minimizing the tax revenues). The Department's reading of "other revenue" is certainly in line with this interpretation. Conversely, the Louisiana legislature may have intended to expand the tax base (and maximize the tax revenues) by taxing not only certain revenues derived from the regular course of business, but all other revenues, except those specifically excluded by the legislature. The Debtor's reading of "other revenue" is in line with this later interpretation.

It is unclear which interpretation was intended by the Louisiana legislature. Instead, this Court is faced with two reasonable interpretations of the term "other revenue," each supporting a different reading of the Louisiana legislature's intent. Therefore, this Court must follow the dictates of the Louisiana Supreme Court in *Goudchax*: "Where a tax statute is susceptible of more than one reasonable interpretation, the construction favorable to the taxpayer is adopted." 590 So.2d at 1161. Since this tax statute does not address an exemption from taxation, which is strictly construed against the taxpayer, *see id.*, and since this Court has concluded that the Debtor's interpretation is reasonable, this Court must construe § 47:606(A)(1) in favor of the Debtor. Accordingly, the Debtor properly included debt forgiveness as "other revenue" in its franchise tax calculations.

**2. The Main Pass Revenue Issue**

The second issue before this Court is the Main Pass revenue issue – *i.e*, did the Debtor's revenue from its Main Pass platform constitute income allocatable to Louisiana under the Volume of Business Ratio. Pursuant to § 47:606(A)(1)(a), all sales where the goods, merchandise, or property are received in Louisiana are attributable to Louisiana. But, "[i]n the case of delivery of goods by common carrier or by other means of transportation, including transportation by the purchaser, the place at which the goods are *ultimately received* after all transportation has been completed shall be considered as the place at which the goods are received by the purchaser." LA.

REV. STAT. §§ 47:606(A)(1)(a). The regulation that accompanies this provision clarifies that "[g]enerally, transportation by public carrier pipelines is accorded the same treatment as transportation by any other type of public carrier, that is, actual delivery to the purchaser controls, rather than technical or constructive delivery." LA. ADMIN. CODE § 61:I.306(A)(1)(a)(iv)(a).

The Department attributed $468,917 of revenue from the Debtor's Main Pass platform to Louisiana. Per the audit report, the Department justified this adjustment because "[t]he oil and gas from the Main Pass platform was delivered into Louisiana." *See* Department's Exh. 3, sch. B, p. 5. The Department argues that (i) its Proof of Claim on this issue, supported by the auditor's report, is entitled to prima facie validity and (ii) the Debtor did not put on any evidence at the Hearing to rebut the prima facie validity of the Proof of Claim. In fact, the Debtor's assistant comptroller testified that while the Debtor sells and transfers title to the Main Pass oil in federal waters off the Louisiana coast, the Debtor does not know where its oil is ultimately delivered. *See* Transcript at 15. And, while it is true that if the Debtor could have proven that ultimate delivery occurred outside of Louisiana, the Department's claim would have been rebutted, the Debtor could also rebut the Department's claim by proving that the Department itself did not know where ultimate delivery was received. While the Department's auditor testified on direct examination that the Main Pass oil was delivered into Louisiana, *see* Transcript at 91-92, he admitted on cross-examination that he did not know if Louisiana was the place where the oil was ultimately received:

> Q. And the only thing that you know is that there are pipelines that run into the State of Louisiana and you don't know where the ultimate point was when it was transported outside the State of Louisiana or not?
>
> A. No. Based on where the well was located, it was transferred into Louisiana.
>
> Q. But then those are transported out of Louisiana after it went in?

A. *Well, the taxpayer does not know where it went after that either, too.* I need to elaborate how this really works. I mean, it's oil and gas.

Q. Your franchise tax focuses – it's not whether it went into Louisiana, it's the point where it's ultimately received, right?

A. Yes.

Transcript at 112-13 (emphasis added).

Based on this limited evidentiary record, the Court concludes that the Debtor met its burden to present evidence sufficient to rebut the prima facie validity of the Proof of Claim on the Main Pass revenue issue. The auditor's report attached to the Proof of Claim was rebutted by the auditor's admission at the Hearing that he did not know where the oil was ultimately received. Once the prima facie validity of the Proof of Claim was rebutted, the burden shifted to the Department to prove up this portion of the Proof of Claim by a preponderance of the evidence. The Department did not meet its burden. Since § 47:606(A)(1)(a) provides that the sale of delivered goods are only attributable to Louisiana if the goods are ultimately received in Louisiana after all transportation has been completed, and since the Department admitted that it does not know where the Main Pass oil was ultimately received, the Court must hold in favor of the Debtor on this issue. Accordingly, the income received from the Main Pass oil was not income allocable to Louisiana.

### 3. The Abandonment Fund Liability Issue

The third issue before this Court is the abandonment fund liability issue – *i.e.*, was the Debtor's abandonment fund liability properly included in the Debtor's total taxable base for franchise tax years 2001 and 2002. Pursuant to § 47:602, the total taxable base is computed by determining "the amount of [the taxpayer's] issued and outstanding capital stock, surplus, undivided profits and borrowed capital." LA. REV. STAT. § 47.602(A). Section 47:605 provides "that in computing surplus

and undivided profits there shall be included all reserves other than those for fixed liabilities." *Id.* § 47:605(A). Section 46:603 defines borrowed capital as "all indebtedness of a corporation . . . maturing more than one year from the date incurred, or which is not paid within one year from the date incurred regardless of maturity date," *id.* § 47:603, but excludes certain sums deposited with a "trustee or other custodian when segregated into a separate or special account." *Id.* § 47:603(3). The regulation that accompanies § 47:603 explains that the exclusion mentioned is only applicable if "such segregation is fixed by a prior written commitment or court order for the payment of principal or interest on funded indebtedness or other fixed obligations." LA. ADMIN. CODE § 61:I.303(B)(3)(a).

The Debtor set up a separate bank account called the Breton Sound Abandonment Fund (the "Fund") at a time when the Debtor only owned about 40% of the Breton Sound, which is apparently either an oil field or a platform. The Debtor asked the outside interest owners to make contributions to the Fund to cover the owner's liability to the state if a well or platform was abandoned. *See* Transcript at pp. 29-32. At some point, however, the Debtor's ownership interest in Breton Sound increased. The Debtor apparently purchased much of the outside interest owners' interest in Breton Sound. Then, because so much of the potential abandonment liability would be the Debtor's liability (due to its increased ownership interest), the Debtor concluded that it no longer needed the Fund. *See* Transcript at 33. And, some time after the additional taxes were assessed by the Department, the Debtor liquidated the Fund and paid the monies paid back to the original outside interest owners or provided them with a credit on their joint interest billings. *See* Transcript at pp. 29, 32.

The Department initially argued that the Fund represented a contingent liability that was properly included in Debtor's total taxable base for years 2001 and 2002 in accordance with §

47:605(A) as surplus and undivided profits. At the Hearing, the Department made the further argument that even if the Fund represented a definite liability, the monies in the Fund should still be included in the Debtor's total taxable base, albeit through the borrowed capital provision in § 47:603. In contrast, the Debtor argued that the Fund represented a definitely fixed liability that was segregated by written agreement with the outside interest holders such that it was properly excluded from the Debtor's total taxable base.

At the Hearing, the Debtor met its evidentiary burden through both the testimony of its assistant comptroller, *see* Transcript at pp. 29-35, and the introduction of Debtor's Exhibit 5 (which shows the exact amounts owed to each contributor to the Fund). The assistant comptroller testified that the amounts in the Fund were to be repaid to the outside interest holders if the monies were not used to pay the state. *See id.* at p. 41. The assistant comptroller further testified that the Fund represented a "definitely fixed liability because we know exactly the amount that is due to exactly the person it is due." *Id.* at 31. In response, the Department offered the testimony of its auditor, who explained how even if the Fund represented a definitely fixed liability, the monies in the Fund should still be applied to the Debtor's total taxable base as borrowed capital. *See id.* at pp. 115-16.

A contingent liability is "[a] liability that will occur only if a specific event happens; a liability that depends on the occurrence of a future and uncertain event." BLACK'S LAW DICTIONARY 933 (8th ed. 2004). A definitely fixed liability is a liability that has already attached. *See Goudchaux/Maison Blanche, Inc., v. Broussard*, 590 So.2d 1159, 1162 (La. 1991) (stating that accrued taxes are definitely fixed liabilities because "the liability for the [sales] tax attaches at the time the sale is made"). Using these definitions as guidelines, the Court concludes that the Fund represented a contingent liability at the time the additional taxes were assessed. The Debtor's liability

to repay the outside interest owners would only arise if the monies in the Fund were not used to pay the state. If the monies were needed to pay the state, the Debtor would have no obligation to the outside interest owners concerning these monies. As such, the Department properly included the Fund in the Debtor's total taxable base as surplus and undivided profits pursuant to § 47:605(A).

But, even if the Court were to hold that the Fund represented a definitely fixed liability, this liability would still need to be included in the Debtor's total taxable base as borrowed capital under § 47.603. The evidence establishes that the Fund represented indebtedness of the Debtor that was not repaid within one year. *See* Debtor's Exh. 5 (including spreadsheets for the amounts due in 2000 and 2001; a comparison between the 2001 spreadsheet and the 2000 spreadsheet reveals that the funds owed were still owing one year later); *see also* LA. REV. STAT. § 47.603 (defining borrowed capital). While § 47.603 provides an exclusion from borrowed capital for certain amounts held by a trustee or other custodian in a separate account pursuant to a written commitment or court order, *see id.* at § 47.603(3), there is not sufficient evidence in the record for the Court to conclude that the Debtor is entitled to the benefit of this exclusion.

The Debtor's assistant comptroller testified that the Debtor was acting as an escrow agent and that the monies in the Fund were held in a separate account. *See* Transcript at pp. 29-32, 40, 113. But, there is insufficient evidence in the record from which the Court can conclude that the segregation was pursuant to a written commitment as the exclusion requires. *See* LA. ADMIN. CODE § 61:I.303(B)(3)(a). The only testimony in the record that possibly relates to this written commitment requirement is as follows: "[W]e had in place in the operating agreement a provision where we could require [the outside interest owners], if we felt it was necessary, to get us the funds in advance." Transcript at p. 32. This testimony is too vague to prove that the segregation of the

Fund was by prior written commitment. While the operating agreement might have satisfied the Debtor's burden to prove its entitlement to the exclusion, the operating agreement was not offered, or admitted, into evidence.

For either of these reasons, the Department properly included the Debtor's abandonment fund liability in the Debtor's total taxable base.

**Conclusion**

Since this Court has found in favor of the Debtor on the debt forgiveness issue and the Main Pass revenue issue, but has found in favor of the Department on the abandonment fund liability issue, the Objection is granted in part and denied in part. Pursuant to the Joint Stipulation, the Department is allowed a claim of $1,424.38, consisting of $1,150.00 in tax and $269.38 in interest. *See* Joint Stipulation at p. 2.

**SO ORDERED**.

### End of Order ###