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## Special Report / Viewpoint

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# Nonresident REIT Shareholder Held to Be Subject to Louisiana Tax

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The Louisiana Supreme Court has held in *Bridges v. Autozone Properties Inc.*, No. 2004-C-814 (La. Mar. 24, 2005)<sup>1</sup> that a nonresident shareholder in a corporate real estate investment trust was subject to personal jurisdiction in the Louisiana courts based solely on its ownership of stock in a REIT that owned property and conducted business in Louisiana. The state supreme court found that the exercise of personal jurisdiction over the out-of-state corporation did not violate the Due Process Clause of the U.S. Constitution. While the court's opinion provides a lengthy, but selective, recapitulation of the due process jurisprudence of the U.S. Supreme Court and the courts of other states, it provides little analysis regarding how these cases apply to the facts at issue in the case. Even more baffling is the court's failure to address several pertinent cases dealing directly with personal jurisdiction issues as they relate to corporate shareholders. (For the Louisiana Supreme Court's decision in *Autozone*, see *Doc 2005-6391* or *2005 STT 50-16*.)

The sole issue in the case was whether Autozone Properties Inc. (Properties), a subsidiary of Autozone, was subject to the jurisdiction of the Louisiana court under federal Due Process Clause standards. Properties was established as a holding company and its only business purpose was to hold shares of stock in Autozone Development Corp. (Development), which is a corporate REIT. Properties owned 100 percent of the common stock and approximately 90 percent of the preferred stock of Development. The remaining preferred shares were owned by Autozone employees. Properties had no contacts whatsoever with Louisiana other than its ownership interest in Development. Development owns the real property where Autozone retail stores operate, including Autozone stores in Louisiana.

The retail stores were operated by Autozone Stores Inc. (Stores), which also is a member of the Autozone consolidated group. Stores paid rent to Development for the use of the real property owned by Development. Both Development and Stores were registered with the Louisiana secretary of state as nondomiciliary business corporations that filed Louisiana corporation income tax returns. On its Louisiana income tax

returns, Stores deducted the rent it paid to Development. Although Development, the REIT, was taxed as a corporation for federal and Louisiana corporation income tax purposes, it paid no federal or Louisiana taxes because it received a dividends paid deduction based on the fact that it paid at least 90 percent<sup>2</sup> of its taxable income as dividends to its shareholders. Thus, the rental income Development received from Stores, including rental income generated from real property in Louisiana, was not subject to Louisiana corporation income tax. Further, Properties did not file Louisiana corporation income tax returns and, thus, no Louisiana corporation income tax was paid on the dividends received by Properties from Development.

The Louisiana Department of Revenue filed suit against Properties, asserting jurisdiction under the state's long-arm statute (La. R.S. 13:3201) and alleging that Properties was required to pay Louisiana corporation income and franchise taxes based on its ownership of Development. Properties responded to the DOR's petition by filing an exception of lack of personal jurisdiction, which the district court granted, dismissing the DOR's suit. The DOR appealed the district court's decision.

In affirming the district court's decision sustaining Properties' exception, the Court of Appeal, First Circuit,<sup>3</sup> held that the dividends received by Properties from Development had not acquired a business situs in Louisiana and that the shares of stock owned by Properties "were not acquired by Properties in the course of any business conducted in Louisiana. There is no indication that any physical evidence of the share ownership or receipt of dividends has ever occurred in Louisiana. No accounting records of the dividends have been kept in Louisiana. Properties plays no part in the decision-making process of Development with respect to the payment of dividends. Thus, the ownership and control of these shares remained in Properties, and there has been a complete lack of localization or integration of the dividends within Louisiana, which legally is of the essence of 'business situs' for purposes of taxation." 873 So.2d at 30, citing *McNamara v. George Engine Co. Inc.*, 519 So.2d 217 (La. App. 5th Cir. 1988), and *Gay v. Bessemer Prop.*, 32 So.2d 59 (Fla. 1947).

The Court of Appeal also concluded that Properties' commercial domicile was not in Louisiana, it was not qualified to do business in Louisiana, it conducted no business activities in Louisiana, it owned no property in Louisiana, it had no office

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<sup>1</sup>The taxpayer's motion requesting a rehearing was denied by the Louisiana Supreme Court on May 13, 2005.

<sup>2</sup>IRC section 857.

<sup>3</sup>For the Court of Appeal's decision in *Autozone*, see *Doc 2004-9700* or *2004 STT 90-21*.

in Louisiana, it had no employees in Louisiana, and it had never solicited business from or contracted with Louisiana residents. The appellate court concluded that “even under the expansive ‘economic presence’ approach Autozone Properties did not have a sufficient nexus with Louisiana to satisfy the Due Process Clause.” The appellate court further found that “[a]side from a clear lack of tangible or physical presence in this state, Properties receipt of dividends from Development also does not constitute intangible property in this state. This is so even though that dividend income is derived from rental income from Autozone retail stores located in Louisiana.” Based on its analysis that the Louisiana court did not have jurisdiction over Properties under the Due Process Clause of the U.S. Constitution, the court of appeal sustained the trial court’s granting of Properties’ exception of lack of personal jurisdiction and dismissal of the DOR’s petition.

The Louisiana Supreme Court granted the DOR’s writ of certiorari. On appeal, the Louisiana Supreme Court did not address the court of appeal’s holding regarding the business situs of Properties’ investment in Development and Properties’ commercial domicile. Instead, the state supreme court focused on whether Properties’ contacts with Louisiana were sufficient to meet the “minimum contacts” standard of the Due Process Clause. Focusing on that personal jurisdiction issue should have been the only focus of the court.

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***The court in Autozone Properties seems to uphold the long-standing legislative policy that Louisiana is a ‘separate return state.’***

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Before addressing whether the state had personal jurisdiction over Properties, the high court first noted that Louisiana is a separate reporting state, as opposed to a unitary combination state. The court said “[t]he separate report used in Louisiana is distinguished from the state combined report utilized in other states that recognize the unitary business principle for tax purposes.”<sup>4</sup> While that may seem obvious to most observers, the DOR has recently advanced a tortured reading of Louisiana corporation income tax law under which it has attempted to exhume a long-buried provision of the tax law (La. R.S. 47:287.480) and dress it up as a combined reporting provision. The state supreme court’s holding on this point should provide hope to Louisiana corporation income taxpayers that have been victimized by the DOR’s confusing assertions in audits and in litigation regarding the state’s status as a combined reporting state. The court in *Autozone Properties* seems to uphold the long-standing legislative policy that Louisiana is a “separate return state.”

After reaffirming Louisiana’s status as a separate return state, the state supreme court next examined the use of passthrough entities by taxpayers. The court noted the large increase in the use of passthrough entities in recent years and declared that “states have failed to give sufficient attention to passthrough entities despite their growing popularity.” That is an excellent point and one that the court should have focused

on more steadily in its opinion. If the DOR believes that it is losing revenue because of the increased use of passthrough entities, the Legislature has sole responsibility and jurisdiction to focus on the use of those entities and approve legislation to deny passthrough status in situations where it believes the entities are being used to unduly reduce Louisiana corporation income tax liabilities.<sup>5</sup> Instead of focusing on legislation related to the taxation of income of some passthrough entities themselves, which clearly Louisiana has the right to tax if it so chooses, the DOR has instead resorted to dubious legal theories in order to pursue the nonresident owners of those entities. Such use of the courts to undermine the clear language of the state’s taxing statutes will necessarily lead to the creation of bad law, at best.

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***The Louisiana Supreme Court relied on International Harvester to support its conclusion that Louisiana can impose its income tax on a nonresident shareholder based solely on the ownership of stock in an entity that operates in Louisiana.***

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The Louisiana Supreme Court also felt compelled to write extensively on the proper classification (corporation or trust) of Development, the REIT. Even though Development was organized as a corporation, the department attempted to classify it as a trust, hoping to more easily tax Properties as the corporate beneficiary of a Louisiana trust, which is required to file a Louisiana tax return.<sup>6</sup> The court dismissed the DOR’s position, determining that a REIT is allowed to be formed as a corporation under federal law and that Louisiana chose to follow the federal REIT provisions in drafting the Louisiana corporation income tax statutes. Thus, “Development’s status as a corporation remains intact and is not converted to a trust simply by its business operations in Louisiana.”

When the state supreme court finally turned to the real issue (the jurisdictional issue), it first determined that Louisiana’s long-arm statute is coextensive with the Due Process Clause of the U.S. Constitution and must be examined in light of the U.S. Constitution’s due process requirements. The court’s due process analysis focused mainly on one U.S. Supreme Court decision, *International Harvester Co. v. Wisconsin*.<sup>7</sup> That case involved an entity-level tax on dividends paid by a corporation that was doing business in Wisconsin and clearly was subject to personal jurisdiction in Wisconsin. The tax at issue was

<sup>5</sup>In its opinion, the court of appeals recognized in footnote 11 that the taxpayer had structured its operations in a manner that legally reduced its Louisiana corporation income tax liability and noted that as unfortunate as that might be for the fisc, “the Department’s remedy in this case seems to lie with the legislature.” 873 So.2d at 31. The DOR has indicated that it intends to ask the Legislature to address the structure at issue in the *Autozone* case and similar structures and essentially disallow a dividends paid deduction to some REITs.

<sup>6</sup>The DOR asserted that under La. R.S. 47:287.93(A)(7), a corporate beneficiary is required to file a Louisiana tax return. That section, however, deals only the allocation of income from a trust when Louisiana has jurisdiction over the corporate beneficiary. It does not confer jurisdiction over the beneficiary.

<sup>7</sup>322 U.S. 435 (1944).

<sup>4</sup>Actually, all states that apportion income of multistate companies are bound by the unitary business principle, including Louisiana. See *Mobil Oil v. Commission*, 445 U.S. 425 (1980). What the Louisiana Supreme Court apparently meant is that Louisiana does not recognize unitary combined reporting.

imposed on the corporation's dividend income distributed to nonresidents of Wisconsin. The taxpayer argued that Wisconsin's attempt to tax the dividend income violated the protections afforded by the Due Process Clause because it was declared outside of the state, paid from banks outside of the state, and paid to nonresident shareholders. The U.S. Supreme Court found that even though the ultimate burden of the tax was felt by the nonresident dividend recipients, a tax by Wisconsin on the dividend income in the hands of the corporation did not violate the due process rights of the shareholders.

The Louisiana Supreme Court relied on *International Harvester* to support its conclusion that Louisiana can impose its income tax on a nonresident shareholder based solely on the ownership of stock in an entity that operates in Louisiana. The court, however, provides no analysis as to how *International Harvester* applies to the facts at issue in *Autozone*, but concludes that the case "stands for the proposition that a state may tax a nonresident shareholder's investment income based on its investment in a separate corporation engaging in business activities in the taxing state, when the state has provided benefits, opportunities, and protections which contributed to the profitability of the in-state activities." Despite the court's conclusion, it is difficult to see how any U.S. Supreme Court case can be read to stand for a proposition that the U.S. Supreme Court was not even being asked to address. That is the situation in the *Autozone* opinion.

As *International Harvester* only addressed the imposition of an entity-level tax on a corporation that was doing business in Wisconsin, anything it might have said about taxing nonresident shareholders would clearly be *dicta* and would not establish U.S. Supreme Court precedent on that issue. The statements that the Louisiana Supreme Court attribute to the U.S. Supreme Court in *International Harvester*, however, do not even rise to the level of *dicta* as they vanish upon closer scrutiny. The Louisiana Supreme Court cites several statements from *International Harvester* in support of its position, including the Court's holding that "Wisconsin may impose the burden of the tax either upon the corporation or the stockholders who derive the ultimate benefit from the corporation's Wisconsin activities" and that "[p]ersonal presence within the state of the stockholder-taxpayers is not essential to the constitutional levy of a tax taken out of so much of the corporation's Wisconsin earnings as is distributed to them." Clearly, the U.S. Supreme Court was only holding in those passages that the fact that the "burden" of the tax falls on a nonresident shareholder does not render a tax on the resident corporation unconstitutional. The U.S. Supreme Court was not holding that Wisconsin had personal jurisdiction over the nonresident shareholders based on their ownership of stock in a company doing business in Wisconsin.

In fact, the U.S. Supreme Court has held elsewhere that such contacts are not sufficient to establish personal jurisdiction over a nonresident shareholder. In *Shaffer v. Heitner*,<sup>8</sup> a case decided subsequent to *International Harvester*, the U.S. Supreme Court determined that ownership of stock in a Delaware corporation by nonresident shareholders was not sufficient to give Delaware personal jurisdiction over the nonresident shareholders. While that was a nontax case, it was cited by the U.S. Supreme Court in *Quill v. North Dakota*<sup>9</sup> regarding the due process standards for taxing jurisdiction and should be applicable to the facts in *Autozone*.

<sup>8</sup>433 US 186 (1977).

<sup>9</sup>504 US 298 (1992).

Also, *International Harvester* was decided before *International Shoe Co. v. Washington*,<sup>10</sup> which established the current minimum-contacts standard for Due Process Clause jurisdiction on which the Louisiana Supreme Court's decision necessarily rests. *International Shoe* and its progeny are the proper starting point for determining whether a nonresident individual or entity has sufficient minimum contacts with a state so as to subject the individual or entity to the state's jurisdiction.<sup>11</sup> It is difficult to understand how the court in *Autozone* was able to reach its conclusion that Properties had minimum contacts with Louisiana by relying almost exclusively on a case decided *before* the establishment of the current minimum contacts standard and without mentioning any of the U.S. Supreme Court's jurisprudence regarding application of the current minimum-contacts standard.

If the Louisiana Supreme Court had instead chosen to examine the current U.S. Supreme Court precedent regarding the Due Process Clause jurisdictional standards, it would have discovered that the U.S. Supreme Court has held that a nonresident must take some "action" that demonstrates its intention to "purposefully avail itself" of the market in that state before the state will have personal jurisdiction.<sup>12</sup> While the U.S. Supreme Court has held that a state can have personal jurisdiction over a nonresident that has no physical contacts with the state, the Court has only so held when the nonresident has engaged in some action to direct its activities toward that state. It would be difficult for the DOR to demonstrate that Properties' passive ownership of stock in Development was a sufficient "action" to demonstrate its intent to avail itself of the Louisiana market. While it would not be impossible to make a case that a nonresident has established minimum contacts with a state without ever entering the state, it should not be attempted without even a cursory discussion of the law upon which such a finding must be based.

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### ***The Louisiana Supreme Court merely recites the facts and holding of Geoffrey Inc. v. South Carolina and never explains how Geoffrey applies to the facts of Autozone, which would likely be difficult to do.***

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The Louisiana Supreme Court also relied on the much-maligned *Geoffrey* decision of the South Carolina Supreme Court in support of its finding of personal jurisdiction. The Louisiana Supreme Court merely recites the facts and holding of *Geoffrey Inc. v. South Carolina*<sup>13</sup> and never explains how *Geoffrey* applies to the facts of *Autozone*, which would likely be difficult to do. *Geoffrey* involved a Delaware company that owned trademarks that it licensed to a related entity that did business in many states, including South Carolina. *Geoffrey* had no physical presence in South Carolina and asserted that it

<sup>10</sup>326 U.S. 310 (1945).

<sup>11</sup>See, e.g., *Burger King v. Rudzewicz*, 471 US 462 (1985); *Asahi Metal Industry Co. v. California*, 480 US 102 (1987).

<sup>12</sup>*Asahi Metal, id.*

<sup>13</sup>437 SE2d 13 (S.C. 1993), cert. denied, 510 U.S. 992 (1993). (For the South Carolina Supreme Court's Decision on *Geoffrey*, see 93 STN 133-12.)

could not be required to pay South Carolina corporate income tax. The South Carolina Department of Revenue asserted that Geoffrey had minimum contacts with the state based on the royalty income it earned from licensing its intangibles. Thus, the South Carolina Supreme Court reasoned that the DOR's exercise of personal jurisdiction over Geoffrey did not offend due process standards.

Without rehashing the errors in the *Geoffrey* decision, suffice it to say that the facts in that case are clearly distinguishable from those in the *Autozone* case. It could be argued that Geoffrey, by making the decision to license its intangibles to an entity doing business in South Carolina, had taken some "action" to direct its activities toward South Carolina and thus would satisfy the minimum contacts standard announced in *Asahi*. However, it is difficult to see how Properties' passive investment in Development could be construed to be an action aimed at the Louisiana market. Any activities aimed at the Louisiana market for automobile parts or commercial retail real estate were conducted by Stores and Development, respectively, not by Properties.

The Louisiana Supreme Court agreed with the DOR's arguments that Louisiana provides many benefits, such as fire and police protection and street sanitation services, to the 68 Autozone retail stores located in Louisiana, which were owned by Development and leased to and operated by Stores. There can be no argument, of course, that Louisiana has nexus aplenty over Stores and Development, two separate legal entities with activities in Louisiana. The DOR's argument apparently boiled down to whether nexus is broken because of the passthrough nature of the REIT. The DOR, relying on *International Harvester*, argued that the answer is no. The DOR asserted that "Properties owns 100 percent of Development. Development generates some \$10 million of rental income from store locations (immovable property) located in the State of Louisiana. Louisiana extends protection and benefits to Development. *International Harvester* is authority for the exercise of jurisdiction under Louisiana's long-arm statute."<sup>14</sup> With little discussion, the Louisiana Supreme Court responded to the DOR's argument with a simple sentence: "We agree."

The state supreme court reasoned that "*International Harvester, supra*, stands for the proposition that a state may tax a nonresident shareholder's investment income based on its investment in a separate corporation engaging in business activities in the taxing state, when the state has provided benefits, opportunities, and protections which contributed to the profitability of the in-state activities. Since the taxing jurisdiction, Louisiana, has helped to create the income, it should not be prevented from assessing a constitutionally permissible share of those gains in the form of income taxes for the support of the government [citation omitted]."<sup>15</sup> The court had no explanation whatsoever as to how the nexus aplenty with respect to Development could somehow be attributed to a

separate legal entity, Properties. A careful reading of the court's opinion reveals no facts that would support a position that Properties itself received any benefits or protection from Louisiana. Certainly, any fire or police protection or sanitation services afforded to Properties, which is a pure holding company, were provided by Nevada, its legal domicile, or Tennessee, its apparent commercial domicile. Unless the separate existence of Development could be ignored, Properties simply did not receive any benefits from police or fire protection or sanitation services provided by Louisiana to the retail stores.<sup>16</sup>

The U.S. Supreme Court in *Shaffer v. Heitner* specifically refuted a similar argument regarding to nonresident shareholders. In that case, the plaintiffs argued that the Delaware courts had personal jurisdiction over several individuals who were officers, directors, and shareholders of a corporation that was legally domiciled in Delaware. The plaintiffs argued that Delaware provided benefits to the corporation's officers and directors, who also were shareholders of the corporation, and thus the state had personal jurisdiction over the individuals. The Supreme Court found that such benefits provided by the state would only establish that it was appropriate for Delaware law to govern the obligations of the officers and directors of the company and did not "demonstrate that [the nonresident shareholders] have 'purposefully avail[ed]' themselves of the privilege of conducting activities within the forum states." Further, the Supreme Court determined that "[i]t strains reason . . . to suggest that anyone buying securities in a corporation formed in Delaware impliedly consents to subject himself to Delaware's . . . jurisdiction on any cause of action." Similarly, any benefits that Louisiana provided to Stores and Development would not be a sufficient foundation on which to build a case that Louisiana has personal jurisdiction over Development's shareholders.<sup>17</sup>

In *Autozone*, the Louisiana Supreme Court seems to assert that the Louisiana courts have personal jurisdiction over all nonresident shareholders in a corporation that conducts business in and receives benefits and protections from Louisiana based on the theory that the benefits and protections afforded the corporation somehow can be attributed to all of the corporation's shareholders. That certainly seems to be the logical extension of the court's holding. Such a position would seem to be directly contrary to the holdings of the U.S. Supreme Court in *Shaffer v. Heitner* and *International Shoe*, which would not permit such a boundless personal jurisdiction standard in Louisiana.

In the end, the court's position seems to be designed to prevent what the court perceives as an avoidance of Louisiana corporation income tax using an established corporate structure

<sup>16</sup>The DOR apparently asserted that Development should be treated as the alter ego of Properties. The court of appeals held that the so-called alter ego theory did not apply "because the evidence shows Properties did not control Development's operations in Louisiana." 873 So.2d at 31, footnote 10. The Louisiana Supreme Court did not need to and did not address the DOR's alter ego theory.

<sup>17</sup>The only defendant in the suit by the DOR was Properties. The DOR apparently did not sue the Autozone employees who owned some of the preferred stock of Development and received dividends from Development. Thus, the Court did not have to decide whether Louisiana could assert personal jurisdiction over any of the individual shareholders of Development who were nonresidents of Louisiana. Under the U.S. Supreme Court's holding in *Shaffer v. Heitner, supra*, it is doubtful whether such an attempt would be sustained by a court.

<sup>14</sup>Despite the DOR's assertion that Properties owns 100 percent of Development, the facts recited by the court state that Properties owned 100 percent of the common stock and approximately 90 percent of the preferred stock of Development. The remaining shares of preferred stock were owned by Autozone employees.

<sup>15</sup>If this truly is the position of the Court, then an individual who lives in Alaska and owns stock in Microsoft Corp. could be hauled into a Louisiana state court simply because Microsoft earns income in Louisiana. Without a doubt, that would come as a significant shock to that individual.

that is permitted under current Louisiana law. Indeed, the Louisiana First Circuit Court of Appeals noted with dismay that the structure was perfectly legal, even though it resulted in a loss of revenue to Louisiana. 873 So.2d at 31, footnote 11. The Louisiana Supreme Court also carefully noted the DOR's assertions in its writ application that "the lower courts have sanctioned a tax abuse strategy that will have a far-reaching, negative impact on the state's economy since this and other similar tax schemes are robbing the state of 42 percent of its corporate income base." The fact of the matter is that the structure employed by Properties was and is perfectly legal under current Louisiana corporation income tax laws, which have "been on the books" for years. As with the admonition of the Louisiana First Circuit Court of Appeals, if the DOR does not like the laws that permit Properties to so structure its activities in Louisiana, it should seek redress in the legislature, the sole, constitutionally established policymaking body in Louisiana, and not in the courts.<sup>18</sup> As demonstrated by the *Autozone* decision, such attempts will often lead to the creation of bad law. In this case, the bad law might extend far beyond the reach of the facts at issue in *Autozone*.

Also, it is far from clear that the DOR will be able to tax the dividend income received by Properties even though the Louisiana Supreme Court has held that Louisiana has jurisdiction over Properties. The trial court will first have to determine whether the U.S. Constitution's Commerce Clause will act as a bar to the state's imposition of tax on the income of Properties even though the Due Process Clause nexus minimum contacts standard has presumably been met. While the court in *Autozone* said the Commerce Clause issue had been "abandoned" by the taxpayer, it is far from clear whether that is correct. The taxpayer won the personal jurisdiction issue at the trial court and thus when the DOR appealed that decision to the court of appeal, the taxpayer believed that it was only necessary to address the personal jurisdiction issue because that was the only issue that the trial court had addressed in finding for the taxpayer. Thus, the taxpayer will undoubtedly raise the Commerce Clause issue on remand and the trial court will have to determine first whether the Commerce Clause issue was indeed abandoned and, if not, whether the physical presence requirements for Commerce Clause purposes, as set out in *Quill*, apply to an income tax.

Further, even if the Commerce Clause is determined by the trial court not to apply, it is still not clear whether the income received by Properties is taxable in Louisiana under Louisiana corporation income tax law. Under La. R.S. 47:287.93(A)(4), dividend income is allocated to the business situs of the securities that produce the income. If the securities have not been used in the business so that they acquire a business situs the dividend income is allocated to the recipient's commercial domicile. An exception is provided for "dividends upon stock having a situs in Louisiana" received by a corporation that owns 50 percent or more of the stock of the dividend paying company. In that case, the dividend income would be allocated based on the Louisiana apportionment percentage of the subsidiary. Thus, a parent company receiving dividend income

from a subsidiary would allocate the dividend income to Louisiana based on the subsidiary's apportionment percentages, as calculated under La. R.S. 47:287.95, if the subsidiary stock had a situs in Louisiana.

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### ***In the long run, the Autozone decision might turn out to be a Pyrrhic victory for the DOR.***

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Regarding Properties, it seems clear that even if Louisiana has personal jurisdiction over the company, the stock of Development would not have a Louisiana situs because Properties has no presence in Louisiana and the stock is not held by Properties in Louisiana. Thus, the dividend income would be allocated based on either the business situs of the securities producing the income or to the commercial domicile of the taxpayer. Regarding Properties, neither of those should be in Louisiana because Properties is not legally or commercially domiciled in Louisiana, does not engage in any activity in Louisiana and does not have any contact with Louisiana other than its ownership of the stock in Development. Thus, the dividend income should be allocable outside of Louisiana, as provided in La. R.S. 47:287.93(A)(4). In the long run, the *Autozone* decision might turn out to be a Pyrrhic victory for the DOR.

#### **Addendum**

On May 13, the Louisiana Supreme Court denied Properties' application for rehearing in this case because the request for rehearing had not been timely filed. In a surprising concurrence to the rehearing denial, Chief Justice Calogero said that while he believed that the rehearing should be denied because of its tardiness he was of the opinion that the original decision "might have been decided incorrectly." According to the chief justice, he concurred in the original opinion because he believed that the structure at issue was essentially a "scheme" to deprive Louisiana of tax revenue. On further review it became apparent, said the chief justice, that "more serious constitutional issues" were involved than he had earlier perceived.

After reviewing the application for rehearing, the judge determined that "applicable federal jurisprudence" indicated that the Court of Appeal<sup>19</sup> had likely made the right decision when it determined that the Louisiana courts did not have personal jurisdiction over Properties. According to the chief justice, the Louisiana Supreme Court's original opinion in *Autozone Properties* had conflated personal jurisdiction with taxing jurisdiction, and while Louisiana might have had jurisdiction to tax the income it did not have personal jurisdiction over the nonresident shareholders. The chief justice said in the concurrence that the state supreme court's original opinion did not adequately address the U.S. Supreme Court's holding in *International Shoe*<sup>20</sup> regarding the minimum contacts standard for personal jurisdiction under the Due Process Clause. According to the chief justice, *International Shoe* stands for the proposition that "authority to tax and personal jurisdiction are

<sup>18</sup>The DOR has indicated that it will accept the invitation of the First Circuit Court of Appeals to change Louisiana law to impose an entity-level tax on some REITs. As of the date of publication of this article, the bill has not been introduced.

<sup>19</sup> See note 3, *supra*.

<sup>20</sup> See note 9, *supra*.

discrete questions” and that merely because a state has authority to tax income because it provides benefits, opportunities and protections that contributed to the earning of the income did not mean that nonresident shareholders that received dividends paid out of that income had established minimum contacts with the state.

In addition, the chief justice in the concurrence correctly analyzes the flaws in the high court’s original opinion regarding the application of *International Harvester*.<sup>21</sup> The key difference being that “the nonresident shareholders were not named as defendants in [*International Harvester*]” because the suit was only against the “corporation issuing the dividends.” Thus, it is difficult to see how *International Harvester* can support an attempt by Louisiana to tax nonresident corporate shareholders. The chief justice said that if the rehearing request had been timely he would have voted to grant it so that the personal jurisdiction issue could have been further addressed in order to prevent “untold numbers of corporate shareholders” from being potentially subject to suit in Louisiana. The chief justice also correctly says in the concurrence that if the state does not like this alleged “scheme,” the proper way to remedy the situation is through the Legislature and not through the courts.

Even though the chief justice’s concurrence is not precedential, it should send a message to the lower courts in Louisiana to beware of the potential flaws in the state supreme court’s original opinion in *Autozone Properties* and to carefully examine the personal jurisdiction issue in light of *International Shoe*. And it may also send a message to the DOR that the next time it comes across a tax “scheme” that it does not like, it may be more prudent for it to look to the Legislature for a remedy and not to pursue questionable assertions of jurisdiction through the Louisiana courts. ☆

<sup>21</sup> See note 6, *supra*.

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