

LOUISIANA ASSOCIATION OF TAX ADMINISTRATORS

2013 Annual Meeting
December 6, 2013
Marksville, Louisiana

Louisiana State and Local Tax Developments (Covers Selected Developments Through November 30, 2013)

Russell J. Stutes, Jr., Esq.
Partner
Stutes & Lavergne, LLC
600 Broad Street
Lake Charles, LA 70601
Telephone: (337) 433-0022
E-mail: rusty@stuteslaw.com
Web Site: <http://www.stutetslaw.com>

William M. Backstrom, Jr.
Jones Walker
Suite 5100
201 St. Charles Ave.
New Orleans, LA 70170-5100
Telephone: (504) 582-8228
E-mail: bbackstrom@joneswalker.com
Web Site: www.joneswalker.com

LOUISIANA STATE AND LOCAL TAX DEVELOPMENTS¹

I. LOCAL SALES AND USE TAXES²

A. Legislative Developments

1. General.

The 2013 Regular Session of the Louisiana Legislature was a fiscal session, which means that state and local tax measures were germane and tax issues were abundant. In 2012, the Louisiana Legislature created the Revenue Study Commission to review Louisiana's tax exemptions. The report was released in August 2012 and was widely expected to be the basis of tax reform for the 2013 Regular Session. However, Governor Jindal took the reins early with his own tax swap plan that sought to repeal the individual income tax, the Income Tax and the Franchise Tax. To make up for projected lost revenue, the Governor proposed raising the State Sales Tax rate (first to 5.82%, then to 6.25%) and broadening the State Sales Tax base to include services (including many business-to-business services) and remove many exemptions. Finally, the proposal included the establishment of an independent tax court, as well as a single administrative body (in the form of a commission) to administer both State Sales Tax and Local Sales Taxes. The Governor's plan was ultimately met with overwhelming resistance. Consequently, Governor Jindal withdrew the plan on the opening day of the 2013 Regular Session, but stated that the onus was on the Legislature to pass a bill repealing the state income taxes. Governor Jindal's withdrawal of his tax plan left the field wide open for numerous legislators and groups to propose their own repeal of the state income taxes. However, House Ways and Means Committee Chairman Joel C. Robideaux, the sponsor of Governor Jindal's tax swap plan, announced after the first week of the legislative session that the issue of repeal of the state income taxes was "indefinitely deferred," and was not resurrected during the 2013 legislative session. After the failure of the efforts to repeal the state income taxes, much of the wind was taken out of

¹ The author gratefully acknowledges the substantial work on these materials by Kathryn S. Friel, a Partner in the Jones Walker SALT Group, and Matthew A. Mantle and Justin Stone, Associates in the Jones Walker SALT Group. Additional contributions were provided by Kimberly L. Robinson (Partner), Jay Adams (Partner), and Andre B. Burvant (Partner), all of Jones Walker. The materials cover selected Louisiana state and local tax developments from October 1, 2012 through November 30, 2013.

² Throughout this outline, the following definitions will apply: the Louisiana Corporation Income Tax will be referred to as the "Income Tax;" the Louisiana Corporation Franchise Tax will be referred to as the "Franchise Tax;" the Louisiana General Sales/Use Tax will be referred to as the "State Sales Tax;" the Louisiana Department of Revenue will be referred to as the "DOR" or the "Department;" the Louisiana Board of Tax Appeals will be referred to as the "Board;" the Louisiana Administrative Code will be referred to as the "LAC;" a sales/use tax levied by a local taxing authority will be referred to as a "Local Sales Tax;" and a local tax administrator will be referred to as a "Collector."

any tax reform efforts, including the initial effort to rein in some of the state's 450+ exemptions, exclusions, and credits.

Following Governor's Jindal's withdrawal of his tax plan, the Legislature continued its attempt to achieve a long-awaited compromise on tax incentives and state fiscal policy through its passage of a new operating budget for the 2013-2014 Fiscal Year. While the legislature's budget initially called for an across the board cut for all state tax incentive programs and later a three-year suspension of certain programs, the final compromise reflects changes to the Enterprise Zone Program, a reduction in Vendors' Compensation, and a phase out of the Solar Energy Tax Credit for state income tax purposes.

B. Legislation from the 2013 Regular Session:

1. **H.B. 653 (2013 Regular Session)** provides a reduction in the amount dealers can retain for the collection of State Sales Tax. House Bill 653 reduces the dealer's compensation from 1.1 percent to 0.935 percent of the amount of State Sales Tax due. The bill also authorizes and directs the Secretary of the DOR to employ all means available to collect the Louisiana consumer use tax on all sales of tangible personal property by remote sellers. While legislation was introduced to move Louisiana towards centralized collection of the local sales and use taxes due on sales by remote sellers, those bills did not make it through the legislative process. For now it seems Louisiana will continue monitoring the Marketplace Fairness Act, which is working its way through the United States Congress. H.B. 653 has been designated as Act 257 and is effective as of July 1, 2013.

C. Judicial Developments

1. ***TIN, Inc. v. Washington Parish Sheriff's Office, 12-2056 (La. 03/19/2013)***. On March 19, 2013, the Louisiana Supreme Court issued its ruling in *TIN*, overturning the Louisiana First Circuit Court of Appeals' decision, which had created uncertainty among taxpayers, consultants, attorneys and tax collectors regarding the proper refund appeal procedures, including the timelines for filing appeals of a purported denial of a claim for refund of taxes. In the decision, the court held that:
 - a. The payment under protest requirement of La. R.S. 47:337.77(F) is not applicable where the Collector has ***not*** acted on a properly filed Local Sales Tax refund claim and has ***never*** articulated an interpretation of the statute or regulation involved that is contrary to the taxpayer's interpretation.
 - b. A refund claim denial, without any explained reasoning, cannot serve as a basis for requiring the payment under protest for

subsequent periods where a subsequent refund claim includes different tangible personal property and different time periods.

- c. The statutory delays for pursuing an appeal to court under La. R.S. 47:337.81 do ***not*** begin when the Collector has not affirmatively denied a refund claim, but rather has simply failed to act on a refund claim (i.e., the court concluded that there is ***no*** “deemed” denial of a refund claim). The Collector is required to affirmatively deny a refund claim before any statutory delay period begins to run.
- d. The court also confirmed that the agency principles properly relied upon by the taxpayer in *J-W Power v. State, through Dept. of Revenue and Taxation*, 10-1598 (La. 3/15/11), 59 So. 3d 1234, also apply to overpayment refund claims because, according to the court, “nothing in the tax laws precludes an agent from acting for a taxpayer.”

The Collector’s request for rehearing was denied on May 3, 2013. The decision is now final.

- 2. ***Bridges v. Nelson Industrial Steam Co.*, 12-477 (La. App. 3 Cir. 11/07/2012); 106 So.3d 147, writ granted, reversed and remanded, 13-0171 (La. 03/08/13).** The Louisiana Third Circuit Court of Appeals found that a taxpayer’s purchases of limestone and sand for the manufacture of electricity and steam were not excluded from State Sales Tax under the “further processing” exclusion in La. R.S. 47:301(10)(c)(i)(aa). Applying the test for the “further processing” exclusion as set forth in *International Paper, Inc. v. Bridges*, 07-1151 (La. 1/16/08); 972 So.2d 1121, the court concluded that it was clear from the evidence that coke was purchased for the purpose of heating the scrap iron; the small amount of carbon in the finished product is incidental. The fact that using coke as a fuel has a beneficial side effect did not change the purpose for which it is bought. Accordingly, the court concluded that the taxpayer’s purchase of coke was as a “consumer” for a “purpose other than for resale,” that is, for its use as a heat source to melt scrap iron and not for further processing into an article of tangible property for sale at retail.

The taxpayer filed a writ application with the Louisiana Supreme Court, which was granted on March 8, 2013, docket number 2013-C-171. The Court granted the writ only to remand the matter back to the trial court for a full trial. In a *per curiam* opinion, the Court found there were genuine issues of material fact that necessitate a full trial on the merits.

D. Administrative Developments

1. Revenue Rulings

- a. **Revenue Ruling No. 13-003 (February 27, 2013) (Parts and Materials Purchased for Repair or Maintenance of Lease or Rental Equipment) (SUSPENDED).** The Department ruled that repair parts and materials purchased for the repair or maintenance of lease or rental equipment does not qualify for the exclusion in La. R.S. 47:301(10)(a)(iii), which provides an exclusion from State Sales Tax for purchases made for the purposes of lease or rental. In particular, La. R.S. 47:301(10)(a)(iii) defines “retail sale” or “sale at retail” for purposes of ... state sales and use taxes imposed on transactions involving the lease or rental of tangible personal property ... means a sale to a consumer or to any other person for any purpose other than for ... lease or rental in an arm’s length transaction in the form of tangible personal property” The Department then discussed *International Paper Company v. East Feliciana School Board*, 2002-0648 (La. App. 1 Cir. 3/28/2003), 850 So. 2d 717, *writ denied*, 2003-1190 (La. 6/20/2003), 847 So.2d 1235, which held that regardless of whether the labor/service and parts/materials were separately billed, the two components constituted a repair to equipment subject to sales tax. The court reasoned that parts are of no use to a customer without the service provided and that the service cannot be completed without the parts.

The Department distinguished the *IP* case because La. R.S. 47:301(10)(a)(iii) provides an exclusion from sales tax for items of tangible personal property that are sold for the purpose of lease or rental and does not provide an exclusion for repair parts or materials necessary for the repair or maintenance of lease or rental equipment subject to the exclusion. As such, regardless of whether such items are purchased and installed by the owner of the lease or rental equipment or installed as a repair service which is separately billed by a third party, repair parts and materials for lease or rental equipment do not qualify for the exclusion found in La. R.S. 47:301(10)(a)(iii).

This Revenue Ruling was suspended by Revenue Information Bulletin No. 13-014 (see below), and the Department is reconsidering its position.

2. **Revenue Information Bulletins**

- a. **Revenue Information Bulletin No. 13-014 (July 1, 2013) (Temporary Suspension of Revenue Ruling No. 13-003).** This RIB was issued to explain that the Department was temporarily suspending the implementation of Revenue Ruling No. 13-003, which addressed whether parts and materials purchased by equipment lease or rental dealers to repair and maintain their lease or rental equipment is excluded from the payment of sales tax under La. R.S. 47:301(10)(a)(iii). The suspension became effective on July 18, 2013.
- b. **Revenue Information Bulletin No. 13-012 (July 1, 2013).** This Revenue Information Bulletin was issued to explain that the Vendor’s Compensation Rate on the State Sales Tax return has changed from 1.1 percent to .935 percent of tax. The change in vendor’s compensation became effective with the July State Sales Tax return, which was due August 20, 2013.

3. **Private Letter Rulings (“PLR”)** [None to Report]

4. **Adopted Rules** [None to Report]

5. **Notices of Intent to Adopt Rules** [None to Report]

II. OTHER TAXES AND PROCEDURAL MATTERS

A. Judicial Developments

- 1. ***Catahoula Parish School Board, et al. v. Louisiana Machinery Rentals, LLC, Docket No. 2012-C-2504 (La. 10/15/2013).*** In one of several Local Sales Tax cases (others are discussed in the following paragraphs) involving the same taxpayers and similar issues, the Collector issued notices of assessment seeking to collect Local Sales Taxes allegedly owed by the taxpayers. Based solely on the alleged finality of its notices of assessment, the Collector then instituted summary proceedings as provided for in La. R.S. 47:337.61. The district court concluded that the notices of assessment had become final and were not subject to review by the district court. Based on that conclusion, the district court granted summary judgment in favor of the Collector, prevented the taxpayers from presenting any evidence in their own defense, and declared that the notices of assessment were final and the executory judgment of the court.

On appeal, the Louisiana Third Circuit Court of Appeals held that notices of assessment issued to the taxpayers were statutorily deficient and thus null and not final as to permit summary relief to the Collector. Under the relevant statutory provisions in effect at the time of its issuance, a notice of assessment was required to inform the taxpayers that they had 60

calendar days from the date of the notice to pay the amount of the assessment, request a hearing with the collector, or pay the amount under protest. Because the notices failed to inform the taxpayers of their option to request a hearing within 60 days, they were deficient and invalid and summary judgment was not properly granted in favor of the tax collector by the district court.

The Louisiana Supreme Court granted the Collector's application for writ of certiorari, and affirmed the decision by the Third Circuit. The Court found that the notices of assessment issued by the Collector did not satisfy the mandates required by La. R.S. 47:337.51(A). As such, the notices were not "final" and did not have the preclusive effect claimed by the Collector.

The Court also noted that because the assessments were not final, the Collector was required to support its claims in the summary proceedings with evidence. As the Collector had not submitted any additional documentation or other evidence to support its claims, the Court concluded that the Collector failed to prove its claims and thus the district court erred in its grant of summary judgment in favor of the Collector. The Court reversed the district court's granting of partial summary judgment and remanded the matters to the district court. On remand, the taxpayers will be allowed to present their exceptions and defenses to the merits of the Collector's claims.

2. ***Washington Parish Sheriff's Office et al. v. Louisiana Machinery Rentals, LLC, Docket No. 2013-C-0583 (La. 10/15/2013).*** In this companion case, the Louisiana First Circuit Court of Appeals acknowledged that where the finality of an assessment is the sole basis upon which a Collector seeks relief in a summary proceeding, it naturally follows that compliance with the notice provisions of La. R.S. 47:337.51 is necessary. However, the First Circuit went on to find that the notice at issue did properly inform the taxpayers, *as dealers*, of the statutory delay within which to request a hearing with the Collector. Because the taxpayers could be further classified as "dealers," they were only entitled to a 30-day period within which to request a hearing.

On writ of certiorari, the Louisiana Supreme Court reversed the decision of the First Circuit, holding that La. R.S. 47:337.51(A) provides the mandatory notice requirements that must be sent to all taxpayers against whom an assessment is imposed, even those who can be further classified as "dealers." Because the notice issued by the Collector did not advise the taxpayers that they had sixty days to request a hearing with the Collector, the Court found the notice to be deficient, and therefore, could not have become final. As in *Catahoula*, the Court remanded the matter to the district court to allow the taxpayers to present their exceptions and defenses to the Collector's claims.

3. ***Tensas Parish School Board v. Louisiana Machinery Company and Louisiana Machinery Rentals, 47,516-CA c/w 47,517-CA; 94 So. 3d 1039 (La. App. 2 Cir. 6/29/12).*** In this case, the Collector issued a notice of assessment seeking to collect Local Sales Tax allegedly owed by the taxpayers. Based solely on the alleged finality of its notices of assessment, the Collector instituted summary proceedings as provided in La. R.S. 47:337.61. The district court concluded that the notices of assessment had become final and were not subject to review by the district court. Based on that conclusion, the district court granted summary judgment in favor of the Collector, prevented the taxpayers from presenting any evidence in their own defense, and declared that the notices were final and the executory judgments.

On appeal, the Louisiana Second Circuit Court of Appeals reversed the district court and noted that if a Collector issues a final assessment to a taxpayer, “collection upon a final assessment is executed by the collector by distraint.” The court then noted that the assessment/distraint procedure is an alternative and ***wholly independent*** proceeding to the summary proceeding, and concluded that when a Collector files a summary proceeding under La. R.S. 47:337.61, ***the Collector must establish its claim through competent evidence***. Further, the court acknowledged that the taxpayer must be allowed to offer witnesses and evidence in defense of the Collector’s prima facie case at a “trial” on the rule. Moreover, the court held that motions for summary judgment are not allowed or needed in summary proceedings.

The Collector filed an application for a writ of certiorari with the Louisiana Supreme Court, which granted the application and determined that the underlying appeal was not timely filed. Thus, the Second Circuit’s decision was vacated and the district court’s decision was reinstated.

4. ***Caldwell Parish School Board v. Louisiana Machinery Company and Louisiana Machinery Rentals, 47,349-CA c/w 47,350-CA (La. App. 2 Cir. 5/16/12); 94 So. 3d 144.*** The Louisiana Second Circuit Court of Appeals held that formal assessments issued to the taxpayers were statutorily deficient and thus null and not final as to permit summary relief to the Collector. Under the relevant statutory provisions in effect at the time of its issuance, the notice was required to inform the taxpayers that they had 60 calendar days from the date of the notice to pay the amount of the assessment, request a hearing with the Collector, or pay the amount under protest. Because the notices failed to inform the taxpayers of their option to request a hearing within 60 days, they were null and summary judgment was not properly granted in favor of the Collector by the district court.

The Collector applied for a writ of certiorari with the Louisiana Supreme Court, which was granted on September 28, 2012. The application was granted, argued, and subsequently dismissed by the Court as untimely filed. Thus, the decision of the Second Circuit in *Caldwell* is final.

5. ***Concordia Parish School Board, et al. v. Louisiana Machinery Rentals, LLC, No. 12-422 (La. App. 3 Cir. 10/24/2012); 103 So. 3d 566.*** The Louisiana Third Circuit Court of Appeals held that formal assessments issued to the taxpayers were statutorily deficient and thus null and not final as to permit summary relief to the Collector. Under the relevant statutory provisions in effect at the time of its issuance, the notice was required to inform the taxpayers that they had 60 calendar days from the date of the notice to pay the amount of the assessment, request a hearing with the Collector, or pay the amount under protest. Because the notices failed to inform the taxpayers of their option to request a hearing within 60 days, they were deficient and invalid and summary judgment was not properly granted in favor of the Collector by the district court.

This case is not final. The Collector applied for a writ of certiorari with the Louisiana Supreme Court. The Louisiana Supreme Court has not acted on the application.

6. ***Livingston Parish School Board v. Louisiana Machinery Company and Louisiana Machinery Rentals, 2011-CA-1235, 2011-CA-1236 (La. App. 1 Cir. 6/8/12); 98 So. 3d 407.*** The Louisiana First Circuit Court of Appeals held the alleged defect in the notice of assessment issued by the Collector, which informed the taxpayers that they had 15 days to respond (rather than the statutorily-mandated 60 days), did not prevent the Collector from utilizing that notice of assessment as the sole basis for collecting Local Sales Taxes in a subsequent summary proceeding. The court held that the notice requirement applied only to the remedy of assessment and distraint and the Collector's initiation of assessment and distraint procedures did not bar it from pursuing the alternative remedy of a summary proceeding.

This case is not final. The taxpayers have filed an application for a writ of certiorari with the Louisiana Supreme Court. The Louisiana Supreme Court has not yet acted on the application.

7. ***LaSalle Parish School Board v. Louisiana Machinery Rentals, 12-259 (La. App. 3 Cir. 6/6/12); 92 So. 3d 1232; and LaSalle Parish School Board v. Louisiana Machinery Company, 12-276 (La. App. 3 Cir. 6/6/12); 92 So. 3d 1238.*** The Louisiana Third Circuit Court of Appeals held because the Collector was not obligated to use the assessment and distraint provisions before the disputed Local Sales Tax could be collected in a summary proceeding, summary judgment was properly granted in favor of the Collector.

This case is not final. The taxpayers have filed an application for a writ of certiorari with the Louisiana Supreme Court. The Louisiana Supreme Court has not yet acted on the application.

8. ***Jefferson Davis Parish School Board v. Louisiana Machinery Rentals, LLC et al.*, C863-10 c/w C684-10 (La. App. 3 Cir. 10/5/11); 74 So. 3d 1272; writ denied, 2011-C-2437 (1/13/12).** The Louisiana Third Circuit Court of Appeals held that formal assessments became final and were not appealable because the taxpayers “failed to respond” to the formal assessment within the 60-day period. Following the issuance of the formal assessment to the taxpayers and expiration of the 60-day period, the Collector filed summary proceedings against the taxpayers for collection of the Local Sales Taxes. The taxpayers filed exceptions to the summary proceeding and argued that the statutory provisions at issue do not preclude the taxpayers from defending against the assessments in a summary proceeding. The court ultimately found that the statutory provisions provided that the assessments became final and not appealable due to the failure of the taxpayers to respond to the formal assessments.
9. ***Devon Energy Production Company, L.P. v. Bridges*, No. 2012 CA 0809 (La. App. 1 Cir. 6/3/13) (Not Designated for Publication).** The Louisiana First Circuit Court of Appeal affirmed the trial court’s dismissal of the taxpayer’s Petition for Refund of Severance Taxes Paid Under Protest because the payment under protest was made after formal assessments by the DOR became final.

The DOR audited the taxpayer’s predecessor entity and determined a deficiency for Louisiana severance tax and related amounts. The DOR issued notices of proposed assessments in accordance with La. R.S. 47:1562(B) to the taxpayer’s predecessor. The taxpayer did not protest the proposed assessments within the thirty-day period provided in La. R.S. 47:1563. After the expiration of the thirty-day protest period, the DOR issued formal assessments to the taxpayer. The assessments notified the taxpayer that it had sixty days to either pay the taxes under protest pursuant to La. R.S. 47:1576 or appeal the formal assessments to the Louisiana Board of Tax Appeals. The taxpayer did neither. The final assessment notices also contained a warning that the assessments would become final sixty calendar days from the date of the notices.

Long after the expiration of the sixty-day appeal period, on November 17, 2009, the taxpayer paid the assessments under protest and notified the DOR that it intended to file suit for recovery of the amounts paid under protest pursuant to La. R.S. 47:1576. The taxpayer filed a refund suit on December 7, 2009. The DOR filed exceptions of no right of action, no cause of action and lack of subject jurisdiction. The district court sustained the DOR’s exception of no right of action and found that the other two exceptions were moot. The taxpayer appealed the matter to the

Louisiana First Circuit Court of Appeal, which affirmed the trial court's decision.

The taxpayer argued that it had the right to pay the taxes under protest and file the refund pursuant to La. R.S. 47:1576(A) at any time. Reading the tax procedural statutes together, the Court held that the taxpayer did not have the right to utilize the payment under procedures after the assessments had become final.

B. Administrative Developments [None to Report]