



# LATA NEWSLETTER

## Act 442 Work Group Begins Deliberations

Fall 2009

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Following a couple of organizational meetings in August, the Act 442 Collaborative Working Group, established by Act 442 of the 2009 Legislative Session, met in Baton Rouge on September 30<sup>th</sup> to begin consideration of its task to prepare policy recommendations regarding the definition of “tangible personal property”, or more specifically, which items should be considered as moveable or immovable property for the purposes of state and local sales tax statutes.

For many years, going back to the *Exxon v. Traigle* court decision, sales tax administrators and practitioners have had to rely on the Civil Code for definitions of immovable property and its component parts as that definition is lacking in the general sales tax law. The collaborative working group (hereafter, work group) hopes to be able to fashion recommendations that will have application to the sales tax statutes apart from the Civil Code articles, which is subject to amendment for reasons beyond sales and use tax considerations.

To that end the chairman of the work group has assigned tasks for recommendations within the following areas: Hospital and Healthcare, Industrial Property, and Commercial Property.

At the September meeting the work group received one such proposal in the area of Industrial Property. The proposal would establish a two-part analysis with respect to component parts of an immovable. Namely:

1. The property must have some degree of permanent attachment to the building or other construction to which it is attached.
  - Permanent attachment to the building/constructions electrical, ventilation or plumbing system, or
  - Be cemented, bolted or welded to the structure in order to operate properly or satisfy its intended operation, and
2. Removal of the property from the building/construction to which it is attached would cause physical damage to the structure or the

### Reminders!

**Annual  
Conference**

**Dec 9 - 11  
Shreveport**

**Act 442  
Meeting**

**Oct 25  
Baton Rouge**

property itself, or removal of the property would cause functional damage to the property itself or to the operation from which it was removed, regardless of whether or not there was any physical damage.

*Functional damage occurs when the property or the operation from which the property was removed will not perform as intended.*

The proposal retains current application of such property which is physically removed from the taxpayer's premises, that is the property will be considered moveable until it is permanently reinstalled.

No action was taken as this was the first opportunity the group had to view the proposed language. This proposal is significantly different from the two part descriptive definition of component parts of an immovable currently used by administrators and practitioners under Article 466 of the Louisiana Civil Code.

A report was also issued by Mr. William Potter (appointee by the LA CPA Society) which itemized how several other southern states treat component parts of immovables.

So what are sales tax collectors and practitioners to do while the work group is busy at their assignment? In addition to the creation of the collaborative work group, Act 442, in Section 2., enacted La. Rev. Statute 47:301(16)(q), which reads:

*For purposes of sales and use taxes imposed by the state, any statewide taxing authority, or any political subdivision, the term "tangible personal property" shall not include any property that would have been considered immovable property prior to the enactment on July 1, 2008, of Act No. 632 of the 2008 Regular Session of the Legislature.*

Prior to Act 632 of 2008, most collectors looked to Civil Code Articles 462, 463, 464, 465 and 466. However, Act 632 only amended Article 466. Prior to Act 632, one has to go back to Act 301 of 2005 for the last substantive amendment to Article 466. (See Note 1 however). Article 466, as amended by Act 301 reads:

#### **Article 466 Component parts of an immovable**

**Things permanently attached to an immovable are its component parts.**

**Things, such as plumbing, heating, cooling, electrical or other installations, are component parts of an immovable as a matter of law.**

**Other things are considered to be permanently attached to an immovable if they cannot be removed without substantial damage to themselves or to the Immovable or if, according to prevailing notions in society, they are considered to be component parts of an immovable.**

This then is the law which must currently be applied by collectors and practitioners with reference to “component parts” until such time as the legislature considers and enacts further changes (whether as a result of the work group recommendations or otherwise). Except for the controversial “societal expectation” language in the third paragraph, this was the criteria most collectors used in an analysis of what was moveable versus immovable property for sales tax purposes prior to Act 632 in any event.

In addition to the enactment of LRS 47:301(16)(q), Act 442, Section 5 further provides that:

**The provisions of Sections 2 and 3 of this Act are declared to be remedial, curative, and procedural and therefore shall be applied retroactively as well as prospectively, and shall apply to all transactions occurring on or after the enactment on July 1, 2008, of Act No. 632 of the 2008 Regular Session of the Legislature.**

Many tax collectors have questioned the constitutional propriety of the Legislature to enact tax statutes that have a retroactive effect, however it is generally accepted that enactments of the Legislature are presumed to be constitutional unless challenged and ruled on by the LA Supreme Court.

[Note 1: Article 466 was further amended by Act 792 of 2006, however the changes are not substantive in that the term “an immovable” utilized in Act 301 was changed to “a building or other construction”, which was the terminology in Art. 466 prior to Act 301 of 2005.]

## **Act 762 of 2008 Provides for Uniformity Disputes**

In a recent communication copied to the Association’s Executive Director, consideration was being given to the publication in several outlets of an article pointing out Louisiana’s lack of an integrated, centralized sales tax audit function and the impact the lack thereof has on the state’s business community. This is not a new issue, but one that has thus far not produced any measurable advancement, from either that of the Louisiana Department of Revenue or local tax administrators. Although some discussion has been

held among local collectors, and discussions are set with representatives of the LDR this month, the road to producing some workable plan will not be easy, for if it was, it would have been done already.

One inference considered by the author of the article was “the state is simply a bad place to do business because the Parishes make up their own rules even though there is a uniform sales tax code that is supposed to be applied to all...”. As is often the case in such articles, the author did not cite any specifics.

In any event, the Legislature has provided just for that situation... whereby a taxpayer who is aggrieved by the alleged lack of uniform interpretation of a so called “common law” provision of the sales tax law and its attendant regulation (applicable to both the LDR and local collectors) or any ordinance and attendant rule issued pursuant to the Uniform Local Sales Tax Code, may seek relief under a decision rendered by a panel of arbitrators. Act 762 of 2008 applies equally to the collector against a taxpayer whose resistance to the collection of the tax violates the uniform interpretation of said statutes and ordinances.

**Basic components of the Act applicable to the taxpayer or tax collector include:**

- Filing of a written request for an arbitration proceeding seeking uniform interpretation of a common sales tax law or local sales tax law
- Written response required within ten days, failure to receive timely response considered a rejection of the request
- Timely acceptance suspends running of prescription and certain other collection actions until an arbitration panel issues a final written decision
- Selection of arbitrators from a qualified list appointed by the LATA, LABI, and the LA Society of CPAs
- Procedural hearing matters, including format of the panel’s decision
- Expense sharing
- Binding nature of the panel’s decision
- Cites other available remedies: rule in any court of competent jurisdiction, declaratory judgment in any court of competent jurisdiction

This legislation is a derivative of a policy adopted by the LATA several years prior which sought to encourage alternative dispute resolution, by either arbitration or mediation.

## **LA Dept. of Revenue Issues Ruling on Certain Restaurant Purchases**

On September 17, 2009 the Louisiana Department of Revenue issued Revenue Ruling No. 09-002 concerning the state sales tax application of cooking oils and shortening purchased by restaurants in this state. The issues addressed by the ruling states:

Whether items (i.e. butter and oil) purchased by the restaurants, for the following purposes, are for resale, and therefore excluded from advance sales and use tax:

1. When used as an integral ingredient in the recipe of the finished prepared product (i.e. oils in cake recipes and baked goods).
2. When used as a cooking medium that becomes a component part of the finished product (i.e. frying and grilling).
3. When used to coat pans and skillets to produce a more desirable finished product.

In its legal analysis, the Department noted the repeal of the state's advance sales tax requirement as of 1/1/09 and turned its attention to sales tax definitions of "retail sale" (LRS 47:301(10)(a)(i), and "sale at retail" (LRS 47:301(10)(c)(i) which includes the "further processing" exclusion. In addition, the LDR examined the language in the La. Administrative Code 61:I.4301(C) pertaining to "further processing" requirements and cited the three prong test confirmed by the court in the *International Paper, Inc. v. Bridges* decision, namely:

1. The material must be a recognizable and identifiable component part of the end product;
2. The material must be of benefit to the end product; and
3. The purpose for the purchase of the material must be to process it into the end product.

Following an analysis of the cited sources, and that of rulings issued by certain other states on similar issues, the Department concluded:

Restaurants are no longer required to pay advance state sales and use tax on tangible personal property purchased for "further processing" into tangible personal property produced for sale.

Instead, they are to use the Louisiana Resale Certificate, providing the certificate to the seller to certify the purchase of such items as oil and butter are for resale, and therefore not charged the state sales tax.

All sales that are not supported by resale certificates properly executed shall be deemed retail sales, and the dealer will be held liable for the tax. Certificates of resale may not be used to obtain tangible personal property or taxable services that would be used by

the purchaser, not resold.

Pursuant to the rules and regulations, as mentioned above, oil and butter purchased as an integral ingredient or as a cooking medium to fry food is exempt for the state sale and use tax. However, oil and butter purchased as a cooking medium to coat a pan does not qualify as an item purchased for resale or for the “further processing” of a finished product and therefore is not subject to the exempt or applicable for the Louisiana Resale Certificate.

A complete copy of the ruling may be obtained from the Department’s website, found at <http://revenue.louisiana.gov> and click on the “Laws and Policies” link, from which you can select the desired tax type and ruling format.

A Revenue ruling is intended to provide guidance to the public and LDR employees but does not have the force of law nor is it binding on the public. As such revenue rulings are not binding on local tax collectors but every consideration should be given to them by local collectors in the interest of uniformity when the issue ruled on has “common law” application.

## IN MEMORIAM

The LATA family is mourning the sudden passing of our colleague and friend Doug Frye.

Doug died September 24<sup>th</sup> from complications of a heart attack the previous week. Our condolences are extended to his parents, Thomas and Deanne Frye, sons Christopher, Hayden, and Marshall and all his immediate family, and to his co-workers at the Caddo Parish Sales Tax Commission.



Doug will always be remembered for his skill in his profession and a wonderful smile, infectious laughter, and a congeniality that drew people to his friendly ways. We miss you already old friend....

Our condolences are also extended to LATA associate **Drew Talbot**, with the firm of Rainer, Anding & McLindon, on the passing of his grandfather, Mr. **Ames J. Talbot**, who died on September 27<sup>th</sup> at the age of 88. Mr. Talbot was a proud member of the U.S. Coast Guard, having served in World War II and a retiree from Exxon Refinery with thirty-seven years of service.

Our deepest sympathies to Terrebonne Parish Sales Tax Director **Christa Lagarde** on the loss of her father Mr. **Rivers “Bud” Mire** at the age of 82. Mr. Mire worked for Acadia Dairy for 25 years and was retired from the city of Thibodeaux and also a World War II veteran. Our thoughts are with Christa and her family.

*I have fought the good fight, I have finished the course, I have kept the faith; in the future there is laid up for me the crown of righteousness, which the Lord, the righteous Judge, will award to me on that day; and not only to me, but also to all who have loved His appearing.* 2 Timothy 7-8

## From the Editor's Desk:

### “Speaking of all things Civil”

With the recent televised outbursts of the likes of Rep. Joe “You Lie” Wilson during President Obama’s address to the Congress and rap-artist Kanye West’s rude interruption of Taylor Swift’s acceptance of a MTV Video award, talk show pundits have had a field day bemoaning the loss of civility in American discourse. Several opined that today’s “me first” and “in your face” culture standards are the chief blame for the decline in the fabric of our interaction with each other.

Who knows...I don’t profess to be a sociologist by any stretch of the imagination. I can only look back to my own experience over time, especially with this organization. Over the years we have had many a debate over issues that affect our daily work output, but I can recall only a very few times where the “intensity” level reached above normal conversational tones. We all at one time or another, myself included, let our emotions exceed our rationale, in most cases because we are passionate about our expressed position.

I attribute this lack of “hostility” among our membership to two things: the length of time many of us have known each other, leading to an acceptance of each other’s “ways” and the fact that we are often presented with an opportunity to discuss issues in a “non-threatening” environment. How many times do you recall collectors or business and industry folks taking the opportunity to pull one another aside during a hospitality room gathering or during a break in one of our quarterly sessions to delve deeper into questions before us? In my case, and many of you as well, too numerous to count.

Or it could just be a “southern thing”, where we were taught by our parents at an early age that “yes sir” and “no maam”, and “please” and “thank you” were the requisites of

mutual respect and politeness.

In the months ahead, I wonder how the relationships and demeanor of the members of the Act 442 Work group, who perhaps will re-engineer elements of the “Civil Code”, will evolve. To some extent, several of us have known each other for a period of time and have had conversations on the very issue before us. It will be a test of all the above factors, in my opinion, to see if we can maintain that “civility” in the undeniable hard times to come.

**J Roger Bergeron, Editor**  
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*“Become a possibilitarian. No matter how dark things seem to be or actually are, raise your sights and see possibilities—always see them, for they are always there.”*

*—Norman Vincent Peale*

*“In the middle of difficulty lies opportunity”*

*- Albert Einstein*

## MEMBERSHIP INVITATION AND APPLICATION

Name \_\_\_\_\_ Title \_\_\_\_\_

Representative of \_\_\_\_\_ Dept/Div \_\_\_\_\_

Mailing Address \_\_\_\_\_ City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_

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**Annual Dues: \$150.00 (Government Employees)**  
**\$125.00 (Business/Industry Representatives)**

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