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LATA NEWSLETTER

Board Bits:

LA. Department of Revenue Seeks New Regulation

The Louisiana Department of Revenue has asked the LATA Board of Directors to review a draft of a new rule regarding the definition of “sale” in Title 61 of the Louisiana Administrative Code. The draft seeks to further define or clarify “point of sale” as it relates to the transfer of title or possession of tangible personal property subject to the sales tax statutes.

“Sale” is defined at La. R. S. 47:301(12). In part, it reads “a sale is any transfer of title or possession or both, exchange, barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property, for a consideration”. The rule draft provides:

“Sales taxes are due in the jurisdiction in which the buyer takes physical possession of the property. Delivery is defined as the point in time where the obligations of the seller are at an end and the transfer of risk of loss has passed from the seller or its agent and/or carrier to the buyer or the buyer’s agent and/or carrier, and possession transfers.”

The draft then identifies three scenarios of when “delivery” has transpired:

(1) when the buyer or his agent takes physical possession within the seller’s jurisdiction, the sale has occurred and sales taxes are due in seller’s jurisdiction; (2) when the seller or his agent delivers to the buyer’s jurisdiction, possession by the buyer is the point of sale, and sales or use taxes are due at buyer’s jurisdiction, and (3) when the buyer or his agent takes possession outside of buyer’s and seller’s jurisdiction, sales or use taxes are due at that location.

Absent a writing to the contrary, the best evidence of the obligations of the parties will determine when delivery by the seller and possession by the buyer has occurred.

Transfer of risk of loss is the presumptive factor for transfer of physical possession and/or ownership. And the manner of shipment, be it common or contract carrier or the parties own vehicle does not affect the proposed “point of sale”.

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Reminder!

**Second
Quarter
Conference**

**June 10-12
Lake Charles**

As provided by the Uniform Local Sales Tax Code, the LATA Board of Directors, through its Legislative Committee, is reviewing the draft regulation with the intent of responding to the Secretary of Revenue by April 27th. This committee had previously considered a similar “local only rule” with respect to La. Revised Statute 47:337.12 (C) which restricts a sales tax imposed on goods shipped outside of the selling jurisdiction.

That UTC provision, plus the local-only rule adopted for “Temporary Storage” will likely be affected by the ultimate language promulgated by the Department in a rule on the “common law” term “sale”.

FROM THE BENCH:



**A Synopsis of Recent Court Cases of
Importance to Local Taxing Authorities and other
Legal News Notes**

Boyd Racing LLC d/b/a Delta Downs Race Track & Casino v. Rufus R. Fruge as Director of Calcasieu Parish Sales and Use Tax Department

Facts & Issues: Boyd Racing operates a slot machine casino, located at Delta Downs Race Track in Vinton, La. under authority of La. Revised Statute 27: 351, et seq. The casino opened in February 2002.

The Calcasieu Parish Sales Tax Department assessed sales and use tax on materials used in the renovation and construction of the casino, restaurants, stores and hotel at the facility during the period January 1999 through July 2002. In November 2003, Boyd filed suit to recover the taxes paid under protest.

In December 2005, the Louisiana Department of Revenue (LDR) also filed suit in Calcasieu Parish District Court seeking similar taxes owing by Boyd for the period July 2002 through August 2005. In April 2006, the 14th Judicial Court, Parish of Calcasieu consolidated the two cases.

Previously, in December 2003, Boyd filed suit for recovery of state sales and use taxes on the constructions paid under protest to the LDR for the period June 2001 through June 2002. The suit by Boyd was filed in East Baton Rouge Parish, 19th JDC. Later that case was transferred to the Calcasieu District Court and consolidated with the prior two cases in June 2006.

Boyd Racing argued that La. R.S. 4:168 excluded these purchases from the sales and use taxes imposed by the state and local taxing authorities. Louisiana Revised Statutes 4:168 appears in Chapter 4 of Title 4, which governs horse racing in this state. It states:

The license fees, commissions, and taxes imposed in this Part are in lieu of all other such licenses, sales, excise and occupational taxes to the state or to any parish, city, town, or other political subdivision thereof.

Calcasieu Parish argued that the slot machine casino and hotel, which were authorized under Title 27 of the Revised Statutes, are distinct from the horse racing facility and that Boyd Racing is required to pay the sales and use taxes for purchases made in regard to those properties.

The lower court ruled in favor of the defendants and appeal was filed by the plaintiff before the Third Circuit. In addition to the tax at issue, the appellant also raised the issue of attorney fees and penalties assessed.

Decision:

The opinion of the Third Circuit panel states:

“The statute allowing the horse racing facilities to operate slot machine casinos appears in Title 27. In furtherance of the legislation's stated goals of furthering the horse breeding industry, the statute does provide for significant contributions to the purses for horse races and to horsemen's groups from the net proceeds of the slot machine casino. But Title 27 contains no trade-off provision similar to La. R.S. 4:168 . The Act did not create any new burdens for Boyd Racing under Title 4, Chapter 4, Part I. As such, we find that La. R.S. 4:168 does not apply to excuse Boyd Racing from paying sales and use taxes associated with the operation of a slot machine casino authorized under Revised Statutes Title 27.”

“Finally, Boyd Racing argues that the horse racing facility and the slot machine casino at Delta Downs should not be considered two separate entities. Instead, it argues that the slot machine casino can only operate at Delta Downs because it is a horse racing facility. Thus, it argues La.R.S. 4:168 should be read to offset all purchases made by Boyd Racing, whether they are racing related or not, because without the racing facility there would be no non-racing purchases. Again, we disagree. We find that the Act allowed Delta Downs to operate a slot machine casino at the situs of its racetrack, but enacted an entirely new set of regulations for operating the slot machine casino, specifically with regard to the taxes and fees which had to be paid for the operation of the slot machines. In defining those taxes and fees, the legislature did not create an offset similar to La.R.S. 4:168 , and we will not create one.”

In addition the Third Circuit ruled the attorney fees of 10% of the aggregate amount due was not excessive, but a reasonable determination by the trial court; also, the fact that the attorney for Calcasieu was paid on an hourly basis and that fee was less than the 10% penalty imposed by the Ordinance did not constitute a windfall to the Parish or an abuse of the lower court's discretion.

Finally, once again, this Court refused to accept a "good faith" argument as a defense against properly imposed penalties by the taxing authority.

Other notes: Case cite –Third Circuit Court of Appeal 996 So 2d 659, 11/05/2008

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Cajundome Commission v. Carl Meche, Director Sales Tax, et al.

Facts & Issues: The Cajundome Commission, a joint venture between the University of Louisiana Lafayette and the city of Lafayette, operates a public facility which hosts various events, at which it sells tickets, catering, food, beverage and other merchandise at retail.

A joint audit was conducted by the Lafayette Parish School Board, the central collector for Lafayette Parish, and the Louisiana Department of Revenue for the period January 2004 through June 2007. Although registered as a "dealer" with both agencies, it was determined that the Commission failed to collect or remit sales tax on retail sales during the audit period. While the audit was pending, the Commission filed a Petition for Declaratory Judgment with the 15th Judicial Court, arguing that it was not a "dealer" or "person" under the sales tax statutes, and therefore not required to collect or "pay" sales tax.

The Department reconvened for the delinquent tax, interest, penalties and attorney fees, and the Department and Board filed a Joint Motion for Partial Summary Judgment directed to the principal demand alone. Prior to hearing, the Department and Board filed a Joint Petition for Writ of Mandamus ordering the Commission to begin collecting and remitting the sales tax on all taxable transactions. The Third Circuit Court denied the writs. Subsequently, the district court granted the motion for partial summary judgment declaring the Commission to be legally obligated to charge, collect, and remit sales taxes

to the defendants. The Commission subsequently filed an appeal with the Third Circuit.

Decision: The Court examined the definitions of “dealer” at La. Revised Statute 47:304 (4) which in part reads “ Every person who sells at retail, or who offers for sale at retail, or who has in his possession for sale at retail, or for use, or consumption, or distribution, or storage to be used or consumed in the taxing jurisdiction, tangible personal property as defined herein.

It also examined the definition of “person” at LRS 47:301(8) which read in pertinent parts:

(8)(a) “Person”, except as provided in Subparagraph (c), includes any individual, firm, copartnership, joint adventure, association, corporation, estate, trust, business trust, receiver, syndicate, this state, any parish, city and parish, municipality, district or other political subdivision thereof or any board, agency, instrumentality, or other group or combination acting as a unit, and the plural as well as the singular number.

....

(8)(c)(i) For purposes of the payment of the state sales and use tax and the sales and use tax levied by any political subdivision, “person” shall not include this state, any parish, city and parish, municipality, district, or other political subdivision thereof, or any agency, board, commission, or instrumentality of this state or its political subdivisions.

The Court then ruled under the plain language of the statute that the Commission is a person for all purposes under the sales and use tax statutes except for the payment of sales and use taxes on its purchases. It found that the Commission is also a “dealer” to the extent that a “dealer” is required to collect and remit sales and use tax. The Court also discounted the Commission’s argument that there is no difference between collection and payment.

Other Notes: The Third Circuit, while upholding the Partial Summary Judgment of the lower court also reserved to the trial court other issues not brought for review, namely: whether the Commission failed to collect sales taxes in the past, whether it was liable for taxes not collected and whether specific goods or services offered by the Commission are subject to the sales and use tax.

If the Supreme Court denies writs or takes the case and affirms the Third Circuit, the remaining issues will be: the audit findings and the amount of delinquent tax, interest and penalty owed; the taxable elements in the ticket sales price (whether the tax also applies to such stated charges as "facility charges", "handling fees", etc.); and whether "suite leases" are leases or rentals of immovable property or are taxable as "admissions" to the

facility.

Also the restrictions on liability limits on judgments against local governing authorities may become an additional issue.

Case cite –3rd CA 08-1057, 02/04/2009

Counsel for the Defendants-Appellees: Robert R. Rainer and Drew M. Talbot
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LATA COMMITTEES **ROCK!**

The work horses of the Association, several standing committees are once again addressing projects that reflect the goals and objectives of the organization in the current year. Under the guidance of able chairpersons, each group has dedicated itself to pursuing excellence in its given area. Here are some of the highlights of activities by these groups thus far.

Certified Testing – Ron Carter (Morehouse Parish) & Kathy Pettis (Calcasieu) co-chair this group which is preparing to issue the latest certification testing for administrators and examiners later this fall.

They have also made recommendations to the Board of Directors for the qualifications of future members who serve on the committee.

Education- Neshelle Nogess (St. James) and Ron Carter head this group which is in the process of readying the LATA-sponsored Sales Tax Seminar, to be held in Baton Rouge in May. The committee is updating the class material, engaging the facilities needed, securing presenters and publicity for this annual service event.

Legislative- this large group, co-chaired by Donna Andries (Rapides Parish) and George Marretta (La. Municipal Assn.) are gearing up for what promises to be an interesting 2009 Regular Legislative Session, it being a year dedicated to fiscal matters. The committee also reviews and responds to regulations proposed by the La. Department of Revenue.

Local Audit- this new committee, chaired by Mark West (Ascension Parish) and Donna Andries, is a follow-up to last year's Contract Audit Task Force. They are charged by the Board to develop a guide for administrators, taxpayers, and all auditors that delineates a set of "best practices" for all parties engaged in the lo-

cal audit process. They hope to have an initial draft ready by the Second Quarter Conference.

Membership- under the leadership of Kathy Vincent, this committee is exploring the idea of a pictorial membership directory.

Occupational License- this large working group continues to provide a needed service to the membership, many who handle this revenue source for their respective towns and cities. Co-chairmen Steve Thomas (City of Baton Rouge) and James Bowie (City of Shreveport) conducted a workshop at the Monroe Quarterly, at which over thirty registrants attended.

Technical Research- congratulations to this hard working group on the issuance of the updated TRIALS disk at the Monroe quarterly. Bobby Craig (City of Baton Rouge/Parish of EBR) and his gang of sixteen worked diligently throughout 2008 to bring the data current, following newly enacted or amended sales tax statutes, regulations and new court decisions on the subject matter. The TRIALS serve a “one-stop shopping” reference tool for administrators and auditors alike. The Board of Directors envision the TRIALS as an vehicle to promote uniformity of local sales tax administration throughout the state.

Uniform Forms- an offshoot of this committee, including James Brabham (Allen Parish) and Jerry Moore (Lincoln Parish) met with La. Department of Revenue officials in March to discuss concerns over the easy availability of the state’s “Sale for Resale” certificate. Prompted by the discussions, the DRT plans to implement new safeguards and procedures in the near future. The LATA will work further with the DRT to possibly allow the state certificate to be accepted in lieu of similar local certificates, once their new policy has been in effect for a period of time and found to be effective.

Uniform Returns & Remittance- following the successful implementation of the new Parish E-Filing System in October of last year, the group, chaired by Mark West (Ascension), must now complete the task of developing a uniform local sales tax “paper” return to accommodate the “final” requirement of the UTC mandate of 2003.

Mark hopes to once again utilize focus groups in the development of this document, a successful strategy employed in the electronic system development.

If you would like to serve on any of these LATA committees, or others, please contact the respective chair person with your request

Editorial:

“Just when you thought it was safe to go back in the water”

—(byline from movie trailer “Jaws 2”)

Just when you think a nagging issue may have been finally resolved, the controversy over compensation of contract audit firms for services rendered is once again front and center.

Following a contentious battle over the question in last year’s Legislative Session (see HB 747), many thought the opinion issued by the Attorney General’s office in AGO 09-035 on March 2nd of this year was a well reasoned interpretation of the legislature’s intent on the subject when it last amended the controlling statute in 1997 (LRS 33:2719), prior to its incorporation into the Uniform Local Sales Tax Code of 2003 as Sec. 47.337.26. Within days the legal opinion was “withdrawn for reconsideration” following a request from the District Attorney for the 30th Judicial District.

That aside for the moment, there are three forces at work here: (1) the contract audit service providers, (2) the users of those services and (3) the state legislature. One might argue there is even a fourth player...business interest lobby groups.

Contract audit services for local tax authorities goes back into the early 1980s and their method of receiving compensation has evolved from a “straight commission” to straight hourly, straight hourly plus expenses, or a hybrid of straight hourly with limitations tied to deficiencies collected. Normally, under the free enterprise system, businesses have the right to establish their own business model that best serves it profitability, meets competitive challenges and insures its own survivability.

Taxing authorities, as the primary consumer of such services, have to determine how best to utilize these resources. Many so-called “small parishes” rely solely on contract firms for their audit coverage. Others, big and small parishes alike, supplement their internal audit forces with contract firms, typically for out-of- state examinations or other assignments which are outside of their own audit selection process. Still others place no reliance on contracted coverage.

Finally, while the Louisiana Constitution authorizes local governments to levy and collect sales taxes in a manner *defined by law*, it is unequivocal that it is the state legislature that determines what the law is. With regard to contract audit compensation, legislation has also evolved over the years. Initially permitting contingency based contracts (1983), to imposing a 30% cap on contractual payments tied to actual collections (1995), to its last pronouncement of mandating compensation to be “on an hourly basis, plus reasonable expenses” (1997), the legislature has, in effect, made a determination of which

business model for contract audit compensation is allowable in this state.

The request for reconsideration by the 30th JD D.A. centers on three issues: (1) that a previous AGO 99-298 sanctioned audit service contracts with a contingency clause [a legal question]; (2) that numerous parishes may have to cease audit activity without such contingency arrangements [a factual question] and (3) the “defeat” of HB 747 last year was an indication that such arrangements are permissible under the current statute [a political question].

Perhaps the ultimate solution to these questions lies with the Courts, the final arbitrator of legislative intent. In the meantime, we are faced with this: how deep do you want to wade out there ...what else could lie in these murky waters. Oh, did I mention something about a bigger shark in the water?

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“Whenever you are to do a thing, though it can never be known but to yourself, ask yourself how you would act were all the world looking at you, and act accordingly.”

Thomas Jefferson

MEMBERSHIP INVITATION AND APPLICATION

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