McGLINCHEY STAFFORD

Louisiana Sales/Use Tax Update

Focus on Business

Summer 2014

Judicial Developments

The Louisiana courts have been busy but very few recent Louisiana sales and use tax cases actually address substantive tax issues. Many of the tax opinions issued by Louisiana courts over the last year or so, tell a cautionary tale to both the tax collector and to taxpayers about what not to do if you don't want your tax dispute thrown out or remanded on procedural grounds. This report is going to be proactive though and outline what tax collectors and taxpayers must affirmatively do to get to their day in court!

Here's what to do if you are a tax collector:

1. **Don't forget to comply with those pesky statutory requirements when drafting a notice of assessment**
   Multiple parish tax collectors sought to collect sales and use taxes from Louisiana Machinery Rentals but a number of them had difficulty complying with the statutory requirements for issuing a notice of assessment and so were out of luck when it came to summary judgment rulings based on reliance on the deficient notices (none of which could establish a prima facie in favor of the applicable collector). In the Fall of 2013, the Louisiana Supreme Court held that summary judgment in favor of several parish collectors was precluded as the underlying notices were statutorily deficient in both *Washington Parish Sheriff's Office v. Louisiana Machinery Company, LLC*, No. 13-0583 (October 15, 2013), and *Catahoula Parish School Bd. v. Louisiana Machinery Company, LLC,* No. 12-2504 (October 15, 2013). Subsequently, in light of this holding, the Third Circuit Court of Appeal reversed its prior holding, affirming a trial court's grant of partial summary judgment in favor of the local tax collector and remanded the case to allow the tax collector to support its claim for taxes, if possible, with documentation or other evidence. *LaSalle Parish School Board v. Louisiana Machinery Rentals, LLC,* Court of Appeal of Louisiana, Third Circuit, No. 12-259 (April 9, 2014), decision reaffirmed, (Mar. 14, 2014). See also, *Concordia Parish School Board v. Louisiana Machinery Rentals, LLC*, Third Circuit, No. 12-422 (October 24, 2012), decision reaffirmed (March 12, 2014).
2. **It's good idea to make sure you are assessing the right taxpayer**
   This is the lesson of T*homas v. Bridges, Louisiana Supreme Court,* No. 2013-C-1855 (May 7, 2014). This case involved a Louisiana resident who formed a Montana limited liability company to purchase a recreational vehicle and who received an assessment in his own name for unpaid sales/use tax. The vehicle was titled in Montana in the name of the Montana LLC and the individual admitted the arrangement was created to minimize tax liability. Upon receiving the assessment, the individual represented to the Department that the vehicle was not housed in Louisiana and throughout the course of the proceedings, he repeatedly objected that he did not personally own the nor had he ever personally acquired the vehicle. Nevertheless, the Department continued to pursue him personally (not having issued an assessment to the LLC) and throughout the course of the proceedings (but mainly after the assessment stage) continued to offer various, evolving theories of taxability including fraud, alter ego, sham transaction, that the entity's veil should be pierced, and others but offered no evidence to support any of these theories. The Board of Tax Appeals upheld the assessment but was reversed by the First Circuit Court of Appeals which reversal was affirmed by the Louisiana Supreme Court which held that an individual who engaged in tax avoidance ("the act of taking advantage of legally available tax-planning opportunities in order to minimize one's tax liability," as opposed to deceitful tax "evasion") was within his rights and could not be held personally liable for the tax. This despite the filing of amicus briefs by the State of Alabama, the Multistate Tax Commission and several parishes.

Here's some good advice if you are a taxpayer (and in particular, a government contractor):

1. **Government contractors must establish agency properly or pay sales tax on materials**
   A government contractor which modified and replaced HVAC systems at Fort Polk was liable for unpaid sales/use tax on purchases of materials and supplies for use in the project despite its claim of exemption as a purchasing agent for the U.S. government. The contract with the government did not contain provisions establishing an agency or mandatory relationship and the taxpayer did not provide evidence that title to the property passed to the government when the materials and supplies were purchased. In fact, the invoices listed the contractor as the purchaser. The contractor had provided its vendors with a blanket exemption form (rather than following the Department's procedures for establishing the exemption) but the blanket exemption form did not relieve the contractor of liability (nor did the vendor's claim of an exemption based on a sale for resale which was not established). *Bridges v. Cepolk Corp.*, Third Circuit, No. CA-13-1051 (February 12, 2014).

And finally, here is some good advice for everyone - whether you are a tax collector or a taxpayer:

1. **File your appeal/petition on time**
   In *Dillard University v. Barfield*, No. 2013-CA-1336 (April 2, 2014), Louisiana's Fourth Circuit ruled on a recent controversy involving computation of delays with respect to tax notices. At issue in this case was the date on which the 60 day period for appealing the Department's denial of a claim for refund under La. R.S. § 47:1625 begins. La. R.S. § 47:1625 provides that an appeal may not be filed "after the expiration of sixty days from the date of mailing by registered mail by the collector to the taxpayer of a notice of the disallowance of the part of the claim to which such appeal relates." Although the date of the event triggering the delay period under this statute is the mailing by registered mail, the court stated that the Department had a practice of issuing post-dated denial letters informing taxpayers that they had 60 days from the date of the letter to file an appeal, which resulted in the date of mailing occurring before the date of the letter. The court affirmed the holdings of the district court and the Board of Tax Appeals which both found that this practice precluded the Department from asserting the statutory language of "sixty days from the date of mailing" to determine the prescriptive period. Consequently, the event triggering the 60 day period was the date of the notice. Additionally, the court upheld the Board's rule that adopted La. C.C.P. art. 5059 by reference (providing that the date of the event is not to be included in computing a period of time) and upheld its determination that this principle governs the calculation of time delays for La. R.S. § 47:1625, and therefore the computation of the 60 days began the day after the date of the notice.
2. **Seriously, file your appeal/petition on time**
   In *Jazz Casino Company, LLC v. Bridges,* No. 2012 CA 1237 (August 9, 2013), the Louisiana First Circuit Court of Appeals held that the Department of Revenue's request for review of a Board of Tax Appeals decision addressing whether the taxpayer was a "permanent guest" of a hotel for sales/use tax exemption purposes was time-barred. The taxpayer had timely appealed a different issue (that a 2004 private letter ruling in favor of the taxpayer was not binding) and the Department answered and requested reversal of a separate finding in the BTA's decision. The Department's answer which contained the appeal was not filed within 30 calendar days of the BTA's decision. The court of appeal held that the taxpayer's peremptory exception raising the objection of prescription was properly granted by the district court. It was significant that the judgment of the district court, which dismissed in its entirety, the department's suit for judicial review of the BTA decision was a final judgment and so immediately appealable under Louisiana Code of Civil Procedure art. 1915(A).

And lastly but not leastly, here's a case which is not a sales tax case (and despite not being designated for publication) may contain an important procedural ruling

In D*epartment of Revenue v. KCS Holdings I, Inc.,* 2013-CA-1479 (La. App. 1. Cir. 3/31/14) (not designated for publication), Louisiana's First Circuit ruled on the district court's jurisdiction over matters that were not yet final at the Board of Tax Appeals level. After the decision in UTELCOM, Inc. v. Bridges, 10-0654 (La. App. 1 Cir. 9/12/11), KCS sought a refund of franchise taxes paid pursuant to La. R.S. § 47:1621 and filed a petition with the BTA as a claim against the state. Relying on § 47:1621(F) (which provides that section 1621 shall not be construed to authorize any refund of a tax overpaid through a mistake of law arising from the secretary's misinterpretation of the law), the Department denied the request for refund. After KCS appealed the denial of the refund to the BTA, the Department filed exceptions alleging that KCS had no cause of action and no right of action to pursue its claim under § 47:1621 and argued that KCS's sole remedy to recover the taxes it had voluntarily paid was a claim against the state since La. R.S. § 47:1621(F) precluded the issuance of a refund. The Board denied the Department's exceptions and found that while section 1621(F) may prohibit the Department from making a refund where the secretary misinterpreted the law, it does not prohibit the BTA from making a refund.

Following the BTA's decision, the Department filed a petition for judicial review, an application for supervisory writs, and a petition for declaratory judgment in district court based upon its position that the BTA erred in determining that § 47:1621(F) does not prohibit the taxpayer from obtaining a refund from the Department. Thereafter, the district court consolidated the actions and granted KCS's exception of lack of subject matter jurisdiction over the consolidated actions, and the Department appealed to the 1st Circuit. The court of appeal affirmed the district court's decision that it lacked appellate, supervisory, and declaratory judgment jurisdiction, finding as follows: (1) Because a district court's appellate jurisdiction under La. R.S. § 47:1434 over a "decision or order" of the BTA extends only to "final" decisions or orders by the BTA and the BTA's judgment denying the Department's exception is interlocutory in nature, the district court correctly dismissed the Department's petition for judicial review for lack of subject matter jurisdiction; (2) Because the Department's application for supervisory writs neither asserted a claim of deprivation of a constitutionally protected right, nor contended that an agency exceeded its constitutional or statutory authority, the district court correctly dismissed it based upon a lack of subject matter jurisdiction; and (3) Since the trial court lacks original jurisdiction to consider the merits of plaintiffs' claims, as distinguished from the legality or constitutionality of the procedural mechanisms for assertion of those claims, the district court correctly sustained the exception of lack of subject matter jurisdiction and dismissed the petition for declaratory judgment, which concerned the merits of the Department's defense to the refund claim rather than a challenge to the statute's legality or constitutionality.

Guidance Issued by Department of Revenue

As for recent guidance issued by the Department, the Department continues to issue rulings which must be (or should be) retracted.

1. **Rulings on Taxable Repairs**
   The Department temporarily suspended, effective July 18, 2013, Revenue Ruling No. 13-003 (February 27, 2013) which addressed the exclusion from sales tax of parts and materials purchased by equipment lease or rental dealers for repairing and maintaining lease and rental equipment. The suspended ruling had provided that sales tax exclusion did not apply to these purchases. See Revenue Information Bulletin No. 13-014 (July 18, 2013).
2. **Ruling on Taxability of Leased Solar Panel Systems (Jul. 1, 2013)**
   In a particularly troubling ruling which has created significant issues for the solar panel industry (for both vendors and lessors of this type of property although the ruling is ostensibly addressed to leased property), the Department issued a revenue ruling outlining its position as to the lease tax consequences of the leasing of solar panels where income tax credits are claimed by a taxpayer other than the homeowner under a lease or rental agreement. Although the statute permits in many instances the lessor to claim the credit directly, the ruling appears to suggest that the homeowner must always waive/transfer the homeowner's right to the credit in connection with the lease and therefore suggests that the amount of the credit is additional consideration for the lease (and accordingly subject to sales tax to the extent that the property is tangible personal property). The ruling examines the types of installations that may occur but finds them all to be tangible personal property. The rulings suggests that the assignment of the solar energy income tax credit in exchange for the right of use of the installed solar panels constitutes taxable consideration and because the gross proceeds of the lease may not be broken into component parts or nontaxable elements, the ruling finds that the entire amount of the assigned tax credit is subject to lease tax. And ultimately the ruling states that sales tax would apply to a transfer of the property at the end of the lease. See Revenue Ruling 2013-006 (June 28, 2013). Parish tax collectors have picked up on this language to find that solar panel vendors are liable for tax on sale of solar panels as sales of tangible personal property and state audits have been initiated seeking tax on the "purchase price" defined to include the tax credits.