

NOTICE OF INTENT
Department of Revenue
Policy Services Division

Payment of Sales and Use Taxes by Persons Constructing, Altering, or Repairing
Immovable Property
(LAC 61:I.4372)

Under the authority of R.S. 47:1511, and in accordance with the provisions of the Administrative Procedure Act, R.S. 49:950 et seq., the Department of Revenue, Policy Services Division, proposes to adopt LAC 61:I.4372. This proposed rule will provide that the contractors who purchase or import tangible personal property that they or their contractors, subcontractors, or agents will use in the construction, alteration, or repair of immovable property are presumed liable for the taxes imposed by the state sales and use law and by the sales tax ordinances of political subdivisions of the state on their purchases or importations of such tangible personal property.

There is a long line of jurisprudence in Louisiana which holds that contractors are users and consumers of tangible personal property, rather than re-sellers. The Louisiana Supreme Court has issued several decisions so holding, including *State v. J. Watts Kearny & Sons*, 181 La. 554, 160 So. 77 (La. 1935); *State v. Owin*, 191 La. 617, 186 So. 46 (La. 1938); *Claiborne Sales Co. v. Collector of Revenue*, 42981 (La. 11/27/57), 99 So.2d 345; *Chicago Bridge & Iron Co. v. Cocreham*, 55769 (La. 6/23/75), 317 So.2d 605; and *Bill Roberts, Inc. v. McNamara*, 88-1776 (La. 3/13/89), 539 So.2d 1226.

The payment of sales or use taxes on materials purchased or imported for use on immovable property contracts is routine for most contractors, so this rule will not affect their business practices. In a minority of cases, however, mostly on transactions for the repair or alteration of immovable property, some service providers and contractors have engaged in the practice of invoicing customers separately for materials used in providing the service, and collecting and remitting sales taxes on the separate materials charges. In such cases, the service providers have not themselves paid sales or use taxes on their acquisitions of the materials for their use on the real property repair or alteration projects, but have instead treated the materials as purchases of tangible personal property for resale.

Often the practice of contractors invoicing sales taxes on materials used on immovable property contracts has not reflected the true nature of the transactions. Customers have submitted claims to the department and to local sales tax administrators for refund of sales taxes that they have remitted to their service providers pursuant to those invoices. The filing of these claims has placed tax authorities in the position of having to determine – very often, without the benefit of written contracts – the nature of the transactions that occurred between two parties. Tax authorities' payment of such claims has resulted in no sales or use taxes being paid on the materials used in the projects, either as tax paid by the service providers on their purchases or as tax collected and remitted by the service providers. Tax authorities believe that having a presumption concerning the tax liability is necessary in order to protect the public fisc and to provide guidance to service providers and contractors as to the proper methods for the payment of sales and use taxes. Since this rule imposes a rebuttable presumption, it will not interfere with the parties freedom to contract in cases where tangible personal property is actually sold to the customer, and not just used in providing a service. The presumption may be overcome by evidence as to the nature of the transaction.

Upon final promulgation of this proposed rule, the Louisiana Department of Revenue will repeal Revenue Ruling No. 05-001, issued on March 1, 2005, which, in discussing alternative means for the payment of sales or use taxes on transactions for the repair and alteration of immovable property, places undue emphasis on the form or wording of the invoice.

Title 61
REVENUE AND TAXATION
Part I. Taxes Collected and Administered by the Secretary of Revenue

Chapter 43. Sales and Use Tax

§ 4372. Payment of Sales and Use Taxes by Persons Constructing, Renovating, or Altering Immovable Property

A. General. The purpose of this Section is to help clarify which party to the transaction is liable for the payment of sales and use taxes on the purchase, use, consumption, distribution, or storage for use or consumption of tangible personal property in this state when such property is used in the construction, alteration, or repair of an immovable property.

B. Definition. For the purposes of this Section, the term “contractor” means any dealer, as defined in this Chapter, who contracts or undertakes to construct, manage, or supervise the construction, alteration, or repair of any immovable property, such as buildings, houses, roads, levees, pipelines, and industrial facilities. It also includes subcontractors. The term *contractor* shall not include a dealer who fabricates or constructs property that is sold to another person as tangible personal property, provided that the fabricator or constructor of the tangible personal property does not affix that tangible personal property to the buyer’s immovable property.

C. Sales of tangible personal property, including materials, supplies, and equipment, made to contractors, or their contractors, subcontractors, or agents, for use in the construction, alteration, or repair of immovable property are presumed to be sales to consumers or users, not sales for resale, and therefore the contractor is liable for the taxes imposed by this Chapter on their purchases or importations of such tangible personal property. Such presumption shall be prima facie and subject to proof to the contrary furnished to the secretary.

AUTHORITY NOTE: Promulgated in accordance with R.S. 47:1511.

HISTORICAL NOTE: Promulgated by the Department of Revenue, Policy Services Division, LR ____:

Family Impact Statement

Rule Title: LAC 61:I.4372 Payment of Sales and Use Taxes by Persons Constructing, Renovating, or Altering Immovable Property

Implementation of this proposed should not have any known or foreseeable impact on any family as defined by R.S. 49:972 D or on family formation, stability, and autonomy. Specifically, the implementation of this proposed rule will have no known or foreseeable effect on:

1. the stability of the family,
2. the authority and rights of parents regarding the education and supervision of their children,
3. the functioning of the family,
4. family earnings and family budget,
5. the behavior and personal responsibility of children, or
6. the ability of the family or a local government to perform this function.

Interested persons may submit data, views, or arguments regarding this proposed rule, in writing to Frederick Mulhearn, Policy Services Division, Office of Legal Affairs, P.O. Box 44098, Baton Rouge, LA 70804-4098. All comments must be received no later than 4:30 p.m., [date]. A public hearing will be held on [date] at [time] p.m. in the _____ Room on the _____ Floor of the LaSalle Building, 617 North Third Street, Baton Rouge, Louisiana.

Cynthia Bridges
Secretary