

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 and such tangible personal property is transferred to the final customer from the contractor in an immovable state, then in such cases the contractors 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.

In some cases, contractors invoicing sales taxes on materials used on immovable property contracts have 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 fiscal 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, and such tangible personal property is transferred from the contractor to its customer in an immovable state.

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, oil and gas wells (downhole), 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. This presumption may be rebutted by a showing of credible evidence, such as a writing signed by the contractor's customer stating that title and/or possession of itemized articles of tangible personal property were transferred to the customer prior to their being made immovable.

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

HISTORICAL NOTE: Promulgated by the Department of Revenue, Policy Services Division, LR 38:

Family Impact Statement

Implementation of this proposed Rule 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.

Public Comments

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 p.m., May 25, 2012.

Public Hearing

A public hearing will be held on May 29, 2012 at 10:30 a.m. in the River Room on the seventh floor of the LaSalle Building, 617 North Third Street, Baton Rouge, LA.

Cynthia Bridges
Secretary

FISCAL AND ECONOMIC IMPACT STATEMENT FOR ADMINISTRATIVE RULES

RULE TITLE: Payment of Sales and Use Taxes by Persons Constructing, Altering, or Repairing Immovable Property

I. ESTIMATED IMPLEMENTATION COSTS (SAVINGS) TO STATE OR LOCAL GOVERNMENT UNITS (Summary)

There will be no implementation costs to state or local governmental units. The implementation savings will be minimal. In some cases, contractors have invoiced sales taxes on materials used in immovable property contracts, and their customers have submitted claims to the Department of Revenue and local tax administrators for refund of the taxes they have paid to the contractors pursuant to those invoices. Under this rule, the contractor is presumed to be liable for sales/use taxes, not the contractor's customer. This may result in a small decrease in the number of refund claims filed by such customers at the state and local level.

II. ESTIMATED EFFECT ON REVENUE COLLECTIONS OF STATE OR LOCAL GOVERNMENTAL UNITS (Summary)

The overall effect should be effectively neutral. With this proposed rule, there should be fewer refund claims filed by contractor's customers, and thus fewer refunds paid by the tax authorities. The tax liability has always rested with the contractor, though the few times this occurred, the collection period had prescribed. This rule is expected to prevent a repeat of this occurrence. While the impact of the rule may be minimal at this point, without the guidance it provides, the situation could worsen, causing tax authorities to have to make more refunds because of incorrectly charged taxes.

III. ESTIMATED COSTS AND/OR ECONOMIC BENEFITS TO DIRECTLY AFFECTED PERSONS OR NONGOVERNMENTAL GROUPS (Summary)

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. There should be no costs or benefits to directly affected persons. The proposed rule only serves to clarify which party should remit sales tax and provides no change to the establishment of the sales tax liability.

IV. ESTIMATED EFFECT ON COMPETITION AND EMPLOYMENT (Summary)

The rule should have no effect on competition or employment.

Cynthia Bridges
Secretary
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