

# POST-AUDIT SALES AND USE TAX PROCEDURES

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# AVAILABLE TAX COLLECTION REMEDIES FOLLOWING AN AUDIT

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You have completed the audit of a business – either a taxpayer or dealer – and your auditor has forwarded the audit findings which evidence a tax liability.

What steps do you take to collect the amounts found due?

- **Review the audit findings** and familiarize yourself with the findings.

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- **Do not** simply **assume** that the audit is accurate and that all amounts are due. Ultimately, **you will be the final word** on what is due, or not. Remember, if the matter goes to Court, you will be the one to testify and will have to justify your actions going forward.

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- **Identify any factual or legal issues** which may be present in the audit and discuss the auditor's rationale for scheduling the transaction.

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- **Identify any factual or legal issues** which may be present in the audit and discuss the auditor's rationale for scheduling the transaction.

- Once **you are satisfied** that the audit and schedules are appropriate, you can then proceed to a collection method.

## §337.45. Alternative remedies for the collection of taxes

A. In addition to following any of the special remedies provided in this Chapter, the collector may, in his discretion, proceed to enforce the collection of any taxes due under the local ordinance by means of any of the following alternative remedies or procedures:

- (1) Assessment and distraint....
- (2) Summary court proceeding....
- (3) Ordinary suit .....
- (4) Demand in reconvention.....



## §337.45. Alternative remedies for the collection of taxes

B.(1) The collector may choose which of these procedures he will pursue in each case, .....provided that in every case the taxpayer shall be entitled to proceed under R.S.

47:337.63, except in the following circumstances:

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(b) When an assessment for the tax in question has become final.

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(b) When an assessment for the tax in question has become final.

**(c) After the deadline to file an answer or defenses, .....in any proceeding or suit involving the same tax obligation pending against him.**

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(b) When an assessment for the tax in question has become final.

(c) After the deadline to file an answer or defenses, .....in any proceeding or suit involving the same tax obligation pending against him.

(d) When an incidental demand for the same tax obligation is pending .....

## §337.45. Alternative remedies for the collection of taxes

B. (2) The fact that the collector has initiated proceedings under the assessment and distraint procedure will not preclude him from thereafter proceeding by summary or ordinary court proceedings for the enforcement of the same tax obligation.

§337.65. Tax obligation to constitute a lien, privilege and mortgage  
.....any tax, penalty, interest, attorney fees, or other costs due shall operate as a lien, privilege and mortgage on all of the property of the tax debtor, both movable and immovable, which said lien, privilege and mortgage shall be enforceable in any court of competent jurisdiction in an action, at law, or may be enforced as otherwise provided by this Chapter. **The collector may cause notice of such lien, privilege and mortgage to be recorded at any time after the tax becomes due,** whether assessed or not, and regardless of whether or not then payable, **in the mortgage records of any parish wherein the collector has reason to believe the tax debtor owns property.** The lien, privilege and mortgage created by this Section shall affect third parties only from the date of recordation and shall take their respective ranks by virtue of recordation.

# ASSESSMENT PROCESS



## §337.48. Determination and notice of tax due

A. (1) If a taxpayer fails to make and file any return or report required by the provisions of the local ....the collector shall send by mail a notice to the taxpayer ....setting out his determination and informing the person of his purpose to assess the amount so determined against him after fifteen calendar days from the date of the notice.

## §337.48. Determination and notice of tax due

A. (2) Notwithstanding any other provision of law to the contrary, **a notice issued pursuant to Paragraph (1) of this Subsection to a taxpayer or dealer who fails to make and file any required report or return shall not be appealable to the Board of Tax Appeals for redetermination of the notice of tax due issued pursuant to this Section when the notice is solely for the periods and is in the amount stated on the notice transmitted to such taxpayer or dealer pursuant to Paragraph (1) of this Subsection. Nothing in this Paragraph shall prohibit any taxpayer or dealer from proceeding to file suit pursuant to R.S. 47:337.63 or 337.64, or any other applicable law.**

## §337.48. Determination and notice of tax due

B. If a return or report made and filed does not correctly compute the liability of the taxpayer, **the collector shall cause an audit,** investigation, or examination, as provided for by R.S. 47:337.35, to be made to determine the tax, penalty, and interest due. Having determined the amount of tax, penalty, and interest due, **the collector shall send by mail a notice to the taxpayer** at the address given in the last report filed by him pursuant to the provisions of this Chapter, or to any address that may be obtainable from the U.S. Postal Service or from U.S. Postal Service certified software,..... setting out his determination and informing the person of his purpose to assess the amount so determined against him **after thirty calendar days from the date of the notice.**

## §337.49. Protest to collector's determination of tax due

A. The taxpayer, within fifteen calendar days from the date of the notice provided in R.S. 47:337.48(A) or within thirty calendar days from the date of the notice provided in R.S. 47:337.48(B), may protest thereto.

This protest must be in writing and should fully disclose the reasons, together with facts and figures in substantiation thereof, for objecting to the collector's determination. The collector shall consider the protest, and shall grant a hearing thereon, before making a final determination of tax, penalty, and interest due.

## §337.49. Protest to collector's determination of tax due

B. The taxpayer or the local collector may request that a member of the Louisiana Uniform Local Sales Tax Board attend a hearing granted in accordance with this Section. The request shall be made in writing and received by the board at least five business days prior to the date of the hearing. The chairman of the board may appoint a designee to serve in the place of a board member for this purpose. A person eligible to serve as a designee shall be either a full-time employee of the board or the head of a single parish collector's office.

## §337.50. Assessment of tax, interest, and penalties

A. At the expiration of fifteen calendar days from the date of the collector's notice provided in R.S. 47:337.48(A), ..... the collector shall proceed to assess the tax, penalty, and interest that he determines to be due under the provisions of the local ordinance and this Chapter. **The assessment shall be evidenced by a writing in any form suitable to the collector,** which sets forth the name of the taxpayer, the amount determined to be due, the kind of tax, and the taxable period for which it is due. **This writing shall be retained as a part of the collector's official records.** The assessment may confirm or modify the collector's originally proposed assessment.

## §337.50. Assessment of tax, interest, and penalties

B. At the expiration of thirty calendar days from the date of the collector's notice provided in R.S. 47:337.48(B), ....., the collector shall proceed to assess the tax, penalty, and interest that he determines to be due under the provisions of the local ordinance and this Chapter. **The assessment shall be evidenced by a writing in any form suitable to the collector,** which sets forth the name of the taxpayer, the amount determined to be due, the kind of tax, and the taxable period for which it is due. **This writing shall be retained as a part of the collector's official records.** The assessment may confirm or modify the collector's originally proposed assessment.



## §337.51. Notice of assessment and right to appeal

A.(1) Having assessed the amount determined to be due, the collector shall send a notice by certified mail to the taxpayer .....This notice shall inform the taxpayer of the assessment and that he has thirty calendar days from the date of the notice to do any of the following:

(a) Pay the amount of the assessment.

(b) Appeal to the Board of Tax Appeals for redetermination of the assessment.

(c) **Pay under protest** in accordance with R.S.

47:337.63, and then either file suit or file a petition with the Board of Tax Appeals, all as provided for in that Section.



## §337.51. Notice of assessment and right to appeal

A. (2) If no report has been timely filed, the collector shall send a notice by certified mail to the taxpayer against whom the assessment is imposed ..... This notice shall inform the taxpayer of the assessment and that he has thirty calendar days from the date of the notice to do either of the following:

(a) Pay the amount of the assessment.

(b) Pay under protest in accordance with R.S.

47:337.63 and then either file suit or file a petition with the Board of Tax Appeals, all as provided for in that Section.

## §337.51. Notice of assessment and right to appeal

A. (3) If the taxpayer has not paid under protest in accordance with the provisions of R.S. 47:337.63, or pursued an alternative remedy in accordance with R.S. 47:337.64, or filed an appeal with the Board of Tax Appeals within the thirty-day period provided for in Paragraph (1) of this Subsection, **the assessment shall be final and shall be collectible by distraint and sale as provided in this Part. If an appeal for a redetermination of the assessment has been timely and properly filed, the assessment shall not be collectible by distraint and sale until such time as the assessment has been redetermined or affirmed by the Board of Tax Appeals or the court which last reviews the matter.**

## §337.51. Notice of assessment and right to appeal

B. If any dealer disputes any findings or assessment of the collector, he may, within thirty days of the receipt of notice of the assessment or finding, do any of the following:

(1)(a) File an appeal from the decision of the collector directed to the Board of Tax Appeals.

(b) Pay under protest in accordance with R.S. 47:337.63, and either file suit as provided for in that Section, or file a petition with the Board of Tax Appeals, as provided in that Section.

### **§337.51. Notice of assessment and right to appeal**

B. (2) This Section shall afford a legal remedy and right of action in the Board of Tax Appeals, or in any state, city, or federal court having jurisdiction of the parties and subject matter for a full and complete adjudication of any and all questions arising in the enforcement of the local ordinance and this Chapter as to the legality of any tax accrued or accruing or the method of enforcement thereof. If an appeal for a redetermination of the assessment has been timely and properly filed with the Board of Tax Appeals pursuant to Subparagraph (1)(a) of this Subsection, the assessment shall not be collectible by distraint and sale until the assessment has been redetermined or affirmed by the Board of Tax Appeals or the court which last reviews the matter.

(3) A notice of tax due issued pursuant to the provisions of R.S. 47:337.48 shall not constitute a finding for purposes of this Subsection.

## §337.51. Notice of assessment and right to appeal

C. (1) No assessment made by the collector shall be final if it is determined that the assessment was based on an error of fact or of law. An "error of fact" for this purpose means facts material to the assessment assumed by the collector at the time of the assessment to be true but which subsequently are determined by the collector to be false. "Error of law" for this purpose means that in making the assessment the collector applied the law contrary to the construction followed by the collector in making other assessments.

## §337.51. Notice of assessment and right to appeal

C. (2) The determination of an error of fact or of law under this Subsection shall be solely that of the collector, ..... it being the intent of this Subsection only to permit the collector to correct manifest errors of fact or in the application of the law made by the collector in making the assessment; ..... Estimated assessments made due to the failure of the taxpayer to file a proper tax return may be corrected by the acceptance of the proper tax return and must be approved by the collector or his designee.



## §337.51. Notice of assessment and right to appeal

*D. (1) A collector may elect to send to a taxpayer or dealer by regular mail a copy of the notice of assessment containing the same information and addressed in the same manner as provided for in Subsection A of this Section. **If the collector mails this regular mail notice on the same date and to the same address as the collector mails a notice of assessment by certified mail, then the notice transmitted by regular mail shall be deemed to have been received by the taxpayer or dealer on the earlier of the date that the United States Postal Service record indicates that it first attempted to deliver the notice of assessment to the taxpayer or dealer, or on the seventh business day from the date of mailing. A certificate of mailing or other proof of mailing from the United States Postal Service shall establish that this copy of the notice of assessment was transmitted by regular mail. Other evidence may be used to alternatively establish the presumption of delivery provided for in this Subsection, including an affidavit of the person who transmitted the notice attesting to the fact that it was transmitted in accordance with the provisions of this Subsection.***

### §337.51. Notice of assessment and right to appeal

(2) Notwithstanding any provision of law to the contrary, if a **collector**, in his sole discretion, **chooses not to send the copy** of the notice of assessment provided for in Paragraph (1) of this Subsection, the absence of transmitting the notice by regular mail **shall not be used** to establish that a notice of assessment was either not mailed or not received.

(3) If a collector, in his sole discretion, **sends the copy of the notice of assessment** provided for in Paragraph (1) of this Subsection, the transmittal of the notice **shall have no impact on the time within which the amount of the assessment is required to be paid or paid under protest**, or, as provided in this Section, the time within which the assessment becomes final or the time within which an appeal may be made to the Board of Tax Appeals.



## §337.55. Assessment of tax shown on face of taxpayer's returns

A. Whenever a taxpayer files returns and computes the amount of any tax due, such tax together with any penalty and interest due or accruing thereon, whether computed or not, shall be considered assessed and shall be entered by the collector as an assessment in his official records without the necessity of observing the delays or giving the notice ordinarily required prior to assessment.

## §337.55. Assessment of tax shown on face of taxpayer's returns

B. If the taxpayer fails to accompany his return filed with a proper payment, as required by this Chapter, the collector shall immediately send a notice by mail to such person, addressed to the address appearing on the return or to any available address, informing him of the amount due, or the balance of the amount due if a partial payment has been made, and demanding payment of such amount within ten calendar days from the date of the notice. If payment has not been received at the expiration of such time, the assessment shall be collectible by distraint and sale as is hereinafter provided.

## §337.55. Assessment of tax shown on face of taxpayer's returns

C. Nothing in this Section shall be construed as **denying the right of the taxpayer to pay the assessment under protest or to claim a refund of the assessment after payment**, all in a manner as is hereinafter set out in this Chapter.

# EFFECT OF FINAL ASSESSMENT

Considering *Catahoula Parish School Board, et al., v. Louisiana Machinery Company, LLC* (La. 10/15/13) and consolidated cases, the issue before the Court was the sufficiency of the assessment process utilized by the Collector.

“[i]n these cases, the motions for summary judgment filed by the Collector in the summary proceedings were based solely on the Collector’s assertions that it followed the statutory requirements of the assessment procedure, including providing sufficient notice pursuant to La. R.S. 47:337.51, and its assertions that because the Companies failed to respond to the notices of assessments, the assessments are final and equivalent to judgments against the Companies. Thus, based on the facts of this case, we are required to examine the notices of assessments and determine whether they were adequate.”

“There is no dispute the Collector properly sent the notices of assessments to the Companies at the proper addresses and that the Companies received the notices. The disputed issue is whether **the notices provided the statutorily required information.**

“In *Black v. St. Tammany Parish Hosp.*, this court stated:

“Words and phrases must be read with their context and construed according to the common and approved usage of the language. **The word “shall” is mandatory and the word “may” is permissive.** Further, every word, sentence, or provision in a law is presumed to be intended to serve some useful purpose, that some effect is given to each such provision, and that no unnecessary words or provisions were employed. Consequently, courts are bound, if possible, to give effect to all parts of a statute and to construe no sentence, clause, or word as meaningless and surplusage if a construction giving force to and preserving all words can legitimately be found.



“Breaking down the language of the statute, Section A provides that once a collector assesses the amount of tax determined to be due, **“the collector shall send a notice by certified mail to the taxpayer against whom the assessment is imposed... .”** Further, Section A provides that this notice **“shall inform the taxpayer of the assessment and that he has sixty calendar days from the date of the notice to...request a hearing with the collector... .”** Given the clear and explicit language of the statute, the only conclusion is that Section A provides mandatory notice requirements that must be sent to all taxpayers against whom an assessment is imposed.”

Section A requires the notice inform the taxpayer it has **sixty calendar days from the date of the notice to (1) pay the amount of the assessment; (2) request a hearing with the collector; or (3) pay the amount under protest in accordance with La. R.S. 47:337.63.**

The notices in this case did advise the Companies they had sixty days to pay the amount of the assessment or pay the amount under protest. However, **the notices failed to advise the Companies they had sixty days to request a hearing with the Collector.** Rather, the notices advised the Companies that pursuant to La. R.S. 47:337.51(B), they had thirty days to file a written protest and request a hearing. **Thus, because the notices failed to comply with the mandatory notice requirements of Section A, we find they were deficient.**

“Because the Collector’s claims are premised on its assertions that the assessments were final and thus equivalent to judgments, which cannot be challenged by the Companies, **we find the issue of the validity of the notices of assessments constituted an essential element of the Collector’s claims rather than strictly a defense asserted by the Companies.**

“Finally, considering our determination that the assessments **were not final**, we also find the district court erred in prohibiting the Companies from pursuing their defenses and ruling the Companies’ exceptions were moot on that basis.”

The corollary is that if the Collector can prove that the assessment procedures were followed, and the assessment becomes final, then **the Collector may rely upon the final assessment as a final judgment.** The **assessment process** is a procedural mechanism that **has final legal effect** where the taxpayer or dealer fails to avail themselves of any of the administrative remedies afforded under the statutes (See 47:337.51 (B)). **The assessment becomes proof of the tax obligation and the taxpayer or dealer can present no evidence to dispute the amount of the assessment.** See also 47:337.45(B) which supports this conclusion.

# DISTRAINT

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§ 337.56. Collection by distraint and sale authorized

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§ 337.57. Distraint defined

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§ 337.57. Distraint defined

§ 337.58. Distraint procedure



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§ 337.57. Distraint defined

§ 337.58. Distraint procedure

§ 337.59. Surrender of property subject to distraint

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§ 337.56. Collection by distraint and sale authorized

§ 337.57. Distraint defined

§ 337.58. Distraint procedure

§ 337.59. Surrender of property subject to distraint

§ 337.60. Sale of distrained property

# SUMMARY COURT PROCEEDINGS

Summary court proceedings allow quick access to the Court system. **The law mandates a quick setting, two to ten days after service but this is oftentimes hard to accomplish.** Our judges ordinarily set our rules on their ordinary rule day – usually within 30 days. While theoretically the Collector could insist on a quicker setting, we work with the judges. **A summary proceeding is an ordinary trial – it is simply a trial by preference on an expedited basis.** Any defenses of the taxpayer can be raised at any time up to and immediately prior to hearing.

# SUMMARY COURT PROCEEDINGS

All tax matters can be tried by summary rule if the Collector is in a posture to present his case. A common practice is to combine the remedies for injunction for closure (La. R.S. 47:337.33) along with a cause of action for a money judgment (La. R.S. 47:337.61).

# SUMMARY COURT PROCEEDINGS

If the matter is being tried on the basis of the final assessment – where the taxpayer or dealer will be prohibited from raising defenses on the assessed amounts, you can expect no surprises and a summary proceeding is recommended. In some instances where additional taxes have become due between the time of filing and the trial, there is nothing to prevent presentation of evidence of both the assessed claim and claims made without assessment. This will obviously require evidence beyond the assessment documents.

# SUMMARY COURT PROCEEDINGS

Where a taxpayer/dealer fails to file a return, the Collector, pursuant to 47:337.28 “shall make an estimate of the retail sales of such dealer for the taxable period, etc.” Proof to support such an estimate can be prior returns. Our practice is to use the prior 12 months returns if they are available, and take a monthly average.

# SUMMARY COURT PROCEEDINGS

Where a taxpayer/dealer opens a business and has never filed a return, the Collector may wish to consider filing a rule to compel the taxpayer/dealer to file pursuant to 47:337.44. Can a Collector close a business where no returns have been filed, or where no estimate can be calculated? The answer is probably no. See 47:337.33 “Such rule may be taken only for amounts due as a result of assessments or judgments which have become final and nonappealable.”

**§ 337.61. Collection by summary court proceeding authorized**

In addition to any other procedure provided in this Chapter or elsewhere in the laws of this state, and for the purpose of facilitating and expediting the determination and trial of **all claims for taxes, penalties, interest, attorney fees, or other costs and charges arising, there is hereby provided a summary proceeding** for the hearing and determination of all claims by or on behalf of the taxing authority, or by or on behalf of the collector, for taxes and for the penalties, interest, attorney fees, costs or other charges due thereon, by preference in all courts, all as follows:



**§ 337.61. Collection by summary court proceeding authorized**

(1) All such proceedings, whether original or by intervention or third opposition or otherwise, brought by or on behalf of the taxing authority, or by or on behalf of the collector, for the determination or collection of any tax, interest, penalty, attorney fees, costs or other charge claimed to be due shall be summary and shall always be tried or heard by preference, in all courts, original and appellate, whether in or out of term time, and either in open court or chambers, at such time as may be fixed by the court, which shall be **not less than two nor more than ten days after notice to the defendant or opposing party.**

## **§ 337.61. Collection by summary court proceeding authorized**

(2) All defenses, whether by exception or to the merits, made or intended to be made to any such claim, must be presented at one time and filed in the court of original jurisdiction prior to the time fixed for the hearing, and no court shall consider any defense unless so presented and filed. This provision shall be construed to deny to any court the right to extend the time for pleading defenses, and no continuance shall be granted by any court to any defendant except for legal grounds set forth in the Louisiana Code of Civil Procedure.

### **§ 337.61. Collection by summary court proceeding authorized**

(3) That all matters involving any such claim shall be decided within forty-eight hours after submission, whether in term time or in vacation, and whether in the court of first instance or in an appellate court, and all judgments sustaining any such claim shall be rendered and signed the same day, and shall become final and executory on the fifth calendar day after rendition. No new trial, rehearing or devolutive appeal shall be allowed. Suspensive appeals may be granted, but must be perfected within five calendar days from the rendition of the judgment by giving of bond, with good and solvent security, in a sum double that of the total amount of the judgment, including costs. Such appeals, whether to a court of appeal or to the supreme court, shall be made returnable in not more than fifteen calendar days from the rendition of the judgment.

## § 337.61. Collection by summary court proceeding authorized

(4) Whenever the pleadings filed on behalf of the taxing authority, or on behalf of the collector, shall be accompanied by an affidavit of the collector or of one of his assistants or representatives or of the counsel or attorney filing the same, that the facts as alleged are true to the best of the affiant's knowledge or belief, all of the facts alleged in said pleadings shall be accepted as prima facie true and as constituting a prima facie case, and the burden of proof to establish anything to the contrary shall rest wholly on the defendant or opposing party.

## § 337.27. Venue

An action to enforce the collection of a sales or use tax, including any applicable interest, penalties, or other charges, levied by a taxing authority may be brought in the parish in which the taxing authority is situated, **or in the Board of Tax Appeals** as provided by law.

## § 337.33. Failure to pay tax; rule to cease business

A.(1) On motion in a court of competent jurisdiction, the collector may take a rule on a taxpayer, to show cause in not less than two or more than ten days, exclusive of holidays, why the taxpayer should not be ordered to cease from further pursuit of his business for failure to pay to the taxing authority amounts collected from others by his business as sales and use tax, along with any interest, penalty, and costs related to such tax. Such rule may be taken only for amounts due as a result of assessments or judgments which have become final and nonappealable.

## **§ 337.33. Failure to pay tax; rule to cease business**

(2) This rule may be tried out of term and in chambers, and shall always be tried by preference.

(3)(a) If the rule is made absolute, the order rendered thereon shall be considered a judgment in favor of the taxing authority, and the court shall enjoin and prohibit the taxpayer from the further pursuit of his business until such time as he has paid the delinquent tax, interest, penalties, and all costs or has entered into an agreement with the collector to do so.

(b) If the collector files a subsequent motion with the court alleging a violation of the injunction, the court shall hold a hearing in not less than two days or more than ten days, exclusive of holidays, to determine whether such violation has occurred. Upon a showing by the collector that there has been a violation of the injunction, the court shall consider the violation to be a contempt of the court and shall punish the violator in accordance with law, and every violation of the injunction shall be considered as a contempt of court.



## § 337.33. Failure to pay tax; rule to cease business

(4) Whenever the pleadings filed on behalf of the collector shall be accompanied by an affidavit of the collector or of one of his assistants or representatives or of the attorney filing the same, that the facts as alleged are true to the best of the affiant's knowledge or belief, all of the facts alleged in the pleadings shall be accepted as prima facie true and as constituting a prima facie case, and the burden of proof to establish anything to the contrary shall rest wholly on the taxpayer.



## § 337.33. Failure to pay tax; rule to cease business

(5) The collection procedure provided for in this Subsection shall be in addition to any other collection procedure provided by law. When issuing an order pursuant to this Subsection, **the Board of Tax Appeals** or any court of competent jurisdiction, upon proper showing, may also render a money judgment against the taxpayer and in favor of the collector **in the amount of any final and non-appealable assessment**, together with all penalties, interest, attorney fees and costs due.

### **§ 337.33. Failure to pay tax; rule to cease business**

B. Failure to pay any tax due as provided in the local ordinance shall, without demand or putting in default, cause the tax, interest, penalties, and costs to become immediately delinquent and the collector has the authority, on motion in a court of competent jurisdiction, to take a rule on such person, to show cause in not less than two or more than ten days, exclusive of holidays, why such person should not be ordered to cease from further pursuit of business. This rule may be tried out of term and in chambers and shall always be tried by preference. If the rule is made absolute, the order rendered thereon shall be considered a judgment in favor of the taxing authority, prohibiting the person from the further pursuit of said business until he has paid the delinquent tax, interest, penalties, and costs, and every violation of the injunction shall be considered as a contempt of court and punished according to law.

## § 337.33. Failure to pay tax; rule to cease business

C. For the purpose of the enforcement of the local ordinance and the collection of the tax levied therein, it is presumed that all tangible personal property imported or held in the taxing jurisdiction by any dealer is to be sold at retail, used or consumed, or stored for use or consumption in the taxing jurisdiction, or leased or rented within the taxing jurisdiction, and is subject to the tax herein levied. This presumption shall be prima facie only, and subject to proof furnished to the collector.

## § 337.33. Failure to pay tax; rule to cease business

D. The provisions of this Section shall not apply if the person has entered into an installment agreement for the payment of delinquent taxes with the collector and is in compliance with the terms of the agreement.

# TESTIMONY AND PROOF OF THE COLLECTOR

## DOCUMENTARY EVIDENCE:

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- Original copy of the NOA (Notice of Assessment) and proof of service;
- Evidence of registration of the dealer/taxpayer with the Sales Tax Office for proof of business address, etc.;



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- Original copy of the NOI (Notice of Intent to Assess) and report/work papers;
- Original copy of the NOA (Notice of Assessment) and proof of service;
- Evidence of registration of the dealer/taxpayer with the Sales Tax Office for proof of business address, etc.;
- Proof of ownership/membership from the Secretary of State (if necessary) for personal liability of the officer/director/member(s);

# TESTIMONY OF THE COLLECTOR:

Testimony of the Collector or his/her representative to the following areas of questions:

**Familiarity with taxpayers' account?**

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Did you perform an audit? or estimate provided by R.S. 47:337.28 and basis?

# TESTIMONY OF THE COLLECTOR:

Testimony of the Collector or his/her representative to the following areas of questions:

Familiarity with taxpayers' account?

Is it in arrears?

Did you perform an audit? or estimate provided by R.S. 47:337.28 and basis?

**Did you issue a NOI?**

**Can you identify a copy of it?**

**Did you send it certified mail? Or certificate of mailing? (Not required by statute but regularly done by Collectors)**

# TESTIMONY OF THE COLLECTOR:

Testimony of the Collector or his/her representative to the following areas of questions:

Familiarity with taxpayers' account? Is it in arrears? Did you perform an audit? or estimate provided by R.S. 47:337.28 and basis? Did you issue a NOI? Can you identify a copy of it? Did you send it certified mail? Or certificate of mailing? (Not required by statute but regularly done by Collectors)

**Did the T/P file a protest to the NOI? Hearing, if so?**

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**Did you issue a formal assessment?**

**Proof of receipt? Certified Mail or certificate?**

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**Did the T/P avail themselves of any of the remedies available pursuant to R.S. 47:337.51? (Pay under protest, suit in DC or BTA, or suit at BTA)**



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## Has the assessment become final?

Do you seek closure of the business until the taxes due are paid?

Penalties, interest, attorney's fees?

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Penalties, interest, attorney's fees?

Audit costs?

# ORDINARY PROCEEDINGS

An ordinary proceeding is simply an ordinary lawsuit. There is no special or preferential setting. The ordinary process is governed by the Code of Civil Procedure and allows for delays for answering, all defenses, discovery, etc. A suit to recover taxes paid under protest is an ordinary proceeding.

**§ 337.63. Remittance of tax under protest; suits to recover**

**A.(1)(a) Any taxpayer protesting** the payment of any amount found due by the collector or the enforcement of any provision of law in relation thereto **shall remit to the collector the amount due and at that time shall give notice of intention to file suit for the recovery of such tax** or shall remit to the collector the amount due, **and at that time give notice of intention to file a petition with the Board of Tax Appeals**, as provided in this Section.

(b) In the case of sales or use taxes that are required to be collected and remitted by a selling dealer as provided for in R.S. 47:337.17, **the purchaser**, in order to avail himself of the alternative remedy provided by this Section, **shall remit protested sales or use tax to the selling dealer, and shall retain copies of documentation evidencing the amount** of the sales or use tax paid to the dealer on the transactions. **On or before the twentieth day** of the month following the month of the transactions on which the selling dealer charged the tax, **the purchaser shall inform the collector by certified mail** or other reasonable means of the dates and **amounts of the protested taxes that were charged by the selling dealer, and shall give notice of the purchaser's intention to file suit for recovery of the tax or to file a petition for recovery of the tax with the Board of Tax Appeals**, as provided by law.

§ 337.63. Remittance of tax under protest; suits to recover  
A. (2) Upon receipt of this notice, the amount remitted to the collector or the amount of protested taxes that have been paid to the selling dealer **shall be placed in an escrow account** and held by the collector or his duly authorized representative **for a period of thirty days**. If suit is filed for recovery of the tax or a petition is filed with the Board of Tax Appeals for recovery of the tax, **within the thirty-day period, the funds in the escrow account shall be further held pending the outcome of the suit or petition** with the Board of Tax Appeals or appeal therefrom.

§ 337.63. Remittance of tax under protest; suits to recover  
A. (3) To the extent **the taxpayer prevails**, the collector shall **refund the amount** to the claimant, **with interest** at the rate established pursuant to R.S. 47:337.80, except as provided in Subsection E of this Section.

## **§ 337.63. Remittance of tax under protest; suits to recover**

B.(1) This Section shall afford a legal remedy and right of action in the Board of Tax Appeals as provided in this Section, or in any state court having jurisdiction of the parties and subject matter, for a full and complete adjudication of any and all questions arising in the enforcement of the sales and use tax of a taxing authority as to the legality of any tax accrued or accruing or the method of enforcement thereof. In such action, service of process upon the collector shall be sufficient service, and he shall be the sole necessary and proper party defendant in any such suit.

**(2) If the collector files suit against a taxpayer in district court pursuant to R.S. 47:337.45(A)(3), and the taxpayer timely pays under protest, the district court shall retain exclusive jurisdiction to adjudicate the matter to final judgment.**



## § 337.63. Remittance of tax under protest; suits to recover

C. This Section shall be construed to provide a legal remedy in the state courts in case such taxes are claimed to be an unlawful burden upon interstate commerce, or the collection thereof, in violation of any Act of Congress or the United States Constitution, or the Constitution of Louisiana.

**§ 337.63. Remittance of tax under protest; suits to recover**

D. Upon request of a taxpayer and upon proper showing by such taxpayer that the principle of law involved in an additional assessment is already pending before the courts for judicial determination or before the Board of Tax Appeals, the taxpayer, upon agreement to abide by the decision of the courts, the Board of Tax Appeals, or by a final judgment of a court upon a timely appeal of a decision of the Board of Tax Appeals, may remit the additional assessment under protest, but need not file an additional suit or petition. In such cases, the tax so paid under protest shall be placed in an escrow account and held by the collector until the question of law involved has been determined by the courts, the Board of Tax Appeals, or by a final judgment of a court upon a timely appeal of a decision of the Board of Tax Appeals, and shall then be disposed of as therein provided.

§ 337.63. Remittance of tax under protest; suits to recover

E. When the collector has pursued collection of taxes pursuant to any remedy provided for in R.S. 47:337.45(A)(2) or (3) and the taxpayer has made a timely payment under protest concerning the same tax obligation, and if the collector has deposited the monies into an interest-bearing account in accordance with this Section, the interest to be paid on the tax obligation to the party or parties adjudged to be entitled to the interest shall be that interest actually earned and received by the collector on the payment.

# RULES OF PRESCRIPTION FOR ASSESSMENTS

## §337.67 Suspension and interruption of prescription

A. Sales and use taxes levied by any political subdivision shall prescribe as of **three years from the thirty-first day of December of the year in which such taxes became due.**

## §337.67 Suspension and interruption of prescription

B. The prescriptive period running against any such sales and use tax **shall be interrupted** by any of the following:

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**(1) The action of the collector in assessing** the amounts of such taxes in the manner provided by law.

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- (1) The action of the collector in assessing the amounts of such taxes in the manner provided by law.
- (2) The filing of a summary proceeding in court.**



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(1) The action of the collector in assessing the amounts of such taxes in the manner provided by law.

(2) The filing of a summary proceeding in court.

**(3) The filing of any pleading**, either by the **collector** or the **taxpayer**, with the Board of Tax Appeals or with any state or federal court.

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(1) The action of the collector in assessing the amounts of such taxes in the manner provided by law.

(2) The filing of a summary proceeding in court.

(3) The filing of any pleading, either by the collector or the taxpayer, with the Board of Tax Appeals or with any state or federal court.

(4) The filing of a false or fraudulent return.

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- (1) The action of the collector in assessing the amounts of such taxes in the manner provided by law.
- (2) The filing of a summary proceeding in court.
- (3) The filing of any pleading, either by the collector or the taxpayer, with the Board of Tax Appeals or with any state or federal court.
- (4) The filing of a false or fraudulent return.
- (5) The failure to file a return, with the intent to defraud.

## §337.67 Suspension and interruption of prescription

C. The running of such prescriptive period may also be suspended as follows:

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C. The running of such prescriptive period may also be suspended as follows:

(1) By means of a **written agreement** between the **taxpayer** and the **collector** made prior to the lapse of such period.

## §337.67 Suspension and interruption of prescription

C. The running of such prescriptive period may also be suspended as follows:

- (1) By means of a written agreement between the taxpayer and the collector made prior to the lapse of such period.
- (2) With respect to **bankruptcy**, for any period from the time the taxpayer files for bankruptcy until six months after the bankruptcy case is closed.

## §337.67 Suspension and interruption of prescription

C. The running of such prescriptive period may also be suspended as follows:

- (1) By means of a written agreement between the taxpayer and the collector made prior to the lapse of such period.
- (2) With respect to bankruptcy, for any period from the time the taxpayer files for bankruptcy until six months after the bankruptcy case is closed.

(3) **By the filing of a claim for refund** as to the period for which a refund is requested, **which shall suspend prescription for the same period for the collector to determine whether the taxpayer owes any other liability for the same type of tax** under the provisions of R.S. 47:337.78.

## §337.67 Suspension and interruption of prescription

D. (1) The failure to file any return required to be filed by this Chapter shall interrupt the running of prescription, and **prescription shall not commence to run again until the subsequent filing of such return.** Once prescription commences to run, the tax, interest, and penalty, or other charge which is reported on such return **shall prescribe in three years after the thirty-first day of December of the year of the filing of the return.**



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(2) However, if a **taxpayer who does not file a tax return required to be filed by this Chapter later becomes responsible for the filing of such return due to a decision of the Board of Tax Appeals which has become final or due to a final court decision** which renders a transaction or other activity as taxable, and the laws, regulations, or jurisprudence of this state previously classified that transaction or other activity as nontaxable, **this provision shall not apply and prescription shall run as if the taxpayer had timely filed the return.**

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(2) However, if a taxpayer who does not file a tax return required to be filed by this Chapter later becomes responsible for the filing of such return due to a decision of the Board of Tax Appeals which has become final or due to a final court decision which renders a transaction or other activity as taxable, and the laws, regulations, or jurisprudence of this state previously classified that transaction or other activity as nontaxable, this provision shall not apply and prescription shall run as if the taxpayer had timely filed the return.

(3) The interruption of the running of prescription due to the failure to file a return reporting a tax shall not apply to any tax periods for which **the collector and the taxpayer have entered into a valid and enforceable voluntary disclosure agreement.**

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- (3) The interruption of the running of prescription due to the failure to file a return reporting a tax shall not apply to any tax periods for which the collector and the taxpayer have entered into a valid and enforceable voluntary disclosure agreement.
- (4) The provisions of the Subsection shall apply only to use tax returns when the amount due exceeds five hundred dollars for the tax levied.**

§ 337.68. Prescription of assessments as judgments  
Any tax, penalty, interest, or other charges duly assessed under this Chapter, being the equivalent of a judgment, shall not be subject to the running of any prescription other than such prescription as would run against a judgment in favor of the state of Louisiana in accordance with the constitution and laws of this state; and the recordation of such assessment shall have the same effect as the recordation of a judgment.

# SPECIAL ASSESSMENT PROCEDURES

## §337.54. Assessment and claims in bankruptcy and receivership

Upon the adjudication of bankruptcy of any taxpayer in any bankruptcy proceeding, ....., the collector may immediately make a determination from any available information or by estimate or otherwise, of the amount of tax, penalty and interest the taxpayer is liable to pay and immediately assess this amount, and by a writing to be retained as a part of his official records indicate that such assessment has been made. ....Claims for such assessments, and additional interest and attorney fees thereon, shall be presented for adjudication in accordance with law ..... However, no petition for the redetermination of an assessment shall be filed with the collector, the Board of Tax Appeals, or the courts after an adjudication of bankruptcy or the appointment of a receiver, unless the petition is accompanied by a certified copy of an order of the court before which the bankruptcy or receivership proceedings is pending, authorizing the trustee or receiver to prosecute such appeal.

(See also §337.53. Assessment and notice when tax is in jeopardy.)

# OFFICER, DIRECTOR, MEMBER LIABILITY



## § 337.46. Special authority to enforce collection of taxes collected or withheld; personal liability of certain officers and directors

A. Notwithstanding any other provision of law to the contrary, if any corporation, limited liability company, or limited partnership fails to file returns or to remit the sales and use taxes collected from purchasers or consumers under the local ordinance and this Chapter, the collector is authorized, as an alternative means of enforcing collection, to hold those officers or directors, or those managers or members as defined in R.S. 12:1301(A)(12) and (13), **having direct control or supervision of such taxes or charged with the responsibility of filing such returns and remitting such taxes and who willfully fail to remit or account for such taxes collected**, personally liable for the total amount of such taxes collected, and not accounted for or not remitted, together with any interest, penalties, and fees accruing thereon. Collection of the total amount due may be made from any one or any combination of such officers or directors, or managers or members as defined in R.S. 12:1301(A)(12) and (13), who willfully fail to remit or account for such taxes collected, by use of any of the alternative remedies for the collection of taxes as provided in R.S. 47:337.45.



§ 337.46. Special authority to enforce collection of taxes collected or withheld; personal liability of certain officers and directors

B. A corporation, limited liability company, or limited partnership by resolution of the board of directors or members may designate an officer or director, or a manager or member as defined in R.S. 12:1301(A)(12) and (13) having direct control or supervision of such taxes or charged with the responsibility of filing such returns and remitting such taxes, and such resolution shall be filed with the secretary of state.

In [Kennedy v. St. Peirre, 762 So. 2d 170, 2000 La. App. LEXIS 2000 \(La.App. 1 Cir. May 12, 2000\)](#), interpreting La. R.S. 47:1561.1 (the State equivalent to R.S. 47:337.46) the First Circuit notes:

“As explained by the Supreme Court in *State v. De Jesus*, 94-0261 (La. 9/16/94); [642 So. 2d 854, 857](#) (quoting [Barton v. United States, 988 F.2d 58, 59](#) (8 Cir. 1993)), [La.R.S. 47:1561.1](#) explicitly places a duty upon officers and directors who possess "*significant decision-making authority over the corporation's tax matters*," as individuals to collect and pay over trust fund taxes including income taxes withheld." The state or local governing authority has the option of collecting the unpaid taxes from the corporation, if it has remained viable and solvent, or from the officers or directors who possessed significant responsibility for the tax-making decisions of that business entity." *Id.* The duty of these officers or directors to pay over these funds is a statutory duty.

[Pg3] The ten-year liberative prescription provided by [La.Civ. Code art. 3499](#) is applicable to the obligation of a corporation, as a fiduciary, to turn over taxes collected by it to the State. [Sabine Pipe, 411 So. 2d 1167 at 1169](#). The same prescriptive period is applicable to the personal obligation of officers and directors whose duty is statutorily recognized by [La.R.S. 47:1561.1](#). In the present case, the three-year prescriptive period is not applicable, and the ten-year prescriptive period has not run. The trial court erred in granting the exception of prescription.”

The Third Circuit in [Morrison v. C. A. Guidry Produce, 733 So. 2d 119, 1999 La. App. LEXIS 885 \(La.App. 3 Cir. Mar. 31, 1999\)](#), also considering 47:1561.1 adds the wrinkle of intent which seemed to be either overlooked or considered by the Court to be implied by the degree of control of the member by the First Circuit in *Kennedy, above*.

In State v. DeJesus, 94-0261 (La. 9/16/94); [642 So. 2d 854](#), the supreme court read this statute to provide that the State can proceed against "officers or directors who possessed significant responsibility for the tax-making decisions of that business entity." [Id at 857](#). The court also noted that the determination of whether a particular officer [Pg 4] exercised significant decision-making authority over tax matters is a fact intensive inquiry on the merits. Id. Likewise, we note that [La.R.S. 47:1561.1](#) requires that an officer or director *willfully* fail to remit taxes.

The following evidence is good proof of control and intent:

a. Tax returns signed by the officer, director or member;

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- c. Signed acknowledgment by the officer, director, or member that he/she is the person responsible for the filing of and remittance of sales and use taxes either in the initial written application, or if online registration, a follow-up document acknowledging responsibility;

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- d. Whether the Inc. or LLC is closely held, i.e., is it a family business or a major corporation;**



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- d. Whether the Inc. or LLC is closely held, i.e., is it a family business or a major corporation;

**e. Information on the Inc. or LLC from the Secretary of State evidencing the officer, director or members;**

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- b. Checks signed for the payment of tax by the officer, director or member;
- c. Signed acknowledgment by the officer, director, or member that he/she is the person responsible for the filing of and remittance of sales and use taxes either in the initial written application, or if online registration, a follow-up document acknowledging responsibility;
- d. Whether the Inc. or LLC is closely held, i.e., is it a family business or a major corporation;
- e. Information on the Inc. or LLC from the Secretary of State evidencing the officer, director or members;
- f. Written communications between the taxpayer and the Collector. This can evidence who is the “significant decision maker”.**

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- d. Whether the Inc. or LLC is closely held, i.e., is it a family business or a major corporation;
- e. Information on the Inc. or LLC from the Secretary of State evidencing the officer, director or members;
- f. Written communications between the taxpayer and the Collector. This can evidence who is the “significant decision maker”.

**g. Sales receipts evidencing the collection of sales tax with the corresponding ledger of paid expenses by the Inc. or LLC for the same period (this evidences collection of monies belonging to the political subdivision and the use of the money for payment of debts of the Inc. or LLC which can be proof of intent to misappropriate the collected taxes.)**

The online registration form has no language that requires the registrant to acknowledge or identify the person(s) who have direct control or supervision of the remittance of sales tax. It also does not provide for an electronic signature. The Lafourche written application has the following language:

“I/We the undersigned acknowledge that I/we have direct control or supervision of the remittance of sales tax to the collector and acknowledge that I/we can be held personally liable for the total amount of taxes, interest, penalties, court costs, and attorney fees due pursuant to LSA R.S. 47:337.46.”

In the event of online registration, a separate acknowledgment is sent to the registrant with the above language. It is further recommended that the application be scrutinized to insure that an officer, director or member is the representative seeking to register – and not a bookkeeper or accountant for the Inc. or LLC.

# SUCCESSOR LIABILITY

## §337.21. Termination or transfer of business

A. If any dealer liable for any tax, interest, or penalty levied hereunder sells his business or stock of goods or quits the business, he shall make a final return and payment within fifteen days after the date of selling or quitting the business. His successor, successors, or assigns, if any, shall withhold sufficient of the purchase money to cover the amount of such taxes, interest, and penalties due and unpaid until such time as the former owner shall produce a receipt from the collector showing that they have been paid, or a certificate stating that no taxes, interest, or penalties are due. **If the purchaser of a business or stock of goods fails to withhold purchase money as above provided, he shall be personally liable for the payment of the taxes, interest, and penalties accrued and unpaid on account of the operation of the business by any former owner, owners, or assigns.**

## §337.21. Termination or transfer of business

B. In the case of a dealer who has quit a business, and who **subsequently opens another similar business under the same ownership**, whether that ownership is individual, partnership, corporation, or other, that dealer shall be liable for any tax, interest, or penalty owed by the original business.

In [Livingston Parish Sch. Bd. v. Hwy 43 Cornerstore, LLC, 93 So. 3d 709, 2012 La. App. LEXIS 689, 2012 WL 1893540 \(La.App. 1 Cir. 2012\)](#) the successors of a retail outlet were held responsible for the previous judgment rendered by the Court as well as enjoined from operating until the tax debt was paid.



# QUESTIONS

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