LOUISIANA UNIFORM LOCAL SALES TAX BOARD

Policy Advice No. 18-001
December 18, 2018
Sales and Use Tax

THIS BOARD TAX ADVISORY WAS SUPERSEDED BY R.S. 47:337.12.1 (eff. 06-11-19).

Asphalt Materials Purchased for Construction or Repair of Roadways and Bridges

Purpose

The purpose of the Louisiana Uniform Local Sales Tax Board is to promote uniformity and efficiency in the imposition, collection, and administration of local sales and use taxes. This policy advice is to address the local sales and use taxability of asphalt materials purchased for the construction or repair of roadways and bridges as requested by the City of Monroe, through its Taxation & Revenue Division, the single local collector of all sales and use taxes imposed by the taxing authorities located in Ouachita Parish. The Request for Policy Advice was submitted to the Louisiana Uniform Local Sales Tax Board ("the Board") on June 27, 2018.

Facts and Background

The Collector of Ouachita Parish (the "Collector") performed a sales and use tax compliance audit ("Audit") of a private company ("Company A") for the period beginning December 1, 2013 through March 31, 2017. This is Company A's first Audit by the Collector in over a decade.

Company A is a private company doing business as a "road contractor" in and around Ouachita Parish. Company A purchased raw materials and manufactured asphalt at its plant located in West Monroe, Ouachita Parish. For each of the materials purchased by Company A, vendors delivered the materials to Company A's plant in Ouachita Parish such that title and possession transferred the moment the materials were delivered in the Parish. Company A used, consumed, and/or combined the raw materials purchased to make asphalt meeting the specific standards required by its contracts with its customers.

Of the total asphalt manufactured by Company A, some was sold by Company A to other companies who purchased the manufactured asphalt in a moveable form. With respect to those sales, the Collector and Company A agreed that those sales were considered taxable retail sales of articles of tangible personal property in the absence of the customer presenting a valid exemption certificate. The taxability of the portion of raw materials purchased for the manufacture of asphalt sold to other companies was not in dispute.

The remainder of asphalt manufactured by Company A was transported by Company A to the location of its road construction project in Parish B. At the time Company A purchased its raw materials, it knew with a high degree of certainty that the materials purchased would be manufactured into asphalt for use and consumption by Company A on a road construction project in Parish B.

Company A did not pay Ouachita Parish sales tax on its purchases of raw materials for manufactured asphalt used and consumed by itself in connection with the road construction project in Parish B. Instead, Company A accrued and remitted to Parish B "use tax" on the cost price of the materials purchased by Company A to produce the asphalt.

The Collector allowed a credit for any "use tax" paid to Parish B; however the Collector is seeking Ouachita Parish sales tax owed on the sales price of the raw materials purchased for use and consumption by Company A in connection with the road construction project in Parish B after allowing Company A credit for all use taxes accrued and remitted to Parish B, together with applicable penalties and interest on the incremental tax assessed.

Company A, through a consulting firm, provided the additional facts and background for the Board's consideration:

First, Company A referenced an "agreement" akin to a verbal "gentlemen's agreement" whereby certain local collectors agreed to allow "road contractor" companies to pay local sales and use taxes in the manner Company A employed during the Audit Period.

Second, Company A suggested that other parishes throughout this State have reviewed and approved of the manner in which Company A has paid its local sales and use taxes whereby sales tax was not owed in the Parish in which the raw materials were delivered. Rather, after the raw materials are manufactured into asphalt, Company A suggests that other parishes throughout this State have concluded that only a "use tax" should be accrued and paid in the jurisdiction(s) in which the road project is located.

The supplemental information received by the Board from Company A's consulting firm affirmed that Company A operated as a manufacturer, a retailer, and a construction service provider. Company A manufactured asphalt which was sold both to third party customers and used by Company A in the performance of construction projects. Contracts were typically entered into with the Louisiana Department of Transportation and Development ("DOTD"), or other municipal customers, for the construction, repair, and/or maintenance of roads and bridges in Louisiana. Furthermore, most materials were ordered from out-of-state suppliers and, due to different specifications required of the asphalt used in its respective road projects, Company A did not keep a general inventory from which materials were typically drawn. Instead, the materials were purchased on a job-by-job basis and only after a contract had been finalized. Company A knew how much of its materials were purchased for and used at each project location. Depending on the type of material, the ease and speed of delivery, and the project start date, Company A would install certain materials as part of a road project as quickly as within 72 hours or as long as 60 - 90 days from initial delivery.

The Representative further stated that Company A had consistently accrued use tax at the project location without objection for over 25 years. Over that period, the Company A had undergone audits by many parishes, including Ouachita Parish. All such taxing jurisdictions prior to this Audit had held that the contractor's method of accruing use tax at the location where the asphalt was installed in the roadway was correct. Representative asserts, "[t]he position taken by the Collector would require road contractors be treated differently than other Ouachita Parish construction contractors who accrue and pay use tax on their materials in the jurisdiction in which the materials are used pursuant to a construction contract."

Questions Presented by Collector

1) Based upon the facts set forth herein above, the Collector seeks the Board's opinion as to when and where any and all local sales and/or use taxes are owed.

2) Is this Board aware of any "agreement" - formal or informal - between local sales and use tax collectors and "road contractor" companies to treat local sales and use taxes in any manner inconsistent with current statutes and prevailing jurisprudence?

3) If the answer to #2 is "yes", does the Board believe any such "agreement" is binding over the Collector herein?

4) Based upon the facts set forth herein above, is the Board aware of any circumstances in which the Collector cannot lawfully seek to impose penalties on any unpaid Ouachita Parish sales taxes that may be owed?

Analysis & Response

1) Based upon the facts set forth herein above, the Collector seeks the Board's opinion as to when and where any and all local sales and/or use taxes are owed.

In determining when and where any and all local sales and/or use taxes are owed, one must first determine the company's business classification (i.e. retail, wholesale, contractor, etc.) and secondly, examine the particulars of the transaction. In the facts and circumstances as offered by the Collector and Company A, Company A is a "road contractor" engaged in the business of the construction, repair, and/or maintenance of roads and bridges in Louisiana. Louisiana Administrative Code, 61:I.4372, states:

> 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.

The Louisiana Supreme Court has issued several significant decisions holding contractors as users and consumers of tangible personal property and not resellers. Most notable being *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 Collector and Company A further agree that a sales or use tax is due on purchases of raw materials (i.e. tangible personal property) used in the road construction projects in Ouachita

Parish and surrounding parishes. The dispute arises with respect to the point of taxability. The Collector and Company A agree that the raw materials were delivered by both in-state vendors and out-of-state vendors to Company A's manufacturing plant in Ouachita Parish such that title and possession transferred the moment the materials arrived.

LA R.S. 47:301.12 defines a sale as …any transfer of title or possession, or both, exchange, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property, for a consideration…" Company A's Representative, noted that Company A generally purchased the specific materials needed for each project on a job-by-job basis, and only purchased materials after the contract had been finalized such that Company A knew how much of its materials were purchased for and used at each project location. The raw materials were stored until manufactured into asphalt and installed as part of a construction project. The amount of time between Company A's purchase/delivery of its materials varied from as little as within 72 hours to 60 - 90 days from initial delivery.

LA R.S.:337.12(C)(1) states "[n]o taxing authority shall levy or collect any use tax on the storage of property which has been documented for use outside the taxing jurisdiction of the taxing authority although the property may be stored within its taxing jurisdiction if the owners of such property which is to be stored for exclusive use outside the taxing jurisdiction have acquired a tax exemption certificate from the taxing authority's collector". Louisiana Administrative Code 72:I.501A states:

> For the purpose of use tax levied by local political subdivisions, storage means the keeping or retention of tangible personal property for use or consumption within the local taxing jurisdiction. An analysis of whether or not a taxable storage event has occurred within a local taxing jurisdiction requires an evaluation of the original

> sales transaction as well as the subsequent possession and use of the tangible personal property by the purchaser.

Section 503 further states:

> "Transactions involving specific pieces of property imported by the purchaser into the taxing jurisdiction, which have written documentation, i.e., invoices, purchase orders, etc., clearly labeled (earmarked for exclusive use outside the taxing jurisdiction) for transshipment outside the taxing jurisdiction at the time of importation into the taxing jurisdiction, are excluded from use tax. Property may be stored in the taxing jurisdiction for an indefinite period of time, however any disposition of the property for a purpose contrary to that originally labeled (earmarked) would immediately subject the transaction to the use tax in the jurisdiction where stored."

Section 503 clearly refers to, "…specific pieces of property ***imported by the purchaser*** [emphasis added] into the taxing jurisdiction …" Based upon the facts presented, Company A does not contend that the raw materials (tangible personal property) were imported into Ouachita Parish and stored exclusively for transshipment and use outside the taxing jurisdiction. The raw materials were manufactured (i.e., fabricated) into asphalt at its plant in Ouachita Parish. The Board considers that the fabrication of tangible personal property for personal use, as was the case in the in this matter, is not an element in the act of storage. Section 503 allows materials to be imported into a jurisdiction for storage without use tax until transshipment to and use in the final destination provided the materials have been earmarked for exclusive use at the final destination at the time of purchase. This is made clear by the last sentence which states, "…any disposition of the property for a purpose contrary to that originally labeled (earmarked) would immediately subject the

transaction to the use tax in the jurisdiction where stored." The regulation finds support in La. R.S. 47:337.12(C)(3) which states, "If the property is removed from storage and is used within the taxing jurisdiction where it has been stored, the property shall be subject to taxation." The taxability is further supported by La. R.S. 47:301(18)(ii) which reads, "For purposes of the imposition of the sales and use tax levied by a political subdivision or school board, 'use' shall mean and include the exercise of any right or power over tangible personal property incident to the ownership thereof, except that it shall not include the sale at retail of that property in the regular course of business…" The act of fabricating the raw materials constitutes "use" as described in the statute. The parties both agree that the asphalt on which use tax was disputed was not resold in the form of tangible personal property. At no time were any of the raw materials delivered into Ouachita Parish *exclusively* for storage and subsequent transshipment outside the jurisdiction. The materials were delivered to Company A's plant for fabrication into asphalt.

It is agreed by Collector and Company A that the vendors delivered the raw materials to the asphalt plant such that title and possession transferred to Company A the moment the materials were delivered into Ouachita Parish. LAC 72:I.507 addresses this issue in particular:

> Transactions in which title and possession of tangible personal property are transferred within a local taxing jurisdiction ***are clearly sales at retail and these transactions are not eligible for the temporary storage exclusion*** [emphasis added]. Sales tax is due regardless of whether a Temporary Storage Tax Exemption Certificate has been issued or the property is labeled (earmarked) for use in another jurisdiction. The key factor in the transaction is the delivery in purchaser's taxing jurisdiction via the seller's vehicle or by the seller's agent. In such event, the seller is physically giving possession to the purchaser in the purchaser's taxing

> jurisdiction and a sales tax would be due. Likewise, when the purchaser picks up the property in its own vehicle at the seller's place of business, title and possession have been transferred, and a sales tax would be due in the seller's taxing jurisdiction.

The Board of Tax Appeals, Local Tax Division ("BTA"), recently ruled similarly in a Motion for Summary Judgment related to a Rule for Uniformity in the case of *St. John the Baptist Parish v. Washington Parish*, Docket No. L00166 (La. Bd. Tax App. 10/15/18)[1]. In that case, the taxpayer, Barriere Construction Co., LLC, purchased liquid asphalt from Marathon Petroleum Company LP's refinery in St. John the Baptist Parish. Barriere used the asphalt for road construction projects in Washington Parish. Barriere picked up the liquid asphalt from the Marathon refinery in St. John the Baptist Parish itself or arranged for a contractor to truck it to Washington Parish. Barriere assumed the risk of loss when the liquid asphalt left Marathon's plant in St. John the Baptist Parish. Marathon never delivered the liquid asphalt to Barriere in Washington Parish. The Board of Tax Appeals ruled that the sale took place in St. John the Baptist Parish and since Barriere had purchased the liquid asphalt for use in road construction projects and not for resale (at least in the disputed portion of the purchases), the sales tax was due on the sale in St. John the Baptist Parish. Washington Parish unsuccessfully attempted to argue that Barriere's purchase of liquid asphalt qualified for the further processing exclusion as ruled in *Bridges v. Nelson Industries Steam Co. ("NISCO")*, 2015-1439 (La. 5/3/16), 190 So.3d 276. However, the BTA reasoned that for the further processing exclusion to apply, tangible personal property must be purchased for processing into an end product produced for retail sale in the form of tangible personal property. The BTA concluded that the asphalt was clearly purchased for incorporation

[1] The decision was rendered on October 15, 2018 and is subject to appeal.

into road construction projects by Barriere in its own work as a contractor rather than for resale to third parties. As such, the BTA found that sales tax was due at the first point of taxation, which was the transfer of title and possession of the liquid asphalt in St. John the Baptist Parish.

In the matter at hand, the transfer of title and possession occurred when the raw materials were delivered by the vendors to the contractor's asphalt plant in Ouachita Parish and not when the asphalt subsequently installed in the roadways.

Based on the above, the Board is of the opinion:

1) The transfer of title or possession of the raw materials took place at Company A's plant in Ouachita Parish and that the vendors should have collected sales tax from Company A at the point of sale; and

2) If the raw materials had been *imported* into the parish by the contractor for temporary storage before use in another parish, that storage was disturbed by the act of fabricating the raw materials into asphalt within Ouachita Parish.

Therefore, the Board concludes that the raw materials were subject to sales tax upon the transfer of title or possession to Company A in Ouachita Parish.

2) Is this Board aware of any "agreement" - formal or informal - between local sales and use tax collectors and "road contractor" companies to treat local sale and use taxes in any manner inconsistent with current statutes and prevailing jurisprudence?

The Board has no knowledge of any such "agreement" – formal or informal. The Louisiana Uniform Local Sales Tax Board was established by Act 274 of the 2017 Regular Session of the Louisiana Legislature. The Act was signed by Governor Edwards on June 16, 2017. The Board held its inaugural meeting on Wednesday, October 11, 2017. This Request for Policy Advice is

the first notice to this Board of the existence of an alleged agreement, akin to a verbal "gentlemen's agreement," that allows road contractors to accrue and pay use tax at the point of installation instead of the point of transfer of title and possession.

3) If the answer is "yes", does the Board believe any such "agreement" is binding over the Collector herein?

As stated above, the Board was previously unaware of the purported existence of any "agreement" – formal or informal between any local sales and use tax collectors and "road contractor" companies regarding the local sales and use tax treatment of raw materials used to produce asphalt for road projects. Accordingly, the Board is not in a position to opine on the terms of any such agreement or its validity. Although the Board cannot affirmatively answer the question, the Board is mindful that there are two potentially relevant doctrines Louisiana courts employ in determining the impact of an administrator's actions or statements relating to legal interpretation of statutes.

The first doctrine is called the "contemporaneous construction" doctrine. The contemporaneous construction doctrine is a long established jurisprudential rule that courts may use to interpret ambiguous statutory language. See *New Orleans Firefighters Pension & Relief Fund v. City of New Orleans,* 2017-CA-0320 (La. App. 4 Cir. 3/21/2018), 242 So. 3d 682, 693, and cases cited therein. Pursuant to the contemporaneous construction doctrine, a court may lean in favor of a construction given to a statute by the governmental entity charged with the execution of such statute, and, if such construction has been acted upon for a number of years, the court will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced. *Id.* However, the limits of the

applicability of the doctrine was addressed by the Louisiana Supreme Court in *Traigle v. PPG Industries, Inc*., 332 So2d 777 (1976). The court stated (at 782):

> As the taxpayer notes, an administrative construction cannot have weight where it is contrary to or inconsistent with the statute. However, where the statute is ambiguous (as, most favorably to the taxpayer, this statutory definition may be), a long settled contemporaneous construction by those charged with administering the statute is given substantial and often decisive weight in its interpretation. *Traigle* at 782 (citations omitted).

According to the *Traigle* court, the mere interpretation of a statute by a tax administrator is insufficient for a taxpayer to be relieved from a tax collection or payment responsibility or for a collector to establish such a responsibility when the interpretation, "… is contrary to or inconsistent with the statute." See also *State v. Exxon Corp.*, No. 95 CA 2501 (La. App. 1 Cir. 6/28/96), 676 So. 2nd 783, 787 ("… while the contemporaneous administrative construction of statutes by the agency charged with administering them is generally entitled to great weight, an administrative construction cannot be given any weight where it is contrary to or inconsistent with the statute"). Further, an administrative construction has weight only when the law is ambiguous, and as outlined above, the Board is not persuaded that the law is ambiguous in the present situation.

The second doctrine that courts employ when examining the potential impact of an administrator's actions or statements relating to interpretation of law is the defense of detrimental reliance or judicial estoppel. The Louisiana Supreme Court in *Showboat Star Partnership v. Slaughter*, 789 So.2d 554 (2001) discussed factors that should be considered when evaluating a taxpayer's defense of detrimental reliance or judicial estoppel:

1) The taxpayer must have been given unequivocal advice from an unusually authoritative source;

2) The taxpayer must have reasonably relied upon that advice;

3) Extreme harm must result from that reliance; and

4) Gross injustice must occur in the absence of judicial estoppel.

The Board is unable to provide a full response as to whether the above factors are met in this matter without additional information. For instance, the Board would need more information relative to the advice or guidance provided Company A by the Collector (former and current) or by other administrators in order to evaluate whether the first factor was met. Since an administrator for one parish lacks authority to speak on behalf of administrators for other parishes, estoppel would be less likely to apply if the advice had come from other parishes. See *Amberg Trucking, Inc. v. Tarver,* 626 So.2d 511, 514 (La.App. 3rd Cir.1993) (The failure of public officers to correctly enforce statutory provisions with respect to the collection of taxes should not be permitted to inhibit correct administration of the law or be construed to estop more diligent public officers from performing their duty by collecting taxes owed under the law).

Second, whether Company A (or any other taxpayer) reasonably relied on advice from an administrator is a fact intensive inquiry that would ultimately require a court's determination of all the relevant facts and circumstances at trial. See *McLin v. Hi Ho,* 2013 CA 0036 (La. App. 1 Cir. 06/07/13) 119 So. 3d 830 (Reasonableness prong of detrimental reliance claim cannot ordinarily be disposed of by summary judgment as it requires the determination of reasonableness of acts and conduct of parties under all facts and circumstances of the case.).

As to the third and fourth factors, extreme harm resulting from the reliance and gross injustice, the Board likewise does not have enough facts to fully assess those factors with regard to Company A. It should be noted, however, that the Louisiana Supreme Court has held that no detriment is incurred when the party's only injury is that it must pay taxes legitimately owed under the correct interpretation of the law and that liability for non-punitive interest on the tax legitimately due does not constitute detrimental reliance. *Showboat Star P'ship v. Slaughter*, 2000-1227 (La. 4/3/01), 789 So. 2d 554. In this matter, the Collector allowed Company A credit for all use taxes accrued and remitted to Parish B, which would serve to mitigate any extreme harm or gross injustice to Company A since it is not being required to pay a "double tax" and then seek a refund from Parish B at its own peril. All that Company A is being required to pay are the legitimately owed sales tax above the use tax remitted in Parish B, along with non-punitive interest.

Finally, with regard to the application of detrimental reliance or judicial estoppel doctrine at all, the *Showboat Star* court noted that "Louisiana jurisprudence applying estoppel to tax matters has been described as running a spectrum." *Showboat Star P'ship v. Slaughter*, 2000-1227 (La. 4/3/01), 789 So. 2d 554. At one end of the spectrum, when the tax statutes are clear and unambiguous, estoppel has not been applied. *Id.* On the other hand, where a statute is not clear or where the a collector has adopted regulations or administrative policies regarding the scope and application of a tax statute, but the collector abruptly departs from that established precedent, estoppel has been applied because the taxpayer is entitled to rely on such an interpretive position, and the collector must be bound to act with administrative consistency. *Showboat Star Partnership, 789 So. 2d at 561 n.12*; see also *Hitachi Medical Systems America, Inc. v. Bridges*, 2015-0658, p. 14 (La. App. 1st Cir. 12/9/15), 2015 La. App. Unpub. LEXIS 496, 2015 WL 8479021 at *7, (unpublished), **[*14]** writ denied, 2016-0042 (La. 2/26/16), 187 So. 3d 1004. Since here the law is

clear and unambiguous as to the point of taxability, this matter would arguably fall closer to the end of the spectrum where the equitable estoppel doctrine would not likely be applied by the courts. See also *Chaser Financing, LLC, et.al. v. McOnnell*, 2017 CA 0315 (La. App. 1 Cir. 9/15/2017), unpublished (Equitable considerations and estoppel cannot be permitted to prevail when in conflict with the positive written law).

4) Based upon the facts set forth herein above, is the Board aware of any circumstances in which the Collector cannot lawfully seek to impose penalties on any unpaid Ouachita Parish sales taxes that may be owed?

As outlined above, the *Showboat Star* court provided a discussion as to whether the payment of interest due on unpaid taxes served to qualify as extreme harm or gross injustice that would be necessary for the doctrine of equitable estoppel to be applicable. In *Showboat Star*, the court was careful to note that the payment of *non-punitive* interest would not be the sort of detriment that would satisfy the extreme harm and gross injustice elements. *Showboat Star* at 563 (emphasis added). This indicates that had the *Showboat Star* court been presented with different facts—the assessment of a punitive amount in addition to the tax due (i.e. penalties)—the extreme harm and gross injustice elements may have been met which could have served to allow for the application of estoppel. See *Showboat Star* at 561, N. 12 (Referencing treatise which concluded "a taxpayer may be relieved of any penalties associated with such tax liabilities, provided that he has acted in good faith or without an intent to avoid payment of a tax known to be due."). Much like the Collector's allowance for credit for taxes paid in Parish B discussed above, the waiver of penalties by the Collector in this matter would also serve to mitigate any harm suffered by Company A and militate against a finding of extreme harm and gross injustice to move this matter

closer toward the end of the spectrum where estoppel would not be found to apply. See La. R.S. 47:337.70 (allowing for waiver of penalties by collector).

Conclusion

The root of this matter revolves around the premise that road contractors are treated differently than other construction contractors with respect to when and where sales and/or use taxes are due on the cost of materials used or consumed in the completion of a particular contract. Current law and established jurisprudence hold that contractors are the users and consumers of tangible personal property used or consumed and not resellers. The law and rules governing the sale of tangible personal property with respect to title and possession and the storage of tangible personal property are also well established. The Board finds no distinction between road contractors and other contractors or asphalt from other forms of tangible personal property. Absent a legislative provision providing for differential treatment for a particular type of tangible personal property, all are treated equally under the law.

This policy advice is issued based solely on the facts and background presented in the request for such advice. Please direct any questions to the Executive Director of the Louisiana Uniform Local Sales Tax Board.