

Louisiana Sales and Use Tax: The Construction Industry

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Practice Areas

- Local & State Sales & Use Tax

Introduction

The State of Louisiana, the various parishes and other political subdivisions, including school boards, water and drainage districts impose a tax on the sale at retail, the use, consumption, distribution and storage for use or consumption of tangible personal property, as well as on the lease or rental of such property and on sales of certain services (hereinafter collectively, the "sales tax") within their jurisdictions.¹

The construction industry is highly competitive with contracts often awarded only after completion of a bidding process. An accurate estimate of the applicability and amount of a Louisiana sales tax liability often can be the difference between a successful or failed bid. Furthermore, the imposition of an unexpected Louisiana sales tax can erode or completely eliminate a contractor's profit margin if a contract is awarded.

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icant Louisiana sales tax statutes and jurisprudence affecting the construction industry.

Tangible Personal Property

The Louisiana sales tax applies generally to retail sales of tangible personal property.²

"Tangible personal property" is defined as "personal property which may be seen, weighed, measured, felt or touched, or is in any other manner perceptible to the senses."³ The statute specifically excludes from the definition stocks, bonds, notes or other obligations or securities, gold or silver coins or bullion having at total value of \$1,000 or more and proprietary geophysical survey information or data analysis furnished under a restricted use agreement.

Louisiana courts have also applied the Louisiana Civil Code provisions equating tangible personal property for sales tax purposes with "corporeal movable property" as used in the Civil Code.⁴

The Civil Code defines movable property negatively, namely, as anything, corporeal or incorporeal, that is not immovable.⁵ Immovable property includes tracts of land, buildings and other constructions permanently attached to the ground, standing timber and unharvested crops, things incorporated into a tract of land or building as to become an integral part of it or component parts permanently attached to a building.⁶ Things are considered permanently attached if they cannot be removed without substantial damage to themselves or to the immovable to which they are attached.⁷ Additionally, an owner of an immovable can declare that machinery, appliances and equipment owned by him and placed on an immovable, other than his private residence, for its service and improvement are deemed to be its component parts.⁸ Such a declaration is filed for registry in the conveyance records of the parish in which the immovable is located. Conversely, component parts of an immovable that are so damaged or deteriorated that they can no longer serve their purpose are "demobilized".⁹ An owner can demobilize the component parts by an act translatif of title which is delivered to an acquirer in good faith. Additionally, an owner may demobilize things by detachment

or removal, provided the rights of third parties are not prejudiced.

The Civil Code defines corporeal movables as things that normally move or can be moved from one place to another.¹⁰ Building materials are considered movable until their incorporation into the building.¹¹ Materials separated from a building for purpose of repair, addition or alteration remain immovable if the owner intends to put them back into the building.

As a result, building materials and component parts remain tangible personal property potentially subject to the Louisiana sales tax until such time as made a part of the building through the construction process or by the owner's declaration. Thereafter, the materials and components are immovable property and are no longer subject to the sales tax.

Retail Sales

A typical construction contract will involve the owner of the property, the general contractor and numerous subcontractors, laborers and materialmen. The Louisiana sales tax is imposed only on the retail sale of tangible personal property to the ultimate consumer. Thus, excluded from the definition of a taxable retail sale are:

- Sales for resale.¹²
- Isolated or occasional sales of tangible personal property by a person not engaged in such business.¹³
- Sales of materials for further processing into articles of tangible personal property for sale or retail.¹⁴
- Sales at retail to a consumer outside of the State of Louisiana.¹⁵

Louisiana statutorily includes within the definition of a sale the fabrication of tangible personal property for consumers who furnish, either directly or indirectly, the materials used in the fabrication work. ¹⁶ A fabrication where the materials are supplied by the fabricator is not a taxable service.¹⁷

Included within the definition of "sales price" subject to the sales tax are the cost of materials used, labor or service costs, but not financing costs.¹⁸ Also excluded from the definition of sales price are any costs of installation if separately stated on the invoice.¹⁹ Charges for freight are included in the sales price if, under the terms of the contract, the seller, at his expense, is obligated to deliver the property sold; conversely, freight charges are not included in the taxable sales price where transportation services are provided by the buyer, at the buyer's expense, whether personally or through an independent contractor.²⁰

Construction Contracts

Louisiana jurisprudence classifies building contracts for sales tax purposes either as: (a) contracts for the construction of an immovable or (b) contracts to supply movable property for future incorporation into the building. The tax consequences will differ marketably depending upon the classification of the contract.²¹

If a building contract is for the construction of an immovable, the general contractor is considered to be the retail consumer of the building materials and components in their movable state and, as such, is the proper taxpayer for the Louisiana sales tax.²² The property owner is not the proper taxpayer because he is purchasing immovable property which is outside the ambit of the Louisiana sales tax statute. Subcontractors are not the proper taxpayer because their purchases and sales of the materials and components in the chain of commerce are sales for resale and are excluded from the tax. Thus, the Louisiana sales tax is focused on the last sale from a subcontractor to the general contractor. The fact that a portion of the construction job may have been performed by subcontractor is irrelevant in the computation of the amount of the sales tax due for the general contractor on building materials used in a construction project.²³ However, a contractor who constructs an immovable is not liable for sales tax for the portion of the contract price attributable to labor but is only liable for sales tax calculated on the materials that it purchases or uses in completing the contract.²⁴

Conversely, if the building contract is a contract for the delivery of the movable property for further installation in the future, it is the property owner rather than the general contractor who is the final retail consumer of the materials and components in their movable state.²⁵ Under these circumstances, the labor component will be a part of the sales price for purposes of calculating the sales tax. If a contractor purchases materials within Louisiana to complete a construction contract outside of the state, the resale to the property owner for future incorporation into the property, including the labor component, could be exempt under Louisiana exclusions for bona fide interstate commerce and sales for export.²⁶

Louisiana excludes from the state and local sales tax sales of tangible personal property to the State of Louisiana, any parish, city, municipality or political subdivision, agencies, boards or commissions. ²⁷ Additionally, sales to the U.S. government are excluded from sales tax by virtue of the supremacy clause of the U.S. Constitution.²⁸ Under these circumstances, there is a planning incentive to fashion the building contract as an agreement to provide movable property for future incorporation into the building as the agent of the owner rather than as a contract to build immovable property since the sale to the owner would be exempt from sales tax.²⁹ Furthermore, the mere entry of the movable property into the general contractor's inventory is not subject to Louisiana use tax.³⁰

Louisiana contractors should carefully review the sales tax implications of any job prior to formulating a bid and should be sensitive to the characterization of the construction contract in order to determine the appropriate sales tax exposure to protect profit margins. In view of the substantial uncertainty in the area, appropriate tax indemnification provisions should be inserted in all Louisiana construction contracts.

1 LSA R.S. 47:302(A), (B) and (C).

2 LSA R.S. 47301(10)(a)(i).

3 LSA R.S. 47301(16).

4 Exxon Corp. v. Traigle, 353 So.2d 314 (La. App. 1st Cir. 1977), writ ref., 354 So.2d 1385.

5 La. Civil Code art. 475.

6 La. Civil Code art. 462-466.

7 La. Civil Code art. 466.

8 La. Civil Code art. 467.

9 La. Civil Code art. 468.

10 La. Civil Code art. 471.

11 La. Civil Code art. 472.

12 LSA R.S. 47:301(10)(a)(i). However, these sales may be subject to the advance collection procedure of LSA R.S. 47:306.

13 LSA R.S. 47:301(10). There cannot be a casual or isolated sale of a motor vehicle. LSA R.S.

47:301(10)(f) and 303(B)(4). Additionally, the exclusion is lost if the sale is through an auctioneer. LSA R.S. 47:303(C).

14 LSA R.S. 47:301(10)(c)(i); Rule 4301(10). It is not necessary to obtain an exemption certificate for purchases for further processing

15 LSA R.S. 47:305(E).

16 LSA R.S. 47:301(12).

17 Ibid.

18 LSA R.S. 47:301(13)(a).

19 Rule 4301(13).

20 Ibid.

21 Cajun Contractors v. Dept. of Revenue, 515 So.2d 625 (La.App.1st Cir. 1987).

22 Bill Roberts, Inc. v. McNamara, 539 So.2d 1226 (La. 1989); Louisiana Paving v. St. Charles Schools, 604 So.2d 593 (La.App.3d Cir. 1992).

23 St. John the Baptist Parish School Board v. Marbury Patillo Const. Co., 254 So.2d 607 (La. 1971).

24 American Sign and Indicator Corp. v. City of Lake Charles, 320 So.2d 234 (La.App.3d Cir. 1975).

25 Modern Homes & Equipment v. Collector of Revenue, 422 So.2d 1237 (La.App.1st Cir. 1982).

26 LSA R.S. 47:305(E).

27 LSA R.S. 47:301(8)(c). Other IRC §501(c)(3) organizations are not exempt except for churches and synagogues (as to bibles and religious books) and the Society of the Little Sisters of the Poor. LSA R.S.

47:301(8)(d) and (e).

28 U.S. Constitution, Article IV, Clause 2.

29 F. Miller & Sons v. Calcasieu School Board, 838 So.2d 1269 (La. 2003).

30 Regional Mechanical Contractors, Inc. v. McNamara, 536 So.2d 818 (La.App.1st Cir. 1988).

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