

PUBLICATION

Spotlight on Louisiana: Recent Louisiana Sales and Use Tax Decision Provides Tax Refund Opportunities

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On May 7, 2010, the Louisiana First Circuit Court of Appeals reversed the decision of the district court and held that Dillard's catalogs printed outside of Louisiana and mailed directly to Dillard's credit card holders in Louisiana were excluded from the 4% Louisiana sales and use tax under Louisiana R.S. 47:302(D). *Dillard's, Inc. v. John N. Kennedy, Secretary, Louisiana Department of Revenue and Taxation*, No. 2009-CA-1423 (May 7, 2010).

Louisiana Sales and Use Tax System

Louisiana has a bifurcated sales and use tax system. The State of Louisiana imposes a 4% Louisiana sales and use tax. In addition, 63 of the 64 Louisiana parishes impose a separate local sales and use tax at rates ranging from 3% to 7%. The only Louisiana parish that does not impose a local sales or use tax is Cameron Parish.

Thus, the combined Louisiana and local parish sales and use tax rate ranges from 4% for taxable transactions in Cameron Parish to 11% for taxable transactions in East Carroll Parish.

Exclusions versus Exemptions

An exclusion from Louisiana and parish sales and use taxes means the transaction or property was never subject to the tax, because it falls outside the scope of the statute imposing the tax. Many exclusions are provided by definitional provisions, which, for example, regard property as not being tangible personal property.

Contrast this with an exemption, which typically is a transaction or property that is subject to Louisiana and parish sales or use tax, but is exempted from such tax because of a statutory decision not to impose the tax.

In Louisiana, since 1986 the Louisiana Legislature has suspended certain Louisiana tax exemptions in an effort to raise additional state revenue. However, the suspension of certain exemptions does not affect the existence of an exclusion. In other words, exclusions have never been suspended by the Louisiana Legislature.

Advertising Exclusion

Louisiana R.S. 47:302(D) excludes advertising services rendered by an advertising business from both the 4% Louisiana and the local parish sales and use taxes. However, a transfer of mass-produced advertising items from an advertising business to its customer for the customer's use is subject to both Louisiana and parish sales and use taxes.

Court's Holding

Relying on its 1999 decision in *Louisiana Health Services and Indemnity v. Secretary, Louisiana Department of Revenue* ("Blue Cross case"), the First Circuit disagreed with the Louisiana Department of Revenue's

("Department's") arguments that there was a transfer to Dillard's when Dillard's instructed the third-party printer as to the identities of the credit card holders who were to receive the Dillard's catalogs by mail.

The First Circuit concluded that the distribution of free Dillard's catalogs by mail from a non-Louisiana printer to Dillard's Louisiana credit card holders did not constitute a transfer to Dillard's. In reaching its conclusion, the First Circuit refused to impute a transfer to Dillard's, instead requiring that there be an actual transfer by the advertising business to its customer in order to be taxable.

The Department disagreed with the First Circuit's earlier decision in the Blue Cross case by issuing Statement Of Non-Acquiescence No. 03-001 (February 3, 2003), which informed taxpayers that the Department would apply Louisiana R.S. 47:302(D) to require that Louisiana sales and use tax be remitted, "regardless of whether or not the advertisers or other buyers of the materials take physical possession of the materials prior to the materials being placed in the mail."

The First Circuit rejected the Department's arguments that the Court should reverse its prior holding in the Blue Cross case and affirmed that holding in the Dillard's litigation.

Future Implications

The Dillard's decision reinforces the exclusion for advertising materials in Louisiana R.S. 47:302(D) and excludes these transactions from the 4% Louisiana and the varying local parish rates of sales and use taxation. Most importantly, the Dillard's decision raises immediate tax planning opportunities for taxpayers who advertise in Louisiana through brochures, catalogs, pamphlets, newspaper inserts, coupons, and other forms of advertising that are printed outside of Louisiana and mailed directly to credit card holders or other customers in Louisiana.

If such taxpayers have been paying the Louisiana 4% use tax and/or the local parish use tax on such advertising materials, there may be refund opportunities by filing claims for refund for such taxes paid in the preceding three years. Since Louisiana and local parish sales and use taxes generally prescribe three years after the December 31st of the year in which such taxes become due, these refunds opportunities exist for sales and use taxes attributable to the month of December of 2006 through the present date.

For additional information regarding the Dillard's decision and its implications on Louisiana state and local taxes, please contact any attorney in the Firm's Tax Department.