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LOUISIANA SUPREME COURT DENIES WRITS IN *UTELCOM* CASE

As we previously published in a September 2011 E*Bulletin, the Louisiana Court of Appeal, First Circuit, unanimously held in a landmark decision, *UTELCOM, Inc. and UCOM, Inc. v. Bridges*, 2010-CA-0654 (La. App. 1 Cir. 09/12/11), 77 So. 3d. 39, that the mere ownership of a limited partnership interest in a limited partnership that conducted business in Louisiana, by itself, was not sufficient to subject the non-resident corporate limited partner to the Louisiana corporation franchise tax ("Franchise Tax"). Today, the Louisiana Supreme Court has denied the writ application filed by the Louisiana Department of Revenue (the "Department") in this case. *See* 2011-C -2632 (La. 03/02/2012). Therefore, subject to the extremely remote possibility that the case is appealed to the United States Supreme Court and certiorari granted, the Court of Appeal's decision is now final.

The Court of Appeal's holding in *UTELCOM* and the Louisiana Supreme Court's subsequent denial of writs in this case will have wide-spread application to similarly situated non-resident corporations with passive ownership interests, whether those interests be in limited partnerships or limited liability companies.

This decision could also present refund opportunities in certain circumstances. Many companies have already filed protective refund claims or paid their Franchise Taxes under protest based on this issue. It is of paramount importance that those claims be procedurally preserved to ensure the opportunity for a full refund of any Franchise Taxes affected by this decision.

In *UTELCOM*, the petitioners UTELCOM and UCOM ("Petitioners") were foreign corporations that did not engage in any business activities in Louisiana and had no physical or other presence in Louisiana. Petitioners (1) were not registered or qualified to do business in Louisiana, (2) did not render any services to or for any affiliate, or to or for any other party in Louisiana, (3) did not have employees, independent contractors, agents, or other representatives in Louisiana, (4) did not buy, sell, or procure any services or property in Louisiana, and (5) did not maintain any bank accounts in Louisiana. Rather, Petitioners, as holding companies, owned limited partnership interests as passive investors in Sprint Communications Company LP (the "Partnership"), which was registered in Louisiana as a foreign limited partnership and conducted business in Louisiana. In the proceedings below, the District Court adopted the position of the Department, and held that Petitioners were subject to Franchise Tax based on their indirect ownership and use of property in Louisiana through their limited partnership interests in the Partnership. The lower court relied on LAC 61:I.301(D), a Department regulation which provides as follows:

> Thus, the mere ownership of property within this state, or an interest in property within this state, including but not limited to mineral interests and oil payments dependent upon production within Louisiana, whether owned directly or by or through a partnership or joint venture or otherwise, renders the corporation subject to franchise tax in Louisiana since a portion of its capital is employed in this state.

Based on this regulation, the District Court held that a non-resident corporate partner in a partnership that owns property in or otherwise conducts business in Louisiana is subject to Franchise Tax as a result of its investment in the partnership.

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On appeal, the Court of Appeal considered the statutory incidents of taxation set forth in La. R.S. 47:601 and found that none of the incidents of taxation contained in the statute were present. Moreover, the Court of Appeal found that the Department's regulation, LAC 61:I.301(D), "ignored the clear wording of the statute and the interpretation of the supreme court and seeks to expand the scope of the specific 'incident of taxation' at issue." Consequently, the Court of Appeal reversed the District Court and granted summary judgment in favor of Petitioners, holding that the Department's attempts to administratively expand the scope of the Franchise Tax beyond that statutorily allowed was impermissible.

Despite ruling that the assessment of Franchise Tax on Petitioners was improper on statutory grounds, thus obviating an analysis of the federal constitutional implications of the case, the Court of Appeal nevertheless briefly addressed the three cases claimed by the Department to be dispositive of the matter. First, the Court of Appeal found *Bridges v. AutoZone Properties, Inc.,* 04-0814 (La. 3/24/05), 900 So.2d 784, and *Bridges v. Geoffrey*, 07-1063 (La. App. 1 Cir. 2/8/08), 984 So.2d 115, *writ denied*, 08-0547 (La. 4/25/08), 978 So.2d 370, to be inapplicable because neither directly addressed the Franchise Tax issues involved. In addition, the Court of Appeal considered and distinguished *Secretary, the Department of Revenue v. Gap (Apparel), Inc.*, 886 So.2d 459 (La. App. 1st Cir. 2004), on the basis that the taxpayer in that case itself owned intangible property that was present in Louisiana. The *UTELCOM* case is of seminal importance because of the Court of Appeal's refusal to be swayed by the Department's administrative interpretation, which has no basis in the law.

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Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

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