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### PARISH'S BROAD INTERPRETATION OF SALES TAX ON TRANSPORTATION CHARGES STRUCK DOWN

By

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In a case that illustrates the disturbing trend of local taxing authorities taking positions that are inconsistent with positions taken by the Louisiana Department of Revenue on the same or similar statutory language, the Court of Appeal of Louisiana for the Fourth Circuit has affirmed a district court's rulings that: (1) a Corporation was not required to collect Plaquemines Parish sales taxes on transportation charges; and (2) the Corporation was not required to pay Plaquemines Parish lease taxes on the rental of certain barges that the Corporation used in Plaquemines Parish. *Pontchartrain Materials Corp. v. Plaquemines Parish Gov.*, 2003-1444 (La. App. 4th Cir., 3/31/04).

The Corporation involved in the case is a Louisiana corporation that is not domiciled in Plaquemines Parish. The Corporation is engaged in the business of selling materials such as limestone and crushed concrete. The Corporation stores the material at its place of domicile, which is not in Plaquemines Parish. When the Corporation sells this material to its customers, the customers may pick up the material or have the Corporation deliver it. The Corporation charges the same price for the material in each case. If the Corporation delivers the material, it charges its customer a transportation charge that is separately stated on the invoice that the Corporation sends to its customers. The Corporation sometimes leases barges from another company to deliver materials to its customers. The lessor company is not domiciled in Plaquemines Parish either.

Several years before the audit period at issue in the case, the Corporation had requested a ruling from the Louisiana Department of Revenue on whether it was required to collect the State's sales tax on the transportation charges. The State issued a ruling to the Corporation that it was not required to collect the State's sales tax on the transportation charges because those charges were not part of the "sales price" of the material, as the term "sales price" is defined in the Louisiana revised statutes. The Plaquemines Parish sales tax statute essentially copied the definition of "sales price" from the state statute. Therefore, there was no reason for the Corporation to believe that they should collect Plaquemines Parish sales taxes on the transportation charges.

Plaquemines Parish took the position that the Corporation should have collected the Parish's sales tax on the transportation charges. When the Corporation presented the Parish and the contract auditor with the Louisiana Department of Revenue's letter ruling, the Parish declined to follow the ruling. The Parish also took the position that the Corporation should have paid the Parish's lease tax on the lease of barges that the Corporation sometimes used to deliver materials in the Parish.

The Corporation paid the taxes under protest and filed suit to recover the protested taxes. The Corporation also requested attorney fees from the Parish under 42 U.S.C. §§ 1983 and 1988. The District Court held for the Corporation on the sales tax issue and the lease tax issue, but dismissed the Corporation's claim for attorney fees. The Parish filed a motion for new trial, which was denied by the District Court. The Parish

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then appealed to the Court of Appeal for the Fourth Circuit of Louisiana, and the Corporation cross-appealed the District Court's denial of its claim for attorney fees.

The Court of Appeals affirmed the District Court's decision on the sales tax issue and the lease tax issue. With respect to the sales tax issue, the Court noted the statutory construction rule that a local ordinance that is copied from a State statute is deemed to incorporate the interpretations of the state statute from which it is copied. Although the court did not rely upon the Department of Revenue's private letter ruling, it did base its holding on the case that resulted in a public ruling upon which the Department's private letter ruling was based. With respect to the lease tax issue, the court agreed with the Corporation that the Louisiana Supreme Court's decision in *Lafayette Parish School Bd. V. Market Leasing Co., Inc.*, 440 So. 2d 81 (La. 1983), was the only authority that addressed this issue. In *Market Leasing*, the Louisiana Supreme Court held that the proper parish to collect a lease tax is the parish in which the lessee is domiciled. The Corporation was not domiciled in Plaquemines Parish. As such, the court held that the Corporation was not subject to the Plaquemines Parish lease tax on the rental of barges, even though they were used in Plaquemines Parish.

The court denied the Corporation's appeal on the attorney fee issue. The Corporation had taken the position that the Parish's interpretation of its statutes was contrary to clear and consistent authority, which made it arbitrary and capricious. As such, the Corporation argued that the assessment violated the Corporation's due process rights because it forced the Corporation to hire an attorney and file suit to recover the protested taxes. The court, citing *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Dept. of Business Regulation of Fla.*, 496 U.S. 18, 110 S. Ct. 2238, 110 L. Ed. 2d 17 (1990), held that the Parish's payment under protest procedure did not violate the Corporation's due process rights because it provided the Corporation with a clear remedy by which the Corporation could refute the deprivation of tax money.

This case is a good win for taxpayers because it could potentially put an end to the disturbing trend of local taxing authorities taking positions that are inconsistent with positions taken by the Department even where the state and local statutes are virtually identical. This often forced taxpayers to enter into costly litigation to fight issues that had already been decided at the state level. In addition, the case illustrates how contract auditors encourage local taxing jurisdictions to be overly aggressive in applying their tax statutes. In Louisiana, a contract auditor cannot be paid on a contingent basis. This has been interpreted as meaning that a contract auditor's fee cannot be based on a percentage of the taxes collected; it must be based on an hourly fee. In this case, the contract auditor's fee was an hourly fee, but the contract provided for payment to the auditors only if taxes were recovered. Therefore, there was no incentive for the Parish not to take the aggressive position. The only incentive would have been the requirement that the Parish pay the Corporation's attorney fees in such cases if it did not prevail. Taxpayers should demand this, as the payment under protest procedure does not make the taxpayer whole.

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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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