

## RULE

### Department of Revenue Policy Services Division

#### Payment of Sales and Use Taxes by Persons Constructing, Altering, or Repairing Immovable Property (LAC 61:I.4372)

Under the authority of R.S. 47:1511, and in accordance with the provisions of the Administrative Procedure Act, R.S. 49:950 et seq., the Department of Revenue, Policy Services Division, adopts LAC 61:I.4372. This Rule provides that the contractors who purchase or import tangible personal property that they or their contractors, subcontractors, or agents will use in the construction, alteration, or repair of immovable property and such tangible personal property is transferred to the final customer from the contractor in an immovable state, then in such cases the contractors are presumed liable for the taxes imposed by the state sales and use law and by the sales tax ordinances of political subdivisions of the state on their purchases or importations of such tangible personal property.

There is a long line of jurisprudence in Louisiana which holds that contractors are users and consumers of tangible personal property, rather than re-sellers. The Louisiana Supreme Court has issued several decisions so holding, including *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 payment of sales or use taxes on materials purchased or imported for use on immovable property contracts is routine for most contractors, so this Rule does not affect their business practices. In a minority of cases, however, mostly on transactions for the repair or alteration of immovable property, some service providers and contractors have engaged in the practice of invoicing customers separately for materials used in providing the service, and collecting and remitting sales taxes on the separate materials charges. In such cases, the service providers have not themselves paid sales or use taxes on their acquisitions of the materials for their use on the real property repair or alteration projects, but have instead treated the materials as purchases of tangible personal property for resale.

In some cases, contractors invoicing sales taxes on materials used on immovable property contracts have not reflected the true nature of the transactions.

Customers have submitted claims to the department and to local sales tax administrators for refund of sales taxes that they have remitted to their service providers pursuant to those invoices. The filing of these claims has placed tax authorities in the position of having to determine, very often, without the benefit of written contracts, the nature of the transactions that occurred between two parties. Tax authorities' payment of such claims has resulted in no sales or use taxes being paid on the materials used in the projects, either as tax paid by the service providers on their purchases or as tax collected and remitted by the service providers. Tax authorities believe that having a presumption concerning the tax liability is necessary in order to protect the public fisc and to provide guidance to service providers and contractors as to the proper methods for the payment of sales and use taxes. Since this Rule imposes a rebuttable presumption, it does not interfere with the parties' freedom to contract in cases where tangible personal property is actually sold to the customer, and not just used in providing a service. The presumption may be overcome by evidence as to the nature of the transaction.

The Louisiana Department of Revenue has repealed Revenue Ruling No. 05-001, issued on March 1, 2005, which, in discussing alternative means for the payment of sales or use taxes on transactions for the repair and alteration of immovable property, placed undue emphasis on the form or wording of the invoice.

#### Title 61

#### REVENUE AND TAXATION

#### Part I. Taxes Collected and Administered by the Secretary of Revenue

#### Chapter 43. Sales and Use Tax

#### §4372. Payment of Sales and Use Taxes by Persons Constructing, Renovating, or Altering Immovable Property

A. General. The purpose of this Section is to help clarify which party to the transaction is liable for the payment of sales and use taxes on the purchase, use, consumption, distribution, or storage for use or consumption of tangible personal property in this state when such property is used in the construction, alteration, or repair of an immovable property, and such tangible personal property is transferred from the contractor to its customer in an immovable state.

B. Definition. For the purposes of this Section, the term *contractor* means any dealer, as defined in this Chapter, who contracts or undertakes to construct, manage, or supervise the construction, alteration, or repair of any immovable property, such as buildings, houses, roads, levees, pipelines, oil and gas wells (downhole), and industrial facilities. It also includes subcontractors. The term *contractor* shall

not include a dealer who fabricates or constructs property that is sold to another person as tangible personal property, provided that the fabricator or constructor of the tangible personal property does not affix that tangible personal property to the buyer's immovable property.

C. 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.

AUTHORITY NOTE: Promulgated in accordance with R.S. 47:1511.

HISTORICAL NOTE: Promulgated by the Department of Revenue, Policy Services Division, LR 38:1995 (August 2012).

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