

## INTERSTATE & FOREIGN COMMERCE

### A. RESTRICTIONS ON THE STATE'S IMPOSITION OF SALES AND USE TAXES FOR PROPERTY UTILIZED IN INTERSTATE COMMERCE

1. In the past, the Louisiana Department of Revenue attempted in *Tiqator, Inc. vs West Baton Rouge Parish*, 657 So.2d221 (La. App. 1<sup>st</sup> Cir. 1995) to impose "use" taxes on tractor/trailers and repair parts which were purchased outside of Louisiana, and brought into West Baton Rouge Parish. The First Circuit Court of Appeals held that the imposition of "use" taxes under such circumstances was improper. The Court concluded that the ultimate "use" of the tractor/trailers purchased in other localities was for Interstate Commerce. This decision by the Appellant Court was reached even though the vehicles were regularly garaged in West Baton Rouge Parish for maintenance and repair.<sup>1</sup>

In another relatively recent case, a similar result occurred. In *Dow Chemical Company vs McNamara*, Docket No. 928-154; Division "E", 19<sup>th</sup> Judicial District Court (Minute Entry January 10, 1989), the Taxpayer was assessed sales tax on railroad cars which were located in Louisiana, but were utilized both within and out-of-the-State. The DOR proposed to apportion the tax based on a ratio of miles traveled in Louisiana to the total miles traveled in Louisiana to the total miles traveled nationwide. The Court, citing the fourth criteria in *Complete Auto Transit*, supra, held **that the Department had not shown any statutory basis for imposing the allocation of the tax.** Without this power, not tax could be imposed. See also *Mississippi Chemical Express Inc. vs Glover* 467 So.2d 1261 (La. App. 2<sup>nd</sup> Cir. 1985). The Court further found that the railroad cars were continually in Interstate Commerce, and, therefore, *Dow's* railroad cars were exempt from tax.

From the above authorities, the mere fact that vessels are temporarily "moored" in the State of Louisiana does not indicate a "withdrawal" of these vessels from Interstate Commerce. Accordingly, the transactions and supplies involving a Taxpayer's vessels should not be taxed since the vessels are in "continuous Interstate Commerce", as that term has been defined by Louisiana State Courts. The *Dow* Court expressly held that, notwithstanding the fact that there was certain repairs and maintenance undertaken with regard to certain railroad cars while in the State of Louisiana, these railroad cars remained continuously in Interstate Commerce and beyond the reach of the taxing authorities pursuant to Louisiana Revised Statute 47:305 (E). See *Dow Chemical Company vs McNamara*, supra. This is the exact same situation that faced the Taxpayer in the *Dow Chemical Company* case.

<sup>1</sup>This case was later overturned substituting the "ultimate use" test with an initial determination being made as to whether the tractor/trailer was in Interstate Commerce at the time it entered Louisiana for the first time.

In summary, all of the vessels' supplies, materials and equipment utilized by the Taxpayer are normally in continuous Interstate Commerce. These same vessels may be used in Louisiana; and then be diverted to Texas, or to Mississippi or Alabama. These vessels are capable of working, and are actively bid, in Interstate, as well as international markets. As such, there is no permanent connection between any one vessel and that of the State of Louisiana. The vessels do not become "a part of the common mass of property located within the State." On the contrary, it is very clear that vessels utilized by most Taxpayers are in the continuous ebb and flow throughout State and Federal waters; and in various parts of the United States or the world.

**B. RELATIVELY NEW LEGISLATION HAS CLARIFIED THE MEANING OF "FOREIGN AND INTERSTATE COASTWISE COMMERCE" AND TAXPAYER'S VESSELS ARE EXCLUSIVELY ENGAGED IN SUCH COMMERCE.**

1. Traditionally, there has been an exclusion from sales and use tax for all supplies, materials and equipment (including repairs) utilized by a vessel operating in "Interstate or Foreign Coastwise Commerce". See LSA R.S. 47:305.1(B). Until recently, the debate has always been when does the exclusion provided by this revised statute attach to the activities of a Taxpayer. The myriad of different interpretations of what constitutes "Interstate and Foreign Coastwise Commerce" has resulted in contradictory decisions, with diametrically opposed decisions with seemingly similar factual situations – especially between State and Federal Court. In order to resolve these conflicts, the legislature passes new legislation to clarify, and preclude further confusion.

Act No. 41 of the 2002 Regular Louisiana Legislative Session was signed into law by the Governor, with an effective date of June 25, 2002. This law, expressly by its own terms, is to be applied retroactively to all claims, and redefine "Interstate and Foreign Coastwise Commerce". See LSA R.S. 47:305.1 (C) and (D). This new legislation says, in pertinent part:

§305.1. Exclusions and exemptions; ships and supplies

- (1) For purpose of this Section, the term "foreign or interstate coastwise commerce" shall mean and include trade, traffic, transportation, or movement of passengers or property by, in, or on a ship or vessel:
  - a) Between a point in one state and a point outside the territorial boundaries of such state;
  - b) Between points in the same state where the trade, traffic, transportation, or movement of passengers or property traverses through a point outside of the territorial boundaries of such state;
  - c) At a point in or between points in the same stat as port of or in connection with the business of providing or delivering materials, equipment, fuel, supplies, crew, repair services, laundry services, dredging waterways services, stevedoring services, other loading or unloading services, or ship or vessel movement services to or for ships or vessels that are operating in foreign or interstate coastwise commerce as defined in this Subsection; or

- d) At a point in or between points in the same state when such trade, traffic, transportation, or movement of passengers or property is part of or consists of one or more segments of trade, traffic, transportation, or movement of passengers or property that either (i) follows movement of passengers or property into or within the state from a point beyond the territorial boundaries of such state, (ii) precedes movement of the passengers or property from within the state to a point outside the territorial boundaries of such state, or (iii) is part of a stream of trade, traffic, transportation, or movement of the passengers or property originating or terminating outside the territorial boundaries of such state or otherwise in foreign or interstate coastwise commerce, as defined in the Subsection.
- (2) The term “foreign or interstate coastwise commerce” shall not include intrastate commerce, which, for purposes of this Section, shall mean any trade, traffic, transportation, or movement of passengers or property in any state that is not described in the term “foreign or interstate coastwise commerce” as defined in the Section.
- (3) For purposes of the Section, the term “component part” or “component parts” shall mean and include any item or article of tangible personal property that is:
  - a) Incorporated into, attached to, or placed upon a ship, vessel, barge, commercial fishing vessel, drilling ship, or drilling barge (collectively referred to in this Section as “vessel” or “vessels”) during either (i) the construction of such vessel in the case of the exemption provided for the Subsection B of this Section;
  - b) Required for the navigation or intended commercial operation of a vessel; or
  - c) Required to obtain certification or approvals from the United States Coast Guard or any regulatory agency or classification society with respect to a vessel.
- (4) For purposes of this Section and except with respect to any gaming equipment, as defined in R.S. 27:44(12), the determination of whether any item or article of tangible personal property is a component part shall be made without regard to any provision of the Louisiana Civil Code.
- (5) The provisions in Paragraph (3) of this Subsection shall not apply to any gaming equipment as defined in R.S. 27:44(12).

**C. THE EXEMPTION FROM THE STATE SALES TAX IN THIS SECTION SHALL BE APPLICABLE TO ANY SALES TAX LEVIED BY A LOCAL GOVERNMENTAL SUBDIVISION OR SCHOOL BOARD.**

Please note that the exemption provided by LSA R.S. 47:305.1(B) expressly excludes materials and supplies. But moreover, under the amended statute it includes “tangible personal property” that is “incorporated into, attached to, or placed upon a ship, vessel, barge, fishing vessel, drilling ship or drilling barge, etc.” This would be inclusive of all other supplies and materials, including food stuffs,

since it is “required” for the “intended commercial operating of a vessel.” LSA R.S. 47:305.1(C)(3)(B). This exemption would also apply to repairs. See LSA R.S. 47:305.1(C)(3)(a) and LSA R.S. 47:305(B).

The statute also states that a Taxpayer is in “Interstate or Foreign Coastwise Commerce” when Taxpayer is transporting or undertaking the movement of passengers or property in, or on, a ship, or vessel when the activity “(ii) proceeds movement of the passengers or property from within State to a point outside the territorial boundaries of such state, or (iii) is part of a stream of trade, traffic, transportation or movement of passengers or property originating or terminating outside the territorial boundaries of the State...” LSA R.S. 47:305.1(C)(1)(d).

For instance, the movement of oil for the sea floor in or around Louisiana to refineries in Louisiana or Texas with ultimate distribution all over the world should be considered as in the “stream” of commerce envisioned under this statute. The broad wording of the statute is most useful in precluding the imposition of sales and use taxes by the state and the parishes for business that traverse state and federal boundaries.

(TO BE CONTINUED)

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