



Statement of Non-Acquiescence
No. 03- 001
Sales and Use Tax
February 3, 2003

Louisiana Health Services and Indemnity Company d/b/a Blue Cross and Blue Shield of Louisiana versus Secretary, Department of Revenue, State of Louisiana (98-1971 La. App. 1 Cir, 11/05/99); 746 So. 2d 285; 1999 La. App. LEXIS 3094)

Purpose: The purpose of this statement is to announce that the Department of Revenue will not acquiesce in the result of the above decision concerning the issue of whether Louisiana sales or use taxes are due on purchases of mass-produced advertising materials that are delivered through the mail to potential customers of the purchasers of the materials.

Analysis/Discussion: Louisiana Health Services and Indemnity Company, d/b/a Blue Cross and Blue Shield of Louisiana (hereafter, “Blue Cross/Blue Shield”) was a buyer of advertising brochures that it purchased from another company. The seller of the brochures mailed the brochures from outside Louisiana directly to possible Louisiana customers of Blue Cross/Blue Shield. The First Circuit Court of Appeal ruled that Blue Cross/Blue Shield was not liable for the payment of the sales or use tax on the brochures since Blue Cross/Blue Shield did not take physical possession of the brochures. The decision was based on Louisiana Revised Statute 47:302(D) that provides as follows:

D. Notwithstanding any other provision of law to the contrary, no state sales or use tax nor any such tax levied by a political subdivision shall be levied on any advertising service rendered by an advertising business, including but not limited to advertising agencies, design firms, and print and broadcast media, or any member, agent, or employee thereof, to any client whether or not such service also involves a transfer to the client of tangible personal property. However, a transfer of mass-produced advertising items by an advertising business which manufactures the items itself to a client for the client's use, which transfer involves the furnishing of minimal services other than manufacturing services by the advertising business shall be a taxable sale or use of tangible personal property; provided that in no event shall tax be levied on charges for creative services which are separately invoiced.

The court’s decision was based on the second sentence of the above paragraph. The court reasoned that the “transfer of mass-produced advertising items by an advertising business”, that is required for the tax on mass-produced advertising items to be levied, necessarily involves the transfer of physical possession of the items to the advertiser or other purchaser of the items. Since the advertising materials involved in the case were placed by the seller in the U.S. Mail for delivery to potential customers of Blue Cross/Blue Shield, the court ruled that Blue Cross/Blue Shield never had the physical possession of the brochures that the Court determined was necessary for that company to become liable for the payment of the tax. The majority opinion of the Court quoted portions of the minutes from a June 25, 1987, meeting of the Senate Committee on Revenue and Fiscal Affairs in which the legislative bill that enacted R.S.

47:302(D) was discussed. The majority opinion, discussing the minutes of that committee meeting, stated:

According to the minutes, as they appear in the record, "the transfer of the items must be for the client's use." If the advertising firm was "using the items themselves to do something for the client, then that situation would not be taxable." The language envisions something more than payment by the client to the advertising firm.

One Justice of the Court of Appeal issued a separate written opinion, dissenting from the majority opinion, as follows:

I believe that a "transfer to the client" under La. R.S. 47:302D includes the present fact situation, which consists of a transfer of advertising materials to the Blue Cross customers for the benefit of the client, Blue Cross. I think the quoted language in the majority opinion from the Revenue and Fiscal Affairs Committee meeting supports such a conclusion.

Department Position: R.S. 47:302(D) does not create a total exemption from the state sales or use tax on sales and purchases of advertising materials. The purpose of the statute is to create an exemption from the collection of the tax on sales of advertising services rendered by advertising businesses, including advertising agencies, design firms, and print and broadcast media in cases where the rendering of the services also involves the transfer to clients of tangible personal property. In cases where the rendering of advertising services involves the transfer to clients of tangible personal property, the providers of the services would be considered, for sales and use tax purposes, to be the consumers of the tangible personal property. The advertising businesses, as consumers, are required to pay the sales or use tax on the acquisition prices of that tangible personal property.

R.S. 47:302(D) creates an exception to the exemption from tax collection in cases of the furnishing of mass-produced advertising items to clients where only minimal services, other than manufacturing services, are involved in the transactions. The second sentence of R.S. 47:302(D) requires that sales tax be collected on such transactions. Charges for creative services that are separately invoiced can be excluded from the taxable bases on sales of the mass-produced items.

The department will administer 47:302(D) so as to require that sales or use tax be remitted on mass-produced advertising materials that are delivered to Louisiana mailing addresses, 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 department believes, just as did the justice who dissented from the majority opinion in this decision, that R.S. 47:302(D) does not make a distinction in tax collection responsibility between situations where mass-produced advertising items are delivered directly to the purchasers of the materials and those where the materials are delivered to others in Louisiana, through the mail or otherwise, at the direction of the purchasers. Furthermore, any seller of mass-produced advertising materials

who would be recognized as being eligible for tax collection exemption on the furnishing of the materials would instead be liable for payment of sales or use tax on his/her acquisition prices of the materials.

Questions concerning this matter can be directed to the Policy Services Division at (225) 219-2780.

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Secretary

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A Statement of Acquiescence or Nonacquiescence (SA/SNA) is written to provide guidance to the public and to Department of Revenue employees. It is issued under Section 61:III.101(C)(2)(c) of the Louisiana Administrative Code to announce the department's acceptance or rejection of a specific unfavorable court or administrative decision. If a decision covers several disputed issues, a SA/SNA may apply to just one of them, or more, as specified. A SA/SNA is not binding on the public, but is binding on the department until superseded or modified by a subsequent SA/SNA, declaratory ruling, rule, statute or court case.