



OUT OF THE CLOUDS AND BACK TO EARTH:

THE LOUISIANA DEPARTMENT OF REVENUE SUSPENDS POLICY STATEMENT ON SALES/USE TAX ASPECTS OF DIGITAL TRANSACTIONS

The Louisiana Department of Revenue has announced it is temporarily suspending Revenue Ruling No. 10-001, a far-reaching revenue ruling examining the taxability of transactions involving the purchase or use of products, computer software and applications, or stored media and/or other materials electronically delivered into Louisiana to be accessed from in-state or out-of-state providers or vendors. The Department's decision was made public by way of Revenue Information Bulletin 10-028 (dated November 15, 2010) and appears to have been prompted, in part, by a strong outcry of criticism and concern from taxpayers, professional organizations, and the business community following the ruling's original promulgation on March 23, 2010.

Revenue Information Bulletin 10-028 also announced the Department's suspension of Revenue Information Bulletin 10-015, which addressed the sales tax treatment of transactions involving Pay Per View movies and Video on Demand movies purchased for viewing by customers of cable television and satellite television providers.

Revenue Ruling 10-001:

Relying on its liberal extension of the decision in *South Central Bell Telephone Company v. Sidney J. Barthelemy, et al.*, 94-0499 (La. 10/17/94), 643 So. 2d 1240, the Department concluded in Revenue Ruling 10-001 that electronically-delivered information, data, material, media, or other forms of communication, including software and products for one-time use or through online subscription services, are deemed tangible (and thus taxable) if they are "felt" by the senses of sight or sound or both, even if the body of information is only viewed in Louisiana on a computer screen and never actually stored on the computer. The Department reasoned that the essential element for consumption of electronic or digital media is that the information is "physically manifested in machine readable form" and that "the computer reads the pattern." According to the Department, the reconstituted matter need not be stored to be recognized as tangible personal property; the taxable transaction is "the acquisition of the coded material from the vendor or provider." For transactions where no storage capability is intended or provided, it is the "interactive use" that establishes the transaction by an acquirer. Thus, however momentary, the conversion of instructions read, viewed, or used is the alleged taxable event.

The Department determined that taxable transactions include, but are not limited to, remotely accessed software, information materials, and entertainment media or products, whether as a one-time use or through ongoing subscription, and whether capable of only being viewed, or being downloaded when that transfer requires payment of consideration in any form. Thus, according to the Department, any consideration paid for electronic receipt or access to data, information, materials, media or other form of communications that are converted to readable, viewable, or usable form by browsers or software installed on mobile hardware or system hardware located in Louisiana is subject to sales, use, or lease tax in the



state. The Department also specifically included as taxable these same types of transactions when they are made with mobile “PDA-type” devices.

According to Revenue Ruling 10-001, software located on a provider’s remotely-accessed server and utilized by subscribers in Louisiana without transfer of the data characterizes the transaction as a *lease*, which is subject to tax. If the software is downloaded or otherwise stored in permanent form, it is considered a taxable *sale*. The Department also contended that an installation fee, initiation fee, or other fee related to the transaction is part of the transaction and incidental to the sale or lease; thus, such fee cannot be segregated or separated from the transaction to avoid taxation.

A copy of Revenue Ruling 10-001 can be found [here](#).

A copy of RIB 10-028 (temporarily suspending Revenue Ruling 10-001) can be found [here](#).

Jones Walker Practice Commentary

Although it is promising that the Department has decided to suspend Revenue Ruling 10-001, the final determination from the Department on this issue is still uncertain. Taxpayers and their representatives should be aware of the potentially sweeping impact of the Department’s ultimate ruling, which could very well be felt in many different business sectors utilizing or providing some form of online information or service component (including, for example, certain subscription-based online research services). In propounding Revenue Ruling 10-001, the Department, on its own, attempted to create a new sales tax not only on certain recently developed online services, but also on other services that have been in existence and considered non-taxable for decades. It is yet to be known to what extent the second iteration of this ruling will move away from such a far-reaching position.

At the time of Revenue Ruling 10-001’s suspension, the Department’s auditors had already begun relying upon it to assess sales tax—in some cases retroactively—against otherwise compliant taxpayers. Also, as a direct result of Revenue Ruling 10-001, some online vendors and service providers have already begun to charge state and local sales tax for online subscriptions and information service transactions. In some cases vendors are charging sales tax as a precautionary measure, at times possibly without even having given due consideration to whether this ruling actually applies to their business activities. Although the Department has temporarily suspended Revenue Ruling 10-001, taxpayers should still carefully review all recent and incoming invoices for any newly included sales tax charges based on the ruling and be prepared to take the necessary procedural steps to properly protect their interests.

If you have any questions or would like additional information about Revenue Ruling 10-001 or its suspension, please feel free to contact [William M. Backstrom, Jr.](#), [Andre B. Burvant](#), [Kimberly Lewis Robinson](#), or any other member of the Jones Walker State & Local Tax Team.



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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