

Shop Talk: Suit by Taxpayer's Agent Was Permitted in Louisiana Tax Refund Case

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In Louisiana, for purposes of collecting the sales tax, the vendor, or dealer, is deemed to be the agent of the taxing authority. In *J-W Power Co. v. State ex rel Department of Revenue & Taxation*, 59 So 3d 1234 (La., 2011), *reh'g den.*, the Louisiana Supreme Court considered whether a dealer that collected sales tax from its customers can subsequently act as its customer's agent to recover the tax. The court, after an analysis of Louisiana's Civil Code, its Code of Civil Procedure, and Tax Code, found that such representation was permissible.

Background. J-W Power Company (Power) provided gas compression services to the oil and gas drilling industries in Louisiana. Compression services have been a target of the Louisiana Department of Revenue for several years. (See, e.g., Cassidy, "Louisiana: Sales Tax Imposed on 'Free' Gas Consumed in Processing Gas; Circuits Now Split," 19 J. Multistate Tax'n 47 (May 2009).) In La. Rev. Rul. 04-009 (12/2/04), the Department announced that from that date forward, gas compression services would be treated as a lease of the gas compression equipment by the customer and, accordingly, sales taxes would be owed on the payments made by the customer to the service provider.

Power collected the tax on payments it received from two companies with which it was affiliated and from several unrelated third parties. Power then remitted the taxes to the Department together with a letter stating that Power was paying the taxes under protest and intended to file a suit for refund. No mention was made in the letter of the affiliated companies or the third parties. Power subsequently filed suit asking that the tax be refunded to Power. Power was the sole plaintiff in the suit, and there again, no mention was made of either the affiliates or the third parties.

The Department filed an "exception of no right of action" on the grounds that Power was not the taxpayer. That is, Power did not actually pay the tax, rather it just collected and remitted the tax. The district court granted the Department's exception, but allowed Power to amend its petition to remove the grounds for objection. Power did so, alleging in its amended petition that it was the authorized agent for its affiliates. Power dropped its protest as to the unrelated third parties.

Concurrently with Power's filing of the amended petition, its affiliated entities intervened in the suit and alleged that they had previously authorized Power to act as their agent. These related entities also acknowledged that they would be bound by Power's actions.

The Department re-urged its exception, arguing that there was no authority in the tax law for Power to act as the affiliates' agent. The Department also opposed the intervention on the grounds that the affiliates had not followed the proper procedure for protesting a tax.

The district court ruled in favor of the Department again, as to both issues. Power appealed the granting of the "no right of action" exception, but the affiliates did not appeal the dismissal of their interventions.

Court of appeal disagrees with district court. In *J-W Power Co. v. State ex rel. Secretary of Department of Revenue & Taxation*, 40 So 3d 1214 (La. Ct. App. 1st Cir., 2010), the Louisiana Court of Appeal reversed the district court and ruled in favor of Power. The court of appeal stated:

"There is no rational basis to refuse to allow a party to sue through an agent, even in a tax refund case, so long as the agent successfully complies with the statutes so as to trigger the Department's requirement to escrow the disputed funds."

The Department appealed and the Louisiana Supreme Court granted writs.

The supreme court's decision. La. Rev. Stat. §47:1576 deals with "any taxpayer protesting the payment of any amount found due by the ... Department of Revenue." The supreme court stated that the case hinged on §47:1576(A)(1)(b), which concerns "sales or use taxes that are required to be collected and remitted by a selling dealer" and states that in order to protest a tax, a "purchaser" must comply with all of the following:

- (1) Remit the protested sales or use tax to the dealer.
- (2) Retain copies of the documents evidencing the amount of sales or use tax paid.
- (3) Timely notify the Department of Revenue as to the payment under protest and the purchaser's intent to file a suit to recover those payments.
- (4) Timely file suit for the refund.

Citing Cassidy, "Louisiana: Buyer-Taxpayer Can Directly Protest Sales Tax Payments," 10 J. Multistate Tax'n 48 (Mar/Apr 2000), the court noted that this "protest" provision had been added to La. Rev. Stat. §47:1576 in 1999 "to eliminate some of the confusion as to who is the proper party to make such a protest." Prior to 1999, the term "taxpayer" as used in §47:1576 had been interpreted by the Department to mean the "seller," since it was the seller who literally "paid" the tax to the Department. The court stated that the 1999 amendment specified that the "purchaser" was the proper party to file a protest.

The court held that under this provision, only the affiliates, as purchasers, had the "real and actual interest" necessary to bring an action for a refund. The court also found, however, that under La. Code Civ. Proc. art. 694, a duly authorized agent is permitted to bring an action on the part of its principal. The court noted that La. Rev. Stat. §47:1576 neither authorized nor precluded an agent from bringing an action on the part of a principal.

The Department argued that tax laws are *sui generis* (i.e., unique, in their own category) and, thus, other provisions of the law have no application to them, and that allowing a dealer to act as its customer's agent "would be problematic from an accounting standpoint." Neither argument was found to be compelling by the court. The court stated that the *sui generis* concept was applicable only to remedies available to a taxpayer. As to the Department's onerous vision of the consequences of allowing agents to represent taxpayers, the court noted that the Department routinely deals with countless agents (e.g., CPAs, attorneys) for various taxpayers and, accordingly, refused to carve out a prohibition against agents representing taxpayers in the present litigation context.

Finally, the Department contended that Power's failure to disclose that it was acting as an agent when it filed the original petition, precluded it from amending the petition to allege that it was acting as an agent. After finding that the Department had not been prejudiced, since it had "received sufficient notice that the specified taxes were being protested so as to enable it to comply with the escrow requirements ... and to thereafter refund the amount of taxes paid under protest in the event the purchasers/taxpayers prevailed," the court brushed aside the "disclosure" argument, noting that under Louisiana's Civil Code, a person may be a disclosed or nondisclosed agent and disclosure was necessary only upon the opposing party's filing of an exception of no right of action. The court did, however, limit this part of its ruling to "the facts of this case."

The majority seemingly acknowledged the dissent. This limitation may have been in response to the dissent, which feared that the court's holding could result in the Department's paying a refund to the wrong person or failing to offset a refund against other tax liabilities owed to the taxpayer entitled to the refund. While these concerns may be theoretically valid, practically speaking both the courts and tax administrators require ample proof that a person claiming a refund is entitled to that refund and, in any event, tax collectors are authorized to recoup erroneous refunds from the payee.

Analysis. The decision in *J-W Power* is important for two reasons. First, it formally recognizes that a duly authorized agent may represent a taxpayer in tax matters. Second, and perhaps more important, the court refused to apply the concept of *sui generis* to the

case and, instead, used the Louisiana Civil Code, Code of Civil Procedure, and the Tax Code in arriving at its decision.

The concept of *sui generis* is an incantation used by a party to prevent an opposing party from employing concepts that arise outside of tax law to, as in this case, interpret, clarify, or supplement the tax law. Properly, the concept is applicable only to limiting the remedies available to a taxpayer to those authorized in the Tax Code, as opposed to remedies that may be available in other areas of the law. See, for instance, those remedies cited by the supreme court in footnote 12 of its *J-W Power* opinion. One hopes that the decision will prevent the concept of *sui generis* from being blindly applied in tax cases.

What to do. Although this case allows a dealer to act as an agent for an undisclosed taxpayer, the simpler solution, since the taxpayer will eventually have to be disclosed anyway, would be for the taxpayer to give written authorization to the agent to pay the taxes under protest and to file suit for the recovery of the protested tax. The agent could then file suit on behalf of its principal in its representative capacity. □

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