



SALT Alert!



SALT Alert! 2016- 09: Louisiana: Special Session Bills Signed Into Law

On March 9, 2016, Louisiana's special legislative session ended after 25 days. Because revenue measures cannot be introduced in the regular session in even years, newly-elected Governor John Bel Edwards called a special session to address eliminating the \$900 million deficit expected for the fiscal year ending June 30, as well as a \$2 billion shortfall for the fiscal year starting July 1. Lawmakers were able to agree on certain revenue raising measures—spending cuts and tax increases—many of which are temporary. These measures will avert disaster in the short-term, but it has been reported that the state continues to face an \$800 million shortfall in the coming fiscal year. A second special session may be held in June. Below are summaries of the significant bills affecting business taxpayers that have been signed into law.

Corporate Income and Franchise Tax Bills

House Bill 7, ACT 1 - Restores the Dividend Exclusion for Dividends Received from Banks

Act 123 of 2015 limited the exclusion for dividends received from certain banks to 72 percent of the dividends received. House Bill 7 restores the dividend exclusion to 100 percent of dividends received from certain banks organized or doing business in Louisiana, as well as dividends from capital stock associations whose stock is subject to ad valorem taxes.

House Bill 7 was signed into law on March 4, 2016.

House Bill 19, ACT 12 - Expansion of the Corporate Franchise Tax

Every foreign corporation “exercising its charter or qualified to do business, or doing business” in Louisiana or “owning or using any part or all of its capital, plant or any other property” in Louisiana is subject to corporate franchise tax. In the 2012 *Utelcom* case, a Louisiana appellate court held that two corporations were not subject to the Louisiana franchise tax by virtue of owning limited partnership interests in a partnership that was doing business in Louisiana.

House Bill 19, likely in response to *Utelcom*, expands the coverage of the franchise tax to all corporations that are doing business in Louisiana through an interest in a pass-through entity. Specifically, House Bill 19 provides that effective for tax periods beginning on or after January 1, 2017, a corporation will be subject to corporate franchise tax if it owns or uses

part or all of its capital in Louisiana whether owned directly or indirectly by or through a partnership, joint venture or any other business organization of which the corporation is a related party.

The definition of a "corporation" is revised to include all entities taxed as corporations under IRC Subchapter C. Such entities will be treated and taxed in the same manner for Louisiana purposes as they are for federal income tax purposes. House Bill 19 also makes clear that for franchise tax purposes, limited liability companies will be treated and taxed in the same manner for Louisiana purposes as they are for federal income tax purposes. The bill does, however, provide that franchise tax liability is not extended to any limited liability company qualified and eligible to make an election to be taxed as a Subchapter S corporation.

House Bill 19 also authorizes a new "holding company" deduction from taxable capital for corporations (1) not entitled to other deductions under R.S. § 47:602, and (2) that have one or more subsidiaries (as defined). Such corporations are allowed to deduct from taxable capital, any investments in or advances to one or more subsidiaries, whether made directly or indirectly. "Subsidiaries" are corporations in which at least 80 percent of the voting and nonvoting power of all classes of the stock, membership, partnership, or other ownership interests are owned by a corporation subject to the franchise tax. The amount of the deduction is determined by multiplying the parent corporation's investments in and advances to each subsidiary by each subsidiary's average ratio (i.e., the subsidiary's percentage for allocating taxable capital).

Finally, House Bill 19 increases the rate of the initial franchise tax from \$10 to \$110 per entity for the first accounting period, or part thereof, in which the entity becomes subject to the tax.

House Bill 19 was signed into law on March 10, 2016.

House Bill 20, ACT 6 - Permanent Limitations on NOLs

Under Act 123 as enacted last year, for all tax returns filed on or after July 1, 2015 and before 2018, Louisiana net income could only be reduced in an amount equal to seventy-two percent NOL carryovers to such year. The statute was badly drafted and the limitation could have been interpreted as applying broadly to a taxpayer's aggregate NOL carryovers, or to the amount of NOL carryover that would reduce a taxpayer's income to zero in a taxable year. The Department's position in subsequent guidance was that the limitation applied to the amount of the NOL carryover on the taxpayer's return to reduce its net income.

House Bill 20 effectively adopts the Department's position and clarifies that the NOL carryover deduction can never exceed 72 percent of Louisiana net income for any return filed on or after July 1, 2015. House Bill 20 also makes the NOL limitation permanent, rather than reinstating a full deduction in 2018.

House Bill 20 was signed on March 9, 2016.

House Bill 55, ACT 16 - Related Party Addback Provisions

House Bill 55 adopts related-party expense disallowance rules effective for tax years beginning on or after January 1, 2016. Under the rules, a corporation is required to add back otherwise deductible interest expenses and costs, intangible expenses and costs, and management fees directly or indirectly paid, accrued, incurred, or in connection with one or more direct or indirect transactions, with one or more related members. The bill does not define interest, intangible expenses, or management fees, and it appears that all related-party interest (not just intangible-related interest) is potentially subject to addback. A proposed Senate amendment to define management fees was defeated.

There are three exceptions to the addback requirements - a subject to tax exception, an exception for when there is a valid business purpose and economic substance, and a conduit exception. The subject to tax exception is quite thorough and addresses some of the

issues that are unclear in certain other states. Specifically, the addback will not be required if the taxpayer establishes that the corresponding item of income was either subject to a tax based on or measured by the related member's net income in Louisiana or any other state, or a foreign nation which has an enforceable income tax treaty with the U.S. and the recipient was a "resident" of the foreign nation as defined in the treaty. "Subject to a tax based on or measured by the related member's net income" means the recipient-related member reports and includes the income for purposes of a tax on net income. The income cannot be offset or eliminated in a combined or consolidated return which includes the payor. Any portion of an item of income not attributed to the taxing jurisdiction, as determined by that jurisdiction's allocation and apportionment methodology, will not be considered subject to a tax. However, the subject to tax exception will still apply if, due to deductions or otherwise, no actual taxes are paid.

To qualify for the "business purpose" exception, a taxpayer must establish that the transaction giving rise to the interest expenses and costs, intangible expenses and costs, or the management fees had a substantial business purpose and economic substance, and contains terms and conditions comparable to a similar arm's length transaction between unrelated parties. If the transaction meets this test, it will be presumed to not have tax avoidance as its principal purpose. This presumption is subject to rebuttal by the Department of Revenue.

House Bill 55 was signed on March 10, 2016.

House Bill 116, ACT 24 - Reordering of NOLs

House Bill 166 provides that, effective on January 1, 2017, losses carried over from multiple tax years are applied in the order of the taxable years from which such losses are carried over, beginning with the loss for the most recent tax year. Previously, losses from the earliest tax years applied first.

House Bill 116 was signed on March 10, 2016.

Senate Bill 15, ACT 23 - Application of Credits

For all tax periods beginning on or after January 1, 2016, credits and payments are to be applied in the following order:

- Current year nonrefundable credits with no carry forward;
- Refundable tax credits other than the credit allowed under LRS 47:6006 (the credit for local property taxes paid on inventory). Refundable tax credits that can be applied both against corporate income and franchise tax are to be applied first against corporate income tax;
- Any carry forward amount from a tax credit earned, granted or received in a prior year, in the order of the length of the carry forward period remaining, beginning with the shortest carry forward period;
- Current year nonrefundable credits with a carry forward, in the order of the length of the carry forward period, beginning with the credit with the shortest carry forward period;
- Tax credits that are transferable, but not refundable, that the taxpayer elects to apply against the tax;
- Refundable tax credits provided for in LRS 47:6006 (property tax on inventory); and
- Estimated payments, withholding payments, and other payments of tax.

Senate Bill 15 was signed on March 10, 2016.

House Bill 71, ACT 18 - Reduces Enterprise Zone Credits and Removes Hotels from Eligibility

House Bill 71 makes various changes to the Enterprise Zone program, including but not limited to, increasing the jobs credit from \$2,500 to \$3,000 per employee for employees receiving public assistance or for businesses located in a designated enterprise zone census tract. The jobs credit is reduced to \$1,000 per employee for all others, and the bill mandates that no advance notifications will be accepted for the program after July 1, 2017. The bill also precludes hotels and various other facilities providing traveler accommodations from eligibility for the credits if the advance notification for the project is filed after April 1, 2016.

Constitutional Amendment to Eliminate Corporate Deduction for Federal Income Taxes

House Bill 31 is a joint resolution sending an important question to Louisiana's voters. Notably, on the next ballot voters will be asked to decide whether to amend the State Constitution to eliminate the current corporate income tax deduction for federal income taxes paid. If the voters approve the constitutional amendment, the corporate income tax deduction for federal income taxes paid would be eliminated effective for tax years beginning on or after January 1, 2017.

If the voters approve the amendment, House Bill 29 (ACT 8 signed into law on March 9, 2016) adopts a flat 6.5 percent corporate income tax rate. This rate is only effective if the constitutional amendment is approved. Current corporate tax rates are graduated up to 8.0 percent.

Sales and Use Tax Bills

House Bill 30, ACT 22 - Sales and Use Tax Nexus Expansion

Effective April 1, 2016, House Bill 30 redefines the term "dealer" to include sellers that have certain types of relationships or agreements with in-state persons.

Specifically, a dealer will be considered to be engaging in business in Louisiana through an independent contractor or a representative pursuant to an agreement with a Louisiana business or resident if, under the agreement, the Louisiana business or resident, for a commission, referral fee, or other consideration of any kind, directly or indirectly, refers potential customers to the seller. The referral may be by link on an Internet website (i.e., a click-through), an in-person oral presentation, telemarketing, or otherwise. If the receipts from Louisiana customers from such arrangements exceed \$50,000 during the preceding 12 months, the person is presumed to be a "dealer" unless he demonstrates that he cannot reasonably be expected to have gross receipts in excess of \$50,000 for the succeeding 12 months.

A dealer also includes any person selling taxable tangible personal property or services who does one of the following:

1. Sells the same or a similar line of products as a Louisiana retailer under the same or a substantially similar business name, using the same or substantially similar trademarks, service marks, or trade names.
2. Solicits business and develops and maintains a market in Louisiana through an agent, salesman, independent contractor, solicitor, or other representative pursuant to an agreement with a Louisiana resident or business. The Louisiana resident or business is referred to in the bill as an "affiliated agent." Under this agreement, the affiliated agent, for a commission, referral fee, or other consideration of any kind engages in activities in Louisiana that inure to the benefit of the person by aiding in the development or maintenance of a market for the person's goods or services in Louisiana. The activities of the affiliated agent must be sufficient to satisfy the nexus requirement of the United States Constitution. Interestingly, the activities of an affiliated agent that will be considered in asserting nexus over the nonresident seller include referring potential customers to the person, either directly or indirectly,

whether by link on an internet website or otherwise, much the same as the click-through arrangement described above.

In addition to the expanded definition of dealer discussed above, House Bill 30 further sets forth a presumption that a dealer includes any person who holds a substantial ownership interest, directly or through a subsidiary, in a retailer maintaining sales locations in Louisiana or any person who is owned, in whole or in substantial part, by a retailer maintaining sales locations in Louisiana, or by a parent or subsidiary thereof. "Substantial ownership interest" means affiliated persons where one of such persons has a direct or indirect ownership interest of greater than five percent in the other.

House Bill 30 was signed on March 14, 2016.

House Bill 43, ACT 15 - Limits to Vendor Compensation

Under current law, dealers collecting and remitting sales and use tax on behalf of the state can retain 0.935 percent of the taxes collected as compensation for timely remitting the tax. There is currently no limit on the amount of tax dealers may retain. Effective April 1, 2016, House Bill 43 limits vendor compensation to \$1,500 per month for dealers that operate one or more business locations in Louisiana. The bill also specifies that there is no compensation allowed for the additional 1.0 percent sales tax that is in effect under House Bill 62. (See below.)

House Bill 43 was signed on March 10, 2016.

House Bill 61, ACT 25 - Limits on Sales and Use Tax Exclusions and Exemptions

Under Louisiana law, the state-level sales and use tax consists of four components — a two percent tax levied under LRS 47:302, a one percent tax levied under LRS 47:321, and what equates to one percent tax levied under LRS 47:331. House Bill 61 sets forth exclusive lists of the exclusions and exemptions that will be allowed under each component of the existing state sales and use tax, thus having the effect of suspending those exemptions and exclusions in current law that are not included in the "exclusive" lists in House Bill 61. For the two percent tax levied under LRS 47:302, House Bill 61 lists 32 specific exemptions and exclusions that will be the only exemptions and exclusions that are operative for that portion of the state tax from April 1, 2016 through July 1, 2018.

For the one percent tax under LRS 47:321, House Bill 61 lists 31 specific exemptions and exclusions that are the only exemptions and exclusions in effect for this one percent tax from April 1, 2016 through July 1, 2016, again meaning that certain current law exemptions and exclusions will be operative under this part of the tax for three months. Of particular note, the sale, use, or lease of manufacturing machinery and equipment, which will remain excluded under House Bill 61 from the taxes levied under LRS 47:302 and 47:331, will be subject to the one percent tax levied under LRS 47:321 from *April 1, 2016 through June 30, 2018*. Manufacturing machinery and equipment is also subject to the new one percent tax levied under LRS 47:321.1 from April 1, 2016 through June 30, 2016. (See House Bill 62 discussed below.)

For the one percent tax under LRS 47:331, House Bill 61 lists 32 specific exemptions and exclusions that are the only exemptions and exclusions that will be operative under this one percent tax from April 1, 2016 through July 1, 2016. The bill also extends the suspension of certain exemptions from the tax levied pursuant to LRS 47:331 for sales of steam, water, electric power or energy, and natural gas for business purposes that was adopted by House Concurrent Resolution No. 8 in 2015. Notably, for purposes of the one percent tax levied under LRS 47:331, these exemptions for business utilities will be inapplicable, inoperable, and have no effect through April 1, 2019.

Because utilities used by businesses are not included in any of the exclusive lists, business utilities will be taxed as follows:

- From April 1, 2016 through July 1, 2016, taxed at five percent (two percent tax under LRS 47:302, one percent taxes under LRS 47:321, 47:331, and 47:321.1);
- From July 2, 2016 through June 30, 2018, taxed at four percent (business utilities remain subject to taxes levied under LRS 47:302, 47:331, and 47:321.1, but will be exempt from the tax under LRS 47:321 as the exclusive list in House Bill 61 expires on July 1, 2016);
- On July 1, 2018, taxed at three percent (business utilities remain subject to the taxes levied under LRS 47:302 and 47:331, but the new one percent tax under LRS 47:321.1 expires on June 30, 2018);
- From July 2, 2018 through April 1, 2019, taxed at one percent (the tax levied under LRS 47:331 applies, but business utilities will be exempt under the tax levied by LRS 47:302 as the exclusive list of exemptions contained in House Bill 61 expires after July 1, 2018).

In sum, any current exemption or exclusion from sales and use tax that is not specifically enumerated in these lists, will be suspended effective April 1, 2016 for the length of time specified. House Bill 61 was signed on March 14, 2016.

House Bill 62, ACT 26 - New One Percent Tax

One of the major revenue raisers adopted during the special session was a new one percent state-level sales and use tax levied under new section LRS 47:321.1. The new one percent tax is effective April 1, 2016 through June 30, 2018. House Bill 62 states that there will be no exemptions or exclusions from the new one percent tax, except for sales or purchases of 65 specifically enumerated items. Interestingly, the new one percent tax has many more allowable exemptions and exclusions than are temporarily allowed under House Bill 61 discussed above.

House Bill 62 was signed into law on March 14, 2016.

Next Steps

The Louisiana sales and use tax changes are all effective April 1, 2016 as a means of generating an immediate influx of cash to balance the budget for the fiscal year ending June 30, 2016. The resulting array of limitations on various sales and use tax exemptions is quite complex, and taxpayers will need to start working through these as soon as possible. It is not clear when and if guidance will be issued from the Department on the myriad changes, or whether there will be any administrative penalty relief due to the short turnaround time to process these changes.

Please contact [Amy Hatten](#) at 713-319-2649 with questions on the income and franchise tax changes. Please contact [Randy Serpas](#) at 504-569-8810 with questions on the sales and use tax changes.