NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2009 CA 1634

**CYNTHIA BRIDGES, SECRETARY,
DEPARTMENT OF REVENUE,
STATE OF LOUISIANA**

VERSUS

R.H.P. by JMM

THE HIGBEE COMPANY T/A DILLARD'S

JMM
E.K. by JMM

**On Appeal from the 19th Judicial District Court
Parish of East Baton Rouge, Louisiana
Docket No. 515,172, Division "O," Section 8
Honorable Wilson E. Fields, Judge Presiding**

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BEFORE: PARRO, KUHN, AND McDONALD, JJ.

Judgment rendered JUN 2 8 2010

PARRO, J.

The Higbee Company (Higbee) appeals a judgment in favor of Cynthia Bridges, Secretary of the Louisiana Department of Revenue (the Department), granting the Department's motion for summary judgment and ordering Higbee to pay $61,774.34, representing use tax for the period of February 1998 through July 2001, plus interest calculated in accordance with LSA-R.S. 47:1601, and all court costs. For the following reasons, we reverse the judgment in part, vacate in part, and remand this case to the district court for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

The Department filed a petition on December 18, 2003, alleging that during the tax period January 1, 1998, through July 31, 2001, Higbee had failed to accrue and remit sales and use taxes on the printing costs associated with catalogs and other printed material sent into the State of Louisiana to Dillard's department stores and customers.[1] Higbee filed a general denial to the Department's petition and further averred that advertising materials printed out of state and shipped into Louisiana by an unrelated third-party printer were not subject to Louisiana sales or use tax, citing LSA-R.S. 47:302(D). It also stated that if such advertising materials were subject to use tax, the tax would be the lower of either 4% of the cost price or 4% of the fair market value, and that the advertising materials have a fair market value of zero to the Dillard's customers who get them free. It also alleged that the Department erred in assessing Louisiana sales and use taxes on third-party freight charges, which are not taxable under Louisiana law, and in computing the interest amounts allegedly due without first subtracting amounts already paid by Higbee against the sales and use tax assessment for that period. Finally, Higbee claimed that

[1] The record shows that Dillard's, Inc. acquired Higbee in 1988 and changed its stores' names to Dillard's stores. Higbee, a Delaware corporation, is a wholly owned subsidiary of Dillard's that operates Dillard's department stores in Louisiana and other states. Therefore, the issue involves Louisiana use tax on Dillard's catalogs that were ordered and paid for by Higbee.

the Department erred by claiming in its petition that the taxes due related to a tax period beginning January 1, 1998, when the notice of proposed tax due sent to Higbee by the Department stated that the tax liability was for a tax period beginning February 1, 1998.

The Department then filed a motion for summary judgment and a motion to have requests for admission deemed admitted due to Higbee's failure to respond to those requests. The motions were set for hearing on May 11, 2009. On May 7, 2009, Higbee filed a cross motion for summary judgment; the court set the hearing on Higbee's motion for September 28, 2009.

Because Higbee's opposition to the Department's motions had been filed late, the court did not allow counsel for Higbee to argue at the May 11, 2009 hearing. At that hearing, the court granted the Department's motion to have requests for admission deemed admitted. The affidavit of Mike Blalock, the Department's Revenue Tax Audit Supervisor, stated that the Department's audit of Higbee showed there was a tax balance of $61,744.34, of which $50,428 represented use taxes on catalogs, circulars, and other promotional materials printed out of state and distributed in Louisiana to Dillard's stores and to its credit card customers. According to Blalock's affidavit, the remaining $11,316 related to flat fees charged to Dillard's customers when merchandise was shipped to them.[2] Based on Higbee's admissions and the affidavits and memoranda submitted by the parties, the court concluded that there was no genuine issue of material fact and that the Department was entitled to judgment as a matter of law and granted the Department's motion. The judgment, which was signed on June 17, 2009, ordered Higbee to pay the Department $61,774.34,[3] representing sales and use tax for the period of February 1998 through July 2001, plus interest calculated in accordance with

[2] We note that there is an obvious mathematical error in the amounts provided in the affidavit, as $50,428 + $11,316 ≠ $61,744.34.

[3] The judgment contains another error, in that Blalock's affidavit stated the total due was $61,744.34, whereas the judgment awarded $61,774.34.

LSA-R.S. 47:1601, and all costs. Higbee timely filed a suspensive appeal to this court.

Higbee assigned as error the court's failure to apply the exclusion from such taxes found in LSA-R.S. 47:302(D), citing this court's decision in Louisiana Health Services & Indem. v. Secretary, Dep't of Revenue, State of Louisiana, 98-1971 (La. App. 1st Cir. 11/5/99), 746 So.2d 285, writ denied, 00-0263 (La. 3/24/00), 758 So.2d 155. It also assigned as error the court's application of the "reasonable market value test" by considering Higbee to be the willing buyer, when in fact, the "willing buyers" in this case were the Dillard's customers who received the catalogs free of charge. Therefore, the reasonable market value of the catalogs at the time they became subject to Louisiana use tax was zero.

ANALYSIS

There is no dispute concerning the facts of this matter; the only issue before us involves the interpretation and application of Louisiana statutes and jurisprudence. Higbee contends that the distribution of Dillard's catalogs by mail directly to Dillard's customers or to its Louisiana stores is excluded from Louisiana sales or use taxes pursuant to LSA-R.S. 47:302(D). Prior to its amendment by 2003 La. Acts, No. 73, § 1, that statute provided, in pertinent part:

> Notwithstanding any other provision of law to the contrary, no sales or use tax ... 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. (Emphasis added).

Based on this court's decision in Louisiana Health Services, 746 So.2d 285, and the very recent decision by another panel of this court in Dillard's, Inc. v. John

N. Kennedy, Secretary, Louisiana Dep't of Rev. & Taxation, 09-1423 (La. App. 1st Cir. 5/7/10), _____ So.3d _____, we conclude that Higbee is correct. None of the catalogs were transferred **to Higbee**, the client, for its use. Some were sent to Dillard's department stores in Louisiana and others were sent to Dillard's credit card customers. As this court stated in the Louisiana Health Services case, "actual transfer of the items by the advertising firm to [the client], for use by [the client], was a pre-requisite for a taxable basis." Louisiana Health Services, 746 So.2d at 287. Therefore, none of the catalogs distributed by the out-of-state printing companies were subject to Louisiana use tax, and the court legally erred in concluding that Higbee owed such taxes to the Department.[4] That portion of the judgment must be reversed.

Other than Blalock's affidavit, the record does not include any evidence related to the $11,316 assessed on flat fees or "handling charges" that Dillard's charged to its customers when merchandise was shipped to them. Higbee contends the court erred in concluding this tax was owed, because the Department's petition made no allegations concerning such taxes, and because, according to the Department's Revenue Ruling No. 01-007 (October 10, 2001), freight charges associated with sales of tangible personal property are not subject to Louisiana sales or use tax. The judgment of the district court did not specifically address these taxes, but merely included them in the total amount it found was owed by Higbee to the Department. Therefore, we will vacate that portion of the judgment and remand this matter to the district court for consideration of whether such taxes are owed.

[4] We note that the Department cited the case of D.H. Holmes Co., Ltd. v. McNamara, 486 U.S. 24, 108 S.Ct.1619, 100 L.Ed.2d 21 (1988), in support of its position. That case held that the Commerce Clause of the United States Constitution was not violated by the assessment and collection of Louisiana use tax on catalogs ordered and printed by out-of-state vendors for distribution in Louisiana to customers and potential customers of D. H. Holmes. However, the D. H. Holmes case was decided on the basis of the version of LSA-R.S. 47:302 in effect at the time the company was audited in 1979-1981. The exclusion of advertising services from such taxes was enacted by 1987 La. Acts, No. 869, § 2, and applied to services rendered on or after January 1, 1982. Therefore, the exclusion underlying this court's opinion in this case was not in effect when the D. H. Holmes case was decided.

CONCLUSION

For the above reasons, the district court's grant of summary judgment in favor of the Department is reversed in part and vacated in part. This matter is remanded for further proceedings solely on the issue of whether a tax is due on flat fees or "handling charges" and, if so, in what amount. All costs of this appeal, in the amount of $1,035.76, are assessed against the Department.

REVERSED IN PART, VACATED IN PART, AND REMANDED.