**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**2005 CA 2574**

**M & H CAR RENTAL, LLC**

**VERSUS**

**CYNTHIA BRIDGES, SECRETARY OF THE LOUISIANA DEPARTMENT OF REVENUE AND CHARLES FOTI, ATTORNEY GENERAL OF THE STATE OF LOUISIANA**

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**On Appeal from the 19th Judicial District Court**
**Parish of East Baton Rouge, Louisiana**
**Docket No. 535,549, Division "D"**
**Honorable Janice Clark, Judge Presiding**

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**State of Louisiana**
**Department of Revenue**

**BEFORE: PARRO, GUIDRY, AND McCLENDON, JJ.**

**Judgment rendered March 23, 2007**

**PARRO, J.**

M & H Car Rental, L.L.C. (M&H) appeals a judgment that denied its rule to show cause why former LSA-R.S. 47:303(B)(6) should not be declared unconstitutional and dismissed its petition for a declaratory judgment. For the following reasons, we affirm.

## Factual Background and Procedural History

In 2003, the Louisiana Department of Revenue (the Department) assessed M&H the amount of $165,266, plus interest and a penalty, for the tax period of January 1, 2000, through June 30, 2002. After initially filing a petition with the Board of Tax Appeals contesting the factual and legal issues regarding the assessment, M&H subsequently filed a petition for a declaratory judgment in the district court. In its petition, M&H contended that LSA-R.S. 47:303(B)(6) imposed a tax and sought to have that statutory provision declared to be unconstitutional. M&H alleged the statute to be unconstitutional because it was enacted in 1993, an odd-numbered year, in direct contravention of LSA-Const. Art. III, §2(A)(2), which at that time provided, in pertinent part:

> No measure levying or authorizing a new tax by the state . . . shall be introduced or enacted during a regular session held in an odd-numbered year.

In oral reasons for judgment, the district court found that the presumption of constitutionality had not been overcome. Therefore, it declined to find that LSA-R.S. 47:303(B)(6) was unconstitutional. M&H has appealed, contending that the district court erred in refusing to declare the statute to be unconstitutional.

## Applicable Law

During the tax period in question, LSA-R.S. 47:303(B)(6) provided:

> Those lessors or renters subject to the tax levied by R.S. 47:551[1] may directly transfer the cost of any local sales and use taxes paid on any automobile purchased for lease or rental by allocating such taxes to each automobile rental contract. Such allocation shall be determined by a schedule promulgated by the secretary of the Department of Revenue and Taxation and shall be collected by such lessors or renters. The schedule shall be based on automobile purchases in the year prior to the particular allocation assessed. The secretary shall promulgate such other rules as he deems necessary to ensure that the allocation provided in this Paragraph is equitable and is not in excess of the actual local sales taxes paid by such lessors and renters. [Footnote added.]

Louisiana Revised Statute 47:303(B)(6) was added by 1993 La. Acts, No. 569, § 2, effective July 1, 1993. The preamble to Act 569 provided that the enactment of this provision was to allow the transfer of costs for certain local sales and use taxes to consumers under certain circumstances.

In March 1994, the Department promulgated LAC 61:I.4307(B)(4)(h)(ii)(a) through (d), which pertained to the local sales tax recovery system, as authorized by LSA-R.S. 47:303(B)(6). The regulation authorized qualified automobile rental dealers to collect a local sales tax recovery surcharge of $2 per rental day per contract as reimbursement for the local sales and use taxes paid on their fleet pursuant to the provisions of Title 33, Chapter 6, Part I, Subpart D of the Louisiana Revised Statutes. The regulation was promulgated to provide for the allocation of such local sales and use

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[1] Following its amendment by 2000 La. Acts, No. 18, § 1, LSA-R.S. 47:551 provided, in pertinent part:

> A. There is hereby levied for the period from August 1, 1990 through June 30, 2002, a state tax of two and one-half percent and a local tax of one-half of one percent of the gross proceeds derived from the lease or rental of an automobile pursuant to an automobile rental contract, less any sales and use tax included in such contract. The tax shall be in addition to any tax, fee, or license imposed directly or indirectly. The tax shall not apply to any automobile rented by an insurance company as a replacement vehicle for a policyholder or by an automobile dealer as a replacement vehicle while a customer's vehicle is being serviced or repaired, nor shall the tax apply to any individual or business who rents a vehicle as a replacement vehicle while his vehicle is being repaired if the individual presents to the renter upon return of the rented vehicle a copy of the repair or service invoice.
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> B. The tax shall be payable to the secretary of the Department of Revenue. The tax shall be collected and payment enforced pursuant to the provisions of Chapter 2 of Subtitle II of Title 47 of the Revised Statutes of 1950 insofar as such provisions are not in conflict with this Section. The secretary is authorized to promulgate rules and regulations necessary for the proper administration and enforcement of this Chapter.
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> C. For purposes of this Chapter "automobile rental contract" shall mean all agreements for the rental of an automobile without a driver designated to carry less than nine passengers for a period of not more than twenty-nine calendar days. Rental agreements for a period of more than twenty-nine calendar days shall not be subject to the tax, unless the actual period of the rental agreement is less than twenty-nine days as a result of the exercise of a cancellation clause.

taxes to each automobile rental contract. The recovery option was not mandatory. This surcharge was to be a line item on the customer invoice, which would be separate and apart from the state and local sales and use tax and the Automobile Rental Excise Tax. LAC 61:I.4307(B)(4)(h)(ii)(b). According to LAC 61:I.4307(B)(4)(h)(ii)(d)(i), an automobile lessor was required to discontinue the collection of the surcharge from its lessees once total annual collections from the surcharge equaled the amount of local sales and use taxes paid on eligible vehicles during the preceding calendar year. In the event that actual collections of the surcharge during a calendar year exceeded the amount needed to reimburse the lessor for recoverable local taxes paid during the preceding calendar year, any such excess was to be remitted to the Department as "excess tax" on the lessor's monthly return for the Automobile Rental Excise Tax. See LAC 61:I.4307(B)(4)(h)(ii)(d)(ii).

The right to recover the local sales and use taxes paid on purchases of automobiles held for rental periods of 29 days or less was afforded to every qualified automobile rental dealer who registered for, collected, and remitted the Automobile Rental Excise Tax levied by LSA-R.S. 47:551. Only those lessors or renters that were subject to the three percent excise tax were allowed to transfer to each individual rental contract the cost of local sales and use taxes paid on the purchases of such automobiles. See LAC 61:I.4307(B)(4)(h)(ii)(a)(i). However, by 1996 La. Acts, No. 7, §1, effective July 1, 1996, automobiles purchased for subsequent lease or rental, subject to special rules, were excluded from the definition of retail sale or sale at retail found in LSA-R.S. 47:301(10)(a)(iii).[2] Seemingly, after July 1, 1996, local sales and use

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[2] Following this amendment, LSA-R.S. 47:301(10)(a)(iii), in pertinent part, provided:

> "Retail sale" or "sale at retail" for purposes of sales and use taxes imposed by the state on transactions involving the sale for rental of automobiles which take place on or after January 1, 1991, and by political subdivisions on such transactions on or after July 1, 1996, ... means a sale to a consumer or to any other person for any purpose other than for resale as tangible personal property, or for lease or rental in an arm's length transaction in the form of tangible personal property, and shall mean and include all such transactions as the secretary, upon investigation, finds to be in lieu of sales; provided that sales for resale or for lease or rental in an arm's length transaction must be made in strict compliance with the rules and regulations. Any dealer making a sale for resale or for lease or rental, which is not in strict compliance with the rules and regulations, shall himself be liable for and pay the tax.

taxes were no longer levied on such qualified transactions.[3]

In October 2003, the provisions of LAC 61:I.4307(B)(4)(h)(ii)(a) through (d)(ii) were repealed by the Department,[4] as these provisions had become obsolete in light of the 1996 revision to LSA-R.S. 47:301(10)(a)(iii). For this same reason, LSA-R.S. 47:303(B)(6) was repealed in its entirety by 2005 La. Acts, No. 384, § 1, effective June 30, 2005.

**Discussion**

M&H urged that the surcharge authorized by LSA-R.S. 47:303(B)(6) and LAC 61:I.4307(B)(4)(h)(ii)(a) through (d)(ii) constituted a tax on the customers of the rental company, as it was not aimed at regulation and was not owed by the rental customers before the enactment of LSA-R.S. 47:303(B)(6). According to M&H, qualified automobile rental lessors were acting, in essence, as the agents for the taxing authority, and such lessors who did not collect the tax suffered financially as a result.

Clearly, under the applicable law, it was the purchaser of the automobile to be rented who was liable at the time of the purchase for the local sales and use tax owed under the provisions of Title 33, Chapter 6, Part I, Subpart D of the Louisiana Revised Statutes. The constitutionality of this tax has not been challenged by M&H. Louisiana Revised Statute 47:303(B)(6) authorized, but did not require, such a qualified automobile rental purchaser to transfer the financial impact of this tax to its customers. This authorized transfer does not change the fact that M&H, as the owner, was the debtor for the tax owed pursuant to the applicable version of the local sales and use tax provision. The local sales and use tax was imposed on the purchaser/lessor and remains on it; it was not imposed on the rental customer by virtue of LSA-R.S.

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[3] If a qualified automobile rental dealer did not have to pay local sales and use taxes after July 1, 1996, we question whether LSA-R.S. 47:303(B)(6) would even be applicable for the tax period of January 1, 2000, through June 30, 2002. This is especially questionable in light of the particular language in LSA-R.S. 47:303(B)(6) which provides, "The schedule shall be based on automobile purchases in the year prior to the particular allocation assessed." Obviously, if no local sales and use taxes were paid after July 1, 1996, there would be nothing to allocate during the tax period at issue.

[4] See La. Reg. 29:2115.

47:303(B)(6), although a limited portion of the tax could be incorporated into a rental contract by the lessor with its customers. The rental customer did not pay the total tax, although he would have paid the lessor more for the rental of the automobile because of the lessor's payment of the local sales and use tax at the time of the purchase, just as any other expense of the lessor might result in increased rental fees to the renters. See State v. Wilson & Co. of Louisiana, 179 La. 648, 154 So. 636, 638 (1934). Furthermore, the transfer authorized by LSA-R.S. 47:303(B)(6) was discretionary with the lessors and renters, and if done, the allocation of such taxes was not to exceed the actual local sales taxes paid by such lessors and renters in the previous year. Under these conditions, the purpose of LSA-R.S. 47:303(B)(6) was not to raise revenue for a public body, but to allow the lessor to recoup some of the local sales and use taxes associated with the purchase of the automobile.[5]

Based on these findings, we conclude that the legislature's allowing, but not requiring, the qualified lessors and renters to transfer to their rental customers the cost of any local sales and use taxes paid on any automobile purchased for lease or rental by allocating such taxes to each automobile rental contract did not result in the imposition of a tax on those customers. Therefore, we conclude that M&H's assignment of error relating to the unconstitutionality of LSA-R.S. 47:303(B)(6) lacks merit.

## Decree

For the foregoing reasons, the judgment of the district court is affirmed. Costs of this appeal are assessed to M & H Car Rental, L.L.C.

**AFFIRMED.**

[5] See City of New Orleans v. Heymann, 182 La. 738, 162 So. 582 (1935); City of Lake Charles v. Wallace, 247 La. 285, 170 So.2d 654 (1965); Ewell v. Board of Supervisors of Louisiana State Univ. & Agric. & Mech. Coll., 234 La. 419, 100 So.2d 221 (1958).