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Louisiana Construction Law Update

The ***Construction Law Update*** is published by Baldwin Haspel Burke & Mayer, LLC for the benefit of its clients and others having interest in the construction industry. It includes discussions of Louisiana state and federal court decisions, legislative developments, and tax issues concerning construction-related matters. For further information on the decisions and legislative developments, contact **John Stewart, Jr.** at (504) 585-7846 - jstewart@bhbmlaw.com or **Stuart Richeson** at (504) 585-7839 – sricheson@bhbmlaw.com.

At the end of this newsletter, you will find a section titled *Tax Law Alert*. It contains a snippet from Baldwin Haspel Burke & Mayer's most recent ***Tax Law Alert***, which provides information on updates and changes in tax law on both the state and federal level. To subscribe to BHBM's electronic ***Tax Law Alert***, please visit www.bhbmlaw.com/subscribe. For information on tax-related issues, please contact **Matt Miller** at (504) 585-7867 - mmiller@bhbmlaw.com or **Andrew Sullivan** at (504) 585-7734 – asullivan@bhbmlaw.com.

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REMOVAL TO FEDERAL COURT UNDER THE FEDERAL OFFICER REMOVAL STATUTE

Hill Brothers contracted with the U.S. Army Corps of Engineers for the construction of the Dwyer Road intake canal in New Orleans. A class action was filed by several owners of adjacent property against Hill Brothers and others alleging damage to their property. The lawsuit was filed in the Civil District Court for the Parish of Orleans, State of Louisiana. Hill Brothers removed the lawsuit to federal court under the Federal Officer Removal Statute, 28 U.S.C. § 1442(a)(1). The plaintiffs sought to have the matter remanded to state court.

The statute permits removal of any civil or criminal action brought in state court when the defendant is the United States or any agency thereof or any officer (or any person acting under that officer) of the United States or any agency thereof, in an official or individual capacity, for or relating to any act under the color of such office or on account of any right, title or authority

claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of revenue. The court held the purpose of removal pursuant to the statute was to ensure a federal forum in any case where a federal official is entitled to raise a defense arising out of his official duties, and that right is not to be frustrated by a grudgingly narrow interpretation of the removal statute. Removal is proper only when the defendant: (1) is a "person" within the meaning of the statute, (2) has acted under color of federal authority when he committed the acts that allegedly led to the plaintiff's injuries, and (3) has a colorable federal defense. To satisfy the second aspect of the analysis, a defendant must demonstrate that he acted pursuant to a federal officer's directions and that a causal nexus exists between the defendant's actions under color of federal office and the plaintffs' claims.

The plaintiffs claimed that Hill Brothers failed to follow the Corps' vibration and dewatering specifications. Hill Brothers invoked the government contractor immunity defense. The court held Hill Brothers did not need to prove its defense, and must only assert its colorable applicability to the claims. The project was funded entirely by the federal government, and the Corps exercised direct and detailed control over the construction activities. Hill alleged the Corps imposed precise specifications to which it conformed, and demonstrated the statute was applicable. The motion to remand was denied. *Crutchfield v. Sewerage & Water Board of New Orleans,* 2015 WL 1781663 (E.D. La. 4/20/15).

NEW INSURANCE PRODUCTS FOR CONTRACTORS

CNA is offering two new insurance policies for contractors. One is the Contractors Errors & Omissions and Pollution Incident Policy, and the other a Contractors Professional Liability Policy.

The errors & omissions policy covers claims for wrongful acts which include negligent acts, errors or omissions with respect to design services and workmanship. Damages, among other things, do not include liquidated damages. Delays are excluded as well as bodily injury, except that which arises out of a pollution incident.

The professional liability policy covers wrongful acts which are defined to mean errors, omissions or other acts that cause liability in the performance of professional services. Professional services mean services the insured is qualified to perform as an architect, engineer, interior designer, landscape architect, land surveyor, LEED consultant, construction manager or the management of subconsultants retained to provide those services. Claims for faulty workmanship arising out of construction are excluded as are claims for liquidated damages.

Both policies are written on a claims-made and reported basis. If you would like to have copies of the specimen policies, please email John Stewart at jstewart@bhbmlaw.com.

VACATING AN ARBITRATION AWARD

Crescent Property Partners, LLC contracted with Greystar Development and Construction, LP to build a mixed-use development in Lafayette. Crescent alleged there were defects in the work, and filed an arbitration demand against Greystar. Greystar filed third party demands against various subcontractors in the same proceeding. At the time the last certificate of occupancy and certificate of substantial completion were issued, L.R.S. 9:2772 provided for a seven-year

peremptive period for construction claims. The statute was later amended to provide for a five-year period. Greystar and the subcontractors filed motions for summary judgment representing the claims were perempted since they were not filed within five years. The arbitration panel agreed and concluded Crescent's claims were untimely, and found Greystar's third party claims against the subcontractors were untimely as well; all claims were dismissed.

Crescent applied to the district court for an order vacating the arbitration decision, and Greystar and the subcontractors applied for orders confirming the award. The district court denied Crescent's application, and granted the applications of Greystar and the subcontractors to confirm the award. Crescent sought relief in the court of appeal which reversed the district court's judgment. The court of appeal found the arbitration panel incorrectly concluded the amendment to the statute reducing the peremptive period from seven years to five years could be applied retroactively, holding that, in doing so, the panel violated Crescent's due process rights. The court of appeal reversed the trial court judgment and vacated the arbitration award. The Louisiana Supreme Court granted writs of certiorari on applications of Greystar and the subcontractors.

The Supreme Court held the exclusive grounds for vacating the award are established in L.R.S. 9:4210 which provides an award may be vacated only if: it was procured by corruption, fraud or undue means; there was evident partiality or corruption on the part of the arbitrators or any of them; the arbitrators were guilty of misconduct or other misbehavior by which the rights of a party are prejudiced; or the arbitrators exceeded their powers or so imperfectly executed them that a mutual, final, and definitive award upon the subject matter submitted was not made. Because of the strong public policy favoring arbitration, arbitration awards are presumed to be valid. Judges are not entitled to substitute their judgment for that of the arbitrators chosen by the parties. The court held the foregoing grounds do not include errors of law or fact. A court does not ordinarily sit in an appellate capacity over an arbitration panel, but instead must confine its determination to whether there exists one or more of the specific grounds for invalidation as provided by the statute.

The court of appeal opined the grounds for vacating an award according to the statute are broad in scope and provide sufficient leeway to correct fundamental due process violations, and shortening the time limitation was fundamentally unfair. The Supreme Court found there were no statutory grounds here for vacating the arbitration award, and the court of appeal erred in doing so. It stated that assuming for the sake of argument the court of appeal wrongly interpreted and applied the jurisprudence, an issue on which it took no position, such an error of law does not permit vacating an award.

Crescent argued the award was properly vacated because of willful misbehavior of the arbitrators. The Supreme Court found no such behavior. The upshot of the decision of the court of appeal and argument of Crescent was that the panel of arbitrators simply got it wrong on the law. An error of fact or law, however, will not invalidate an otherwise fair or honest arbitration award. Crescent failed to establish any proof of dishonesty, bias, bad faith, willful misconduct, or any conscious attempt of the panel to disregard Louisiana law. The judgment of the court of appeal was reversed, and the district court's judgment confirming the arbitration panel's award was reinstated. *Crescent Property Partners, LLC v. American Manufacturers Mutual Insurance Company*, 2014-0969 (La. 1/28/15), 158 So.3d 798. The decision demonstrates the difficulty in overturning an arbitration award, and the limited grounds for doing so.

ARBITRATION

Mark and Marie McDonnell entered into two separate contracts for the construction of a new home. One contract was with Architectural Solutions, LLC, and the other with Detail Design-Build, LLC. The Architectural Solutions contract did not contain an arbitration clause for the resolution of disputes, but the contract with Detail Design-Build did. The McDonnells filed a lawsuit against both Architectural Solutions and Detail Design-Build. Detail Design-Build filed an exception of prematurity based on the arbitration clause of its contract. The trial court granted the exception, and dismissed the claims against Detail Design-Build. The McDonnells appealed.

The McDonnells argued the arbitration clause should not be enforced since the other defendant, Architectural Solutions, could not be compelled to arbitrate. The court of appeal held, even though both Architectural Solutions and Detail Design-Build had the same principals, the McDonnells were required to arbitrate their claims against Detail Design-Build. The court found it was not unusual to order that certain claims proceed to arbitration when all claims are not subject to that process. Judgment granting the exception of prematurity and dismissing the claims against Detail Design-Build rather than staying the claims was affirmed. *McDonnell v. Architectural Solutions, LLC*, 2014-432 (La.App. 11/5/14), 150 So.3d 572, *writ denied,* 2014-2554 (La. 2/27/15), 161 So.3d 1.

OWNER BARRED FROM LITIGATING DAMAGE CLAIM AS A RESULT OF NOT UTILIZING DISPUTE PROCESS OF A CONTRACT; LIABILITY OF A CONTRACTOR FOR ACTS OF A SUBCONTRACTOR; AND DAMAGES FOR MENTAL DISTRESS NOT ALLOWED UNDER NHWA

Sandy and Bruce Iteld sued Four Corners Construction, LP, together with others, for damages arising out of a contract to remodel their home in New Orleans. The general conditions required that Four Corners submit pay applications to the architect for review. If accepted by the architect, the architect was obligated to issue a certificate for payment that bound the Itelds to make payment or institute a timely claim for resolution with the architect. Submission of a claim to the architect was a condition precedent to arbitration and/or mediation of the claim. The failure to demand arbitration within 30 days after the architect's final written decision would result in the decision becoming final and binding among the parties. Four Corners presented several change order requests which were authorized by the architect. The Itelds did not make payments on the requests, and did not formally object to the charges and utilize the dispute process set forth in the contract. The court of appeal held the Itelds were barred from later attempting to litigate the payment requests.

The Itelds sought to recover from Four Corners damages caused by one of its subcontractors, and contended it should be vicariously liable for the subcontractor's negligence. Four Corners argued the subcontractor was an independent contractor, and it was not responsible for its fault since it had no control over the subcontractor. The issue was whether Four Corners had the right to exercise control over the subcontractor, not whether control was actually exercised. The court of appeal found the record was insufficient to determine the issue of control.

The Itelds sought damages for mental distress. The contract between the Itelds and Four Corners incorporated the terms and conditions of the New Home Warranty Act (NHWA). The court of appeal held the NHWA prohibited the award of consequential damages which included,

in the absence of a clearly written contract to the contrary, non-pecuniary damage which encompassed damages for mental distress. Damages for mental distress were not allowed. *Iteld v. Four Corners Construction, L.P.*, 2012-1504 (La. App. 4th Cir. 6/5/13), 157 So.3d 702.

RIGHT OF A SURETY TO INDEMNIFICATION FOR AMOUNTS PAID PURSUANT TO PAYMENT BONDS AND ATTORNEYS FEES

Gray Insurance Company issued payment and performance bonds to Government Technical Services, LLC (GTS) for work performed by GTS on government projects. Several subcontractors asserted claims against GTS and Gray for payment. Gray paid several of the claims and incurred costs and attorneys fees for investigating and resolving them. Gray incurred a loss of $1,683,509.82, including approximately $600,000.00 in legal fees, costs and expenses. Gray sued the indemnitors under the indemnity agreement executed in connection with the bonds. The district court granted summary judgment to Gray against the indemnitors. Two of them appealed.

The indemnitors claimed there was a genuine issue of material fact regarding whether Gray acted in bad faith by making payments on certain claims despite GTS having valid defenses. The court of appeals found that by the very terms of the surety agreement, whether GTS had a valid defense against a subcontractor's claim was not a condition precedent to the obligation of the indemnitors to indemnify Gray. The surety agreement only required that Gray incur the expenses because of having furnished a bond, and it was undisputed that the losses Gray claimed were incurred in connection with bonds furnished in favor of GTS. There was no evidence indicating Gray acted dishonestly or commercial unreasonableness when investigating and settling underlying claims.

The indemnitors argued summary judgment was improper because Gray had not provided proper documentation of the attorneys fees and costs it incurred. The court of appeals found Gray satisfied the provisions of the indemnity agreement in this respect by providing ledgers it kept in the ordinary course of business indicating the payments it made for legal services for the claims submitted under the bonds. The records were sufficient to establish a *prima facie* case against the indemnitors for indemnification. The indemnitors failed to provide any evidence to rebut the accuracy of the fees or indicate Gray acted in bad faith. The indemnitors contended the legal fees were unreasonable, but provided no evidence that would indicate that the amount of fees Gray incurred over several years litigating claims asserted by a number of subcontractors was excessive, let alone clearly so. Summary judgment in favor of Gray was affirmed. *Gray Insurance Company v. Terry*, 2015 WL 1223664 (5th Cir. 2015).

COURT ENFORCES INDEMNITY AGREEMENT FOR PAYMENT BONDS

Tracey Middleton and her husband entered into an indemnity agreement with American Contractors Indemnity Company (ACIC) to induce ACIC to issue payment and performance bonds for R.E. Jenkins, Inc. ACIC issued bonds for two projects. Jenkins failed to pay subcontractors and/or material suppliers who filed claims under the payment bonds. ACIC made payments to the claimants totaling $138,862.00.

ACIC sued Tracey Middleton under the indemnity agreement to recover the payments. Her husband, Charles Middleton, also an indemnitor on the bonds, was discharged in bankruptcy. The court found Tracey Middleton was liable for the full sum. *American Contractors Indemnity*

Company v. R.E. Jenkins, Inc., 2015 WL 2184293 (M.D. La. 5/8/15).

APPLICATION OF THE EICHLEAY FORMULA

The Louisiana First Circuit Court of Appeal considered the application of the Eichleay formula for awarding home office expenses during a period of suspension of work. The court found the use of the formula requires contractors to satisfy several strict prerequisites:

> First, the contractor must demonstrate that there was a government-caused delay not excused by a concurrent contractor-caused delay. Second, the contractor must show that it incurred additional overhead expenses, either because the contract's performance period was extended or because the contractor would have finished prior to the un-extended performance period's close. Third, the contractor must establish it was required to remain "on standby" for the duration of the delay.
>
> In order to establish standby, contractors must demonstrate three things. First, the contractor must show that the government caused delay was "not only substantial but was of an indefinite duration." Second, the contractor must demonstrate that, during the delay, it was required to return to work "at full speed and immediately." Third, the contractor must show a suspension of most if not all of the contract work.

The court held, in this instance, there was no work stoppage which was one of the prerequisites for the application of the formula. The award by the trial court of home office overhead was vacated. *Gilchrist Construction Company, LLC v. State of Louisiana, Department of Transportation and Development*, 2013-2101 (La. App. 1 Cir. 3/9/15), 2015 WL 1020860.

MOLD EXCLUSION

The First Circuit Court of Appeal held a fungi and mold exclusion to a general liability policy precluded coverage of a plumbing company for personal injuries allegedly suffered by a homeowner caused by defective work resulting in mold damage, despite a claim the insured believed the products-completed operations hazard coverage was separate and apart from the commercial general liability coverage. *Ainsworth v. Tri Star Builders, LLC*, 2012-0691 (La. App. 1 Cir. 4/22/13), 156 So.3d 71.

COVERAGE FOR BREACH OF CONTRACT AND NEGLIGENCE CLAIMS

The United States District Court for the Eastern District of Louisiana recently considered the issue of whether an exclusion for contractual liability of a general liability policy also applied to claims for negligence. The court found the exclusion precluded coverage for negligence claims. All of the duties which were alleged to have been breached would not have existed but for the contract. There was no allegation with respect to the breach of a general duty owed to the public at large. *Hanover Insurance Company v. Plaquemines Parish Government*, 2015 WL 1268314 (E.D. La. 3/19/15).

ALLEGATION IN AN ANSWER NOT SUFFICIENT TO STATE A CLAIM FOR PURPOSES OF PEREMPTION

The City of Baton Rouge/Parish of East Baton Rouge answered a petition filed by Boes Ironworks for extra compensation for work performed on the Louisiana Arts and Science Center Planetarium and Space Theater project. The answer stated the City/Parish relied on the advice and counsel of its architect, Smith Tipton Bailey Parker, APAC, and in the event any judgment was rendered against the City/Parish, it claimed indemnity and contribution from the architect. The City/Parish ultimately filed a cross claim against Smith Tipton for indemnity. Smith Tipton filed an exception of peremption arguing the claim against it was barred by the peremptive limitations of L.R.S. 9:5607 which provides a five-year period for claims against architects and other designers.

The cross claim was not filed within the five-year peremptive period. The City/Parish argued the allegations in its answer were sufficient for purposes of the statute. The court of appeal disagreed. The answer was not a claim asserted against the architect for purposes of the Code of Civil Procedure.

The City/Parish also argued it should be allowed to amend its original answer to the petition to assert a cross claim against Smith Tipton so that the amended pleading would relate back to the filing of the original answer, thus, preserving its claim. The court of appeal held an amendment could not relate back to the filing of another pleading to cure the failure to properly assert a claim within a peremptive period. Once peremption accrues, the cause of action no longer exists and is destroyed, and there is nothing to which an amended or supplemental pleading can relate back. The judgment of the district court sustaining the peremptory exception of peremption of Smith Tipton was affirmed. *Boes Ironworks, Inc. v. M.D. Descant, Inc.*, 2014-0270 (La.App. 1 Cir. 9/19/14), 154 So.3d 555.

PENALTIES FOR LATE PAYMENT BY CONTRACTORS TO SUPPLIERS AND SUBCONTRACTORS

Fisk Electric Company sued Woodrow Wilson Construction Company, Inc. to recover penalties and attorneys fees under L.R.S. 9:2784 for Wilson's failure to timely pay to it funds which it received from the owner.

The statute provides that when a contractor receives payment from the owner for the improvement to an immovable, the contractor shall promptly pay such monies received to each subcontractor and supplier in proportion to the percentage of work completed prior to the issuance of the certificate of payment by such subcontractor and supplier. Whenever a subcontractor receives payment from the contractor, the subcontractor shall promptly pay such monies received to each subsubcontractor and supplier in proportion to the work completed. If the funds received are less than full payment, prorated payments are to be made to others. The statute also provides that when the contractor or subcontractor fails to make payment without reasonable cause within 14 consecutive days of the receipt of payment from the owner, the contractor or subcontractor shall pay, in addition to the payment, a penalty in the amount of one-half of one percent of the amount due, per day, not to exceed 15% of the outstanding balance due, and reasonable attorneys fees for the collection of the payments. Any claim which is found to be without merit will subject the claimant to reasonable costs and attorneys fees.

The court enforced the statute. Fisk was awarded penalties. It was also awarded attorneys fees incurred in collecting the additional payment, but not attorneys fees incurred in seeking recovery of the penalties and attorneys fees. *Fisk Electric Company v. Woodrow Wilson Construction Company, Inc.*, 2015 WL 328306 (E.D. La. 1/26/15).

NON-RESPONSIVE BID FOR PUBLIC WORKS PROJECT

The town of Benton advertised for bids for the replacement of a ground storage tank at its water treatment facility. The advertisement required bidders to complete the prescribed bid form, and all blank spaces for bid prices were to be completed in both words and figures. The advertisement and bid form required a price for alternate no. 1. The apparent low bidder, in the space for the price for alternate no. 1, stated "no price." The mayor of Benton sought an opinion from the Louisiana Attorney General as to whether the bid was in compliance with the Public Bid Law, L.R.S. 38:2211, et seq.

The Attorney General concluded that once a requirement is established, that requirement must be uniformly followed by all bidders. Under the circumstances, he opined the failure of the apparent low bidder to include a price for alternate no. 1 did not comply with the bid documents, and its bid was non-responsive and must be rejected. Attorney General Opinion, 15-0052 (June 30, 2015).

TAX LAW ALERT

2015 Legislative Session

During the 2015 Louisiana Legislative Session, which concluded on June 11, 2015, the Louisiana legislature passed a number of tax bills in an attempt to address Louisiana's budget shortfall. The bills below were all signed by the Governor and are now effective. Please find summaries of the key tax acts/bills that will affect many Louisiana businesses and individuals, below.

House Bill 624

House Bill 624 was signed by the Governor on June 19, 2015 and became Act 123. House Bill 624 implements several tax increases which are effective between July 1, 2015 and July 1, 2018. Specifically, corporations will only be able to use seventy-two percent (72%) of Net Operating Loss ("NOL") carryforwards (as opposed to 100% under present law) to offset current year income for tax years beginning on or after January 1, 2015.

In addition only seventy-two percent (72%) (as opposed to 100% under present law) of the following items will be deductible by a corporation for returns filed on or after July 1, 2015: (i) Louisiana Corporate Tax Refunds; (ii) Funds accrued for transit subsidies by a corporation operating a transit system; (iii) Dividends received from national and state banks and associations whose stock is subject to ad valorem taxation; (iv) Dividends (the corporate dividends received deduction is reduced by 28%); and (v) Certain Hurricane recovery benefits.

Only seventy-two percent (72%) of expenses disallowed for federal income tax purposes under

Section 280C of the Internal Revenue Code will be deductible by corporations (this includes certain research expenses and amounts for which federal credits are granted (e.g. clinical research testing expenses)).

In addition, depletion deductions for oil and gas wells are reduced from twenty two percent (22%) of the gross income from the property (excluding any rents/royalties paid or incurred by the taxpayer due to the property) to fifteen and eight tenths percent (15.8%) of the gross income from the property (and excluding only 72% of rents/royalties paid). Furthermore, the current law deduction cap of fifty percent (50%) of the net income from the property is reduced to thirty-six percent (36%) of the taxpayer's net income from the property. Similarly, depletion deductions for coal and sulphur are also reduced and subject to similar limitations.

Finally under this legislation, only seventy-two percent (72%) (as opposed to 100% under present law) of income of certain corporations operating a public transit system is excluded from Louisiana income tax.

House Bill 629

House Bill 629 was signed by the Governor on June 19, 2015 and became Act 125House Bill 629 reduces a number of income and corporate franchise tax credits by twenty-eight percent (28%) for tax returns filed on or after July 1, 2015, but before June 30, 2018, regardless of the taxable year to which the return relates. The reduction in the tax credits in House Bill 629 does not apply to an amended return filed on or after July 1, 2015, but before June 20, 2018, relating to a credit properly claimed on an original return filed prior to July 1, 2015. There is an exception to the July 1, 2015 timing deadline: if a valid filing extension was allowed by the Louisiana Department of Revenue prior to July 1, 2015, then the reduced portion of the tax credit may be allowed as a credit in the amount of one-third (1/3) of such reduced portion of the credit on the taxpayer's return for each of the taxable years beginning during calendar years 2017, 2018 and 2019. For a listing of the tax credits reduced in House Bill 629, visit www.bhbmlaw.com.

House Bill 402

House Bill 402 was signed by the Governor on June 19, 2015 and became Act 109. House Bill 402 modifies the requirements that must be met in order for a taxpayer to claim an income or franchise tax credit for taxes paid to other states. House Bill 402 adds the following requirements:

> (1) the credit is only allowed if the other state has a similar credit for Louisiana income taxes paid on income derived from property located in, or from services rendered in, or from business transacted in Louisiana (thus a reciprocal tax credit in that state);
>
> (2) the credit is limited to the amount of Louisiana income tax that would have been imposed if the income earned in the other state would have been earned in Louisiana (cap on tax rate is the rate that would be paid to Louisiana); and
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> (3) the credit is only allowed for income taxes paid to a state that allows a nonresident a credit against the income taxes imposed by that state for taxes paid or payable to the state of residence. Thus, it is important to determine if the other state to which the tax is

paid allows a reciprocal credit; if not, then there will be no credit allowed for the tax paid to the other state (i.e., Texas margins tax).

House Bill 402 is effective for all tax returns filed on or after July 1, 2015, regardless of the taxable year to which the return relates. House Bill 402 does not apply to an amended return filed on or after July 1, 2015 relating to a claim for a credit properly claimed on an original return filed prior to July 1, 2015. There is an exception to the July 1, 2015 timing dealing: if a valid filing extension was allowed by the Louisiana Department of Revenue prior to July 1, 2015, then the disallowed tax credit shall be allowed as a credit in the amount of one-third (1/3) of such disallowed tax credit on the taxpayer's return for each of the taxable years beginning during calendar years 2017, 2018 and 2019. House Bill 402 is only effective beginning July 1, 2015 and remains effective through June 30, 2018.

House Bill 218

HB 218 was signed by the Governor on June 19, 2015 and became Act 103. The provisions of House Bill 218 are effective for tax returns filed on or after July 1, 2015, regardless of the taxable year to which the tax return relates. There is an exception to the July 1, 2015 filing deadline if the taxpayer filed an amended tax return on or after July 1, 2015, relating to a net operating loss deduction properly claimed on an original return filed prior to July 1, 2015.

Unlike much of the other tax legislation, House Bill 218 does not contain a sunset provision. House Bill 218 extends the time period for the carryforward of net operating losses for tax years beginning January 1, 2000 from fifteen (15) years (current law) to twenty (20) years immediately following the year in which the loss occurred. House Bill 218 also eliminates the current three (3) year carryback of net operating losses. Under current law, a taxpayer with a net operating loss in a given year could either carry the net operating loss forward for fifteen (15) years or make an election to carry that election back for three (3) years. Under House Bill 218, the taxpayer has no choice but to carry that net operating loss forward for up to twenty (20) years.

There is an inconsistency in the amendment of La. R.S. 47:1621 which authorizes refunds resulting from the application of net operating loss carryforwards for returns filed on or after July 1, 2015, and the amendment to La. R.S. 47:1623 which provides that no refund shall be allowed for any claim for this deduction on any return filed on or after July 1, 2015, regardless of the taxable year to which the return relates. The amendment to La. R.S. 47:1623 contained in House Bill 218 is overboard and unclear in its use of the term "this deduction."

House Bill 805

House Bill 805 was signed by the Governor on June 19, 2015 and became Act 133House Bill 805 alters both the tax credit for ad valorem taxes paid to local governments on inventory and the research and development tax credit.

Ad Valorem Tax Credit

Under present law, an eligible taxpayer is entitled to a refund for any allowable credit authorized under La R.S. 47:6006, which exceeds the taxpayer's liability for taxes imposed by Louisiana for

either Louisiana income or corporation franchise tax.

House Bill 805 amends the nature of the credit for certain taxpayers by providing that the credit is nonrefundable and can only be carried forward rather than refunded to such taxpayers. Specifically, House Bill 805 provides that for eligible taxpayers whose ad valorem taxes paid on inventory to all political subdivisions was less than $10,000, then any such taxpayer shall be refunded the entire excess credit amount. However, House Bill 805 provides that for eligible taxpayers whose ad valorem taxes paid on inventory to all political subdivisions was $10,000 or more, then any such taxpayer shall be refunded seventy-five percent (75%) of the excess credit and the remaining twenty-five percent (25%) of the excess credit may be carried forward to offset subsequent tax liabilities for up to five (5) years.

Research and Development Tax Credit

As with the ad valorem tax credit for inventory, under present law, any excess research and development tax credits can be refunded to taxpayers. However, House Bill 805 changes the nature of the research and development credit authorized by La R.S. 47:6015 by providing that if any such tax credit exceeds the amount of tax liability for the tax year, the excess credit may be carried forward as a credit against Louisiana income or corporation franchise tax liability for up to five (5) years.

Effective Date

The provisions of House Bill 805 shall apply for these credits on any return filed on or after July 1, 2015, regardless of the taxable year to which the return relates. However, the provisions of House Bill 805 will not apply to an amended return filed on or after July 1, 2015 as long as the credits were properly claimed on the original return filed prior to July 1, 2015.

House Bill 664

House Bill 664 was signed by the Governor on July 1, 2015 and became Act 415. House Bill 664 adds certain definitions to more narrowly define inventory for purposes of La. R.S. 47:6006 (Tax Credits for local inventory taxes paid).

Under present law, only the terms “manufacturer,” “distributor” and “retailer” are defined in La. R.S. 47:6006. However, House Bill 664 adds a definition of “inventory” and gives specific examples of items that are included in inventory and those items which are not included in inventory. Additionally, House Bill 664 adds a new section to the relevant statute which allows the Secretary of the Department of Revenue to intervene in any proceeding related to the valuation or classification of property as inventory for purposes of the credit allowed under La. R.S. 47:6006 when there is a finding of overvaluation or misclassification for the purposes of this credit by audit or on appeal by the Board of Tax Appeals or court that last reviews the matter.

Effective Date

The provisions of House Bill 664 are effective for all tax years beginning on or after January 1, 2016.

House Bill 829

Summary

House Bill 829 was signed by the Governor on June 19, 2015 and became Act 134. The bill provides for an annual program cap of $180 million on allowance of motion picture tax credits.

Present law

Present law provides an income tax credit to Louisiana taxpayers for investment in state-certified productions earned at the time expenditures are made by a motion picture production company in a state-certified production. The amount of the credit is equal to 30% of the base investment made by the investor if the total base investment is more than $300,000, with an additional credit equal to 5% of the base investment expended on payroll for Louisiana residents employed in connection with a state-certified production (but is not applicable to payroll of any one person that exceeds $1 million). The credit is allowed against the income tax for the taxable period in which the credit is earned or for the taxable period in which initial certification authorizes the credit.

New Law Highlights

Credits are Earned when Expenditures Certified - Changes present law by providing that tax credits are earned at the time expenditures are certified (rather than the time the expenditures are made) and that the credits are allowed against income tax for the taxable period in which the credit is certified.

Cap on Credits - the maximum amount of credits that may be claimed against income tax allowed on returns (or credits transferred to the state) regardless of the year of certification of the credit are capped at $180 million per fiscal year for fiscal years 2015-2016, 2016-2017 and 2017-2018. Any credits disallowed to a taxpayer due to the cap are carried over to subsequent years. If the total credits claimed by taxpayers are less than the $180 million cap, any remaining cap amount shall increase the cap amount allowed in subsequent years.

Cap on Single Production - the maximum amount of credits available for any single state-certified production is capped at $30 million.

Allows Credit for Certain Marketing Expenses - Adds eligibility for marketing and promotion expenses of the state-certified production as a “production expenditure”; however, the amount of these expenses eligible for tax credits cannot exceed 15% of the total state certified tax credits for the production.

Credit for Resident Payroll - Increases the amount of the tax credit for payroll expenditures for Louisiana residents from 5% to 10% and increases the $1 million salary income limitation to $3 million.

Effective Date

The provisions of House Bill 829 are effective July 1, 2015 (beginning in fiscal year 2018-2019,

the $180 million cap on tax credits is no longer applicable).

House Bill 387

Summary of Key Changes

House Bill 387 was signed by the Governor on June 19, 2015 and became Act 108. Maintains the amount of the tax credit for 25% of eligible costs and expenses incurred prior to Jan. 1, 2018.

Decreases the amount of the tax credit from 25% to 20% for eligible costs and expenses incurred on and after Jan. 1, 2018, regardless of the year in which the property is placed in service.

Extends sunset of tax credit from January 1, 2018 to January 1, 2022.

Prohibits projects whose rehabilitation costs and expenses are paid for with state or federal funds from being eligible to receive the tax credits, unless the state or federal funds used in the rehabilitation are reported as taxable income or are structured as repayable loans.

Directs the state historic preservation office to consult with the Dept. of Revenue in determining the amount of the application fee to be collected and requires that the application fee be distributed equitably between the entities.

House Bill 779

Summary

House Bill 779 was signed by the Governor on June 19, 2015 and became Act 131Amends R.S. 47:6030 to redefine and limit the solar electric credit against income tax for primary single-family residences.

For purchased systems

Purchased and installed from 1/1/08 and before 7/1/15: Credit of 50% of first $25,000 of cost.

Purchased and installed from 7/1/15 and before 1/1/18: Credit is smaller of:

(i) $2 x size of system measured in DC watts

(ii) 50% of cost

(iii) $10,000

A statewide maximum of $10 M will apply for credits claimed on returns filed on or after 7/1/15, reduced to $5 M for returns filed on or after 7/1/17. No credits will apply for installations on or after 1/1/18.

Applied on a first-come, first-served basis.

For leased systems

Purchased and installed before 1/8/14: Credit is 50% of first $25,000 of cost, provided it costs no more than $4.50/watt and provides no more than 6 kilowatts.

Installed from 1/1/14 and before 1/1/18: Credit is 38% of first $20,000 of cost, provided it costs no more than $3.50/watt and provides no more than 6 kilowatts ($2/watt from 7/1/15 – 12/31/17).

An additional statewide maximum for leased systems will have the same aggregate amounts and times as for purchased systems.

Applied on a first-come, first-served basis.

The credit is limited to solar electric systems and no longer applies to solar thermal systems. Only one credit per one installation per residence will apply (subsequent installations will not qualify). No credit will apply if the installer or affiliate finances the cost and installation.

House Bill 244

House Bill 244 was signed by the Governor on June 19, 2015 and became Act 104. This law extends the Angel Investor Tax Credit program from July 1, 2015 through June 30, 2017.

Contact Us:

Baldwin Haspel Burke & Mayer, LLC

Phone: (504) 569-2900 | Fax: (504) 569-2099

www.bhbmlaw.com | bhbm@bhbmlaw.com

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