



QUESTION 1: SHOULD TAXPAYER USE A LUMP SUM CONTRACT INSTEAD OF A RETAIL SALE PLUS INSTALLATION CONTRACT WHEN CONTRACTING WITH CUSTOMERS WHERE AN ITEMIZED LIST OF MATERIALS TO BE USED IN THE PERFORMANCE OF THE CONTRACT IS NOT PROVIDED?

ANSWER 1: IF THE TAXPAYER CANNOT PROVIDE AN ITEMIZED LIST OF MATERIALS AND SUPPLIES AT THE INCEPTION OF A CONTRACT, OR THE CONTRACT DOES NOT OTHERWISE QUALIFY AS A "RETAIL SALE PLUS INSTALLMENT CONTRACT," THEN THE CONTRACT IS USUALLY CATEGORIZED AS A LUMP-SUM CONTRACT.

QUESTION 2: SHOULD TAXPAYER CONTINUE TO COLLECT SALES TAX FROM ITS CUSTOMERS ON THE CHARGES MADE TO CUSTOMERS FOR THE REAL PROPERTY IMPROVEMENTS DESCRIBED ABOVE?

ANSWER 2: YES, UNLESS THE CONTRACT IS STRUCTURED AS A LUMP-SUM REAL PROPERTY CONTRACT.

QUESTION 3: DOES TAXPAYER OWE SALES TAX ON THE MATERIALS IT USES FULFILLING THE REAL PROPERTY IMPROVEMENTS CONTRACTS? (IF SO, SHOULD RULE 12A-1.043, F.A.C. APPLY?)

ANSWER 3: YES.

QUESTION 4: IS TAXPAYER REQUIRED TO SEPARATELY LIST THE APPLICABLE AMOUNT OF SALES TAX DUE ON CONTRACTS THAT ARE FOR MATERIALS ONLY?

ANSWER 4: UNDER S. 212.07(2), F.S., TAXPAYER MUST COMPLY AND IS REQUIRED TO SEPARATELY STATE SALES TAX FROM THE PRICE OF THE GOOD(S) SOLD.

November 23, 2015

Re: Technical Assistance Advisement No. 15A-019
XXX ("Taxpayer")
Sales and Use Tax - Sales of Tangible Personal Property & Installation Labor
Section 212.05 and 212.07, Florida Statutes ("F.S.")
Rule 12A-1.051, Florida Administrative Code ("F.A.C.")

Child Support – Ann Coffin, Director • General Tax Administration – Maria Johnson, Director
Property Tax Oversight – Dr. Maurice Gogarty, Director • Information Services – Damu Kuttikrishnan, Director

<http://dor.myflorida.com/dor/>
Florida Department of Revenue
Tallahassee, Florida 32399-0100

Dear:

This letter is a response to your petition dated July 21, 2015, for the Florida Department of Revenue's ("Department") issuance of a Technical Assistance Advisement concerning the above referenced party and matter. Your petition has been carefully examined and the Department finds it to be in compliance with the requisite criteria set forth in Chapter 12-11, Florida Administrative Code. This response to your request constitutes a TAA and is issued to you under the authority of s. 213.22, F.S.

Stated Facts and Requested Advisement

Your letter dated July 21, 2015, represents:

XXX Taxpayer XXX provides hollow metal frames, wood doors, hollow metal doors, and supporting hardware from a facility located in Florida. Taxpayer also installs the doors during new construction or renovation projects. We are writing, pursuant to Rule 12-11, Florida Administrative Code, to request a Technical Assistance Advisement ("TAA") concerning the application of sales and use tax to transactions conducted by Taxpayer.

Currently, when Taxpayer is contracted to supply and install doors, the contract lists: the lump sum price for material, labor and equipment which will be used during the job. The lump sum price also include[s] the sales tax. However, an itemized listing of materials is not expressly stated in the contract. While the contract submittals provide a list of item specifications and a list of items to be used in the contract, it is not an exhaustive list of materials to be used.

Moreover, all materials are not itemized. For example, the contract enclosed herewith as Appendix 1 is a copy of a recent contract used by the Taxpayer which is indicative of the contracts it often uses for similar transactions. The provided contract merely lists the grossed up contract price which includes all labor, materials, equipment, supervision, and taxes, sales or otherwise....

Based on the foregoing information, Taxpayer's contracts are structured as a "retail sale plus installation" contract. Under a retail sale plus installation contract, as detailed in Rule 12A-1.051(3)(d), Florida Administrative Code, a contractor contracts to sell specifically described and itemized materials and supplies at an agreed upon price, and provides for payment for labor either at a separate agreed upon price or on the basis of time consumed. All materials that will be incorporated in the work must be itemized and priced before work begins. If a contractor itemizes some materials but does not itemize other materials that will be incorporated into the work, the contractor will be liable for sales tax on all the personal property sold. Contractors who enter retail sales plus installation contracts are not considered the ultimate consumer of tangible personal property and are not responsible for sales and use tax.

However, pursuant to Rule 12A-1.051(17)(k), Florida Administrative Code, contractors who install door and window installation or perform on-site repair are generally considered to be real property contractors. Generally, under Rule 12A-1.051(4), Florida Administrative Code, real property contractors are the ultimate consumers of materials and supplies....

Therefore, in instances where Taxpayer is contracted to supply materials, and installation, it should contract with its customers using a "lump sum" contract - as defined by Rule 12A-1.051(3)(a), [F.A.C.] - instead of a retail sale plus installation contract for contracts where itemization of all materials is not provided to the customer.

You ask us to provide guidance as to the following questions:

1. Should Taxpayer use a lump sum contract instead of a retail sale plus installation contract when contracting with customers where an itemized list of materials to be used in the performance of the contract is not provided?
2. Should Taxpayer continue to collect sales tax from its customers on the charges made to customers for the real property improvements described above?
3. Does Taxpayer owe sales tax on the materials it uses fulfilling the real property improvements contracts? (if so, should Rule 12A-1.043, F.A.C. apply?)
4. Is Taxpayer required to separately list the applicable amount of sales tax due on contracts that are for materials only?

Discussion and Response

When dealers of tangible personal property also contract to install those items, in such a way that the installation creates a fixture, or real property improvement, the sales tax consequences may produce two different results. First, if the dealer merely sells the tangible personal property, sales tax must be collected from the customer and remitted by the dealer. *See* s. 212.05(1)(a), F.S. However, if the dealer also installs the property, the dealer may become the customer of the tangible personal property, which requires the dealer to pay the sales tax to its supplier. *See* Rule 12A-1.051(10), F.A.C. In these cases, the dealer becomes a "real property contractor"¹ and is not merely a dealer of tangible personal property.

First, when a dealer merely sells tangible personal property which may become a fixture, sales tax must be collected and remitted. As such, Rule 12A-1.051, F.A.C., has applicability to this type of transaction. This is made clear in the language of Rule 12A-1.051(1), F.A.C.:

Scope of the rule. This rule governs the taxability of the purchase, sale, or use of tangible personal property by contractors and subcontractors who purchase, acquire, or manufacture materials and supplies for use in the performance of real property contracts . . .

¹ *See* Rule 12A-1.051(2)(h)1., F.A.C.

Therefore, if the dealer is not also making an installation that results in a real property improvement, the dealer will collect and remit sales tax from the customer.²

Second, when the dealer also installs the tangible personal property in a transaction which is classified as a real property improvement, then the general rule is that contractors are liable for the sales tax as the ultimate consumers. *See* Rule 12A-1.051(4), F.A.C. To begin this analysis, Rule 12A-1.051(2)(h)1, F.A.C., states:

Real property contract means an agreement, oral or written, whether on a lump sum, time and materials, cost plus, guaranteed price, or any other basis, to:

- a. Erect, construct, alter, repair, or maintain any building, other structure, road, project, development, or other real property improvement; . . .

The taxability of purchase and sales by real property contractors is determined by the pricing arrangements in the contract. Rule 12A-1.051(3), F.A.C., creates five contractual classifications, each based upon the contractual structure of the transaction involving real property contracts.

(a) Lump sum contracts. These are contracts in which a contractor or subcontractor agrees to furnish materials and supplies and necessary services for a single stated lump sum price.

(b) Cost plus or fixed fee contracts. These are contracts in which the contractor or subcontractor agrees to furnish the materials and supplies and necessary services in exchange for reimbursement of costs plus a fee that is fixed in advance or calculated as a percentage of the costs.

(c) Upset or guaranteed price contracts. These are contracts in which the contractor or subcontractor agrees to furnish materials and supplies and necessary services based on costs plus fees but with an upset or guaranteed maximum price which may not be exceeded.

(d) Retail sale plus installation contracts. These are contracts for improvements to real property in which the contractor or subcontractor agrees to sell specifically described and itemized materials and supplies at an agreed price or at the regular retail price and to complete the work either for an additional agreed price or on the basis of time consumed. In order for a contract to fit in this category, all the materials that will be incorporated into the work must be itemized and priced in the contract before work begins. If a contract itemizes some materials but does not itemize other materials that will be incorporated into the work, the contract is not included in this category. Because the sale of the materials is a separable transaction from the installation, the purchaser must assume title to and risk of loss of the materials and supplies as they are delivered, rather than accepting title only to the completed work. The contractor may remain liable for negligence in handling and installing the items.

(e) Time and materials contracts. These are contracts in which the contractor or subcontractor agrees to furnish materials and supplies and necessary services for a price that will be calculated as the sum of the contractor's cost or a marked up cost for materials to be used plus an amount for services to be based on the time

² *See* Rule 12A-1.051(2)(h)2.b., F.A.C.

spent performing the contract. These contracts are similar to cost plus or fixed fee contracts, because the final price to the property holder will be determined based on the cost of performance. A time and materials contract may or may not also have a guaranteed or upset price clause. Time and materials contracts differ from contracts described in paragraph (d), because the materials are not completely identified, itemized, and priced in the contract in advance and because the property owner is contracting for a finished job rather than the purchase of materials. (Emphasis added)

Agreements structured as a "retail sales plus installation contracts" are contracts for real property improvements which require the contractor to collect and remit sales tax from the homeowner on the materials and supplies portion of the contract. Rule 12A-1.05(3), F.A.C., provides that the retail sales plus installation contract must state that the homeowner is buying the materials from the contractor. The contractor is required to register as a dealer, and is thereby able to buy the materials and supplies tax-free from its supplier.

If the contract does not state that the materials are being sold to the homeowner, then the contract is generally treated as a lump-sum real property contract. Under a lump-sum contract arrangement, the contractor is required to pay the sales tax on the materials and supplies when the contractor buys them from its supplier, and no sales or use tax is charged to the homeowner.

Focusing on the four specific questions raised in your letter requesting the TAA, we offer the following guidance based on the facts provided:

1. Should Taxpayer use a lump sum contract instead of a retail sale plus installation contract when contracting with customers where an itemized list of materials to be used in the performance of the contract is not provided?

If the Taxpayer cannot provide an itemized list of materials and supplies at the inception of a contract, or the contract does not otherwise qualify as a "retail sale plus installment contract," then the contract is usually categorized as a lump-sum contract. See Rule 12A-1.051, F.A.C. A lump-sum contract is an agreement whereby the contractor will furnish and install the materials and supplies on which the contractor will pay sales tax to its vendor.

2. Should Taxpayer continue to collect sales tax from its customers on the charges made to customers for the real property improvements described above?

The Taxpayer should collect and remit sales tax on transactions in which it merely sells tangible personal property to its customers, but does not install that property. If the Taxpayer enters into a real property contract placing the sales tax obligation on the customer, then sales tax would be collected and remitted by the Taxpayer. If a contract is structured as a lump-sum real property contract, then sales tax is not collected from the homeowner, but instead would be paid by the Taxpayer when it buys the materials and supplies.

3. Does Taxpayer owe sales tax on the materials it uses fulfilling the real property improvements contracts? (if so, should Rule 12A-1.043, F.A.C. apply?)

The Taxpayer would be the ultimate consumer of materials in real property contracts described in Rule 12A-1.051, F.A.C. As such, the obligation to pay sales tax under the relative agreements is established. Rule 12A-1.043, F.A.C., applies to a Taxpayer who manufactures tangible personal property for its own uses. If the Taxpayer does manufacture items for its own use, (i.e. in real property contracts), the sales tax obligation is established in either case.

4. Is Taxpayer required to separately list the applicable amount of sales tax due on contracts that are for materials only?

All Taxpayers are required to comply with Section 212.07(2), F.S. This law requires all Taxpayers to separately state sales tax from the price of the good(s) sold. The law states:

A dealer shall, as far as practicable, add the amount of the tax imposed under this chapter to the sale price, and the amount of the tax shall be separately stated as Florida tax on any charge ticket, sales slip, invoice, or other tangible evidence of sale.

The Taxpayer must comply with Section 212.07(2), F.S., and list the applicability amount of sales tax.

Conclusion

The statutes and rules discussed therein should provide sufficient guidance to the Taxpayer in this matter. A contractor who both sells and installs fixtures (i.e. real property contracts) must comply with the requirements of collecting and remitting sales tax from the customer on the sale of tangible personal property. Or, the contractor must pay the sales tax upon purchasing or manufacturing tangible personal property to be used in real property contracts. The terms of this contract govern the tax treatment.

This response constitutes a Technical Assistance Advisement under section 213.22, F.S., which is binding on the Department only under the facts and circumstances described in the request for this advice as specified in section 213.22, F.S. Our response is predicated on those facts and the specific situation summarized above. You are advised that subsequent statutory or administrative rule changes, or judicial interpretations of the statutes or rules, upon which this advice is based, may subject similar future transactions to a different treatment than that expressed in this response.

You are further advised that this response, your request and related backup documents are public records under Chapter 119, F.S., and are subject to disclosure to the public under the conditions of section 213.22, F.S. Confidential information must be deleted before public disclosure. In an effort to protect confidentiality, we request you provide the undersigned with an edited copy of your request for Technical Assistance Advisement, the backup material, and this response, deleting names, addresses, and any other details which might lead to identification of the taxpayer. Your response should be received by the Department within 15 days of the date of this letter.

Sincerely,

Haben Abraha, Esq.
Tax Law Specialist
Technical Assistance & Dispute Resolution

Record ID: 201490

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