SUMMARY

QUESTION 1: Is Taxpayer a "dual operator" as defined in FAC Rule 12A-1.051(9)?

ANSWER - Based on Facts Below: If Taxpayer enters into lump sum agreements for fabricating and installing building materials, such as doors and trim work, that become improvements to real property upon installation, as well as sells these same building materials without performing the installation, then Taxpayer meets the criteria set forth to be a "dual operator" in Rule 12A-1.051(9), F.A.C.

QUESTION 2: If Taxpayer is a "dual operator," is it appropriate to extend a "resale certificate" on its purchase of materials?

ANSWER 2 - Based on Facts Below: As provided in Rule 12A-1.051(9), F.A.C., it is appropriate to extend a copy of Taxpayer's Annual Resale Certificate (Form DR-13) to its vendors when Taxpayer is not sure at the time of purchase whether the items will be resold or consumed in the performance of an improvement to real property. As provided in Rule 12A-1.043(1), F.A.C., it is permissible to extend a copy of Taxpayer's Annual Resale Certificate when tangible personal property will be used in the fabrication of items Taxpayer will install in real property improvement contracts, if Taxpayer elects to accrue tax at the time of fabrication rather than paying it at the time of purchase.

QUESTION 3a: What is the definition of a "working unit" or "part of a working unit" as the terms are used in FAC Rule 12A-15.004?

ANSWER 3a - Based on Facts Below: The terms "working unit" and "part of a working unit" are not defined by Rule 12A-15.004, F.A.C. The determination must be made on a case-by-case basis.

QUESTION 3b: If the purchaser takes delivery of the product (as opposed to the purchaser picking up the product), in

multiple deliveries, what requirements must be met to effectuate a single sale, and what are the consequences of failing to meet all of the requirements?

ANSWER 3b - Based on Facts Below: Rule 12A-15.004(3)(a), F.A.C., requires that, for purposes of meeting the single sale test, purchase orders or other tangible evidence of sale must be in writing, the order must be specific as to the quantity of tangible personal property ordered, and it must be specific as to the date by which the tangible personal property must be delivered. Failure to meet any of these three criteria will result in each delivery being treated as a single sale for purposes of the single sale test for applying the $5,000 discretionary sales surtax limitation.

QUESTION 3c: What happens if a customer issues a written change order for the purchase of more materials?

ANSWER 3c - Based on Facts Below: A change order is a new order of materials, and it constitutes a separate sale for purposes of the single sale test. It must meet both the single sale test and the bulk sale/working unit test on its own for purposes of applying the $5,000 discretionary sales surtax limitation. The timing of the issuance of the change order is irrelevant.

QUESTION 3d: How is it determined which county's surtax rate applies?

ANSWER 3d - Based on Facts Below: If the delivery of tangible personal property occurs in a county imposing a surtax, then the county's surtax rate will apply to the sale.

QUESTION 4: What is the application of the $5,000 discretionary sales surtax limitation with respect to written contracts in which Taxpayer fabricates some items for installation, and purchases some items that are ready for installation?

ANSWER 4 - Based on Facts Below: In accordance with Rule 12A-15.008(1)(c)4., F.A.C., the written contract constitutes a single sale for purposes of the fabricated item. Taxpayer's purchases of non-fabricated items constitute a separate single sale. Therefore, Taxpayer would owe surtax on more than $5,000 for any written contract in which it fabricates items and purchases items that it will not further fabricate for use in the contract. If Taxpayer purchases items that it will not further fabricate from each of several vendors, the purchase from each vendor will be subject to a separate $5,000 discretionary sales surtax limitation, assuming all of the criteria set forth in Rule 12A-15.004(3), F.A.C., are met.

QUESTION 5: What elements must be included in the cost price of items fabricated for one's own use?

ANSWER 5 - Based on Facts Below: The elements to be included in the cost price are found in Rule 12A-1.043(1), F.A.C.

QUESTION 6: [W]hat consists of incorrectly charging and collecting sales tax from a customer?

ANSWER 6 - Based on Facts Below: All amounts represented to a purchaser as tax collected from that purchaser are considered to be tax, and they become state funds at the moment of collection and are due to the state of Florida. See Sections 212.15, 213.756, F.S. In some cases, contractors will report to clients the amount of tax paid by the contractor. If this is what Taxpayer does, any itemized tax amount should be clearly labeled as Taxpayer's cost rather than as an amount being collected as tax on the client.

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Aug 11, 2003

Re: Technical Assistance Advisement 03A-042

Sales and Use Tax - Discretionary Sales Surtax $5,000 Limitation
Section 212.054, F.S.
Rule 12A-15.004, F.A.C.
Petitioner: XXX (herein "Taxpayer")
FEI:XX

Dear :

This letter is a response to your petition dated May 19, 2003, for the Department's issuance of a Technical Assistance Advisement ("TAA") 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, F.A.C. This response to your request constitutes a TAA and is issued to you under the authority of s. 213.22, F.S.

The petition sets forth the following information:

> The Taxpayer's main products are doors and trim. The doors are ordered from the manufacturer in components such as the base door, wood for hanging the door, door jams, door hinges, door locks, etc. The Taxpayer assembles the doors at its facility... in [Florida]. The Taxpayer generally enters into two types of contracts with its products.
>
> Type 1 Contract - The first type of contract is one where the Taxpayer "fabricates" its doors at its plant and also installs the doors and trim at the job site. This is typically in a multi family construction project (apartments). In almost all situations[,] the Taxpayer enters into a written contract which provides for a lump-sum price in exchange for the doors, trim and installation. Such contracts are usually AIA contracts. For the balance of this letter, these types of contracts will be referred to as "real property improvement contracts[].["]....
>
> Type 2 Contract - The Taxpayer agrees to sell fabricated doors and trim to a home builder in exchange for a fixed price without installation. The doors and trim are usually

> installed by the builder in a single family construction project (tract homes). In almost all situations, this type of contract is in writing, or a written purchase order is given to the Taxpayer by the home builder. For the balance of this letter, these types of contracts will be referred to as "retail sales contracts[].["]...

Taxpayer's petition poses a number of questions on a variety of issues related to its business and business practices. Taxpayer's questions, additional facts and interpretations are in italics, and are followed by the Departments response.

> 1) The Taxpayer believes that it is a "dual operator" as defined in FAC Rule 12A-1.051(9)[This and all other footnotes are omitted.]. Is this correct?

Response: Rule 12A-1.051(9), F.A.C., provides:

> Dual operators. Some contractors both use materials themselves in the performance of contracts and resell materials either in over-the-counter sales or under contracts described in paragraph (3)(d). Those contractors should register as dealers. When they purchase materials that they may either use themselves or that they may resell, they may issue a copy of the contractor's Annual Resale Certificate (form DR-13) to the selling dealer. Florida tax should be remitted when a subsequent event determines the appropriate taxation of the materials. If the materials are subsequently resold, tax should be collected from the buyer and remitted to the state. If the materials are used by the contractor, use tax should be paid to the state instead.

If Taxpayer enters into lump sum agreements for fabricating and installing building materials, such as doors and trim work, that become improvements to real property upon installation, as well as sells these same building materials without performing the installation, then Taxpayer meets the criteria set forth to be a "dual operator" in Rule 12A-1.051(9), F.A.C.

> 2) If the Taxpayer is a "dual operator[,]" then it believes

it may extend a "resale certificate" when it is buying materials (e.g., doors, door parts, trim, etc.) of a type that typically are:

a) used in both retail sales contracts and real property improvement contracts, and

b) solely with respect to real property improvement contracts, the materials become part of a working unit. Is this correct?

Response: As provided in Rule 12A-1.051(9), F.A.C., it is appropriate to extend a copy of Taxpayer's Annual Resale Certificate (Form DR-13) to its vendors when Taxpayer is not sure at the time of purchase whether the items will be resold or consumed in the performance of an improvement to real property. As provided in Rule 12A-1.043(1), F.A.C., it is permissible to extend a copy of Taxpayer's Annual Resale Certificate when tangible personal property will be used in the fabrication of items Taxpayer will install in real property improvement contracts, if Taxpayer elects to accrue tax at the time of fabrication rather than paying it at the time of purchase. The term "working unit" is not relevant to a discussion concerning Taxpayer's use of its Annual Resale Certificate.

3) With respect to retail sales contracts, the Taxpayer requests guidance or confirmation regarding its interpretation of the surtax [limitation] under FAC Rule 12A-15.004.... The Taxpayer's questions regarding FAC Rule 12A-15.004 are below. Each question presumes that the Taxpayer is selling items normally sold in bulk or items which, when assembled will comprise a working unit or part of a working unit.

Response: Rule 12A-15.004, F.A.C., was amended effective April 17, 2003. The current rule provides in pertinent part:

(3) When multiple items of tangible personal property are sold by a dealer to the same purchaser at the same time, the $5,000 limitation applies when the sale or purchase is a single sale that meets the requirements of paragraph (a)

and is a sale of items normally sold in bulk or items that comprise a working unit, or a part of a working unit, that meets the requirements of paragraph (b).

(a) SINGLE SALE. The sale or purchase of multiple items of tangible personal property must be a single sale in which the purchaser buys all items of tangible personal property from the dealer at the same time.

1. There must be an invoice, sales slip, charge ticket, written purchase order or agreement, or other tangible evidence of sale that establishes the items were sold in a single sale.

2. A single sale of items of tangible personal property that is documented by a written purchase order or written agreement executed between a purchaser and the selling dealer must:

a. Provide for a specific quantity of tangible personal property; and

b. If delivery of all items does not occur at the same time, provide for a specific time period within which delivery of the tangible personal property to the purchaser must be made.

3. Each delivery of items of tangible personal property, under the provisions of a written purchase order or written agreement that does not specify the quantity and the time period during which delivery of the property will occur, will be a single sale.

4.a. Example: A developer and an appliance distributor enter an agreement pursuant to which the developer purchases 250 refrigerators for an apartment complex project. Delivery will be in 10 loads of 25 refrigerators, as buildings in the complex are completed, with invoicing to follow each delivery and final delivery to occur no later than 10 months after the contract is signed. The 250 refrigerators will be viewed as purchased in a single sale,

because the agreement specified both the quantity to be purchased and the time period in which delivery will occur.

b. Example: A road contractor enters a contract to purchase all of the asphalt needed for a certain job from an asphalt dealer that is willing to guarantee delivery as needed over a six-month period for a set price per ton, with invoicing to follow each delivery. Each delivery is a separate sale, because the agreement does not specify the quantity of asphalt to be purchased.

(b) ITEMS NORMALLY SOLD IN BULK OR ITEMS THAT COMPRISE A WORKING UNIT. A single sale must be a sale of items of tangible personal property that meets at least one of the following conditions:

1. The items are multiple quantities of a single item that the dealer normally sells in multiple quantities in the normal course of the dealer's business or that the purchaser normally buys in multiple quantities in the normal course of the purchaser's business;

2. The items are normally sold as a set or a unit and the utility of each for its intended purposes is dependent on the set being complete;

3. The items are normally sold in single sale by the seller to the purchaser for use in the normal business practice of the purchaser as an integrated unit; or

4. The items are component parts that have no utility unless assembled with each other to form a working unit or part of a working unit.

(c) MULTIPLE ITEMS OF TANGIBLE PERSONAL PROPERTY IN A SINGLE SALE. Multiple items of tangible personal property sold or purchased under a single sales transaction that are not normally sold in bulk or that, when assembled, will not comprise a working unit, part of a working unit, or comprise an integrated unit to be used in the purchaser's normal business practice, cannot be aggregated into a

single sale for purposes of the surtax limitation.

(d) EXAMPLES.

1. When furniture dealers advertise, sell, and invoice furniture suites or sets for a certain amount, without itemization of individual pieces that make up the suite or set, the surtax applies to the first $5,000 of each such suite or set of furniture. If the invoice contains other items not included in the suite or set, the surtax applies to the first $5,000 of each of these items. When furniture dealers sell individual pieces of furniture and separately itemize each piece, the surtax applies to the first $5,000 of each piece.

2. When a heating and air conditioning contractor, who normally purchases several heating and air conditioning units at the same time, purchases several units from a selling dealer who bills for the units on one invoice, the surtax applies to the first $5,000 on the total amount of the invoice.

3. When a lumber and building supply dealer sells lumber of various kinds and sizes, nails of different sizes, rolls of felt, squares of shingles, and other building materials that are used by the purchaser to comprise a working unit (e.g., a roof), the surtax applies to the first $5,000 of the total amount of the single sale. If the single sale or purchase contains items that are not used to comprise the working unit (e.g., the roof), the surtax applies to the first $5,000 of each item separately itemized on the sales invoice or other evidence of sale. Examples of such items that are used by the contractor to construct the roof, but do not become a part of the roof when completed are hammers, saws, shovels, and power tools.

It is not clear from Taxpayer's petition that it is relying on this amended rule when it presumes that it is selling items normally sold in bulk, as set forth in Rule 12A-15.004(3)(b)1., F.A.C., or that the items when assembled will comprise a working unit or part thereof, as set forth in Rule 12A-15.004(3)(b)2.,

3., and 4., F.A.C.

a) What is the definition of a "working unit" or "part of a working unit" as the terms are used in FAC Rule 12A-15.004? For example, if a customer purchases large quantities of wood that will be used for both the roof and the walls of an apartment building, is the apartment building considered the overall working unit and therefore all of the wood will become "part of a working unit"? Alternatively, would a roof be considered different from a wall when defining a "working unit"? If a roof is different from a wall[,] then how is the seller (Taxpayer) supposed to know this and what information must it gather from the purchaser?

Response: The terms "working unit" and "part of a working unit" are not defined by Rule 12A-15.004, F.A.C. The determination must be made on a case-by-case basis. When Taxpayer sells components (windows, doors, crown moldings, etc.) in a single sale as tangible personal property for a single structure, Taxpayer can view those components as comprising part of a working unit (a complete structure). Even if there are multiple buildings involved, the bulk sale test may apply as well to permit aggregation of the working units sold by Taxpayer. The bulk sale test could be met because selling multiple quantities of identical working units, which working units themselves can be viewed as a single item and, thus, can be sold in multiple quantities with a single $5,000 discretionary sales surtax cap.

b) If the purchaser takes delivery of the product (as opposed to the purchaser picking up the product), in multiple deliveries, then it is the Taxpayer's understanding that if the following three requirements are met, that the entire transaction will be treated as a "single sale" for purposes of the $5,000 surtax limitation:

i) The purchase order, contract or other agreement is in writing.

ii) The purchase order, contract, or other agreement specifies the type and quantity of tangible personal

property being ordered.

iii) The purchase order, contract, or other agreement specifies the time frame in which the deliveries are to occur.

It is the Taxpayer's understanding that failure to meet any of the above three criteria will mean that each delivery will be treated as a separate sale for purposes of applying the $5,000 surtax limitation. Is the above interpretation correct?

Response: Rule 12A-15.004(3)(a), F.A.C., requires that, for purposes of meeting the single sale test, purchase orders or other tangible evidence of sale must be in writing, the order must be specific as to the quantity of tangible personal property ordered, and it must be specific as to the date by which the tangible personal property must be delivered. Failure to meet any of these three criteria will result in each delivery being treated as a single sale for purposes of the single sale test for applying the $5,000 discretionary sales surtax limitation.

Taxpayer is advised that a sale must meet both the single sale test and the bulk sale/working unit test before the $5,000 discretionary sales surtax limitation may be applied.

c) What happens if a customer issues a written change order for the purchase of more materials? Will this change order be part of the original sale for purposes of applying the above rules? Will the answer be different if a change order is received before the first delivery is made versus after the first delivery is made?

Response: A change order is a new order of materials, and it constitutes a separate sale for purposes of the single sale test. It must meet both the single sale test and the bulk sale/working unit test on its own for purposes of applying the $5,000 discretionary sales surtax limitation. The timing of the issuance of the change order is irrelevant.

d) Lastly, it is the Taxpayer's understanding that the location of the delivery (where the purchaser takes possession of the property) will determine the county [of] which the surtax rate is applicable. Is this correct?

Response: Section 212.054(3), F.S., provides in pertinent part:

(3) For the purpose of this section, a transaction shall be deemed to have occurred in a county imposing the surtax when:

(a)1. The sale includes an item of tangible personal property, a service, or tangible personal property representing a service, and the item of tangible personal property, the service, or the tangible personal property representing the service is delivered within the county. If there is no reasonable evidence of delivery of a service, the sale of a service is deemed to occur in the county in which the purchaser accepts the bill of sale. (Emphasis Supplied)

If the delivery of tangible personal property occurs in a county imposing a surtax, then the county's surtax rate will apply to the sale.

4) With respect to real property improvement contracts, the Taxpayer requests guidance or confirmation regarding the interpretation of the surtax [limitation] under FAC Rule 12A-15.004.... Taxpayer believes that in real property improvement contracts[,] it fabricates items for its own use in fulfilling such contracts. Furthermore, it is anticipated that the Taxpayer will use a resale certificate... when purchasing materials to be used in fulfilling real property improvement contracts.

a) Considering the above, it is the Taxpayer's understanding that it is the contract that it controlling for purposes of applying the $5,000 surtax limitation. In general terms, the contract will call for the installation of certain items [that] will be incorporated into real property (e.g., doors and trim). In these instances, it is the Taxpayer's understanding that the cost of all items

which become part of the working unit being installed, will be summed together and treated as a "single sale" for purposes of applying the $5,000 surtax limitation. For these purposes..., the cost will include materials as well as fabrication labor.

Example 1:

A contract is signed by the Taxpayer to install 1,000 doors for 300 apartment units in exchange for a lump-sum price of $300,000. Due to the fact that the doors will comprise part of a working unit, such contract is considered a single transaction for purposes of applying the $5,000 surtax [limitation]. Assuming that the cost of all materials that became a component part of the door system was $150,000, fabrication labor at the plant was $25,000 and installation labor at the job site was $75,000, then the taxable fabricated cost would be $175,000 ($150,000 + $25,000 = $175,000) and total surtax (assume surtax rate of 1/2 %) due as a result of the contract would be $25.

Is the above interpretation correct?

Response: Rule 12A-15.008(1)(c), F.A.C., as mended effective April 17, 2003, provides in pertinent part as follows:

(c)1. Contractors and subcontractors are required to pay use tax on the fabricated cost of items of tangible personal property they manufacture, produce, compound, process, or fabricate for their own use in performing contracts. When the contractor or subcontractor owes use tax on the fabricated cost of items manufactured, produced, compounded, processed, or fabricated for use at a manufacturing plant site located within a surtax county, the contractor or subcontractor is required to pay surtax on such fabrication cost. Labor incurred at the job site where the item will be incorporated into a real property improvement or transportation from the plant where an item was fabricated to the job site is not subject to tax or surtax. See Rule 12A-1.043, F.A.C., for determining fabrication cost.

2. Contractors who pay sales tax to vendors for direct materials that are incorporated into fabricated items of tangible personal property are not required to pay use tax on the cost of those materials. Contractors who are registered as dealers may elect either to pay sales tax to their vendors on direct materials or to extend a copy of their Annual Resale Certificate and accrue use tax when the materials are used for fabrication. If sales tax is paid on the purchase of direct materials at the time of purchase, the county of delivery determines whether surtax is due. If use tax is accrued at the time of fabrication of the items, the surtax must also be accrued when the fabrication occurs within a county imposing a surtax.

3. Contractors and subcontractors who are located within a county imposing a surtax, and who have elected and have been authorized by the Department to use an alternate tax calculation method, must compute the surtax on the appropriate percentage of the contract price at the same time and in the same manner in which use tax is computed.

4. The $5000 limitation is applicable to the fabricated cost when the written contract or agreement specifies the particular project for which **the fabricated item** of tangible personal property is to be used.

5. Example: A contractor operates a roofing tile manufacturing plant in a surtax county. The contractor sells roofing tiles, as well as uses roofing tiles in performing real property contracts. The contractor is a registered dealer and purchases raw materials tax exempt by extending a copy of the dealer's Annual Resale Certificate. The contractor enters a contract to furnish materials and install a tile roof for $15,000. The direct materials cost is $5,000 and the other taxable fabrication costs are $3,000, for a total of $8,000 on which use tax must be accrued. The contractor must accrue sales tax and surtax, because the fabrication occurs at the plant located within a surtax county. If roofing contractors were permitted to accrue use tax on 40 percent of the contract price, use tax

would be due on $6,000, because the fabrication occurred at the plant located within a surtax county. Whether the contractor computes use tax on $8,000 actual cost or on $6,000 on a percent of contract price basis, surtax only needs to be accrued on $5,000, because the fabricated tangible personal property is identified to the specific contract. (Emphasis Supplied)

When a written lump sum contract is involved, the single sale test is met for purposes of the $5,000 discretionary sales surtax limitation. Taxpayer is also advised that that bulk sale/working unit test must also be met. The criteria for the bulk sale/working unit test are set forth in Rule 12A-15.004(3)(b), F.A.C. Taxpayer is also advised that whether a particular project comprises a working unit is irrelevant in determining whether a sale constitutes a single sale, contrary to Taxpayer's assertion in its example. In Taxpayer's example, assuming that all 1,000 are a single item, then Taxpayer must accrue surtax of $25 because they are items Taxpayer regularly contracts to install in multiple quantities and the "in bulk" test is met.

b) It is the Taxpayer's understanding that the county to which the surtax will apply will be the location where the materials are delivered. In most instances, this will be the Taxpayer's door plant[,] as the materials must first be fabricated before being installed. Is this interpretation correct?

Response: See response to question (3)(d). See also Rule 12A-15.008(1)(c)2., F.A.C.

c) Although it does not often occur, what would happen if... pursuant to the same contract, materials were delivered both directly to the job site (non-fabricated items) and materials were fabricated at the Taxpayer's door plant. If the Taxpayer's interpretation of the $5,000 surtax limitation is correct, then the $5,000 would apply to the overall material and fabrication labor cost of the entire contract. However, if the counties of delivery were different and had different surtax rates, which rate would

be used?

Response: In accordance with Rule 12A-15.008(1)(c)4., F.A.C., the written contract constitutes a single sale for purposes of the fabricated item. Taxpayer's purchases of non-fabricated items constitute a separate single sale. Therefore, Taxpayer would owe surtax on more than $5,000 for any written contract in which it fabricates items and purchases items that it will not further fabricate for use in the contract. If Taxpayer purchases items that it will not further fabricate from each of several vendors, the purchase from each vendor will be subject to a separate $5,000 discretionary sales surtax limitation, assuming all of the criteria set forth in Rule 12A-15.004(3), F.A.C., are met.

d) If a change order is issued and becomes subject to the terms of the original agreement, will such change order be included as part of the original contract for purposes of applying the $5,000 surtax limitation?

Response: See the response to question (3)(c).

5) With respect to real property improvement contracts, it is the Taxpayer's understanding that it is subject to use tax under Fla. Stat[.] 212.05(1)(b) based upon the "cost" of assembling doors (and possibly trim) which will ultimately be used in performing the real property improvement contract. This belief is based upon the Taxpayer's understanding that the assembly activities will be considered the "fabrication" of tangible personal property under FAC Rule 12A-1.051. As such, the determination of what constitutes taxable "fabrication" is determined under FAC Rule 12A-1.043.

With respect to the doors, the Taxpayer has materials and/or parts delivered to its shop for assembly/fabrication. The materials/parts are drop shipped [to] the Taxpayer's plant where they are unloaded off the delivery truck by the Taxpayer and temporarily stored at the plant. From this point[,] an employee will take the materials from storage (on the plant floor) and begin

assembly. Assembly might include cutting the door frame, nailing the frame, installing the hinges, door knobs, locks, etc., until a finished product has been assembled. Once assembled, the door is then moved to a place where it is again stored at the plant. Depending on the delivery schedule, the assembled doors are then loaded on a truck and delivered to their ultimate destination for installation.

With respect to trim (and possibly other products that are not connected with the door system), it is also delivered to the Taxpayer's plant for storage. Although rare, in some cases the trim may be cut to size at the plant. This would be the only "fabrication" associated with the trim.

Response: Taxpayer's questions follow. For clarity's sake, the applicable statutes and rules are given for reference purposes.

Section 212.05(1)(b), F.S., imposes tax:

> At the rate of 6 percent of the cost price of each item or article of tangible personal property when the same is not sold but is used, consumed, distributed, or stored for use or consumption in this state.... (Emphasis Supplied)

Section 212.02(4), F.S., defines the term "cost price" as follows:

> "Cost price" means the actual cost of articles of tangible personal property without any deductions therefrom on account of the cost of materials used, labor or service costs, transportation charges, or any expenses whatsoever.

Rule 12A-1.043(1), F.A.C., provides a list of the elements that must be included in the calculation of the cost price of fabricated tangible personal property, and it states in pertinent part as follows:

> (1)(a) Any person who manufactures, produces, compounds, processes, or fabricates in any manner an article of tangible personal property for his own use shall pay a tax

upon the cost of the property manufactured, produced, compounded, processed, or fabricated without any deduction therefrom on account of the cost of material used, labor or service costs, or transportation charges.

(b) Elements of cost will include the following materials, labor, service, or transportation costs that are attributable to manufacturing, producing, compounding, processing, or fabricating an article of tangible personal property for one's own use and which are properly chargeable to the cost of the product under generally accepted cost accounting standards.

1. Material costs include the following:

a. All direct materials and related freight costs that are physically observable as being identified to the finished tangible personal property, that are consumed in producing the property, or that become a component or ingredient of the finished property. See paragraphs (c) and (d), below, for calculating the tax on the cost of the finished product when sales tax has or has not been paid on direct materials.

b. Material handling and warehousing of direct materials and goods in process.

c. Manufacturer's excise taxes on materials.

2. Labor costs include the following:

a. The total direct labor costs for employees or contract labor that are allocable to the production of the finished property, including the entire amount of payroll burden, which includes but is not limited to overtime premium, vacation and holiday pay, sick leave pay, shift differential, payroll taxes, payments to a supplemental unemployment benefit plan, and employee fringe benefits.

b. Compensation of officers, to the extent it is allocated to production and not administrative functions.

c. Costs of service, engineering, design or other support employees allocated to production.

3. Service costs include the costs of non-employee services that are allocated to the production of the tangible personal property, such as engineering, design or similar consulting or professional services.

a) The Taxpayer believes that the cost of labor allocated to the unloading of items that will ultimately be assembled/fabricated is considered taxable "fabrication" labor as well as the cost of all labor allocated to the warehousing of such items before they are actually used in the assembly/fabrication process. Is this correct?

Response: Yes. See Rule 12A-1.043(1)(b)1.b., F.A.C.

b) The cost of labor allocated to the unloading of items that will not be assembled/fabricated (including any labor cost associated with warehousing such items) is not considered taxable "fabrication" labor. For example, none of the labor associated with unloading or storing trim that will not be fabricated is taxable as fabrication labor. Is this correct?

Response: Yes. If there is no fabrication occurring (or that will occur), then there is no fabrication labor to tax.

c) After the assembly/fabrication process is complete (i.e., the item is finished and then stored) then all subsequent labor incurred with respect to warehousing of the finished item and loading the finished item for its delivery to the job site is not taxable as fabrication labor. Is this correct?

Response: Yes. Once the fabrication is complete, then no further fabrication labor will occur. Only fabrication labor is subject to tax as part of the fabricated cost.

d) All shop labor allocated to assembly/fabrication is

taxable based upon the cost allocated to such process and includes payroll, which includes[,] but is not limited to[,] overtime premium, vacation and holiday pay, sick leave pay, shift differential, payroll taxes, payments to a supplemental unemployment benefit plan, and employee fringe benefits. Is this correct?

Response: Yes. See Rule 12A-1.043(1)(a)2.a., F.A.C.

e) Compensation of officers, to the extent it is allocated to production and not administrative functions[,] is taxable as fabrication labor. It is the Taxpayer's understanding that the determination of whether or not the compensation is allocated to production is strictly based upon how the Taxpayer allocates such expenses in its financial statements. Is this correct? If this is not correct, are there any guidelines how this should be determined?

Response: Rule 12A-1.043, F.A.C., does not specify the method by which a taxpayer must allocate compensation of officers to fabrication labor. However, the Department will respect a taxpayer's allocation of officer compensation. Taxpayers that require audited financial statements should consult their accounting professional advisors on this point.

f) [Cost] of engineering, design or other support employees allocated to production is taxable as fabrication labor. Again, it is the Taxpayer's understanding that the determination of whether or not such costs are "allocated to production" is strictly based upon how the Taxpayer allocates such expenses in its financial statements. Is this correct? If this is not correct, are there any guidelines how this should be determined?

Response: Rule 12A-1.043, F.A.C., does not specify the method by which a taxpayer must allocate costs of engineering, design or other support employees to fabrication labor. Taxpayer's accounting professional advisors should be consulted concerning whether any allocation is required.

6) The final item the Taxpayer wishes the Department to

comment on concerns the issue of what consists of incorrectly charging and collecting sales tax from a customer. It is the Taxpayer's understanding that when a person incorrectly charges and collects sales tax[,] that such person incurs a liability to the state of Florida to remit such sales tax to the Department.

In the case at hand, the Taxpayer primarily enters into a lump sum contract[] when it improves real property. In many cases, the Taxpayer[,] when invoicing the customer (pursuant to the terms of the contract) lists sales tax on the invoice or in the documentation supporting the invoice. However, in no case will the sum total of invoices exceed the lump-sum amount (plus or minus change orders).

In a lump-sum contract for the improvement to real property, it is the Taxpayer's understanding that as long as the amount it charges the customer is in accordance with the terms of the contract, (e.g., contract for $500,000 and the Taxpayer charges the customer $500,000), then it could never be considered to have charged the customer sales tax on the transaction. This is true regardless of whether or not the invoice or supporting documents reflect sales tax. The reasoning behind this is that the contract, and not the invoice, is controlling. Please comment on whether or not this interpretation is correct.

Response: Taxpayer's interpretation is not correct. All amounts represented to a purchaser as tax collected from that purchaser are considered to be tax, and they become state funds at the moment of collection and are due to the state of Florida. See Sections 212.15, 213.756, F.S. In some cases, contractors will report to clients the amount of tax paid by the contractor. If this is what Taxpayer does, any itemized tax amount should be clearly labeled as Taxpayer's cost rather than as an amount being collected as tax on the client.

With respect to the contract, the Taxpayer often has change orders. Typically, the contract is not revised for the change orders. Instead, a separate purchase order is issued to the Taxpayer by the customer and a separate

invoice is issued by the Taxpayer for such change order. Installation labor is also included on the invoice.... [S]ome of the invoices relating to change orders reflect sales tax on their face. The question that this brings is whether or not the inclusion of sales tax on the change order invoice is considered the charging and collecting of sales tax. In general, it should not be[,] as [it] is listed on the invoice in order to be reimbursed to the Taxpayer. For example, in a cost plus arrangement, the Taxpayer would have to list the sales tax so that they could be reimbursed for this amount. Please comment whether this interpretation is correct. However, what happens if the sales tax listed on the change order invoice is actually more than the amount due to the Department of Revenue? Is this an issue between the Taxpayer and its customer as an overcharge under the terms of the contract or could such excess be considered sales tax which must be remitted to the Department of Revenue?

Response: As previously stated, all amounts represented to a purchaser as tax are considered to be tax, and they become state funds at the moment of collection and are due to the state of Florida. See Sections 212.15, 213.756, F.S. With respect to cost plus contracts, the contractor is not required to separately list the sales tax in order to be reimbursed for it. In fact, the contractor's cost as invoiced to the customer may well be a lump sum amount. Rule 12A-1.051(4), F.A.C., specifically states that contractors utilizing cost-plus contracts should not charge tax to their customers.

With respect to tax that is overcharged/overcollected, Taxpayer must either remit the entire amount collected to the Department of Revenue, or it must refund the amount overcharged/overcollected to the customer. See Rule 12A-1.014(4), F.A.C.

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 upon 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 from that which is 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 s. 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,

Sara D. Faulkenberry,
Tax Law Specialist
Technical Assistance and Dispute Resolution
850/414-9838

Control #55441