

SUMMARY

FACTS

The Taxpayer provides a variety of water restoration services to nonresidential, for-profit customers in Florida (e.g., hotel chains, hospitals, manufacturing facilities), primarily with regard to damage caused by natural disasters, such as hurricanes and floods. The Taxpayer's various services are primarily for real property, although some services involve personal property. The Taxpayer's contracts with and invoices to its customers usually do not allocate the contract price or charges among the various elements of the work performed, including the real property services and any personal property services.

QUESTION: Are the subject water restoration services subject to sales tax?

ANSWER - Based on Facts Below: The predominant nature of Taxpayer's services is to be determined on a contract by contract basis. The predominant nature of Taxpayer's contracts is that of improvements to real property. However, Taxpayer could occasionally have a contract in which the predominant nature was that of a sale of (repair to) tangible personal property, or that clearly allocates the price among the various elements. On all contracts that do not clearly allocate the price among the various elements and in which the predominant nature is that of an improvement to real property, Taxpayer should follow the guidelines of Rule 12A-1.051(4), F.A.C., which states that Taxpayer owes tax on all materials and supplies it uses in the performance of a contract and that no tax is charged to the customer. To the extent that the predominant nature of a contract is that of a sale of tangible personal property, tax is charged on the total contract price to the customer, and Taxpayer does not owe tax on the materials that are incorporated into the repair. Likewise, to the extent Taxpayer enters into a contract that clearly allocates the price among the elements, the various elements are taxed according to their classification.

January 3, 2006

Re: Technical Assistance Advisement 05A-054
Sales and Use Tax - Water Restoration Services
Section: 212.05, F.S.
Rules: 12A-1.006, 12A-1.0091, 12A-1.051, F.A.C.
Petitioner: XXX (herein "Taxpayer")
FEI: XX

Dear:

This letter is a response to your petition dated July 18, 2005, 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, Florida Administrative Code. This response to your request constitutes a TAA and is issued to you under the authority of s.

FACTS

The petition sets forth the following facts:

The Taxpayer provides a variety of water restoration services to nonresidential, for-profit customers in Florida (e.g., hotel chains, hospitals, manufacturing facilities), primarily with regard to damage caused by natural disasters, such as hurricanes and floods. The Taxpayer's various services are described below and are primarily for real property, although some services involve personal property. The Taxpayer's contracts with and invoices to its customers usually do not allocate the contract price or charges among the various elements of the work performed, including the real property services and any personal property services. The Taxpayer[']s services are described as follows:

Debris Removal. The Taxpayer removes any debris that hinders the restoration process or is on its customer's property to a dumpster, usually rented by Taxpayer. In certain circumstances, when third party trucking is not available, the Taxpayer will haul the debris to a landfill for disposal, usually at a fixed price.

Water Removal. The Taxpayer removes any standing water from the customer's facilities using Wet/Dry vacuums, squeegees, brooms, and other means.

Moisture Stabilization. The Taxpayer uses large dehumidifiers to remove moisture from the air, walls, wall cavities, furniture and other real or personal property in the facility. Air movers are used to circulate the air and improve the drying capabilities of the dehumidifiers.

HVAC cleaning. The Taxpayer cleans and encapsulates the High Velocity Air Conditioning (HVAC) Units. This involves cutting the ductwork to provide access to enable the Taxpayer's HVAC cleaning equipment to vacuum and/or sweep out any particulate that has accumulated. After the cleaning, the Taxpayer sprays a sealant to trap any particulate left in the duct work from being blown out when the units are turned back on.

Drywall Removal. The Taxpayer cuts out and removes any drywall damaged due to the water intrusion. Once removed, the Taxpayer cleans what is accessible between the walls using a HEPA (High-Efficiency Particulate Air) vacuum.

Dust Control and Cleaning. The Taxpayer sets up containment by framing the area to be cleaned using 2x4's and 6 mil polyethylene sheeting on both sides. The framing is temporary and is removed after the dust control and cleaning is completed. HEPA Filtration Units are used to provide a negative pressure in the containment area to ensure the cross contamination of the dust does not occur. A micromanometer is used to ensure the containment remains under constant negative pressure. The contents of the area are removed from the containment area and cleaned and then moved to a storage/holding area until the cleaning is completed. When the cleaning is completed, the contents are returned to the site. The cleaning of the containment area consists of wiping down all surfaces, spraying a biocide and disinfectant and then encapsulating the porous surfaces with an anti-microbial sealant.

Carpet and Furniture Cleaning. The Taxpayer uses a proprietary, patented extraction cleaning machine, which heats water to a certain temperature and extracts particulate from the carpet, in place, and furniture which is deemed salvageable.

Carpet and Furniture Removal. The Taxpayer removes and disposes of any carpet, tack strip and furniture which are damaged from the water or debris and cannot be restored.

Drapery Cleaning. The Taxpayer uses a proprietary, patented cleaning machine to steam clean drapery which is deemed salvageable.

Ceiling Tile Removal. The Taxpayer removes and disposes of any ceiling tile damaged by the water or debris.

Wallpaper Removal. The Taxpayer removes and disposes of any wallpaper damaged by the water or debris.

Scraping of Plaster Wall. The Taxpayer scrapes and removes any portion of plaster walls damaged by the water or debris.

Final Paint. The Taxpayer provides a final paint coating to the sheetrock or plaster after the build-back by another contractor is completed.

Post-Construction Clean-up. The Taxpayer performs many of the water restoration services listed above after a third party contractor finishes the build-back of the facility.

REQUESTED ADVISEMENT

Advice is requested whether the water restoration services are subject to tax.

APPLICABLE LAW

Section 212.05, Florida Statutes, generally imposes tax on the sale of tangible personal property and certain services. Tax is specifically imposed on the sale of nonresidential cleaning services. See Section 212.05(1)(i)1.b., Florida Statutes.

Section 212.02, Florida Statutes, provides the following pertinent definitions:

(15) "Sale" means and includes:

(a) Any transfer of title or possession, or both, exchange, barter, license, lease, or rental, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration.

(16) "Sales price" means the total amount paid for tangible personal property, including any services that are a part of the sale, valued in money, whether paid in money or otherwise, and includes any amount for which credit is given to the purchaser by the seller, without any deduction therefrom on account of the cost of the property sold, the cost of

materials used, labor or service cost, interest charged, losses, or any other expense whatsoever. "Sales price" also includes the consideration for a transaction which requires both labor and material to alter, remodel, maintain, adjust, or repair tangible personal property.... (Emphasis Supplied)

Section 212.06, Florida Statutes, provides in pertinent part as follows:

(14) For the purpose of determining whether a person is improving real property, the term:

(a) "Real property" means the land and improvements thereto and fixtures and is synonymous with the terms "realty" and "real estate."

(b) "Fixtures" means items that are an accessory to a building, other structure, or land and that do not lose their identity as accessories when installed but that do become permanently attached to realty....

(c) "Improvements to real property" includes the activities of building, erecting, constructing, altering, improving, repairing, or maintaining real property. (Emphasis Supplied)

Rule 12A-1.006, F.A.C., addresses charges made by dealers who adjust, apply, alter, install, maintain, remodel, or repair tangible personal property and provides in pertinent part:

(1)(a) Where parts are furnished by the repairer, the entire charge the repairer makes to a customer for adjusting, applying, installing, maintaining, remodeling, or repairing tangible personal property is taxable, except as otherwise provided in paragraph (b) of this subsection.

(c) Materials which are actually incorporated into and become a part of the tangible personal property repaired, remodeled, or maintained, such as welding rods, solder, body solder, or other surfacing materials, paint, thinner, bolts, nuts, etc., are not taxable when purchased by the repairer. Materials and supplies used by the repairer in making such repairs, etc., but which do not become a part of the property repaired are taxable to the repairer as overhead items. For example: Tools, sandpaper, steel wool, flux, detergents, and the like are not incorporated into the repair or remodeling job and are taxable.

(3) The provisions of this rule do not apply to contracts covering a combination of work on both real and personal property. Such contracts are governed by the provisions of Rule 12A-1.051, F.A.C.

(7)(b) The charge for refinishing, restoring, or upholstering furniture is taxable. (Emphasis Supplied)

Rule 12A-1.0091, F.A.C., provides in pertinent part:

(1)(a) Nonresidential cleaning services are subject to tax. Nonresidential cleaning services are those services (not involving repair) rendered to maintain the clean and sanitary appearance and operating condition of a nonresidential building, but they do not include cleaning services provided for tangible personal property. Examples of such nonresidential cleaning services subject to tax are:

1. Acoustical tile cleaning services;
2. Building cleaning services, interior;
3. Chimney cleaning services;
4. Custodians of schools on a contract or fee basis;
5. Deodorant servicing of restrooms;
6. Disinfecting services;
7. Floor waxing services;
8. Housekeeping (cleaning services) on a contract or fee basis;
9. Janitorial services on a contract or fee basis;
10. Lighting maintenance services (bulb replacement and cleaning);
11. Maid services on a contract or fee basis;
12. Maintenance of buildings (except repairs);
13. Office cleaning services;
14. Restroom cleaning services;
15. Service station cleaning and degreasing services;
16. Venetian blind cleaning;
17. Washroom sanitation service; and
18. Window cleaning (interior or exterior).

(b) Residential cleaning services are not taxable....

(5) Cleaning service providers are considered the ultimate users or consumers of the tangible personal property sold to them and used in connection with their service and are required to pay the tax imposed upon such sales of tangible personal property to their dealers.

Rule 12A-1.051, F.A.C., addresses sales made to or by contractors who repair, alter, improve and construct real

property, and it provides in pertinent part:

(1) 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 other than public works contracts....

(2) Definitions. For purposes of this rule, the following terms have the following meanings:

(c)1. "Fixture" means an item that is an accessory to a building, other structure, or to land, that retains its separate identity upon installation, but that is permanently attached to the realty....

3. The determination whether an item is a fixture depends upon review of all the facts and circumstances of each situation. Among the relevant factors that determine whether a particular item is a fixture are the following:

a. The method of attachment....

b. Intent of the property holder in having the item attached....

c. Real property law....

d. Customization....

The foregoing list of factors relevant to determining whether an item is a fixture is intended to be illustrative only. Additional factors may exist in any particular case, and the weight to be given to the factors will also vary in each case.

(d) "Improvement to real property" or "real property improvement" includes the activities of building, erecting, constructing, altering, improving, repairing, or maintaining real property.

(h)1. "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;

c. Furnish and install tangible personal property that becomes a part of or is directly wired or plumbed into the central heating system, central air conditioning system, electrical system, plumbing system, or other structural system that requires installation of wires, ducts, conduits, pipes, vents, or similar components that are embedded in or securely affixed to the land or a structure thereon.

2. The term "real property contract" does not include:

b. A contract to furnish tangible personal property that will be installed or affixed in such a way as to become a fixture or improvement to real property if the person furnishing the property has not also contracted to affix or install it.

3. A contract is a real property contract if described in subparagraph 1. above, whether or not such agreement also involves providing property or services that would not be considered improvements to real property. See subsection (8) of this rule for discussion of such contracts.

(4) General rule of taxability of real property contractors. Contractors are the ultimate consumers of materials and supplies they use to perform real property contracts and must pay tax on their costs of those materials and supplies, unless the contractor has entered a retail sale plus installation contract. Contractors performing only contracts described in paragraphs (3)(a), (b), (c), or (e) do not resell the tangible personal property used to the real property owner but instead use the property themselves to provide the completed real property improvement. Such contractors should pay tax to their suppliers on all purchases. They should also pay tax on all materials they fabricate for their own use in performing such contracts, as discussed in subsection (10). They should charge no tax to their customers, regardless of whether they itemize charges for materials and labor in their proposals or invoices, because they are not engaged in selling tangible personal property. Such contractors should not register as dealers unless they are required to remit tax on the fabricated cost of items they fabricate to use in performing contracts.

(8) Mixed contracts. A real property contract may also include materials and labor that are not real property improvements. A contract that includes both real property work and tangible personal property is referred to in this subsection as a mixed contract. A mixed contract is not the same as a contract described in paragraph (3)(d) of this rule. Paragraph (3)(d) deals with a real property contract in which the contractor separately itemizes and prices all the materials that will be incorporated as part of the real property. A mixed contract is one that involves a real property improvement, maintenance, or repair and also involves providing tangible personal property that remains tangible personal property and does not become part of the real property. In the case of a mixed contract, taxability depends upon the predominant nature of the work performed under the contract and upon the contract terms.

(a) If the predominant nature of a mixed contract is a contract for real property improvements, taxability will be determined as if the contract were entirely for real property....

(b) If the predominant nature of a mixed contract is a contract for tangible personal property, taxability of the contract will be determined as if the contract were entirely for tangible personal property....

(c) The determination of the predominant nature of a contract will depend upon the facts and circumstances of each case. Consideration will be given to the description of the project and the responsibilities of the contractor as set forth in the contract. Consideration will also be given to the relative cost of performance of the real property and tangible personal property components of the contract.

(d) If a mixed contract clearly allocates the contract price among the various elements of the contract, and such allocation is bona fide and reasonable in terms of the costs of materials and nature of the work to be performed, taxation will be in accordance with the allocation....

(17) Specific activities classified as real property contracts. Contractors who are engaged in the following activities are generally considered to be real property contractors, although any particular job may be determined not to involve an improvement to real property:

(g) Carpeting installed with tacks, glue, or other permanent means and serving as the finished floor;

(p) Flooring;

(s) Heating, ventilating, and air conditioning system work;

(ee) Sheetmetal/ductwork;

(nn) Tilework;

The determination whether any particular job involves a contract for an improvement to real property will be based on the criteria set forth in paragraphs (c), (d), (e), (g), (h), (i), and (j) of subsection (2).

(18) Specific activities not classified as real property contracts. The sale, installation, maintenance, or repair of the following items is not considered to be a real property contract.

(a) Area rugs and carpets;

(g) Furniture.... (Emphasis Supplied)

The word "maintain" is defined in part as "to keep in an existing state; preserve or retain," as well as "to keep in a condition of good repair or efficiency." The word "repair" is defined in part as "to restore to sound condition after damage or injury." American Heritage Dictionary (4th ed. 2000).

DETERMINATION

A contract that involves work on both real property and personal property is considered to be a "mixed contract." Such contracts are discussed in Rule 12A-1.051(8), Florida Administrative Code. A mixed contract is one that involves a real property improvement, including maintenance and repair, and also involves providing tangible personal property that remains tangible personal property regardless of installation. The taxability of mixed contracts depends on the predominant nature of the work performed. If the predominant nature of the contract is that of an improvement to real property, then the contract is taxed as if it were entirely for improvements to real property. Likewise, if the predominant nature of the contract is that of a sale of tangible personal property, then the entire contract is taxed as a sale of tangible personal property. However, if a mixed contract clearly allocates the contract price among the various elements of the contract in a bona fide and reasonable manner, then the taxation will be in accordance to the allocation. See Rule 12A-1.051(8)(d), Florida Administrative Code.

Section 212.06(14)(c), Florida Statutes, and Rule 12A-1.051(2)(d), Florida Administrative Code, define the term "real

property improvement" to include the activities of building, erecting, constructing, altering, improving, repairing, or maintaining real property. The terms "repair" and "maintain" are not defined by Chapter 212, Florida Statutes, or Rule 12A-1.051, Florida Administrative Code. As you correctly note, absent a statutory or regulatory definition, one must look to the plain and ordinary meanings of these terms. See St. Petersburg Bank & Trust Co. v. Hamm, 414 So.2d 1071 (Fla. 1982). The American Heritage Dictionary defines the term "maintain" as "to keep in an existing state; preserve or retain," as well as "to keep in a condition of good repair or efficiency," and the term "repair" as "to restore to sound condition after damage or injury."

Taxpayer's representative's correspondence states that its "contracts generally are mixed contracts that do not allocate the contract price among the various elements." However, based on the description of the services provided, it appears that the predominant nature of the contracts is generally that of an improvement to real property.

Taxpayer's correspondence asserts that its "services rendered with respect to tangible personal property, such as furniture cleaning, are insignificant in comparison to the real property services provided, such as debris removal, water removal and moisture stabilization, HVAC cleaning, drywall removal, dust control and cleaning, and carpet and wallpaper removal." Water restoration, HVAC, and other services provided are in the nature of maintaining or repairing carpet, walls, air-conditioning and heating systems, and other parts of the real property upon which the services are performed. These services do not fall within the purview of section 212.05(1)(i), Florida Statutes, and Rule 12A-1.0091, Florida Administrative Code, which impose tax on the sale of nonresidential cleaning services.

CONCLUSION

The predominant nature of Taxpayer's services is to be determined on a contract by contract basis. Although it is generally assumed that the predominant nature of Taxpayer's contracts is that of improvements to real property, it is also assumed that Taxpayer could occasionally have a contract in which the predominant nature was that of a sale of (repair to) tangible personal property, or that clearly allocates the price among the various elements. On all contracts that do not clearly allocate the price among the various elements and in which the predominant nature is that of an improvement to real property, Taxpayer should follow the guidelines of Rule 12A-1.051(4), Florida Administrative Code, which states that Taxpayer owes tax on all materials and supplies it uses in the performance of a contract and that no tax is charged to the customer. To the extent that the predominant nature of a contract is that of a sale of tangible personal property, tax is charged on the total contract price to the customer, and Taxpayer does not owe tax on the materials that are incorporated into the repair. Likewise, to the extent Taxpayer enters into a contract that clearly allocates the price among the elements, the various elements are taxed according to their classification.

This response constitutes a Technical Assistance Advisement under Section 213.22, Florida Statutes, 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, Florida Statutes. 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, Florida Statutes, and are subject to disclosure to the public under the conditions of s. 213.22, Florida

Statutes. 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

Control #15463