

November 5, 2009

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Re: Technical Assistance Advisement 09A-055
Sales and Use Tax – XXX Service
Sections: 212.02 and 212.05(1), Florida Statutes (F.S.)
Rules: 12A-1.006 and 12A-1.040, Florida Administrative Code (F.A.C.)
Petitioner: XXX(herein after Taxpayer)
FEI: XXX

Dear XXX:

This letter is a response to your petition dated October 31, 2008, and the supplemental information provided under cover letter dated November 12, 2008, 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.

FACTS

As provided by the Taxpayer, the Taxpayer provides a service called "XXX." Taxpayer's request states that the project consists of using pipe, pumping equipment, etc. to remove water from the ground. The installation includes the drilling of holes in the ground to install wellpoints, swing joints and header pipe, which will then be connected to a pump to suction the water from the ground. All products are supplied by Taxpayer, including the pump, accessories, and installation labor to provide the XXX service. The project is quoted to the customer as a lump sum per month/week/day, and billed weekly. The quotation and invoice to the customer are not itemized and show one charge for dewatering service. The Taxpayer further states that the equipment remains at the job site until all ground water has been removed, and once removed, all equipment is returned to the Taxpayer.

The Taxpayer states that this process removes water from the ground for various purposes, such as installing sewers, pools, gas tanks, etc. below ground. Taxpayer's equipment is left at the job site until the customer calls and advises that the ground water

has been removed from the site which varies by job. Taxpayer's employees are not required to remain at the jobsite to operate the equipment during the dewatering process. The only labor required by Taxpayer's employees is to install or remove the XXX equipment. The Taxpayer bills its customer weekly. The first invoice provided the customer contains a charge for the dewatering installation costs, and the second and subsequent invoices are for the quoted weekly rental price. Copies of invoices presented for review reveal that the Taxpayer breaks out its charges as "rental" for the equipment provided, and as "services" for other charges, such as backhoe mobilization, loader NEFF rental, and dewatering service. The Taxpayer has been charging its customers sales tax on its dewatering services.

A review of the Taxpayer's web site revealed that the Taxpayer maintains a "rental" section in its business, and that its products were equipped with automatic priming and repriming capabilities; indefinite dry run capability with no harm to the unit; and, can run unattended for hours.

ISSUE

The issues in this case are whether the Taxpayer is engaged in a real property contract or the rental of tangible personal property, and the proper tax treatment of the equipment installation and removal services.

APPLICABLE LAW

Section 212.05, F.S., provides in pertinent part:

It is hereby declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of selling tangible personal property at retail in this state . . . or who rents or furnishes any of the things or services taxable under this chapter.
...

(1) For the exercise of such privilege, a tax is levied on each taxable transaction or incident, which tax is due and payable as follows:

* * *

(c) At the rate of 6 percent of the gross proceeds derived from the lease or rental of tangible personal property

Section 212.02, F.S., provides the following regarding the definition of terms used in Chapter 212, F.S.:

(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

Rule 12A-1.071, F.A.C., contains the Department's interpretation of the rental, lease, or license to use tangible personal property. Paragraph (1)(a) of the rule provides that the term "lease" includes any rental or license to use tangible personal property, unless a different meaning is clearly indicated by the context in which it is used. In addition, subparagraph (1)(c) of the rule provides that for an operating lease the tax applies to the gross proceeds derived from the lease of tangible personal property for the entire term of the lease when the lessor of such property is an established business, part of an established business, or leasing tangible personal property is incidental or germane to the lessor's business.

ANALYSIS and DISCUSSION

The Taxpayer asserts that the installation process of its service is considered an improvement to real property. Thus, the Taxpayer asserts that, since it is providing an installation service of labor only and removing the equipment from the jobsite once the water has been removed, this service qualifies as tax exempt labor only services.

The Taxpayer is not correct in its assumption that the installation of its XXX equipment is an improvement to real property. Pursuant to Section 212.06(14)(b), F.S., quoted above, a "fixture" must be permanently attached to the real property to qualify as "realty." In this case, the Taxpayer is temporarily installing pipe and other equipment in order to produce the desired results of "XXX" the specific job site. Once the jobsite is free of the unwanted water, the Taxpayer removes its equipment. Therefore, the Taxpayer's equipment is not, and is not intended to be, permanently attached to the real property.

Since the Taxpayer's services are not considered to be the improvement real property, it remains to be determined whether the Taxpayer is involved in the rental of tangible personal property. Section 212.05(1)(c), F.S., levies sales tax on the gross proceeds derived from the rental of tangible personal property. The sales price includes the amount charges, as well as any services that are a part of that sale. See Section 212.02(16), F.S.

The identity of a service that is "part of a sale," as required by Section 212.02(16), F.S., has been clarified in American Telephone and Telegraph Company v. Department of Revenue, 764 So.2d 665 (Fla. 1st DCA 2000).

In that case, the appeals court affirmed the conclusion of the trial court that certain engineering services were "inextricably intertwined" with the sales of the telecommunications equipment. *Id.* at 667. Also, the court found that there is no requirement that the purchases of services must be linked with tangible personal property. The court, referring to Section 212.02(16), F.S., stated that ". . . the Legislature chose not to limit the sales tax to services that must be purchased with

tangible personal property” Id. at 667. The court concluded that the intent of the statute did not limit the services in such a manner and that the court would “. . . have no authority to do so.” The court distinguished the Fifth District Court of Appeal opinion in Department of Revenue v. B&L Concepts, 612 So.2d 720 (Fla. 5th DCA 1993), which found no tax was due on the charge for delivering furniture. The court in American Telephone and Telegraph stated that the test is not whether such charges are optional. The real question is whether the sale of the service is incidental to the sale of property, whether the service is subordinate, having a minor role. In American Telephone and Telegraph, since the trial court found that the engineering services were clearly not incidental to the sale of the switching equipment, the services were part of the sales price of the equipment. Further, the appeals court held that services were not separate or discrete transactions but were “a part of the sale,” even when the sales prices of the services and of the tangible personal property were separately billed. Id. at 668.

In this case, the service of installing the required pipes and equipment is not incidental to the rental of the equipment. It is clearly not subordinate or a minor role in the process of XXX the customer’s jobsite, and is thus, “inextricably intertwined” with the rental of the equipment such as to become a part of the taxable sales price.

RESPONSE

Based on the discussion and analysis above, the Taxpayer is renting tangible personal property. Therefore, charges for the rental of the XXX equipment are subject to sales tax. Equipment installation and removal services are a part of the equipment rental charges and are also subject to sales tax.

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 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.

If you have any further questions with regard to this matter and wish to discuss them, you may contact me directly at (850) 922-4727.

Sincerely,

Horace Royals
Senior Tax Specialist
Technical Assistance & Dispute Resolution

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Record ID: 53807