

**TENNESSEE DEPARTMENT OF REVENUE  
LETTER RULING # 05-11**

**WARNING**

**Letter rulings are binding on the Department only with respect to the individual taxpayer being addressed in the ruling. This presentation of the ruling in a redacted form is informational only. Rulings are made in response to particular facts presented and are not intended necessarily as statements of Department policy.**

**SUBJECT**

Application of sales and use tax to the fabrication and installation of countertops.

**SCOPE**

This letter ruling is an interpretation and application of the tax law as it relates to a specific set of existing facts furnished to the department by the taxpayer. The rulings herein are binding upon the Department and are applicable only to the individual taxpayer being addressed.

This letter ruling may be revoked or modified by the Commissioner at any time. Such revocation or modification shall be effective retroactively unless the following conditions are met, in which case the revocation shall be prospective only:

- (A) The taxpayer must not have misstated or omitted material facts involved in the transaction;
- (B) Facts that develop later must not be materially different from the facts upon which the ruling was based;
- (C) The applicable law must not have been changed or amended;
- (D) The ruling must have been issued originally with respect to a prospective or proposed transaction; and
- (E) The taxpayer directly involved must have acted in good faith in relying upon the ruling; and a revocation of the ruling must inure to the taxpayer's detriment.

**FACTS**

[THE TAXPAYER] owns and operates a regional [BUSINESS]. The company is headquartered in Tennessee with additional stores located out-of-state. One of its Tennessee stores sells custom countertops. Once a customer selects a countertop at the Taxpayer's store, the Taxpayer subcontracts with a third party to fulfill the order. A representative from the third party measures the installation site to determine the size of countertop needed. The third party then manufactures the selected countertop using its

own materials, delivers the property to the residence, and attaches the countertops in the residence. The Taxpayer is only involved in the ordering and customer billing portion of the transaction and does not participate in the actual fabrication or installation of the countertop. Once the job is completed, the Taxpayer charges the customer one lump sum for the work done. The third party then bills the Taxpayer for the completed work.

## QUESTIONS

1. Does the Taxpayer owe sales and use tax on the purchase of raw materials used to fabricate and install the countertops?
2. Must the Taxpayer collect sales and use tax from its customers on the lump sum charge for the work performed?

## RULINGS

1. The Taxpayer is liable for sales and use tax on the materials used to fabricate and install the countertops unless the tax on such materials has already been paid.
2. The Taxpayer should not collect sales and use tax from its customers on the charge for providing and installing the countertops.

## ANALYSIS

### Applicable Case Law, Statutes, Rules and Regulations

In Tennessee the primary test for distinguishing chattels from fixtures is the intention and purpose of the installation. *Hubbard v. Hardeman County Bank*, 868 S.W.2d 656, 660 (Tenn.App.1993) quoting *Process Systems Inc. v. Huddleston*, 1996 WL 614526 (Tenn. Ct. App., 1996). Such intent may be shown by applying an objective test which considers the type of structure, the mode of attachment and the use and purpose of the property. *Harry J. Whelchel Company v. King*, 610 S.W.2d 710 (Tenn. 1980). Chattels are fixtures when they are so attached to real property that, from the intention of the parties and the uses to which such chattels are put, they are presumed to be permanently annexed. If the chattel is intended to be removable at the pleasure of the owner, it is not a fixture. *Magnavox Consumer Electronics v. King*, 707 S.W.2d 504 at 507 (Tenn. 1986) quoting *Hickman v. Booth*, 173 S.W. 438 (Tenn. 1914).

The Taxpayer is a “person”, as defined in Tenn. Code Ann. § 67-6-102(a)(25), for Tennessee sales and use tax purposes. The Taxpayer is also a “dealer” according to Tenn. Code Ann. § 67-6-102(a)(8)(K) which states that a dealer includes every person who:

Uses tangible personal property, whether the title to such property is in such person or some other entity, and whether or not such other entity is required to pay a sales or use tax, in the performance of such person’s contract or to fulfill such person’s contract obligations, unless such property has previously been subjected to a sales or use tax, and the tax due thereon has been paid.

Tenn. Code Ann. § 67-6-209(b) imposes Tennessee use taxes on the use of tangible personal property by a contractor in fulfillment of a contract. This part also provides that the Taxpayer is a “contractor.”

Where a contractor or subcontractor defined in this chapter as a dealer uses tangible personal property in the performance of the contract, or to fulfill contract or subcontract obligations, whether the title to such property be in the contractor, subcontractor, contractee, subcontractee, or any other person, or whether the title holder of such property would be subject to pay sales or use tax.... Such contractor or subcontractor shall pay a tax at the rate prescribed by Tenn. Code Ann. § 67-6-203 measured by the purchase price of such property, unless such property has been previously subjected to sales or use tax, and the tax due thereon has been paid.

TENN. COMP. R. & REGS. 1320-5-1-27(2) provides that there is no sales and use tax on charges made for the installation of tangible personal property which becomes a fixture.

Charges made for installing tangible personal property which becomes part of real property, are not subject to the Sales or Use Tax. The person so installing the property shall be liable for any Sales or Use Tax that may be due, if any, on the property bought and/or used in making the installation.

TENN. COMP. R. & REGS. 1320-5-1-1.03(2) provides that contractors must pay sales and use tax on the purchase price of the materials used in their work.

Contractors and sub-contractors who are not in the business of selling tangible personal property which they fabricate to erect or apply as a component part of a building shall pay the sales or use tax on the purchase price of the materials and supplies used in connection with their contract work.

#### Application of Case law, Statutes, Rules and Regulations

The countertops which the Taxpayer fabricates are custom-made to fit the customer’s specifications. The countertops are not free-standing structures nor are they easily removable. Once the countertops are installed, they remain permanently in place. They are not removed if the owner moves. The fact that the countertops are custom-made, their mode of attachment to the residence, their use and purpose, and the intent that they remain attached to the realty support the conclusion that they become a part of the realty to which they are attached and are real property fixtures rather than tangible personal property chattels. *Whelchel*, 610 S.W.2d at 713.

1. According to Tenn. Code Ann. § 67-6-209(b), the Taxpayer must pay sales and use tax on any tangible personal property used in fulfillment of the contract unless tax has already been paid. In the case of the countertops, the Taxpayer must pay sales and use

tax on the materials used to fabricate and install the countertops if the tax has not already been paid. Specifically, the Taxpayer must pay sales and use tax on the purchase price of the materials used in its work. TENN. COMP. R. & REGS. 1320-5-1-1.03(2).

The fact that the Taxpayer hires a third party to fabricate and install the countertop does not change the tax obligations. Even though the Taxpayer has contracted with a third party, the Taxpayer is still considered the user and consumer of the materials used in fabricating and installing the countertop. *See Woods v. M.J. Kelley Co.*, 592 S.W.2d 567, 572 (Tenn. 1980) (holding that hiring a subcontractor to install the material does not change use tax obligations). The subcontractor is liable for paying sales or use tax on the materials at the time of purchase. However, if sales or use tax is not paid, then the contractor is also liable for the tax. Although both parties remain liable until the tax is paid, the tax should only be paid once.

2. Whether the Taxpayer must collect sales tax from its customers depends on whether the countertops are considered fixtures or tangible personal property. TENN. COMP. R. & REGS. 1320-5-1-.27(2) provides that there is no sales and use tax on the installation of tangible personal property which becomes a fixture. Since the countertops in question become a part of the realty after installation, the Taxpayer should not collect sales and use tax from its customers.

Deborah A. Toon  
Tax Counsel

APPROVED: Loren L. Chumley  
Commissioner of Revenue

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