

**TENNESSEE DEPARTMENT OF REVENUE
LETTER RULING # 11-13**

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

The application of the Tennessee sales and use tax to the installation of tangible personal property.

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 retroactive revocation of the ruling must inure to the taxpayer's detriment.

FACTS

[TAXPAYER] is a custom woodworking company located in [STATE – NOT TENNESSEE]. The Taxpayer manufactures and installs custom woodworking and millwork such as cabinetry, wall paneling, base and crown moldings, [TYPE OF FURNITURE], etc. Most of the Taxpayer's work is done for [TYPES OF CUSTOMERS]. The products are manufactured to the customers' specifications in the Taxpayer's [CITY] plant and then delivered to the various job sites, including sites in Tennessee. If the products require installation, the Taxpayer will also install the products. The Taxpayer manufactures, sells, and installs both items that remain tangible personal property after installation and items that become attached to real property upon installation.¹

QUESTIONS

1. Is the sale and installation of the Taxpayer's products, when the products remain tangible personal property upon installation, subject to the Tennessee sales and use tax?
2. Is the sale and installation of the Taxpayer's products, when the products become attached to real property upon installation, subject to the Tennessee sales and use tax?
3. What are the Tennessee sales and use tax consequences when the Taxpayer, for a lump sum, sells and installs both products that remain tangible personal property and products that become attached to real property after installation?

RULINGS

1. Yes. The sale and installation of the Taxpayer's products, when the products remain tangible personal property upon installation, are subject to the Tennessee sales and use tax.
2. No. The sale and installation of the Taxpayer's products, when the products become attached to real property upon installation, are not subject to the Tennessee sales and use tax. However, the Taxpayer is subject to the contractor's use tax on the purchase price of the materials used to manufacture its products.
3. If the Taxpayer sells and installs both products that remain tangible personal property and products that become attached to real property after installation, but the charges for each

¹ Whether the tangible personal property installed remains tangible personal property after installation or becomes part of the realty must be determined on a case by case basis by applying the law of fixtures to the particular factual circumstances that exist. The Taxpayer has not asked for that determination to be made in this ruling. The Taxpayer has only asked about the tax consequences flowing from the characterization of the property following installation.

are separately itemized, then the sales and use tax consequences are the same as under Rulings 1 and 2. However, if the Taxpayer does not separately itemize, but rather charges one lump sum, then the entire lump sum sales price is subject to the Tennessee sales and use tax.

ANALYSIS

Retail sales of tangible personal property and specifically enumerated services in Tennessee are subject to sales and use tax under TENN. CODE ANN. § 67-6-101 *et seq.*, unless specifically exempted from taxation. TENN. CODE ANN. § 67-6-102(79) (Supp. 2010) defines a “retail sale” as any “sale, lease or rental for any purpose other than for resale, sublease or subrent.” The term “sale” is defined under the Tennessee sales and use tax laws in part as “any transfer of title or possession, or both, exchange, barter, lease or rental, conditional or otherwise, in any manner or by any means whatsoever of tangible personal property for a consideration.”² TENN. CODE ANN. § 67-6-102(81)(A).

TENN. CODE ANN. § 67-6-205(c)(6) (Supp. 2010) imposes the sales tax on the service of “installing of tangible personal property that remains tangible personal property after installation ... where a charge is made for the installation, whether or not the installation is made as an incident to the sale of tangible personal property ..., and whether or not any tangible personal property ... is transferred in conjunction with the installation service.” TENN. COMP. R. & REGS. 1320-5-1-.27 (2000) (“Rule 27”) further explains that the installation of items that become part of real property are not subject to the Tennessee sales and use tax. However, persons installing items that become affixed to real property may be subject to the contractor’s use tax on such items under TENN. CODE ANN. § 67-6-209(b) (Supp. 2010).

1. Sale and installation of items that remain tangible personal property upon installation

The sale and installation of the Taxpayer’s products, when the products remain tangible personal property upon installation, are subject to the Tennessee sales and use tax.

TENN. CODE ANN. § 67-6-202(a) (Supp. 2010) imposes the sales tax on the sales price of each article of tangible personal property that is sold at retail in Tennessee. As stated previously, a “sale” is a transfer of title or possession of tangible personal property for a consideration. TENN. CODE ANN. § 67-6-102(81)(A). The Taxpayer sometimes sells to its customers in Tennessee items, such as office furniture, that remain tangible personal property after installation. Thus, sales of these items are considered retail sales in Tennessee and as such are subject to the Tennessee sales and use tax under TENN. CODE ANN. § 67-6-202(a).

The sales price of the Taxpayer’s products is the total amount of consideration paid and includes any installation charges. TENN. CODE ANN. § 67-6-102(82)(A)(v). Accordingly, when the Taxpayer sells and installs products that remain tangible personal property after installation, the Taxpayer must collect and remit sales and use tax on the total amount paid for its products, including any charges for the installation of the products.

² TENN. CODE ANN. § 67-6-102(92)(A) defines “tangible personal property” as “personal property that can be seen, weighed, measured, felt, or touched.”

Alternatively, the installation of items that remain tangible personal property upon installation, where a separate charge is made for the installation, is a taxable service under TENN. CODE ANN. § 67-6-205(c)(6) (Supp. 2010), which imposes the sales tax on the sales price of the installation service. Thus, if the Taxpayer installs, as a separate service, items of tangible personal property that remain tangible personal property, the sales price of the installation service is subject to the Tennessee sales and use tax.

2. *Sale and installation of items that become attached to real property*

The sale and installation of the Taxpayer's products, when the products become attached to real property upon installation, are not subject to the Tennessee sales and use tax. However, the Taxpayer is subject to the contractor's use tax on the purchase price of the materials used to manufacture the products sold.

TENN. CODE ANN. § 67-6-205(c)(6) (Supp. 2010) imposes the sales tax on the retail sale of the service of installing "tangible personal property that remains tangible personal property after installation..., where a charge is made for the installation." In other words, the sales tax will be imposed when a taxpayer installs tangible personal property that does not become affixed to realty following installation. Conversely, the sales tax is not imposed when the installed tangible personal property becomes affixed to realty. Rule 27 clarifies this point, providing that "[c]harges made for installing tangible personal property which becomes a part of real property, are not subject to the Sales or Use Tax." Additionally, when the property becomes part of realty upon installation, there is no retail sale of tangible personal property to the taxpayer's customer. TENN. CODE ANN. § 67-6-209(c) (Supp. 2010). Instead, the contractor that sells and installs tangible personal property that becomes part of real property upon installation is considered the user and consumer of that property in fulfilling his or her contract. TENN. COMP. R. & REGS. 1320-5-1-.07 (2000). Thus, in this situation, there is no taxable retail sale of tangible personal property to the customer and no taxable installation service.

However, TENN. CODE ANN. § 67-6-209(b) provides that when a contractor uses tangible personal property in the performance of a contract, the contractor must pay a use tax on the purchase price³ of the property used. When the Taxpayer sells and installs products that become attached to real property upon installation, the Taxpayer is considered a contractor for purposes of the Tennessee sales and use tax. Accordingly, under these circumstances, the Taxpayer must pay Tennessee use tax on the purchase price of the materials used to manufacture and install its products. The Taxpayer may, however, take a credit for any sales and use tax already paid on the materials. TENN. CODE ANN. §§ 67-6-209(b) and 67-6-507(a) (Supp. 2010).⁴

³ TENN. CODE ANN. § 67-6-102(75) defines the term "purchase price" as having the same meaning as the term "sales price."

⁴ Note that if a contractor sold, as well as used, building materials and supplies and could not segregate upon purchase the materials and supplies used for specific jobs from those that the contractor will sell, then the contractor may purchase the materials and supplies on a resale certificate. However, the contractor must pay use tax on any materials or supplies that he later withdraws from his inventory in order to use in fulfillment of a contract. TENN. COMP. R. & REGS. 1320-5-1-.08 (1984).

Because the Taxpayer is a manufacturer of the products that it installs, TENN. CODE ANN. § 67-6-209(a) could also potentially apply, imposing the use tax on the fair market value of the products installed. TENN. CODE ANN. § 67-6-209(a) provides in pertinent part that “[w]here a manufacturer ... erects or applies tangible personal property, that the manufacturer ... has manufactured, ... such person so using the tangible personal property shall pay the tax levied in this section on the *fair market value* of such tangible personal property when used.” (Emphasis added.) However, TENN. CODE ANN. § 67-6-209(a) does not apply to a contractor who manufactures tangible personal property that becomes a component part of a building and is not sold by the contractor as a manufactured item. Based on the facts provided, it appears that the Taxpayer’s products become component parts of buildings upon installation and are not sold by the Taxpayer as manufactured items. Under these facts, TENN. CODE ANN. § 67-6-209(a) would not apply to the Taxpayer.

3. *Sale and installation of both items that remain tangible personal property upon installation and items that become attached to real property*

If the Taxpayer sells and installs products that remain tangible personal property upon installation as well as products that become attached to real property upon installation, but both types of products are separately itemized, then the sales and use tax consequences will be the same as if the products were sold separately. However, if the Taxpayer does not separately itemize, but rather charges one lump sum, then the entire lump sum sales price will be subject to the Tennessee sales and use tax under TENN. CODE ANN. § 67-6-202(a) (Supp. 2010). As stated above, however, the Taxpayer may take a credit for any sales and use tax already paid on the materials. TENN. CODE ANN. § 67-6-209(b) (Supp. 2010).

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APPROVED: Richard H. Roberts
Commissioner of Revenue

DATE: April 12, 2011