

Date Issued: September 16, 2015
Georgia Leter Ruling: LR SUT-2015-12
Topic: Contractors

This letter is in response to your request for guidance on the application of Georgia sales and use tax to contracts of Taxpayer.

Facts Presented by Taxpayer

Taxpayer is engaged primarily in the business of contracting to furnish and erect structural and miscellaneous requirements (beams, columns, trusses, bar joists, etc.) to be incorporated into real estate. Taxpayer takes delivery of raw materials at its Georgia facility, fabricates such materials into parts and structures, and then incorporates such structures into realty at a construction site (“erection sales”).

Occasionally, raw materials purchased by Taxpayer for a contract to be performed outside of Georgia are shipped directly to the job site rather than Taxpayer’s facility in Georgia. Taxpayer also fabricates parts and structures for sale outside the context of a construction contract (“non-erection sales”).

All parts are custom-fabricated as needed for each erection or non-erection sale. Taxpayer does not maintain an inventory of manufactured or fabricated products for sale to third parties or for use by Taxpayer in performance of its construction contracts.

Issues

- 1) Does Taxpayer owe Georgia use tax on materials delivered to Taxpayer’s facility in Georgia when such materials are further fabricated or modified by Taxpayer prior to being incorporated into realty by Taxpayer at job sites located outside Georgia?
- 2) Are materials purchased by Taxpayer for use in erection contracts that are subsequently further fabricated or modified by Taxpayer prior to being incorporated into realty subject to the withdrawal from inventory provisions of O.C.G.A. § 48-8-39(b)?
- 3) If Taxpayer pays sales or use tax on purchases of raw materials used for non-erection contracts, can Taxpayer take a credit or obtain a refund of such taxes when the materials are instead sold at retail?

Analysis

Georgia levies and imposes sales tax (subject to certain specific exemptions) on the retail purchase, retail sale, storage, use, or consumption of tangible personal property and on certain enumerated services.¹ Every purchaser of tangible personal property at retail in Georgia is liable for a tax on the purchase at the rate of 4 percent of the sales price of the purchase, plus any applicable local sales taxes.² The dealer making the taxable sale must collect the tax from the purchaser and remit the tax to the Department.³

“Retail sale” or “sale at retail” means a sale of tangible personal property to any person other than for resale.⁴ “Sale” means any transfer of title or possession, exchange, barter, lease, or rental, conditional or otherwise, in any manner, by any means of any kind of tangible personal property for a consideration.⁵ Each dealer must add the amount of the tax to the sale price or charge, and any dealer who neglects, fails, or refuses to collect the tax shall be liable for and

¹ O.C.G.A. §§ 48-8-1, -30(a).

² O.C.G.A. § 48-8-30(b)(1).

³ *Id.*

⁴ O.C.G.A. § 48-8-2(6)(A).

⁵ O.C.G.A. § 48-8-2(8)(A).

shall pay the tax himself.⁶ In addition, a purchaser of tangible personal property who does not pay the tax to the retailer is still liable for the tax.⁷

Georgia also imposes a tax on the storage, use, or consumption of tangible personal property if Georgia sales tax was not paid on the purchase of the property.⁸ Generally, this tax is referred to as “use tax.” O.C.G.A. § 48-8-30(c)(1) specifically provides that “[u]pon the first instance of use, consumption, distribution, or storage within this state of tangible personal property purchased at retail outside this state, the owner or user of the property shall . . . be liable for a [State] tax at the rate of 4 percent of the cost price . . .”⁹ Use means the “exercise of any right or power over tangible personal property incident to the ownership of the property.”¹⁰ Storage means “any keeping or retention in this state of tangible personal property for use or consumption in this state or for any purpose other than sale at retail in the regular course of business.”¹¹

In addition to the four percent state tax, local use tax rate will be due upon the first instance of use, consumption, distribution, or storage of such tangible personal property in a local jurisdiction. Because local county tax rates vary by county, the local county tax rate is dependent upon in which county the tangible personal property was used, consumed, distributed, or stored.¹² Thus, when a person purchases tangible personal property outside Georgia and subsequently brings the property into Georgia, that person is liable for Georgia state and local use tax. A credit is allowed against Georgia use tax due for like taxes previously paid in another state.¹³

O.C.G.A. § 48-8-39 addresses two specific taxable uses of tangible personal property. First, when a purchaser who buys property for resale makes any use of the property other than retention, demonstration, or display while holding it for sale, the use shall be deemed a retail sale at the time the property is first used.¹⁴ The purchase price of the property to the purchaser shall be deemed the gross receipts from the retail sale.¹⁵ Second, when a person who engages in the business of processing, manufacturing, or converting industrial materials into articles of tangible personal property for sale, whether as custom-made or stock items, makes any use of such property other than retaining, demonstrating, or displaying it for sale, the use shall be deemed a retail sale at the time the property is first used by such person.¹⁶ The fair market value of the property at the time of the use shall be deemed the sales price of the property.¹⁷

Based on the facts presented by Taxpayer, O.C.G.A. § 48-8-39 does not apply. Taxpayer does not purchase items for resale and subsequently use the items, and Taxpayer does not generally engage in processing, manufacturing, or converting industrial materials into articles of tangible personal property for sale.¹⁸ Rather, the contractor provisions of O.C.G.A. § 48-8-63 apply.

A person contracting to furnish tangible personal property and to perform services under the contract within Georgia is deemed the end user and consumer of the tangible personal property and is liable for sales tax at the time of the purchase.¹⁹ If sales tax is not paid at the time of purchase or the purchase is made outside the state, the purchaser is

⁶ O.C.G.A. § 48-8-35.

⁷ O.C.G.A. § 48-8-30(g).

⁸ See generally O.C.G.A. § 48-8-30.

⁹ If the item was purchased outside Georgia and used outside Georgia for more than six months, the owner of the property is then liable for tax at the rate of four percent of the cost price or fair market value of the property, whichever is less. O.C.G.A. § 48-8-30(c)(2).

¹⁰ O.C.G.A. § 48-8-2(40).

¹¹ O.C.G.A. § 48-8-2(35).

¹² The MARTA Act of 1965; O.C.G.A. §§ 48-8-1, -80, -100, -110, -140, -200, -240.

¹³ O.C.G.A. §§ 48-8-30(c)(3), -42. Local taxes are also subject to a credit for previously paid local taxes.

¹⁴ O.C.G.A. § 48-8-39(a).

¹⁵ *Id.*

¹⁶ O.C.G.A. § 48-8-39(b).

¹⁷ *Id.*

¹⁸ If Taxpayer were to fabricate an item for sale but instead of selling the item, make any use of the item, § 48-8-39(b) would apply.

¹⁹ O.C.G.A. § 48-8-63(b).

liable for the sales or use tax, even if the property is subsequently manufactured, processed, or converted before use in performance of services under the contract.²⁰ A contractor is the *per se* end user and consumer of tangible personal property purchased for use in performing contracts, and such property is not considered purchased by the contractor for resale.²¹ This is so regardless of where the actual construction under the contract occurs.²² Thus, if a contractor purchases tangible personal property outside of Georgia then stores or otherwise uses such property in Georgia, the contractor owes Georgia use tax, even if the property is to be used in performing a contract outside of Georgia.

Taxpayer is a contractor required to pay sales tax on its purchases of tangible personal property in Georgia. If Taxpayer purchases tangible personal property outside of Georgia, Taxpayer owes use tax when Taxpayer stores or otherwise uses such property in Georgia. The fact that Taxpayer performs the contracts outside of Georgia does not change this result. However, if taxpayer fabricates an item for sale (as with non-erection sales) and instead of selling the item makes any use of the item, other than retention, demonstration, or display, tax is due on the fair market value of the item at the time of such use.

If a contractor pays sales and use tax on purchases of raw material intended for use in contracts but which is ultimately sold at retail, the contractor may claim a refund of such taxes within three years after the date of payment of the taxes.²³

Rulings

- 1) Taxpayer owes Georgia sales or use tax on materials delivered to its facility in Georgia even when such materials are further fabricated or modified by Taxpayer prior to incorporation into realty at a job site outside of Georgia. Even if such purchases are not made from Georgia dealers, storing and fabricating the materials in Georgia are taxable uses.
- 2) Materials purchased by Taxpayer for use in erection contracts that are subsequently further fabricated or modified by Taxpayer prior to being incorporated into realty are not subject to the withdrawal from inventory provisions of O.C.G.A. § 48-8-39(b). As a contractor, Taxpayer is the end user and consumer of tangible personal property purchased for use in performing its contracts and is liable for sales and use tax on the purchase price of such property.
- 3) If Taxpayer pays sales or use tax on purchases of raw materials used for non-erection contracts then sells such materials at retail, Taxpayer can take a credit or claim a refund of such taxes within three years after the date the taxes are paid. The Department cannot address the sales or use tax consequences of retail sales that occur outside of Georgia.

The opinions expressed in this ruling are based upon the information contained in your request and limited to the specific transactions, facts, circumstances, and taxpayer in question. Should the circumstances regarding the transactions change or differ materially from those represented, this ruling may become invalid. Subsequent statutory or administrative rule changes or judicial interpretations of the statutes or rules upon which this ruling is based may subject similar future transactions to different tax treatment than that expressed in this ruling.

²⁰ *Id.*; Ga. Comp. R. & Regs. 560-12-1-.14(5)(e).

²¹ *Inglett & Stubbs Int'l, Ltd. v. Lynnette T. Riley*, 2015-2 Ga. Tax Tribunal at 15-17 (February 11, 2015) (“A contractor is the *per se* end-user consumer of the tangible personal property that it purchases to perform its contracts and the purchase by the contractor is a taxable retail sale upon which tax is due at that time.”).

²² *Inglett & Stubbs*, 2015-2 Ga. Tax Tribunal at 19 (holding that a contractor’s purchases of tangible personal property both inside and outside of Georgia, where the property was stored and repalleted in Georgia, were taxable, even though the property was to be installed under contracts performed in Afghanistan).

²³ O.C.G.A. § 48-2-35.