

Georgia Letter Ruling: LR SUT-2015-21
Dated: December 16, 2015
Topic: Contractors

Facts Presented by Taxpayer

[Redacted] (“Taxpayer”) produces, sells, and installs custom signs in Georgia. The signs are mounted to buildings or poles that are attached to real property by concrete. Taxpayer contracts with third parties for delivery and installation of the signs. Charges to the customer for surveys, permits, engineering, repairs, packaging, removal, freight, and installation are separately stated on the customer’s invoice. Taxpayer charges customers for freight and installation at a higher rate than Taxpayer’s cost.

Issue

How does sales and use tax apply to charges made by Taxpayer for the sale and installation of its signs?

Analysis

Georgia levies and imposes a tax (subject to certain exemptions) on the retail purchase, retail sale, rental, storage, use, or consumption of tangible personal property and on certain enumerated services.¹

Retail Sales

“Retail sale” or “sale at retail” means a sale of tangible personal property for any purpose other than for resale.² “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.³ A purchaser of tangible personal property or taxable services is liable for the tax at the rate of 4 percent of the sales price of the purchase, plus any applicable local taxes.⁴ The tax applies to the retail sales price of signs, posters, and other advertising displays.⁵ Sales price is the total amount of consideration for which tangible personal property is sold and includes charges by the seller for delivery and for services necessary to complete the sale.⁶ Delivery charges include charges for transportation, shipping, postage, handling, crating, and packing.⁷

Generally, a retail sale is sourced to the location where the purchaser takes possession of the tangible personal property.⁸ The dealer making the taxable sale must add the amount of both the state and local tax to the sales price or charge, collect both taxes from the purchaser, and remit both taxes to the Department.⁹ Any dealer who neglects, fails, or refuses to collect the tax shall be liable for and shall pay the tax.¹⁰ Tangible personal property that the dealer will sell at retail may be purchased by the dealer for resale without payment of sales or use tax.

In order for a purchaser to purchase tangible personal property without payment of Georgia sales and use tax, the purchaser must present certain documentation to the seller at the time of purchase. A list of the required documentation for each exemption is available at <http://dor.georgia.gov/documents/2015-list-sales-and-use-tax-exemptions>. The seller has the burden of proving that a sale of tangible personal property is not a taxable retail sale, unless the seller,

¹ O.C.G.A. §§ 48-8-1, -30(a). Exemptions from sales and use tax can be found in O.C.G.A. §§ 48-8-3 to -5.

² O.C.G.A. § 48-8-2(6)(A).

³ O.C.G.A. § 48-8-2(8)(A).

⁴ The MARTA Act of 1965; O.C.G.A. §§ 48-8-1, -80, -100, -110, -140, -200, -240.

⁵ Ga. Comp. R. & Regs. 560-12-2-.82.

⁶ O.C.G.A. § 48-8-2(34). The tax should be collected on the total amount charged to the customer for delivery and for the services necessary to complete the sale of the tangible personal property.

⁷ O.C.G.A. § 48-8-2(10).

⁸ O.C.G.A. § 48-8-77. Because local tax rates vary by county, the local county tax rate is dependent upon to which county the sale is sourced.

⁹ O.C.G.A. § 48-8-35.

¹⁰ *Id.*

in good faith, takes from the purchaser the appropriate sales and use tax exemption or resale documentation.¹¹

In this case, when Taxpayer transfers title to and/or possession of a sign to a customer for a consideration without also providing installation services, Taxpayer is making a retail sale of the sign. Taxpayer must collect the tax on the sales price of the sign, including the total charges to the customer for delivery, unless Taxpayer, in good faith, takes from the customer the appropriate sales and use tax exemption documentation.

Use Tax

Georgia also imposes a tax on the first instance of use, consumption, distribution, or storage in Georgia of tangible personal property purchased at retail outside Georgia.¹² The owner or user of the property shall be liable for a tax at the rate of 4 percent of the cost price, plus any applicable local taxes.¹³

Local use tax will be due upon the first instance of use, consumption, distribution, or storage of tangible personal property in a local jurisdiction. The local county tax rate is dependent upon in which county the tangible personal property is used, consumed, distributed, or stored.¹⁴ Local use tax may be due even when a use created no state tax obligation.¹⁵ For example, a construction contractor that purchases items in one county, pays state sales and use tax in that county, and then uses those items in another county may owe additional local tax on the use of the items in the other county even though the contractor owes no additional state tax.¹⁶ Additional sales or use tax due must be reported on the sales and use tax return for the period in which the additional tax becomes due.

Contractors

A person contracting to furnish tangible personal property and to perform services under a contract is deemed the end user and consumer of the tangible personal property and is liable for sales tax at the time of purchase.¹⁷ If sales tax is not paid at the time of purchase or the purchase is made outside the state, the purchaser is liable for the sales or use tax.¹⁸ 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 to be purchased by the contractor for resale.¹⁹ Tangible personal property incorporated into real property is deemed to be used up and consumed in performance of the contract and also is not purchased for resale.²⁰

Whether or not tangible personal property is incorporated into and becomes part of real property is a factor in determining whether a particular transaction is a retail sale or is a contract such that O.C.G.A. § 48-8-63 applies (as described in the previous paragraph). The tangible personal property being incorporated into real property weighs in favor of treating the transaction as a contract. Real property means land and the buildings thereon and anything

¹¹ O.C.G.A. § 48-8-38.

¹² O.C.G.A. §§ 48-8-1, -30(c).

¹³ O.C.G.A. § 48-8-30(c)(1). 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).

¹⁴ The MARTA Act of 1965; O.C.G.A. §§ 48-8-1, -80, -100, -110, -140, -200, -240.

¹⁵ *E.g.*, O.C.G.A. § 48-8-90; *C.W. Matthews Contracting Co. v. Collins*, 265 Ga. 448, 449 (1995).

¹⁶ *C.W. Matthews Contracting Co.*, 265 Ga. 448.

¹⁷ O.C.G.A. § 48-8-63(b).

¹⁸ *Id.*

¹⁹ *Inglett & Stubbs Int'l, Ltd. v. Lynnette T. Riley*, 2015-2 Ga. Tax Tribunal, pp. 15-17 (Feb. 11, 2015), *aff'd*, No. 2015CV257902 (Super. Ct. of Fulton Cnty.) (“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.”). “A contractor when fabricating personalty into realty neither sells, resells, sells at retail, nor can he be considered a retailer. . . . Sales to contractors are sales to consumers. . . .” *J. W. Meadors & Co. v. State*, 89 Ga. App. 583, 584 (1954).

²⁰ O.C.G.A. § 48-8-63(b); Ga. Comp. R. & Regs. 560-12-2-.26(1); *Troup Roofing Co. v. Dealers Supply Co.*, 91 Ga App 880 (1955).

permanently attached to land or the buildings thereon.²¹ “Fixtures” are classified as real property.²² “Fixtures” means tangible personal property that is intended to remain permanently in its place.²³ Whether personal property has become part of real property is determined by looking at various factors, including the degree of attachment, removability of the item, and intent of the parties.²⁴

Where Taxpayer contracts to sell and install a sign to a building or other structure permanently attached to real property such that the sign itself becomes part of the real property, Taxpayer is a contractor. Accordingly, Taxpayer is the end user and consumer of all tangible personal property used to fulfill the contract, including the sign itself, and is liable for sales and use tax on the purchase price of such property.²⁵ If Taxpayer purchases the signs or any other materials without payment of tax to Georgia (from, for example, an out-of-state supplier), Taxpayer is still liable for the tax to Georgia on the purchase price of those items.²⁶ When Taxpayer contracts for the sale and installation of a sign to a building or other structure permanently attached to real property such that the sign itself becomes part of the real property, Taxpayer is not required to collect the tax from the customer on any components of the contract, even if Taxpayer passes the costs on to the customer at a higher amount than Taxpayer paid.²⁷

Contracting With Sales and Use Tax Exempt Entities

A contractor performing a project for the government or another sales and use tax exempt entity is subject to Georgia sales and use tax in the same manner as any other contractor. The contractor cannot use the sales and use tax exemption of the government or other exempt entity. Furthermore, a contractor will owe use tax on the fair market value of any tangible personal property provided to the contractor by its customer for use in performing the contract when tax was not paid to Georgia on the purchase of the tangible personal property received.²⁸ If the tangible personal property is provided to the contractor by the government, the contractor will owe use tax on any tangible personal property that is used up and consumed in the performance of the contract, including items incorporated into real property.²⁹

Accordingly, when Taxpayer contracts to sell and install a sign for a government or other sales and use tax exempt entity, Taxpayer still owes the tax on its purchases of tangible personal property used to perform the contract and cannot use the customer’s sales and use tax exemption. In addition, Taxpayer will generally owe use tax on the fair market value of any property provided to Taxpayer by its customer for use in performing the contract when tax was not paid to Georgia on the purchase of the tangible personal property received.

²¹ O.C.G.A. § 44-1-2(a). *See also Fayette County Bd. of Tax Assessors v. Ga. Utils. Co.*, 186 Ga. App. 723, 725 (1988) (“[R]eal property includes not only the land but all improvements thereon.”); BLACK’S LAW DICTIONARY 1254 (8th ed. 2007) (defining “real property” as “[l]and and anything growing on, attached to, or erected on it, excluding anything that may be severed without injury to the land.”).

²² O.C.G.A. § 44-1-6(a). *See also* O.C.G.A. § 48-8-3.2(4).

²³ *Id.*

²⁴ *Homac, Inc. v. Fort Wayne Mtg. Co.*, 577 F. Supp. 1065, 1069-1070 (N.D. Ga. 1983); *Brown v. United States*, 512 F. Supp. 24, 25 (N.D. Ga. 1980). *See also* Ga. Comp. R. & Regs. 560-11-10-.02(1)(r), (w) (“A consideration for whether personal property is a real fixture is whether its removal would cause significant damage to such property or to the real property to which it is attached.”); *Wolff v. Sampson*, 123 Ga. 400, 402 (1905) (“Whether an article of personalty connected with or attached to realty becomes a part of the realty, and therefore such a fixture that it can not be removed therefrom, depends upon the circumstances under which the article was placed upon the realty, the uses to which it is adapted, and the parties who are at issue as to whether such an article is realty or detachable personalty.”).

²⁵ Because the sign itself is a fixture, it becomes part of the real property and is deemed to be used up and consumed in the performance of the contract (not a retail sale to Taxpayer’s customer).

²⁶ If in this situation, the property is purchased out of state, Taxpayer will owe use tax. Taxpayer may take a credit for taxes paid to another state, if applicable. Refer to the “Reciprocal Credit” section of this ruling for details on this point.

²⁷ Taxpayer is liable for tax on its purchases of items used to perform its contracts for the sale and installation of signs regardless of how Taxpayer structures the customer’s invoice (lump sum, sale of a sign with itemized installation charges, etc.).

²⁸ O.C.G.A. § 48-8-63(c).

²⁹ O.C.G.A. § 48-8-63(g), (h)(1).

Reciprocal Credit

A credit is allowed against Georgia sales and use tax for like taxes previously paid to another state.³⁰ This credit is given only for a like taxable incident that first occurs in another state where the tax to be collected in Georgia is based on a taxable incident occurring thereafter.³¹ In other words, the like taxes must have been *legally due* and paid first in the other state. The credit is not allowed for taxes paid to another state based on a taxable incident occurring after the taxable incident in Georgia. Thus, a credit for like taxes previously paid to another state will not be allowed if the tax to be collected in Georgia was legally due first in Georgia. Similarly, a credit is allowed for local taxes previously paid to another local jurisdiction.³²

To receive credit for like taxes previously paid to another state or local jurisdiction, the taxpayer must maintain records showing that the tax was billed and paid, the state or jurisdiction to which the tax was paid, and that the tax paid has not been refunded to the taxpayer. The Department may also require an affidavit to that effect.³³

Rulings

When making a retail sale in Georgia of only a sign (with no installation), Taxpayer must collect from the customer the state and local sales tax on the retail sales price of the sign, including delivery charges, unless Taxpayer, in good faith, takes from the customer the appropriate sales and use tax exemption documentation.

When Taxpayer contracts to sell and install a sign to real property such that the sign itself becomes part of the real property, Taxpayer is liable for sales or use tax on the purchase price of all tangible personal property used to perform the contract.

Because Taxpayer engages in both retail sales and contracts that include both tangible personal property and services, if Taxpayer purchases the tangible personal property without knowing whether the items will be used for a retail sale or for an installation contract, Taxpayer may purchase the items for resale and thereafter collect the sales tax from the customer on the retail sale or accrue use tax on the purchase price of the items used to perform the contract, as outlined above.

The Georgia Department of Revenue provides an email list for taxpayers to stay updated on important notices, new or updated regulations, and policy bulletins. To sign up for the email list, please visit <http://dor.georgia.gov/revenue-messenger>.

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 expressed in this ruling.

³⁰ O.C.G.A. § 48-8-30(c)(3).

³¹ *Hawes v. National Service Industries, Inc.*, 121 Ga. App. 775, 781 (1970).

³² O.C.G.A. § 48-8-30(c)(3). No credit is granted against the local sales tax due for tax paid in another jurisdiction if the tax paid in the other jurisdiction is used to obtain a credit against any other local sales or use tax levied in the special district or in the county which is coterminous with the special district. Ga. Comp. R. & Regs. 560-12-5-.07.

³³ Ga. Comp. R. & Regs. 560-12-1-.32(4).