

Georgia Letter Ruling: LR SUT-2017-01
Dated: January 24, 2017
Topic: Contractor, Real Property Improvements

This letter is in response to your request for guidance on the application of Georgia sales and use tax to custom storage products designed and installed by [redacted] (“Taxpayer”).

Facts Presented by Taxpayer

Taxpayer designs, engineers, manufactures, and installs custom storage products in new construction homes and existing homes. Storage systems may also be installed in businesses (custom offices or storage areas) from time to time. As of the date of this letter, Taxpayer does not sell without installation.¹ This process involves the following stages:

- a. A designer visits each home and measures (to the 1/16th of an inch) each area where custom storage units are desired.
- b. The designer then comes up with plans specifically for each area of the home where storage solutions are desired; these areas can include, but are not limited to, closets, pantries, offices, craft rooms, wall beds, garage cabinets, and entertainment centers.
- c. Taxpayer’s engineering team (and sometimes the designers) draws plans on a CAD (computer-aided drafting) program that gives the customer a drawing of each specific area where they are wishing to add cabinets. Each home is different; therefore, there are no two designs that are the same. The designs are 100% customized for each client’s home or business.
- d. Once the customer (either homeowner or builder) approves the drawn plans, a lump sum contract is drawn up and Taxpayer receives a 50% deposit upon execution of the contract and the balance is paid after the work has been completed.
- e. Once Taxpayer receives an executed contract, the engineering team reviews the CAD drawings for build-ability and technical accuracy then passes the file to the production department.
- f. Taxpayer’s production department receives the completed CAD file and begins the manufacturing process of the parts. This is done by “nested base routers” which drill and cut 4’x8’ or 5’x8’ sheets of melamine (laminated, pressed wood) into the specific parts needed to build the storage system.
- g. After the parts are cut, they are sent to an “edge-bander” where the edges of the parts are covered with a matching material to complete the look.
- h. Accessories such as belt racks and tie racks are then pulled from stock and placed with the closet parts.
- i. Taxpayer’s installation team (all employees, not contractors) then load the unassembled parts into a company-owned vehicle and go to the home where the product is permanently installed using a “cleat” system (the same as kitchen cabinets are installed). The closets/cabinets are screwed directly into the studs of the home and are “permanently” fixed. Some pieces of the closet are “above the floor” and some pieces are built “to the floor,” but regardless, they are always screwed into the studs. These units cannot be removed without causing major damage to the units themselves and to the underlying walls, and would not typically fit into any other space or home as they were custom designed and cut using the measurements for this particular space.

Taxpayer plans to expand its business model by receiving orders for custom closet/cabinets storage units, assembling parts to create the custom closet/cabinet storage units, and selling the custom closet/cabinets storage units to resellers of the storage units and not to either contractors (with a business model similar to Taxpayer’s current model) or to end-users.² Taxpayer expects that revenues from such sales will account for no more than [redacted] % of total annual revenue. As to such resale transactions, Taxpayer will continue to pay sales and use tax on purchases of raw materials.

¹ E-mail from Taxpayer’s attorney, [redacted], January 18, 2017.

² E-mail from Taxpayer’s attorney, [redacted], January 23, 2017.

Issues

1. For sales and use tax purposes, does Taxpayer, under its current model of doing business, sell tangible personal property or perform under real property contracts?
2. When Taxpayer expands its business and makes sales for resale, does Taxpayer have to collect sales and use tax on such transactions?

Analysis

Georgia levies and imposes a tax (subject to certain specific exemptions) on the retail purchase, retail sale, storage, use, or consumption of tangible personal property, certain enumerated services, and utilities.³ For purposes of this tax, “retail sale” means a sale of tangible personal property for any purpose 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 In the event of a retail sale, a dealer must add the amount of the tax to the sales price, and any dealer who neglects, fails, or refuses to collect the tax shall be liable for and shall pay the tax himself.⁶

Additionally, Georgia sales and use tax is imposed on the first instance of storage, use, distribution, or consumption of tangible personal property in Georgia. However, the relevant sales and use tax statutes are not construed to require a duplication in the payment of the tax. Thus, the tax imposed on the storage, use, distribution, or consumption of tangible personal property is generally only due if Georgia sales tax was not paid on the retail purchase of the particular property.⁷ Moreover, the tax is subject to a credit for like taxes previously paid in another state.⁸

Upon the retail purchase or the first instance of storage, use, distribution, or consumption of tangible personal property in Georgia, the owner or user of the property shall be liable for state tax at the rate of four percent of the purchase price plus applicable local tax, at a rate that varies by local jurisdiction.⁹ If such property is subsequently used in another local jurisdiction with a higher local tax rate, the taxpayer must also accrue and remit an additional amount of local use tax equal to the difference between the higher rate of the jurisdiction where the property is subsequently used and the lower rate of the jurisdiction where the property was initially used.¹⁰

Each person who contracts to furnish tangible personal property and to perform services under a contract in this state is deemed a contractor. Contractors are end users and consumers of the tangible personal property they buy, use, or consume in the performance of contracts, and such property is not considered to be resold by the contractor. Moreover, tangible personal property incorporated into real property loses its identity as tangible personal property and is statutorily deemed to be used up and consumed by the installer. As end users and consumers, contractors are liable for the tax on the purchase price of all tangible personal property used and consumed by them in the performance of contracts.¹¹ Any person so contracting who fails to pay the tax at the time of the purchase remains liable for the payment of the sales or use tax.¹²

³ O.C.G.A. §§ 48-8-1, 48-8-2(31)(A), and 48-8-30.

⁴ O.C.G.A. § 48-8-2(31).

⁵ O.C.G.A. § 48-8-2(33).

⁶ O.C.G.A. § 48-8-35.

⁷ O.C.G.A. §§ 48-8-1 and 48-8-30(c).

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

⁹ O.C.G.A. §§ 48-8-1, 48-8-30, 48-8-80, 48-8-100, 48-8-110, 48-8-140, 48-8-200, 48-8-240, and 48-8-260; MARTA Act of 1965.

¹⁰ See Ga. Comp. R. & Regs. r. 560-12-1-.14(3).

¹¹ O.C.G.A. § 48-8-63. Ga. Comp. R. & Regs. r. 560-12-2-.26(1). See *J. W. Meadors & Co. v. State*, 89 Ga. App. 583 (1954) (a contractor when fabricating personality into realty neither sells, resells, nor can he be considered a retailer); *Troup Roofing Co. v. Dealers Supply Co.*, 91 Ga. App. 880 (1955) (where building materials are purchased by contractor to be used in construction, improvement or repair of house of party who engages contractor, such materials are not bought for purposes of resale so as to be exempt from sales tax).

¹² O.C.G.A. § 48-8-63(b).

Whether or not tangible personal property is incorporated into and becomes part of real property indicates if a particular transaction is a retail sale or is a use by a contractor. In certain instances, materials or items that are attached to real property may retain their identity as tangible personal property after installation. In contrast, real property means land and the buildings thereon and anything permanently attached to land or the buildings thereon.¹³ Real property includes fixtures, which are tangible personal property that has been installed or attached to land or to any building thereon and that is intended to remain permanently in its place.¹⁴ Whether an article of tangible 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. An objective consideration for whether tangible property is a fixture is whether its removal would cause significant damage to such property or to the real property to which it is attached.¹⁵

Based on the specific facts presented by Taxpayer (e.g., the manner in which and degree to which the personalty is attached to and becomes a part of the realty and the general intent of the parties), Taxpayer constructs and installs materials or items that are attached to real property and do not retain their identity as tangible personal property after installation.

If Taxpayer expands its business and sells tangible personal property for resale, Georgia law imposes on Taxpayer the burden of proving that such sales of tangible personal property are not sales at retail, unless Taxpayer, in good faith, takes from its purchaser a certificate stating that the property is purchased for resale or is otherwise tax exempt.¹⁶ The certificate relieves Taxpayer from the burden of proof on sales for resale if Taxpayer acquires from the purchaser a properly completed certificate, taken in good faith, from a purchaser who:

Is engaged in the business of selling tangible personal property;

Has a valid sales tax registration number at the time of purchase and has listed his or her sales tax number on the certificate; and

At the time of purchasing the tangible personal property, the seller has no reason to believe that the purchaser does not intend to resell it in his or her regular course of business.¹⁷

Rulings

1. Articles of tangible personal property become part of real property when Taxpayer designs, cuts, and installs tangible personal property in a customer's home in the manner described. Because tangible personal property is incorporated into and becomes part of real property, the subject transaction is a use by a contractor, rather than a retail sale. As a contractor, Taxpayer is the end user and consumer of the tangible personal property Taxpayer buys, uses, or consumes in the performance of contracts. Accordingly, Taxpayer owes sales and use tax on everything it purchases to fulfill its contractual obligations in Georgia. In addition to tax at the state rate of four percent, local sales and use tax is accrued in the jurisdiction where the property is first purchased, used, or stored. If the property is later used in another locality with a higher local tax rate, Taxpayer must remit additional local use tax equal to the difference between the rates of the localities.
2. When Taxpayer expands its business and makes sales for resale, Taxpayer can meet its burden of proving a sale is for resale and will not have to collect sales and use tax on these sales if Taxpayer obtains in good faith a Georgia Department of Revenue Form ST-5 from Taxpayer's customer if the customer takes delivery in 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.

¹³ 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.”).

¹⁴ See O.C.G.A. §§ 44-1-6(a) and 48-8-3.2(a)(4) & (14).

¹⁵ *Homac, Inc. v. Fort Wayne Mtg. Co.*, 577 F. Supp. 1065 (N.D. Ga. 1983); *Brown v. United States*, 512 F. Supp. 24, 25 (N.D. Ga. 1980). See *Consolidated Warehouse Co. v. Smith*, 55 Ga. App. 216 (1937) (platform-scale bolted to sills embedded in cement was a permanent fixture where scale was placed on and attached to a foundation under the floor).

¹⁶ O.C.G.A. § 48-8-38(a).

¹⁷ O.C.G.A. § 48-8-38(c).