

Rulings of the Tax Commissioner

Document Number: 14-43
Tax Type: Retail Sales and Use Tax
Brief Description: Consuming contractor/Retailer? Out of state place of business
Topics: Computation of Tax; Credits; Exemptions; Tangible Personal Property; Taxable Transactions
Date Issued: 03/21/2014

March 21, 2014

Re: Request for Ruling: Retail Sales and Use Tax

Dear *****:

This reply is in response to your letter submitted on behalf of ***** (the "Taxpayer"), in which you request a ruling on the application of the Virginia retail sales and use tax to the sales and installations of certain products sold by the Taxpayer. I apologize for the delay in responding to your letter.

FACTS

The Taxpayer is a commercial interior finishing contractor located in Tennessee. The Taxpayer's contracting jobs consist of acoustical ceilings, decorative metal ceilings, carpet, resilient flooring, wood flooring, tile, blinds, shades, drapes and valances and cubicle curtains. The Taxpayer performs its contracts primarily in Virginia and Tennessee.

The Taxpayer was previously audited by the Department and deemed a retailer with respect to its sales and installations of blinds and shades. The Taxpayer does not contest the audit assessment but questions the application of the tax to its sales and installations of blinds, shades, drapes and valances (the "window treatments") and cubicle curtains. The window treatments and cubicle curtains at issue are described as follows.

- Blinds: the blinds are generally custom made to fit the inside of a window frame and are made out of materials such as wood or aluminum.
- Shades: the shades are generally custom fit to the inside of a window frame.
- Drapes and valances: these drapes and soft treatments can consist of cloth covered boards and are attached above the blinds. The drapes are

- cloth material and hang on rods.
- Cubicle curtains: the cubicle curtains create a separate space from the rest of a room for privacy purposes. The curtain installation consists of the installation of metal track systems, carriers and hanging of the privacy curtain.

Typically, the Taxpayer supplies and installs the window treatments and cubicle curtains in new and existing commercial and residential buildings. In some instances, the Taxpayer supplies and installs the window treatments and cubicle curtains on a subcontract basis and in other instances, the window treatments and cubicle curtains are supplied and installed in a contract directly with the customer.

The Taxpayer asks its questions in light of the fact that it is located outside of Virginia and performs jobs for a variety of customers in Virginia. These customers include general and residential contractors, businesses, individuals, exempt entities such as universities, schools, hospitals, nursing homes, churches, and federal and state governments. The Taxpayer also raises the issue of whether the application of the Virginia retail sales and use tax to the window treatments and cubicle curtains changes if such items are installed in new or existing construction.

RULING

While the Taxpayer has historically treated itself as a contractor regarding the sale and installation of its products, it must be determined whether the Taxpayer is a contractor or a retailer regarding the sale and installation of the window treatments.

Contractor or Retailer Designation

Virginia Code § 58.1-610 A provides that:

Any person who contracts orally, in writing, or by purchase order, to perform construction, reconstruction, installation, repair, or any other service with respect to real estate or fixtures thereon, and in connection therewith to furnish tangible personal property, shall be deemed to have purchased such tangible personal property for use or consumption. Any sale, distribution, or lease to or storage for such person shall be deemed a sale, distribution, or lease to or storage for the ultimate consumer and not for resale, and the dealer making the sale, distribution, or lease to or storage for such person shall be obligated to collect the tax to the extent required by this chapter.

Notwithstanding, *Va. Code* § 58.1-610 D provides an exception to the contractor rule and states:

Any person selling fences, venetian blinds, window shades, awnings, storm windows and doors, locks and locking devices, floor coverings (as distinguished from the floors themselves), cabinets, countertops, kitchen equipment, window air conditioning units or other like or comparable items, shall be deemed to be a retailer of such items and not a using or consuming contractor with respect to them, whether he sells to and installs such items for contractors or other customers and whether or not such retailer fabricates such items.

The window treatments at issue include blinds, shades, drapes and valances. Although the drapes and valances are not listed above, they are like or comparable items to the venetian blinds and window shades. Blinds and shades are affixed to windows for purposes of decor, light filtering and privacy. I find this to also be true of the drapes and valances. Therefore, the drapes and valances are considered comparable items to the venetian blinds and window shades for purposes of the exception.

Title 23 of the Virginia Administrative Code (VAC) 10-210-410, the regulation that interprets the contractor statutes, defines the term "retailer" for purposes of the exception. In Section G, a "retailer" is any person who:

- maintains a retail or wholesale place of business,
- maintains an inventory of the aforementioned items and/or materials which enter into or become a component part of the aforementioned items, and
- performs installation as part of or incidental to the sale of the aforementioned items.

The Taxpayer has its place of business at one location in Tennessee where it takes and receives sales orders, as well as negotiates job bids and contracts. At this site, the Taxpayer maintains a showroom and a warehouse. A tour of the Taxpayer's facility was conducted by the Department's auditor. Based upon the auditor's observations, the Taxpayer maintains in its showroom a supply of samples or sample books and displays. The warehouse stores materials, supplies and inventory ordered for specific jobs and leftover materials from prior jobs. The Taxpayer does not stock shelves with window treatments for sale to the general public, nor does the Taxpayer maintain an inventory of materials to complete such products. However, the Taxpayer does occasionally make over-the-counter retail sales of materials that it may have on hand.

In this instance, the Taxpayer maintains a wholesale place of business and performs installation as part of or incidental to the sale of its window treatment products. However, the Taxpayer does not maintain an inventory of window

treatments or component parts sufficient to complete a finished product. Although the Taxpayer supplies and installs window treatments that are subject to the exception, it is not a retailer as defined in the regulation. Therefore, the Taxpayer is deemed a using and consuming contractor with respect to real property when it supplies and installs its window treatment products. This decision is consistent with a number of prior rulings of the Tax Commissioner. I would draw your attention to Public Document (P.D.) 09-60 (5/5/09), as this document is instructive and addresses the issues of place of business and inventory. See also P.D. 09-157 (10/16/09), as it provides clarification regarding P.D. 09-60. In addition, see P.D. 97-315 (7/30/97), which addresses inventory.

Further, the retailer exception has no application to cubicle curtains. Therefore, the Taxpayer is a using and consuming contractor regarding sales and installations of these items.

Virginia Jobs

When the Taxpayer performs jobs in Virginia, it orders and receives the materials and supplies for those jobs at its Tennessee location. The Taxpayer then transports that property to the Virginia jobsite in its own delivery trucks. Because the Taxpayer is a contractor with respect to real property in Tennessee, and because it imports into Tennessee property used in the performance of real property jobs, it is considered the consumer of that property for Tennessee retail sales and use tax purposes. As such, Tennessee has the first right of taxation of such property. This means that the Taxpayer is required to remit the sales or use tax to Tennessee on the property imported into Tennessee for Virginia jobs.

The Taxpayer is also a contractor with respect to real property in Virginia and the consumer of the property for Virginia retail sale and use tax purposes. The property imported into Tennessee and subsequently delivered by the Taxpayer to the Virginia jobsite is subject to the Virginia use tax. To avoid the issue of double taxation, *Va. Code* § 58.1-611 provides the following:

A credit shall be granted against the taxes imposed by this chapter [*Va. Code* § 58.1-600 et seq] with respect to a person's use in this Commonwealth of tangible personal property purchased by him in another state. The amount of the credit shall be equal to the tax paid by him to another state or political subdivision thereof by reason of the imposition of a similar tax on his purchase or use of the property. The amount of the credit shall not exceed the tax imposed by this chapter.
[Insert added.]

The credit is generally applied in audit situations. Therefore, the Taxpayer should keep a complete record of purchases of property delivered to the Taxpayer's

Tennessee location that are subsequently transported for installation in the Virginia jobs. The Taxpayer should also keep a record of the tax returns and payments reported to Tennessee on the property installed in the Virginia jobs. When the Taxpayer is audited, a credit will be applied to any use tax liability assessed on this property. The credit amount will be the amount of the Virginia use tax that is due. Because Tennessee's sales and use tax rate is 7%, and Virginia's is 5.3% or 6.0% (depending on the location of the job), no additional Virginia use tax would be due from the Taxpayer on the property consumed in the performance of each Virginia job.

There are instances in which Virginia has first right of taxation regarding materials and supplies purchased by the Taxpayer for installation in Virginia real property jobs. First, if the Taxpayer comes into Virginia and physically purchases materials and supplies and, second if the Taxpayer orders materials and supplies from its Tennessee location and instructs the vendor to drop ship the property to the Virginia job site. In both instances, the property is not imported into Tennessee and there is no issue of double taxation. Also, if the Tennessee sales or use tax is not paid on property imported into Tennessee and brought into Virginia for installation in real property jobs, the Taxpayer must pay the Virginia use tax on such property.

Transactions Involving Exempt Entities

Title 23 VAC 10-210-410 A states that:

Tangible personal property incorporated in real property construction which loses its identity as tangible personal property and becomes real property is deemed to be tangible personal property used or consumed by the contractor...The dealer (supplier) making the sale, distribution, or lease to or storage for such a contractor must collect the tax from him. No sale to a contractor is exempt on the ground that the other party to the contract is a governmental agency, a public service corporation, a nonprofit school, or nonprofit hospital, or on the ground that the contract is a cost-plus contract. [Emphasis added.]

Although the *Code of Virginia* provides exemptions from the retail sales and use tax for purchases of tangible personal property by schools, hospitals, churches, governments and nonprofit organizations, such exemptions do not pass through or flow to the Taxpayer when it agrees to supply and install window treatments and cubicle curtains with respect to real property. This is true whether the Taxpayer is performing a job on a subcontract basis or when the job is performed directly for the exempt customer. See Tax Bulletin 92-2 (4/1/92) which specifically addresses contractors' sales to governments and public schools.

Installations in New or Existing Construction

The Taxpayer is a contractor with respect to real property whether such property is new, existing, commercial or residential. These are not factors that affect the application of the use tax when the Taxpayer contracts to supply and install window treatments and cubicle curtains.

Sales Without Installation

Please note that although the Taxpayer is considered a contractor, on those occasions when the Taxpayer makes over-the-counter sales of leftover materials, without installation, such transactions would constitute retail sales. Because the Taxpayer makes such sales from its business location, these sales would be subject to the Tennessee retail sales and use tax.

CONCLUSION

In accordance with the decisions made in this ruling, the Taxpayer is a consuming contractor with respect to real property for Virginia retail sales and use tax purposes. Therefore, the Taxpayer is subject to the use tax on tangible personal property purchased for use and consumption when it supplies and installs window treatments and cubicle curtains in the performance of real property jobs in Virginia. In those instances when the Taxpayer is required to pay the Tennessee sales or use tax on property consumed in Virginia jobs, and if an audit is performed, the Taxpayer will be allowed a credit applied to any Virginia use tax that may be due on such property. Moreover, the application of the Virginia retail sales and use tax, as discussed in this ruling, is not affected by the fact that the Taxpayer's customer may be an exempt entity or that such exempt entity is a party to the contract entered into by the Taxpayer. Furthermore, the application of the tax is not affected by the nature (new, existing, commercial or residential) of the property upon which the Taxpayer affixes its window treatments and cubicle curtains. Lastly, retail sales made by the Taxpayer, without installation, are subject to the Tennessee retail sales and use tax.

I trust I have responded to your questions. This response is based on the facts provided as summarized above. Any change in facts or the introduction of new facts may lead to a different result.

The *Code of Virginia* sections, regulation, public documents and tax bulletin cited are available on-line at www.tax.virginia.gov in the Laws, Rules and Decisions section of the Department's website. If you have any questions about this ruling, you may contact ***** in the Department's Office of Tax Policy, Appeals and Rulings at *****.

Sincerely,

Craig M. Burns
Tax Commissioner

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