



FLORIDA

Executive
Director
Leon Biegalski

August 30, 2017

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Subject: Technical Assistance Advise ment (“TAA”)
TAA 17A-018
Real Property Improvements

Section(s) 212.02(16), 212.05, and 212.06(14), Florida Statutes (“F.S.”)
Rule(s) 12A-1.051 and 12A-15.008, Florida Administrative Code (“F.A.C.”)

XXXXXXXX (“Petitioner”) (“Taxpayer”)
Business Partner#: XXXXXX
FEI#: XXXXXXXXX

XXXXXXXXXXXX (“Franchisor”)

Dear XXXX:

This letter is a response to your petition dated May 22, 2017, but mailed on July 8, 2017, for the Department’s issuance of a Technical Assistance Advise ment (“TAA”) to Petitioner, regarding whether Taxpayer is a seller of tangible personal property or a real property improvement contractor. Your petition has been carefully examined, and the Department finds it to be in compliance with the requisite criteria set forth in Rule Chapter 12-11, F.A.C. This response to your request constitutes a TAA and is issued to you under the authority of section 213.22, F.S.

Issue

Whether Taxpayer is a real property improvement contractor for purposes of Rule 12A-1.051, F.A.C.?

Facts

Engineered stone is manufactured by the Franchisor and is then sold to Taxpayer. Engineered stone is custom cut to client’s needs by either the Franchisor or Taxpayer. Re-facing products, tile, and mosaics are sold by the Franchisor to the Taxpayer. All other materials are purchased

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by Taxpayer from other vendors. All Franchisor's material suppliers are either Florida registered businesses or have nexus with Florida.

Taxpayer is a franchisee of Franchisor. Taxpayer is a kitchen and bath remodeling business, installing custom engineered stone countertops, new cabinets, or door and re-facing products and services. Taxpayer is the installer of tile and mosaic products. Taxpayer does not fabricate tangible personal property.

Taxpayer has a showroom location that displays materials available to potential clients. Taxpayer's customers are not allowed to purchase materials for self-installation. Taxpayer is the only installer of these materials offered at the showroom.

Taxpayer performs an in-home consultation with customers to discuss the project. If a customer wishes to proceed further, then a written XXXX is provided to the customer that contains a project description with a total price for the project.

In this agreement, the labor and material are not separately stated. Once the customer signs the agreement, a deposit is due and refundable for three days. After the three-day period, there is no refund. After the three-day period, Taxpayer orders materials from Franchisor and other vendors.

Taxpayer installs the tangible personal property to the customer's residence as permanent attachments, using permanent construction adhesives, product specific adhesives, screws, nuts, bolts, and other mechanical fasteners. Taxpayer's agreements with its customers do not address the acceptance of title or delivery by the customer prior to the time of installation.

Taxpayer Position

The installations are intended to be permanent, and are necessary to the proper functioning of the baths, showers, kitchens, and other areas where they are installed. Taxpayer believes it enters into lump sum contracts with its customers for the installation of items that become a real property improvement.

Taxpayer believes that sales tax is due on the purchases made from Franchisor and its other vendors. Taxpayer does not make retail sales of tangible personal property. Taxpayer believes that if Franchisor and Taxpayer's other vendors fail to collect sales tax, then Taxpayer should remit sales tax directly to the Department on its purchases of tangible personal property from Franchisor and Taxpayer's other vendors.

Requested Advisement

Taxpayer would like to know whether it is considered a real property improvement contractor and whether Taxpayer should collect sales tax from its customers or pay the tax on the purchase price of tangible personal property used in its contracts. Taxpayer would like to know the applicable County discretionary sales surtax.

Law and Discussion

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The primary issue identified by the request is whether Taxpayer is improving real property, or selling tangible personal property to Taxpayer's customers. Section 212.05(1)(a)1.a., F.S., applies to sales of tangible personal property. It provides, in part, the following:

It is hereby declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of selling tangible personal property at retail in this state

(1) For the exercise of such privilege, a tax is levied on each taxable transaction or incident, which tax is due and payable as follows:

(a)1.a. At the rate of 6 percent of the sales price of each item or article of tangible personal property when sold at retail in this state, computed on each taxable sale for the purpose of remitting the amount of tax due the state, and including each and every retail sale.

Section 212.06(14), F.S., provides, in part, the following:

(14) For the purpose of determining whether a person is improving real property, the term:

(a) "Real property" means the land and improvements thereto and fixtures and is synonymous with the terms "realty" and "real estate."

(b) "Fixtures" means items that are an accessory to a building, other structure, or land and that do not lose their identity as accessories when installed but that do become permanently attached to realty....

(c) "Improvements to real property" includes the activities of building, erecting, constructing, altering, improving, repairing, or maintaining real property.

Section 212.05, F.S., provides that the sale of tangible personal property is subject to sales tax on the sales price of the tangible personal property sold. The sales price can include the charge for installation and other services that are part of the sale of the tangible personal property. See s. 212.02(16), F.S., and Rule 12A-1.016, Florida Administrative Code ("F.A.C.").

Generally, stone masonry and tile installations are considered real property improvement contracts. See Rule 12A-1.051(17), F.A.C. Rule 12A-1.051(4), F.A.C., provides that real property improvement contractors are the ultimate consumers of materials and supplies they use to perform real property contracts and must pay tax on their costs of those materials and supplies. As to the issue whether Taxpayer's sales are for real property improvements, Rule 12A-1.051, F.A.C., applies. Rule 12A-1.051, F.A.C., provides, in part, the following:

(1) Scope of the rule. This rule governs the taxability of the purchase, sale, or use of tangible personal property by contractors and subcontractors who purchase, acquire, or manufacture materials and supplies for use in the performance of real property contracts

....

(2) Definitions. For purposes of this rule, the following terms have the following meanings:

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(c)1. "Fixture" means an item that is an accessory to a building, other structure, or to land, that retains its separate identity upon installation, but that is permanently attached to the realty. Fixtures include such items as ... built-in cabinets, counters

(h)1. "Real property contract" means an agreement, oral or written, whether on a lump sum, time and materials, cost plus, guaranteed price, or any other basis, to:

a. Erect, construct, alter, repair, or maintain any building, ... or other real property improvement;

c. Furnish and install tangible personal property that becomes a part of or is directly ... embedded in or securely affixed to ... a structure thereon.

Rule 12A-1.051(2)(c)3., F.A.C., provides that the determination whether an item is a fixture depends upon a review of all the facts and circumstances. When attachment of the tangible personal property is screwed or bolted in place and removal is impossible without causing substantial damage to the underlying realty, then the item attached tends to be considered a fixture. If the property holder who causes an item to be attached to realty intends that the item will remain in place for an extended or indefinite period of time, that item is more likely to be a fixture. If the property owner reports the value of the item for property tax purposes as realty and depreciates the item for federal income tax purposes as real property, this tends to indicate an intent that the property be permanently attached as a fixture. If items are custom designed or custom assembled to be attached in a particular space, they are more likely to be classified as fixtures. Customization indicates intent that the items are to remain in place following installation. Based on the information provided in the request, Taxpayer's installation services relate to fixtures.

Rule 12A-1.051(3), F.A.C., provides the classification of contracts by pricing. The taxability of purchases and sales by real property contractors is determined by the pricing arrangement in the contract. Contracts generally fall into different categories. As to lump sum contracts, the contractor agrees to furnish materials and supplies, and necessary services, for a single stated lump sum price.

Rule 12A-1.051(3)(d), F.A.C., address retail sale plus installation contracts. "These are contracts for improvements to real property in which the contractor or subcontractor agrees to sell specifically described and itemized materials and supplies at an agreed price or at the regular retail price and to complete the work either for an additional agreed price or on the basis of time consumed." For a contract to fit in this category, "all the materials that will be incorporated into the work must be itemized and priced in the contract before work begins. If a contract itemizes some materials but does not itemize other materials that will be incorporated into the work, the contract is not included in this category. Because the sale of the materials is a separable transaction from the installation, the purchaser must assume title to and risk of loss of the materials and supplies as they are delivered, rather than accepting title only to the completed work.... " (Emphasis added)

Response

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Based on the documentation and information provided, Taxpayer is a lump sum real property improvement contractor. Taxpayer does not issue contracts provided for by Rule 12A-1.051(3)(d), F.A.C., because Taxpayer's customers do not obtain title and assume risk of loss of the items installed until the items are attached as fixtures.

Taxpayer's sales are for real property improvements as provided by Rule 12A-1.051(4), F.A.C. Taxpayer is liable for the tax on its purchases of tangible personal property. Taxpayer's suppliers should be collecting and remitting sales tax on Taxpayer's purchases of stone, tile, mosaics, and other products used by the Taxpayer to complete the real property improvement contracts. The discretionary sales surtax is due based on where the tangible personal property is delivered. See Rule 12A-15.008(1)(a), F.A.C.

This response constitutes a Technical Assistance Advisement under section 213.22, F.S., which is binding on the Department only under the facts and circumstances described in the request for this advice, as specified in section 213.22, F.S. Our response is predicated on those facts and the specific situation summarized above. You are advised that subsequent statutory or administrative rule changes, or judicial interpretations of the statutes or rules, upon which this advice is based, may subject similar future transactions to a different treatment than expressed in this response.

You are further advised that this response, your request and related backup documents are public records under Chapter 119, F.S., and are subject to disclosure to the public under the conditions of section 213.22, F.S. Confidential information must be deleted before public disclosure. In an effort to protect confidentiality, we request you provide the undersigned with an edited copy of your request for Technical Assistance Advisement, the backup material and this response, deleting names, addresses and any other details which might lead to identification of the taxpayer. Your response should be received by the Department within 10 days of the date of this letter.

Respectfully,

Chuck Wallace

Chuck Wallace
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Record ID: 16435