



Florida Department of Revenue
Technical Assistance and Dispute Resolution

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QUESTION 1: Is Taxpayer in compliance with the Florida sales and use tax laws when it collects sales tax on its charges to customers for the sale and installation of Structure Signs and Freestanding Signs when such signs are installed at a location in Florida?

ANSWER 1: Yes.

QUESTION 2: Is Taxpayer in compliance with the Florida sales and use tax laws when it provides a Florida resale certificate to vendors in lieu of paying sales or use tax on its purchases of materials which will become a component of a Structure Sign or Freestanding Sign that will be installed at a location in Florida?

ANSWER 2: Yes.

QUESTION 3: Is Taxpayer in compliance with the Florida sales and use tax laws when it does not pay Florida sales or use tax on the cost of labor incurred in the fabrication of a Structure Sign or in the installation of a Freestanding Sign at a location in Florida?

ANSWER 3: Yes.

December 4, 2020

XXXXXXXXXX
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Re: Technical Assistance Advisement No. 20A-020
Sales and Use Tax – Fabrication Costs
XXXXXXXXXXXX (“Taxpayer”)
FEI No. XXXXXXXXX
BPN: XXXXXXXXX
Sections 212.02, 212.05, and 212.06(14), Florida Statutes (“F.S.”)
Rules 12A-1.016 and 12A-1.051, Florida Administrative Code (“F.A.C.”)

Dear XXXXX:

This letter is a response to your petition on behalf of XXXXXXXX (“Taxpayer”), dated February 13, 2020, for the Florida Department of Revenue’s (the “Department’s”) issuance of a Technical Assistance Advisement (“TAA”) with regards to whether Taxpayer is properly paying and collecting sales tax on its

sales of Structure Signs and Freestanding Signs that are installed in Florida. Your petition has been carefully examined and the Department finds it to be in compliance with the requisite criteria set forth in Chapter 12-11, Florida Administrative Code. This response to your request constitutes a TAA and is issued to you under the authority of s. 213.22, F.S.

Requested Advisement

1. Is Taxpayer in compliance with the Florida sales and use tax laws when it collects sales tax on its charges to customers for the sale and installation of Structure Signs and Freestanding Signs when such signs are installed at a location in Florida?
2. Is Taxpayer in compliance with the Florida sales and use tax laws when it provides a Florida resale certificate to vendors in lieu of paying sales or use tax on its purchases of materials which will become components of a Structure Sign or Freestanding Sign that will be installed at a location in Florida?
3. Is Taxpayer in compliance with the Florida sales and use tax laws when it does not pay Florida sales or use tax on the cost of labor incurred in the fabrication of a Structure Sign or in the installation of a Freestanding Sign at a location in Florida?

Brief Answer

1. Is Taxpayer in compliance with the Florida sales and use tax laws when it collects sales tax on its charges to customers for the sale and installation of Structure Signs and Freestanding Signs when such signs are installed at a location in Florida?

Yes.

2. Is Taxpayer in compliance with the Florida sales and use tax laws when it provides a Florida resale certificate to vendors in lieu of paying sales or use tax on its purchases of materials which will become a component of a Structure Sign or Freestanding Sign that will be installed at a location in Florida?

Yes.

3. Is Taxpayer in compliance with the Florida sales and use tax laws when it does not pay Florida sales or use tax on the cost of labor incurred in the fabrication of a Structure Sign or in the installation of a Freestanding Sign at a location in Florida?

Yes.

Facts As Provided

Taxpayer is engaged at its facilities in XXXXXXXXXX, Florida in the fabrication and installation of signs. All of the signs fabricated by Taxpayer are purchased by businesses and used for commercial purposes. Taxpayer fabricates three general types of signs:

- Signs that are shipped to and installed by the purchaser (either directly or using a third-party installer not affiliated with Taxpayer) (referred to herein as “Shipped Signs”).
- Signs that are installed by Taxpayer on a building or other structure (referred to herein as “Structure Signs”).
- Signs that are installed by Taxpayer on a post, piling(s) or similar support imbedded into the ground and which are not attached to any structure (referred to herein as “Freestanding Signs”).

This petition seeks a binding written opinion concerning only Structure Signs and Freestanding Signs.

As stated above, Structure Signs are attached to buildings and other structures. The method of attachment of such signs can vary depending on the size and style of the sign as well as the type of material to which it is to be attached. The most common method of attachment involves the use of metal bolts or rods that are affixed to the sign and the structure. These bolts or rods are affixed to the signs using threaded nuts or by welding or soldering and are attached to the structure using the same method or by imbedding in the structure.

As also stated above, Freestanding Signs are placed on a post, piling(s) or similar support imbedded into the ground. The supporting structure is typically mounted on a foundation fashioned from concrete. This is built in place or pre-made and then placed into the ground. Next, the post or piling is attached to the foundation through the use of bolts built into the foundation. However, in some cases, the post or piling is actually placed into the foundation and affixed with concrete or a high-strength adhesive. The sign is then affixed to the post or piling in a manner similar to that used to attach a Structure Sign to a building, that is, by using bolts or rods and threaded nuts or welding. As compared to the cost of the sign itself, the cost of the foundation is relatively nominal. More specifically, Taxpayer states that the cost of the foundations (material and labor, including installation at the site) is lower than the cost of producing the signs at Taxpayer’s facility. Several project examples of Taxpayer’s were provided along with the request for the TAA. These were provided in order to substantiate the costs involved in a typical project. Taxpayer also provided copies of invoices, proposals, and photographs of various projects. In these examples, the percentage cost of the foundations ranged between 16% and 38.65% of the cost of the total sign projects.¹

¹ The calculation for the last sign in the materials for the 7/30/20 presentation, the Elaborate Freestanding Sign for XXXXX, did not include the installation cost when the percentage of the foundation’s cost in relation to the total sign’s cost was determined. When the installation cost was included, the percentage of the foundation became 38.65% of the total project cost as opposed to 33.87%.

When Taxpayer issues invoices to its customers for Structure Signs and Freestanding Signs, these invoices set forth a single, lump sum charge for the installed sign. There is no separate statement on the invoice of the cost or charge for materials, fabrication labor or installation labor.

Both Structure Signs and Freestanding Signs can be removed from the realty to which they are attached without damage to the sign or the realty. Specifically, Structure Signs can be removed by detaching the threaded nuts or by cutting the rods or bolts and then detaching the sign from the structure. Depending on the customer's preference, the rods or bolts can be removed from the structure in the same manner – either removing the threaded nut or cutting the rod or bolt flush with the face of the structure.

The removal of Freestanding sign is similar in that the process begins by removing the sign from the metal support post by detaching the threaded nuts or cutting the bolt or rods. The post can then be removed from the foundation in the same manner or by cutting the post off at grade level. The remaining foundation can either be left in place and covered with dirt or other material or removed from the ground with the resulting hole in the ground being filled with dirt or other material. In the cases of larger, monument signs, where the base similar to a brick wall, Taxpayer can remove the sign but normally leaves the "monument" part of the structure at the location.

Throughout its XX-year history, Taxpayer has been engaged on many occasions to remove a Structure Sign, Freestanding Sign or both from a location. In some cases, the removed sign is then disposed of by Taxpayer or the customer but in a significant number of cases, Taxpayer re-installs the sign(s) at another location as directed by the customer. In some cases, the re-installed signs are re-furbished by Taxpayer prior to installation. The ability to easily and inexpensively change or remove a Structure Sign or Freestanding Sign as needed (e.g., due to business changes, logo changes or the need to physically move the location of a sign) is an appealing feature for Taxpayer's customers.

Taxpayer is registered as a dealer for Florida sales tax purposes. Taxpayer has been collecting and remitting Florida sales tax on its sales of Structure Signs and Freestanding Signs whenever the signs have been installed at locations in Florida. Taxpayer does not pay Florida sales or use tax on its purchases of materials used in its fabrication of Structure Signs or Freestanding Signs when the material becomes a part or component of the installed sign. Taxpayer does not itself pay Florida sales tax on any portion of labor costs incurred in its fabrication of Structure Signs or Freestanding Signs.

Taxpayer provided a copy of the proposals, which are included in many projects. The proposals indicate that Taxpayer holds title to the signs until the customer pays for them.

Taxpayer's Argument

The question of how Florida sales and use tax should be paid by a person who fabricates and installs signs turns on the determination of whether the sign becomes real property upon installation or remains tangible personal property. This is due to the scope of the Florida sales and use tax imposed under chapter 212, F.S. Generally speaking, the tax is not imposed on the sale or use of real property but is limited to the sale and use of tangible personal property (and certain designated services).²

² See s. 212.05, F.S.

Based on this aspect of the law (i.e., that sales tax does not apply to sales of real property), the Department has historically, by rule, taken the position that, when a contractor improves real property for a customer (such as by constructing a building), the contractor's lump sum charge to the customer is not subject to sales tax because it is, ultimately, a charge for real property and not a charge for the various items of tangible personal property used by the contractor to provide the improvement services.³ In such cases, however, the contractor is expected to pay sales tax on the materials used to perform the work.⁴ In addition, the contractor is also expected to pay use tax on its direct labor costs for any fabrication the contractor performs at a location other than the site of the improvement work.⁵ The general concept in this situation is that the contractor is the consumer of the materials and other taxable components of the work rather than a reseller of those materials and components.⁶

In contrast, where a contractor is engaged to install an item of tangible personal property and the item will not be viewed as becoming real property upon installation, the contractor is expected to collect sales tax on the amount charged to the customer for the property that is installed as a sale of tangible personal property (including the amount charged for the installation component).⁷ In such cases, the contractor is not expected to pay sales tax on its purchases of the items installed based on the sale-for-resale exemption (assuming all other requirements are met) or on its fabrication labor, regardless of where that fabrication is performed. The general concept in this scenario is that the contractor is reselling the materials and other components of the work to the customer rather than being a consumer of those materials and components.

A. Fixture Determination

In the present matter, Taxpayer believes that both Structure Signs and Freestanding Signs remain tangible personal property upon installation notwithstanding the fact that the signs are affixed to real property.

For sales tax purposes, the statutory and rule definitions of real property are virtually identical:

"Real property" means the land and improvements thereto and fixtures and is synonymous with the terms "realty" and "real estate."⁸

As seen in this definition, "improvements" to real property are also deemed to be real property. However, this term is not defined by statute and the rule definition is circular and unhelpful.⁹

The "real property" definition also includes "fixtures" and this term is defined by statute as:

³ See Rule 12A-1.051, F.A.C.

⁴ See Rule 12A-1.051(4), F.A.C.

⁵ See Rule 12A-1.051(10), F.A.C.

⁶ See Rule 12A-1.051(4), F.A.C.

⁷ See Rule 12A-1.051(6), F.A.C.; *see also* Rule 12A-1.016, F.A.C.

⁸ See s. 212.06(14)(a), F.S. *See also* s. 212.02(10)(h), F.S. (substantially similar definition). The rule definition is just slightly different and reads as follows: "'Real property' means land, improvements to land, and fixtures. It is synonymous with the terms 'realty' and 'real estate.'" *See* Rule 12A-1.051(2)(g), F.A.C.

⁹ "'Improvement to real property' or 'real property improvement' includes the activities of building, erecting, constructing, altering, improving, repairing, or maintaining real property." *See* Rule 12A-1.051(2)(d), F.A.C.

“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.¹⁰

In its rules, the Department provides a more extensive definition of this term.¹¹ The rule states that any determination concerning whether an item is considered to be a fixture depends on a review of all of the facts and circumstances and then sets out the following factors to be considered:

3.a. The method of attachment. Items that are screwed or bolted in place, buried underground, installed behind walls, or joined directly to a structure's plumbing or wiring systems are likely to be classified as fixtures. Attachment in such a manner that removal is impossible without causing substantial damage to the underlying realty indicates that an item is a fixture.

b. Intent of the property holder in having the item attached. 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. That intent may be determined by reviewing all of the property holder's actions in regard to the item, including how the item is treated for purposes of ad valorem and income tax purposes. For example, if a property owner reports the value of the item for purposes of ad valorem taxation of the realty and depreciates the item for tax and financial accounting purposes as real property, that indicates an intent that the property is permanently attached as a fixture.

c. Real property law. If an interest in an item arises upon acquiring title to the land or building, the item is more likely to be considered a fixture. For example, if the seller of real property would be expected to leave an item behind when vacating the premises for a new owner without the contract specifically requiring that it be left, that item is likely to be classified as a fixture.

d. Customization. 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.

e. Permits and licensing. If installation of an item requires a construction permit or licensing of the contractor under statutes or regulations governing the building trades, that item is more likely to be regarded as a fixture.

f. Legal agreements. The terms of any purchase agreement, deed, lease, or other legal document pertaining specifically to an item may be relevant in determining whether that item is a fixture of real property. The foregoing list of factors relevant to determining whether an item is a fixture is intended to be illustrative only. Additional factors may exist

¹⁰ See s. 212.06(14)(b), F.S.

¹¹ See Rule 12A-1.051(2)(c), F.A.C.

in any particular case, and the weight to be given to the factors will also vary in each case.
(*emphasis added*)

Each of these factors in the context of the facts and circumstances at issue herein will be addressed separately below.

Method of attachment

The method of attachment has been previously described. Although this rule provision states that, if an item is attached with screws or bolts, it is “likely to be classified as a fixture,” it also states that, if removal of the item is “impossible without causing substantial damage to the realty,” the item “is” a fixture indicator. Thus, it appears that the removal element is more important than the nature of the attachment. Indeed, it is easy to think of examples of items that are installed with screws or bolts that are readily removable from whatever they may be attached to. Regarding removal, it has been explained above that Structure Signs attached with bolts to buildings can be removed with no or only nominal damage to the building. Even with Freestanding Signs, actual damage to the realty (i.e., the underlying ground) in many cases is nominal or non-existent.¹² Also, the fact that the signs at issue are commonly removed and, in some case, installed at another location strongly supports the conclusion that the signs at issue are not fixtures.

Intent of the property holder

Taxpayer has not interviewed its customers to determine their intent concerning the signs or how they treat the signs for tax purposes. Rather, Taxpayer can only speak to its own experience in the business. That experience is that signs are often removed and either relocated or replaced. Taxpayer also believes that, in many cases, the “holder” of the realty rents rather than owns the realty and that, at the end of the lease, either the lessee removes the sign to another location or the lessor removes the sign anticipating a new lessee. Signs are usually so connected with the nature of a business that it appears contrary to logic to view signs as “permanent” in the same way that one would view a building or other structure or the underlying realty itself to be “permanent.” Common logic (and business sense) would certainly indicate that the intent with signs is that they are not intended to be permanent and are fully expected to be removed when the occupant of the realty closes or moves to another location.

Real property law

This provision references whether the item would be required to be left behind by a seller of the realty. As stated previously, Taxpayer’s experience has been that the signs would not be desirable to a new owner or occupant of a building because the signs make reference to the name and business of the prior owner or occupant. It seems unlikely in that case that the sign would be expected to be left behind by the prior owner/occupant. Indeed, the opposite is more likely – a new owner or occupant would most likely want the prior owner/occupant’s sign removed so that the new owner/occupant could install their own signage.

¹² See *F. W. Harvey v. Green*, 85 So. 2d 829 (Fla. 1956) (sale and installation of iron grill work to real property determined to be a sale and installation of tangible personal property for sales tax purposes).

It is also important to note that the signs at issue and, indeed, commercial signs generally, are not essential to the function of property to which they are attached which is an important element of the law relating to fixtures. A sign is certainly important to let prospective customers know the occupant's identity and business but not to the conduct of the business itself. For example, a pizzeria does not need its sign in order to be able to make a pizza any more than a widget maker needs a sign in order to be able to make widgets. Stated another way, the realty can be fully utilized for its intended purpose without a sign unlike other items typically considered to be fixtures because of their essential nature concerning the use of the realty.

Customization

This provision indicates that an item is more likely to be considered to be a fixture if it is "custom assembled to be attached in a particular space." In this case, the signs are certainly designed and fabricated in accordance with the customer's specifications and are usually unique to the customer and/or location. Contrary to the terms of this rule provision, this aspect of the signs actually is what makes them items that would likely not be desired by a new owner or occupant. Accordingly, it seems more likely that the "customization" referenced in this provision is more in the nature of being fitted or constructed in such a way that the item is useful only in that particular location and not in any other location. As explained previously, both types of signs at issue in this Petition can be removed and placed at another location if desired by the sign owner. In this case, Taxpayer believes that the custom nature of the sign actually is a factor in favor of the sign being considered to be personal rather than real property.

Permits and licensing

In order to install either a Freestanding or Structure Sign, Taxpayer must obtain a building permit from the local government entity responsible for issuing such permit for the location at which the sign will be installed. If the sign will be illuminated, Taxpayer must also obtain a permit for the electrical work. Taxpayer cannot, however, move power connections from another point to the sign location if such a move is necessary in order to get power to the sign location. Taxpayer is only allowed to connect the sign wiring to a power connection installed by another, properly licensed person. Taxpayer operates under its owner's specialty electrical contractor's license.

B. Mixed Contracts

Based on consideration of the above rule factors, Taxpayer believes that the Structure and Freestanding Sign should be considered to be personal rather than real property for sales and use tax purposes. It is possible, however, that the foundations for the Freestanding Signs could be considered to be real property upon installation. However, it should be recalled that the signs themselves can be removed from the foundation. This means, then, that the signs remain personal property while the foundation becomes real property.

The Department's rule addresses this situation where a person is fabricating, installing and/or constructing both personal and real property under a single contract. These types of contracts are referred to in the applicable rule as "mixed contracts:"

Mixed contracts. A real property contract may also include materials and labor that are not real property improvements. A contract that includes both real property work and tangible personal property is referred to in this subsection as a mixed contract. . . . A mixed contract is one that involves a real property improvement, maintenance, or repair and also involves providing tangible personal property that remains tangible personal property and does not become part of the real property. In the case of a mixed contract, ***taxability depends upon the predominant nature of the work performed under the contract*** and upon the contract terms.

(a) If the predominant nature of a mixed contract is a contract for ***real property*** improvements, taxability will be determined as if the contract were entirely for real property

(b) If the predominant nature of a mixed contract is a contract for ***tangible personal property***, taxability of the contract will be determined as if the contract were entirely for tangible personal property¹³ (*emphasis added*)

Thus, in order to **determine how** the contract is to be taxed, it is necessary to determine its predominant purpose. Pursuant to the rule, this determination is based on all of the facts and circumstances. In this regard, the rule references the description of the project, responsibilities of the contractor and the “relative cost of performance of the real property.”¹⁴

In the case of the Freestanding Signs, the description of the project is typically a simple statement that Taxpayer will fabricate, furnish and install the sign along with a reference to the specifics of the sign and the type of installation to be provided. Thus, the focus is on the tangible personal property, i.e., the sign. Importantly, the cost of performance is substantially higher for the fabrication of the sign (personalty) than for the construction of the foundation and the installation of the sign (real property improvement). As set out above, the project examples Taxpayer provided showed that the percentages of the costs of the foundations and the installation of the signs at the sites ranged from between 16% and 38.65% of the total contract cost for the sale and installation of a Freestanding Sign.

An example in Rule 12A-1.051, F.A.C., is quite analogous to the situation with the Freestanding Signs:

For example, ***a vendor of a mechanical conveyor system for a warehouse provides reinforced concrete foundations and embeds steel plates in the concrete to permit installation of the equipment by bolting it to the plates***. The contract is predominantly for the sale of equipment. The contractor should buy the equipment, concrete, and steel plates tax exempt by extending a copy of the contractor's Annual Resale Certificate (form

¹³ See Rule 12A-1.051(8), F.A.C.

¹⁴ See Rule 12A-1.051(8)(c), F.A.C.

DR-13) to the selling dealer and charge tax on the full price charged to the customer.¹⁵
(emphasis added)

This is no different from Taxpayer fabricating a sign, constructing the foundation and then bolting or otherwise attaching the sign to the foundation.¹⁶

Applicable Law and Discussion

Section 212.05, F.S., provides that all dealers selling tangible personal property must collect sales tax on the sale of tangible personal property. Section 212.02(15), F.S., includes within the definition of the word “sale” the transfer of title or possession of tangible personal property for consideration.

Real property improvement contractors are typically not considered to be engaged in selling tangible personal property. Rule 12A-1.051, F.A.C., provides the criteria to establish whether or not a contractor is a real property improvement contractor. The request identifies many of these criteria, including the intent of the parties, method of removal, the degree of customization, the required permits and licenses of Taxpayer, the real property law, and the requirements of the legal agreements between the parties.

Taxpayer established that the intent of the parties was, at some point in the future, to remove and replace the sign and possibly remove the foundation base. The signs were, in each instance, customized to the Taxpayer’s customer’s business. In addition, the signs in many cases, when required by the proposals, remained as personal property, with the title in the name of Taxpayer when attached and until such time as the sign had been paid for by the customer.

Taxpayer also identifies its projects as being mixed contracts, with a portion of the contract being for the sale of the sign and a portion of the contract being for the real property improvement of the foundation. Taxpayer established during the telephone conference, and through other information provided with the request, that the projects were predominantly for the production of tangible personal property. Rule 12A-1.051(8)(c), F.A.C., also provides, in relevant part, that “consideration will be given . . . to the relative cost of performance of the real property and tangible personal property components of the contract.” Based on the documentation submitted, the predominant cost of the signs was for the production of the tangible personal property aspects. This would support a finding that the predominant nature of the contract was a contract for tangible personal property. See Rule 12A-1.051(8)(a), F.A.C.

In light of the above, based on the documentation submitted, Taxpayer is a dealer selling tangible personal property, and it is required to collect sales tax on the full lump sum price of its invoices.

Conclusion

Taxpayer is in compliance with the Florida sales and use tax laws when Taxpayer: (1) collects the sales tax on its charges to customers for the sale and installation of Structure Signs and Freestanding Signs when

¹⁵ See Rule 12A-1.051(8)(b), F.A.C.

¹⁶ In further support of this determination, see *King’s Bay Yacht & Country Club*, 173 So. 2d 509 (Fla. 1st DCA 1965) (contract predominantly for the installation of tangible personal property is taxable as such notwithstanding incidental real property improvement also being conducted).

such signs are installed at locations in Florida; (2) provides a Florida resale certificate to vendors in lieu of paying sales or use tax on its purchases of materials which will become components of a Structure Sign or Freestanding Sign that will be installed at a location in Florida; and (3) does not pay Florida sales or use tax on the cost of labor incurred in the fabrication of a Structure Sign or in the installation of a Freestanding Sign at a location in Florida.

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 that 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 15 days of the date of this letter.

Sincerely,

Katharine Heyward

Katharine Heyward
Senior Attorney
Technical Assistance & Dispute Resolution

Record ID: 334196