

**TENNESSEE DEPARTMENT OF REVENUE
REVENUE RULING # 00-20**

WARNING

Revenue rulings are not binding on the Department. This presentation of the ruling in a redacted form is information only. Rulings are made in response to particular facts presented and are not intended necessarily as statements of Departmental policy.

SUBJECT

Application of Tennessee sales and use tax to the installation of glass windows in commercial buildings.

SCOPE

Revenue rulings are statements regarding the substantive application of law and statements of procedure that affect the rights and duties of taxpayers and other members of the public. Revenue rulings are advisory in nature and are not binding on the Department.

FACTS

The taxpayer is a contractor in the business of installing glass windows in commercial buildings. The installation may be part of a newly constructed building or may involve replacing glass in an existing building. Upon installation, the glass windows become part of the building for the entire useful life of the window.¹

The taxpayer purchases approximately 75% of his materials from dealers who collect sales tax. The remaining 25% of the materials are purchased from dealers who refuse to collect sales tax on the taxpayer's purchases.

The taxpayer uses the materials he purchases to complete his jobs. Occasionally, the taxpayer will purchase materials for a job that will not be completed for several months. This material is temporarily maintained in the taxpayer's inventory. The taxpayer does not resell the material. All material is used in performing the installation.

¹For purposes of this ruling it is assumed that the building itself is permanently attached to the realty.

ISSUES

1. Whether the taxpayer must pay sales or use tax on its purchases of materials used in the installation of glass windows.
2. Whether the taxpayer can use a resale certificate when purchasing materials used in the installation of the windows.
3. Whether the taxpayer should charge sales tax to its customers on the windows that it installs.

RULINGS

1. Yes. The windows become part of the real property upon installation. Therefore, the taxpayer must pay sales tax to its vendor when materials are purchased. If the vendor does not collect sales tax, the taxpayer must remit use tax directly to the Department of Revenue. If the vendor collects less than the applicable rate of tax in Tennessee, then the taxpayer must remit the difference directly to the Department of Revenue.
2. No. The materials purchased by the taxpayer are not resold, but are used by the taxpayer in the performance of its contracts to install windows. The taxpayer cannot use a resale certificate to purchase the materials it uses in the installation of windows.
3. No. Sales tax does not apply to the taxpayer's charges to its customers for the installation of windows.

ANALYSIS

The taxpayer is in the business of installing glass windows in commercial buildings. The tax consequences of installing tangible personal property differ depending on whether the property remains tangible personal property following installation or becomes part of the realty.

Whether the tangible personal property remains tangible personal property after installation or becomes part of the realty must be determined on a case by case basis by applying the law of fixtures to the facts at issue. The Tennessee Supreme Court has stated the test as follows:

“In Tennessee only those chattels are fixtures which are so attached to the freehold that, from the intention of the parties and the use to which they are put, they are presumed to be permanently annexed, or a removal thereof would cause serious injury to the freehold. The usual test is said to

be the intention with which a chattel is connected with realty. If it is intended to be removable at the pleasure of the owner, it is not a fixture.”

Magnovox Consumer Electronics v. King, 707 S.W.2d 504, 507 (Tenn. 1986).

In *General Carpet Contractors, Inc. v. Tidwell*, 511 S.W.2d 241 (Tenn. 1974), the Court examined carpet that was laid in a commercial building. The Court found that the carpet became part of the realty because the parties installed it with the intent that it remain in place for the length of its useful life. *Id.* at 243. Similarly, under the facts presented, the windows installed by the taxpayer are intended to remain part of the building for the useful life of the window. Accordingly, under these facts, the windows become part of the real property upon installation.²

Tenn. Comp. R. & Regs. 1320-5-1-.27(2) ("Rule 27") makes the following provisions concerning charges for installation of tangible personal property which becomes a part of real property:

Charges made for installing tangible personal property which becomes a part of real property, are not subject to the Sales or Use Tax. The person so installing the property shall be liable for any Sales or Use Tax that may be due, if any, on property bought and/or used in making the installation.

Charges for making an installation to real property are not subject to sales or use tax under Rule 27 because there is no sale of tangible personal property. See T.C.A. § 67-6-209(c).³

Since the windows are not sold by the taxpayer, he cannot use a resale certificate to purchase the materials. Tenn. Comp. R. & Regs. 1320-5-1-.68(3) ("Rule 68") provides as follows:

Certificates of resale may not be used to obtain tangible personal property or taxable services to be used by the purchaser, and not for resale; such use shall be grounds for the Commissioner to revoke the registration certificate of the dealer wrongfully making use of such certificate of resale. In addition to this penalty, it is a misdemeanor to misuse the certificate of registration and resale certificates for the purpose of obtaining tangible personal property or taxable services without the payment of the Sales or Use Tax when it is due.

² The rulings contained herein would not apply to the installation of tangible personal property that remains tangible personal property upon installation.

³T.C.A. § 67-6-209(c) provides in pertinent part that "the transfer of tangible personal property by a contractor who contracts for the installation of such tangible personal property as an improvement to realty does not constitute a sale...."

Instead, the taxpayer is the user and consumer of the materials purchased. The taxpayer, therefore, must pay sales tax to its vendor when the materials are purchased. If the vendor does not collect sales tax from the taxpayer, then the taxpayer must remit use tax directly to the Department of Revenue on the cost of the materials. If the vendor collects less than the applicable rate of Tennessee tax, for example if the material is purchased outside Tennessee and a lower sales tax rate is paid in the state of purchase, then the taxpayer must remit to the Department of Revenue the difference between the applicable Tennessee use tax and the amount of sales or use tax previously paid. These requirements are set out as follows:

Where a contractor or subcontractor hereinafter defined as a dealer uses tangible personal property in the performance of the contract, or to fulfill contract or subcontract obligations, whether the title to such property be in the contractor, subcontractor, contractee, subcontractee, or any other person, or whether the title holder of such property would be subject to pay the sales or use tax, except where the title holder is a church, private nonprofit college or university and the tangible personal property is for church, private nonprofit college or university construction, **such contractor or subcontractor shall pay a tax at the rate prescribed by § 67-6-203 measured by the purchase price of such property, unless such property has been previously subjected to a sales or use tax, and the tax due thereon has been paid.** The exemption provided for herein for private nonprofit colleges or universities shall apply only to the state portion of the sales tax....

T.C.A. § 67-6-209(b)(emphasis added).

In summary, the taxpayer installs windows that become real property upon installation. The taxpayer, therefore, is not in the business of selling tangible personal property. Charges made by the taxpayer to its customers are not subject to sales and use tax. The materials purchased by the taxpayer for installation are not resold, but are instead used by the taxpayer in the performance of its contract. The taxpayer cannot use a resale certificate to purchase the materials. Instead, it must pay sales tax to its vendor or remit use tax directly to the Department of Revenue if the vendor does not collect the tax.

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