North Carolina Department of Revenue

Beverly Eaves Perdue
Governor

David W. Hoyle
Secretary

December 7, 2010

[redacted]

Account ID: [redacted]

Re: Private Letter Ruling Request

Dear Mr. [redacted]

We have your letter dated October 22, 2010 requesting a written ruling on the classification of your company for sales and use tax purposes. Two examples of typical quote/estimate forms for a customer were included with your letter.

You stated the following in your correspondence: "In an effort to correctly set up our sales taxable status we are requesting your determination as to what type of business we are considered to be. We are referencing 'Sales and Use Tax Technical Bulletins' Section 31-1 Contractors, Subcontractors and Retailer-Contractors. Our business is a building and remodeling company specializing in kitchen and baths. We are also a dealership for two cabinet companies. The base of our business will be a showroom here in [redacted]County. It is our interpretation that we would be 'retailer-contractor' as described in 31-1C and are asking you to confirm this. If not, please tell us what our designation is with your department."

Sales and Use Tax Technical Bulletin 31-1A states, "Contractors are deemed to be consumers of tangible personal property which they use in fulfilling performance contracts and, as such, are liable for payment of the general rate of State tax and any applicable local sales or use tax on such property unless the property is exempt from tax by statute. In order to establish if a transaction constitutes a performance contract, the tenor of the agreement is for the contractor to perform a job, retaining the right to control the means, the method, and the manner of accomplishing the desired result. A performance contract does not provide for a sale of specific items; rather, the contractor agrees to furnish the necessary materials, labor, and expertise to accomplish the job. With a performance contract, responsibility for the job and title to the materials purchased by the contractor remain with the contractor until the job is completed and accepted by the purchaser/owner. The contractor is liable for accidents or injury at the job site and loss or damage due to vandalism, neglect, theft, and fire.

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"When a contractor or a subcontractor makes taxable purchases of tangible personal property from suppliers inside or outside this State who charge the applicable State and any local sales or use tax thereon, he shall remit the tax on such purchases to his suppliers. When a contractor or subcontractor makes taxable purchases of tangible personal property for use in this State from a supplier outside this State who does not collect the applicable State tax and any local sales or use tax thereon, such contractor or subcontractor must remit the tax directly to the Department."

Sales and Use Tax Technical Bulletin 31-1C states, "The term 'retailer-contractor' shall mean any person who engages in the business of selling building materials, supplies, equipment and fixtures at retail and, in addition to such business, enters into contracts for constructing, building, erecting, altering or repairing buildings or other structures, and for the installation of equipment and fixtures to buildings and, in the performance of such contracts as described in Paragraph A., consumes or uses such materials or merchandise.

" When a retailer-contractor as herein defined makes purchases of the above-named tangible personal property, a part of which he will use in performing contracts and a part of which he will sell at retail, the retailer-contractor shall furnish his supplier a properly executed Streamlined Sales and Use Tax Agreement Certificate of Exemption, Form E-595E. This form can be obtained from the North Carolina Department of Revenue website or the Taxpayer Assistance Division. The supplier shall keep the executed Certificate of Exemption for his records as his authority for not charging tax on the transaction. The retailer-contractor then becomes liable for remitting, directly to the Department, tax on the sales price of any tangible personal property sold at retail, and tax on the purchase price of any tangible personal property used in a performance contract."

Generally, a sales agreement provides for the sale of specific items or quantities of tangible personal property, and for an additional charge, the vendor will erect, install, or apply the property. The tax base for this type of transaction is the "sales price" of the property sold and the installation labor is exempt from the tax provided it is separately stated on the customer's invoice and in your records. Sales and Use Tax Technical Bulletin 41.2 states, "Sales to users or consumers of tangible personal property, including articles fabricated by the vendor, which the vendor contracts to install are subject to the sales or use tax and persons making such sales must register with the Department and collect and remit all tax due. If the vendor makes a charge for installing articles of tangible personal property which he sells, the charge for installation will not be subject to tax provided it is in addition to the sales price of the property and is stated separately on the customer's invoice and in the vendor's records. If the installation charge is not separately stated, the entire amount will be taxable."

A construction or performance type contract does not provide for the sale of specific items or quantities of property to a consumer but rather, it requires the contractor to furnish the necessary materials, labor and expertise to accomplish a particular result or a particular job. In performance contracts, the total responsibility for the job until it is completed and turned over to the owner generally rests upon the contractor. Title to any materials purchased by the contractor passes to the contractor. The contractor usually bears the responsibility and liability for any accidents or injuries at the job site. The liability for loss or damage due to acts of vandalism, neglect, theft and fire is also the responsibility of the contractor. In the case of a performance contract, the tax is due on the contractor's cost of materials used in fulfilling the contract. The contractor should take the amount of tax into account in quoting the contract

price; however, the tax should not be invoiced to the customer as a separate item since the contractor is not making a retail sale.

Sales and Use Tax Technical Bulletin 31-1E states, "For a performance contract as described in Sales and Use Tax Technical Bulletin Section A. of this Bulletin, the charge for materials and labor may be shown separately in the job cost file but shall not be shown separately on the customer's invoice. The tax shall not be added to the agreed-upon price as a separate charge on the invoice but shall be included in the computation of the cost of the materials necessary to perform the contract. If the vendor/contractor does show the materials and installation separately and adds the sales tax as a separate item on the invoice or statement provided to the purchaser/owner, the vendor/contractor shall be deemed to be making sales and collecting sales tax for which he shall be liable for payment to the Secretary of Revenue."

You provided two examples of typical quote/estimate forms given to customers by your firm. Example number one is an estimate for a kitchen with an itemization of the project by tangible personal property and labor and an amount your firm is charging the customer is listed for each part of the project. This particular example appears to be structured as a sales and installation agreement because the charge for materials and labor is shown separately on the customer's invoice. If your firm chose to structure its invoice in this manner, tax would be due on any tangible personal property. Example number two shows a total price of the proposed project and appears to be a performance contract agreement.

This ruling is based solely on the facts submitted to the Department of Revenue for consideration of the transactions described. If the facts and circumstances given are not accurate, or if they change, then the taxpayer requesting this ruling may not rely on it. If a taxpayer relies on this ruling and the Department discovers, upon examination, that the fact situation of the taxpayer is different in any material aspect from the facts and circumstances given in this ruling, then the ruling will not afford the taxpayer any protection. It should be noted that this document is not to be cited as precedent and that a change in statute, a regulation, or case law could void this ruling.

Very truly yours,

[redacted]
Administration Officer
Sales and Use Tax Division

Enclosure

cc: [redacted] Director of Sales Tax
[redacted] Assistant Director Sales and Use Tax