



North Carolina Department of Revenue

Beverly Eaves Perdue
Governor

David W. Hoyle
Secretary

Account ID: [REDACTED]

FEIN: [REDACTED]

March 30, 2012

[REDACTED]

Re: Request for Private Letter Ruling

Dear Mr. [REDACTED]:

We are in receipt of your letter dated November 4, 2010, in which you have requested a private letter ruling regarding the application of North Carolina sales and use tax on business transactions your firm has with customers in this State.

It is our understanding that [REDACTED] is a North Carolina-based firm engaged in the Heating and Air Conditioning (HVAC) industry. The business activities include both commercial and residential equipment installations and replacements, as well as commercial and residential service and repairs to existing systems.

In your correspondence, you advise that you currently classify your business transactions into either (a) Service and Repair or (b) Replacement of Existing Systems, and that you currently apply North Carolina sales tax as follows:

Service and Repair

If a technician is dispatched, diagnoses a problem and makes a repair, a customer is billed for parts required for the repair, sales tax applied to those parts (at retail cost plus markup) and labor charges. You describe this, in your correspondence as "[n]o heat or cooling call to John Doe. The technician finds a bad fan motor, makes repair and bills..." You advise that when you buy such parts, you do not pay sales tax on the purchases.

Replacement of Existing Systems

If a customer requests a replacement of an existing system or installation of a new system in conjunction with new construction, you quote the customer a lump-sum price and show no breakdown of cost to the customer. You state that "when I am quoting the job to the customer, I give them a lump sum price to perform the job. I show no breakdown cost to the customer." On your own internal quote sheets, you compute North Carolina sales tax based on the wholesale cost of materials/equipment provided, as adjusted with an appropriate markup rate. Since a customer is quoted a lump-sum price, there is no itemization of materials, labor or related taxes

that you compute in arriving at the lump-sum price reflected on the invoice. You advise that when you buy equipment/materials/parts to be used in these jobs, you do not pay sales tax on the purchases.

Analysis

Per North Carolina Sales and Use Tax Technical Bulletins Section 31-1A, 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."

North Carolina Sales and Use Tax Technical Bulletin Section 31-3 A. states in part, "[c]ontractors are deemed to be the users or consumers of building materials and other tangible personal property which they use in the performance of lump sum, cost-plus or time and material contracts to furnish and install a . . . heating, air conditioning . . . system or which they use in making repairs, alterations or additions to an existing system. Contractors are therefore liable for payment of tax on their purchases of such property. The charge for the materials 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 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 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."

Conclusion

Based on information provided, it is our opinion that [REDACTED] currently is deemed a retailer as a result of separately stating materials, labor, and tax on the invoices provided to customers and is therefore subject to the North Carolina Sales and Use Tax provisions of Technical BulletinSection 31-3.

Based on your assertions, it is our understanding that [REDACTED] does not carry any levels of inventory for sale and that, generally, equipment and supplies are purchased as needed for either service and repair or systems replacement jobs/contracts. Therefore, the Department recognizes that in the event [REDACTED] opts to change its current billing process, [REDACTED] can operate as a contractor.

In the event [REDACTED] plans to change its billing process and wishes to operate as a contractor, the Department suggests that such change be made no sooner than the first day of a month on or after sixty days from the date of this letter. If the corporation wishes to operate as a contractor for sales and use tax purposes, sales tax should be paid at the point of purchase on such tangible personal property in this State. [REDACTED] should advise vendors of the change by letter and request that any previously issued certificates of resale or other exemption information noted in the vendors' files are being rescinded as of the effective date of the change. To the extent any tangible personal property is purchased from out-of-state vendors and North Carolina sales tax is not charged, [REDACTED] should accrue and remit the applicable use tax due to the Department.

Note that, for certain purchases by manufacturing and qualifying industries, North Carolina imposes a mill machinery privilege tax in lieu of the general sales and use tax. Accordingly, purchases by contractors and subcontractors of mill machinery or mill machinery parts or accessories for use by them in the performance of contracts with manufacturing industries and plants, and purchases by subcontractors of mill machinery or mill machinery parts or accessories for use by them in the performance of contracts encompassed in such contracts with manufacturing industries and plants are subject to the 1% privilege tax, with a maximum tax of \$80.00 per article where applicable. Such mill machinery or mill machinery parts or accessories must be for use by a manufacturing industry or plant in the production process, as the term "production" is defined in Sales and Use Tax Technical Bulletin 57-1, to qualify for the 1% privilege tax with a maximum of \$80.00 per article when purchased by such contractors or subcontractors. If applicable to your business, you may obtain the **Streamlined Sales and Use Tax Agreement Certificate of Exemption, Form E-595E**, from the North Carolina Department of Revenue website to be executed and furnished to vendors in connection with such purchases as the vendors' authority to exempt the transaction from the sales and use tax. The privilege tax is remitted via Form E-500J, "Machinery and Equipment Tax Return" and requires a Machinery, Equipment, and Manufacturing Fuel Tax Account. Additionally, a separate registration will be required for your company either through the online registration process or by submitting Form NC-BR, Business Registration Application for Income Tax Withholding, Sales and Use Tax, and Machinery and Equipment Tax.

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 factual 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.

If you have any questions, you may contact me at the telephone number listed below.

Very truly yours,



Administration Officer
Sales and Use Tax Division

cc: , Director - Sales and Use Tax Division