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TAXABILITY OF INSTALLATION CHARGES UNDER THE MICHIGAN SALES AND USE TAX

INTRODUCTION

Sales tax is applicable on the sale of tangible personal property at retail.¹ Sales tax is not applicable on the sale of services where there is no transfer of ownership of tangible personal property.

Where a sale includes both the taxable transfer of ownership of tangible personal property and the performance of tax exempt services, a single mixed transaction, the Supreme Court has provided a six part test, the incidental to service test, to determine if the transaction is a tax exempt service or the taxable sale at retail of tangible personal property.²

The General Sales Tax Act recognizes that a taxpayer may be engaged in both taxable sales as well as nontaxable sales and provides that the entire transaction will be subject to sales tax unless the taxpayer's books separately identify the taxable and nontaxable sales.³

The sales tax base is defined by statute to be "gross proceeds" as "sales price" and includes the total amount of consideration without any deduction for services incurred before the transfer of ownership of the property.⁴

In 2004, Public Act 173, effective September 1, 2004, amended the General Sales Tax Act to include in sales price installation charges incurred before the completion of the transfer of ownership of tangible personal property.⁵

There are two critical factors which must be accurately determined before a correct calculation of tax base and sales tax can be determined. The first is at what point does a transfer of ownership of tangible personal property occur and to what extent is the taxpayer engaged in a separate nontaxable activity. The final issue is the effect of installation performed by a third party.

¹ MCL 205.52(1)

² *Catalina marketing Sales Corporation v Michigan Department of Treasury*, Michigan Supreme Court Docket No. 121673 and No. 121674

³ MCL 205.52(3)

⁴ MCL 205.51(1)(d)(ii)

⁵ MCL 205.51(1)(d)(v)

Transfer of Ownership

For purposes of this RAB, the statutory phrase “transfer of ownership” is synonymous with the term “transfer of title” used in the Michigan Uniform Commercial Code and the courts.

The legal question is whether legal title or ownership to tangible personal property passes from the seller to the customer at the sellers shipping dock or after installation is completed at the customers place of business. If title passes at the shipping dock, the installation charges are not included in the sales tax base. If title or ownership passes after installation, then the installation charges are included in the sales tax base.

The Michigan Uniform Commercial Code⁶ specifies that title to the goods pass from the vendor to the customer at that time when all the conditions for the sale have been completed. This determination is factually based and should include a complete review of not only the sellers books and records, but also the purchasers books and records.

The key factual determination is the obligations of the seller and at what point of time the seller completes its obligation to the purchaser. Is the seller obligated to install the tangible personal property at the purchaser’s place of business or other location designated by the purchaser?

Obligations of the Seller

The issue involves the seller’s obligation as to when and at what point title to property or ownership transfers from the seller to the purchaser. If title or ownership transfers prior to the point and time installation is completed, then the installation charge is not included in the sales tax base. If title or ownership transfers at the point and time after installation is complete, then the installation charge is included in the tax base. There are no judicial decisions based on pre 2004 law. However, the courts have addressed the transfer of title or ownership issue in other contexts and have provided guidance on factors to be considered.

Courts have considered the location of transfer of title, possession, risk of loss, delivery. Although the statute imposes the sales tax on the transfer of “ownership,” there is no authority to support the imposition of sales tax merely by delivery of documents of title, or by execution of a sales contract in Michigan, regardless of where the property is installed. Under Michigan law, title passes to the buyer at the time and place at which the seller completes his performance⁷ with reference to the physical delivery of the goods.⁸

⁶ MCL 440.2401 The Michigan Uniform Commercial Code (Act 174 of 1962) determines at what point a title to goods pass from the seller to the purchaser. Section 2401, Subsection (2) states that "Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance ..."

⁷ MCL 440.2401(2)..

⁸ *Jerry McCarthy Highland Chevrolet v Dep't of Revenue*, 351 Mich 558; 88 NW2d 383 (1958)

Books, Records and Documents to Determine Seller's Obligations of Sale

The General Sales Tax Act specifies that certain installation charges are included in the sales tax base.⁹ If the seller determines that the installation charges are not included in the sales tax base, then the seller, based on the seller's books, records and other documents must prove that the seller's obligation of the sale is completed before installation charges are incurred.¹⁰ Such books and records may include, but are limited to, the following books, records and documents that may be created, executed and preserved by the seller as well as the purchaser.

1. Purchase orders
2. Request for proposal
3. Bid documents
4. Purchase contracts
5. Sales invoices
6. Sales contracts
7. Job budget worksheets
8. Correspondence including letters, emails fax transmissions
9. Independent contractor agreements

Engaged Simultaneously in a Non Taxable Business

The General Sales Tax Act recognizes that a taxpayer may be engaged in selling both taxable sales of tangible personal property as well as nontaxable sales of services.¹¹ The entire transaction will be subject to sales tax unless the taxpayer's books separately identify the taxable and nontaxable sales.¹² When determining the taxability of installation charges, the taxpayer must consider all of the facts and circumstances surrounding the retail business activities.

Installation charges on merchandise installed by a seller who is not engaged in a separate installation service business are taxable if the charges are incurred prior to the transfer of ownership. Installation charges are not taxable if incurred after the transfer of ownership.

Third Party Installation Services

A seller may contract a third party to perform installation services relating to the otherwise taxable sale of tangible personal property. Such services and the charges to the customer for such services may or may not be included in the sales tax base.

If the seller books, records and other documents support the legal determination that title or ownership of the tangible personal property is transferred after the installation is complete and the

⁹ MCL 205.51(1)(d)(v)

¹⁰ MCL 205.52(3)

¹¹ MCL 205.52(3)

¹² MCL 205.52(3)

seller retains management and control over the third party installation, then the third party installation charges are included in the sales tax base.¹³

If the seller does not exert management and control over the third party installation, then the installation services are not included in the sales tax base. The method of accounting, billing and payment are not determinant of the taxability of the installation services. The legal ownership of the third party installer is not determinant of the taxability of the installation services. The only factor to be considered is the extent of the management and control which the seller exerts over the installation.

If the customer arranges for the third party installation, the installation charges are not included in the sellers sales tax base unless the seller exerts management and control over the installation.

¹³ *Greystone International, Inc. v Michigan Department of Treasury*, Michigan Tax Tribunal, Docker No. 429973, May 10, 2013.