

Let the Buyer Beware

Your Contractor Might Have Built an Unexpected Liability

By KRISTINA DRZAL HOUGHTON, CPA, MST

By now, most Massachusetts residents and businesses know that the state imposes a 6.25% sales tax on retail sales of tangible personal property in Massachusetts by any vendor. A little-known fact is that the general sales-tax rule for contractors and subcontractors who construct, reconstruct, alter, improve, remodel, and repair real property ('construction contractors') is that contractors are the consumers of tangible personal property purchased by them for the performance of their contracts.

And as consumers of tangible personal property, construction contractors pay sales tax to their suppliers on their purchases. The transfer of real property by a construction contractor to a buyer is not subject to sales tax.

One factor to which consumers should pay attention, due to current controversy, is that the general sales-tax rule for construction contractors does not apply to sales contracts in which persons act as retailers selling tangible personal property in the same manner as other retailers, and install a complete unit of a standard item of tangible personal property, which requires no further fabrication other than installing, applying, or connecting services.

Persons acting as retailers of tangible personal property are not construction contractors and must collect tax on the sales price of the item from the buyer. Any separately stated charges for installation of the item are not taxable. As an example, a contract for a custom storage shed is a construction contract if it is a contract for the construction, reconstruction, alteration, improvement, remodeling, or repair of real property. However, if a sales contract for a storage shed requires a person merely to sell and install a complete unit of standard tangible personal property, such as a prefabricated storage shed that is simply transported to the purchaser's property, that person is a vendor of tangible personal property and should charge the purchaser sales tax on the full sales price of the storage shed.

Where a non-resident contractor enters into a contract with a person under which, or in the carrying out of which, tangible personal property will be used or consumed in the Commonwealth, the non-resident contractor

must deposit an amount with the Department of Revenue that is equivalent to 6.25% (was 5%) of the total amount of the contract, or must furnish a guarantee bond to the satisfaction of the department in the amount of 6.25% (was 5%) to ensure payment of tax on the tangible personal property. The contractor will receive a certificate in duplicate confirming that the bond requirements have been met.

'Non-resident contractor' is defined as a construction contractor or subcontractor who does not own or lease real property located in Massachusetts that is continuously used by the construction contractor as an

personal property consumed or used by a non-resident contractor in carrying out the contract.

Note that voluntary registration as a Massachusetts vendor, by itself, does not meet the statutory requirements. The non-resident contractor must complete and file a non-resident contractor registration form, available from the DOR Web site, and meet the bond or deposit requirements.

For a construction project where the contract between a person and the project's general contractor is \$20,000 or less, a non-resident contractor will not be required to make a deposit or post a bond with the

Commissioner.

This exception to the deposit or bond requirement does not exempt non-resident contractors from paying the tax on the items the contractor purchased for use on Massachusetts



.....

As consumers of tangible personal property, construction contractors pay sales tax to their suppliers on their purchases.

.....

office, warehouse, store, factory, or other regular place of business. A temporary office at the site of a construction contract is not real property continuously used as an office, warehouse, store, factory, or other regular place of business.

Any person dealing with a non-resident contractor without first obtaining a duplicate copy of the certificate from the Department of Revenue must deduct 6.25% (was 5%) of any amount due the contractor, or furnish the department with a guarantee bond in the amount of (effective Aug. 1, 2009) 6.25% (was 5%) of the total amount, in order to ensure payment of the tax payable relative to the tangible personal property or the carrying out of the contract.

A person, including but not limited to a property owner, lessee, or general contractor, who does not receive a certificate from the non-resident contractor and does not deduct and pay over to the Commissioner or post a bond as required by the statute is personally liable for the tax due with respect to tangible

jobs. If a non-resident contractor is not required to provide deposit or bond because of the \$20,000 limitation, the person dealing with the non-resident contractor will not be personally liable for payment of sales or use tax due from the non-resident contractor for tangible personal property used or consumed in carrying out the construction contract. In determining whether a general contractor has exceeded the \$20,000 limitation, the department will aggregate the amounts paid under all contracts between a general contractor and same person in Massachusetts in any 120-day period.

The real issue is when non-resident contractors purchase goods outside of the state and use them in a construction contact within the state. If they purchase in Massachusetts, they will pay the proper sales tax. If they pay sales tax to another state upon purchase, Massachusetts will require them only to pay the incremental tax to Massachusetts.

With Connecticut in such close proximity

to our area, it is likely that goods could be purchased and taxed at the Connecticut rate of 6%, and an additional liability of .25% would be due. If goods are purchased out of state and delivered into Massachusetts by a supplier who is not registered as a Massachusetts sales and use vendor, no tax at

all may have been paid.

Due to budget constraints, there is increasing pressure to identify all sources of revenue possible. The DOR can easily accumulate a list of all building permits acquired by individuals or by non-resident contractors. So make sure your contractor is not building

more than you anticipate — a large tax liability. ■

Kristina Drzal Houghton, CPA, MST is partner-in-charge of Taxation at Meyers Brothers Kalicka; (413) 536-8510.