

SUMMARY

QUESTION: Is the cleaning service provider and/or repairman required to collect sales tax on the cleaning services and/or repairs made to concrete outdoor and indoor water fountain pools.

ANSWER: Based on s. 212.05(1)(i), F.S., pool cleaning, which would include cleaning an outdoor or indoor concrete water fountain pool, is not subject to sales tax, because this service would not be included within the specific NAICS National Number that lists taxable nonresidential cleaning services. The contractor is making a repair to real property, and as such, is deemed to be the ultimate consumer of the materials and supplies used in the performance of such a contract. Accordingly, the taxpayer should be paying sales tax on its purchases of materials and supplies, and the taxpayer should not charge the dealer sales tax on the cleaning or the repair of its fountains.

April 14, 2011

XXX

Re: Technical Assistance Advisement 11A-007
Sales and Use Tax
XXX (Taxpayer)
Taxability of Pool Repair and Cleaning Services (Real Property)
Section 212.05(1)(i)1.a., Florida Statutes (F.S.), and
Rules 12A-1.0091, and 12A-1.051, Florida Administrative Code (F.A.C.)

Dear XXX:

This response is in reply to your letter dated November 18, 2010, and subsequent letter dated February 2, 2011, requesting the Department's issuance of a Technical Assistance Advisement ("TAA") pursuant to s. 213.22, F.S., and Chapter 12-11, F.A.C., regarding the above-referenced matter. An examination of your letter has established that you have complied with the statutory and regulatory requirements for issuance of a TAA. Therefore, the Department is hereby granting your request for a TAA.

ISSUE STATEMENT:

Whether cleaning and repairing cement water fountains are subject to sales tax.

FACTS:

The taxpayer cleans and repairs concrete indoor and outdoor water fountain pools located on the customer's property. The taxpayer's customer is a large automobile dealership that contracted with the taxpayer to clean and repair its cement water fountains that are located on the dealership property. To clean and repair the fountains, the taxpayer adds chemicals to the water, skims and cleans the pool walls and bottom, and repairs the motors and filtering systems, including water spouts and other component parts. There is no written contract between the taxpayer and its customer.

The water fountains are located just outside the building, and there is a similar fountain on the inside of the building. Also, there is a fountain located at the edge of the property that is designed to spout water three to four feet high, from beneath the ground level, creating the effect of a water-gate by using water spouts that are connected to the fountain. Each water fountain consists of equipment to spray the water, motor and filter systems, and a pool where the water falls and is recycled through the system.

REQUESTED ADVISEMENT:

Advice is requested on the taxability of cleaning and repairing the fountains, including the component parts. Taxpayer takes the position that the services provided to the customer are for a real property contract and charges to the customer are not subject to sales tax. The taxpayer has treated both the cleaning services and any repairs made to the water fountains as real property contracts, thus, not taxable. On the other hand, the taxpayer's customer is of the opinion that the services provided by the taxpayer are subject to sales tax. The taxpayer desires to resolve this conflict and therefore has requested a binding opinion from the Department of Revenue.

DISCUSSION AND STATUTORY AUTHORITY:

The taxability of the transactions for repairs made to the water fountains will be based on the fact that the classification of these fountains is real property.

Section 212.06(14), Florida Statutes (F.S.), defines the terms "real property" and "fixture" for purpose of determining if a taxpayer is performing a real property contract. That statute provides:

(a) "Real property" means the land and improvements thereto and fixtures and is synonymous with the terms "realty" and "real estate."

(b) "Fixtures" means items that are an accessory to a building, other structure, or land and that do not lose their identity as accessories when installed but that do become permanently attached to realty. . . .

(c) "Improvements to real property" includes the activities of building, erecting, constructing, altering, improving, repairing, or maintaining real property.

Rule 12A-1.051, Florida Administrative Code (F.A.C.), provides additional guidance on deciding if an item is a fixture of real property. Paragraph (2)(c) of the rule provides in part:

(c)1. "Fixture" means an item that is an accessory to a building, other structure, or to land, that retains its separate identity upon installation, but that is permanently attached to the realty. Fixtures include such items as wired lighting, kitchen or bathroom sinks, furnaces, central air conditioning units, elevators or escalators, or built-in cabinets, counters, or lockers. . . .

3. The determination whether an item is a fixture depends upon review of all the facts and circumstances of each situation. Among the relevant factors that determine whether a particular item is a fixture are the following:

a. The method of attachment. Items that are screwed or bolted in place, buried underground, installed behind walls, or joined directly to a structure's plumbing or wiring systems are likely to be classified as fixtures. Attachment in such a manner that removal is impossible without causing substantial damage to the underlying realty indicates that an item is a fixture.

b. Intent of the property holder in having the item attached. If the property holder who causes an item to be attached to realty intends that the item will remain in place for an extended or indefinite period of time, that item is more likely to be a fixture. That intent

may be determined by reviewing all of the property holder's actions in regard to the item, including how the item is treated for purposes of ad valorem and income tax purposes. . . .

The rule states that the lists of factors are only illustrative. Particular cases may involve additional factors. The rule also notes that the weight to be given to the factors will vary from case to case. The rule does provide that "swimming pool installation, including accessories and parts that are permanently attached or are plumbed or wired into plumbing or electrical systems" are generally considered to be real property improvements. See Rule 12A-1.051(17)(mm), F.A.C.

Real property improvement jobs, including repairs made to real property, are classed based on contract type and the contractor making improvements to real property is deemed to be the ultimate consumer of the tangible personal property used in the performance of the contract. The taxation of transactions regarding real property improvements is different from taxation of transactions involving tangible personal property. In Rule 12A-1.051, F.A.C., subsection (3) describes the classification of contracts by pricing. Under this subsection, contracts are classed as: (a) Lump Sum; (b) Cost Plus or Fixed Fee; (c) Upset or Guaranteed Price; (d) Retail Sale plus Installation; and, (e) Time and Materials contracts. Subsection (4) of the rule gives the general rule of taxability for real property contractors, specifically: "Contractors performing only contracts described in paragraph (3)(a), (b), (c), or (e) do not resell the tangible personal property used to the real property owner but instead use the property themselves to provide the completed real property improvement."

The legislature has identified specific services and made them subject to Florida's sales tax. Section 212.05(1)(i), F.S., imposes sales tax on the charges for all nonresidential cleaning and nonresidential pest control services (NAICS National Numbers 561710 and 561720). NAICS National Number 561720 is the classification for "Janitorial Services," which include establishments primarily engaged in cleaning building interiors and/or windows. Pool cleaning, which would include cleaning an outdoor or indoor concrete water fountain pool, is not included within the specific NAICS National Number that is subject to tax on nonresidential cleaning services. Special note must be given here for any instance where the contract calls for the weekly or monthly furnishing of pool chemicals and chemical feeders, along with the term and price for the chemicals without any cleaning or other maintenance; in such instances these contracts are for the sale of tangible personal property and are taxable.

CONCLUSION:

The taxpayer is correct in its treatment of the cleaning and repair of the car dealer's fountains as real property. As a contractor engaged in the performance of a real property contract, the taxpayer is deemed to be the ultimate consumer of the materials and supplies used in the performance of such a contract. Accordingly, the taxpayer should be paying sales tax on its purchases of materials and supplies, and the taxpayer should not charge the dealer sales tax on the cleaning or the repair of its fountains.

CLOSING STATEMENT:

This response constitutes a Technical Assistance Advisement under § 213.22, F.S., which is binding on the Department only under the facts and circumstances described in the request for this advice as specified in § 213.22, F.S. Our response is predicated on those facts and the specific situation summarized above. You are advised that subsequent statutory and administrative rule changes or those judicial interpretations of the statutes or rules upon which this advice is based may subject similar future transactions to a different treatment than expressed in this response.

You are further advised that this response, your request and related backup documents are public records under Chapter 119, F.S., which are subject to disclosure to the public under the conditions of § 213.22, F.S. Confidential information must be deleted before public disclosure. In an effort to protect confidentiality, we request that you provide the undersigned with an edited copy of your request for Technical Assistance Advisement, the backup material and this response, deleting names, addresses and any other details which might lead to identification of the taxpayer. Your response should be received by the Department within 15 days of the date of this letter.

If you have further questions with regard to this matter and wish to discuss them, you may contact Technical Assistance and Dispute Resolution at 850/717-6729.

Sincerely,

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Technical Assistance & Dispute Resolution
(850)717-6729

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