

## **INFORMATION BULLETIN # 60**

### **SALES TAX**

**April 2004**

**(Replaces Bulletin #60 dated December 2002)**

**DISCLAIMER:** Informational bulletins are intended to provide nontechnical assistance to the general public. Every attempt is made to provide information that is consistent with the appropriate statutes, rules and court decisions. Any information that is not consistent with the law, regulations or court decisions is not binding on either the Department or the taxpayer. Therefore, the information provided herein should serve only as a foundation for further investigation and study of the current law and procedures related to the subject matter covered herein.

**SUBJECT:** Construction Contractors

**REFERENCES:** IC 6-2.5-1-5, IC 6-2.5-3-3, IC 6-2.5-4-1, IC 6-2.5-4-9, IC 6-2.5-5-3, 45 IAC 2.2-3-7 through 45 IAC 2.2-3-12, 45 IAC 2.2-4-21 through 45 IAC 2.2-4-26

### **INTRODUCTION**

The general rule for the application of sales or use tax is that all sales of tangible personal property are taxable, and all sales of real property are not taxable. This general rule is not changed by the conversion of tangible personal property into realty. Therefore, all construction material purchased

by a contractor is taxable either at the time of purchase, or if purchased exempt (or otherwise acquired exempt) upon disposition unless the ultimate recipient could have purchased it exempt.

## **DEFINITIONS**

- A. "Construction Contractor" means anyone who is obligated under the terms of a contract to furnish the necessary labor or materials, or both, to convert construction material into realty, including a general or prime contractor, a subcontractor, or a specialty contractor. The term includes a person engaged in the business of: building, cement work, carpentry, plumbing, heating and cooling, electrical work, roofing, wrecking, excavating, plastering, tile work, road construction, landscaping, or installing underground sprinkler systems.
  
- B. "Construction materials" means any tangible personal property to be used for incorporation in or improvement of a facility or structure constituting or becoming part of realty. A "facility" means any additions to the land.
  
- C. "Lump sum contract" means a contract to incorporate construction materials into real estate with the charge for labor and materials being quoted as one price. The contractor may subsequently furnish a breakdown of the charges for labor and materials without changing the nature of the lump sum contract. For example, a typical lump sum contract provides that the contractor will build a structure for a total stated price such as \$40,000. A lump sum contractor generally must pay sales tax to the vendor who sells the contractor construction materials. If the vendor is located out-of-state and is not required to collect Indiana sales tax or if the person for whom the structure is being built would be exempt from sales tax for the purchase of the construction materials, the lump sum contractor would not pay sales tax. Although the contractor may not pay sales tax when purchasing material from an out-of-state vendor, the contractor would be liable for use tax if the construction materials are stored, used or consumed in Indiana for a nonexempt purpose. Unless otherwise exempt, when a

lump sum contractor purchases construction materials free of sales tax, the contractor must pay use tax on those materials when they are incorporated into real property in Indiana. To purchase construction materials exempt from sales tax, a lump sum contractor must be registered as a retail merchant.

- D. "Time and materials contract" means a contract to incorporate construction materials into real estate with the charge for the labor and materials being separately stated and the final contract price being dependent on the cost of the materials and the amount of labor it actually takes to complete the contract. Time and materials contractors are considered retail merchants making retail transactions with respect to the sale of construction materials and must register as retail merchants with the Department. Contractors that perform time and material contracts must separately state the charge for any construction materials and must collect Indiana sales tax on the full sales price of the construction material including overhead and profit charges. (Effective March 18, 2004, sales tax must also be collected on delivery charges in a time and materials contract.) The construction materials used by a contractor in a time and materials contract should be purchased exempt by the contractor. The sales tax collected by the contractor must be separately stated on the invoice. A time and materials contractor would be entitled to the eighty-three hundredths of one percent (.83%) collection allowance for timely remittances. Exemption certificates and direct pay permits must be retained by time and materials contractors to prove their non-liability for collecting sales tax on a sale of construction materials. If a time and materials contractor purchases construction materials exempt from sales tax and subsequently uses those materials to fulfill a lump sum contract, the contractor would be subject to use tax on those materials.
- E. "Improvement to real estate" means that personal property has been incorporated into and becomes a permanent part of the real property. To accomplish this, the personal property generally takes on an immovable character. An immovable fixture is characterized by three elements:

- (1) Real or constructive annexation of the article in question to the land.
- (2) Adaptation of the personal property as part of the land.
- (3) The intention of the party making the annexation to make the personal property a permanent part of the land so that it would pass with the land upon a sale.

Examples of installations that constitute improvements to realty are: doors, garage doors, garage door openers, windows, cabinets, garbage disposals, water heaters, water softeners, alarms, furnaces, central air conditioning units, gutters, and carpeting.

Examples of installations that do not constitute improvements to realty are: personal computers, home stereos, televisions, refrigerators, stoves, dishwashers, garbage compactors, washers, dryers, and window air conditioning units.

Indiana Property Tax regulations concerning commercial property may be consulted as a guideline to determine whether property is real or personal, but it should not be considered determinative.

### **Tax Consequences**

A contractor's purchase of machinery, tools, equipment and supplies that are not incorporated into the structure being built is subject to sales and/or use tax at the time of purchase. No exemption is available to the contractor because of the exempt status of the customer. Rule 45 IAC 2.2-3-12 [c], which is specifically applicable to contractors under contract for an improvement to real estate with an organization entitled to exemption from sales and use tax, states:

- (1) Utilities, machinery, tools, forms, supplies, equipment, and any other items used or consumed by the contractor and which do not become part of the improvement to real estate are not exempt

regardless of the exempt status of the person for whom the contract is performed.

**Note:**

In the construction and repair of public roads, bridges, highways and other public infrastructure for a governmental entity, a contractor may be specifically required to provide certain items of tangible personal property for the safety of the public, for traffic control, or to enable the government to perform its responsibilities. Such items include, but are not limited to, traffic signals; signs; barrels; barricades; temporary pavement markings; materials to construct temporary traffic lanes, roads and bridges; erosion control and drainage materials; aggregates used to set grades; and field offices and communications equipment, provided such offices and equipment are exclusively for government representatives. The purchase, lease or use of such items by a contractor or its subcontractor to comply with the requirements of a government construction contract are not subject to sales or use tax, provided the item is used solely, in connection with the construction and/or repair of public roads, bridges, highways or other public infrastructures that will be paid for by a governmental entity and is not used for any other purpose.

**Direct Payment Permits**

A contractor holding a direct payment permit may issue it to his suppliers, but when acting as a contractor should remember that he must obtain an exemption certificate—not a direct payment permit—from any exempt customer for whom he is making an improvement to real estate as a result of a lump sum contract.

A lump sum contractor does not sell tangible personal property or collect sales tax as a result of the contract and may not accept a direct payment permit. If the organization, for which the contractor is constructing the improvement, is entitled to an exemption, it must give the contractor an exemption certificate (Form ST-105) -- not a direct payment permit—certifying the exemption.

A prime contractor receiving an exemption certificate for a particular job should issue exemption certificates to subcontractors. Contractors and subcontractors must be registered as retail merchants in order to issue exemption certificates (ST-105 or ST-134).

### **Asphalt Manufacturers**

The manufacturing exemption will apply to an asphalt plant and paver, including repair parts and fuel for the respective equipment. Asphalt manufacturers/contractors will be granted an exemption for dump trucks used to transport "hot mix asphalt" from their asphalt plant to the job site. No exemption is available to the extent the respective dump trucks are used to haul "raw materials". Additionally, no exemption for dump trucks is available to contractors who do not produce "hot mix asphalt". Actual records must be maintained to document the exempt usage, if any. Graders, rollers, distributors, front-end loaders and other construction equipment are not exempt and will be subject to Indiana sales and use tax.

### **Streets and Sewers**

Contractors acquiring material for incorporation as an integral part of a public street or of a public water, sewage or other utility service system are exempt from sales tax on the purchase of the construction material. The public street or public utility service system must be required under an approved subdivision plot and must be accepted by the appropriate Indiana political subdivision to be publicly maintained after its completion.



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Kenneth L. Miller  
Commissioner