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DEPARTMENT OF TREASURY
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REVENUE ADMINISTRATIVE BULLETIN 2019-15

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**SALES AND USE TAXATION OF THE CONSTRUCTION INDUSTRY
(EXCLUDING MANUFACTURER/CONTRACTORS)**

Replaces Revenue Administrative Bulletin 2016-18

Pursuant to MCL 205.6a, a taxpayer may rely on a Revenue Administrative Bulletin issued by the Department of Treasury after September 30, 2006, and shall not be penalized for that reliance until the bulletin is revoked in writing. However, reliance by the taxpayer is limited to issues addressed in the bulletin for tax periods up to the effective date of an amendment to the law upon which the bulletin is based or for tax periods up to the date of a final order of a court of competent jurisdiction for which all rights of appeal have been exhausted or have expired that overrules or modifies the law upon which the bulletin is based.

RAB 2019-15.

This Revenue Administrative Bulletin (RAB) updates the discussion contained in RAB 2016-18 of the application of the General Sales Tax Act and the Use Tax Act (the Acts) to the construction industry generally,¹ and to contractors specifically, to reflect the enactment of the following legislation:

- 2016 PA 372 and 373, *retroactive and effective beginning January 1, 2013*
- 2017 PA 48 and 49, *effective July 24, 2017*
- 2018 PA 201, *retroactive*

This RAB does not address the tax base for a manufacturer/contractor that affixes its product to the real estate of others, the distinction between tangible personal property and real property, or the agricultural production exemption.²

ISSUES

I. Taxable Sales to Contractors and Use Tax for Conversion

¹ A “contractor” is a person directly engaged in the business of constructing, altering, repairing, or improving real estate for others; and includes a prime, general, or subcontractor. Mich Admin Code, R 205.71.

² Those topics are discussed in detail in other RABs.

- A. What sales or use tax liability does a contractor incur when engaged in the business of constructing, altering, repairing, or improving real estate for others?
- B. Is a contractor required to pay sales or use tax on all items used to provide the contractor's service, including equipment, supplies, and materials?
- C. May a contractor charge sales or use tax to his or her customer?
- D. Is a contractor required to pay sales or use tax if the contractor *acquires*, but does not purchase or own, the tangible personal property used or consumed to perform a contract?
- E. Is a contractor required to pay sales or use tax on tangible personal property used or consumed in construction that takes place within or outside of Michigan?
- F. Is a contractor required to pay use tax if the contractor converts to a taxable use tangible personal property acquired for an exempt use?
- G. Does a general contractor have joint and several liability for the payment of sales and/or use tax on materials used or consumed by an independent subcontractor?

II. Exempt Sales to Contractors and Core Charge Credit and Refund

- A. When does a real property contractor qualify for an exemption from sales and/or use tax for property affixed to and made a structural part of real estate in the following contexts:
 - 1. Nonprofit hospitals;
 - 2. Qualified nonprofit housing;
 - 3. Church sanctuaries;
 - 4. Qualified air or water pollution control facilities;
 - 5. Qualified convention facilities;
 - 6. Qualified data centers;
 - 7. Certain qualifying real property associated with federally-recognized Indian Tribes (and their qualifying members) that have an effective and implemented Tax Agreement with the State of Michigan;
 - 8. Qualified business activities (enterprise zones);
 - 9. Foundations for certain machinery or equipment used in industrial processing;
 - 10. Property to be affixed to and becoming a structural part of real estate located outside Michigan (use tax only), and;

11. Property purchased or acquired for eligible activities in transformational brownfield plans.

- B. Is a contractor liable for sales or use tax for property affixed to and made a structural part of real estate when it receives a claim of exemption for an exempt purpose?
- C. What information is required to support a claim of exemption?
- D. What is core charge credit and refund, and what equipment qualifies?

III. Contractors Engaged in Retail Sales

- A. When is a contractor engaged in the business of making sales at retail?
- B. What sales and use tax responsibilities does a contractor have when engaged in the business of making sales of tangible personal property at retail?
- C. Is a contractor who is also a retailer required to be licensed under the General Sales Tax Act?
- D. Is a contractor who is also a retailer required to pay sales or use tax when tangible personal property is removed from resale inventory in Michigan and used by the contractor in performing a construction contract?

IV. Retailers (“Suppliers” to the Contractor)

- A. Who is a retailer (supplier) for sales and use tax purposes?
- B. Is a retailer (supplier) liable for the collection and payment of sales and use tax to the Department of Treasury?
- C. What sales or use tax liability arises when a subcontractor affixes to real estate property that was sold in a retail transaction?

CONCLUSIONS

I. Taxable Sales to Contractors

- A. The General Sales Tax Act imposes tax at rate of 6% on retail sales of tangible personal property in Michigan unless the sale is otherwise exempt.³ A contractor incurs sales tax liability when it sells tangible personal property at retail even if the property was originally purchased with a claim of exemption.⁴

³ MCL 205.52(1).

⁴ See *infra* Conclusions Section III. Contractors Engaged in Retail Sales.

The Use Tax Act imposes tax on tangible personal property that is used, stored, or consumed in Michigan at a rate of 6% of the purchase price,⁵ unless Michigan sales or use tax was already paid (or a sales or use tax equal to or in excess of 6% was already imposed under the laws of another state or local government)⁶ when the property was purchased.⁷ For purposes of use tax, contractors are “consumers” of materials used and/or consumed by them when engaged in the business of constructing, altering, repairing, or improving real estate of others.⁸ Therefore, if sales tax was not paid on the property a contractor purchased for the constructing, altering, repairing, or improving of real estate of others, the contractor is liable for use tax based on the purchase price of the property.

Example 1: Contractor ABC and Contractor XYZ purchase from a Michigan Retailer the building materials they will use to fulfill their construction contracts. The sales receipts or invoices given to Contractor ABC by Retailer indicate that Michigan sales tax was charged on the purchases. In lieu of sales receipts or invoices, the sales of building materials by Retailer to Contractor XYZ are memorialized through contracts which itemize each of the materials sold by Retailer and indicate that Michigan sales tax is included in the sales price for the itemized materials sold. Neither Contractor ABC nor Contractor XYZ will be liable for use tax on these building materials provided they maintain the receipts, invoices, and/or contracts demonstrating that the sales tax was paid.

Example 2: Contractor is also a retailer. Contractor purchases building materials exempt from sales tax claiming a resale exemption. Contractor eventually removes the materials from retail inventory and uses the materials to perform a construction contract. Contractor is liable for use tax based on the purchase price of the materials consumed in the construction.

- B.** A contractor is required to pay sales or use tax on all items used to provide the contractor’s service, including equipment, supplies, materials (including materials affixed to and made a structural part of real estate located in Michigan), and any other non-exempt tangible personal property it uses or consumes.
- C.** A contractor acting as a retailer is liable for sales tax on the property it sells to a customer at retail and may charge sales tax to its customer..⁹ A contractor that pays sales or use tax on the property it uses and consumes in performing a construction contract, such as equipment, supplies, and materials, may not charge sales or use tax directly to its customer. However, the contractor may include the amount of the tax in the total contract price as an overhead cost.

⁵ MCL 205.93(1).

⁶ MCL 205.94(1)(e).

⁷ MCL 205.94(1)(a). See also *Andrie Inc v Dep’t of Treasury*, 496 Mich 161 (2014).

⁸ MCL 205.92(g)(i); See also Rule 205.8.

⁹ “Although the legal incidence of the sales tax falls on the retailer, the retailer is authorized to pass the economic burden of the tax onto the purchaser by collecting an equal amount at the point of sale.” *Ammex, Inc v Dep’t of Treasury*, 237 Mich App 455, 460 (1999).

- D.** In general, a contractor is required to pay use tax if the contractor acquires tangible personal property that it affixes to real property of others in Michigan, even if the contractor does not purchase or own the tangible personal property, if sales or use tax has not already been paid on the property.¹⁰ Under 2018 PA 201, a contractor is not liable for use tax for storing, using, or consuming property acquired from another person so long as the following three conditions are met: (i) the property was *purchased* by that other person; (ii) that other person is *not exempt* from the tax imposed under the General Sales Tax Act or the Use Tax Act; and (iii) the property was acquired by the contractor for the *sole purpose* of affixing the property to real estate on behalf of that other person.¹¹

Example 3: Nonprofit School purchases building materials in a tax-exempt retail transaction and provides the materials to Contractor for use or consumption in performing a contract upon the school's real property. Contractor is liable for use tax on the purchase price of tangible personal property used or consumed in performing the contract, including the tangible personal property provided it by the school. The purchase price is the price paid by the school for the building materials.

Example 4: Retailer (a home improvement store) purchases tangible personal property (e.g., shelves) and hires a contractor to affix that tangible personal property to the real estate in Michigan upon which the store is located. Contractor acquires the tangible personal property from Retailer for the sole purpose of affixing that property to this real estate. Contractor is not liable for use tax, but Retailer is liable for use tax on the purchase price of the tangible personal property used and consumed by the contractor unless Michigan sales tax was paid on the retail sale of that tangible personal property.¹²

- E.** Absent a valid claim of exemption,¹³ a contractor is required to pay sales tax on property it purchases in Michigan for affixation within or outside of Michigan if the retailer exercises its right to reimburse itself for the tax.¹⁴ However, a contractor is not required to pay Michigan use tax on tangible personal property acquired in Michigan for use in a construction project that takes place exclusively outside of Michigan.¹⁵

Example 5: Contractor enters a contract with Customer to build a residential home in Michigan. Contractor purchases the materials to build the home from Retailer. Contractor has no valid claim of exemption; therefore, Retailer is liable for sales

¹⁰ MCL 205.92(g)(i) (a person is a consumer of tangible personal property, and therefore liable for use tax, if the person is "acquiring tangible personal property [and is] engaged in the business of constructing, altering, repairing, or improving the real estate of others.").

¹¹ MCL 205.94ee.

¹² *Andrie, supra.*

¹³ See *infra* Conclusions Section II. Exempt Sales to Contractors.

¹⁴ *Ammex, supra.*

¹⁵ MCL 205.94(1)(z).

tax and may charge sales tax to Contractor. Contractor may include the amount of the tax as an overhead cost in the contract with Customer, but may not directly seek reimbursement from Customer.

Example 6: Contractor enters a contract with Customer to build a residential home in Michigan. Contractor purchases from Retailer the materials to build the home and provides an Exemption Certificate for purposes of resale to the Retailer. Contractor does not make a retail sale to Customer. Retailer is not liable for sales tax on the sales to Contractor because Retailer received an Exemption Certificate. However, Contractor (which improperly claimed the exemption) is liable for use tax on the purchase price of all of the property it purchased exempt for resale and consumed in performing the contract for Customer. Contractor may include the amount of the tax as an overhead cost in the contract with Customer, but may not directly seek reimbursement from Customer.

Example 7: Contractor also acts as a retailer and has an inventory of property that it purchased exempt from sales tax for purposes of resale. Contractor enters a construction contract with Customer to remodel a home located in Ohio. Contractor withdraws property from its retail inventory to perform the contract, but does not make a retail sale of the property to Customer. Contractor is not liable for Michigan use tax on the materials it uses or consumes in performing this contract.

- F. A contractor that acquires tangible personal property for an exempt use, but then uses that tangible personal property for a non-exempt use, is liable for use tax based on the purchase price of the property, whether the non-exempt use is in whole or in part, or permanent or not permanent, and regardless of any subsequent tax-exempt use.¹⁶
- G. A general contractor is not jointly and severally liable for sales or use tax on materials consumed by an independent subcontractor. If a general contractor hires a subcontractor, and the subcontractor consumes property by affixing it to real estate without properly paying its sales and use tax liability on the property, the general contractor is not liable for the subcontractor's failure because it is the subcontractor that is the consumer of the property.

II. Exempt Sales to Contractors and Core Charge Credit and Refund

- A. **Exemptions.** A contractor in the business of constructing, altering, repairing, or improving real estate for others is afforded an exemption for property affixed to and/or made a structural part of real estate that qualifies under one of the following:

¹⁶ See MCL 205.93(1), MCL 205.92(q), and MCL 205.97(2).

1. Nonprofit Hospitals¹⁷

Property sold to a contractor to be affixed to and made a structural part of a “nonprofit hospital” is exempt.¹⁸ The Acts provide that a “Nonprofit hospital” means one of the following:

(A). That portion of a building to which one of the following applies:

(i) Is owned or operated by an entity exempt under Internal Revenue Code (IRC) 501(c)(3), that is licensed¹⁹ as a hospital.²⁰

(ii) Is owned or operated by a governmental unit in which medical attention is provided.²¹

(iii) Is owned or operated by an entity or entities exempt under IRC 501(c)(2) or (3) in which medical attention is provided.

(B). That portion of real property necessary and related to a building described in (A) above in which medical attention is provided.

(C). A county long-term medical care facility, including any “addition”²² to an existing county long-term medical care facility, if the addition is owned and operated by the county long-term medical care facility and offers health services provided by the county long-term medical care facility.²³

“Nonprofit hospital” does not include:²⁴

1. A freestanding building (unless a qualifying addition to a county long-term medical care facility) or other real property of a licensed nursing home or skilled nursing facility;²⁵

¹⁷ MCL 205.54w; MCL 205.94s.

¹⁸ In the case of a county long-term medical care facility, “affixed to and made a structural part of” means any physical connection to an existing county long-term medical care facility.

¹⁹ 1978 PA 368, MCL 333.21501 to 333.21571.

²⁰ Under part 215 of the public health code.

²¹ “Medical attention” means “that level of medical care in which a physician provides acute care or active treatment of medical, surgical, obstetrical, psychiatric, chronic, or rehabilitative conditions, that require the observation, diagnosis, and daily treatment by a physician.” MCL 205.54w(3)(c); MCL 205.94s(3)(c).

²² With the enactment of 2016 PA 372 and 373, for purposes of a county long-term medical care facility, an “addition” includes a “freestanding building” as long as that freestanding building “is operated under the same license held by the county long-term medical care facility and continues to offer the same medical services as the county long-term medical care facility in that freestanding building.”

²³ Until January 1, 2008, an exemption under this section existed regardless whether the addition was licensed as a nursing home or skilled nursing facility under part 217 of the public health code, 1978 PA 368, MCL 333.21701 to 333.21799e, or whether the addition met the requirements under either MCL 205.54w(1) or MCL 205.94s(1).

²⁴ MCL 205.54w(3)(b), MCL 205.94s(3)(b).

²⁵ 1978 PA 368, MCL 333.21701 to 333.21799e. Under part 217 of the public health code.

2. A licensed hospice;²⁶ or,
3. A licensed home for the aged.²⁷

A “county medical care facility” is “a nursing care facility, other than a hospital long-term care unit, that provides organized nursing care and medical treatment to 7 or more unrelated individuals who are suffering or recovering from illness, injury, or infirmity and that is owned by a county or counties.”²⁸ Operations not requiring licensure, such as “assisted living facilities,” do not qualify as a hospital for the construction exemption.²⁹

The exemption does not apply to any portion of property otherwise qualifying for the exemption if income or a benefit inures directly or indirectly to an individual, private stockholder, or other private person from the independent or nonessential operation of that portion of property. If benefit from any portion of the real estate inures to an individual or a private shareholder in the manner described in the Acts, that portion of the real estate does not qualify for the exemption, even if it is owned by a qualified nonprofit hospital.³⁰ Commercial ventures such as shopping center retail store buildings held as an investment do not qualify for exemption. In instances where a single building is being constructed that will have multiple uses, some of which do not qualify as a “nonprofit hospital” as described above, only the portion of the building that qualifies as a “nonprofit hospital” under the Acts is exempt.

Because the exemption only includes property that is “affixed to and made a structural part of” the nonprofit hospital (as that phrase applies depending on the type of nonprofit hospital), the exemption does not include tools and equipment or supplies used and consumed in the construction which do not become affixed to and made a structural part of the hospital, e.g., sandpaper, hammers, saws.

Example 8: Medical Center is a nonprofit hospital. A portion of Medical Center is constructed to house a retail gift shop that will be operated by ABC Inc. Profits made by ABC inure to its private owner. The portion of Medical Center that is constructed to house the retail gift shop is not eligible for the exemption.

Example 9: ABC, a county long-term medical care facility, hired a contractor to construct a freestanding building on ABC’s existing campus. The new building will be used as an office and not operated under ABC’s license or otherwise offer the same medical services as ABC. Notwithstanding satisfaction of any other requirements for the exemption, tangible personal property sold to Contractor for this project is not eligible for the exemption because the freestanding building will

²⁶ 1978 PA 368, MCL 333.21401 to 333.21420. Under part 214 of the public health code.

²⁷ 1978 PA 368, MCL 333.21301 to 333.21335. Under part 213 of the public health code.

²⁸ MCL 333.20104(3).

²⁹ *Id.*

³⁰ Accordingly, this exemption may be calculated on a pro-rata basis.

not be operated under the same license held by ABC or continue to offer the same medical services as ABC.

Example 10: Contractor is hired by developer to construct a new campus of freestanding buildings with each building licensed and operated as a county long-term medical care facility. There is no *existing* county long-term medical care facility on the campus. Tangible personal property sold to Contractor for this project is not eligible for the exemption.

2. Qualified Nonprofit Housing

Property sold to a contractor to be affixed to and made a structural part of qualified nonprofit housing is exempt. Only private qualified nonprofit housing that is exempt under section 15a of the State Housing Development Authority Act of 1966, 1966 PA 346, MCL 125.1415a, qualifies for this exemption. Public nonprofit housing is not covered by the State Housing Development Authority Act and does not qualify for this exemption.³¹

The Acts do not allow the exemption if income or a benefit inures directly or indirectly to an individual, private stockholder, or other private person from the independent or nonessential operation of that portion of property.³² If benefit from any portion of the real estate inures to an individual or a private shareholder in the manner described in the Acts, that portion of the real estate will not qualify for the exemption, even if it is owned by a nonprofit housing entity.

The exemption only includes property that is affixed to and made a structural part of the nonprofit housing. The exemption does not include tools and equipment or supplies used and consumed in the construction which do not become a structural part of the non-profit housing, e.g., sandpaper, hammers, saws.

3. Church Sanctuaries

Property sold to a contractor to be affixed to or made a structural part of a “sanctuary” is exempt.³³ A “sanctuary” is that portion of a building used predominantly and regularly for public worship, and those portions of a building structurally necessary to the portion of the building where worship takes place.³⁴ Predominant use will be presumed if public worship occurs more than 50% of the time that the portion of the building is in use. “Use” includes passive uses, such as storage. Regular use means the normal or usual periodic use or uniform use of that portion of the building. The exemption does not apply to the entire building, but applies only to materials affixed to or made a structural part of the sanctuary portion

³¹ MCL 205.54w(1); MCL 205.94s(1).

³² MCL 205.54w(2); MCL 205.94s(2).

³³ MCL 205.54p(1); MCL 205.94m(1).

³⁴ MCL 205.54p(2)(b); MCL 205.94m(2)(b).

of a building. The building also must be owned and occupied by a religious organization qualified under IRC 501(c)(3) to qualify as a sanctuary.

The exemption only includes property that is affixed to or made a structural part of the sanctuary. The exemption does not include tools and equipment or supplies used and consumed in the construction which do not become a structural part of the sanctuary, e.g., sandpaper, hammers, saws.

“Those portions of a building where public worship takes place” means those areas where the public participates in worship, including areas dedicated to individual worship such as chapels, and those portions of a building whose sole use and function is directly related to the act of public worship. These areas include a sacristy or similar area adjacent to the room where public worship services are conducted or areas where consumables are prepared for use in the worship service. It includes a vestry or similar area adjacent to the room where public worship services are conducted or where clergy or other religious leaders prepare for public worship services. It does not include areas for social functions, day care, schooling, religious education, or any other activity that does not constitute public worship.

“Those portions of a building structurally necessary to the portion of the building where worship takes place” means those structural portions of the building directly connected to the area where public worship takes place such as: (i) foundations, including basement walls which support the interior worship area; (ii) exterior walls and their finishing materials directly adjacent to the interior worship area; (iii) interior walls, floors and ceilings facing the interior worship area; and (iv) roofs directly over the interior worship area. Exterior walls, foundations and roofs that extend beyond the interior worship area are not exempt. Roofs not directly over the interior worship area, such as roofs over a second story office that is above the interior worship area, are not exempt, but may be included in the apportionment formula described below.

Structural necessity includes building utilities such as heating, ventilating and air conditioning devices. In instances where a single piece of equipment, such as a furnace, is supplying qualified sanctuary areas as well as other non-exempt areas, a percentage must be developed to represent the exempt portion of the device. The percentage is a fraction, the numerator of which is the square footage of the sanctuary and the denominator of which is the total square footage of the entire building, including all regularly heated or cooled areas such as basements.³⁵ This same percentage may be applied to total material purchases for multiple use areas such as roofs and foundations in lieu of accounting for actual cubic yards of concrete or squares of roof shingles directly under or over the sanctuary.

³⁵ Other reasonable methods of apportioning a sanctuary’s taxable and exempt use may be applied if they are approved by the Department.

Building areas generally not provided exemption include gymnasiums, offices, vestibules, hallways, restrooms, basements and classrooms. Outdoor areas such as parking lots, sidewalks and steps leading into a building are not exempt. Also, finishing materials affixed to basement foundation walls or attached to walls common to the sanctuary, but constituting the interior walls of space dedicated to any activity other than public worship are not exempt. Basement floors and second story flooring are also not exempt.

4. Qualified Water or Air Pollution Control Facilities

Tangible personal property that is installed as a component part of a water or air pollution control facility is exempt.³⁶ However, the State Tax Commission must certify the facility before a contractor may qualify for the exemption; however, after a certificate is granted, refunds may be authorized. The exemption is not available before receipt of a signed exemption certificate from the State Tax Commission. This exemption may include portions of real property as well as equipment and other items of tangible personal property, provided that the tangible personal property must be installed as a component part of the qualified water or air pollution control facility.

5. Qualified Convention Facilities

Tangible personal property sold or acquired on or before December 31, 2015 for use in construction or renovation of a “qualified convention facility” is exempt from sales and use tax.³⁷ This exemption does not apply to tangible personal property sold or acquired on or after January 1, 2016, even if used in the construction or renovation of a qualified convention facility.

A “qualified convention facility” is a publicly owned convention facility with not less than 600,000 square feet of usable exhibition area and that is located in a qualified city.³⁸

6. Qualified Data Centers

Beginning January 1, 2016, through December 31, 2035, data center equipment that is affixed to or made a structural part of a qualified data center is exempt from the sales and use tax.³⁹

For purposes of this exemption, “data center equipment” means only:

³⁶ MCL 205.54a(1)(o); MCL 205.94(1)(s).

³⁷ MCL 205.54d(m); MCL 205.94z.

³⁸ MCL 141.1355(k).

³⁹ MCL 205.54ee(1); MCL 205.94cc(1). The exemption may be repealed earlier if certain job creation targets are not met. The Department of Labor and Economic Opportunity is responsible for tracking the jobs requirements of the Acts and reporting the information to the Department of Treasury. To determine whether data center equipment is to be considered “affixed” to a qualified data center, please refer to RAB 2016-4.

[C]omputers, servers, routers, switches, peripheral computer devices, racks, shelving, cabling, wiring, storage batteries, back-up generators, uninterrupted power supply units, environmental control equipment, other redundant power supply equipment, and prewritten computer software used in operating, managing, or maintaining the qualified data center or the business of the qualified data center or a colocated business. Data center equipment also includes any construction materials used or assembled under the qualified data center's proprietary method for the construction or modification of a qualified data center, including, but not limited to, building materials, infrastructure, machinery, wiring, cabling, devices, tools, and equipment that would otherwise be considered a fixture or related equipment. Data center equipment does not include any equipment owned by a third party that is used to supply the qualified data center's primary power.⁴⁰

“Qualified data center” means:

- a. a facility composed of 1 or more buildings located in this state;
- b. which is owned or operated by an entity engaged at that facility in operating, managing, or maintaining a group of networked computers or networked facilities for the purpose of centralizing, or allowing 1 or more colocated businesses to centralize, the storage, processing, management, or dissemination of data of 1 or more other persons who is not an affiliate of the owner or operator of a qualified data center or of a colocated business; and
- c. the entity that owns or operates the facility receives 75% or more of its revenue from colocated businesses that are not an affiliate of the owner or operator of the qualified data center.⁴¹

7. Indian Tribes

Affixing property to a structural part of certain qualifying real property that is associated with federally-recognized Indian Tribes (and their qualifying members) that have an effective and implemented Tax Agreement with the State of Michigan is exempt.⁴²

⁴⁰ MCL 205.54ee(4)(c); MCL 205.94cc(4)(c).

⁴¹ MCL 205.54ee(4)(d); MCL 205.94cc(4)(d).

⁴² Tax Agreements are public and may be found at <http://www.michigan.gov/taxes>.

8. Qualified Business Activity (Enterprise Zones)

Tangible personal property used in a qualified business activity of the purchaser is exempt from sales and use tax.⁴³ A “qualified business activity” is a “business activity in an enterprise zone established before 1994 of a qualified existing business attributable to a new facility or the business activity in an enterprise zone established before 1994 of a qualified new business.”⁴⁴

9. Foundations for Certain Machinery or Equipment used in Industrial Processing

The Acts exempt “foundations for machinery or equipment...used in an industrial processing activity...”⁴⁵ “Industrial processing” is “the activity of converting or conditioning tangible personal property by changing the form, composition, quality, combination, or character of the property for ultimate sale at retail or for use in the manufacturing of a product to be ultimately sold at retail or affixed to and made a structural part of real estate located in another state.”⁴⁶

Example 11: Contractor constructs a foundation for a machine press for use in industrial processing by Manufacturer. The foundation is exempt from sales and use tax.

10. Property to be affixed to and becoming a structural part of real estate located outside Michigan (use tax only)

Effective January 1, 2005, property that is purchased by a contractor for the purpose of constructing, altering, repairing, or improving real estate for others and that is affixed to and made a structural part of real estate located in another state is exempt from use tax.⁴⁷ However, there is no corresponding sales tax exemption. Therefore, when a contractor purchases property for affixation in another state from a Michigan retailer, absent another reason to claim exemption, the contractor has no basis to claim a sales tax exemption and the retailer will be liable for sales tax.

11. Property Purchased or Acquired for Eligible Activities in Transformational Brownfield Plans

Effective July 24, 2017, the sale of tangible personal property for use in (or acquired by a contractor for) eligible activities described in section 2 of the Brownfield

⁴³ MCL 205.54j; MCL 205.94h.

⁴⁴ MCL 125.2103(l).

⁴⁵ MCL 205.54t(4)(b); MCL 205.94o(4)(b).

⁴⁶ MCL 205.54t; MCL 205.94o. Property that is affixed to and made a structural part of real estate located in another state is exempt from use tax, but not sales tax. For a more detailed discussion of the industrial processing exemption see the Industrial Processing RAB.

⁴⁷ MCL 205.94(1)(z).

Redevelopment Financing Act⁴⁸ on “eligible property” that is included in a “transformational brownfield plan” is exempt to the extent that the tangible personal property will be affixed to and/or made a structural part of the real property or “infrastructure improvements” included within the transformational brownfield plan.⁴⁹ Contractors seeking to purchase tangible personal property exempt from sales or use tax under this provision must contact the transformational brownfield plan developer to obtain Form 5555 (Michigan Certificate of Exemption for Transformational Brownfield Plan).⁵⁰ Form 5555 is the document to be given to retailers (suppliers) from whom the contractor purchases its materials in order to claim an exemption from sales or use tax under this provision.⁵¹ Contractors may not use Form 3372 to claim an exemption from sales or use tax related to a transformational brownfield.⁵²

- B. Other Exemptions.** When a contractor receives an exemption claim from its customer other than those described above, such as the industrial processing exemption⁵³ or a direct pay authorization,⁵⁴ the contractor is liable for use tax for any property it affixes to real estate despite the exemption claim.⁵⁵

Example 12: Contractor enters into a contract with ABC Inc. The contract provides that all of the work to be done by Contractor is exempt under the industrial processing exemption. Some of the contract requires Contractor to permanently affix property to ABC’s real estate, and some of the contract requires Contractor to affix property to machinery that will maintain its character as tangible personal property after affixation (e.g., non-affixed machinery). Contractor is liable for use tax for any property it affixed to ABC’s real estate.

C. Exemption Support

⁴⁸ 1996 PA 381, MCL 125.2652.

⁴⁹ MCL 205.54d(n); MCL 205.94dd. “Eligible property,” “infrastructure improvements,” and “transformational brownfield plan” mean those terms as defined in MCL 125.2652. It is also worth noting that 2017 PA 48 requires the tangible personal property to be affixed to “and” made a structural part of the “real property or infrastructure improvements” included within the transformational brownfield plan while 2017 PA 49 requires the tangible personal property to be “affixed to “or” made a structural part of the “improvements to real property” included within a transformational brownfield plan ...”

⁵⁰ Form 5555 is made available to developers of transformational brownfield projects for distribution to contractors only after the transformational brownfield project plan has been approved.

⁵¹ It is the contractor’s responsibility to ensure the eligibility of the exemption being claimed as all claims are subject to audit.

⁵² For additional information on transformational brownfield plans and allowable tax incentives, contractors should contact the Michigan Economic Development Corporation (“MEDC”) or refer to the MEDC’s website at www.michiganbusiness.org.

⁵³ The industrial processing exemption excludes “[t]angible personal property permanently affixed and becoming a structural part of real estate in this state...” MCL 205.54t(5)(a); MCL 205.94o(5)(a). However, the industrial processing exemption does include foundations for machinery or equipment used in industrial processing. MCL 205.54t(4)(b); MCL 205.94o(4)(b).

⁵⁴ MCL 205.98(1).

⁵⁵ To the extent that the property the contractor uses or consumes remains tangible personal property, the property is exempt if the contractor receives a valid claim of exemption pursuant to MCL 205.62.

When a contractor that acts as a retailer purchases property for resale the contractor may present Form 3372 (Exemption Certificate) to the retailer indicating that the purchase is exempt for purposes of resale or, in lieu of an exemption certificate, other identifying information of the contractor and the reason for claiming the exemption, either in paper or electronic format. To claim any of the other exemptions listed above, except for the exemption related to transformational brownfield projects which is claimed on Form 5555, the contractor may provide an Exemption Certificate, or other identifying information and the reason for claiming the exemption, indicating the purchaser is a contractor, and should also provide Form 3520 (Contractor Eligibility Statement) containing identifying information from the property owner and the reason for claiming the exemption.⁵⁶ Both forms are available on the Department's website (www.michigan.gov/treasury).

The contractor should retain a copy of the Contractor Eligibility Statement. Where appropriate, a contractor may also wish to retain other documentation, including copies of a Michigan State Housing Development Authority ruling, a hospital license from the Michigan Department of Health and Human Services, a State Tax Commission certification, or an IRS 501(c)(3) ruling letter. If a contractor pays sales tax to the retailer on property it purchases for affixation that property is exempt from use tax.⁵⁷ The contractor must retain documentation that demonstrates the Michigan sales tax was paid to the retailer to prove entitlement to this exemption.⁵⁸

A Contractor Eligibility Statement signed by the property owner does not absolve a contractor of sales or use tax liability. If it is determined, by audit or otherwise, that some or all of the property does not qualify for exemption, the contractor is liable for use tax as the consumer of that property.

Example 13: Contractor enters into a contract to build a sanctuary for Church. Church indicates to Contractor that all of the areas that are being constructed are exempt areas and provides a completed Contractor Eligibility Statement. Contractor purchases all of the materials for the construction exempt from sales tax based on this assurance from Church. Contractor remits no use tax on the materials consumed in performing the contract. Upon audit it is determined that 40% of the area constructed by Contractor is used for a nonexempt purpose. Contractor is liable for use tax on the purchase price of the materials used to construct the nonexempt areas of the building.

D. Credits and Refunds for Certain Core Charges

⁵⁶ Because a contractor does not possess an entity-based exemption, the use of Form 3520 (or any other document or medium containing the reason for the exemption) satisfies the requirement under MCL 205.62(1) and MCL 205.104b(1) that the seller obtain the "reason for claiming the exemption" from the purchaser claiming the exemption.

⁵⁷ MCL 205.94(1)(a).

⁵⁸ *Andrie, supra.*

A core charge is a deposit that is made for certain items. When the item is returned to the seller the core charge is refunded to the customer. Typically, a seller is liable for sales tax on core charges, however, “[a] person who paid sales tax on a core charge attributable to a recycling fee, deposit, or disposal fee for a component, part, or battery for heavy earthmoving equipment may calculate a credit and seek a refund from the department...in an amount equal to the sales tax paid” to the State on the core charge.⁵⁹

III. Contractors Engaged in Retail Sales

- A. A contractor is engaged in the business of making sales at retail when selling tangible personal property, such as building materials, “over-the-counter” to customers.⁶⁰ A contractor also makes a sale at retail when the contractor sells tangible personal property in the course of performing a construction contract, and the property is not consumed, affixed to, or made a structural part of the real estate upon installation, but remains tangible personal property.

Example 14: Contractor enters into a contract with Nonprofit School to remodel the school. Nonprofit School is eligible to purchase tangible personal property exempt from sales tax. Contractor has materials in its inventory that it purchased exempt from sales tax for purposes of resale. Under the contract, Contractor will sell Nonprofit School all of the property that Contractor will affix to the real estate of Nonprofit School at retail. Nonprofit School provides Contractor a valid claim of exemption on the retail sales of the materials. Contractor is liable for use tax on the property it affixes to Nonprofit School’s real estate as the consumer of that property.

Example 15: Assume the same facts as Example 13, however, under this contract, Contractor will sell Nonprofit School all of the property that Contractor will affix *and* property that it will *not* affix (moveable book cases, desks etc.) at retail. Under these facts, Contractor is liable for use tax on the property it affixes to Nonprofit School’s real estate as the consumer of that property, however, Contractor is not liable for use tax for the property it does not affix if Nonprofit School provides and Exemption Claim (Form 3372) or equivalent information.

Example 16: Contractor enters into a contract with a customer to build a custom home. The contract states a general building price and additional charges for appliances depending on the grade of appliance. The appliances will be purchased by Contractor and resold to the customer. When making these sales of appliances,

⁵⁹ MCL 205.184a. Beginning January 1, 2017, a similar exemption from sales and use tax is available concerning core charges for a motor vehicle (or recreational vehicle) part of battery if separately stated on the invoice, bill of sale, or similar document given to the purchaser. See MCL 205.51(d)(xiii) and 205.92(f)(xiii).

⁶⁰ Examples of property that are most likely (but still dependent on the facts and circumstances) to be characterized as personal property include: free-standing appliances, window unit air conditioners, catwalks attached to equipment, fire suppression/protection systems for equipment, fire extinguishers, supplemental water system for equipment, generators for equipment, freestanding lockers, and window treatments.

Contractor separately lists the prices for each appliance to be purchased in the contract and the contract notes that the customer will be charged for the sales tax on the appliances. Under these facts, the contract is sufficient to document the contractor's sales tax liability as the retailer of the appliances and the payment of the tax on these appliances for any use tax liability that would otherwise arise if the appliances are built-in rather than freestanding and affixed to real estate under the contract. Regardless whether the customer makes payment upfront for these appliances or pays for the appliances in monthly installments, Contractor's obligation to remit sales tax on the entire purchase price for those sales accrues immediately.⁶¹

- B.** Contractors that consistently hold themselves out to the public as retailers, and therefore collect and remit sales tax pursuant to the sales tax act, are liable for sales tax based on the sales price of the property. However, if the amount remitted as sales tax from the contractor is less than the amount that would be remitted if the contractor paid sales or use tax on its purchases in performing its contracts, the contractor is liable for the difference.⁶²
- C.** A contractor that makes sales at retail (except a contractor registered under the Streamlined Sales and Use Tax Agreement who is not otherwise required to obtain a sales tax license in Michigan) must be licensed under the General Sales Tax Act.⁶³
- D.** A contractor that makes sales at retail is required to pay use tax based on the purchase price of the property when it is removed from resale inventory in Michigan and used by the contractor in performing a construction contract if the property will be affixed to or made a structural part of real estate located in Michigan.⁶⁴ Removal of resale inventory for affixation to real estate located in another state is exempt from use tax.⁶⁵

IV. Retailers (Suppliers to the Contractor)

- A.** A retailer (supplier) for sales and use tax purposes, is a person in the business of selling building materials, supplies, tools, equipment, etc. to contractors at retail.
- B.** A retailer (supplier) is liable for the collection and payment of sales or use tax to the Department when selling materials, supplies, tools, equipment, etc. to a contractor, absent an applicable exemption.⁶⁶ If the retailer (supplier) collects sales or use tax from the contractor, the contractor is relieved from owing use tax for that property if the contractor can demonstrate that the tax was collected by the

⁶¹ See *Ally Fin Inc v State Treasurer*, 502 Mich 484, 493-94 (2018).

⁶² See IPD 2005-3.

⁶³ MCL 205.53; see also, Mich Admin Code, R 205.1.

⁶⁴ The reference to "resale" inventory means inventory for which the contractor (who makes sales of its inventory at retail) did not pay sales (or use) tax on the purchase of the inventory because it claimed a "sale for resale" exemption.

⁶⁵ MCL 205.94(1)(z).

⁶⁶ A supplier may reimburse itself for the amount of sales tax on taxable sales to contractors. *Ammex, supra*.

retailer (supplier.) When an exemption is claimed by a contractor the retailer (supplier) must retain an Exemption Certificate or, in lieu of an Exemption Certificate, other identifying information of the contractor and the reason for claiming the exemption, either in paper or electronic format. When the sale is for property to be affixed to and made a structural part of real estate of one of the exempt properties described in this RAB, the retailer (supplier), in addition to an Exemption Certificate or other identifying information provided, should also obtain a Contractor Eligibility Statement indicating the reason for the claim of exemption.

- C. When a retailer (supplier) makes a taxable sale of property to a customer, it must remit sales tax regardless whether the retailer (supplier) subcontracts with a contractor for installation of the property. If the retailer (supplier) collects sales or use tax from its customer, the contractor is relieved of paying use tax for that property if the contractor can demonstrate that the sales tax was collected by the retailer (supplier.) A sales invoice or similar documentation from the retailer (supplier) to the customer that separately states the sales or use tax is sufficient evidence to establish that sales tax was collected on the retail sale and will satisfy the contractor's burden of proving its entitlement to the exemption provided in MCL 205.94(1)(a).⁶⁷

Example 17: ABC, Inc., a retailer (supplier) sells an entry door to Customer in a retail transaction. ABC charges Customer sales tax on the sales price of the door. ABC and Customer agree that ABC will subcontract with Contractor for installation of the door. Contractor is not liable for use tax for the door so long as it can demonstrate that sales tax was collected by ABC on its sale of the door to Customer.

⁶⁷ Letter Ruling 2014-1.