



STATE OF MICHIGAN
DEPARTMENT OF TREASURY
LANSING

GRETCHEN WHITMER
GOVERNOR

RACHAEL EUBANKS
STATE TREASURER

September 22, 2021

[REDACTED]
[REDACTED]
[REDACTED]

RE: Request for Technical Advice Letter – [REDACTED]

Dear [REDACTED]:

Thank you for your letter dated July 19, 2021 seeking a technical advice letter from the Michigan Department of Treasury (“Department”) on behalf of [REDACTED] (“Company”). Your request concerns Company’s proposed sales and use tax treatment for stone slabs purchased by Company and fabricated by Company into various products that will either be consumed as part of a construction project, when affixed to realty by Company or another contractor, or sold by Company at retail. Your request meets the requirements for issuance of a Technical Advice Letter pursuant to Revenue Administrative Bulletin (“RAB”) 2016-20.

Represented Facts. Company is a Michigan corporation whose primary business activity is the manufacture or fabrication of solid surface countertops (“Countertops”), from large slabs of solid stone, for affixation to real estate of others located in Michigan and outside of Michigan (either by Company or another contractor).¹ In some cases, Company acts as the contractor that affixes its Countertops to real estate and thus constitutes a manufacturer/contractor. When acting as a manufacturer/contractor, Company does not maintain an inventory of its manufactured Countertops that is available for sale to others or make its Countertops available for sale to others by publication or price list. Company also engages in retail sales of the Countertops to other contractors, who will affix them to real estate of others, and retail sales of ancillary products including products (e.g., crushed stone) derived from the portions of stone slabs remaining after Countertops are cut from those slabs (“Remnants”). At the time Company purchases a stone slab, it does not know if the Countertops produced from the stone slab will be ultimately sold at retail or consumed in the completion of a construction contract for affixation to real estate.

¹ This technical advice letter addresses only Countertops and other products produced from the stone slabs that are to be affixed and become a structural part of real estate in Michigan due to the exemption under MCL 205.94(1)(z), which provides an exemption from use tax for “property ... manufactured by a person engaged in the business of constructing, altering, ... or improving real estate for others, to the extent that the property is affixed to and made a structural part of real estate located in another state... .”

Company attempts to address that circumstance by purchasing the stone slabs exempt from sales tax under a “resale” exemption claim.

Company has purchased machinery and equipment (e.g., stone crushing equipment) that provides Company with the capability of converting Remnants into products that Company later sells at retail. As a result, the purchase of one stone slab may result in both a Countertop (that may be sold at retail or consumed in a construction contract by Company or another contractor) and another product (e.g., crushed road base material) created from Remnants that are sold by Company at retail. Company has acquired certain technology as part of its cost accounting system that will enable Company to precisely compute, within a square inch, the exact amount of stone used and consumed to manufacture or fabricate the Countertops. In the past, on jobs where Company acted as a manufacturer/contractor of Countertops, the amount used to calculate the taxable cost of the stone slab was based on the cost of the slab (including any waste), less material returned to inventory for future use. Using this new technology (e.g., software), together with the newly acquired machinery and equipment, Company will be able to determine, for each stone slab, the exact amount of stone slab used to fabricate a Countertop and the amount comprising the Remnants, previously discarded as waste, that it will convert into one or more products that Company will sell at retail.

Request. Company states that it seeks technical advice “regarding the proper allocation of the cost of the stone between stone consumed on a contractor job and stone ultimately sold at retail.” Stated another way, Company declares that it requests a technical advice letter “to confirm ... that [Company] can pay both sales and use tax on the purchased [sic] of a single slab of stone when part of the stone, determined by use of their software cost accounting system, is ultimately sold at retail and part of the stone [is] used and consumed in the completion of a construction contract [as Countertops] affixed to realty.” Considering the Company’s letter as a whole, the Department understands the request as seeking technical advice concerning the proper sales and use tax treatment of stone slabs purchased by Company that Company will use in the fabrication of the Countertops to be either sold at retail to other contractors or affixed to real estate in Michigan (either by Company or another contractor) with the Remnants made into products that Company will sell at retail.

Applicable Law. The Michigan General Sales Tax Act (“GSTA”) and the Michigan Use Tax (“UTA”) Act are complementary tax statutes that generally levy a 6% tax on the sale or use of tangible personal property (e.g., materials) in Michigan. The sales tax is levied on all persons engaged in the business of making “sales at retail,” which involve transactions in which “ownership of tangible personal property is transferred for consideration.”²

A sale at retail does not include a sale “for resale.”³ Where the sale of tangible personal property is taxable, sales tax is measured by the “sales price” which is generally the “total amount of consideration, including cash, credit, property, and services, for which tangible personal property or services are sold.”⁴ The UTA imposes tax on tangible personal property that is used, stored,

² MCL 205.52(1).

³ MCL 205.51(1)(b).

⁴ MCL 205.51(1)(d).

or consumed in Michigan unless an exemption applies. For purposes of the use tax, contractors are considered the “consumers” of materials used, stored, or consumed by them when engaged in the business of constructing, altering, repairing, or improving real estate of others.⁵ 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.⁶

With few exceptions, contractors are liable for use tax (based on the purchase price)⁷ on the property they use, store, or consume in Michigan, even if that property was not purchased by the contractor but was acquired from another.⁸ However, the contractor’s obligation to remit use tax is satisfied if sales tax is due and paid on the property at the time of purchase in a retail sale.⁹

A “manufacturer” is a person who “manufactures, fabricates, or assembles” tangible personal property.¹⁰ When a person is both the manufacturer of tangible personal property and the contractor that affixes that tangible personal property to real estate, that person constitutes a “manufacturer/contractor” regarding that tangible personal property.¹¹ Under certain conditions, a person may still qualify as a manufacturer/contractor even if that person subcontracts out the affixation (installation) work to another contractor.¹² As explained in RAB 2016-24, the use tax base applicable to a manufacturer/contractor depends upon whether the manufacturer/contractor maintains an inventory of its product that is available for sale to others or makes its product available for sale to others by publication or price list. Based on the facts presented in your letter, to the extent Company acts as a manufacturer/contractor, the Department considers Company to be a manufacturer/contractor of the type described in MCL 205.93a(1)(g). Accordingly, when acting in that capacity, Company’s use tax base for each of the Countertops it affixes to real estate (whether directly or through a subcontractor as explained in RAB 2016-24) will be the sum of the materials cost of the property¹³ *plus* the cost of labor to manufacture, fabricate, or assemble the Countertops, but not including any costs of labor to cut, bend, assemble, or attach the Countertops at the job site.¹⁴

A manufacturer/contractor may claim an industrial processing exemption under the UTA for tangible personal property it uses or consumes for industrial processing in connection with its

⁵ 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.” See also Mich Admin Code, R 205.8.

⁶ Mich Admin Code, R 205.71. See also RAB 2019-15 (Sales and Use Taxation of the Construction Industry (excluding manufacturer/contractors)).

⁷ MCL 205.92(f). See also RAB 2019-15.

⁸ Under MCL 205.94ee, a contractor is not liable for use tax for storing, using, or consuming property acquired from another person so long as: (i) the property was *purchased* by that other person; (ii) that other person is *not exempt* from the tax imposed under the GSTA or the UTA, 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.

⁹ MCL 205.94(1)(a); RAB 2019-15. See also *Andrie, Inc v Dep’t of Treasury*, 496 Mich 161 (2014).

¹⁰ MCL 205.93a(5)(m).

¹¹ MCL 205.93a(1)(f)-(g). See also RAB 2016-24 (Use Tax Base of Tangible Personal Property Affixed to Real Estate by a Manufacturer/Contractor or other Contractor).

¹² See RAB 2016-24.

¹³ As already noted, Company will not be liable for use tax on any materials (e.g., slabs) for which it already paid sales tax at the time of purchase.

¹⁴ RAB 2016-24.

product *only* if the product is either ultimately sold at retail or is affixed to and made a structural part of real estate located in *another state*.¹⁵ The industrial processing exemption is limited to the percentage of exempt use to total use determined by a reasonable formula or method approved by the Department (which does not need to be pre-approved by the Department, but must reasonably reflect the percentage of exempt use to total use).¹⁶

Analysis and Conclusion. In general, the sales of the stone slabs to Company are subject to sales tax as retail sales. Company asserts that it intends to purchase the stone slabs at issue exempt from sales tax under a “resale” exemption claim. Because there is no evidence that Company makes retail sales of the stone slabs it purchases, as the stone slabs are used as the raw material to produce Company’s products, it is not entitled to claim a “resale” exemption at the time it purchases the stone slabs.¹⁷ Furthermore, Company explains that at the time of purchase of the stone slabs, it “does not know if the stone will be ultimately sold at retail or consumed in the completion of a construction contract for affixation to real estate” in Michigan. Although Company is not entitled to claim a “resale” exemption at the time it purchases the stone slabs, it may be eligible to claim an “industrial processing” exemption as explained below:

a) Industrial Processing Exemption (100%). In the event that Company knows, at the time of purchase, that a particular stone slab (or group of slabs) will be used *entirely* in the manufacture of products that Company will sell at retail, such as a Countertop *and* crushed road base material, then Company may claim a 100% industrial processing exemption from sales and use tax for the purchase of that particular slab (or group of slabs).

b) Industrial Processing Exemption (Apportioned). To the extent that Company does not know at the time of purchase how a particular stone slab (or group of slabs) will be ultimately used, but reasonably anticipates that some of those uses will involve fabricating products that Company will sell at retail, Company may establish a reasonable formula or method for apportioning the industrial processing exemption and claim this limited exemption from sales and use tax at the time of purchase of a stone slab (or group of slabs).¹⁸ In determining the apportionment percentage, Company may consider as exempt those slabs used to fabricate Countertops that are sold at retail and/or to create products from the Remnants that are sold at retail.¹⁹ Stone slabs (or portions of slabs) used to fabricate products that are not sold at retail (e.g., Countertops consumed by Company as a

¹⁵ MCL 205.94o(1), (4)(a), (5)(a), (7)(a)-(b); RAB 2016-24. See also the industrial processing exemption from sales tax under MCL 205.54t which generally mirrors the language in the UTA except that it does not have an exception to the general rule (which prohibits industrial processing for property affixed to real estate) for affixation to real estate located outside Michigan.

¹⁶ MCL 205.54t(2); MCL 205.94o(2). See also RAB 2016-24.

¹⁷ See Letter Ruling 2019-4.

¹⁸ See MCL 205.54t(2). As previously noted, and explained in RAB 2016-24, this formula or method need not be preapproved by the Department but must reasonably reflect the percentage of exempt use to total use.

¹⁹ Accordingly, an apportioned “industrial processing” exemption would apply even for a stone slab that was used by Company as a manufacturer/contractor for affixation to real estate in Michigan and to produce an ancillary product from the Remnants that were sold at retail by allocating the percentage of the slab used to produce the ancillary product as the exempt percentage and the percentage used to fabricate the Countertop as the taxable percentage.

manufacturer/contractor) are to be treated as taxable and applied to the taxable percentage of the apportionment formula.²⁰

In summary, under the facts presented in your letter, to the extent Company acts as a manufacturer/contractor concerning the stone slabs it purchases, and has not paid sales tax at the time of purchase on the slabs, Company will be liable for use tax equal to the purchase price of these stone slabs *plus* the cost of labor to manufacture, fabricate, or assemble the Countertops from those stone slabs but not including any cost of labor to cut, bend, assemble, or attach the Countertops at the job site. Company must also include in its use tax liability those taxable costs²¹ attributable to any Remnants that are kept for future use in a construction project as those are not eligible for the “industrial processing” exemption.²² Based on the facts presented in your letter, Company may also exclude from this use tax liability the costs attributable to the Remnants that Company will turn into products (e.g., crushed stone) and sell at retail. Company will owe sales tax on the “sales price” of those products and any Countertops that are sold at retail. Although Company is not entitled to claim a “resale” exemption at the time of purchase of the stone slabs, it may be entitled to claim an “industrial processing” exemption at the time of purchase; subject to apportionment as described above.

Please contact me if you have any further questions regarding this matter.

Sincerely,

/s/ Stewart Binke

Stewart A. Binke, Administrator
Tax Policy Division

²⁰ It is likely under these facts that Company will need to estimate what its exempt and taxable uses would be and apportion the industrial processing exemption claim accordingly. If the apportionment percentage turns out to be lower than the actual use, additional use tax would be due.

²¹ See MCL 205.92(f) and MCL 205.93a(1)(f) or (g), as applicable.

²² As noted previously, this technical advice assumes that all construction projects at issue involve real estate located in Michigan.