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RELEASE

February 6, 2020

TO: Michigan Aggregates Association

RE: Sales Tax on Delivery Charges

Dear Members of The Michigan Aggregates Association:

Confusion continues as to whether or not delivery charges for transportation services are taxable under the Michigan General Sales Tax Act. Effective September 1, 2004, the Michigan Legislature amended the Act to provide that "gross proceeds" for the sale of personal property transferred for consideration includes:

Delivery charges to be incurred **before** the completion of the transfer of ownership of tangible personal property subject to the tax levied under this Act from the seller to the purchaser. (MCL 205.52(1)) (emphasis added)

Delivery charges means charges by the seller for preparation and delivery to a location designated by the purchaser of tangible personal property or services. Delivery charges include transportation, shipping, packing, etc.

As a result of the 2004 change, delivery charges incurred **before** the completion of the transfer of ownership of tangible personal property from seller to purchaser, are included in the definition of sales price under the General Sales Tax Act and taxable at 6%. The Treasury Department has determined that it is immaterial whether such transportation charges are billed separately or whether they are paid by the seller or the purchaser. However, Treasury does allow for an exemption from the sales tax under the Act if delivery charges are incurred **after the completion of transfer of ownership**.

Enclosed for your review, is Revenue Administrative Bulletin 2015-17 issued by the Michigan Department of Treasury. The Treasury Bulletin lists various factors Treasury will consider in determining whether delivery charges are taxable or not. (Attachment 1). More specifically, the Bulletin lists factors, which although not exclusive, include the following:

1. Whether the customer has the option to either pick up the property or have the property delivered;

2. Whether the delivery charge is separately negotiated and contracted for on a competitive basis;
3. Whether the property and delivery charges are separately invoiced;
4. Whether the taxpayer's books and records separately identify the transactions used to determine the tax on the sale at retail;
5. Whether the delivery service records indicate a net profit (i.e., the delivery service is a commercial endeavor separate from the retail business);
6. The time at which risk of loss transfers from seller to buyer;
7. The time at which title to the property passes from seller to buyer;
8. Any other information that is relevant in determining when ownership transfers.

Unfortunately, Treasury's various field agents apply these factors differently from audit to audit. None of these factors individually or in combination with others conclusively determines the taxability of delivery charges and can be subject to varying interpretations from field agent to field agent. As a result adherence to as many of the factors as possible provides one of the most effective strategies for a taxpayer subject to these taxes.

One consistent area that Treasury focuses on is whether or not the goods are shipped FOB origin or FOB destination. Enclosed, in Attachment 2 is the deduction manual put out by the Michigan Department of Treasury from 2018 which indicates that if your shipping documents includes the specific term "FOB Origin," meaning the buyer assumes title and control of the goods at the time the goods are loaded onto trucks and assumes the risk of transportation at that same point, then more than likely the delivery charges would be exempt from sales tax. However, if the shipment is made "FOB Destination," the seller still maintains title and control as well as risk for the goods until they are delivered to the customer. In such a case Treasury will determine that delivery charges would be taxed and included in the sales price of the goods.

One suggestion to help clarify that the intent of the FOB delivery is to pass ownership to the customer upon point of origin is to add the following language on your company's invoices:

All deliveries are FOB "NAME of FACILITY" freight prepaid or freight collect to destination. Title to the product(s) and risk of loss to the product(s) shall pass to Buyer at the point of shipment, regardless of which party selects the carrier and arranges the freight charges or particulars of shipment. Risk of loss for damage or delay in transit shall be borne by Buyer.

This suggestion although helpful cannot provide assurance that the Department of Treasury will not still question the application of sales tax to the delivery services.

Seller engaged in a separate delivery business.

Delivery charges for a seller delivering its own aggregate product are exempt from tax if:

1. The charges are incurred or to be incurred after the transfer of ownership from the seller to the purchaser (as explained above); and
2. The seller is simultaneously engaged in a separate delivery service business.

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Treasury generally holds a seller simultaneously engaged in a separate delivery service business, who can substantiate separate delivery charges, would be exempt from the tax when all the following requirements are met:

1. The customer has the option to either pick up or have merchandise delivered;
2. The delivery service charge is separately negotiated and contracted for on a competitive basis and is not a cost in calculating the merchandise price, as customer pays a separate price;
3. The Taxpayer's books and records separately identify the transactions used to determine the tax on the sale at retail; and
4. Delivery service records show a net profit.

Seller not engaged in a separate delivery business.

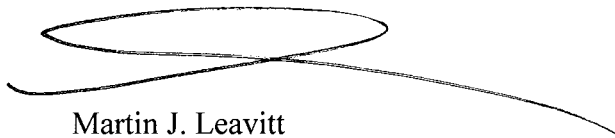
Delivery charges on aggregate commodities delivered by a seller not engaged in the separate delivery service business are taxable if the charges are incurred prior to the transfer of ownership.

The more factors that you can meet and document, as identified above, showing charging for delivery services is a separate business endeavor from the sale of aggregate commodities as well as being able to show that ownership of the goods transfers prior to delivery, all will help your argument that your delivery charges should be exempt from the sales tax. However, again, all of Treasury's field auditors are not consistent in their analysis of the factors identified above. As a result, unfortunately there is no black and white "safe harbor" which insures whether or not delivery charges will be considered exempt if an audit is conducted.

We suggest the most assurance a producer or for that matter carrier of such commodities can have on an ongoing basis is to have a professional with experience in these matters having dealt with many audits and importantly auditors from Treasury review its operations, documentation and practices as the business is conducted to be able to provide the best defense should an audit be conducted of its business.

Very truly yours,

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Enclosures

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ATTACHMENT 1



RICK SNYDER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF TREASURY
LANSING

NICK A. KHOURI
STATE TREASURER

REVENUE ADMINISTRATIVE BULLETIN 2015-17

Approved: September 23, 2015

SALES TAX TREATMENT OF DELIVERY AND INSTALLATION SERVICES PROVIDED BY RETAILERS

(Replaces Revenue Administrative Bulletin 2002-11)

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 2015-17. This bulletin replaces Revenue Administrative Bulletin (RAB) 2002-11. The discussion in this bulletin is limited to charges for delivery or installation directly by the seller or delivery by a contract carrier. Delivery by common carrier or postal service is not discussed.

BACKGROUND

The General Sales Tax Act (Act) provides that “there is levied upon and there shall be collected from all persons engaged in the business of making sales at retail, by which ownership of tangible personal property is transferred for consideration, an annual tax for the privilege of engaging in that business equal to 6% of the gross proceeds of the business...”¹

For tax periods after September 1, 2004, the Act was amended to provide that “gross proceeds” (or “sales price”) includes delivery and/or installation charges in certain instances. Specifically, it provides that “sales price” includes the following:

Delivery charges incurred or to be incurred before the completion of the transfer of ownership of tangible personal property subject to the tax levied under this act from the seller to the purchaser.

[and]

Installation charges incurred or to be incurred before the completion of the transfer of ownership of tangible personal property from the seller to the purchaser.²

¹ MCL 205.52(1).

² MCL 205.51(1)(d)(iv), (v). However, delivery charges for the shipment of exempt property are not subject to sales tax.

The Act defines “delivery charges” to mean “charges by the seller for preparation and delivery to a location designated by the purchaser of tangible personal property or services.” The definition also includes certain specific items in, and excludes certain specific items from, delivery charges:

Delivery charges include, but are not limited to, transportation, shipping, postage, handling, crating, and packing. Delivery charges do not include the charges for delivery of direct mail if the charges are separately stated on an invoice or similar billing document given to the purchaser.³

ISSUES

- I. What factors will be considered to determine if delivery or installation charges are taxable?
- II. What is the tax treatment of single deliveries containing both taxable and exempt goods?

CONCLUSIONS

- I. The tax base includes delivery or installation charges that are incurred prior to the completion of transfer of ownership of tangible personal property subject to the Act.⁴ Therefore, whether ownership of the property is transferred *before* or *after* the delivery or installation charges are *incurred* determines if those charges are subject to tax. The Department will consider all facts and circumstances of the transfer of ownership of the property to determine if delivery or installation charges are taxable, including, but not limited to:
 1. Whether the customer has the option to either pick up the property or have the property delivered;
 2. Whether the delivery or installation charge is separately negotiated and contracted for on a competitive basis;
 3. Whether the property and delivery or installation charges are separately invoiced;
 4. Whether the taxpayer’s books and records separately identify the transactions used to determine the tax on the sale at retail;
 5. Whether delivery or installation service records indicate a net profit (i.e., the delivery or installation service is a commercial endeavor separate from the retail business);
 6. The time at which risk of loss transfers from seller to buyer;
 7. The time at which title to the property passes from seller to buyer;
 8. Any other information that is relevant in determining when ownership transfers.

None of the above factors, standing alone, conclusively determine the taxability of delivery or installation charges; the Department will look at the entire transaction when making its determination.

³ MCL 205.51a(e).

⁴ MCL 205.51(l)(d)(iv) and (v).

II. The tax base does not include “delivery charges allocated to the delivery of exempt property.”⁵ Therefore, when there is a single delivery charge incurred prior to transfer of ownership of the property and the property includes both taxable and exempt items, the tax base must be allocated using one of the following methods:

1. A percentage based on the total sales price of the taxable property compared to the total sales price of all property in the delivery; or
2. A percentage based on the total weight of the taxable property compared to the total weight of all property in the delivery.⁶

LAW AND ANALYSIS

The Act imposes tax on retail sales of tangible personal property at a rate of 6% of the gross proceeds of the business. Specifically:

[T]here is levied upon and there shall be collected from all persons engaged in the business of making sales at retail, by which ownership of tangible personal property is transferred for consideration, an annual tax for the privilege of engaging in that business equal to 6% of the gross proceeds of the business....⁷

The Act defines “gross proceeds” as “sales price.”⁸ Therefore, any item included in the definition of “sales price” is included in the tax base, or gross proceeds. “Sales price” is defined as:

[T]he total amount of consideration, including cash, credit, property, and services, for which tangible personal property or services are sold, leased, or rented, valued in money, whether received in money or otherwise, and applies to the measure subject to sales tax.

Sales price includes, among other things:

Delivery charges incurred or to be incurred before the completion of the transfer of ownership of tangible personal property subject to the tax levied under this act from the seller to the purchaser.

[and]

Installation charges incurred or to be incurred before the completion of the transfer of ownership of tangible personal property from the seller to the purchaser.⁹

⁵ MCL 205.51(1)(d)(iv).

⁶ See IPD 2004-8.

⁷ MCL 205.52(1).

⁸ MCL 205.51(1)(c).

⁹ MCL 205.51(1)(d)(iv), (v). However, delivery charges for the shipment of exempt property are not subject to sales tax.

For periods before September 1, 2004, delivery charges were subject to tax under limited circumstances based on the Court of Appeals holding in *Natural Aggregates Corp v Dep't of Treasury*.¹⁰ In *Natural Aggregates*, the Court of Appeals held that certain delivery charges were not taxable because the retailer was simultaneously engaged in a nontaxable business (i.e., delivery). The Court of Appeals characterized the delivery as a transaction separate from the sale of property, both conceptually and temporally. However, MCL 205.51(1)(d)(iv) now specifically includes delivery charges in the tax base;¹¹ therefore, the analysis used in *Natural Aggregates* does not apply for periods after September 1, 2004.¹²

After September 1, 2004, delivery and installation charges are subject to tax if they are *incurred* or are to be *incurred* before the completion of transfer of ownership of the property; the charges are “incurred” when the purchaser becomes legally liable for the charge. The dispositive determination is, therefore, when the delivery or installation charges were incurred, not necessarily when the actual act of delivery or installation occurs. As noted above, the Department will look at any relevant information to determine whether charges are incurred prior to the completion of transfer of ownership.

If a single shipment contains both exempt and taxable property the tax must be allocated between exempt and non-exempt property.¹³ A taxpayer may choose to allocate the delivery charges by either of the methods set forth in the Conclusions section of this RAB.

EXAMPLES

1. ABC Inc. makes retail sales of office furniture. When a customer purchases property from ABC, it may either arrange for its own delivery or ABC, for an additional cost, will provide delivery. If the customer chooses ABC for delivery, a separate contract is entered into by the customer and ABC after the sale which passed all rights of title and ownership of the property to the customer. Because the delivery charge is incurred after the transfer of ownership of the property, the delivery charge is not taxable.
2. ABC Inc. makes retail sales of office furniture. When a customer makes a purchase, it may either arrange for its own delivery or ABC, for an additional cost, will provide delivery. If the customer chooses ABC for delivery, no separate contract is entered and the delivery charges are itemized as “Shipping and Handling” on the same invoice as the office furniture. Under the terms of the sale, risk of loss remains with ABC until the property is delivered. The customer pays the entire invoice at the time of purchase. Because the delivery charge is incurred before the completion of transfer of ownership it is taxable.

¹⁰ 133 Mich App 441 (1984).

¹¹ 2004 PA 173 explicitly added delivery charges to the tax base.

¹² *Unger Enterprises, Inc v Dep't of Treasury*, MTT Docket No. 343303, (2010) (Michigan Tax Tribunal decisions are not precedential; however, *Unger Enterprises* provides a thorough discussion regarding the taxability of delivery charges after 2004 PA 173.).

¹³ 2008 PA 438. See also, IPD 2004-8.

3. ABC Inc. makes retail sales of office equipment, supplies, and furniture. ABC makes a sale to IP Inc., an industrial processor. The delivery charge is incurred prior to the completion of transfer of ownership; therefore, it is taxable. However, only 70% of the sales price of the transaction is subject to sales tax while the remaining 30% of the sales price is exempt under the industrial processing exemption. On the other hand, 50% of the weight of the delivery is subject to sales tax while the remaining 50% of the weight is exempt under the industrial processing exemption. It is in ABC's discretion to determine the allocation of taxes for the taxable delivery charge. It may choose to remit sales tax based on the taxable percentage of the sales price of the delivery (70% of the delivery charge) or it may instead elect to remit sales tax based on the taxable percentage of the weight of the delivery (50%).
4. ABC Inc. makes retail sales of office furniture. When a customer purchases property that requires installation (such as cubicle walls), ABC, for an additional cost, will provide that service. If the customer chooses to purchase installation services, a separate contract is entered into by the customer and ABC after the sale which passed all rights of title and ownership of the property to the customer. Because the installation charge is incurred after completion of transfer of ownership, it is not taxable.
5. ABC Inc. makes retail sales of office furniture. When a customer purchases property that requires installation (such as cubicle walls), ABC, for an additional cost, will provide that service. If the customer chooses to purchase installation services, no separate contract is entered into and the sale of the property and installation are listed on the same invoice. The sales contract provides that title to the property passes to the customer prior to installation. The contract further provides that risk of loss passes to the customer prior to installation except in the case of loss or damage due to negligence or intentional actions by ABC during the course of installation. Because the installation charge is incurred prior to the completion of transfer of ownership, it is taxable.
6. ABC Inc. leases office furniture and equipment. The lease provides that ABC retains title to all leased furniture and equipment. However, the lease gives the customer the option to purchase the furniture and equipment for fair market value at any time throughout the duration of the lease. ABC provides for optional delivery and installation. Because complete transfer of ownership of the property does not occur until after delivery and installation are completed, any delivery and/or installation charges are taxable.
7. ABC Inc. sells office furniture. ABC sells furniture to XYZ Inc. and delivery charges are incurred before the completion of the transfer of ownership of the furniture. The terms of the sale allow XYZ 30 days to obtain financing for the property. When this option is exercised the sale is "unwound" and title reverts to ABC, and is then transferred to the third-party financier (Bank) for the original purchase price, including the delivery charge. XYZ exercises this option and enters an agreement with Bank to lease the property to XYZ on a conditional sale. The agreement provides that XYZ has a purchase option of \$1 at the conclusion of the lease; XYZ is not required to exercise the \$1 purchase option. The delivery charges are taxable because they were incurred before the completion of transfer of ownership of the property.

ATTACHMENT 2

**Michigan Department of Treasury
Tax Compliance Bureau
Audit Division**



**Other Deductions
Manual**

August 2018

Chapter 15 – Delivery Charges

Delivery charges means charges by the seller for preparation and delivery to a location designated by the purchaser of tangible personal property or services. Delivery charges include transportation, shipping, postage, handling, crating, and packing. Delivery charges do not include charges for delivery of direct mail from delivery charges if the direct mail charges are separately stated on an invoice or similar billing document given to the purchaser.

Delivery charges incurred or to be incurred before the completion of the transfer of ownership of tangible personal property from the seller to the purchaser, are included in the definition of **sales price** under the GSTA and **purchase price** under the UTA. It is immaterial whether such transportation charges are billed separately or whether they are paid by the seller or the purchaser. Delivery charges incurred after the completion of transfer of ownership are not subject to sales or use tax.

Ownership

Ownership can be determined by (this list is not all inclusive):

Whether ownership of the property is transferred before or after the delivery charges are incurred determines if those charges are subject to tax. All facts and circumstances should be considered to determine if delivery charges are taxable, including, but not limited to:

- Whether the customer has the option to either pick up the property or have the property delivered.
- Whether the delivery or installation charge is separately negotiated and contracted for on a competitive basis.
- Whether the property and delivery or installation charges are separately invoiced.
- Whether the taxpayer's books and records separately identify the transactions used to determine the tax on the sale at retail.
- Whether delivery or installation service records indicate a net profit (i.e., the delivery or installation service is a commercial endeavor separate from the retail business).
- The time at which risk of loss transfers from seller to buyer.
- The time at which title to the property passes from seller to buyer.
- Any other information that is relevant in determining when ownership transfers.

None of the above facts, standing alone, conclusively determine the taxability of delivery charges; the Department must look at the entire transaction when making its determination.

Examples:

FOB Origin:

- Buyer assumes title and control of the goods when carrier signs bill of lading.
- Buyer assumes risk of transportation and is entitled to route the shipment.
- Buyer can file claims for loss of damage.

FOB Destination:

- Seller maintains title and control of the goods until delivered and contract completed.
- Seller selects carrier and is responsible for risk of transportation.
- Seller can file claims for loss or damage.

Shipping details cannot be relied upon as the determining factor in all situations.

Seller Engaged in A Separate Delivery Business

Note: Emphasis is placed on when delivery charges are incurred, not necessarily when the actual delivery occurs.

Examples:

FOB Origin:

- Buyer assumes title and control of the goods when carrier signs bill of lading.
- Buyer assumes risk of transportation and is entitled to route the shipment.
- Buyer can file claims for loss or damage.

FOB Destination:

- Seller maintains title and control of the goods until delivered and contract completed.

- Seller selects carrier and is responsible for risk of transportation.
- Seller can file claims for loss or damage.

Shipping details cannot be relied upon as the determining factor in all situations.

Seller Engaged in a Separate Delivery Business

Delivery charges for a seller delivering its own product are exempt from tax if:

- The charges are incurred or to be incurred after the transfer of ownership from the seller to the purchaser; **and**
- The seller is simultaneously engaged in a separate delivery service business.

A seller, simultaneously engaged in a separate delivery service business, can substantiate delivery charges are exempt from tax when all four of the following requirements are met:

- The customer has the option to either pick up or have the merchandise delivered (thus, the delivery service is not always necessary to complete the transfer of tangible personal property or the performance of the transaction);
- The delivery service charge is separately negotiated and contracted for on a competitive basis and is not a cost in calculating the merchandise price, as the customer pays a separate price (thus, the delivery charge is not incidental to the purchase price - demonstrating a separate service transaction);
- The taxpayer's books and records separately identify the transactions used to determine the tax on the sale at retail; **and**
- Delivery service records show a net profit (thus, the delivery service has evidence of a separate competitive, commercial endeavor).

Seller Not Engaged in a Separate Delivery Business

Delivery charges on merchandise delivered by a seller who is not engaged in a separate delivery service business are taxable if the charges are incurred prior to the transfer of ownership. Delivery charges are not taxable if incurred after the transfer of ownership.

Exempt Property

A seller is not liable under the Act for delivery charges allocated to the delivery of exempt property.

If a shipment is comprised of both taxable and exempt property, the seller should allocate the delivery charge based on:

- A fraction equal to the total sales price of the taxable property divided by the total sales price of all property in the shipment; **or**
- A fraction equal to the total weight of the taxable property divided by the total weight of all property in the shipment.

Example:

- Seller makes sales of exempt tangible personal property to an industrial processor – 30% of total sales.
- Seller maintains title and control of the goods until delivered and contract is completed.
- Delivery weight of exempt property is 40% of total weight; 60% of total weight applies to taxable property.

It is the seller's discretion to determine allocation of taxable delivery charges. Seller may choose to remit sales tax based on the total sales price of the taxable property divided by the total sales of all property in the shipment (70% of delivery charge); or it may allocate based on the total weight of taxable property divided by the weight of all property in the shipment (60% of delivery charge).

References pertaining to this information can be found in the index under [Chapter 15](#)