



MAINE REVENUE SERVICES SALES, FUEL & SPECIAL TAX DIVISION INSTRUCTIONAL BULLETIN NO. 4

CONTRACTORS AND SUBCONTRACTORS

This bulletin is intended solely as advice to assist persons in determining and complying with their obligations under Maine tax law. It is written in a relatively informal style and intended to address issues commonly faced by contractors and subcontractors. Taxpayers are responsible for complying with all applicable tax statutes and rules. Although Maine Revenue Services ("MRS") bulletins do not have the same legal force and effect as rules, justifiable reliance upon this bulletin will be considered in mitigation of any penalties for an underpayment of tax due. This bulletin is current as of the last revision date shown at the end of the document.

The Sales and Use Tax Law is found in Part 3 of Title 36 of the Maine Revised Statutes ("M.R.S."). Title 36, MRS rules, instructional bulletins and certificates and affidavits may be viewed on the MRS website, www.maine.gov/revenue.

The term "contractor", as used in this bulletin, includes both contractors and subcontractors. "Contractor" includes building, electrical, plumbing, heating, painting, decoration, paper hanging, masonry, carpentry, plastering, cement, road, bridge, landscape, and roofing contractors.

The term "construction contract", as used in this bulletin, means a contract for repair, alteration, improvement, remodeling or construction of real property.

1. CONSTRUCTION CONTRACTS GENERALLY

When performing a construction contract, a contractor is purchasing materials and incorporating those materials into real property. Title to the materials passes to the contractor's customer after they are incorporated into real property. The contractor, as the last user of the materials as tangible personal property, pays a sales or use tax when purchasing the materials. See Sections 2 and 3 below for exceptions to this general rule, i.e. situations where a contractor does not pay tax on its purchase of materials.

For example:

- A carpenter is contracted to build a house for a customer, furnishing labor and all the materials. The carpenter's purchases from its vendor are taxable, since title will not pass to the customer until the house is built and all the materials have become real property. The carpenter pays tax on its purchase of the materials and does not add sales tax to the lump-sum charge to the customer.
- A customer hires an electrician to add more electrical outlets to their garage. The electrician does not have a written contract and is not a registered retailer with MRS. Although the electrician's business practice is to bill on a time and material basis, the electrician's practice is to not add any sales tax to the bill. Title will not pass to the customer until the outlets have all been installed and have become real property. The

electrician's purchases from its vendor are taxable. The electrician pays tax on its purchase of the materials and does not add sales tax to the charge to the customer.

2. PASSAGE OF TITLE BEFORE INSTALLATION

It is possible for contractors and their customers to arrange for title to pass to the customer before the materials are incorporated into real property. Although it is preferred that this arrangement be in writing, the contractor's business practice of invoicing all customers for time, materials, and sales tax, is sufficient evidence to support the intent that title passes to the customer before affixing the materials to real property.

For example:

- A plumber repairs the furnace of a homeowner. The plumber's business practice is to bill all customers on a time-and-materials basis, charging sales tax on all materials sold. The plumber registers with MRS as a retailer. The plumber purchases materials tax-free, furnishing the vendor with a resale certificate. When the contractor bills the customer for the materials, the contractor also bills for sales tax on the sale price of the materials to the customer, and remits the tax to the State.
- A general contractor enters into a construction contract with a customer to erect a warehouse. The contract contains language that supports the fact that title to all materials transfers to the customer on delivery to the construction site. The contractor registers with MRS as a retailer. The contractor purchases materials tax-free, furnishing the vendor with a resale certificate. When the contractor bills the customer for the materials, the contractor also bills the customer for sales tax on the sale price of the materials, and remits the tax to the State.

3. EXEMPT CONSTRUCTION CONTRACTS

A. CONTRACTS WITH SALES TAX EXEMPT ORGANIZATIONS. 36 M.R.S. § 1760(61) provides an exemption from sales and use tax for items which will be physically incorporated into the real property owned by or sold to a sales tax exempt organization. The real property must be used by the exempt entity primarily in the activity that qualified the entity for exemption. This exemption only applies to lumber, hardware, doors, windows, nails, insulation, and other building materials actually permanently affixed to real property. Tools, apparel, consumable supplies, fuel, machinery, and equipment used by the contractor are taxable, even if purchased specifically for the exempt job. Construction contracts with any of the following agencies or organizations qualify for this exemption:

- (1) The federal government, the State of Maine, or any of their agencies;
- (2) Any city, town, plantation, district or political subdivision of the State of Maine; and
- (3) Any organization holding a permanent sales tax exemption certificate issued by MRS. See Rule 302 ("Sales to Governmental Agencies and Exempt Organizations") for more information on exempt organizations.

A contractor that does not possess a resale certificate may purchase tax-free materials being incorporated in the real property by furnishing the vendor with form ST-A-119 ("Contractor's Exempt Purchase Certificate"). A certificate must be provided to the vendor for each project stating the location of the project and the name and exemption certificate number, if any, of the exempt organization. **This exemption does not apply where title is held or taken as security for any financing arrangement by a governmental agency, as in the case of Municipal Industrial Revenue Bonds.**

Each contractor must maintain adequate records to support the use of exempt purchase certificates and to show the use of all materials purchased.

B. WATER AND AIR POLLUTION CONTROL FACILITIES. 36 M.R.S. §§ 1760(29) & (30) provides an exemption for materials used in the construction, repair, or maintenance of a water pollution control facility or an air pollution control facility certified by the Commissioner of Environmental Protection. For materials purchased prior to certification, such as those purchased during the construction of the facility, a contractor may submit a claim for refund to MRS for sales tax paid on qualifying exempt materials when all of the proper documentation is available using form APP-153 ("Request for Sales Tax Refund"). Once the facility has been certified, the contractor must obtain a copy of form ST-A-117 ("Industrial Users Blanket Certificate of Exemption") from the customer to document and to purchase tax-free materials used in the construction, repair, or maintenance of the facility going forward.

C. ANIMAL WASTE STORAGE FACILITIES. 36 M.R.S. § 1760(81) provides an exemption for materials used in the construction, repair, or maintenance of an animal waste storage facility. The facility must have a nutrient management plan certified by the Commissioner of Agriculture, Conservation and Forestry. For materials purchased prior to certification, such as those purchased during the construction of the facility, a contractor may submit a claim for refund to MRS for sales tax paid on qualifying exempt materials when all of the proper documentation is available using form APP-153 ("Request for Sales Tax Refund"). Once the facility has been certified, the contractor must obtain a copy of form ST-A-103 ("Affidavit Regarding Purchases of Certain Products For Use In [...] Animal Agriculture") from the customer to document and to purchase tax-free materials used in the construction, repair, or maintenance of the facility going forward.

4. REFUNDS ALLOWABLE TO CONTRACTORS

Contractors cannot claim exemption when purchasing construction materials for use in the situations discussed below. Instead, the contractor must pay sales or use tax on the purchase of the materials and submit a claim for refund to MRS for tax paid on qualifying exempt materials once all of the required documentation is available.

A. CONTRACTS FOR FISH PASSAGE FACILITIES. 36 M.R.S. § 2014 provides a refund for sales or use tax paid on materials used in the construction of fish passage facilities when the facilities are built in accordance with plans and specifications approved by the Department of Inland Fisheries and Wildlife ("IFW") or the Department of Marine Resources ("DMR"). Refunds must be submitted to MRS on APP-153 ("Request for Sales Tax Refund")

accompanied by an explanation of the refund requested, a copy of the certification from IFW or DMR, and copies of purchase invoices showing the amount of sales tax paid.

B. CONTRACTS WITH PINE TREE DEVELOPMENT ZONE BUSINESSES. 36 M.R.S. § 2016 provides a refund for sales or use tax paid on tangible personal property that is physically incorporated in and becomes a permanent part of real property that is owned by or sold to a qualified Pine Tree Development Zone business and that is used directly and primarily by that business in one or more qualified business activities. Refunds must be submitted to MRS on APP-151 ("Pine Tree Development Zone Application for Refund of Sales or Use Tax"). See Instructional Bulletin No. 52 ("Pine Tree Development Zones") for more information.

C. TAX PAID ON EXEMPT PARTS. In certain situations parts used by a contractor in a repair of tangible personal property may qualify for exemption. The tax paid on those parts by the contractor would qualify for refund. Parts used in the repair of manufacturing equipment or in machinery and equipment used in commercial agricultural production are two examples where repair parts are exempt. Refunds must be submitted to MRS on APP-153 "Request for Sales Tax Refund" accompanied by an explanation of the refund requested and any documentation required to prove the parts are exempt.

For example:

- An electrician repairs a piece of manufacturing equipment and replaces wires, switches and a motor. The electrician paid sales tax when purchasing these parts. Since repair parts for qualifying manufacturing equipment are exempt from sales tax, the contractor would qualify for a refund of the sales tax paid.

D. TAX PAID ON GOODS REMOVED FROM MAINE. 36 M.R.S. § 2012(3) provides a refund of sales tax paid on goods incorporated into real property located in another taxing jurisdiction, provided that jurisdiction does not impose a sales or use tax. This would apply to a contractor in Maine that purchases goods in Maine, pays the sales tax, and incorporates the goods into property located in a state that does not impose a sales or use tax.

For example:

- A carpenter is building custom cabinets for a house in New Hampshire. The carpenter has paid Maine sales tax on the raw materials purchased from a Maine vendor. The carpenter installs the cabinets in the New Hampshire house. The Maine sales tax is refundable to the carpenter since New Hampshire is a taxing jurisdiction, and one that does not impose sales or use tax. In contrast, if the house was in Massachusetts, no refund would be allowed as Massachusetts imposes sales and use tax.

5. SALES BY CONTRACTORS

Although contractors are normally engaged in affixing property to real property, they may act as retailers in certain situations. A contractor is a retailer when it:

- Purchases and sells materials and supplies at retail; or
- Builds and sells tangible personal property at retail, such as cabinets, furniture, and other items, without incorporating them into real property.

If the contractor makes retail sales of tangible personal property, it must obtain a retailer's certificate from MRS and collect sales tax from its retail customers. When purchasing materials for these situations, the contractor is allowed to provide a resale certificate to the vendor and purchase the materials without payment of tax. The contractor must collect and remit sales tax based on the sale price of the items it sells at retail.

A. SALES OF GRAVEL AND OTHER AGGREGATES AS TANGIBLE PERSONAL PROPERTY. When a contractor delivers gravel or other aggregate to a customer by dumping in a pile, dumping in a fill, or "truck spreading," the transaction is a sale of tangible personal property. Sales tax applies to the sale price including any charges for delivery by the seller.

For example:

- A customer orders 8 yards of loam at \$10 per yard to reseed a lawn. The contractor charges a \$25 delivery fee. The contractor dumps the loam in an area designated by the customer. Sales tax applies and should be collected by the contractor on the total sale price of \$105 (\$80 + \$25).

B. SALES OF GRAVEL AND OTHER AGGREGATES AS REAL PROPERTY. If the contractor performs additional services, for example bulldozing and grading, the contractor is affixing the material to real property, not selling tangible personal property. Sales tax is not charged to the customer. The contractor is responsible for sales or use tax when purchasing the material. If the contractor extracts the material from its own pit, there is no use tax liability to the contractor.

For example:

- A contractor is hired to repair a customer's driveway. The contractor delivers gravel that it has purchased from another contractor, and grades and compacts the customer's driveway. The contractor does not charge sales tax to the customer on the gravel. The contractor is subject to tax on its purchase of the gravel.
- A contractor hires a sub-contractor to fill in around a foundation and prepare proper drainage for the property. The sub-contractor extracts rock, fill and loam from its own pit, delivers the aggregate, excavates the property, and spreads the delivered product. The sub-contractor does not charge the contractor sales tax on the rock, fill, and loam. Because the materials were extracted from its own pit, the sub-contractor is not subject to use tax on the aggregate.

6. PURCHASES

A. PURCHASES FOR OWN USE. On items the contractor uses in its business (rather than sells in the form of tangible personal property), tax is paid to the vendor on the purchase. Trucks, tractors, scaffolding, machinery and equipment, tools and supplies such as pipe cutters, trowels, wrenches, oxygen, acetylene, acid and thread-cutting oil, and fuels used in the performance of construction contracts are taxable. This is true even though the equipment and supplies are used in connection with a contract with an exempt organization. If the seller does not charge sales tax, the contractor must report use tax directly to MRS. If the contractor has bought materials and supplies exempt from tax, but later uses them as a consumer, it must

either report these transactions as "Other Taxable Purchases" on its next sales and use tax return, or, if it is not a registered retailer, must remit the use tax directly to MRS.

If tax was paid to a vendor for materials that are exempt as described in Section 3, the contractor may make an adjustment on its next sales tax return. If the contractor is not a registered retailer, the contractor may apply for a refund directly from MRS.

B. PRODUCTS USED IN THE PERFORMANCE OF A SERVICE. Contractors may also be engaged in using products as part of the service they are providing. For instance, an excavation company may contract to plow, salt and sand parking lots and driveways during the winter season or landscapers may contract to mow lawns and apply fertilizer, weed killer, or pesticides to the property. Salt, sand, fertilizer, weed killer and pesticides are all used by the contractor in the performance of a service. The contractor must pay sales or use tax when purchasing these products and would not charge sales tax to its customer. This is true even if the contract is with an exempt organization.

C. PURCHASES FOR RESALE. When a contractor purchases tangible personal property for resale as tangible personal property, the contractor is acting as a retailer. The contractor must provide the vendor with a resale certificate as provided in Rule 301 ("Sales for Resale and Sales of Packaging Materials"). The certificate will enable the contractor to purchase tangible personal property for resale without payment of sales tax. Only one certificate need be provided to each vendor to cover subsequent purchases. The contractor must state to the vendor whether or not the purchase is for resale and will be held responsible for the tax on any item purchased for resale but subsequently used by the contractor. **Purchasers who avoid payment of tax through deliberate misuse of resale certificates may be subject to criminal prosecution.**

7. FABRICATION

Labor by a contractor to produce an item of tangible personal property may be a fabrication service subject to the service provider tax. Fabrication services are taxable if the purchaser provides the materials used to produce an item of tangible personal property and the tangible personal property is produced and transferred to the customer as tangible personal property. See Instructional Bulletin No. 46 ("Fabrication Services") for further information and for guidance on registering for and remitting the service provider tax.

8. TANGIBLE PERSONAL PROPERTY VS REAL PROPERTY

Determining whether a transaction is for the sale of tangible personal property or the sale of real property requires the consideration of all the facts surrounding the transaction. No one fact is conclusive. Because the type of sale determines the tax consequences, however, a contractor must carefully consider each transaction. Based on past court decisions, the general rule in Maine for determining whether a sale is a sale of real property or tangible personal property is the following three-prong test:

1. The item is physically attached to real property;

It is fair to say that for an item to be considered as an attachment to real property, it must be physically attached. An item that is free standing and can be moved around would be tangible personal property. Bolting, screwing, nailing, or gluing property to real property would result in it being physically attached to the real property. On the other hand, an unattached item may also be considered physically attached to the real property due to its size and weight.

2. The item is being adapted to and usable with that part of the real property to which it is attached; and

The adaptability test is not so easily met. Some factors the courts consider in applying the test are: (1) whether or not there is a unity of purpose between the real property and the property attached to it; and (2) is the property specially designed for the land to which it has been attached. If the property is made for the general market or could be located and used equally as well elsewhere or it retains its market value separate from the land, it may still be “tangible personal property.”

3. The item is affixed to the real property with the intention on the part of the owner to make it a permanent attachment.

The intention of the owner is supported by, but not limited to, the structure and mode of attachment and the purpose and use for which the attachment has been made.

For example:

- A general contractor erects a canopy over the fuel pumps at a service station. The canopy is physically attached by way of concrete, bolts, and pillars, is adapted to the use of the property (a service station), and is intended to be a permanent addition to the property. The canopy is real property after it is installed.
- A carpenter builds and installs free standing display cases for a jewelry store. The cases are not physically attached and can be moved around to form different configurations in the store. The cases are tangible personal property.
- A building contractor constructs a 12 x 18 garden shed and delivers the shed to a customer’s property. The contractor installs the shed on the customer’s concrete pad. Although not bolted to the concrete pad, the shed’s size and weight is sufficient to meet the “physically attached” test. The shed is adapted to the use of the land (a residential home) and is intended by the homeowner to be a permanent addition to the property. The shed is real property after it is installed.

9. ADDITIONAL INFORMATION

The information in this bulletin addresses some of the more common questions regarding the Sales and Use Tax Law faced by contractors. It is not intended to be all-inclusive. Requests for information on specific situations must be in writing, must contain full information as to the transaction in question, and must be directed to:

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Issued: **September 1, 1951**
Amendments: January 19, 1991
June 9, 2016
Last Revised: **November 4, 2019**

(Published under Appropriation 010-18F-0002-07)