



STATE OF ARKANSAS
**Department of Finance
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[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

RE: Gross Receipts Tax – Sales Tax on Fence Construction Labor and Materials Markup
Opinion No. 20190320

Dear [REDACTED]

Your letter requesting a legal opinion has been assigned to me for a response. Your request states in pertinent part as follows:

Currently fence products are taxable and labor on fence construction is not taxable, however, in some cases I will mark product or items up on my invoice to the customer. Is that markup considered taxable?

For example, I purchase a bag of concrete for \$3.00 from a store. I sell a bag of concrete to my customer for \$4.00. I consider this \$1.00 markup my labor & expense to go and get the bag of concrete and deliver to the job site.

Understand that if I just billed it as labor it would not be taxable but in some cases where I'm able to broker a lower cost for goods it enables us to make a profit without showing it as labor on the invoice.

Currently we are and have been paying sales tax on this difference but would like legal opinion if we need to continue?

Your request for opinion was previously assigned to another attorney. His file contains notes that he discussed your opinion request with you and you informed him that you did not have a retail establishment, a vast majority of your business involves the sale and installation of fencing, and you have sold fencing materials without installing the fencing. My response below is based upon your original opinion request and the notes contained within the attorney's file.

RESPONSE

Generally, Arkansas gross receipts (sales) tax is levied upon the gross receipts derived from sales of tangible personal property, specified digital products, digital codes, and certain enumerated services.¹ The tax is computed based on the total value of consideration paid for the taxable property or service (including any markup by the seller).² Tangible personal property is defined as “personal property that can be seen, weighed, measured, felt, or touched or that is in any other manner perceptible to the senses.”³

When a sale of tangible personal property, specified digital products, digital code, or the performance of a taxable enumerated service occurs in Arkansas, a taxable transaction occurs, and the tax should be collected and remitted.⁴ A “sale” means any transaction resulting in the transfer of either the title or possession, for...valuable consideration, of tangible personal property or taxable services regardless of the manner, method, instrumentality, or device by which such transfer is accomplished.⁵ Generally, sellers of tangible personal property, specified digital products, digital codes, and taxable services are required to collect sales tax from their customers and remit the tax to the Department.⁶ A taxpayer making taxable sales of tangible personal property, specified digital products, a digital code, or taxable services is required to file a return and pay the tax to the Department and payment is due on or before the twentieth day of the month for the preceding month.⁷

Sales tax does not apply to services to initially install, alter, add, clean, refinish, replace, or repair nonmechanical, passive, or manually operated components of buildings or other improvements or structures affixed to real estate.⁸ These services are considered contractor services and the contractor is deemed to be a consumer or user of all tangible personal property, specified digital products, or digital codes used or consumed by the contractor in providing these services.⁹ Accordingly, a person performing contractor services is required to pay tax on the materials consumed or used in the performance of such services. Arkansas Gross Receipts Tax Rule GR-21(A)(1).

Your original opinion request, and the notes made by the previous attorney to whom this opinion was originally assigned, present two different tax scenarios that I address in turn below.

¹ ARK. CODE ANN. §§ 26-52-301 (Repl. 2020) and 26-52-302 (Repl. 2020).

² ARK. CODE ANN. § 26-52-103(19) (Repl. 2020).

³ ARK. CODE ANN. § 26-52-103(35)(A) (Repl. 2020)

⁴ ARKANSAS GROSS RECEIPTS TAX RULE GR-5.

⁵ ARKANSAS GROSS RECEIPTS TAX RULE GR-3(M)(1).

⁶ ARK. CODE ANN. § 26-52-508 (Repl. 2020).

⁷ ARK. CODE ANN. § 26-52-501 (Repl. 2020).

⁸ ARK. CODE ANN. § 26-52-301(3)(B)(vii)(a) (Repl. 2020).

⁹ ARK. CODE ANN. § 26-52-301(3)(B)(vii)(b) (Repl. 2020).

Scenario 1. Fence installation services.

The installation of fencing is considered a non-taxable contractor service. You should not collect sales tax from customers on the consideration paid to you to install fencing. Accordingly, regardless of whether a markup is built into the sales price to the customer, you would not collect tax on the sales price charged to the customer. Instead, you must pay tax on the materials you use or consume in the performance of this service. The tax on the materials must be paid by you at the time you purchase the materials or, if you hold a sales tax permit, at the time the materials are withdrawn from stock for use in the fencing installation project.¹⁰

It is my understanding that you may be charging customers sales tax in relation to sales of fencing installation services. If this understanding is correct, you should cease charging your customers sales tax in relation to such sales. You cannot charge sales tax to your customers for the labor, or the materials, associated with performance of the fencing installation service.

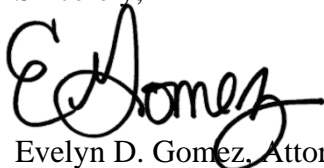
Scenario 2. Sale of fencing materials outside the scope of a fencing installation service.

When you sell fencing materials without performing a fencing installation service, you are engaging in the sale of tangible personal property and are required to collect tax on the total consideration paid for those sales.¹¹ The total consideration would include any markup charged by you in relation to those sales. To legally make such sales, you must hold a sales tax permit.¹² If you hold a sales tax permit, you should purchase the materials tax free as a sale for resale.¹³ At the time you sell the materials to the customer, you must collect the tax from the customer then report and remit the tax to the Department.

I have based this opinion on my understanding of the facts as set out in your opinion request and as current Arkansas laws and rules govern those facts. Any changes in the facts or law could result in a different opinion. Only the requestor may rely on this opinion, and, pursuant to Arkansas Gross Receipts Tax Rule GR-75(B), this opinion will only be binding on the Department for three (3) years from the date of issuance.

A copy of the Arkansas Gross Receipts Tax Rules referenced in this letter can be found online at: http://www.dfa.arkansas.gov/offices/policyAndLegal/Documents/et2008_3.pdf.

Sincerely,



Evelyn D. Gomez, Attorney Supervisor
Office of Revenue Legal Counsel

¹⁰ ARKANSAS GROSS RECEIPTS TAX RULE GR-21(A).

¹¹ ARK. CODE ANN. § 26-52-301(1)(A) (Supp. 2021).

¹² ARK. CODE ANN. § 26-52-201 (Repl. 2020); ARKANSAS GROSS RECEIPTS TAX RULE GR-72.

¹³ ARK. CODE ANN. § 26-52-401(12)(A) (Supp. 2021); ARKANSAS GROSS RECEIPTS TAX RULE GR-53.