



STATE OF ARKANSAS
**Department of Finance
and Administration**

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February 4, 2020

VIA U.S. MAIL

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Re: Legal Opinion No. 20200128

Dear [REDACTED]

This is in response to your request for legal opinion set out in your email of December 10, 2018 to Mr. Greg Ivester. I apologize for the delay in responding to that request.

Your email explained that [REDACTED] ("Taxpayer") has entered into a construction contract to install bridges and perform interstate highway widening for the Arkansas Department of Transportation. The items Taxpayer contemplates purchasing for that construction project includes steel girders, rebar, cement, aggregates, MSE wall panels, precast concrete barriers, and steel casings. Your email requested the issuance of a legal opinion regarding the Taxpayer's state and local sales and use tax obligations to suppliers and service providers on this project.

Response

Two questions are presented for opinion response. First you question whether Taxpayer may claim a rebate pursuant to the provisions of Arkansas Gross Receipts Tax Rule GR-21.1 and Arkansas Code Annotated §§ 26-52-427 and 26-53-138. Second, you ask whether Taxpayer qualifies for a rebate of local sales and use tax under Gross Receipts Tax Rule GR-92 and Use Tax Rule UT-10. As more fully explained below, rebates may be claimed under Ark. Code Ann. §§ 26-5-247 and 26-53-138 only if the proper conditions are present and rebates are available to Taxpayer under GR-92 & UT-10 for local tax paid on single transactions of more than \$2,500.00

Arkansas law imposes sales and use tax on all sales or purchases of tangible personal property and selected services unless a specific tax exemption is available. Arkansas Code Annotated § 26-52-307 addresses sales to construction contractors and provides:

Sales of services ... and tangible personal property, including materials, supplies, and equipment, made to contractors who use them in the performance of any contract are declared to be sales to consumers or users and not sales for resale.

Accordingly, a construction contractor is required to pay Arkansas state and local sales and use taxes on all tangible personal property and taxable services purchased for use in fulfilling a contract. The tax should be paid by the construction contractor to the retailer selling the property or service at the time of the sale.

The language of Ark. Code Ann. §§ 26-52-427 and 26-53-138 are essentially the same. Arkansas Code Annotated § 26-52-427 states in pertinent part:

- (a) A contractor that purchases tangible personal property which becomes a recognizable part of a completed structure or improvement to real property and which is purchased for use or consumption in the performance of construction contracts shall be entitled to a rebate on any additional gross receipts tax or compensating use tax levied by the state or any city or county if:
 - (1) The construction contract for which the tangible personal property was purchased is entered into prior to the effective date of the levy of the additional state, city, or county gross receipts tax or compensating use tax; and
 - (2) The contractor paid the additional gross receipts or compensating use tax to the seller.

- (c) The rebate provided by this section shall apply to tangible personal property purchased within five (5) years from the effective date of the levy of the additional state, city, or county gross receipts tax or compensating use tax.
- (d) The rebate provided by this section shall not apply to cost-plus contracts which allow the contractor to pass any additional tax on to the principal as a part of the contractor's costs.

Arkansas Gross Receipts Tax Rule GR-21.1 was promulgated to administer the provisions of Ark. Code Ann. § 26-52-427 and contains the same requirements as outlined in the language quoted above.

Both Ark. Code Ann. §§ 26-52-427 and 26-53-138 were enacted to address the situation where state or local sales and use tax increases occur after a construction contract is executed. These provisions of state law allow a construction contractor to claim a rebate of additional sales

or use tax paid as a result of a tax rate increase, provided certain conditions are met. Without this rebate, a construction contractor would be obligated to perform work for the contract price without the opportunity to recoup the increased taxes paid on its purchases. The rebate is available if the tax increase was not effective at the time the construction contract was executed, the contractor paid the additional tax to its vendor, the property or service was purchased within five (5) years of the date of the tax increase, and the contract is not a cost-plus contract.

The most recent Arkansas state sales and use tax increase resulted from the adoption of Amendment 91 to the Arkansas Constitution and was effective on and after July 1, 2013. Accordingly, the provisions of Ark. Code Ann. §§ 26-52-427 and 26-53-138 are currently inapplicable for state sales and use taxes paid by a construction contractor since more than five (5) years has elapsed since the last tax increase.

The availability of this rebate for local tax is determined based on the terms of the contract and the date the local tax was enacted. As explained above, the local tax increase must have occurred after the contract was executed, the contractor must demonstrate that it paid the tax to the seller, the purchase must have occurred within five (5) years of the date of the tax increase, and the contract must not be a cost-plus contract. No facts were presented with your opinion request regard a specific local tax or the contract terms so a definite legal opinion cannot be provided.

Next you quote language from Arkansas Compensating Use Tax Rule UT-10 and question whether a rebate of local sales and use tax would be available to the Taxpayer. The specific language of UT-10 you cite reads as follows:

E. REBATES.

2. As of January 1, 2008, local caps on single transactions no longer apply. Contractors may be eligible for a rebate or refund of the additional local tax paid on qualifying purchases on invoices exceeding \$2,500.00. Contractors should pay the full tax on the purchase of materials and follow the rebate procedures provided in Ark. Code Ann. § 26-52-523 and GR-92.

As further explained below, Taxpayer is entitled to a rebate of local sales and use tax on purchases exceeding \$2,500 by following the procedure outlined in Arkansas Gross Receipts Tax Rule GR-92.

Prior to January 1, 2008, Arkansas law provide a cap on the amount of local sales taxes collected on a single transaction. This local tax cap was accomplished by the vendor collecting the local sales or use tax only on the first \$2,500 of the purchase price of a single transaction. That local tax cap administered by the vendor was repealed by the 2007 Arkansas General Assembly and replaced with a rebate administered by this agency.

Arkansas Gross Receipts Tax Rule GR-92 was promulgated by this agency to administer the local tax rebate enacted by Ark. Code Ann. § 26-52-523. Rule GR-92 states:

GR-92. REBATES FOR QUALIFYING PURCHASES:

A. DEFINITIONS.

1. “Qualifying purchase” means a purchase of tangible personal property or a taxable service:
 - a. For which the purchaser may take a business expense deduction pursuant to 26 U.S.C. § 162, as in effect on January 1, 2007;
 - b. For which the purchaser may take a depreciation deduction pursuant to 26 U.S.C. § 167, as in effect on January 1, 2007;

2. “Single transaction” means any sale of tangible personal property or a taxable service reflected on a single invoice, receipt, or statement for which an aggregate sale or use tax amount has been reported and remitted to the state for a single local taxing jurisdiction.

B. GENERALLY.

1. A purchaser that pays any municipal sales or use tax in excess of the tax due on the first \$2,500.00 of gross receipts or gross proceeds from a qualifying purchase of tangible personal property or a taxable service in a single transaction is entitled to a credit or rebate of the excess amount of municipal sales or use tax paid on each single transaction.
2. A purchaser that pays any county sales or use tax in excess of the tax due on the first \$2,500.00 of gross receipts or gross proceeds from a qualifying purchase of tangible personal property or a taxable service in a single transaction is entitled to a credit or rebate of the excess amount of county sales or use tax paid on each single transaction.
3. Except as provided in Subdivision (B)(4), the rebate applies to any local sales or use tax collected by the Director pursuant to any state tax law authorizing a county or municipality to levy a sales or use tax.
4. The rebate does not apply to local sales tax levied in accordance with Ark. Code Ann. §§ 26-52-303 or 26-75-502.

C. CLAIMS FOR CREDIT OR REBATE.

1. Self-Rebate. A purchaser that holds an active Arkansas sales and use tax permit and files excise tax reports with the Department may offset the amount of credit or rebate claimed against any municipal or county sales or use tax due to be remitted with the return.

2. File a Claim. A purchaser that qualifies for a rebate but is not required to file a sales or use tax return as provided in GR-92(C)(1) may file a claim for a credit or rebate with the Director.
 - a. In order to request a refund of the local sales and use tax for qualifying purchases, the purchaser should complete the Claim for Local Cap Rebate Form Number ET-179A and the supplemental schedule Form Number ET-179B, if needed. The form requires the following:
 - (1) A listing of the invoices on which the local tax has been paid to the seller;
 - (2) A determination of the amount of refund owed to the purchaser; and
 - (3) Photocopies of the invoices for which the refund is being requested.
 - b. The form may be obtained by contacting the Sales and Use Tax Section by telephone at (501) 682-7105 or may be downloaded from the Department's website at: www.state.ar.us/salestax and selecting Sales and Use Tax Forms.
 - c. The completed form and copies of the invoices should be mailed to DFA Local Tax Rebate Unit, P.O. Box 3566, Little Rock, AR 72203.

D. TIME.

1. No credit or rebate will be paid for any claim filed after six (6) months (i.e., 180 days) from the date of the qualifying purchase or after six (6) months (i.e., 180 days) from the date of payment, if later.
 - a. Non-Direct Pay Permit Holders. For purchasers that do not hold a direct pay permit, the date of payment is the date the business pays tax to the vendor for the qualifying purchase. The date of payment is evidenced by a receipt provided by the vendor.

Example: On May 1st, Company A purchased several computers from Company B. Company A has an account with Company B and did not pay for the computers until May 20th. The time for Company A to claim the credit or rebate runs from May 20th.

- b. Direct Pay Permit Holders. For purchasers that hold a direct pay permit, the date of payment is the date the business pays tax to the Department on the qualifying purchase.

Example: A business that holds a direct pay permit fails to self rebate and remits tax on the full sales price of a qualifying purchase. The date of payment is the date the business remits tax on the full sales price of the qualifying purchase.

2. A claim for a credit or rebate must be filed with the local taxing jurisdiction if, at the time the claim is filed, the local sales or use tax that is the subject of the claim has been out of existence for more than sixty (60) days.
 3. For the purposes of Ark. Code Ann. § 26-52-523, a month is a thirty (30) day period.
- E. INTEREST. No interest will accrue or be paid on an amount subject to a claim for a credit or rebate.
- F. Claims for credit or rebate pursuant to Ark. Code Ann. § 26-52-523 and this rule are governed by the Arkansas Tax Procedure Act, § 26-18-101, et seq.

Separate rebate claim procedures are provided depending on whether the purchaser entitled to the rebate must file Arkansas sales tax reports and remit tax collected from their customers. For purposes of this opinion response, it is assumed that Taxpayer does not hold an Arkansas sales tax permit and is not required to regularly report, and remit sales taxes collected from its customers.

To claim the local tax rebate, Taxpayer should complete Local Cap Rebate Form ET-179A as well as supplemental schedule ET-179B (copies enclosed). The rebate is available for purchases by Taxpayer which may be deducted or depreciated for federal income tax purposes and for which the purchase price on a single invoice exceeds \$2,500. The Taxpayer must have paid the full amount of the local tax on the invoice for which a rebate is sought. If the requirements outlined in GR-92 above are met, Taxpayer will be entitled to a rebate of any city or county sales and use tax paid on a single transaction in excess of the tax paid on the first \$2,500 of the purchase price. The rebate is not available for some local sales and use taxes paid to vendors located in the city of Texarkana, Arkansas.

The time period in which a rebate claim may be filed is limited. Rule GR-92 indicates that the refund claim must be filed within 6 months of the date of the purchase. This rebate claim period has been extended by amendment to Ark. Code Ann. § 26-52-523 to now allow the rebate claim to be filed within 1 year of the date of the qualifying purchase. The language of Rule GR-92 will be amended as soon as possible to reflect this extended rebate claim period.

Additional copies of Forms ET-179A and ET-179B may be obtained from the following website:

<https://www.dfa.arkansas.gov/excise-tax/sales-and-use-tax/sales-and-use-tax-forms/> The Gross Receipts Tax and Compensating Use Tax Rules cited in this opinion may be obtained at: <https://www.dfa.arkansas.gov/revenue-policy-legal/dfa-revenue-rules/>

This opinion is based on my understanding of the facts as set out in your inquiry as those facts are governed by current Arkansas laws, rules and regulations. Any change in the facts or law could result in a different opinion. You may rely on this opinion for three years pursuant to Ark. Gross Receipts Tax Rules GR-75(B).

Sincerely,

John Theis
Revenue Legal Counsel