

# The Commonwealth of Massachusetts

Department of Revenue

Leverett Saltonstall Building,

100 Cambridge Street, Boston 02204

I. JOYCE HAMPERS  
COMMISSIONER

July 15, 1981

("Contractor") is engaged in the business of building and selling homes. The Contractor pays sales tax to vendors of the materials it uses in constructing houses. You inquire whether the Contractor is in fact the consumer of the materials, and whether its present practice of paying the tax to vendors is therefore correct.

Several home buyers have asked the Contractor to separately state on their bills an amount representing the sales taxes the Contractor has paid on its purchases of materials used in constructing the buyers' homes. The home buyers intend to deduct this amount in determining their federal taxable incomes.

Massachusetts General Laws Chapter 64H, Section 2 imposes the sales tax on sales at retail of tangible personal property by any vendor; "sale at retail" is defined in Section 1(13) as a sale of tangible personal property for any purpose other than resale in the regular course of business. The sales tax does not apply to sales of real property.

It is generally held that a contractor who purchases materials from a retailer for use in building construction is the consumer of the materials and not a purchaser for resale for sales and use tax purposes. Seltzer and Co., Inc. v. State Tax Commission, ATB Docket Nos. 68886, 68887 (1975), aff'd sub nom. Ace Heating Service, Inc. v. State Tax Commission, 371 Mass. 254 (1976); Salem Glass Co. v. State Tax Commission, ATB Docket No. 60903 (1974); State v. J. Watts Kearny & Sons,

July 15, 1981

181 La. 554 (1935); see Fusco-Amatruda Co. v. Tax Commissioner, 168 Conn. 597 (1975). In a case predating the Massachusetts sales tax, the Supreme Judicial Court cited with approval cases so holding, and ruled that a contractor's excavation of gravel for use under a highway reconstruction contract was not a removal of the gravel "for sale," even though the contract set a unit quantity price for the gravel. Town of Saugus v. B. Perini & Sons, Inc., 305 Mass. 403 (1940).

Based on the foregoing, it is ruled that sales of building materials by vendors to the Contractor as consumer for use in constructing houses for sale are retail sales subject to the sales tax. The Contractor's sales of homes are not subject to the sales tax.

Under federal income tax law, a home buyer is not entitled to an income tax deduction for sales taxes paid by the Contractor on the Contractor's purchases of materials used in constructing the buyer's home.

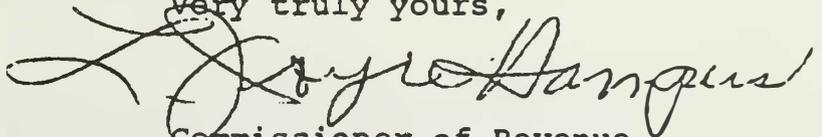
Section 164(a)(4) of the Internal Revenue Code ("Code") provides that state and local general sales taxes are allowed as a deduction for the taxable year in which paid or accrued. Treasury Regulation 1.164-1(a) makes it clear that taxes generally are deductible only by the person upon whom they are imposed (sales taxes are technically imposed on the retail seller), but under Section 164(b)(5) of the Code and Treasury Regulation 1.164-5, a consumer who pays to his seller, otherwise than in connection with the consumer's trade or business, the amount of any separately-stated general sales tax, may deduct such amount in determining his federal taxable income.

In Armentrout v. Commissioner, 43 T. C. 16 (1964), the petitioners engaged a construction company to build their personal residence in Florida. The company itemized amounts on its bill for "labor and materials," "sales tax on materials," and "overhead and profit" calculated at 8 per cent of the labor and materials and sales tax charges. Under the Florida sales and use tax law, the construction company was the consumer of the materials purchased by it for use in building the residence. The United States Tax Court held that the petitioners were not entitled to deduct the separately-stated amount of the sales tax under Code Section 164.

July 15, 1981

In Revenue Ruling 58-292, the Internal Revenue Service ruled that an individual who contracts with a builder for the construction of his personal residence for a stated amount may not deduct the sales taxes paid by the builder on materials purchased by the builder and used in the construction of the residence, even though the taxes may be indirectly reflected in the contract price of the home purchased.

Very truly yours,



Commissioner of Revenue

LJH:JXD:mf

LR 81-66