

The Commonwealth of Massachusetts



W. A. JACKSON
COMMISSIONER

Department of Revenue

Lowell Saltonstall Building,

100 Cambridge Street, Boston 02204

April 25, 1983

Corporation ("Company") is engaged in the business of repair and rebuilding of boilers, including "industrial process" boilers. Industrial process boilers produce steam to power machinery or for other use in industrial processes. On its bills to customers, the Company separately states charges for materials and labor.

You inquire (1) whether, for sales tax purposes, the Company's agreements for the repair or rebuilding of industrial process boilers are contracts respecting real or tangible personal property; and (2) whether the acceptance by the Company of an exempt use certificate (Form ST-12) relieves it from liability for the sales tax on its charges for the repair or rebuilding of industrial process boilers.

The sales tax is an excise on sales at retail of tangible personal property in Massachusetts (G.L. c. 64H, s. 2).

"Sale" includes the producing or fabricating of tangible personal property for a consideration for consumers who furnish the materials used in the producing or fabricating (G.L. c. 64H, s. 1(12)(b)).

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Professional and personal service transactions that involve no sale of tangible personal property or involve sales as inconsequential elements for which no separate charges are made are exempt from the sales tax (G.L. c. 64H, s. 1(13)(c)). On the other hand, any amount paid for services that are part of a sale of tangible personal property must be included in determining the sales price, and no deduction may be taken on account of labor or service costs (G.L. c. 64H, s. 1(14)).

In contracts for the construction, reconstruction or repair of real property, a contractor is generally regarded as the consumer of the materials used, since he is not purchasing the materials for resale as tangible personal property. See 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); Town of Saugus v. B. Perini & Sons, Inc., 305 Mass. 403 (1940). Accordingly, the contractor generally must pay the sales tax on his purchase of such materials.

Whether a boiler is real or personal property is a mixed question of law and fact that depends upon the object, the effect, and the mode of its annexation to realty. Southbridge Savings Bank v. Mason, 147 Mass. 500 (1888). See Winslow v. Merchants Insurance Co., 45 Mass. (4 Met.) 306 (1842); McLaughlin v. Nash, 96 Mass. (14 Allen) 136 (1867).

General Laws Chapter 64H, Section 6(s) provides an exemption for sales of machinery, or replacement parts thereof, used directly and exclusively in an industrial plant in the actual manufacture, conversion or processing of tangible personal property to be sold, or in the furnishing of power to an industrial manufacturing plant.

If tangible personal property is purchased by a person who will use it in a manner that exempts it from the sales tax, he may give an exempt use certificate to the vendor, certifying the exempt use to which the property will be applied (G.L. c. 64H, s. 8(f), (g)). Chapter 64H, Section 8(f) provides that the certificate relieves the vendor from further liability for the tax.

Based on the foregoing, it is ruled that:

1. Where a boiler is part of realty, the Company must pay the sales tax on its purchases of tangible personal property for use in the repair or rebuilding of the boiler, unless the

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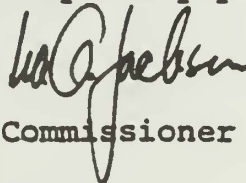
purchases are exempt under Chapter 64H, Section 6(s) because the items purchased will be used directly and exclusively in an industrial plant in the actual manufacture, conversion or processing of tangible personal property to be sold, or in the furnishing of power to an industrial manufacturing plant. Boilers and parts thereof that are used solely or partly for heating purposes do not come within the exemption in Chapter 64H, Section 6(s).

2. Where a boiler is personalty, the Company's separately-stated charge to a customer for materials used in its repair is subject to the sales tax, unless the sale of the materials to the customer is exempt under Chapter 64H, Section 6(s). The Company may give a resale certificate (Form ST-4) in lieu of paying a tax on its purchase of items used in such repair.

3. Where the Company rebuilds a boiler that is personalty, its entire charge to the customer, including separately-stated labor charges, is subject to the sales tax, unless the sale is exempt under Chapter 64H, Section 6(s). The Company may give a resale or exempt use certificate, as appropriate, in lieu of paying a tax on its purchase of items used in the rebuilding.

4. Acceptance by the Company of an exempt use certificate is appropriate only where the boiler it repairs or rebuilds is personalty and the transaction is exempt under Chapter 64H, Section 6(s). The Company is relieved from liability for the tax by acceptance of such a certificate only where it acts in good faith. If the Company has knowledge of facts that give rise to a reasonable inference that a sale is not exempt, it may not accept an exempt use certificate and is liable for the tax.

Very truly yours,



Commissioner of Revenue

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