05-003

NAME
ADDRESS
PHONE

Dear Commissioner Johnson,

Our firm represents a client who would like to request a Private Letter Ruling on a sales tax matter. Our client sells playground equipment that is typically used in public and private parks, in tot lots in subdivision developments, and etc. Approximately 20% of the playgrounds that are sold are to private entities. Sales tax is collected on the purchase price of the playground equipment when sold to these private entities. Approximately 80% of the playground sales are to cities, counties, schools, etc. ("political subdivisions"). Typically, when the client sells the playground equipment to political subdivisions, it does not collect any sales tax due to the exemption for political subdivisions found in Utah Code Ann. §59-12-104(2). Our client does not typically assemble or install the playground equipment. However, if a customer wants our client to install the playground equipment, it will do so. If a customer requests assemble and installation, the charge for installation is separately stated and charged to the customer. Sometimes the installation is billed on a completely separate invoice from the playground equipment and sometimes it is listed as a separate charge on the same invoice as the playground equipment. Approximately 15% to 20% of the political subdivision customers ask our client to assemble and install the playground equipment.

The question that now arises is whether or not our client is required to collect sales tax from the sale of playground equipment to political subdivision customers when such entities request that the playground equipment be assembled and installed by our client. As the Commission is aware the exemption for political subdivisions has an exception for "construction materials" that are not installed by the employees of the political subdivision. The purpose of this letter is to request clarification as to whether or not the sale of the playground equipment to political subdivisions that is assembled and installed by our client is subject to sales tax as being viewed as some type of "construction material."

We do not believe that the playground equipment should be treated as a construction material and do not believe that sales tax should be triggered should a political subdivision customer request that the client assemble and install the playground equipment. Our conclusions are based on the following:

Construction materials are typically defined as "tangible personal property such as lumber, bricks, nails, and cement that are used to construct buildings, structures, or improvements on the land and typically lose their separate identity as personal property once incorporated into the real property." Utah Admin. Rule R865-19S-58.A.1.

The statutory definition of construction materials is a little more broad than the administrative rule and defines construction materials as "any tangible personal property that will be converted into real property". Utah Code Ann. §59-12-102.

In prior Private Letter Rulings, this Commission has applied the statutory and administrative rule definitions to state that "As a general rule, anything that is affixed real property that becomes an integral part of the real property improvement upon installation is treated like construction materials." Private Letter Ruling 97-035. "However, attachment alone is not determinative." Private Letter Ruling 95-051. "Personal property which is merely affixed to real property" is distinguishable from "personal property which has been converted into real property." Id. And see Private Letter Ruling 97-035. Personal property that is "attached to real property merely for stability" retains its personal property characteristics and is not deemed to be construction material. Utah Admin. Rule R865-19S-58.D.1.

The questions then becomes whether or not the playground equipment is affixed to real property in such a manner that it loses its personal property characteristics and becomes an integral portion of the real property improvement.

In *Nickerson Pump and Machinery Co. v. State Tax Commission,* 361 P.2d 520 (Utah 1961), the Utah Supreme Court listed several factors that should be reviewed in determining whether or not an item of personal property retains its personal property status or becomes converted into the real property. In *Nickerson Pump,* the Court concluded that the pumps were not permanently affixed to the land and remained personal property. In particular, the Court reached these conclusions because:

(1) The pumps were "readily removable without harm to the structures in which they were placed.
(2) The pumps could have been used in other locations, if the owner desired to move them.
(3) The primary purpose of the transaction was the sale of the pumps. The placement of the pumps "was a mere convenience for the purchaser because of the great weight of the pumps which required special equipment to move them."

We believe that when these tests are applied to the playground equipment in this matter, the same result is achieved in that the playground equipment is not permanently attached to real property or converted into real property.

(1) The playground equipment is "readily removable without harm to structures in which they were placed." In this matter, the playground equipment can be easily removed and transported to another location without any harm at all to the real property or any building.
(2) The playground equipment can be used in other locations, if the owner desires to move it. The playground equipment is assembled on location and is easily attached to supporting posts. In order to stabilize the playground equipment, post holes are dug into the ground and the poles holding the playground

equipment are placed into the post holes. Cement is then poured into the post holes to add stability. The playground equipment is attached to the ground "merely for stability" and does not lose its personal property characteristics. If the owner desires to remove the playground equipment, the owner merely needs to unbolt the playground equipment from the supporting poles and then dig the posts out of the ground. The cement is broken off of the posts and the entire assembly can be moved to a different location. Approximately 2 or 3 times each year, our client is asked to come and move playground equipment to another location.

(3) The primary purpose of the transaction in this matter is the sale of the playground equipment. The placement and/or assembly of the playground equipment "is a mere convenience to the purchaser." As stated above, the overwhelming majority of customers of the client assemble and install their own playground equipment. Nevertheless, as a mere convenience to the purchaser, the client will assemble and stabilize the playground equipment. This occurs in approximately 15% to 20% of its transactions with political subdivisions.

Based on the foregoing, we do not believe that the playground equipment is a construction material. Rather, it is a separate and distinct piece of equipment that can be easily removed from one location to another and retains its personal property characteristics. Consequently, we request that the Commission issue a letter ruling that in the above situations, no sales tax is owed should a political subdivision customer request our client to assemble and stabilize the playground equipment because the playground equipment retains its personal property characteristics and is not a construction material.

If you have any questions or require a clarification on any of the items contained in this letter, please call me.

Sincerely,

NAME

RESPONSE LETTER

September 27, 2005

NAME
ADDRESS
PHONE

Re: Private Letter Ruling Request 05-003-Playground Equipment

Dear NAME:

We have received your request for a private letter ruling concerning tax liability associated with the sale and installation of playground equipment to cities, counties, schools, ect. ("political subdivisions"). Specifically you have asked whether or not your client is required to collect sales tax from the sale of playground equipment to political subdivision customers when such entities request that the playground equipment be assembled and installed by your client.

From your letter we understand that your client sells playground equipment and about 80% of your client's sales are made to political subdivisions. Approximately 15% to 20% of the political subdivision customers ask your client to assemble and install the playground equipment. If the customer requests installation, the charge for installation is separately stated and charged to the customer by your client.

As you have noted in your request, Utah Code Sec. 59-12-104(2) provides a sales tax exemption for sales to political subdivisions. However, there is a statutory exception to the exemption at Utah Code Sec. 59-12-104(2)(a) for "construction materials" that are not installed or converted to real property by employees of the state, its institutions or its political subdivisions. The specific question then becomes whether the playground equipment would be considered "construction material" for purposes of the exception to the exemption.

You have considered the applicable statute and law in this matter in reaching your conclusion that these sales would not be subject to sales tax. The statutory definition at Utah Code Sec. 59-12-102(19) provides that "construction material" is any tangible personal property that will be converted to real property. Utah Admin. Rule R865-19S-58.A.1 defines "construction material" as "tangible personal property such as lumber, bricks, nails, and cement that are used to construct buildings, structures or improvements on the land and typically lose their separate identity as personal property once

incorporated in the real property." The rule goes on to state that it "does not apply to contracts where the retailer sells and installs personal property that does not become part of the real property. Examples of items that remain tangible personal property even when attached to real property are: 1. moveable items that are attached to real property merely for stability or for an obvious temporary purposes . . .:" Utah Admin. Rule R865-19S-58.D.

In your letter you have outlined the nature of the equipment and the installation. You indicate that the equipment is assembled on location and is easily attached to supporting posts. In order to stabilize the playground equipment, postholes are dug into the ground and the poles holding the playground equipment are placed into the postholes. Cement is then poured into the postholes to add stability. To move the equipment, it merely needs to be unbolted from the supporting poles. The poles then would be dug out of the ground, the cement broken off the posts and the entire assembly moved to a different location. You indicate that your client is asked two or three times per year to move playground equipment from one location to another. You also indicate that the political subdivision customers who purchase the playground equipment usually assemble and stabilize or install the equipment themselves, with you client performing this service in only 15% to 20% of the transactions with political subdivisions.

In answering your question the Commission notes that the applicable rule specifically indicates that moveable items attached to real property merely for stability are not construction materials. Utah Admin. Rule R865-19S-58.D. The Commission notes that there are numerous items that are attached to the ground for stability and listed in the Tax Commission Administrative Rules as personal property for property taxation purposes. Utah Admin. Rule R884-24P-33 lists specific classes of items taxed as personal property, like amusement rides that must be affixed to in some manner to real property for stability. Utah Admin. Rule R884-24P-33.E.7. Additionally items like billboards, sign towers, radio towers and ski lift and tram towers all must be attached to the ground for stability, yet they are specifically listed as personal property at Utah Admin. Rule R884-24P-33.E.15. Although this rule was promulgated in the property tax content, it appears that when the courts have considered the issue of when personal property becomes converted to real property they have looked at the same criteria for both sales tax and property tax purposes. *Crossroads Plaza v. Salt Lake County*, 912 P.2d 961 (Utah 1996).

In *Nickerson Pump and Machinery Co. v. State Tax Commission*, 361 P.2d 520 (1961), the Utah Supreme Court considered whether pumps that were sold and then placed into real property remained personal property for sales tax purposes. In finding that the pumps remained personal property the Court noted that they could be removed without harm to the real property, they could be moved and used in other locations, and the primary purpose of the transition was the sale of the pump, the placement "was a mere convenience for the purchaser because of the great weight of the pumps which required special equipment to move them."

Based on your representations we find that:

1) after the installation the playground equipment can be, and is occasionally moved and used at other locations;
2) political subdivisions can and generally do assemble and install the equipment making this service appear to be a mere convenience for the purchaser;
3) when removed the equipment leaves only a hole in the ground that could easily be filled; and
4) there is no substantial difference from the way the playground equipment is attached to the ground for stability as items classified in the rule as personal property, like billboards and amusement rides.

Therefore we conclude that the playground equipment remains personal property and is not construction material within the meaning of the exception to the exemption at Utah Code Sec. 59-12-104(2)(a). For that reason the Commission agrees that no sales tax is owed on the sales from your client to its political subdivision customers, where the political subdivision customers have your client assemble and install the equipment. The playground equipment retains its personal property characteristics and is not "construction material."

One item of concern in your request letter, however, is on line 4 where you state that tax is collected on the "purchase price" of the playground equipment when sold to private entities. Just to clarify, since the playground equipment remains tangible personal property, your client should be collecting sales tax on its sales price of the equipment. See Utah Admin. Rule R865-19S-51.

Our conclusions are based on the facts as you represented. Should the actual situation differ from your statements, our decision may be subject to reconsideration. Should you have additional questions please do not hesitate to contact us.

For the Commission,

Marc B. Johnson
Commissioner

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