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PRIVATE TAXPAYER RULING LR05-003

June 14, 2005

This private taxpayer ruling is in response to your letter dated December 2, 2004, as updated on February 2, 2005, in which you requested a private taxpayer ruling on behalf of your company . . . ("Taxpayer"). You request a ruling concerning the appropriate classification that Taxpayer is subject to when it performs its various functions. More specifically, you are unsure whether your business activities in Arizona are subject to the retail or prime contracting classification, or both. Pursuant to Arizona Revised Statutes (A.R.S.) § 42-2101, the Department may issue private taxpayer rulings to taxpayers and potential taxpayers on request.

Statement of Facts:

Your December 2, 2004 letter presents the facts relating to Taxpayer's business as follows:

The tank monitoring systems are located inside the store and are bolted to the wall. There is wire running through the walls and underground connecting it to the underground storage tank. The gas pumps are bolted down to a concrete island and there [are] several feet of underground piping going to the underground storage tank. These pieces of equipment cannot perform their "jobs" without each other.

In our line of business we install, service, and maintain gas station equipment. We also sell supplies such as nozzles and paper over the counter or we ship these items out to our customers.

I will outline what our technician might do on a typical service call.

1. When a customer calls us to fix a problem relating to their equipment our technician may furnish and install a new gas nozzle on a gas pump. We do not install any new equipment, (i.e. dispenser), we just replace a nozzle. We invoice our customer for the nozzle as well as labor to replace it.
2. We receive a call from a customer needing a tank probe or a sub pump replaced. These items actually go inside the underground storage tank. We do not have to tear up any cement or asphalt in order to replace these items.

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3. We have a signed contract from our customer for a job to furnish and install the underground storage tanks, dispensers, and inside store equipment for a new gas station.

You further describe the installation process of this equipment in a February 2, 2005 letter to this office, by providing as follows:

Installation and functions of Service Station Equipment:

Tank Monitor– The actual unit is mounted to an interior wall inside the store, with 4 screws. The electrical is hard wired to the unit. Service to this part of the system is generally a quick replacement of a bad part or consists of reprogramming the system. The function of the tank monitor is to ensure there are no leaks in the Underground Storage Tank (hereinafter referred to as “UST”). The EPA inspects and requires that each station have a tank monitor.

Probe– These are located inside the UST. They are dropped in through 4” port and have a “plug in” type of electrical connection that connects them to the tank monitor inside the building. A conduit runs from the probes to the tank monitor. There is typically 1 probe per UST. They are easily removed and require no major excavation to replace them.

Sensor– These can vary greatly. They are usually mounted to a containment box in order to detect liquid products that would indicate a leak in the system. Service generally consists of simply replacing the sensor. All items dealing with the tank monitoring system are easily removed.

Fuel Dispenser (Gas Pump)– Gas pumps are mounted into place using 4 bolts to hold them down. They are placed over a containment sump, which are large plastic containers used to contain any spilled fuel or leak. Fiberglass pipe runs underground from the gas pump connecting it to the UST. Gas pumps can range from having 1 to 4 different types of fuel per dispenser. Gas pumps are relatively easy to remove and replace, but there are some situations that may require extensive work inside the pump in order to properly ensure the isolation of electricity from one single pump.

Gas Nozzle– Part of the gas pump the customer actually holds and uses to dispense gas. A nozzle is basically a simple valve with the ability to detect backflow and shut off when your tank is full.

Underground Storage Tank (UST)– Large fiberglass or steal storage containers typically buried 4’ deep with 8-12 inches of reinforced concrete over them. The UST is strapped to several large cement “anchors” located at

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the bottom of the tank hole. There are various entry ways that allow access to certain parts of the UST. We generally do not provide any repairs or maintenance to the UST itself. However, if a UST needs to be removed or replaced, this requires removal of concrete, excavation of the tank hole, and weeks of planning and obtaining permits due to the size and danger of the process.

Sub-pump– Located inside at the bottom of the UST, this is the pumping unit for the fuel. The sub pump is connected to the pump head with ½” pipe. A pump head is on the top of the UST and located in a containment box. Product piping and electrical are hard wired and hard piped to the head. The sub-pump is built to be serviced and requires no major excavation in order to service it.

Piping– Generally made of plastic polymer and fiberglass, the piping carries fuel from the UST to the gas pumps. It is buried 3’ and in order to remove it and replace it, we would have to remove concrete and excavation of the old pipe would be necessary.

Issue:

Whether Taxpayer, in performance of the business activities described above, is subject to transaction privilege tax under the retail classification in A.R.S. § 42-5061 or the prime contracting classification in A.R.S. § 42-5075, or both.

Your Position:

Taxpayer does not articulate a position. However, the Department understands Taxpayer’s position to be that: (1) Taxpayer pays transaction privilege tax under the retail classification when it sells and ships the above items to its Arizona customers; (2) Taxpayer is subject to the prime contracting classification when it furnishes and installs the above equipment for a gas station located in Arizona; and (3) Taxpayer is either subject to the retail classification or the prime contracting classification when, in response to a service call, its technicians replace some of the equipment described above.

Conclusion and Ruling:

Based on the information provided, Taxpayer is subject to the retail classification on certain business activities and the prime contracting classification on the performance of other business activities. Because Taxpayer indicates that it performs significant over-the-counter selling activities as well as installation activities, the Department assumes that the Taxpayer has separate lines of business sufficient to satisfy *State Tax Commission v. Holmes & Narver*, 548 P.2d 1162 (Ariz. 1976) (en banc).

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The retail classification, as per A.R.S. § 42-5061, imposes transaction privilege tax on the business of selling tangible personal property at retail. "Tangible personal property" is defined as "personal property which may be seen, weighed, measured, felt or touched or is in any other manner perceptible to the senses." A.R.S. § 42-5001(16). Tank monitoring systems, underground storage tanks, gas nozzles, gas pumps, tank probes, piping, fittings, sub pumps, and other gas station equipment constitute tangible personal property, the sale of which is subject to the retail classification. When Taxpayer sells and ships these items to Arizona customers without installing them, they are subject to transaction privilege tax under the retail classification.

The retail classification does not apply to business activity properly included in any other business classification. A.R.S. § 42-5061(A)(6). One such classification is the prime contracting classification, which is imposed on the business of a prime contractor, as per A.R.S. § 42-5075. "Prime contractor" is defined in A.R.S. § 42-5075(K)(6) as:

[A] contractor who supervises, performs, coordinates the construction, alteration, repair, addition, subtraction, improvement, movement, wreckage, or demolition of any...structure, project, development or improvement including the contracting, if any, with any subcontractors or specialty contractors and who is responsible for the completion of the contract.

"Contractor" is defined in A.R.S. § 42-5075(K)(2) as:

[A]ny person, firm, partnership, corporation, association or other organization, or a combination of any of them, that undertakes to or offers to undertake to, or purports to have the capacity to undertake to, or submits a bid to, or does personally or by or through others, construct, alter, repair, add to, subtract from, improve, move, wreck or demolish any building, highway, road, railroad, excavation, manufactured building or other structure, project, development or improvement, or to do any part of such a project, including the erection of scaffolding or other structure or works in connection with such a project, and includes subcontractors and specialty contractors.

When Taxpayer furnishes and installs the above identified equipment for a new gas station, it is acting as a prime contractor. It is sufficiently installing, altering, repairing, adding to, or improving a structure, development, or project. It is also acting as a prime contractor when it services the equipment already installed on an existing gas station by replacing those items. When such work is done by a technician for Taxpayer acting on a service call, both the service and material are taxable under prime contracting.

Arizona Administrative Code (A.A.C.) R15-5-614 provides that the governing factor in distinguishing between the retail and prime contracting classification is "whether or not property or material is replaced in the original or existing structure, or if new materials are added." Examples of activities taxable under the prime contracting classification include:

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[T]he installation of a central air conditioning system, the replacement of an air conditioning unit, water heater, electrical wiring, roof, plumbing, landscaping; the installation of a soft water system, remodeling of a kitchen, and the installation of new appliances, wallpaper, and other fixtures.

A.A.C. R15-5-614(1).

In A.A.C. R15-5-614(2), the retail classification is imposed on activities such as “repairs in which the materials furnished are not incorporated into the structure.” When a technician for Taxpayer replaces gas nozzles, tank probes, or sub pumps and other such equipment, it is providing material that is incorporated into the existing structure. Even though these materials can be replaced with relative ease, they sufficiently add to, alter, repair, or improve an existing project, structure, or development.

Finally, the fact that such property may be provided pursuant to a warranty contract to service the equipment is immaterial. Under Arizona Transaction Privilege Tax Ruling TPR 93-28, gross income derived from the sale of a warranty contract or maintenance service contract that provides for performance of contracting services is subject to tax under the prime contracting classification.

Accordingly, the Department rules that:

- (1) Taxpayer is subject to transaction privilege tax under the retail classification as per A.R.S. § 42-5061 when it sells the above described tangible personal property, including nozzles and paper products and ships the products directly to an Arizona customer without installing them.
- (2) Taxpayer is subject to transaction privilege tax under the prime contracting classification as per A.R.S. § 42-5075 when it furnishes and installs the above described equipment for a gas station in Arizona and when, pursuant to a service call in Arizona, one of Taxpayer’s technicians services the gas station equipment by replacing any of the items of equipment.

The conclusions in this private taxpayer ruling do not extend beyond the facts presented in your correspondence dated December 2, 2004 and February 2, 2005 respectively.

This response is a private taxpayer ruling and the determinations herein are based solely on the facts provided in your request. The determinations are subject to change should the facts prove to be different on audit. If it is determined that undisclosed facts were substantial or material to the Department’s making of an accurate determination, this taxpayer ruling shall be null and void. Further, the

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determination is subject to future change depending on changes in statutes, administrative rules, case law or notification of a different Department position.

The determinations in this private taxpayer ruling are applicable only to the taxpayer requesting the ruling and may not be relied upon, cited nor introduced into evidence in any proceeding by a taxpayer other than the taxpayer who has received the private taxpayer ruling.

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