

████ will earn a profit above its cost-of-goods-sold (“COGS”) and operating expenses by marking-up its purchases. The mark-up will be computed as a percentage of (e.g. 2%) of COGS and separately billed to █████ on a quarterly basis. █████ will collect the appropriate state sales or use tax on all such sales (unless an exemption applies) to █████ or unrelated third parties and then remit such sales or use tax to the state wherein the materials are delivered for █████’s use in its construction business.

Your letter states that █████ and █████ should be regarded as two separate legal entities for sales and use tax purposes, and that the proposed operations described to occur between █████ and █████ will involve two levels of sales, as follows: (1) sales to █████ at a wholesale level from various third-party vendors, and (2) sales by █████ to █████ and to potential third-party customers. Further, your letter states that the latter level of sales constitutes “retail” sale(s) under Ark. Code Ann. § 26-52-103(18) (Repl. 2014), and that █████ will be the “taxpayer” under Ark. Code Ann. § 26-52-103(23) (Repl. 2014), which is defined as “any person liable to remit a tax under this chapter or to make a report for the purpose of claiming any exemption from payment of a tax levied by this chapter.”

Your letter sets forth administrative definitions contained in Ark. Code Ann. § 26-52-103, which impact the analysis of your questions.

Additionally, your letter states:

████ will function as the “seller” and will be required to register for and collect sales tax on sales in the state of Arkansas. Its sales will be “sales at retail.” █████’s purchases of materials for inventory and resale will be “sales for resale” that are exempted under qualifying for exemption under 26-52-401(12) A.C.A.

OUR CONCLUSIONS

Because █████ and █████ will be two separate legal entities operating with substance (i.e., █████ will make purchases for resale, at a profit, to █████), the proposed transactions should be treated as would similar transactions between unrelated sellers and buyers. Accordingly, the proper sales tax sequence for transactions involving these entities will be that:

- *████ will make purchases of building materials/supplies for resale*
- *████ will own these materials until they are sold and delivered for usage at either a █████ site, drop-shipped directly to a customer from a █████ supplier or sold to an unrelated third-party customer*
- *████ will invoice and collect taxes on these sales and remit the tax to the applicable taxing authorities, including the Arkansas Department of Finance and Administration*

We request confirmation regarding the sales tax treatment outlined above in our conclusions.

RESPONSE

Based upon the information provided in your request for a legal opinion, ██████ and ██████ will be regarded as two separate legal entities for Arkansas sales and use tax purposes. Arkansas Code Annotated § 26-52-103(3)(A) (Repl. 2014) defines “consumer as the person to whom the taxable sales is made or to whom taxable services are furnished.” An additional definition other than the ones cited in your letter is important as well. As you noted, “person” means “any individual, partnership, limited liability company, limited liability partnership, corporation, estate, trust, fiduciary, or any other legal entity.” *See* Ark. Code Ann. § 26-52-103(16) (Repl. 2014).

The proper sales tax treatment of proposed transactions between ██████ and ██████ as outlined in your conclusions can be answered in the same legal analysis.

Arkansas Gross Receipts Tax, also referred to as Sales Tax, is generally applicable to the sale of tangible personal property and certain specifically enumerated taxable services. *See* Ark. Code Ann. §§ 26-52-301 *et seq.* (Repl. 2014); *see also* Arkansas Gross Receipts Tax Rule GR-5. The tax is computed based on the total value of compensation paid for the taxable property or service. Ark. Code Ann. § 26-52-103(13) (Repl. 2014); *see also* Arkansas Gross Receipt Tax Rule GR-3(H). In addition, special provisions exist for contractors in Arkansas. *See* Ark. Code Ann. § 26-52-103(5) *and* § 26-52-307 (Repl. 2014); *see also* Arkansas Gross Receipts Tax Rule GR-21. A “contractor” is defined as follows:

(5) “Contractor” means any person who contracts or undertakes to construct, manage, or supervise the construction, erection, alteration, or repair of any building or other improvement or structure affixed to real estate, including any of their component parts[.]

Ark. Code Ann. § 26-52-103(5) (Repl. 2014); *see also* Arkansas Gross Receipts Tax Rule GR-3(D) and GR-21(A)(3).

Contractors are deemed to be the consumers of all materials they use in the performance of a contract and must pay tax on their materials at the time of purchase or upon the withdrawal of the materials from stock.

Contractors that do not hold a sales and use tax permit must pay sales and use tax on all of the contractor’s purchase of materials at the time of purchase. *See* Arkansas Gross Receipts Tax Rule GR-21(D)(2). In the situation outlined in your letter, ██████ is the consumer and will not hold a sales tax permit.

If a contractor holds a sales and use tax permit, the contractor may purchase materials tax-exempt on a sale for resale basis. *See* Ark. Code Ann. § 26-5-301(3)(B)(viii)(b) (Repl. 2014); *see also* Arkansas Gross Receipts Tax Rule GR-21(A)(1). If the materials are purchased as sales for resale, then the contractor must remit Arkansas sales tax on the purchase price of the materials at the time the contractor withdraws the materials from stock for use in fulfillment of the contract. *See* Arkansas Gross Receipts Tax Rule GR-21(D)(1).

Whether [REDACTED] will be required to collect and remit Arkansas gross receipts tax on its sales to [REDACTED], and other instate companies?

Yes. All tangible personal property is subject to gross receipts tax in the state of Arkansas unless a specific exemption applies. Arkansas Gross Receipts Tax Rule GR-3(Q) provides that “[t]angible personal property” means personal property which may be seen, weighed, measured, felt, touched, or is in any other manner perceptible to the senses...”

Whether [REDACTED] may purchase qualifying materials and supplies tax exempt as a sale for resale?

Yes. A specific applicable exemption is the “sale for resale” exemption. Arkansas Gross Receipts Tax Rule GR-53, provides:

- A. The gross receipts or gross proceeds derived from sales for resale to persons regularly engaged in the business of reselling the articles or services purchased are exempt provided that such sales are made to persons to whom a permit has been issued as provided in Ark. Code Ann. § 26-52-201 et seq. and GR-72. A seller may accept a valid retail permit, or resale permit, issued by another state. Sellers should refer to GR-79 for the general provisions

As long as [REDACTED] holds a sales tax permit and is regularly engaged in the business of reselling the qualifying materials at issue, such materials may be purchased tax exempt as a sale for resale under Arkansas Gross Receipts Tax Rule GR-53.

[REDACTED] may purchase such materials and supplies tax free and hold such materials as inventory until sold to [REDACTED] or unrelated third-party customers; however, the exemption under GR-53 is subject to the withdrawal from stock provisions of Arkansas Gross Receipts Tax Rule GR-18, which provides:

D. WITHDRAWAL FROM STOCK

1. Withdrawal of purchased goods. If a seller has a retail permit and purchases goods from its suppliers without paying tax to those suppliers claiming the “sale for resale” exemption and the seller withdraws the merchandise from stock and gives the merchandise to customers or other third parties, or uses the merchandise itself, then the value of this merchandise is part of the seller’s gross receipts or gross proceeds and the seller must remit the tax on the purchase price of the goods paid by the seller.

[...]

5. Tax is due at the time the item is withdrawn from stock. The applicable local tax for a withdrawal from stock is determined by the location which the item is withdrawn.

To the extent [REDACTED] holds a sales tax permit and is regularly engaged in the business of reselling construction materials and supplies, [REDACTED] may purchase such items tax exempt and hold as inventory under GR-53. However, if [REDACTED] pulls purchased items out of its inventory for its own use, gross receipts tax becomes due on the purchase as a withdrawal from stock under GR-18.

Sales of items delivered by [REDACTED] for usage at either a [REDACTED] site or drop-shipped directly to a customer from a [REDACTED] supplier are governed by Arkansas sourcing rules.

Transactions involving sales from an Arkansas vendor to an Arkansas purchaser are governed by the sourcing rules set forth in Ark. Code Ann. § 26-52-521 (Repl. 2014). Specifically, Ark. Code Ann. § 26-52-521(b) (Repl. 2014) provides that if the product or service is received by the purchaser at a business location of the seller, the sale is sourced to that business location. If the product or service is not received by the purchaser at a business location of the seller, the sale is sourced to the location where receipt by the purchaser or the purchaser's designated donee occurs, including the location indicated by instructions for delivery to the purchaser or donee known to the seller.

Therefore, in cases where [REDACTED]'s customer receives the property at the [REDACTED] location, Arkansas state and local sales tax will be due at the rate of tax applicable at [REDACTED]'s location. In cases where [REDACTED]'s customer receives the property at one of [REDACTED]'s Arkansas jobsites, Arkansas state and local sales tax will be due at the rate of tax applicable to that jobsite location. In cases where [REDACTED]'s customer receives the property at a location outside the state, Arkansas tax will not be imposed on those sales.

In accordance with Arkansas Gross Receipts Tax Rule GR-75, this opinion is based upon my understanding of the facts as set out in your inquiry and as current Arkansas laws and rules govern those facts. Any change in the facts or law could result in a different opinion. This opinion will not be binding upon the Department for any topic not specifically addressed herein. Please be advised that this opinion may only be binding upon the Department for three (3) years from the date of issuance. *See* Arkansas Gross Receipts Tax Rule GR-75.

With kind regards,

Lisa Ables
Revenue Legal Counsel