

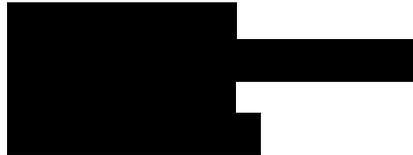


STATE OF ARKANSAS
**Department of Finance
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October 19, 2017



RE: Sales Tax on Labor for Installation of Sod, Planting Seed, and Installation of Fence
Opinion No. 20171004

Dear [REDACTED],

This is in response to your letter dated September 27, 2017, requesting a legal opinion from the Arkansas Department of Finance and Administration (DFA). Your letter states the following:

[REDACTED] is a contractor in the state of Arkansas. I need clarification on if I am required to collect sales tax on the services I perform. I install sod and plant seed on the ground to provide erosion control. The majority is sub work I perform for a general contractor who is under contract with the AR DOT. I also need to know about fence installation sales tax requirements.

I have been paying sales tax based on my contract price (tax included in contract price). I was advised last month after I called your department that I don't have to collect on fence but I do on sod and seed. I had a discussion with a contractor yesterday about sales tax and was told I only pay sales tax on the supplies when purchased.

I need your ruling on [REDACTED] being required to pay sales tax on the labor for installation of sod, planting seed and installation of woven wire or chain link fence.

LAW

Several provisions of Arkansas law and rules relate to your questions. With regard to your erosion control services, Ark. Code Ann. §26-52-301(3)(D) provides that sales tax is to be collected and remitted by businesses providing the service of landscaping. The term "landscaping" is defined in Ark. Code Ann. §26-52-301(3)(D)(ii)(a) to mean:

... the installation, preservation, or enhancement of ground covering by planting trees, bushes and shrubbery, grass, flowers, and other types of decorative plants;

The Arkansas Department of Finance and Administration (DFA) has promulgated Gross Receipts Tax Rule GR-9.2 to implement the state law imposing sales tax on landscaping services. The relevant portions of that rule are quoted below.

GR-9.2. SERVICES SUBJECT TO TAX - LAWN CARE AND LANDSCAPING:

A. Any person engaged in the business of providing lawn care of nonresidential property or landscaping services of both residential and nonresidential property is required to collect and remit sales tax on the gross receipts derived from these services. The business is required to obtain a sales tax permit. All materials that remain in or on the customer's property should be purchased tax exempt as a sale for resale. Examples are fertilizer, weed killer, grass seed, sod, plants, trees, or shrubs. Materials used or consumed by the business may not be purchased exempt. Examples are gasoline, oil, cleaning materials, uniforms, tools, mowers or other equipment used or consumed by the business.

B. The business will collect state and local sales tax on the total consideration for landscaping services or nonresidential lawn care, whether provided as part of a general contract for building construction or as a separate agreement with the landowner. **The business will collect the tax from the party with whom it contracts for the service, including general contractors,** on the total contract cost including the cost of plant materials. A business which has its own nursery is not required to report tax on plant material withdrawn from stock, but will collect tax on the sale of the material to its customers.

C. DEFINITIONS.

1. "Landscaping" means the installation, preservation or enhancement of ground covering by planting trees, bushes, shrubbery, grass, flowers and other types of decorative plants. "Landscaping" does not include site preparation, cutting and filling, leveling, tree trimming or tree removal, or clearing a site of bushes and trees. "Landscaping" does include sodding, seeding and planting, as well as installing items such as landscape timbers, edging, planters, or similar items. **Landscaping performed on highway easements and right-of-ways is taxable.** Landscaping is taxable whether it is done for decorative purposes or non-decorative purposes such as erosion or sediment control. [Emphasis added]

Regarding the installation of fences, several provisions of state law are relevant. First, Ark. Code Ann. §26-52-307 addresses the application of sales tax to sales of services and property by construction contractors. Specifically, that provision of state law provides as follows:

(a)(1) Sales of services and tangible personal property, including materials, supplies, and equipment, made to contractors who use them in the performance of any contract are declared to be sales to consumers or users and not sales for resale.

(2) Subsequent transfers of title or possession of the property used in the performance of a contract by contractors are not subject to the tax imposed by this chapter.

(b) Provided that, if the performance of a contract or any portion thereof by a contractor constitutes the performance of a taxable service under the terms of § 26-52-301(3), then the entire gross proceeds or gross receipts derived from the performance of the taxable services, including the sale or transfer of title or possession of any materials or supplies used or consumed in performing the taxable services shall be subject to the tax imposed by this chapter.

(c) Contractors shall be entitled to receive a gross receipts tax credit, tax offset, or refund for any gross receipts tax or use tax paid on materials or supplies used or consumed by them which become a part of real estate in performing taxable services.

In addition, the provisions of Ark. Code Ann. §26-52-301(3)(B)(viii)(a) and (b) are applicable to the installation of fencing and provides as follows:

(viii)(a) Additionally, the gross receipts tax levied in this section shall not apply to the initial installation, alteration, addition, cleaning, refinishing, replacement, or repair of nonmechanical, passive, or manually operated components of buildings or other improvements or structures affixed to real estate, including, but not limited to, the following:

- * * *
- (20) Fences;
- * * *

(b) A contractor is deemed to be a consumer or user of all tangible personal property used or consumed by the contractor in providing the nontaxable services, in the same manner as when performing any other contract.

DFA has promulgated Rule GR-21 to assist with the administration of sales by construction contractors. The portions of that rule relevant to your question provides:

GR-21.PERSONS REQUIRED TO COLLECT AND REMIT TAX - SPECIFIC BUSINESSES - CONTRACTORS:

A. DEFINITIONS.

1. “Consumer” or “user” means the person to whom the taxable sale is made or to whom the taxable services are furnished. **All contractors are deemed to be consumers or users of all tangible personal property including materials, supplies, and equipment used or consumed by them in performing any contract, and the sales of all such property to contractors are taxable sales.** The contractor must pay tax at the time of purchase or pay tax at the time the materials are withdrawn from stock for use in the performance of the contract. A contractor

cannot rely on the direct pay permit of the other party to the contract for payment of the tax on the construction materials.

2. “Contract” means any agreement or undertaking 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. The term contract shall not include a contract to produce tangible personal property.

3. “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.

B. NON-TAXABLE SERVICES AND SALES. The following represents services which are not subject to sales tax:

1. The initial installation, alteration, addition, cleaning (with exceptions noted in GR-21(C)(1)), refinishing, replacement, or repair of nonmechanical, passive or manually operated components of buildings or other improvements or structures affixed to real estate, including but not limited to the following: walls, ceilings, doors, locks, windows, glass, heat and air ducts, roofs, wiring, breakers, breaker boxes, electrical switches and receptacles, light fixtures, pipes, plumbing fixtures, fire and security alarms, intercoms, sprinkler systems, parking lots, **fences**, gates, fireplaces, and similar components which become a part of real estate after installation, are not taxable services. This means, generally, that services performed on non-mechanical components or fixtures within or on a building or other improvement to real estate are not taxable. [Emphasis added]

ANALYSIS

As more fully described below, the application of these provisions of state law and rules to your questions results in the conclusion that you should collect and remit both state and local sales taxes on the services of installing sod and planting seed. When you perform a landscaping service you are acting as a retailer of a taxable service. When your business erects a woven wire or chain link fence, you are acting as a construction contractor rather than as a retailer. When functioning as a construction contractor with regard to the installation of a fence, your business should pay tax on the materials you purchase for use in fulfilling that contract. You are not required to collect and remit sales tax on the amount charged to your customer for selling and installing a fence.

Erosion Control: Arkansas Code Ann. § 26-52-301(3)(D)(ii) quoted above clearly imposes sales tax on landscaping services. Landscaping includes the installation of grass sod and the planting of grass seed. The purpose for which this grass sod or grass seed are installed has no bearing on whether sales tax is due. These landscaping services are equally subject to sales tax whether performed for beautification or for erosion control. Also, landscaping services are equally taxable whether performed as part of a contract with the Arkansas Highway and Transportation Department (AHTD) or for a homeowner. State law does not provide a sales tax exemption for work performed for AHTD.

Consequently, you should collect and remit both state and local sales tax on the total charges you bill to the general contractor for whom you perform landscaping services. You should obtain a sales tax permit from DFA and remit the state and local sales taxes collected on those taxable landscaping services each month. Local sales tax is due based on the city or county location where the landscaping services are performed. You may purchase grass sod, grass seed, and other materials (e.g. fertilizer, mulch, weed killer) exempt from sales tax if those materials remain with the customer at the end of the project. You should pay sales tax on your purchase of any materials you consume in providing your taxable landscaping services (e.g. equipment, tools, oil for equipment, etc.)

Fence Installation: As mentioned above, when you sell and install a woven wire or chain link fence, you are acting as a construction contractor rather than as a retail seller of goods and services. Construction contractors are required by law to pay sales tax on all materials they purchase for use in fulfilling the construction contract. Consequently, you should pay sales tax to your suppliers on all materials you purchase for use in fence installation. The charges you bill to your customer for labor and materials to install a fence are not subject to sales tax.

Your opinion request did not indicate that your business sells fencing materials to customers at retail. If you do make retail sales of fencing materials, please contact me for a supplemental opinion regarding that issue.

This opinion is based upon my understanding of the facts as set out in your inquiry and as current law and rules apply to those facts. Any changes in the facts or law could result in a different opinion. You may rely on this opinion for three years pursuant to Arkansas Gross Receipts Tax Rules GR-75(B).

Sincerely,

John H. Theis, Attorney
Arkansas Department of Finance and Administration
Office of Revenue Legal Counsel