TRANSMITTAL MEMORANDUM
DEPARTMENT OF REVENUE
INFORMATION RELEASE
SALES AND USE TAX

PURPOSE: This transmittal memorandum contains information and instructions relating to Department of Revenue Information Releases which will be issued weekly for the purpose of implementing the sales and use tax on services. The positions reflected in the statements in this release are effective immediately and are to remain in effect until further notice.

Department of Revenue personnel are advised to use the statements on the issues addressed in information releases when advising taxpayers or responding to questions from the public. The public should be informed that verbal assistance, and any advice or response given in reply to a question or issue not specifically covered in an information release, is not binding on the Department and is merely the opinion of the employee on the issue.

The public may contact the Tallahassee office for assistance by calling (904) 488-6800, or 1-800-872-9909. A nonbinding written statement on the application of the new sales tax provisions may be obtained by submitting a written request detailing the transaction or situation to the Bureau of Tax Information and Assistance, P.O. Box 5139, Tallahassee, Florida 32314-5139. Binding statements may be obtained by submitting a written request in compliance with Emergency Rule 12AER87-91, F.A.C. The request must be submitted to the Department of Revenue, Office of the General Counsel, P.O. Box 6668, Tallahassee, Florida 32314-6668.

Contents:

Sales and Use Tax
New Statements 61-128*

Instructions: This information release and all subsequent releases are to be made available to all Department of Revenue employees involved in implementing the sales tax law changes and those employees who deal directly with the public. Additional information releases will be issued each Friday for as long as necessary. Employees should retain this transmittal memorandum and the attached materials. Subsequent releases will contain filing instructions and new or updated materials.

Filing Instructions:

Add new statements 62 to 128 to package.*

*Note: Only those statements which are numbered between 61 & 128 which have been approved for release are attached to this information release. As those statements which are not included are approved you will receive them as part of a future information release.
Landscape Counseling and Planning

Persons providing landscape design and landscape planning services to prime contractors are not considered subcontractors, but rather are performing construction support services. The construction support services are taxable to the prime contractor as stated in the Rule 12AER87-31.
Insurance Services Title Insurance Exempt

Consideration paid for title insurance that is in excess of 110 percent of the risk premium rate promulgated pursuant to s.627.728, F.S., is taxable. Promulgated rates are set by the Florida Department of Insurance and information regarding these rates may be obtained from that department. The excess of 110 percent of the risk premiums represent charges for services that are in addition to assumption of risk. (See 12AE87-11(11)g.)
Title services, including preparation of abstracts (abstracting) and title searches, are taxable services. The services of escrow agents are also taxable services where the compensation for the service is paid by fees for service or by income on funds of another held by the escrow agent.
Cash Basis Election

The sales and use tax on services shall be due and payable at the time of the sale or use of the services. However, a person who is primarily engaged in the business of selling real estate services may elect to ascertain the tax on the basis of cash receipts for taxable service transactions. When the election is made, it shall be applicable to all service transactions of the real estate service provider.
Transportation Services

Pursuant to Rule 12AER87-34(1)(b), where the seller contracts to deliver tangible personal property under terms that require the property to be shipped F.O.B. to a destination in Florida, the transportation charges are taxable if the sale is taxable. Where the transportation charges are billed by the seller to the buyer and there is inadequate documentation to establish the point at which the title passed, the transportation charges are taxable if the sale is taxable. The mode of transportation does not affect this application.
Transportation Services

Pursuant to Rule 12AER87-11(17)(a)(l), local and long distance trucking services are not subject to sales tax. Contractors who perform trucking services are performing a nontaxable service, provided the service is not provided in conjunction with construction services for a particular client.
Construction Cost Price Imposition of Tax

Pursuant to Rule 12AER87-31(9)(a), the tax is imposed upon 50 percent of the contract price for new construction undertaken pursuant to a contract. Contract price is defined in Rule 12AER87-31(7)(i) 1., as the total consideration paid pursuant to a contract for the construction, alteration, improvement, or repair of realty. All contracts are treated in this manner, whether the contract is a "lump sum," "fixed fee," "cost plus," or "guarantee price."
Sales.85

Prime Contractor; Defined

Pursuant to Rule 12AER87-31(7)(b), your organization would be defined as a "prime contractor." The prime contractor is considered the final consumer of construction services consumed in improving realty, as provided in Rule 12AER87-31(9). In such cases, the prime contractor is required to register as a dealer and remit the amount of tax due and payable on construction. A copy of Rule 12AER87-31, is enclosed for your reference.
Sales.86

Commissions: Taxability of

Subsection 212.0592(2), F.S., as created by Chapter 87-6, L.O.F., exempts services provided by employees to their employers from Florida sales tax. This exemption does not apply to the services provided by an individual or firm acting as an independent contractor. Therefore, the charge for the services of a commission sales person or a manufacturer's representative is taxable. Criteria considered in determining whether a person is an employee or an independent contractor are contained in Rule 12AER87-11(2), enclosed.

To determine where a service is used, the law establishes a series of rules that generally tie the consumption of agent's services to the place where the buyer of the service (i.e., the manufacturer who is represented by the agent) does business.

If a Florida-based broker represents a manufacturer wholly doing business in Florida, it is the broker's responsibility to collect the full 5% tax on his commissions.

If the broker represents a multi-state manufacturer who is doing business in Florida, the service he provides is partially taxable because it is deemed used in Florida to the extent the manufacturer is doing business in Florida. The method for measuring the manufacturer's business activity in Florida, and therefore the extent of sales tax liability for services purchased in Florida, is based upon the manufacturer's Florida corporate income tax apportionment formula. An exception arises if the agent's territory is limited to a county or a Standard Metropolitan Statistical Area. Then the manufacturer pays a tax on the full commission.

In recognition of the fact that the seller of a service generally cannot know what portion of his services are used in Florida and therefore taxable under this formula, the law shifts responsibility for remitting the tax from the service seller (the agent or representative) to the buyer (manufacturer). Multi-state businesses that do business in Florida are required to register with the state, purchase services tax-exempt, and then directly remit to the state any taxes they owe. To sell your service tax-exempt to a multi-state manufacturer, you need only obtain the manufacturer's exempt purchase permit number, note it on your commission invoices, and keep a copy of the permit in your records as justification for not collecting the sales tax.
However, if a manufacturer refuses to obtain and present an exempt purchase permit, the Department will look to you to collect the full 5% tax on your services. Because the apportionment factor for most non-Florida based manufacturers will be well under 100%, it is clearly in their interest to utilize the permit and self-accrue the tax.

Two technical points:

(1) Any manufacturer who utilizes the services of a manufacturer's representative in Florida has sales tax nexus in Florida (see Tyler Pipe Industries v. Washington Department of Revenue, U.S. Supreme Court Case No. 85-1963). Such a manufacturer is considered a multi-state entity, even if his plant and employees are wholly in another state.

(2) Any entity which possesses an exempt purchase permit must utilize it for all Florida service purchases.

In any event, Florida based manufacturer's representatives are required to register as sales tax dealers under the law, even though they may ultimately remit no taxes. Enclosed is a copy of the registration form.
Construction Services—Ultimate Consumer

Rule 12AER87-31(28), provides that the prime contractor is the ultimate consumer of building materials used in the construction of seawalls. Furthermore, under Rule 12AER87-31(29), contractors who prefabricate seawall slabs, T-pilings and tiebacks for use in construction of seawalls are subject to tax upon the fabricated cost of such items.
Commissions; Taxability of Independent Contractor

Subsection 212.0592(2), F.S., exempts the services an employee provides an employer measured by the compensation or renumeration paid to the employee, including retirement plans, insurance, and annuity plans. This exemption does not apply to the services provided by an individual or firm acting as an independent contractor. Rule 12AER87-11(2), (copy enclosed) provides criteria to be considered in determining whether a person is an employee or an independent contractor. The charge for the services of an independent contractor is taxable.

To determine where a service is used, the law establishes a series of rules that generally tie the consumption of agent's services to the place where the buyer of the service (i.e., the manufacturer who is represented by the agent) does business.

If a Florida-based broker represents a manufacturer wholly doing business in Florida, it is the broker's responsibility to collect the full 5% tax on his commissions.

If the broker represents a multi-state manufacturer who is doing business in Florida, the service he provides is partially taxable because it is deemed used in Florida to the extent the manufacturer is doing business in Florida. The method for measuring the manufacturer's business activity in Florida, and therefore the extent of sales tax liability for services purchased in Florida, is based upon the manufacturer's Florida corporate income tax apportionment formula. An exception arises if the agent's territory is limited to a county or a Standard Metropolitan Statistical Area. Then the manufacturer pays a tax on the full commission.

In recognition of the fact that the seller of a service generally cannot know what portion of his services are used in Florida and therefore taxable under this formula, the law shifts responsibility for remitting the tax from the service seller (the agent or representative) to the buyer (manufacturer). Multi-state businesses that do business in Florida are required to register with the state, purchase services tax-exempt, and then directly remit to the state any taxes they owe. To sell your service tax-exempt to a multi-state manufacturer, you need only obtain the manufacturer's exempt purchase permit number, note it on your commission invoices, and keep a copy of the permit in your records as justification for not collecting the sales tax.
However, if a manufacturer refuses to obtain and present an exempt purchase permit, the Department will look to you to collect the full 5% tax on your services. Because the apportionment factor for most non-Florida based manufacturers will be well under 100%, it is clearly in their interest to utilize the permit and self-accrue the tax.

Two technical points:

(1) Any manufacturer who utilizes the services of a manufacturer's representative in Florida has sales tax nexus in Florida (see Tyler Pipe Industries v. Washington Department of Revenue, U.S. Supreme Court Case No. 85-1963). Such a manufacturer is considered a multi-state entity, even if his plant and employees are wholly in another state.

(2) Any entity which possesses an exempt purchase permit must utilize it for all Florida service purchases.

In any event, Florida based manufacturer's representatives are required to register as sales tax dealers under the law, even though they may ultimately remit no taxes. Enclosed is a copy of the registration form.
Rule 12AER87-31(13), provides that contractors who manufacture or fabricate tangible personal property at their own plant for use in the performance of contracts for construction or improvement to real property are subject to tax upon the manufactured or fabricated cost of such items. The tax is based on the cost price of the item manufactured or fabricated. Elements included in cost price are contained in Rule 12AER87-31(13)(b).
Sales.92

Limousine Rentals

Rule 12AER87-34(2)(d), provides that limousine rentals, with drivers, are taxable.
Tangible Personal Property

Rule 12AER87-56, provides that the total consideration for labor or material used to alter, remodel, maintain, adjust or repair tangible personal property is taxable.
Construction Cost Prices - Import Tax

When new construction is undertaken on a speculative basis, the provisions of Rules 12AER87-31(9)(a) & (b), 8(c) 1., 2., 4., and 5., apply. The prime contractor is considered the final consumer of construction services consumed in improving realty. The prime contractor is required to register as a dealer and remit the amount of tax due and payable on construction services. For new construction undertaken on a speculative basis, but sold within six months of completion, the tax is imposed upon 50 percent of the contract price. For new construction undertaken on a speculative basis, which is not sold within six months of completion, the tax is based upon 50 percent of the cost price. In either case, when a contract for sale is procured, the tax is treated as an expense item and must be separately stated as a line item in the contract. When a subcontractor is involved, a partial payment of tax is due when payment is made by the prime contractor to the subcontractor based on 50 percent the amount of such payment. Any tax amounts remaining shall be due 30 days after a certificate of occupancy is issued or, if no certificate of occupancy is issued, when the new construction is first put into its intended use. When no subcontractor is involved, the tax is due when a certificate of occupancy is issued or, if no certificate of occupancy is issued, when the new construction is first put into its intended use. Furthermore, contractors must pay tax on the purchase of building materials and construction support services to the vendor on service provided at the moment of the transaction. Contractors are also required to pay tax on building materials which they import into Florida for use, as well as on items they manufacture for use.
Sales.96

Contractors: Taxability of

Pursuant to Rule 12AER87-31(8)(c)1., vendors, including wholesalers and retailers, are required to collect sales tax from contractors or subcontractors on the sale of building materials at the time of the transaction. Under Rule 12AER87-31(1)(o), contractors and subcontractors who improve real property are considered the final consumer of building materials, whether the construction services are taxable or exempt.
Fabrication of Tangible Personal Property

Pursuant to Rule 12AER87-31(24), the sale or rental of signs fabricated prior to reaching the job site, are sales or rentals of tangible personal property and are fully taxable. Installation changes are a taxable part of the sale or rental.
Sales.100

The lease or rental of tangible personal property is subject to sales tax as provided in Rule 12A-1.071, F.A.C. The lessee is considered to be the ultimate consumer and owes the tax on each lease payment.
Sale For Resale: Rental of Tangible Personal Property

As provided in Rule 12A-1.038, F.A.C., tangible personal property purchased exclusively for resale or re-rental purposes would be exempt from sales tax if the purchaser or lessee provides the seller or lessor with a valid resale certificate.
Purchases by Exempt Organizations: Consumer's Certificate of Exemption

Rule 12A-1.038(7), provides that a qualifying entity must present a consumer certificate of exemption to the dealer, in accordance with Rule 12A-1.039, P.A.C., when any purchases are made for use in carrying on the customary activities of the institution. Purchases made prior to the effective date of the certificate are exempt.
Financial Services: Check Cashing Agencies

Rule 12AER87-13, provides that the term "Financial Institution" means an institution referred to by SIC Group 60 and 61, (1972 Standard Industrial Classification Manual). Check cashing agencies are included within this definition these term. Services provided by financial institutions are exempt from the tax unless excepted in this rule. Fees for cashing checks are not excepted in this rule and are therefore exempt.
Sales.112

Trucking and Warehousing Services

As stated in Rule 12AER87-11(17)(a)2., "over the road" trucking services, provided either as a common carrier or under special and individual contracts on agreements for long-distance trucking, are exempt from the Florida sales tax on services.
Gratuities

Rule 12AER87-89, provides that any gratuity charge made to a customer for the service of food or beverage is a taxable part of the sales price of the food or beverage unless:

1. It is a voluntary gratuity or tip given freely by the purchaser or voluntarily added to his bill or invoice.

2. The tip or gratuity is separately stated on the purchaser's bill invoice and is distributed in full to the employees at least every six months with no part accruing to the benefit or advantage of the dealer.
Transportation Services

As stated in Rule 12AER87-34(3)(a), water transportation services on inland waterways, including the intracoastal waterway on the Atlantic & Gulf coasts, are subject to Florida sales tax. Such taxable services include canal transportation, river transportation, lake transportation, log rafting & towing, & transportation on bays & sounds of the ocean. The transportation services stated above are fully taxable if only intrastate movement is involved.
Transportation Service

If the provider of a taxable transportation service is involved in interstate or international movement, the charges will be taxable based on the proration established in Rule 12AER87-34(7)(b), F.A.C. If the point of origin of the interstate or international transportation service is in Florida, the tax shall be computed upon one-half of the charge imposed by the carrier for the service. Also, if the point of termination of the service is in this state, then one-half of the charge is subject to tax. If both the point of origin and the point of termination are in Florida, the total charge is taxable.
Transportation Services

A motorized escort service for oversize loads on the highway would fall into the category of "miscellaneous services incidental to transportation." As stated in Rule 12AER87-34(4)(c), the services in this category are taxable. Therefore, the escort service described above is taxable except when related to transportation of agricultural commodities and phosphate fertilizers. If the provider of this service is involved in interstate movement, the charges will be taxable based on the proration stated in Rule 12AER87-34(7)(b).
Use Tax on Services Accounting Services

Effective July 1, 1987, a tax is imposed at the rate of 5 per cent for the use of service in this state when the sale of the service is at retail outside this state. This tax is applicable if the benefit of the service is enjoyed within the state and the purchaser of the service has tax nexus in this state:

1. If the service directly relates to and benefits real property in this state.

2. If the benefit of the service is not directly related to real property, the benefit of the service shall be presumed to be enjoyed where the purchaser of the service receives tangible personal property representing the service.

3. If paragraph one or two do not apply, then the benefit of the service is presumed to be enjoyed where the greater portion of the service is performed, based on cost of performance determined in a manner consistent with generally accepted accounting principles.

If the purchaser of the service is not an interstate or international transportation or advertising business, the benefit of the service is enjoyed within this state:

1. If the service directly relates to and benefits real property in this state.

2. If the service directly relates to and benefits specific tangible personal property, the benefit of the service shall be presumed to be where the property has acquired a business situs.

3. If the service involves direct sales to a local market of the service purchaser, the benefit of the service is presumed to be enjoyed where the purchaser's local market exists.

4. If paragraph 1, 2 and 3 are not applicable, and the purchaser of the service is doing business in this state and outside of Florida, the service shall be presumed to be enjoyed in Florida based on an apportionment factor as approved by the Florida Department of Revenue.