



THE ATTORNEY GENERAL OF TEXAS

AUSTIN 11, TEXAS

WILL WILSON
ATTORNEY GENERAL

September 7, 1962

Honorable Jerry Dellana
County Attorney
Travis County Courthouse
Austin, Texas

Opinion No. WW-1435

Re: Whether wholesalers of builders supplies may accept resale certificates for purchases of building materials, in lieu of the sales tax, from builders and developers, who construct houses on land owned by such developers, such houses to be sold afterwards to the general public as real estate upon which no sales tax is collected.

Dear Mr. Dellana:

You have asked the following questions:

"Question 1: Are certain wholesalers required to accept resale certificates from builders and developers who purchase tangible personal property and then make said tangible personal property a part of the real property that is sold to the general public, or must they collect the tax at the time of sale?"

"Question 2: Does the definition 'Sale for Resale', Article 20.01 (S) as quoted in part 'Sale for Resale shall mean a sale of tangible personal property to any purchaser who is purchasing said tangible property for the purpose of reselling it in the normal course of his business . . .' include builders and developers?"

In your letter you have set out the following facts:

"Builders and developers of homes in this area are purchasing tangible personal property, i. e., garbage disposers, built-in stoves, etc. from wholesalers and submitting certificates of resale of tangible personal

property. In said certificate of resale, they specifically state that it will be resold in their regular course of business; their regular course of business is sale of real estate. They claim this exemption under Sec. (N), Article 20.04, of Section 1, Chapter 20, Title 122A.

"The wholesalers, who sell these articles to the builders and developers are apprehensive in that Article 20.12, Violations (B) may hold them guilty of a misdemeanor. . . ."

Articles 20.01 to 20.17, inclusive, Chapter 20, Title 122A, Taxation-General, V.C.S., constitute the Texas Limited Sales, Excise and Use Tax Act. All reference to articles hereafter discussed will be to the Limited Sales, Excise and Use Tax Act, unless otherwise shown.

Article 20.02 reads in part as follows:

"There is hereby imposed on each separate sale at retail of tangible personal property made within this State a limited sales tax at the rate of two per cent (2%) of the sale price of each item or article of tangible personal property when sold at retail in this State.

"(A) Method of Collection and Rate of Limited Sales Tax. The tax hereby imposed shall be collected by the retailer from the consumer.

". . . .

"(C) Limited Sales Tax Permit Application.

(1) Every person desiring to engage in or to conduct business as a seller within this State shall file with the Comptroller an application for a permit for each place of business.

"(D) Limited Sales Permit Issuances. After compliance with paragraph (C) of this Article by the applicant, the Comptroller shall grant and issue to each applicant without charge a separate permit for each place of business within the State. A permit shall not be assignable and shall be valid only for the person in whose name it is issued and for the transaction of business at the place designated therein. It shall at all times be conspicuously displayed at the place for which issued.

". . .

"(F) Presumption of Taxability: Resale Certificate. For the purpose of the proper administration of this Chapter and to prevent evasion of the limited sales tax it shall be presumed that all gross receipts are subject to the tax until the contrary is established. The burden of proving that a sale of tangible personal property is not a sale at retail is upon the person who makes the sale unless he takes from the purchaser a certificate to the effect that the tangible property is purchased for the purpose of reselling, leasing or renting it.

"(G) Effect of Resale Certificate. The resale certificate relieves the seller from the burden of proof only if taken in good faith from a person who is engaged in the business of selling, leasing or renting tangible personal property. A resale certificate may be given by a purchaser, who at the time of purchasing the tangible personal property, intends to sell, lease or rent it in the regular course of business or is unable to ascertain at the time of purchase whether the

tangible personal property will be resold, leased or rented or will be used for some other purpose." * (Emphasis added).

"(H) Form and Contents of Resale Certificate.

(1) The certificate shall:

(a) Be signed by and bear the name and address of the purchaser.

(b) Indicate the number of the permit, if any, issued to the purchaser.

(c) Indicate the general character of the tangible personal property sold, leased or rented by the purchaser in the regular course of business.

(2) The certificate shall be substantially in such form as the Comptroller may prescribe.

"(I) Liability of Purchaser Giving Resale Certificate. If a purchaser who gives a resale certificate makes any use of the tangible personal property other than retention, demonstration or display while holding it for sale, lease or rental in the regular course of business, the use shall be taxable to the purchaser as of the time when the tangible personal property is first so used, and the sales price of the tangible personal property to him shall be deemed the measure of the tax.

"(J) Resale Certificate; Commingled Fungible Goods. If a purchaser gives a resale certificate with respect to the purchase of fungible goods and

thereafter commingles these goods with other fungible goods not so purchased but of such similarity that the identity of the constituent goods in the commingled mass cannot be determined, sales from the mass of commingled goods shall be deemed to be sales of goods covered by the resale certificate until a quantity of such goods equal to the quantity of the goods so commingled has been sold."

Article 20.01 reads in part as follows:

". . .

"(S) Sale for Resale. 'Sale for Resale' shall mean a sale of tangible personal property to any purchaser who is purchasing said tangible personal property for the purpose of reselling it in the normal course of his business. A sale for resale shall include a sale of tangible personal property to a purchaser for the sole purpose of that purchaser's renting or leasing said tangible personal property to another person, but not if incidental to the renting or leasing of real estate."

Article 20.04 reads in part as follows:

". . .

"(N) Sale for Resale: Leasing or Renting.

(1) There are exempted from the taxes imposed by this Chapter the receipts from all sales for resale, leasing or renting.

(2) However, if a person purchases tangible personal property for the purpose of leasing or rent-

ing it to another person, and if he later sells it by means of an occasional sale before he has collected and paid to this State as much tax on the rental or lease charges as would have been due and payable to this State had he not purchased the tangible personal property for the purpose of so renting and leasing it, he shall, at the time of his occasional sale of said tangible personal property include in his receipts from taxable sales the amount by which his purchase price exceeded the amount of rents collected by him on said tangible personal property.

(3) Where a lessor makes a retail sale of leased tangible personal property to a lessee of that tangible personal property under an agreement whereby certain rental payments are credited against the purchase price of the tangible personal property, he need not collect or pay any tax on the sale price to the extent that he has collected and paid on such rental payments."

Article 20.12 reads in part as follows:

"(A) **Penalty for Engaging in Business as Seller Without Permit.** A person who engages in business as a retailer in this State without a permit or permits or after a permit has been suspended, and each officer of any corporation which so engages in business, is

guilty of a misdemeanor, and such person shall upon conviction be fined not more than Five Hundred Dollars (\$500) for each conviction. Each day of such operation shall constitute a separate offense.

"(B) Penalty for Improper Use of Resale Certificate. Any person who gives a resale certificate to the seller for property which he knows, at the time of purchase, is purchased for the purpose of use rather than for the purpose of resale, lease or rental by him in the regular course of business is guilty of a misdemeanor, and such person shall upon conviction be fined not more than Five Hundred Dollars (\$500) for each conviction.

"(C) . . .

"(D) Penalty for other Violations. Any violation of this Chapter, except as otherwise provided, is a misdemeanor, and any person shall, when found guilty of such violation, be fined not more than Five Hundred Dollars (\$500) for each violation."

The limited sales tax is imposed on each separate sale at retail in Texas of tangible personal property. The tax is imposed on the consumer and collected by the retailer. Art. 20.02 (A). Where the purchaser of tangible personal property intends to resell or lease the same as tangible personal property, he may give a resale certificate to the retailer in lieu of paying the tax. With respect to the purchase of tangible personal property, which the purchaser intends to lease, note this language from Art. 20.01 (S):

". . . A sale for resale shall include a sale of tangible personal property to a purchaser for the sole purpose of that purchaser's renting or leasing said tangible personal property to another person,

but not if incidental to the renting or leasing of real estate."
/Emphasis added/.

Thus, if a person who operates a bed rental business wants to purchase from the manufacturer or distributor a bed, such person is entitled to give a resale certificate for the purchase of the bed. The State will receive its tax from the customer who rents the bed, which tax will be collected by the operator of the bed rental service, and remitted in his quarterly tax returns. But if the bed is purchased by the operator of an apartment house, in order to furnish an apartment, which will be rented as real estate, there will be no sales tax to collect from the tenant. Hence, the operator of the apartment house is the ultimate consumer of the bed so purchased, and must pay the sales tax to his supplier.

The first sentence in Art. 20.01 (S) reads as follows:

"'Sale for Resale' shall mean a sale of tangible personal property to any purchaser who is purchasing said tangible personal property for the purpose of reselling it in the normal course of business."
/Emphasis added/.

This clearly contemplates that the tangible personal property purchased for the purpose of resale must be resold in the form of tangible personal property, in order for the purchaser to be authorized to execute a resale certificate and deliver the same to his supplier in lieu of paying the tax. If a person purchases a garbage disposal unit to install in a house which he owns, with the intention of afterwards selling the house, such a person clearly does not intend to resell "it" (the garbage disposal unit) to anyone. He intends to sell a house, which is real estate. To hold that a person who is in the business of constructing houses on his own land, with the intention of selling such houses to the general public, may claim the privilege of using a Sale for Resale Certificate upon the purchase of a garbage disposal unit to be installed in such house, would be to hold that such person is not in the business of selling houses, but instead is in the business of selling lumber, nails, bathtubs, plumbing fixtures, shingles, electrical wiring, etc.

Where a person purchases tangible personal property in the form of construction material to build or repair his own house, and such person performs his own construction work, he gets no exemption from the sales tax. He is neither an exempt person,

nor are the construction materials exempt products, for neither is listed in Art. 20.04. If a person owns his own land, and contracts with another to construct a building thereon, such contractor becomes the ultimate consumer of the products so consumed in construction, if the contract is let as a lump sum contract. Attorney General's Opinion No. WW-1258. If the contract is in the form of a split bid, the tax is paid either by the contractor or the owner of the building, depending on which one of them furnishes the materials to go into the building. Art. 20.01 (T). To hold that all these classes of persons must pay the sales tax, but that a developer who builds houses on his own land for resale may in effect become exempt from the tax by use of a Sale for Resale Certificate when he purchases builder's supplies, and thereafter collects no tax at all from his customer on the ground that his customer is purchasing real property and not tangible personal property, is to reach an absurd result.

"The court will never adopt a construction that will make a statute absurd or ridiculous, or one that will lead to absurd conclusions or consequences, if the language of the enactment is susceptible of any other meaning." 39 Tex. Jur., Statutes, Sec. 118, page 222.

Paragraph (G) of Art. 20.02 reads in part as follows:

"Effect of Resale Certificate.
The resale certificate relieves the seller from the burden of proof only if taken in good faith from a person who is engaged in the business of selling, leasing or renting tangible personal property."
/Emphasis added/.

The above quoted sentence from Par. (G), Art. 20.02, shows the legislative intent. For a purchaser of tangible personal property to be authorized under the Limited Sales, Excise and Use Tax Act to use a Resale Certificate in lieu of paying the tax at the time of his purchase, he must be ". . . engaged in the business of selling, leasing or renting tangible personal property." One engaged in the business of selling real estate in the form of lots with houses affixed thereto is not engaged in the business of selling tangible personal property. And a person engaged in selling both lumber at retail and houses as real estate could use his Resale Certificate only for the

lumber he sells as personal property.

In both Arts. 20.01 (S) and 20.02 (G) reference is made to purchasers who intend to sell or resell "it" in the "normal course of business" or "regular course of business." Such second sale or resale of "it" refers to "tangible personal property." There is no resale of tangible personal property, or "it" as such, in the situation described in your letter. It is true that these developers are engaged in a "normal course of business" and a "regular course of business", but their business is the sale of real estate, not tangible personal property.

An Exemption Certificate is used only by an exempt legal entity or exempt organization, which are listed in Paragraph (F), Art. 20.04. Real estate developers are not listed in this paragraph. Some products are exempt by name, such as food for human consumption (not served as meals). Some products are exempt, because of taxes which have already been imposed thereon, such as cigarettes. Some products, without naming them specifically, are exempt because of some circumstance which has already occurred with respect to them, such as sales of tangible personal property under contracts executed prior to the effective date of the Act; or occurs at the time of the sale, such as an occasional sale; or are destined to be used in a particular manner in the future, such as fuel for a locomotive engine. Nowhere in the Act do we find "builders' Supplies" listed as an exempt product, as such. The only time builders' supplies can fall within the Sale for Resale Exemption is when the sale is made to a wholesale or retail builders' supply establishment, which truly intends to resell "it" in the form of tangible personal property in the "normal" or "regular" course of business, and not to one who intends to consume or use it.

" . . . when the legislative intent is ascertained, or is plainly manifest, it is binding upon the courts, and must be given effect if it is legally possible to do so. To ignore the legislative intent and give a statute a construction obviously contrary thereto, or to refuse to enforce a statute according to the legislative intent, when ascertained, is said by the Supreme Court to be 'an inexcusable breach of judicial duty' and 'an unwarranted interference with the exercise of lawful legislative authority.'"
39 Tex. Jur. 171-172, Statutes, Sec. 90.

In answer to Question No. 1, we hold that wholesalers of builders' supplies, who sell to developers, builders, and lumber companies who purchase tangible personal property for the purpose of incorporating such tangible personal property into real property owned by such developers, builders, and lumber companies, such real property to be sold thereafter to the general public as real estate, must collect the sales tax from such developers, builders, and lumber companies.

We answer Question No. 2 by holding that Art. 20.01 (S), of the Limited Sales, Excise and Use Tax Act, which defines "Sale for Resale", does not include such developers, builders, and lumber companies within the meaning of "any purchaser", since that phrase only includes those who sell "it" in the "normal course of his business"; the word "it" referring to tangible personal property and such developers and builders are not so engaged, but are engaged in the business of selling real estate.

S U M M A R Y

Wholesalers of builders' supplies, who sell to developers and builders who purchase tangible personal property for the purpose of incorporating such tangible personal property into real property owned by such developers and builders, such real property to be sold thereafter to the general public as real estate, must collect the sales tax from such developers and builders.

Art. 20.01 (S), of the Limited Sales, Excise and Use Tax Act, which defines "Sale for Resale", does not include developers and builders within the meaning of "any purchaser", since that phrase only includes those who sell "it" in the "normal course of his business"; the word "it" referring to tangible personal property, and such developers and builders are not so engaged, but are engaged in the business of selling real estate.

Yours very truly,

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