

2013 HOUSE FINANCE AND TAXATION

HB 1419

2013 HOUSE STANDING COMMITTEE MINUTES

House Finance and Taxation Committee
Fort Totten Room, State Capitol

HB 1419
February 5, 2013
Job #18297

Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

A Bill relating to sales tax application to tangible personal property delivered to out of state purchasers for incorporation into or attachment to real property in another state.

Minutes:

Attached amendments #1

Chairman Belter: Opened hearing on HB 1419.

Representative Wieland: Introduced bill. I don't have any technical knowledge on this bill but there are others here who can answer any questions you may have.

Representative Koppelman: See attached amendments #1. The bill was introduced to deal with the situation that emerged in our community. A company there called CMC was running into problems with our tax department with respect to the way some of the rules are interpreted. They had never been considered to be a contractor before and they are a wholesaler and because of a different interpretation of an administrative rule they were being taxed. I have some amendments from John Walstad of the Legislative Council and they believe will deal with the issue. See attached amendments #1.

Paul Levrington, President and CEO of Custom Marketing Corporation: CMC is a company that works with quality grain and storage management so we sell grain bin products to farmers and other wholesale companies all over the United States and three other countries. We've been in business for about 30 years and we're a big promoter of electrical energy, whether it's wind or any type of energy coming from electrical. By going through our process of drying and pressure curing grain down naturally through grain bins we are encouraging farmers to take off their grain earlier, two to three weeks ahead of time, when it's ripe enough to store in their bins then curing it down which allows farmers to achieve and gain about three to four more pounds in test weight in the commodities they sell making them more productive. That's been the heart of our business philosophy for the past 30 years. We now do about \$8-10 million worth of business annually in North Dakota. Last year we were featured on the Discovery Channel throughout the world which doesn't happen to North Dakota businesses. One of the issues we ran into within the last three years is when we sell products and erect our grain bin facilities or we retrofit other farmer's bins in other states and it comes through North Dakota we are getting charged if our contractors who are independent contractors are going out there and erecting the projects

in other states we are getting charged a sales tax in North Dakota and sales tax in the other state. We have a unique in this industry because there are only a few other companies in the United States that put up grain bins. There are a few other companies in North Dakota this bill affects. CMC has never had a tax issue in the past years and the code has never changed so when you go from an annual basis and try to budget annually 10 years ago this was never an issue and then we got audited three years ago and all of a sudden they were back charging us for the tax of that year that we were audited for the way the language was interpreted. I believe that we should be able to stand by what is written and interpret it the same year after year so that our company doesn't have to worry about somebody understanding the language differently then we have \$100,000 bill at the end of the year that we owe the state. This is forcing our company to make a decision on whether or not we should move into Minnesota and purchase products from companies that aren't affiliated with North Dakota in order to go around this or we get this bill supported so we can make these changes and stay in North Dakota and continue to grow our company and support other companies that manufacture products in North Dakota. When we get charged with a sales tax its about \$10,000-15,000 extra revenue that we don't see because it's going as a double dip on tax.

Representative Klein: You sell a grain bin in Iowa and you're being charged a tax in North Dakota on that grain bin?

Paul Levrington: If the contractors go out there and erect it which is how all of this is done, we hire independent contractors and they erect the bin then we would get charged North Dakota tax on that plus tax in Iowa.

Representative Klein: This independent contractor could be from Minnesota or Wisconsin, it wouldn't make a difference?

Paul Levrington: That is correct.

Representative Froseth: On the other hand if that state doesn't have a sales tax then you would collect the North Dakota sales tax on that product according to page 2 line 22.

Paul Levrington: Yes I believe that is correct. That's not the issue we see though. The issue we see is when it's erected in another state we are getting charged sales tax and also having to pay sales tax in North Dakota.

Representative Drovdal: Sales tax is on the consumer and if you charge a sales tax for putting up a bin the consumer is supposed to pay that sales tax. Can you pass that tax on to the consumer in North Dakota?

Paul Levrington: We do pass it on to the consumer. But they are also getting charged sales tax that is getting passed on to them in their own state as well.

Representative Hatlestad: Can you explain what the switch in interpretation was when you weren't being charged before and now you are?

Paul Levrington: That was before I was with the company. Before they were audited back in the early 2000s and everything was passed and went through fine then in 2009 it was found that some of the states should have had sales tax charged but there were already sales taxed on to them in those states and that's when it became an issue. When the prior CEO sold the corporation to a private equity group which is now the majority owner of our company and through that transition and the audit he fought the issue trying not to pay the tax that year and I believe they reached a settlement.

Chairman Belter: In your business you probably compete with companies in other states, do you know how other states do it?

Paul Levrington: I don't believe they are.

Vice Chairman Headland: Are you paying the tax because you're wholesaling the product? Are you paying the tax on the construction of that product so that it would be a use tax or is it on as a wholesaler if you wholesale the bin out to an individual and he built it himself do you have a tax then?

Paul Levrington: We're not selling it to another contractor to erect. We are selling it whether it's wholesale to another company then they erect it or 90% of the business is focused on selling directly to farmers then we pay an independent contractor the labor portion to go there and erect the product for our customer.

Vice Chairman Headland: Is that what you're being taxed on or are you being taxed on the cost of the bin itself?

Paul Levrington: It's the sales and use tax portion. When we buy product and it's housed in our North Dakota and we sell it to another state then that state charges sales tax on that sale. Our problem is on that sale where we're getting charged a tax from North Dakota also on the product.

Vice Chairman Headland: Is it because you're building it in that other state? Can you clarify if the tax is on the construction or on the bin itself?

Paul Levrington: It's on the product.

Representative Trottier: If you sell a \$50,000 bin and it's \$10,000 to construct it and you deliver that to Iowa do you pay the sales tax on the \$50,000 in North Dakota and then when you get to Iowa and construct it and it's \$60,000 completed do you pay on the \$60,000 in Iowa to Iowa?

Paul Levrington: We pay the tax to Iowa and then the tax to North Dakota is the way it is structured now. I believe it happened because of the way it was worded or understood and it was interpreted differently.

Chairman Belter: Further testimony in support of 1419?

Andy Peterson, Greater North Dakota Chamber: I'm not supporting this or opposing this. This issue comes up again and again as I tour companies around North Dakota. We probably need to study this and take a closer look at this. It's confusing for companies and to the tax department. The tax department has been out to these companies to talk about these issues so they're trying to resolve it but it really needs to come to some sort of resolution.

Chairman Belter: Further testimony? Myles, do you want to try and shed some light on this?

Myles Vosberg, Tax Commissioner's Office: I will go through a short series of transactions to help clarify the current law and what I think this bill is trying to do. If you have a company that sells grain handling systems or bins and so on and if they buy that product from their supplier and store it in their North Dakota location if a farmer comes to North Dakota and picks up the product that sale is taxable in North Dakota then make arrangements for their own erection of that product. If you have the same situation but the North Dakota seller delivers that bin and that system to Iowa but there's no part of that contract that calls for the erection of the product that is a retail sale and is taxable at the point of delivery so it would be taxable in Iowa not North Dakota because the product was delivered there by the seller. If you have the same transaction and you go one step farther and the seller enters into a contract with the farmer to supply all the parts and materials and to erect this product which is an improvement into real property that is no longer a retail sale that is a construction contract or the materials are sold for the purpose of installing it into real property. If the seller enters into the contract with the Iowa farmer and does the construction of the system that seller is responsible to pay North Dakota tax, sales or use tax, on the cost of all the materials that go into that system. They can't buy it for resale because they are no longer making a retail sale of that product they are using that in a construction contract so they are the final user and they had the materials here so they are subject to tax here. That same situation and add one additional party where the North Dakota seller delivers the materials to Iowa and has a contract with the farmer but they subcontract the labor for all the construction in Iowa to a third party the tax applies the same in North Dakota, the materials are still subject to tax in North Dakota because it's a construction project the materials are being removed in North Dakota to be installed in another state and they are subject to tax. The only exception to that is if it goes to a state where there is no tax on that transaction like Montana. In that case our law says that if it's being removed from North Dakota to be installed into real property into another state and it normally wouldn't be taxable in that state then we don't tax it either. This bill is intended to address that fourth situation where the North Dakota company provides all the materials, contracts with the final consumer outside of North Dakota, but hires a subcontractor to do the work. The amendment will say if the North Dakota wholesaler or distributor delivers to a subcontractor outside of state to be installed into real property then it will no longer treat those materials in North Dakota as subject to tax. This would apply to any North Dakota company that has materials here but subcontracts the labor.

Chairman Belter: Say you buy a piece of farm equipment or a vehicle out of Minnesota then they don't charge me sales tax on that piece of equipment, it would be charged in North Dakota. Correct?

Myles Vosberg: If that product was delivered in North Dakota then it would be subject to North Dakota tax.

Chairman Belter: But if I pick it up in Minnesota?

Myles Vosberg: Then Minnesota law would apply and you would pay Minnesota tax and if there is no tax in Minnesota you would have to pay the North Dakota use tax when you bring it into North Dakota for use here. The difference with that is in this we're talking about a product that is ultimately installed into real property.

Chairman Belter: This problem is not just unique to this business but any company selling parts or pre-manufactured things and sells it into another state then they are also having this problem.

Myles Vosberg: This is not unique and it is also not unique to North Dakota. The surrounding states with the exception of Montana do it the same way.

Representative Klein: Let me go back to the example you had of the \$50,000 bin and \$10,000 to install it. North Dakota then charges sales tax on the \$60,000 and Iowa is also charging sales tax on that same \$60,000?

Myles Vosberg: If that is a transaction where the total cost is \$60,000 of the contract and \$50,000 are materials the North Dakota party that installs it outside of state would pay tax on the \$50,000, their cost, and not charge tax to the customer on the full \$60,000. They build it into their contract with the customer so they can recoup that. The other state should not be imposing tax on that unless their rate is higher than they would pay on the difference.

Representative Klein: So Iowa would just get paid on the \$10,000?

Myles Vosberg: I'm not sure what Iowa's law is regarding the labor portion of it but just say the materials and our rate is 5% in North Dakota and the dealer installs them in Iowa then they would pay our 5% tax. If the Iowa's tax rate on tangible personal property is 6% they would pay 1% on that \$50,000 cost on the difference. There shouldn't be a double taxation.

Representative Drovdal: Another example would be if a facility sold carpet to a long term care facility and when they installed it it's taxable to that installer whereas if he sold that carpet to the long term care then it would be nontaxable. Why couldn't an individual have one contract for selling the product and a separate contract for the labor part of it and then it would be tax exempt?

Myles Vosberg: If the seller's contract to the farmer was just for the materials then tell them about a contractor who could do the work for them they would enter into a contract with them to do the installation then that would be a retail sale and the sale of those materials would be taxable at the point of delivery. If the seller enters into two separate contracts; one for the materials and one for the installation but one transaction we would

still view that to be the same situation where the tax would be due on the materials to North Dakota.

Representative Trottier: What if the product is manufactured in Illinois and I as a wholesaler have it delivered right to Iowa then who collects the sales tax there?

Myles Vosberg: There would be no North Dakota tax in that transaction.

Chairman Belter: Is what we're doing in North Dakota pretty much standard procedure amongst all the states or are we unique in the way we are doing this?

Myles Vosberg: The way we're doing it now is not unique, it's standard. Minnesota, Wisconsin, Iowa, Nebraska, and Wyoming all do it the same way we do.

Representative Kelsh: In this situation with this business why was the language interpreted differently?

Myles Vosberg: We have not changed our interpretation of that. We may have missed it in an earlier audit, I'm not sure.

Representative Owens: I have item A and I am going to ship it to Iowa and Iowa doesn't have a sales tax so therefore it is not a taxable event in North Dakota, correct?

Myles Vosberg: That is correct.

Representative Owens: Now I'm going to sell you an item and ship it to Iowa and by contract we are going to include it as to being incorporated into real property and Iowa does not have a sales tax, is that taxable.

Myles Vosberg: Yes, that is correct.

Representative Owens: The opposite of that is if they did treat it as a taxable sale there then it would be a taxable sale here if it's to be incorporated into real estate we would turn around and charge our sales tax. If our sales tax was 5% and there's was 6% they should only be charging 1%, is that correct?

Myles Vosberg: This is in the definition of a retail sale so we're saying when you install it into property outside North Dakota it is not a retail sale so they have to pay tax on it in North Dakota because they couldn't buy it for resale, they are the final user and are incorporating it into real property. The other state can collect the additional if their rate is higher.

Representative Owens: That was my point, the additional. In that case where they did have a taxable situation if we did it by contract for installation into real property then we would charge our 5% and if theirs is 5% or less there shouldn't be an additional tax on the other end only if they were higher then only the difference would be charged.

Myles Vosberg: That is correct.

Representative Kelsh: If I go to a lumber yard in Minnesota and buy shingles for my house and they deliver them to my house in North Dakota and I contract with them to put the shingles on I pay the sales tax in Minnesota and the sales tax in North Dakota because it's being converted into real property, correct?

Myles Vosberg: If they deliver and install per your agreement the contractor should be paying tax on his cost of the purchase of those shingles.

Representative Kelsh: Just for the cost of labor?

Myles Vosberg: He's going to pay tax on his cost of the shingles. There's no tax on the labor at all.

Representative Kelsh: But I've already paid for the shingles.

Myles Vosberg: If you separately purchase the shingles and you took ownership in Minnesota you would pay the Minnesota tax. If you had a separate agreement to install there would be no additional tax. It's a retail sale if there is no contract to install it as part of that transaction.

Representative Hatlestad: So the simple solution is for the company to sell the product and then hand the name of the contractor to the farmer and let the farmer make the second agreement then there would be no charge to North Dakota.

Myles Vosberg: That's correct. That would avoid this whole confusion.

Representative Drovdal: In the example of Representative Kelsh if Minnesota had a 4% tax and North Dakota had a 5% he would owe that 1% and should pay it.

Myles Vosberg: The contractor would be responsible for that one percent.

Chairman Belter: If this contractor, CMC, the only way to get out of that predicament is to have some type of agreement with the contractor in the out of state point of sale to construct this thing then it wouldn't be subject to the tax?

Myles Vosberg: Right now my understanding is they contract with the final customer for the whole project but if they just sold them the materials and recommended a contractor and make an agreement with them to erect the project then the sale of the materials would just be a retail sale.

Vice Chairman Headland: They could own the other company as well and just have a different tax structure or entity itself provide that service.

Myles Vosberg: As long as the final customer is contracting separately that would work.

Chairman Belter: I know a case where a company has an office in Minnesota and an office in North Dakota and the North Dakota has a contract with the Minnesota office did that person pay sales tax in Minnesota as well as North Dakota?

Myles Vosberg: Is this a project where materials are being installed into real property?

Chairman Belter: It's a grain bin.

Myles Vosberg: If it's the same company it wouldn't matter whether they enter into an agreement with the Minnesota or the North Dakota dealer so the taxability is going to be where the materials were first owned by that company.

Chairman Belter: If they took possession in Minnesota would the consumer also pay the North Dakota tax?

Myles Vosberg: They would not.

Representative Drovdal: The customer who pays the sales tax, is that customer in Iowa paying the exact same amount if Iowa's taxes are higher or the same?

Myles Vosberg: If it's a retail sale where they don't install then they are just going to pay the tax at the point of delivery.

Representative Drovdal: But they pay the tax.

Myles Vosberg: Right. When the seller also installs those materials the seller really pays the tax and builds that into the contract price.

Representative Drovdal: If the seller builds in the contract price and contracts it to Iowa again is the consumer charged sales on that again?

Myles Vosberg: No. I'm saying in your example if the seller is also a North Dakota seller and are installing the product they will pay the North Dakota tax first and if the rate in Iowa is higher they will pay the difference.

Representative Dockter: Unless a wholesaler sells to a customer and they do their own work someone else is going to have to pay another sales tax, a third party independent contractor.

Myles Vosberg: The tax is going to get paid once. If I as the wholesaler sell to you as the customer and you're going to make your own arrangements for the construction then you're going to pay tax at whatever point it was delivered, whether it be North Dakota or another state.

Representative Dockter: But then if I hire someone they are going to have to pay on the materials and it will be figured into my price when I pay for it?

Myles Vosberg: If in that same transaction you contract with another party if you already paid the tax on the materials there is no additional tax on the materials.

Representative Schmidt: I'm going to play on Representative Hatlestad's example where he gave me the name of a contractor and he hires that contractor then when it's all said and done the contractor gives me a kickback of a couple thousand bucks, what happens then?

Myles Vosberg: I think what's key here is who is contracting with whom. There needs to be a separate contract to do that work is what matters.

Representative Schmidt: If I do get a kickback that wouldn't impact the sales tax at all?

Myles Vosberg: That is correct.

Chairman Belter: Previously I asked you a question on the way we do it in North Dakota is a standard practice?

Myles Vosberg: Yes.

Chairman Belter: As long as this business understands what the rules are then a dealer in North Dakota should not be uncompetitive or at a disadvantage to dealers in other states.

Myles Vosberg: I would agree.

Chairman Belter: If we pass this bill then what impact would result?

Myles Vosberg: It will shift the tax to the other state. In the instance where a company contracts for installation and it's installed by a third party North Dakota will no longer get the tax, it will go to the other state.

Chairman Belter: What if it's coming in the other direction?

Myles Vosberg: This is only addressing what is going out.

Chairman Belter: I'm sure you'll want to take a look at the amendments.

Representative Drovdal: We currently have a Montana exemption in place so would this cover this contract for products going to Montana?

Myles Vosberg: There are a couple of things for Montana; Montana residents can come here and make a retail purchase and they're exempt. If the retailer delivers to Montana it's exempt. The language in this same section of the law, if they contract or install in a state where they don't have a tax it is also exempt.

Representative Drovdal: Currently without this bill?

Myles Vosberg: Without this bill.

Representative Trottier: I have a question for Paul. You heard my question so can you explain where you got caught in this?

Paul Levrington: I think Myles did a great job of explaining and I'm not a tax person. Fifteen percent of our company total sales is out of state where we hire a subcontractor to go into that state and erect the project and that's where the problem is, it's considered not taxed correctly by the state. Labor appears on the invoice with the sale and is CMC is considered a contractor even though CMC is not a contractor; we hire subcontractors to do the work for us. The tax commissioner uses the use tax on contractors as another tax when it shouldn't be another tax. He said the legislature did not intend for the contractor use tax to apply to sales of tangible personal property that are subject to sales or use tax in the state where they are delivered and installed. If the goods are shipped to a customer in another state the tax commissioner wants the seller for the use tax by calling it a contractor. We're not a contractor; we are hiring subcontractors to do the work for us. Tax from the seller to use on use tax on contractors is the reason why that happens.

Chairman Belter: Really what we do here in North Dakota is no different than what your competitors in other states do. Do you agree with that or are we doing something different here?

Paul Levrington: I would strongly disagree with that. We've had our legal department in St. Louis working on this problem for us and we have another location in Lake Village, Arkansas and looking at the scenario of moving our business there and having the billing and collections shipped out of that business or the possibility of moving it to Moorhead, Minnesota which would be a lot easier. They told me that if we shift the business to Minnesota or Arkansas we will get away from this problem we are having.

Representative Drovdal: Currently when you sell a product out of state do you collect the sales tax for that state or is that consumer responsible to remit the sales use tax in that state when he gets the product.

Paul Levrington: We're responsible.

Representative Hatlestad: It would seem to me that as soon as you subcontract the construction of that grain bin you have become a contractor. If you're not a contractor then how can you sub contracts? As soon as you do that it would appear you would change your tax status.

Vice Chairman Headland: It appears to me that if you allow your subcontractor to bill for the services he is providing your problems go away.

Paul Levrington: Yes I believe that would be correct. The problem with that is farmers like to do business with one company who is a voice for the subcontractor. In the uniqueness of erecting grain bins and storage equipment a lot of companies hire independent contractors all over instead of hiring and having all their own technicians to erect the products. A lot of the independent contractors are not business savvy enough to charge all the customers a bill to do the erecting of the equipment. We have contracts with them to work solely for us and represent us.

Vice Chairman Headland: All you have to do is create a new company that is CMC Contracting and have them handle it and your problems go away.

Representative Drovdal: I don't understand why you're paying a double taxation on this. You're paying the sales tax once so you shouldn't be paying tax on the whole amount twice.

Paul Levrington: I believe you're correct on that. We are getting taxed twice and it's only on 15% of our sales that our subcontractors are erecting in other states.

Representative Drovdal: According to the testimony what you're paying in tax here is exempt from the tax there so you'd only be paying on what the difference was for their tax rate not on the full tax.

Paul Levrington: Repeat that please.

Representative Drovdal: If they have a 6% rate and we have a 5% rate you collect the 5% and the first 5% of their 6% is exempt and you only pay 1% on that purchase.

Paul Levrington: I believe that we pay the full amount on both sides to my knowledge.

Representative Owens: I have no doubt that the other state sends you a bill for the sales tax but you should tell them you already paid the sales tax.

Paul Levrington: I would have to say that our CPAs and legal team have gone through that and figured it out.

Representative Dockter: Basically you're selling materials and then performing with subcontractors. I look it as two transactions and by doing two transactions you're making a profit on both, correct?

Paul Levrington: I believe we make a small portion on the labor with our subcontractors and obviously the materials.

Representative Dockter: When you do it with the subcontractors do you have it figured in how much you're going to pay on the sales tax in order to recoup that?

Paul Levrington: Yes we do.

Representative Klein: Isn't a major part of the problem is when you sell this grain bin to someone in Iowa it's a specialized system where you have knowledgeable contractors who know how to install it and you want to satisfy that customer to make sure it gets done right. To let him go find someone to put it up the problem will come back to you if it doesn't work right. Isn't that part of your major problem?

Paul Levrington: Yes that is exactly it. With our technology of what I explained earlier of what we do as company there is a lot of things we do differently and we need to have trained contractors who are used to our products.

Representative Zaiser: Wouldn't what Vice Chairman Headland be the answer to your questions where you have two different companies?

Paul Levrington: Yes that would be one route we could go with the company. There are pros and cons with that. The farmer is writing another check to the business or company.

Representative Trottier: Myles, if this were reversed in Paul's case where it was paid to North Dakota but it was due to Iowa. Paul said he paid twice on the tax so somebody should give some of this back. Would North Dakota give it back?

Myles Vosberg: If it's the reverse situation where a contractor out of state installs it in North Dakota they pay the North Dakota tax on the cost of their materials and they should have paid it to Iowa and they came back to us and documented that then North Dakota would refund it.

Chairman Belter: If there's no further testimony then I will close the hearing on HB 1419.

2013 HOUSE STANDING COMMITTEE MINUTES

House Finance and Taxation Committee
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HB 1419
February 11, 2013
Job #18753

Conference Committee

Committee Clerk Signature

May Brucher

Explanation or reason for introduction of bill/resolution:

A Bill relating to sales tax application to tangible personal property delivered to out of state purchasers for incorporation into or attachment to real property in another state.

Minutes:

Testimony #1

Chairman Belter: This is dealing with the problem that the CMC Corporation is apparently having.

Myles Vosberg, State Tax Commissioner's Office: Distributed testimony #1. The last time we discussed this bill I had talked about the surrounding states and how I had contacted them regarding whether their application of tax for contractors was the same as ours or not. Attached testimony is a copy of those emails in response to this. They all said they handle tax on materials used by contractors in the same way as North Dakota. Nebraska provides an option where when a contractor in Nebraska registers to do business there they make an election as whether they want to be treated like a contractor when they pay tax on everything that they use or whether they want to be treated like a retailer where they charge tax to their customers. When contractors make purchases in North Dakota they are considered the final user so they pay tax when they buy those materials here regardless of where they are going to use it. We have the provision in law that says if a contractor is going to install materials in another state where they don't have a tax then we would also exempt those same transactions so they aren't at a competitive disadvantage. It's not really the removal out of state that creates a taxable situation, it's the fact that the contractor is the final user and they have to pay tax here. If they go out of state and didn't pay tax here when they purchased the materials then they have to pay the tax when they remove those products from their inventory to take for a job regardless of where that job is with the exception of a state that doesn't tax those transactions. CMC would like to be treated like a retailer so when they buy materials and they store it in North Dakota if they take it to another state and hire a subcontractor to install that they want to be able to charge tax to their customer at the point of use of that product. This bill says that if they take the materials out of the state it's not taxable here and that's the end of the transaction as far as North Dakota goes and they would tax it in the state of installation. I worked with John Walstad on the amendments.

Vice Chairman Headland: I'm assuming this is going to be a loss of revenue from the way we are currently doing things.

Myles Vosberg: There will be a loss of revenue because this addresses materials going out where the surrounding states do it like we do now so we wouldn't get any revenue coming in on materials but we would lose revenue on what goes out. Our fiscal note says it cannot determine because we don't really know what that dollar amount would be.

Chairman Belter: In previous testimony you said that they are paying the tax here and if it goes to another state he would only pay the difference if their tax was more than ours.

Myles Vosberg: That is correct. They are required to pay tax under our law now in North Dakota. If they take it to Minnesota where the rate is a little higher they would have to pay the difference. I think they are treating themselves as a retailer and charging tax to the customer in the other state where the job takes place so they are collecting that tax from the customer. Then North Dakota comes in and says he should be paying North Dakota tax on these materials because he's a final user and took possession here. So if there's a double taxation I believe that's where it's coming from. If it was a reverse situation we would refund the tax back to the contractor if they refunded it back to their customer because they collected it.

Chairman Belter: CMC can't be the only company in North Dakota that is involved in a business like this. Has there been an issue with anyone else?

Myles Vosberg: I wouldn't say it wasn't ever an issue. We've made other assessments where they've not paid the tax to North Dakota but this seems to be a situation where we can't come to an agreement in how it should be done. There wasn't anyone else at the hearing that I was aware of who testified so I'm not aware that this is a big problem for anyone else. If it's done correctly where they pay the tax to North Dakota first if the materials were here first they would get credit for tax paid in another state. They will have to pay the difference if their rate is higher.

Vice Chairman Headland: There is no need for them to be double taxed in any scenario? They should never end up paying collectively more than the North Dakota rate and the difference between the North Dakota rate and the other state they are doing the business in?

Myles Vosberg: I can't say never. CMC does business all over the country. There may be states that don't recognize the tax required to be paid here. It's not the five states that I visited with that I verified how they treat this.

Chairman Belter: Any other questions?

Vice Chairman Headland: Could you talk about the discussion that was had between the commissioner's office and you or someone else that coined this term "inventory removal tax" that they reference in this letter.

Myles Vosberg: There really is no such thing as an "inventory removal tax." I believe it was their attorney who coined that phrase. Basically, they are talking about use tax that is due on materials when they take it out of their inventory to use it. If they didn't pay tax at

the time they purchased it they can give an exemption certificate to their supplier and not pay tax on anything but when they take it out of inventory to use it for a job they owe the use tax. I believe that's where that came from.

Chairman Belter: Any other questions?

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Minutes:

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Chairman Belter: This is the CMC bill. Does everyone have the 2001 amendments? What are your thoughts or wishes on this?

Representative Dockter: Made a motion to adopt the amendment 2001.

Representative Owens: Seconded.

VOICE VOTE: MOTION CARRIED.

Representative Schmidt: Made a motion for a Do Not Pass.

Representative Marie Strinden: Seconded.

Chairman Belter: Any discussion?

Representative Klein: I'm going to oppose this motion. I'm more confused now than when we started this. It seems to me that there is still some double taxation going on. If he sells the grain bin and the equipment that goes with it he wants to be assured that he has a usable product and it seems to me that we're going to get away from that.

Chairman Belter: I think this is a problem with the way this business does its accounting. If he's getting doubled taxed that is a big deal. This company is not that unique and I think there are other companies that are involved in this process.

Representative Klein: That's my concern. Certainly there must be other companies in North Dakota doing a similar type operation.

Chairman Belter: That's right but I'm saying that I think these other companies are not getting double taxed because if they were they would be in here big time and they would have been in here a long time ago. You can't withstand 5-7% taxation without crying foul is

my thought. I have to believe that this is a company problem and not something we can solve with this bill.

ROLL CALL VOTE: 10 YES 3 NO 1 ABSENT

Representative Drovdal: I'm not convinced that he's not getting taxed twice.

Chairman Belter: He is getting taxed twice but I think it's his fault though by the way he is doing the transaction. If we solve his problem we are going to lose a bunch of tax revenue is the way Myles explained it.

Representative Hatlestad: I got the impression before that if the business sold their grain bin and didn't subcontract he paid no tax. As soon as he subcontracts then he pays the tax as the end user.

Representative Drovdal: If he sold the grain bin to the customer in Iowa and he was contracting the labor on the side then there would be only one tax then but he's selling it to the contractor and the contractor is going down and reselling it so it's being taxed twice.

Representative Hatlestad: He's not selling it to the contractor.

Vice Chairman Headland: He's retailing it to the customer and when he does that he places himself in the other state's tax after he's already responsible to pay our tax. He's also not applying for the difference.

Representative Drovdal: Myles said he's selling it to the contractor then the contractor is the end user in North Dakota so that's a retail sale to the contractor. When the contractor is going to Iowa he is the one reselling it to the final consumer so it's taxed again as a full sale. He should be able to straighten it out with the bookkeeper.

Vice Chairman Headland will carry this bill.

FISCAL NOTE
Requested by Legislative Council
01/22/2013

Amendment to: HB 1419

- 1 A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2011-2013 Biennium		2013-2015 Biennium		2015-2017 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures						
Appropriations						

- 1 B. **County, city, school district and township fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

	2011-2013 Biennium	2013-2015 Biennium	2015-2017 Biennium
Counties			
Cities			
School Districts			
Townships			

- 2 A. **Bill and fiscal impact summary:** *Provide a brief summary of the measure, including description of the provisions having fiscal impact (limited to 300 characters).*

HB 1419 eliminates the sales and use tax under specified circumstances involving wholesalers and distributors when goods are delivered to out-of-state purchasers and incorporated into real property in another state.

- B. **Fiscal impact sections:** *Identify and provide a brief description of the sections of the measure which have fiscal impact. Include any assumptions and comments relevant to the analysis.*

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*

- A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

There are many types of wholesalers and distributors in North Dakota that may qualify for this sales and use tax exemption, including businesses providing modular buildings, metal farm storage buildings, grain bins and grain dryers, pole buildings, sign companies, cabinet companies, and some retailers utilizing independent contractors for installation. The revenue loss from HB 1419, however, cannot be computed.

- B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

- C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, for each agency and fund affected. Explain the relationship between the amounts shown for expenditures and appropriations. Indicate whether the appropriation is also included in the executive budget or relates to a continuing appropriation.*

Name: Kathryn L. Strombeck

Agency: Office of Tax Commissioner

Telephone: 328-3402

Date Prepared: 02/04/2013

FISCAL NOTE
Requested by Legislative Council
01/22/2013

Bill/Resolution No.: HB 1419

- 1 A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2011-2013 Biennium		2013-2015 Biennium		2015-2017 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures						
Appropriations						

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	2011-2013 Biennium	2013-2015 Biennium	2015-2017 Biennium
Counties			
Cities			
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Townships			

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HB 1419 eliminates the sales and use tax under specified circumstances involving wholesalers and distributors when goods are delivered to out-of-state purchasers and incorporated into real property in another state.

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3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*

- A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

There are many types of wholesalers and distributors in North Dakota that may qualify for this sales and use tax exemption, including businesses providing modular buildings, metal farm storage buildings, grain bins and grain dryers, pole buildings, sign companies, cabinet companies, and some retailers utilizing independent contractors for installation. The revenue loss from HB 1419, however, cannot be computed.

- B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

- C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, for each agency and fund affected. Explain the relationship between the amounts shown for expenditures and appropriations. Indicate whether the appropriation is also included in the executive budget or relates to a continuing appropriation.*

Name: Kathryn L. Strombeck

Agency: Office of Tax Commissioner

Telephone: 328-3402

Date Prepared: 02/04/2013

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1419

Page 2, line 9, after "processing" insert "or resale"

Page 2, line 12, overstrike "North Dakota retail" and insert immediately thereafter "valid"

Page 2, line 12, after "permit" insert "in any state"

Page 2, line 17, remove "(a)"

Page 2, line 19, after "contract" insert "with the North Dakota wholesaler or distributor"

Page 2, line 23, replace "subparagraph" with "paragraph"

Page 2, remove lines 29 through 31

Page 3, remove lines 1 through 4

Renumber accordingly

Date: 2-11-13
Roll Call Vote #: 1

2013 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1419

House Finance and Taxation Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: Do Pass Do Not Pass Amended Adopt Amendment 2001
 Rerefer to Appropriations Reconsider

Motion Made By Rep. Dockter Seconded By Rep. Owens

Representatives	Yes	No	Representatives	Yes	No
Chairman Wesley Belter			Rep. Scot Kelsh		
Vice Chairman Craig Headland			Rep. Steve Zaiser		
Rep. Matthew Klein			Rep. Jessica Haak		
Rep. David Drovdal			Rep. Marie Strinden		
Rep. Glen Froseth					
Rep. Mark Owens					
Rep. Patrick Hatlestad					
Rep. Wayne Trottier					
Rep. Jason Dockter					
Rep. Jim Schmidt					

Total (Yes) _____ No _____

Absent _____

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

Verbal Vote
Motion carried

Date: 2-11-13
Roll Call Vote #: 2

2013 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1419

House Finance and Taxation Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: Do Pass Do Not Pass Amended Adopt Amendment
 Rerefer to Appropriations Reconsider

Motion Made By Rep. Schmidt Seconded By Rep. Strinden

Representatives	Yes	No	Representatives	Yes	No
Chairman Wesley Belter	✓		Rep. Scot Kelsh	✓	
Vice Chairman Craig Headland	✓		Rep. Steve Zaiser	AB	
Rep. Matthew Klein		✓	Rep. Jessica Haak	✓	
Rep. David Drovdal		✓	Rep. Marie Strinden	✓	
Rep. Glen Froseth	✓				
Rep. Mark Owens	✓				
Rep. Patrick Hatlestad	✓				
Rep. Wayne Trottier		✓			
Rep. Jason Dockter	✓				
Rep. Jim Schmidt	✓				

Total (Yes) 10 No 3

Absent 1

Floor Assignment Rep. Headland

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1419: Finance and Taxation Committee (Rep. Belter, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO NOT PASS** (10 YEAS, 3 NAYS, 1 ABSENT AND NOT VOTING). HB 1419 was placed on the Sixth order on the calendar.

Page 2, line 9, after "processing" insert "or resale"

Page 2, line 12, overstrike "North Dakota retail" and insert immediately thereafter "valid"

Page 2, line 12, after "permit" insert "in any state"

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Renumber accordingly

2013 TESTIMONY

HB 1419

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1419

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Page 2, line 12, overstrike "North Dakota retail" and insert immediately thereafter "valid"

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Page 2, line 23, replace "subparagraph" with "paragraph"

Page 2, remove lines 29 through 31

Page 3, remove lines 1 through 4

Renumber accordingly

Vosberg, Myles S.

HB 1419

From: Paxton, Larry [IDR] <Larry.Paxton@iowa.gov> *IOWA*
Sent: Thursday, February 23, 2012 1:04 PM
To: Vosberg, Myles S.; Craig Johnson; Jane Page (jane.page@state.sd.us);
ellen.thompson@nebraska.gov; cathy.wicks@state.mn.us
Subject: RE: Materials Installed by Contractor

Hi Myles,

Iowa would treat construction materials the same as ND

Materials delivered in Iowa for use in a construction contract are subject to tax. It does not matter if the materials purchased by a contractor are for use in construction contracts performed in Iowa or outside of Iowa. IAC 701—219.1 Also Iowa would treat grain bins as real property.

Let me know if you need more info.

Larry

-----Original Message-----

From: Vosberg, Myles S. [mailto:msvosberg@nd.gov]

Sent: Thursday, February 23, 2012 9:20 AM

To: Craig Johnson; Jane Page (jane.page@state.sd.us); Paxton, Larry [IDR]; ellen.thompson@nebraska.gov; cathy.wicks@state.mn.us

Subject: Materials Installed by Contractor

Hi All,

A North Dakota legislator is questioning North Dakota's administrative rule regarding the application of sales and use tax on materials purchased by a contractor that takes delivery of the materials in North Dakota, but later takes those materials and installs them in another state in performance of a construction contract. I would like to verify if your states treat these transactions the same as we do.

Our laws and rules make contractors the final user of all materials used/installed under contract. Therefore, the contractor is liable for sales or use tax on the purchase price of all materials possessed in North Dakota. If a contractor takes delivery of materials in North Dakota and subsequently moves them to another state for use, our law imposes North Dakota tax on the materials even though the ultimate use is in another state. The first storage, use or consumption takes place in North Dakota, so therefore the tax is due to North Dakota. A resale exemption may not be claimed by a contractor that purchases materials for installation under contract. However, we do have a sales and use tax exemption on contractors' materials if the materials would be exempt in the state of installation.

For example, assume a roofing contractor purchases shingles and other roofing materials and takes delivery in North Dakota. If the contractor takes the materials to Minnesota to install, the materials are subject to North Dakota and applicable local tax. Additional use tax may be due to Minnesota if the combined state and local tax rate is higher than the combined North Dakota and local rate. If the contractor takes the same materials to Montana where there are no sales or use taxes, the materials are not subject to North Dakota or local tax.

Do your states treat materials owned by contractors in the same manner as North Dakota? Do you have a specific rule, law, or publication that you can provide that explains how contractor materials are taxed? Also, are grain bins and installed grain handling systems treated differently than other installed materials.

Thanks for your help.

Myles

Myles S. Vosberg, Director
Tax Administration
North Dakota Office of State Tax Commissioner
Phone: 701-328-3471
Fax: 701-328-1942
Email: msvosberg@nd.gov
www.nd.gov/tax

#1 p. 2

#132

Vosberg, Myles S.

Minnesota

From: Wicks, Cathy (MDOR) <cathy.wicks@state.mn.us>
Sent: Thursday, February 23, 2012 12:06 PM
To: Vosberg, Myles S.
Cc: jane.page@state.sd.us; larry.paxton@iowa.gov; ellen.thompson@nebraska.gov; Craig Johnson (craig.johnson@revenue.wi.gov)
Subject: FW: Materials Installed by Contractor

We treat contractor purchases the same as North Dakota.

Our laws and rules make contractors the final user of all materials used/installed under a construction contract. Therefore, the contractor is liable for MN sales or use tax on the purchase price of all materials purchased in Minnesota. If a contractor takes delivery of materials in Minnesota and subsequently moves them to another state for use, Minnesota law imposes tax on the materials even though the ultimate use is in another state. The first storage, use or consumption takes place in Minnesota, so therefore the tax is due to Minnesota. A resale exemption may not be claimed by a contractor that purchases materials for installation under a construction contract. However, we do have a sales and use tax exemption on contractors' materials if the materials would be exempt in the state of installation; and for construction contracts for exempt entities with *qualifying* purchasing agent agreements.

Minnesota law specifically imposes tax on grain bins. Contractor (and farmer) purchases of grain bins are taxable. However, grain drying equipment used in agricultural production qualifies for farm machinery exemption. This includes the dryer, drying system components and similar type equipment. It does not include the grain bin structure or equipment used for storage of grain.

M. S. 297A.61, Subd. 4. Retail sale.

- (a) A "retail sale" means any sale, lease, or rental for any purpose, other than resale, sublease, or subrent of items by the purchaser in the normal course of business as defined in subdivision 21.
- (b) A sale of property used by the owner only by leasing it to others or by holding it in an effort to lease it, and put to no use by the owner other than resale after the lease or effort to lease, is a sale of property for resale.
- (c) A sale of master computer software that is purchased and used to make copies for sale or lease is a sale of property for resale.
- (d) *A sale of building materials, supplies, and equipment to owners, contractors, subcontractors, or builders for the erection of buildings or the alteration, repair, or improvement of real property is a retail sale in whatever quantity sold, whether the sale is for purposes of resale in the form of real property or otherwise.*
- (e) *A sale of carpeting, linoleum, or similar floor covering to a person who provides for installation of the floor covering is a retail sale and not a sale for resale since a sale of floor covering which includes installation is a contract for the improvement of real property.*
- (f) *A sale of shrubbery, plants, sod, trees, and similar items to a person who provides for installation of the items is a retail sale and not a sale for resale since a sale of shrubbery, plants, sod, trees, and similar items that includes installation is a contract for the improvement of real property.*

#194

From: Vosberg, Myles S. [mailto:msvosberg@nd.gov]

Sent: Thursday, February 23, 2012 9:20 AM

To: Craig Johnson; Jane Page (jane.page@state.sd.us); larry.paxton@iowa.gov; ellen.thompson@nebraska.gov; Wicks, Cathy (MDOR)

Subject: Materials Installed by Contractor

Hi All,

A North Dakota legislator is questioning North Dakota's administrative rule regarding the application of sales and use tax on materials purchased by a contractor that takes delivery of the materials in North Dakota, but later takes those materials and installs them in another state in performance of a construction contract. I would like to verify if your states treat these transactions the same as we do.

Our laws and rules make contractors the final user of all materials used/installed under contract. Therefore, the contractor is liable for sales or use tax on the purchase price of all materials possessed in North Dakota. If a contractor takes delivery of materials in North Dakota and subsequently moves them to another state for use, our law imposes North Dakota tax on the materials even though the ultimate use is in another state. The first storage, use or consumption takes place in North Dakota, so therefore the tax is due to North Dakota. A resale exemption may not be claimed by a contractor that purchases materials for installation under contract. However, we do have a sales and use tax exemption on contractors' materials if the materials would be exempt in the state of installation.

For example, assume a roofing contractor purchases shingles and other roofing materials and takes delivery in North Dakota. If the contractor takes the materials to Minnesota to install, the materials are subject to North Dakota and applicable local tax. Additional use tax may be due to Minnesota if the combined state and local tax rate is higher than the combined North Dakota and local rate. If the contractor takes the same materials to Montana where there are no sales or use taxes, the materials are not subject to North Dakota or local tax.

Do your states treat materials owned by contractors in the same manner as North Dakota? Do you have a specific rule, law, or publication that you can provide that explains how contractor materials are taxed? Also, are grain bins and installed grain handling systems treated differently than other installed materials.

Thanks for your help.

Myles

Myles S. Vosberg, Director
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www.nd.gov/tax

#15
p.5

Vosberg, Myles S.

From: Thompson, Ellen <Ellen.Thompson@nebraska.gov> *Nebraska*
Sent: Monday, February 27, 2012 10:43 AM
To: Vosberg, Myles S.; Craig Johnson; Jane Page (jane.page@state.sd.us); larry.paxton@iowa.gov; cathy.wicks@state.mn.us
Subject: RE: Materials Installed by Contractor

Myles,

Nebraska law allows a contractor to select from among three options to either pay sales or use tax on building materials or collect sales tax from the customer. See §77-2701.10. Contractors must register with the Department of Labor and select an option. If no option is selected, the contractor defaults to operating as a retailer of the building materials and can purchase the materials tax-free; then collect sales tax from its customers based upon where the materials are installed.

Basically, Option 1 contractors act a retailers and purchase all building materials exempt (for resale). Option 2 contractors are consumers of the building materials and must pay sales or use tax at the time of purchase – similar to most other states. If the materials are subsequently installed in another state, tax is still due in Nebraska.

Option 3 contractors are also consumers but are allowed to purchase the building materials exempt and remit consumer’s use tax at the time of withdrawal. The difference between Option 2 or Option 3 is just the timing of the tax liability. If the materials are purchased from a Nebraska-licensed vendor, use tax is due in Nebraska upon withdrawal. If the materials are purchased from a non-nexus vendor, the materials can be temporarily stored in Nebraska and withdrawn for use/installation in other state without incurring a Nebraska use tax liability. This is a special exemption found in §77-2704.44(1).

Grain bins are treated as other buildings. However, grain handling equipment, such as augers, and grain drying equipment, such as blowers and aerators, are eligible for exemption as agricultural machinery. In order for the farmer or rancher to purchase this equipment exempt from a contractor, the equipment must be purchased from an Option 1 contractor. Only Option 1 contractors can retail the equipment. Option 2 and Option 3 contractors are the consumers and users of the equipment and must pay tax on their cost.

Ellen Thompson

Tax Specialist
Nebraska Department of Revenue | 301 Centennial Mall South | Lincoln, NE 68509-4818
Phone: (402) 471- 5679 | Fax: (402) 471-5946
Ellen.Thompson@nebraska.gov
<http://www.revenue.ne.gov>

From: Vosberg, Myles S. [mailto:msvosberg@nd.gov]
Sent: Thursday, February 23, 2012 9:20 AM
To: Craig Johnson; Jane Page (jane.page@state.sd.us); larry.paxton@iowa.gov; Thompson, Ellen; cathy.wicks@state.mn.us
Subject: Materials Installed by Contractor

Hi All,

A North Dakota legislator is questioning North Dakota’s administrative rule regarding the application of sales and use tax on materials purchased by a contractor that takes delivery of the materials in North Dakota, but later takes those materials and installs them in another state in performance of a construction contract. I would like to verify if your states treat these transactions the same as we do.

* 1 p. 6

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Thanks for your help.

Myles

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Vosberg, Myles S.

P. J. #1

South Dakota

From: Jane.Page@state.sd.us
Sent: Thursday, February 23, 2012 9:50 AM
To: Vosberg, Myles S.; craig.johnson@dor.state.wi.us; larry.paxton@iowa.gov; ellen.thompson@nebraska.gov; cathy.wicks@state.mn.us
Subject: RE: Materials Installed by Contractor

South Dakota treats it the exact same way as North Dakota. Where the materials are first stored, used or consumed is where the tax applies.

Even if materials are purchased or stored in SD, but used out-of-state on a project exempt from tax in that state, the contractor owes sales or use tax in SD. But we have a sales tax refund program for the contractor, and the contractor must apply for the refund.

Jane

From: Vosberg, Myles S. [mailto:msvosberg@nd.gov]
Sent: Thursday, February 23, 2012 9:20 AM
To: Craig Johnson; Page, Jane; larry.paxton@iowa.gov; ellen.thompson@nebraska.gov; cathy.wicks@state.mn.us
Subject: Materials Installed by Contractor

Hi All,

A North Dakota legislator is questioning North Dakota's administrative rule regarding the application of sales and use tax on materials purchased by a contractor that takes delivery of the materials in North Dakota, but later takes those materials and installs them in another state in performance of a construction contract. I would like to verify if your states treat these transactions the same as we do.

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For example, assume a roofing contractor purchases shingles and other roofing materials and takes delivery in North Dakota. If the contractor takes the materials to Minnesota to install, the materials are subject to North Dakota and applicable local tax. Additional use tax may be due to Minnesota if the combined state and local tax rate is higher than the combined North Dakota and local rate. If the contractor takes the same materials to Montana where there are no sales or use taxes, the materials are not subject to North Dakota or local tax.

Do your states treat materials owned by contractors in the same manner as North Dakota? Do you have a specific rule, law, or publication that you can provide that explains how contractor materials are taxed? Also, are grain bins and installed grain handling systems treated differently than other installed materials.

Thanks for your help.

Myles

Myles S. Vosberg, Director
Tax Administration

North Dakota Office of State Tax Commissioner
Phone: 701-328-3471
Fax: 701-328-1942
Email: msvosberg@nd.gov
www.nd.gov/tax

#1
P. 4

From: Johnson, Craig T - DOR <CraigT.Johnson@revenue.wi.gov>
Sent: Thursday, February 23, 2012 10:14 AM
To: Vosberg, Myles S.
Cc: Jane Page (jane.page@state.sd.us); larry.paxton@iowa.gov;
ellen.thompson@nebraska.gov; cathy.wicks@state.mn.us
Subject: RE: Materials Installed by Contractor
Categories: Red Category

Wisconsin

Hi Myles,

Wisconsin is very similar to North Dakota in that if a contractor purchase materials that will be used in making a real property improvement, whether that real property improvement is made in Wisconsin or some other state, and the contractor first stores the materials in Wisconsin, we would impose Wisconsin tax on the contractor's purchase of those materials.

Our differences appear to be that:

- (1) We give a contractor the option to purchase the materials without tax for resale if at the time of the purchase the contractor did not know if the materials were going to be consumed in a real property construction activity or sold as tangible personal property. However if the contractor purchase the materials without tax for resale and then uses them in a real property construction activity (whether in or outside Wisconsin), the contractor would owe the Wisconsin use tax on those materials.
- (2) We do not have a provision in our law which would allow a contractor to purchase an item that would normally be taxable in Wisconsin without tax if it was going to be first stored in Wisconsin and then used in a real property construction activity outside Wisconsin if those materials would be exempt from tax in the state of installation.
- (3) We would allow a contractor to purchase materials that under Wisconsin law are tangible personal property when installed, but under the laws of the state where the installation occurs are deemed to be real property improvements, without tax - even if the contractor first stored them in Wisconsin before taking them to the out-of-state installation location. Presumably the state where the installation occurs will impose its use tax on these purchases. Example - Contractor purchases parts that are used to repair a furnace. Under Wisconsin law, the repair of a furnace is deemed to be a repair of tangible personal property so the contractor can purchase the parts it transfers to the customer without tax for resale. If the contractor takes those parts to another state that considers the repair of the furnace to be the repair of real property, the contractor would not owe any Wisconsin sales or use tax on those parts, but would (presumably) owe use tax on the parts in the state where the installation takes place.

Section 77.51(2), Wis. Stats. (2009-10) defines contractors as the consumers of items used in real property construction activities.

We also have an Administrative Rule for contractors - sec. Tax 11.68 Construction Contractors as well as a publication that explains who we tax construction contractors - Publication 207, Construction Contractors. Part V.B. on page 22 of the publication provides a statement that pretty well sums this up for Wisconsin.

We treat silos, grain elevators and buildings used to store grain as real property (see page 9, right-hand column, 9th bullet point down of the Publication 207 I provided the link to above). The various "legs" conveying the grain into and out of the bins are generally treated as tangible personal property (deemed by law), but may or may not be taxable depending on the specific facts and circumstances (grain bin/ grain elevator issues can get real messy in Wisconsin).

#1 p.10

If you have any questions on this, please let me know.

Craig

From: Vosberg, Myles S. [mailto:msvosberg@nd.gov]

Sent: Thursday, February 23, 2012 9:20 AM

To: Johnson, Craig T - DOR; Jane Page (jane.page@state.sd.us); larry.paxton@iowa.gov; ellen.thompson@nebraska.gov; cathy.wicks@state.mn.us

Subject: Materials Installed by Contractor

Hi All,

A North Dakota legislator is questioning North Dakota's administrative rule regarding the application of sales and use tax on materials purchased by a contractor that takes delivery of the materials in North Dakota, but later takes those materials and installs them in another state in performance of a construction contract. I would like to verify if your states treat these transactions the same as we do.

Our laws and rules make contractors the final user of all materials used/installed under contract. Therefore, the contractor is liable for sales or use tax on the purchase price of all materials possessed in North Dakota. If a contractor takes delivery of materials in North Dakota and subsequently moves them to another state for use, our law imposes North Dakota tax on the materials even though the ultimate use is in another state. The first storage, use or consumption takes place in North Dakota, so therefore the tax is due to North Dakota. A resale exemption may not be claimed by a contractor that purchases materials for installation under contract. However, we do have a sales and use tax exemption on contractors' materials if the materials would be exempt in the state of installation.

For example, assume a roofing contractor purchases shingles and other roofing materials and takes delivery in North Dakota. If the contractor takes the materials to Minnesota to install, the materials are subject to North Dakota and applicable local tax. Additional use tax may be due to Minnesota if the combined state and local tax rate is higher than the combined North Dakota and local rate. If the contractor takes the same materials to Montana where there are no sales or use taxes, the materials are not subject to North Dakota or local tax.

Do your states treat materials owned by contractors in the same manner as North Dakota? Do you have a specific rule, law, or publication that you can provide that explains how contractor materials are taxed? Also, are grain bins and installed grain handling systems treated differently than other installed materials.

Thanks for your help.

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