



FLORIDA

Executive
Director
Marshall Stranburg

November 6, 2015

Ms. Karen A. Lake
Berkowitz Pollack Brant
KLake@bpbcpa.com

Re: Letter of Technical Advice No. 15A-712
Sales and Use Tax – Tax Cap on Boat Repairs; Repair Facilities; and Foreign-Flagged Vessels
Sections 212.02, 212.05, 212.08, 212.13, and 215.26, Florida Statutes (“F.S.”)
Rules 12A-1.0071, 12A-1.0641, and 12A-1.014 Florida Administrative Code (“F.A.C.”)

Dear Ms. Lake:

Pursuant to Rule 12-11.003, F.A.C., taxpayers may seek informal written technical advice from the Department of Revenue (“Department”). This advice is issued in the form of a Letter of Technical Advice (“LTA”). This LTA is being issued in response to your correspondence, received on October 7, 2015, concerning the above referenced issue. Please note that this LTA constitutes the opinion of the writer only and does not represent the official position of the Department.

Stated Facts and Requested Advice

Ms. Karen Lake, on behalf of Marine Industries Association of South Florida (“MIASF”), provides the following requests for guidance. Questions 1 – 14 focus on the repair of a boat and the relationship the repair has with the tax cap.

1. MIASF inquires as to the meaning of the phrase “each repair of a boat,” as found within the Florida Statutes. This inquiry is expanded to see whether the phrase means “multiple tasks performed at a single shipyard during one continuous period”
2. Is the intent of the law to have a single point-of-contact serve as a general contractor to manage the boat’s repair(s)?
3. May the work performed under an agreement change based upon “discretionary demands” of a customer during the repair period and still be included within the sales tax cap if an addendum to the agreement is made?
4. May a professional (e.g., an attorney) represent the boat owner while repairs are being conducted? If so, must the boat owner transfer funds into an escrow account to pay for the repairs?
5. In order to document the sales tax cap, are interim invoices (e.g., weekly or bi-weekly), describing the agreed-to repairs, sufficient? Is there a preferred format for invoices, less exclusions, for review by the Department?
6. May a boat owner enter into a contract with a shipyard for certain portions of the work and enter

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- into a separate contract for space and support services, while having the tax cap apply to all contracts?
7. May a boat owner engage in multiple contracts with various repair vendors for repairs while the boat is within a single yard period and still take advantage of the sales tax cap? Furthermore, will the prior answer be affected if the repair vendors issue separate invoices for each vendor's services?
 8. If a boat has a crew and the crew must be housed at the crew house while the boat is being repaired, do the costs incurred for the crew to vacate count toward the sales tax cap?
 9. May a boat owner form a company ("New Co.") to manage the repairs to the owner's boat, such that New Co. may extend its resale certificate to the various sub-contracted vendors and then "resell" these repairs to the owner, while still applying the sales tax cap?
 10. Regarding a refund of payments of tax made in excess of the sales tax cap, is there a mechanism to provide a refund?
 11. For repairs in process before and after the sales tax cap went into effect, may a shipyard apply the sales tax cap to invoices starting on and after the date the sales tax cap went into effect (July 1, 2015)?
 12. If a boat owner has multiple boats in a shipyard at the same time, what is the application of the sales tax cap?
 13. Can items that are purchased but have a long lead time (e.g., engines) be included in the sales tax cap? If so, are there any restrictions?
 14. Are any items not allowed to be included in the single repair of the boat?

The following questions focus on repair facilities.

15. May a shipyard or repair facility become a "certified repair facility" or "registered repair facility" to validate the beginning and ending date of repairs via an affidavit or a Department-prescribed form?
16. If the general contractor shipyard provides a single bill for all repairs, would the affidavit or form mentioned in question 15 cover repair work started in one sub-contracted facility and completed in another sub-contracted facility?
17. If a shipyard was contracted to install certain equipment (e.g., engines), would the affidavit or form mentioned in question 15 allow for the pre-purchase of the equipment by a customer?

During a telephone call with Ms. Lake, the following additional question was posed:

18. With respect to foreign-flagged vessels, are repairs to the vessel exempt from tax?

Discussion and Response

I. Boat Repair Sales Tax Cap

Section ("s.") 212.05, F.S., provides every person is engaged in a taxable privilege when engaging in the business of selling, at retail, tangible personal property. In order to exercise such a privilege, tax is levied at a rate of six percent ("6%").¹ See s. 212.05(1)(a)1.a., F.S. Tangible personal property is defined as "personal property which may be seen, weighed, measured, or touched, or is in any manner perceptible to

¹Counties are authorized to charge a discretionary sales surtax, up to 1.5%, in addition to the State sales tax rate. See ss. 212.054 and 212.055, F.S.

the senses” *See* s. 212.02(19), F.S. Therefore, the repair of a boat in Florida is generally subject to tax at a rate of 6%. However, on each repair of a boat in Florida, the tax on the repair may not exceed \$60,000. *See* s. 212.05(5), F.S.

Per the previously cited statute, each individual “repair” of a boat can lead to the conclusion that all repairs to be performed on a boat must be completed in a single repair job (i.e., transaction) in order to take advantage of the cap. The test for whether there is a single repair warrants an analysis from the customer’s viewpoint. If a customer contracts with a single entity or individual to complete various repairs, then those repairs, regardless of whether the repairs are sub-contracted out to other repair facilities, are considered to be a single repair. The repair facility, as well as any sub-contracted repairers, must maintain care, custody, and control of the boat in order for all repairs to constitute a single repair. Failure of the repair facility to maintain care, custody, and control may lead to additional repairs being subject to tax, as the repairs may no longer be considered to be a single repair. However, if the customer contracts with several entities or individuals for various separate repairs, or the repair facility does not maintain continuous care, custody, and control of the boat, then each contract and/or resubmission of the boat to the repair facility will reset the \$60,000 tax cap.

One way a shipyard may wish to evidence the care, custody, and control is through contractual statements. For instance, a shipyard may explicitly state that it must maintain care, custody, and control during all repairs. Furthermore, a shipyard may wish to demonstrate the allocation of the risk of loss while the boat is undergoing repairs and sea trials. This care, custody, and control analysis could prove critical in cases where the boat being repaired has a crew aboard during the repair process. A shipyard must meticulously demonstrate it, and not the crew, has care, custody, and control of the boat being repaired.

With the above analytical framework in mind and in response to question 1, the phrase “each repair of a boat” means a repair or series of repairs that are contracted by a single vendor to a customer. It is irrelevant whether the single vendor does all of the repairs or sub-contracts some or all of the repairs to others. The phrase “each repair of a boat” could mean “multiple tasks performed at a single shipyard during one continuous period” Without having more facts to support this statement, the best information the Department can provide is that the other criteria discussed throughout this letter would apply.

With respect to question 2, the Department is unable to comment on the legislative intent. The Department can only provide its interpretation of the law.

For question 3, if a shipyard engages in the repair of multiple aspects of the boat in a single contract with its customer, regardless of amendments (or other “discretionary demands”) to the original contract, then each independent repair is aggregated to be a single repair, eligible for the \$60,000 tax cap. The changes to the initial contract or additional work authorizations must relate back to the original contract. Care, custody, and control must be maintained by the shipyard.

Regarding question 4, a professional may represent the boat owner while the repairs are being conducted, in order to take advantage of the sales tax cap. If the professional is acting in a fiduciary capacity (i.e., is only representing the boat owner and is not to be a “general contractor” for the repairs), then the Department views this as the professional stepping into the shoes of the boat owner. The analysis performed in the other questions then applies to the professional instead of to the boat owner, which would allow for the sales tax cap to be applied only once, potentially. There is no need for the funds to be

transferred to an escrow account.

However, if the professional is acting in the capacity as a general contractor for the repairs, the professional must be registered with the Department for sales and use tax purposes by filing Form DR-1, Florida Business Tax Application. The professional must also collect and remit the correct amount of tax on the transactions, as any other repair facility would. To remit the tax collected, the professional must submit Form DR-15, Sales and Use Tax Return, on a monthly basis. The professional would be subject to audit and should also keep appropriate books and records. *See* s. 212.13(2), F.S. The professional would then be able to accept a resale certificate from the other repair vendors, as this would be a sale for resale.² The professional must then charge its client the correct amount of tax for the repairs performed on the boat. Based on these requirements, there would be no need for the funds to be transferred to an escrow account.

As it relates to question 5, while the statute does not speak to invoicing, tax must be collected on each invoice until the \$60,000 cap is reached. Frequency of invoicing will not change the application of the cap. The interim invoices should specifically identify the boat at issue (e.g., the hull identification number) and should reference the previously-issued invoices as well as the original contract. This is highly recommended for ease of tracing the single repair for the application of the sales tax cap. For reporting purposes on Taxpayer's invoices to its customers and sales tax returns, Taxpayer should report the transactions in excess of the cap as an exempt sale. Taxpayer should also keep appropriate books and records to demonstrate that the repair of the boat at issue was a single repair and that the maximum amount of tax was properly collected and remitted. *See* s. 212.13(2), F.S.³ In terms of a preferred format, the Department does not have a preference. The Department suggests that the tracing of the single repair be as clear as possible, along with the application of the sales tax cap, especially among multiple invoices and contract changes.

Concerning question 6, the sales tax cap will be applied to the customer's contract with the shipyard for only the actual direct repairs of the vessel. A separate contract for space and support services is an engagement in a separate and distinct taxing privilege that is not subject to the sales tax cap on the repair of the vessel. *See, e.g.,* s. 212.03(6), F.S.

With reference to question 7, the same answer provided in question 6 applies. Each contract entered between the customer and a repair vendor will be independently subject to the sales tax cap. Accordingly, it will be inconsequential whether each repair vendor issues separate invoices for their services.

Pertaining to question 8, the costs incurred for the crew to lodge at the crew house cannot count towards the sales tax cap.

Regarding question 9, a boat owner may form a company ("New Co.") to act as a general contractor for the repairs. New Co. may extend its resale certificate to the sub-contracted repair vendors and then charge the applicable amount of tax, up to the sales tax cap, to the boat owner. New Co. must file Form DR-1, Florida Business Tax Application, so as to obtain registration and a resale certificate. New Co. must keep appropriate books and records to demonstrate that the repair of the boat at issue was a single repair and that the maximum amount of tax was properly collected and remitted. *See* s. 212.13(2), F.S. New Co.

² *See* s. 212.07(1)(b), F.S., and Rule 12A-1.039, F.A.C.

³ *See also* Tax Information Publication 15A01-07 for additional guidance and clarification on the tax calculation.

must file its monthly sales tax return(s), Form DR-15, Sales and Use Tax Return.⁴ New Co. is also subject to audit by the Department.

With respect to question 10, there are a couple of mechanisms in place to claim a refund. One allows for the business to claim a "Line 6 Credit" on its sales tax return. The business must first refund the tax to its customer before it may claim a credit. *See* Rule 12A-1.014, F.A.C. Another mechanism is the Department's Form DR-26S, Application for Refund – Sales and Use Tax. If a refund application is used, the Department reminds repair facilities that a refund may only be paid to the: (i) person that paid the money into the Treasury; (ii) heirs of the person paying the money into the Treasury; (iii) personal representative of the person paying the money into the Treasury; or (iv) assigns of the person paying the money into the Treasury. *See* s. 215.26(1), F.S. Before a refund can be granted to a repair facility applying for the refund, the repair facility must first refund its customer the money. *See* Rule 12A-1.014, F.A.C.

For question 11, the sales tax cap only applies to repairs made on and after July 1, 2015, when the sales tax cap went into effect. Invoices dated July 1, 2015, or later may capture repairs performed prior to July 1, 2015. Repairs performed prior to July 1, 2015, will not be subject to the cap on the invoice, but all repairs performed on and after July 1, 2015, on the invoice will be subject to the cap.

As it relates to question 12, the sales tax cap will only apply to each boat that is being repaired. How a shipyard accounts for each boat being repaired and tracking the sales tax cap as applied to each boat is up to the shipyard.

Concerning question 13, items that are purchased but have a long lead time may be included in the sales tax cap. The purchased items must be part of a single repair, which repair is completed on or after July 1, 2015, and throughout the entire time the boat is being repaired, the repair facility must have care, custody, and control of the boat.

Pertaining to question 14, the Department would need more information to provide an answer as to whether certain items were to be disallowed.

II. Repair Facilities

A registered repair facility must execute an affidavit upon the entry of a boat into its facility, and an affidavit must be completed when the repairs are finished, for boats that are temporarily in the State for repair purposes in order that the boat will not be subject to a use tax. *See* s. 212.08(7)(t), F.S. While I am unable to find what a "certified repair facility" is, a "registered repair facility" is specifically identified by statute. *See* s. 212.08(7)(t)4., F.S.; *see also* Rule 12A-1.0071(2), F.A.C. The facility also must be registered with the Department for sales and use tax purposes.

A shipyard or repair facility may become a "registered repair facility," to answer question 15. However, if such a facility is already registered with the Department for sales and use tax purposes, that facility is most likely a "registered repair facility." A sample of a suggested affidavit that is used for when a vessel is accepted for repairs can be found in Rule 12A-1.0071(1)(c)2., F.A.C.

⁴ The taxes New Co. collects become State funds immediately upon collection. *See* s. 212.15(1), F.S. The same cited statute provides that New Co. is required to remit the tax to the Department on the first day of the month following collection but no later than the 20th of the month.

In response to question 16, a general contractor shipyard could execute a single affidavit and have the affidavit cover all sub-contracted vendors. The Department recommends the sub-contracted vendor obtain a copy of the executed affidavit from the general contractor shipyard.

For question 17, a customer may make a pre-payment on a contract to have the sales tax cap on repairs apply. Care, custody, and control must be maintained for the entire time the boat is at the repair facility, and the engine must be purchased from the same repair facility. However, if care, custody, and control are broken before the repairs are completed, then the boat owner may owe a use tax if the owner is in this State more than twenty (20) days.⁵ Furthermore, if care, custody, and control are broken, then additional repairs performed after the resubmission will cause those additional repairs to be subject to a new sales tax cap. In the alternative, a customer may pre-purchase the engine from another vendor. This purchase from anyone other than the facility completing the repairs will be considered a separate purchase of tangible personal property that does not qualify for the sales tax cap.

III. Foreign-Flagged Vessels

As mentioned in the sales tax cap section, generally every repair of a boat, regardless of whether it is foreign-flagged, will be subject to tax at a rate of 6%, except that the tax on a single repair is capped at \$60,000. *See* s. 212.05, F.S. Accordingly, repairs to foreign-flagged vessels will be subject to tax, unless an exemption applies.

There are specifically enumerated exemptions from various taxes. *See generally* s. 212.08, F.S. It is well-settled law exemptions are strictly construed against the taxpayer, causing the burden of proof for the exemption to be on the taxpayer. *See State ex rel. Szabo Food Servs., Inc. of N.C. v. Dickinson*, 286 So. 2d 529, 530-32 (Fla. 1973); *Green v. City of Pensacola*, 126 So. 2d 566, 569 (Fla. 1961); *State v. Thompson*, 101 So. 2d 381, 386 (Fla. 1958). Any doubt as to an exemption is resolved favorably towards the State. *See Szabo Food Servs.*, 286 So. 2d at 531; *United States Gypsum Co. v. Green*, 110 So. 2d 409, 413 (Fla. 1959).

While there is no blanket exemption for repairs to foreign-flagged vessels and in response to question 18, there is a partial exemption for vessels engaged in interstate or foreign commerce, including vessels engaged in commercial fishing. *See* s. 212.08(8), F.S.; *see also* Rule 12A-1.0641, F.A.C. Vessels transporting persons or property in interstate or foreign commerce, including commercial fishing vessels, are allowed to apportion (prorate) the amount of tax due, based upon the total Florida miles divided by total miles traveled worldwide. *See* s. 212.08(8)(a), F.S.

To be considered a commercial fishing vessel, one must be engaged in fishing in salt or fresh waters and then selling what is caught. *See* Rule 12A-1.0641(2)(c), (6)(a), F.A.C. For interstate and foreign commerce, the vessel must be transporting people or property for hire in interstate or foreign commerce. *See* Rule 12A-1.0641(2)(e), (6)(a), F.A.C.

If one qualifies as a commercial fisher or is engaged in interstate or foreign commerce, then the repairs performed on these vessels, regardless of whether the vessel is foreign-flagged, qualify for the partial exemption. *See* Rule 12A-1.0641(5)(b), F.A.C.

⁵ *See* s. 212.08(7)(t)1., F.S. If a boat is subject to a use tax, the tax will be capped at \$18,000. *See* s. 212.05(5), F.S.

Conclusion

As noted in the first paragraph of this letter, this LTA is being issued in response to the disclosed facts and circumstances of your specific situation, and it does not constitute the official position of the Department. Rather, this letter represents the opinion of the writer only. If you wish an official binding statement, you may file a written request for a Technical Assistance Advisement. Rule Chapter 12-11, F.A.C., outlines the procedure to follow in making this request. This rule chapter of the Florida Administrative Code can be found at <https://revenue.law.state.fl.us/>. Any request for a Technical Assistance Advisement should be sent to Technical Assistance and Dispute Resolution, Department of Revenue, P.O. Box 7443, Tallahassee, Florida, 32314-7443.

If you have any further questions with regard to this matter and wish to discuss them, you may contact me at (850)617-8346.

Sincerely,

A handwritten signature in black ink, appearing to read "D. Brennan, Jr.", written in a cursive style.

David J. Brennan, Jr., Esq.
Senior Attorney
Technical Assistance & Dispute Resolution
Florida Department of Revenue

Record ID: 206677