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TIR 09-11: Change in Rate, Scope, and Computation of Sales/Use Taxes

I. Change in Tax Rate

The Legislature has amended c. 64H (sales tax) and c. 64I (use tax), changing the rate of tax for sales and use of tangible personal property and telecommunications services from 5% to 6.25%. See Stat. 2009, c. 27, §§ 53, 55-57, 59. This change is effective on and after August 1, 2009, *id.* § 155, subject to transition rules described in § IV of this TIR.

II. Change in Scope of Tax; Alcohol Sales

With one exception, the new legislation does not change the scope of the sales and/or use taxes: sales and use of all tangible personal property, prepared food (meals), and telecommunications services now subject to either tax remain taxable, but at the higher rate. However, the legislation repeals the existing exemption for alcoholic beverages, including beer, wine, and liquor, sold at retail by amending G.L. c. 64H, § 6(g) to omit reference to c. 138. This change is also effective August 1, 2009. *Id.* § 157.

As a result, sales of alcoholic beverages^[1] at package/liquor stores and the like on and after August 1, 2009 to retail customers will be subject to tax, and such sales will be reportable as part of the taxable gross receipts of the vendor.^[2] Because the exemption no longer applies, any vendor that makes sales of beer, wine, or liquor must register and file sales tax returns. The vendor must collect tax on all sales of alcoholic beverages unless the purchaser supplies a resale certificate, Form ST-4, to the vendor. For example, meals tax vendors such as bars and restaurants who are in the business of selling alcoholic beverages must now give their suppliers a resale certificate, Form ST-4, in order to purchase these beverages without payment of sales tax. Package/liquor stores must also give resale certificates to their suppliers.

Note that this change in the sales and use tax law does not change or amend existing prohibitions and restrictions in the Liquor Control Act, G.L. c. 138. For example, retail licensees do not have the authority under that Act to sell alcoholic beverages to other retail licensees, and may not use a resale certificate for that purpose. Licensees with questions about the Liquor Control Act should contact the Alcoholic Beverages Control Commission at 617-727-3040 or visit www.mass.gov/abcc.

Use tax will apply to alcoholic beverages purchased by Massachusetts consumers that have not paid a Massachusetts sales tax on their purchases, *e.g.*, purchases in New Hampshire for use in Massachusetts.

III. Change in Computation Method; Rounding Rules

The new legislation repeals the so-called "bracket" system now in use for the computation of sales and use taxes and replaces it with a rounding method. See *id.*, §§ 54, 58, amending G.L. c. 64H, § 4, G.L. c. 64I, § 5. For the purpose of adding and collecting the tax imposed under the new method, vendors must compute the tax due to the third decimal place, rounding up to the next whole cent whenever the third decimal place is greater than 4. The tax due on a transaction may be computed on an item or an invoice basis.

- Example: A vendor sells a taxable item for \$30.00. The tax due is computed by multiplying $30 \times .0625 = \$1.875$. As the third decimal place (in this example, 5) is greater than 4, the tax is rounded up to the next whole cent, *i.e.*, from \$1.875 to \$1.88.

IV. Transition Rules

The Department is authorized by law to establish transition rules allowing certain sales of tangible personal property pursuant to earlier contracts or arrangements to be taxed at 5% for a limited period of time following the effective date

of the rate change. The legislation also provides that for certain periodic utility bills, the new rate applies to the first billing period beginning on or after the effective date of the increase. See Stat. 2009, c. 27, §§ 147,148.

A. *Periodic Bills for Utilities*

In the case of retail sales of gas, steam, electricity, or telecommunications services billed on a recurring basis, the new 6.25% rate applies to the bill for the first billing period starting on or after the effective date of the rate increase.

- Example. Business A is billed for electricity on the 15th day of each month. Its bill for the period from July 15 - August 15, 2009 is taxed at the rate of 5%. All bills thereafter are taxed at 6.25%.

B. *Certain Unconditional Contracts*

In the case of certain qualified written contracts for the sale of tangible personal property subject to sales or use tax entered into prior to August 1, 2009, the former rate will apply, provided the property is delivered to the retail customer not later than 90 days thereafter. As a result of this rule, all property sold pursuant to such contracts and delivered before October 30, 2009 will be subject to tax at the rate of 5%; property delivered thereafter, regardless of contract terms, will be subject to the 6.25% rate. For purposes of this rule, a qualified contract imposes an unconditional liability on the part of the purchaser to buy the goods covered thereby at a fixed price without an escalator clause, and an unconditional liability on the part of the vendor to deliver a definite quantity of such goods at the contract price. Vendors must report all such sales on their July return. Although full payment before August 1, 2009 is not required, contracts that are paid in full prior to August 1, 2009 will be presumed to be unconditional.

Multi-tier marketing taxpayers with existing written combined remittance agreements with DOR shall pay tax at the rate of 5% on all goods sold under orders submitted to them by their representatives prior to August 1, 2009, provided the goods are delivered to the representative before October 30, 2009.

The rules pertaining to certain unconditional contracts do not apply to the following:

- Sales or use tax on motor vehicles, trailers, snow vehicles, recreation vehicles, or boats, which are taxed as of the date of sale, defined as the date on which the dealer or vendor receives payment in full from the purchaser, whether in cash, credit or otherwise;
- Leases or rentals of tangible personal property, which are taxed in accordance with the rules in sections D. and E. of Section IV of this TIR; or
- Sales of meals, which are taxed as of the date the meal is served or delivered to the customer.

C. *Certain Contracts for Construction of Buildings, etc.*

Sales of building materials and supplies to be used in the construction, reconstruction, alteration, remodeling, or repair of any building or structure will be taxed at 5% if the materials and supplies are to be used pursuant to a qualified contract entered into (1) before August 1, 2009, or (2) before October 1, 2009, if the contract is entered into in accordance with a bid that had to be submitted before August 1, 2009. For purposes of this rule, a qualified contract imposes an obligation on the part of the contractor to perform the work without conditions or escalator clauses with respect to the tax and the sale or use of the property in question must take place before January 1, 2011. A contractor or subcontractor making a purchase subject to 5% tax must give the vendor a properly completed exemption Form ST-5R and must report and pay use tax on these purchases.

D. *Leases of Tangible Personal Property with Periodic Payments*

For leases of tangible personal property such as equipment or motor vehicles, exceeding 30 days and paid on a periodic basis, the due date of the payment controls the sales tax rate. If the due date of a payment falls on or after August 1, 2009, tax is due on that payment at the rate of 6.25%.

E. *Rentals of Tangible Personal Property*

For rentals of tangible personal property not to exceed 30 days, the date the customer takes possession of the property controls the sales tax rate.

F. Use Tax

The applicable tax rate on tangible personal property subject to use tax is determined by the date the property is first used in Massachusetts, except in the case of a contract described in Subsection IV. B. of this TIR, in which case the first use must be before October 30, 2009 for the 5% rate to apply.

V. Reporting

As noted above, vendors who have made qualifying sales of tangible personal property pursuant to unconditional contracts as provided in § IV(B) of this TIR must report all such sales on their July 2009 return.

As also noted, a contractor or subcontractor making a purchase subject to 5% tax in accordance with § IV(C) above, must give the vendor a properly completed Form ST-5R. The contractor or subcontractor must then report these purchases as subject to use tax at the 5% rate by listing the purchase price of this property at 80% of the actual cost, either on line 5 of the Sales and Use Tax Return, or on line 2 of the ST-10 (Business Use Tax Return), as applicable.

- Example: A corporation purchases \$80,000 of materials subject to use tax, \$10,000 of which is taxable at the 5% rate. The corporation should report taxable purchases of \$78,000 ($\$70,000 + (\$10,000 \times .8)$), taxable at 6.25%, or \$4,875. This is the equivalent of $\$70,000 \times .0625$ (\$4,375) + $\$10,000 \times .05$ (\$500).

Additional instructions for taxpayers reporting sales made before and after the rate change on quarterly and annual returns are contained in TIR 09-12.

VI. Recordkeeping

Vendors must maintain normal business records showing the date of sale, item(s) purchased and selling price in a manner sufficient to determine whether the proper amount of tax has been paid. These records must be kept for the amount of time specified in the Record Retention Regulation, 830 CMR 62C.25.1, and must be produced for review by the Department in the course of an audit of the vendor. Purchasers required to use Form ST-5R must maintain records distinguishing purchases subject to the 5% tax rate pursuant to the transition rules above from all other purchases.

Vendors that back-date contracts or other documents on or after August 1, 2009, or otherwise act improperly to avoid collecting and remitting sales or use tax at the 6.25% rate may be subject to the tax evasion penalties of G.L. c. 62C, § 73, including a felony conviction, a fine of not more than \$100,000 or \$500,000 in the case of a corporation, or by imprisonment for not more than five years, or both, and may also be required to pay the costs of prosecution.

/s/Navjeet K. Bal

Navjeet K. Bal
Commissioner of Revenue

NKB:MTF:lr

July 22, 2009

TIR 09-11

[\[1\]](#) Products such as non-alcoholic beer, non-alcoholic wine, and cooking wine containing seasonings, which are sold in supermarkets as well as liquor stores continue to be non-taxable food products.

[\[2\]](#) In calculating the sales tax on alcoholic beverages subject to the container deposit law (beer and malt beverages), G.L. c. 94, §§ 321 – 327, the container deposit is not part of the sales price subject to tax. However, if a container deposit refund is used toward the purchase of taxable items including alcoholic beverages, then the credit should be applied *after* calculation of tax on the full sales price of the items.

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