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**MEMORANDUM**

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**TO:** PLUMBING & MECHANICAL ASSOCIATION  
**FROM:** ROB SUMNER  
**SUBJECT:** HB 375  
**DATE:** FEBRUARY 27, 2009

Summary of HB 375

HB 375 would amend the sales tax statute as it applies to contractors.

Georgia's sales tax law provides that "each person who ... contracts to furnish tangible personal property and to perform services under the contract" is deemed to be the consumer of the property and shall pay the sales tax imposed by the statute at the time of purchase." OCGA 48-8-63(b). This language is not changed by HB 375.

OCGA Sec. 48-8-63 contains sales tax provisions dealing with contractors. HB 375 adds to this code section detailed definitions of some terms that are not defined in the current sales tax statute.

The proposed new subsection (a) of the code section adds definitions of the terms "fixture," "machinery or equipment," "real property," "real property contract," "real property improvement," and "titled property."

"Real property" means land, improvements to land, and fixtures. "Real property contract" means an agreement, whether on a lump sum, time and materials, cost plus, guaranteed price, or any other basis to . . . furnish and install tangible personal property that becomes a part of or is directly "wired or plumbed into the central heating system, central air-conditioning system, electrical system, plumbing system, or other structural system that requires installation of wires, ducts, conduits, or similar components that are embedded in or securely affixed to the land or a structure thereon."

The proposed new subsection (b) of the code section states that the taxability of purchases and sales by real property contractors is determined by the pricing arrangement in the contract. Next, the proposed legislation defines five different contracts based on pricing arrangements. The five defined contracts are lump sum, cost plus or fixed fee, upset or guaranteed price, retail sale plus installation, and time and materials.

In proposed new subsection (c) of 48-8-63, an exception is created to the rule that the contractor is deemed the consumer. This exception would apply in the case of contracts for retail sale plus installation. This is one of the contract types defined in subsection (b). I will use the abbreviation "RSPI" in subsequent references to this type of contract.

RSPI contracts are "contracts for improvements to real property in which the contractor or subcontractor agrees to sell specifically described and itemized materials and supplies at an agreed price or at the regular retail price and to complete the work either for an additional agreed price or on the basis of time consumed."

The legislation would further provide that contractors performing contracts *other than RSPI contracts* should pay sales tax to the selling dealer on all purchases and should not collect sales tax from their customers, regardless of whether they itemize charges for materials and labor, because they are not engaged in selling tangible personal property.

New subsection (f) would control how sales tax is handled in the case of RSPI contracts. It states that such contractors are engaged in selling tangible personal property. They do not pay sales tax to the selling dealer when purchasing materials. They must collect sales tax from their customers on the sales price of the itemized tangible personal property, but not on the separately stated charges for installation labor.

New subsection (g) states that contractors who sell and install items of tangible personal property must collect tax on the full sales price, excluding installation charges, if such charges are separately stated. It states that these items are tangible personal property even after installation, and their sale with installation is not classified as a real property contract. It appears that this is a sixth type of contract brought into the legislation; one that is not a real property contract.

New subsection (h) defines "mixed contracts." A contract that includes both real property work and tangible personal property is a mixed contract. If the contract is predominately for a real property improvement, taxability of the contract will be determined as if the contract were entirely for real property, and no sales tax will be collected from the property owner. If the contract is predominately for tangible personal property, taxability will be determined as if the contract were entirely for tangible personal property. In this case, the contractor does not pay sales tax to his supplier and charges sales tax to his customer. "The determination of the predominant nature of a contract will depend upon the facts and circumstance of each case." (I wonder if the Department will provide an agent to stay with every contractor at all times so that all parties can agree on this determination.)

The last paragraph of subsection (h) contains the phrase “to the conveyor machinery itself” when there is no other reference to conveyor machinery. This is a clear error that contributes to my opinion that much of the language in this bill was cut and pasted from other Department of Revenue documents and has not been adequately reviewed by anyone up to this point.

Subsection (i) is a list of specific “activities.” Contractors who are engaged in these activities “are generally considered to be real property contractors, although any particular job may be determined not to involve real property improvement based on the criteria set forth in . . . [this Code section].” “Plumbing work” and heating/air-conditioning work is included in this list of activities.

Another list of items is provided that is not considered to be real property contracting.

### Analysis

I have been told that HB 375 is the Department of Revenue’s attempt to put into statutory law the way sales taxation of contracting is currently handled. This may be. However, this bill creates many new statutory provisions on this subject. In my opinion, the language was hastily hashed together, some of the definitions are overlapping and confusing, and the language is in need of much improvement. At this point, I do not believe anyone knows the full effect of such an enactment.

It is certainly possible that HB 375 would not substantively change the way sales tax is applied to contracting. But I believe contractors would be faced with increased difficulty because the language is susceptible to varying interpretation. I recommend that PMA seek to delay action on this bill. Then it should ask the proponents of the new law to explain the problem they are trying to fix, and then the affected parties can work together to craft language that addresses the specific problem.

Let me know if you have any questions at this time or if you need any further assistance.