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Texas Comptroller of Public Accounts STAR System

200202808R

STATE OF TEXAS
COMPTROLLER OF PUBLIC ACCOUNTS
STATE SALES AND USE TAX

Section 3.357. Nonresidential Real Property Repair, [Remodeling](#) ►, and Restoration; Real Property Maintenance. (Tax Code, secs. 151.0047, 151.0101, 151.056, 151.058, 151.311, 151.350, 151.429)

(a) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Consumable items--Nondurable tangible personal property that is used to improve real property and that, after being used once for its intended purpose, is completely used or destroyed. Examples include, but are not limited to, nonreusable concrete forms, nonreusable drop cloths, barricade tape, natural gas, and electricity. Consumable items do not include incorporated materials, machinery, equipment, accessories to machinery and equipment, repair and replacement parts of machinery and equipment, or any rented or leased item.

(2) Contractor--Any person who builds new improvements to residential or nonresidential real property; completes any part of an uncompleted structure that is an improvement to residential or nonresidential real property; makes improvements to real property as part of periodic and scheduled maintenance of nonresidential real property; or repairs, restores, maintains, or [remodels](#) ► residential real property; and who, in making the improvement, incorporates tangible personal property into the real property that is improved. The term includes subcontractors but does not include material men, suppliers, or persons who provide taxable real property services. Contractors should refer to sec. 3.291 of this title (relating to Contractors). Persons who provide real property services should refer to sec. 3.356 of this title (relating to Real Property Service). Persons who repair, restore, or [remodel](#) ► chemical plants or petrochemical refineries should refer to sec. 3.362 of this title (relating to Labor Relating to Increasing Capacity in a Production Unit in a Petrochemical Refinery or Chemical Plant).

(3) Disaster area--An area that the Governor of Texas declares a disaster under the Government Code, Chapter 418, or that the President of the United States declares a disaster under 42 United States Code, sec. 5141.

(4) Equipment--Tangible personal property that is used in the performance of a contract to improve real property, such as tools, machinery, implements, accessories, repair and replacement parts, or any item that is rented or leased. Equipment includes all items that do not meet the definitions of consumable items or incorporated materials.

(5) Incorporated materials--Tangible personal property that loses its distinct and separate identity when incorporated into real property. Examples of incorporated materials include framing lumber, bricks, concrete, doors, and windows.

(6) Labor--For the purposes of this section, labor means all components of a transaction or contract directly related to the ◀remodeling▶, repair, or restoration other than those components attributable to materials incorporated into the realty. Unrelated components, such as charges by engineers and architects, are also part of the labor component unless separately stated to the customer.

(7) Maintenance on real property--For operational and functional improvements to realty, maintenance means scheduled, periodic work that is necessary to sustain or support safe, efficient, continuous operations, or to prevent the decline, failure, lapse, or deterioration of the improvement. Taxable real property services that are described by sec. 3.356 of this title (relating to Real Property Service) do not qualify as maintenance. Maintenance does not include work to ◀remodel▶, modify, upgrade, perform major repair, or restore, even if the work is scheduled or periodic.

(A) As it relates to maintenance, the term "scheduled" means anticipated and designated to occur within a given time period or production level.

(B) As it relates to maintenance, the term "periodic" means ongoing or continual or at least occurring at intervals of time or production that are reasonably predictable.

(C) The scheduled shutdown or turnaround of a manufacturing or processing plant is considered to be maintenance within the meaning of this definition.

(8) New construction--All new improvements to real property including initial finish out work to the interior or exterior of the improvement. An example is a multiple story building that has had only its first floor finished and occupied. The initial finish out of each additional floor before initial occupancy or use is considered new construction. New construction also includes the addition of new, usable square footage to an existing structure. Examples are the addition of a new wing onto an existing building, or the addition of a new mezzanine level within an existing building. Reallocation of existing square footage inside a structure is ◀remodeling▶ and does not constitute the addition of new, usable square footage. For example, the removal or relocation of interior walls to expand the size of a room, or the finish out of an office space that was previously used for storage, is ◀remodeling▶. Raising the ceiling of a room or the roof of a building is not new construction unless new, usable square footage is created.

(9) Prior contract--A written contract, or a written bid that becomes a written contract, into which the parties enter before the effective date of the applicable section of the Tax Code. See sec. 3.319 of this title (relating to Prior Contracts).

(10) Real property--Land, including structures and other improvements that are embedded into or permanently affixed to the land.

(11) ◀Remodeling▶ or modification--To rebuild, replace, alter, modify, or upgrade existing real property. However, the replacement of an item that is within an operational and functional improvement to realty is not taxable ◀remodeling▶ or modification when the work is scheduled and periodic maintenance as defined in paragraph (7) of this subsection. Improvements to manufacturing or production units of chemical plants or petrochemical refineries that meet the definition of increased capacity are not ◀remodeling▶ or modification services. See sec. 3.362 of this title (relating to Labor Relating to Increasing Capacity in a Production Unit in a Petrochemical Refinery or Chemical Plant). Work that is performed after the initial finish out has been completed is ◀remodeling▶ even when the improvement has not been occupied or used. For example, a prospective tenant wants the unit of a completely finished out shopping complex repainted before the tenant leases the unit. The repainting is ◀remodeling▶. Partial demolition of existing nonresidential realty is taxable ◀remodeling▶. The complete demolition of an existing nonresidential improvement to real property is neither ◀remodeling▶ nor modification and is not taxable.

(12) Repair--To mend or bring back real property that was broken, damaged, or defective as near as possible to its original working order. However, minor repair work that is performed on operational and functional improvements to realty is not taxable repair if the work is done in accordance with paragraph (7) of this subsection.

(13) Residential property--Property that is used as a family dwelling, multifamily apartment or housing complex, nursing home, condominium, or retirement home. The term includes homeowners association-owned and apartment-owned swimming pools, laundry rooms, and other common areas for tenants' use. Common areas of mixed residential and nonresidential property are allocated or prorated based on the ratio of residential to nonresidential use of the property. The term does not include any commercial area open to nonresidents, retail outlets, hospitals, hotels, or any other facilities that are subject to the hotel occupancy tax.

(14) Restoration--An activity that is performed to bring back real property that is still operational and functional but that has faded, declined, or deteriorated, as near as possible to its original condition. Minor restorative work that is performed within the meaning of paragraph (7) of this subsection is maintenance, not restoration.

(15) Unrelated service. A service is unrelated if:

(A) it is not the repair, ◀remodeling▶, or restoration of nonresidential real property, nor a service or labor that is taxable under any other provision of the Tax Code, Chapter 151;

(B) it is of a type that is commonly provided on a stand-alone basis; and

(C) the performance of the service is distinct and identifiable. Examples of unrelated services that may be excluded from the tax base are the creation of engineering plans or architectural designs, new construction, increased capacity, and maintenance on real property.

(b) Tax responsibilities of persons who repair, ◀remodel▶, or restore nonresidential real property.

(1) All persons who repair, restore, or ◀remodel▶ nonresidential real property must obtain Texas sales and use tax permits. Persons who construct new improvements to realty, perform maintenance on real property, or repair, restore, or ◀remodel▶ residential real property should refer to sec. 3.291 of this title (relating to Contractors).

(2) All persons who repair, restore, or ◀remodel▶ nonresidential real property must collect tax on the total sales price to the customer less separately stated charges for unrelated services. The total sales price does not include Texas sales or use tax that the service provider must collect from customers. See sec. 3.286 of this title (relating to Seller's and Purchaser's Responsibilities). The service provider may, in good faith, accept valid resale, exemption, or direct payment exemption certificates in lieu of tax. Previously, lump-sum and separated contracts were treated differently for tax purposes. This distinction is no longer valid when the contract is for the repair, ◀remodeling▶, or restoration of nonresidential real property.

(3) A contract that involves both nonresidential repair, restoration, or ◀remodeling▶ and new construction is taxable in total unless the charge for new construction labor is separately stated to the customer as outlined in paragraph (7) of this subsection. An example is ◀remodeling▶ a restaurant's kitchen at the same time that a new dining area outside the existing structure is added. Work on the kitchen is taxable as ◀remodeling▶, while the construction of the new dining area is nontaxable new construction. Minor repair, restoration, or ◀remodeling▶ that is performed in connection with new construction is not taxable if the portion of the charge that is attributed to repair, restoration, or ◀remodeling▶ is 5.0% or less of the overall lump-sum charge. All separately stated charges for repair, restoration, ◀remodeling▶, or other taxable services are taxable, even if they constitute 5.0% or less of the total contract price.

(4) All persons who repair, restore, or ◀remodel▶ nonresidential real property owe tax at the time of purchase on all machinery, equipment, materials, and supplies that are used but not incorporated into the realty. The service provider is not entitled to a credit for tax paid on taxable items that are used but not incorporated into the realty.

(5) Items used in performing repairs, ◀remodeling▶, or restoration for exempt entities.

(A) Persons who repair, ◀remodel▶, or restore real property or make improvements to real property for entities exempted by Tax Code, sec. 151.309 or sec. 151.310, may claim an exemption for tangible personal property used in those activities if the tangible personal property is incorporated into real property in the performance of the contract.

(B) Person who repair, ◀remodel▶, or restore real property or make improvements to real property for entities that are exempted under Tax Code, sec. 151.309 or sec. 151.310, may claim an exemption for the purchase of taxable services that are used in those activities if the service is performed at the job site and if the contract requires the specific service to be provided or purchased by the person who makes the improvement to realty, or the service is integral to the performance of the contract.

(C) Persons who use consumable items in the improvement of realty that is repaired, ◀remodeled▶, or restored for entities that are exempt under Tax Code, sec. 151.309 or sec. 151.310, may claim an exemption for the purchase of a consumable item if use of the item is necessary for the performance of the contract and the item is completely consumed at the job site.

(D) Persons who repair, restore, or ◀remodel▶ real property may issue a properly completed exemption certificate in lieu of tax for the purchase of items that are identified in subparagraphs (A) through (C) of this paragraph. The exemption certificate must show the service provider as the purchaser and must identify the exempt entity for whom the improvements are made and the project for which the items are purchased.

(6) Repair, restoration, or ◀remodeling▶ that is performed upon a structure that is used both for residential and commercial purposes is taxable in total unless the labor on the residence is separately identified. The labor to repair, restore, or ◀remodel▶ the residence will not be taxable if separately stated. The charge for repair, restoration, or ◀remodeling▶ to common areas of mixed residential and nonresidential property is taxed based upon the ratio of residential to nonresidential use of the property.

(7) If a combination of repair, restoration, or ◀remodeling▶ and new construction is performed under the same contract, and the repair, restoration, or ◀remodeling▶ portion exceeds 5.0% of the overall charge, then the parties to the contract must separately identify taxable and nontaxable labor along with the charges that apply to each or else the entire contract is presumed to be for repair, restoration, and ◀remodeling▶ and is taxable. Both parties must retain documentation that clearly defines the work that is performed to show that, had the new construction and ◀remodeling▶ been done independently, the charge for each would reasonably approximate the amount allocated. Examples of acceptable documentation are written contracts that detail the scope of work, bid sheets, tally sheets, schedules of values, and blueprints. If no written contract clearly shows agreement on the taxable and nontaxable work that is performed, then the customer and the service provider must prepare a written certification that verifies the allocation of charges for repair, restoration, or ◀remodeling▶ and new construction. The comptroller may recalculate the charges if the allocation appears unreasonable, and either party may be held responsible for the additional tax due.

(8) Repainting is presumed to be a restoration or ◀remodeling▶ activity. Either party may overcome the presumption by showing that the scope of the work meets the definition of maintenance found in subsection (a)(7) of this section. Persons who perform repainting or other restoration activities should collect sales tax on the total charge to the customer unless the customer provides a properly completed exemption certificate as outlined in subsection (c)(2) or (4) of this section.

(9) If a combination of taxable services (e.g., repair of nonresidential property), nontaxable services (e.g., new construction, residential repair, or maintenance), and nontaxable unrelated services are sold or purchased for a single charge and the portion that relates to taxable services represents more than 5.0% of the total charge, the total charge is presumed to be taxable. The service provider may overcome this presumption by submission of documentary evidence that establishes the percentages of the total charge that relate to taxable services and to nontaxable services. Examples of acceptable documentation include written contracts that detail the scope of work, bid sheets, tally sheets, schedules of values, and blueprints.

(c) Tax responsibilities of persons who perform maintenance on real property.

(1) A person who performs maintenance on real property and incorporates tangible personal property into the realty acts as a contractor and is subject to sec. 3.291 of this title (relating to Contractors).

(2) A person who performs maintenance on real property and does not incorporate tangible personal property into the realty as part of that service provides nontaxable services and owes tax on all taxable items that are used to perform those services.

(d) Exemptions, exceptions, and exclusions.

(1) A person who performs taxable services has the burden of obtaining an exemption certificate for any exemption that a customer claims. However, if the customer is a governmental entity, a purchase order from the governmental entity is sufficient documentation.

(2) Maintenance on real property is a nontaxable service.

(A) To qualify a purchase as nontaxable real property maintenance, a service provider's customer must prove by way of maintenance schedules or work orders or other similar forms of evidence that the services meet the definition of maintenance on real property that is stated in subsection (a)(7) of this section. If the service provider does not have a written contract, but is only hired on a per job basis, then the service provider must presume that the service is repair or restoration and must therefore collect tax. If the customer has documentation to prove that the service qualifies as maintenance, then the customer may issue to the service provider an exemption certificate in lieu of paying tax or provide the documentation required to overcome the presumption. The certificate must state that the labor is maintenance as defined in subsection (a)(7) of this section, rather than repair or restoration as defined in subsection (a)(13) and (15) of this section, and that the customer is liable for any additional tax that is due in the event that the comptroller determines that a taxable service was performed.

(B) Repairs or restoration that are performed under a claimed maintenance contract will not change a nontaxable maintenance contract into a taxable repair or restoration contract so long as the charges that are attributable to the repairs or restoration are 5.0% or less of the overall charge. Note: The 5.0% test applies to each contract and subcontract. For example, if five different companies provide lump-sum contracts for services, then each contract stands alone for the purposes of determining whether the taxable services are

5.0% or less of that contract. In the absence of a written contract, the 5.0% test will apply to the total charge billed by each service provider.

(C) A contract that includes maintenance and repair or restoration will be taxable in total if the charges for repairs and/or restoration services exceed 5.0% of the total charges and are not separately identified to the customer in the contract or billing. All separately stated charges for repair, restoration, ◀remodeling▶, or other taxable services are taxable, even when the taxable services constitute 5.0% or less of the total contract price.

(3) The modification of parts of existing structures solely to support the addition of new space will not change a new construction contract into a ◀remodeling▶ contract so long as the charges that are attributable to ◀remodeling▶ are 5.0% or less of the overall charge. Examples are conversion of a one-story building into a two-story building with the addition of a stairway to the existing structure to provide access to the new space, or the removal of an existing wall to allow the addition of structural support in the process of construction of a new room outside of the existing structure. Contracts with ◀remodeling▶ charges that exceed 5.0% are taxable in total unless the charges for ◀remodeling▶ are separately identified to the customer. However, see subsection (b)(9) of this section.

(4) A service provider may accept a properly completed exemption certificate in place of tax for the separately stated charges for labor to ◀remodel▶, restore, or repair buildings that are listed in the National Register of Historic Places. The service provider is a contractor under sec. 3.291 of this title (relating to Contractors).

(5) A service provider may accept a properly completed exemption certificate in lieu of tax for both materials and labor charges from an entity that is exempt under Tax Code, sec. 151.309 or sec. 151.310(a)(3), (4), or (5), or that is exempt under Texas Civil Statutes. A service provider may accept a properly completed exemption certificate for both materials and labor charges from an entity that is exempted by Tax Code, sec. 151.310(a)(1) or (2), if the repair, restoration, or ◀remodeling▶ appears reasonably related to the exempt purpose of the organization. See sec. 3.322 of this title (relating to Exempt Organizations).

(6) A service provider who enters into a contract with a nonexempt entity to improve real property for the primary use and benefit of an entity that is exempted under Tax Code, sec. 151.309 or sec. 151.310, may accept a properly completed exemption certificate in lieu of tax. If the improvement is for the primary use and benefit of an entity that is exempted under Tax Code, sec. 151.310(a)(1) or (2), then the primary use and benefit must relate to the exempt purpose of that entity.

(7) A service provider who enters into a contract with a nonexempt entity to add improvements to real property that will become government property may accept a properly completed exemption certificate if the nonexempt entity dedicates the real property and the improvement to a governmental entity before any work begins and the governmental entity accepts the real property and the improvement. If, at a later date, the governmental entity fails to accept the improvement, the non-exempt entity will owe tax on the service.

(8) A service provider may accept a properly completed exemption certificate

from a manufacturer for separately stated charges for equipment that qualifies for the manufacturing exemption. See sec. 3.300 of this title (relating to Manufacturing; Custom Manufacturing; Fabricating; Processing).

(9) The labor to repair real or tangible personal property that is damaged within a disaster area by the condition or occurrence that caused the area to be declared a disaster area is exempt from tax if the charge for labor is separately stated to the customer. The materials that are used to perform the repairs are taxable. A person who has property repaired under this paragraph should issue to the service provider an exemption certificate in lieu of tax. The service provider must presume that all work is taxable until the customer issues an exemption certificate that covers the separately stated labor portion of the bill. If the charge for the repair is lump-sum, the total charge is taxable.

(10) No sales tax is due on the wages or salary paid by an employer to an employee who provides the labor to repair, ◀remodel▶, or restore real property that belongs to and is used by the employer. A person is considered the employee of the employer if the employer pays the person's wages or salary, withholds applicable federal taxes from the employee's wages or salary, pays employment-related benefits such as health insurance, and exercises direct control over the work that the employee performs.

(e) Resale certificates.

(1) Persons who repair, restore, and ◀remodel▶ real property may issue a resale certificate in lieu of tax to suppliers of tangible personal property only if the tangible personal property will be incorporated into the customer's realty.

For example, a repairman or remodeler purchases paint to repaint a repaired or ◀remodeled▶ area. The paint is transferred to the customer as a part of the finished job. The repairman or remodeler may purchase the paint tax free by issuing a resale certificate. Tax is due on the total amount that is charged the customer, including amounts that are charged for the paint and for the services. A resale certificate may not be issued for materials and supplies used or consumed by the repairman or remodeler that are not incorporated into the customer's realty.

(2) A resale certificate may be issued for a service if the buyer intends to transfer the service as an integral part of taxable services. A service will be considered as an integral part of a taxable service if the service purchased is essential to the performance of the taxable service and is of a type without which the taxable service could not be performed. Examples of services for which a resale certificate may be issued in lieu of tax are landscaping and surveying services if the landscaping or surveying is performed upon the property that is ◀remodeled▶.

(f) Local taxes. Local taxes (city, county, transit authority, city transit department, and special purpose districts) apply to services in the same way as they apply to tangible personal property.

(1) Generally, service providers must collect local sales taxes if their place of business is within a local taxing jurisdiction, even if the service is actually provided at a location outside that jurisdiction.

(2) Transit sales taxes do not apply to services that are provided outside the

boundaries of a transit area.

(3) If the service provider's place of business is outside a local taxing jurisdiction but the service is provided to a customer who is located within a local taxing jurisdiction, then local use taxes apply and the service provider is required to collect the local taxes.

(4) For information on the collection and reporting responsibilities of providers and purchasers of taxable services, see sec. 3.374 of this title (relating to Collection and Allocation of the City Sales Tax), sec. 3.375 of this title (relating to City Use Tax), sec. 3.424 of this title (relating to Collection and Allocation of Transit Sales Tax), and sec. 3.425 of this title (relating to Transit Use Tax).

(g) Use tax. If a seller of a service is not engaged in business in Texas or in a specific local taxing jurisdiction, and is not required to collect Texas tax, then the Texas customer must report and pay the use tax directly to the Texas comptroller.

(h) Enterprise project. An entity that qualifies as an enterprise project may qualify to claim a refund of sales tax that is paid on the total charge for nonresidential repair, restoration, or [remodeling](#). See sec. 3.329 of this title (relating to Enterprise Projects, Enterprise Zones, and Defense Readjustment Zones).

(i) Prior contracts. Prior contracts that are signed before the effective date of a statutory change that affects nonresidential real property repair, [remodeling](#), and restoration shall be governed by the provisions of sec. 3.319 of this title (relating to Prior Contracts).

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