

Section 1: Georgia Sales and Use Tax Principles

Presented by Ned A. Lenhart, CMI, CPA

The objective of this section is to introduce and review some of the foundational components of Georgia's sales and use tax rules. Without a fundamental understanding of these basic rules, the more complicated issues and transactions will not make sense. In this section we discuss the most common definitions as to what is subject to sales tax. In many instances, the taxation of a particular transaction is determined by referring to these basic definitions since it is impossible to promulgate rules on every tax scenario.

1. Burden of Tax

Sales Tax

Georgia sales tax is "excise" based sales tax rather than a "privilege" based sales tax. Legal burden of tax is on purchaser. All sales are presumed to be taxable. Only with proper documentation can retailer be excused from charging tax. Liability for tax rests equally between the seller and the purchaser.

Georgia Code Section 48-8-30:

(a) There is levied and imposed a tax on the retail purchase, retail sale, rental, storage, use, or consumption of tangible personal property and on the services described in this article.

(b) (1) Every purchaser of tangible personal property at retail in this state shall be liable for a tax on the purchase at the rate of 4 percent of the sales price of the purchase. The tax shall be paid by the purchaser to the retailer making the sale, as provided in this article. The retailer shall remit the tax to the commissioner as provided in this article and, when received by the commissioner, the tax shall be a credit against the tax imposed on the retailer. Every person making a sale or sales of tangible personal property at retail in this state shall be a retailer and a dealer and shall be liable for a tax on the sale at the rate of 4 percent of the gross sale or gross sales, or the amount of taxes collected by him from his purchaser or purchasers, whichever is greater.

Use Tax:

Georgia Code Section 48-8-30:

(c) (1) Upon the first instance of use, consumption, distribution, or storage within this state of tangible personal property purchased at retail outside this state, the owner or user of the property shall be a dealer and shall be liable for a tax at the rate of 4 percent of the cost price, except as provided in paragraph (2) of this subsection.

(2) Upon the first instance of use, consumption, distribution, or storage within this state of tangible personal property purchased at retail outside this state and used outside this state for more than six months prior to its first use within this state, the owner or user of the property shall be a dealer and shall be liable for a tax at the rate of 4 percent of the cost price or fair market value of the property, whichever is the lesser.

(3) This subsection shall not be construed to require duplication in the payment of the tax. The tax imposed by this subsection shall be subject to the credit otherwise granted by this article for like taxes previously paid in another state.

Service providers who purchase materials for use in fulfilling a service are subject to use tax on the purchase price of the items they obtain. The failure of purchasers to pay the use tax on items purchased from out of state is a major source of revenue shortfall for Georgia and other states.

2. Tax Base

Georgia Code Section 48-8-2(8)

(A) “Sale” means any transfer of title or possession, transfer of title and possession, exchange, barter, lease, or rental, conditional or otherwise, in any manner or by any means of any kind **of tangible personal property** for a consideration except as otherwise provided in subparagraph (B) of this paragraph and includes, but is not limited to:

(i) The fabrication of tangible personal property for consumers who directly or indirectly furnish the materials used in such fabrication;

(ii) The furnishing, repairing, or serving for a consideration of any tangible personal property consumed on the premises of the person furnishing, repairing, or serving the tangible personal property; or

(iii) A transaction by which the possession of property is transferred but the seller retains title as security for the payment of the price.

Georgia Code Section 48-8-2(9) states:

“Sales price” means the total amount valued in money for which tangible personal property or services are sold. Any services that are part of the sale are included, whether or not paid for in money. Sales price also includes any amount for which credit is given to the purchaser by the seller. No deduction is allowed on account of the cost of property sold or materials used, labor or service costs, losses, or any other expenses.

B) “Sales price” does not include;

- (i) Cash discounts allowed and taken on sales;
- (ii) The amount charged for labor or services rendered in installing, applying, remodeling, or repairing property sold; or
- (iii) Finance charges, carrying charges, service charges, or interest from credit extended on sales of tangible personal property under conditional sale contracts or other conditional contracts providing for deferred payments of the purchase price.

Georgia Code Section 48-8-2(22) states:

Cost price means the actual cost of property without any deductions on account of cost of materials used, labor or service costs, transportation charges, or any other expenses.

3. Taxation of Freight and Transportation

Georgia imposes sales tax on most freight and delivery charges where the service of transporting the property occurs before the passage of title. Freight is generally not taxable where the purchaser pays the shipper directly. Freight becomes a taxable component on the sales price when it is provided as an ancillary service of the seller.

560-12-2-.45. Freight, delivery and transportation.

(1) Where tangible personal property is sold at “retail” and “F.O.B. shipping point”, and the purchaser at that point assumes the risks of ownership, and transportation costs do not appear on the invoice as a charge, the tax shall be computed on the total invoice charge, i.e., the total amount for which the property is being sold as defined in O.C.G.A. § 48-8-2(9)(A). The cost of transportation subsequently paid by the purchaser to the carrier is not subject to the tax.

(2) Where tangible personal property is sold at “retail” and on a “delivered” or “F.O.B. destination” basis, the tax shall be computed on the total invoice charges, even though the seller bills the purchaser separately for the freight charges.

(3) Where tangible personal property is sold at “retail” and “F.O.B. shipping point” and the seller has prepaid the transportation charges and such prepaid transportation charges appear on the invoice as an additional charge, or a separate charge is made therefore, the tax shall be computed on the total invoice charge or the total invoice charges, unless a satisfactory showing is made that the seller was acting as bona fide agent for the purchaser in effecting with the carrier such transportation.

(4) Where tangible personal property is sold at “retail” and the seller himself delivers the shipment and makes a charge therefor which appears separately on the invoice, and where in fact the seller assumes responsibility for loss and damage in transit, the tax shall be computed on the total invoice charge.

(5) Where tangible personal property is sold at “retail”, “F.O.B. shipping point”, and the invoice allows a credit for transportation charges paid or to be paid by the purchaser, the tax shall be computed on the invoice charge after the allowance of such credit.

(6) Where only the use tax is involved, the user shall pay the tax computed on “cost price” as defined in O.C.G.A. § 48-8-2(2) , but this does not include adding thereto transportation charges paid to the carrier by the user, or by the seller as the user's bona fide agent.

(7) The foregoing sections are not to be construed in any way to otherwise allow the deduction of transportation charges in computing the actual cost price of tangible personal property used, consumed or stored in this State and subject to tax under O.C.G.A. § 48-8-30(a).

4. Taxable Services

Like most states, Georgia imposes sales tax on only those services that are specifically enumerated and which are separately stated on the invoice. Non-taxable services that are embedded in the price paid for taxable tangible personal property are usually taxed since there is no opportunity to break out these services. In general, if a separately stated service is not listed below, then it is not taxable. The most common exception deals with various types of labor services and whether the labor is part of the price of tangible personal property or a non-taxable personal service.

- utilities, (natural or artificial gas, oil, electricity, solid fuel, and local telephone)
- transportation;
- Rental or leasing of tangible personal property;
- transient accommodations
- admissions; and
- games and amusements

Georgia does not tax many of the services taxed by other states, such as data processing, long distance telecom, security services, background screening, storage services, or information services.

5. Interstate Transactions and Credits for Taxes Paid

With few exceptions, a transaction is subject to either Georgia use tax or Georgia sales tax if title to the property passes to the purchaser within the state. Interstate transactions provide challenges to this general rule.

Import

As discussed above in Point 1., any tangible property that would be subject to Georgia sales tax if sold within the state is taxable is subject to Georgia use tax upon the importation.

Export

If title to property passes to the purchaser (either directly or indirectly) within the state of Georgia, the transaction is taxable even if it immediately leaves the state. All sales are presumed to occur within the state unless adequate documentation exists to support a non-taxable transaction.

- Placing goods on a common carrier for export are not taxable as long as the proper bill of goods and shipping documents support export.
- Export shipments by seller on seller's truck are not taxable.
- Where purchaser sends agent or independent carrier to pick up goods, the sale may be subject to Georgia tax even though it leaves the states.
- Where purchaser arrives in own truck to take delivery, sale is taxable in Georgia.

560-12-2-.54. Interstate commerce.

(1) The tax applies to:

- (a) All sales at retail of tangible personal property, the delivery of which takes place in Georgia, regardless of any subsequent employment or use thereof in interstate commerce; and
- (b) The first use in Georgia of tangible personal property bought elsewhere in a transaction which would have been taxed had the transaction occurred in Georgia, provided such property has become a part of the mass of the property in this State, irrespective of the fact that such property may have been, or may be used in interstate commerce.
- (c) The tax due under (b) above is subject to the credit for like taxes paid elsewhere, if under reverse circumstances the other state would grant credit for like taxes paid to the State of Georgia.

(2) The tax does not apply to:

- (a) Deliveries of tangible personal property outside the State in the seller's vehicle when a valid Certificate of Exemption (Form ST-6) is secured;

(b) Deliveries of tangible personal property outside the State by use of an independent trucker hired by the seller when a valid Certificate of Exemption (Form ST-6) is secured;

(c) Deliveries of tangible personal property to a common carrier or to the U.S. Post Office for transportation outside the State;

(d) Purchases for resale and immediate transportation out of this State by a dealer properly registered in another state, provided a valid Certificate of Exemption (Form ST-4) is secured by the Georgia seller;

(e) Purchases of aircraft, watercraft, motor vehicles and other transportation equipment manufactured or assembled in this State if sold by the manufacturer or assembler for use exclusively outside this State and if possession is taken from the manufacturer or assembler by the purchaser within this State for the sole purpose of removing the same from this State under its own power when it does not lend itself more reasonably to removal by other means.

(f) Purchases of aircraft parts (other than parts and materials described below which are consumed or installed on aircraft while in Georgia) when

(1) the delivery terms are "F.O.B. buyer's aircraft, (City), Georgia," or terms with the same meaning, and

(2) the parts are delivered by the seller directly on board the foreign purchaser's aircraft

(3) for immediate exportation outside the United States

(4) pursuant to an export license issued by the federal government and

(5) such parts are actually transported outside the United States as soon as practicable after loading onto the aircraft without any use in Georgia or diversion to any other state. The tax shall apply to parts and materials which are installed on or in an aircraft while in Georgia or used or consumed in repairing or servicing an aircraft when the aircraft is repaired or serviced in Georgia.

6. Exemption Certificate Issues

All sales of tangible personal property are deemed to be taxable unless the purchaser presents valid documentation to support that the transaction is not subject to tax. The failure of the seller to obtain and to retain this documentation often creates a future sales tax liability for the seller. Further, obtaining improper or incomplete documentation to support a non-taxable transaction can have the same results as collecting nothing.

Examples of sales transactions that are not taxable if supported by a valid certificate are:

- Sales for resale, lease, rental
- Materials for further processing
- Machinery, equipment, certain parts used for manufacturing
- Direct pay permit
- Federal, State, County, City or other body corporate and politic

- Certain aircraft and water craft
- Computer equipment and software for qualified purchasers

The most common Georgia Exemption Certificates are the ST-5, ST-5M, ST-CE1. With the exception of the ST-CE1, these certificates are valid for as long as the retailer holds them. The ST-CE1 expires on December 31 of each year and must be applied for annually. Copies of these forms are attached at back of booklet.

As a common practice, retailers should make an effort to update their certificates every five to seven years depending on the nature of the business.

7. Mixed Transactions (Bundled transactions)

Business transactions can be pure sales of property, pure sales of service, or some hybrid or mixture of property sale and service sale all billed for one price. When a transaction is purely a sale of property or the performance of a service, the tax determination is pretty straight forward. When, however, the sale of property also includes the provision of some service OR when the provision of some service also includes the furnishing of some property, the decision as to what is taxable and what is not becomes difficult.

In general, if the primary purpose or true object of the sales transaction is the sale of tangible personal property, then any services that are included as part of that sale are also taxed. For instance, if you purchase a new computer, a new printer, 2 year extended warranty, set up, training, telephone support, and 4 downloaded software programs all for \$1,200, the taxable amount of the transaction is \$1,200.

In this transaction, the only truly taxable item is the computer and printer. However, because the retailer included all the other non-taxable services as part of the sales price, these non-taxable services have not become taxable services. According to the definition of the term “sales price”, retailers cannot deduct the price of services that are included as part of the price charged for tangible personal property. In this example, the vendor could have saved the customer money by separately stating and pricing each service. Separately listing without separately pricing does not work.

On the other hand, if you hire an accountant to prepare tax returns for you and he charges you a flat fee that includes his services and the material provided, then the total transaction is not taxable since the primary purpose of the contract was the performance of services. The only taxable component of this transaction was the tax on the purchase of the paper used to print the tax return. In this case, the tax is paid by the accountant.

The decision as to what the real object of the transaction is can be difficult. Test your skills:

- Price paid for producing original oil painting of landscape
- Price paid for print of the same landscape painting

- Price paid for custom developed software
- Price paid for purchase of same software when sold to different customer
- Price paid for custom design and fabrication of office furniture
- Price paid for custom catering service including cooking, set-up, tables, and clean up.

The taxation of mixed transactions can become complicated. Georgia does not have a clear rule that expresses the demarcation between what a service is and what a product is. The primary document that determines the nature of the transaction is the invoice. A poorly drafted invoice can create taxable transactions out of non-taxable transactions which can lead to large tax exposure if challenged.

Further, it is important to know what services are “part of the sale” and which are not. For example, fabrication labor is always part of the sale of property and is taxable even if it is broken out on the invoices.

8. Lease Transactions

Georgia Code Section 48-8-2(8)

(A) “Sale” means any transfer of title or possession, transfer of title and possession, exchange, barter, **lease, or rental**, conditional or otherwise, in any manner or by any means of any kind of tangible personal property for a consideration except as otherwise provided in subparagraph (B) of this paragraph and includes, but is not limited to:

In Georgia, as with many other states (but not all), a leasing or rental transaction of tangible personal property is taxable. As such, the retailer who leases or rents property has the same obligation as someone who sells the same property. They can purchase the items tax free as “inventory” and then must collect sales tax on the lease stream. Rentals and leases of real property are not taxable in Georgia.

Leases come in many different forms. Some are leases and some are sales, depending on the full nature of the contract. Many installment sales are presented as leases, but they are not. An installment sale is a sale coupled with a payment plan. In the installment sale, the interest rate or carrying charge is not taxable.

If property which is leased has a balloon purchase price, both the lease stream and the balloon price are taxable.

Sales tax is due only on operating leases; those where the property does not automatically revert to the owner upon the completion of his payments. In an operating lease, there is usually a fair market purchase price at the term of the lease and the lessee has the option of walking away from the property.

Capital leases are not really leases. They are financing transactions with the property being used as collateral. Capital leases are treated as “sales” and not “leases”. Tax is due

on the transaction when it occurs and not over the life of the arrangement. The payment received during the life of the capital lease are deemed to be loan repayments and are not taxable.

9. Non-Taxable Purchasers

Unlike many other states, Georgia does not provide a general sales tax exemption for purchases made by 501(c)(3) organizations. Thus, sales to churches and other charitable organizations are taxable unless they are exempted through other provisions of Georgia law.

The following legal entities are exempt:

- Sales to the Federal Government and appropriate federal instrumentalities. These would include Federal Banks, Federal Credit unions, The American Red Cross.
- The State of Georgia and its state instrumentalities.
- County, City, and Municipality governments
- Public School System
- State universities
- Selected purchases by private elementary, secondary, and colleges
- Nonprofit licensed nursing home, nonprofit licensed in-patient hospice, or a nonprofit general or mental hospital used exclusively by such nursing home, in patient hospice, or hospital in performing a general nursing home, in-patient hospice, hospital, or mental hospital treatment function in this state when such nursing home, in-patient hospice or hospital is a tax exempt organization under the Internal Revenue Code and obtains an exemption determination letter from the Commissioner.
- Sales of tangible personal property or services to any chapter of the Georgia State Society of the Daughters of the American Revolution which is tax exempt under Section 501(c)(3) of the Internal Revenue Code and obtains an exemption determination letter from the commissioner.

To be exempt, the sales must be billed to and paid for directly by the organization. Purchases by employees on credit cards that are reimbursed by the legal entity are taxable.