

## **Letter Ruling Impacts Highway Construction Industry**

*[By Sharon R. Paxton](#)*

July 5, 2010

The Pennsylvania Department of Revenue has ruled that certain contractual arrangements commonly used in highway construction projects will not be respected by the Department for sales and use tax purposes (Ruling No. SUT-10-002). Under the ruling, a Bulletin 15 bridge beam supplier (that is not also a PennDOT approved contractor) that enters into a "supply and erect" subcontract with a prime construction contractor or with an erection subcontractor, and then subcontracts all of the erection work back to that contractor, will be treated as a mere "vendor" of bridge beams and not as a construction contractor. Under the ruling, the bridge beam supplier will be required to collect sales tax on the total sales price of the beams from the contractor performing the erection services (rather than to pay sales or use tax only on the cost of materials it uses to fabricate the beams). Similarly, the contractor performing the erection services will be required to pay sales or use tax on the full purchase price of the beams that it erects. This ruling has broad significance for the highway construction industry because the Department's analysis applies not only to contracts for the erection of bridge beams, but also to contracts for the installation or erection of other components.

If the parties to such a contractual arrangement take the position that the material supplier is a construction contractor rather than a "vendor," the Department may attempt to collect the tax due on the total sales price of the materials from either the material supplier or from the contractor actually performing the erection services. Thus, from a tax standpoint, it would be advisable for a material supplier to collect sales tax on the entire sales price of the materials from the contractor performing the erection services (or at least to seek contractual indemnification from the contractor in the event of a tax assessment against the supplier). Similarly, it would be prudent for contractors to require material suppliers to include sales tax in their quotes to avoid a tax exposure that was not factored into the bid price.

This letter ruling reflects the Department of Revenue's legal position but does not carry the weight of a court decision. An audit assessment issued against a material supplier (for failing to collect the appropriate tax from the contractor performing the erection services) or a contractor (for failing to pay the appropriate tax) who has entered into such an arrangement can obviously be appealed. In addition, contractors who have entered into such contractual arrangements and paid sales tax to the supplier on the total price of the materials have a right to challenge the Department's position through the filing of refund claims for sales tax paid.

The contractual arrangements addressed in the ruling also have implications that go beyond tax consequences (such as compliance with PennDOT requirements). For questions concerning the tax consequences of highway construction contracts, please contact a member of the McNees State and Local Tax Practice Group. For advice concerning general contracting issues, please consult a member of McNees's Construction Law Group.

© 2010 McNees Wallace & Nurick LLC

*This document is presented with the understanding that the publisher does not render specific legal, accounting or other professional service to the reader. Due to the rapidly changing nature of the law, information contained in this publication may become outdated. Anyone using this material must always research original sources of authority and update this information to ensure accuracy and applicability to specific legal matters. In no event will the authors, the reviewers or the publisher be liable for any damage, whether direct, indirect or consequential, claimed to result from the use of this material.*