

EXECUTIVE ORDER NO. 85-20

WHOLESALE'S EXEMPTION FROM BUSINESS PRIVILEGE TAX.

WHEREAS, §19501 of the Government Code and the subsections thereunder vest authority in the Director of Revenue and Taxation (the Director) to prescribe rules and regulations, subject to the approval of the Governor, relating to the administration of Business Privilege Taxes under Chapter VI, Title XX, of the Government Code; and

WHEREAS, the Director has determined that regulations are desirable and appropriate to implement the wholesaler's exemption from the business privilege tax under §19543.1022 and §19541.0102 of the Government Code, as enacted or amended by Public Law 18-2; and

WHEREAS, the Director, pursuant to the provisions of §24201 of the Government Code, has caused a notice to be published of a hearing to be held concerning proposed regulations relating to the wholesaler's exemption; and

WHEREAS, pursuant to §24201 of the Government Code and on September 20, 1985, more than ten (10) days after the aforesaid publication, a hearing was held relating to said proposed changes; and

WHEREAS, after giving due consideration to the testimony presented at the hearing, the Director has determined that the proposed regulations are duly restrictive with respect to sales of food and beverages by wholesalers to restaurants and hotels, and would not be in accord with the intent of the Legislature to promote the development of such wholesale, restaurant and hotel businesses; and

WHEREAS, the Director has determined that the proposed regulations are appropriate and needful in all other respects; and

WHEREAS, the Director has amended the proposed regulations in such manner as to make the wholesaler's exemption in general applicable to wholesale sales of food and beverages to restaurants and hotels; and

WHEREAS, the undersigned, having determined that the proposed regulations as so amended are appropriate and needful in all respects;

NOW, THEREFORE, I, RICARDO J. BORDALLO, Governor of Guam, by virtue of the authority vested in me by the Organic Act and the laws of Guam, including 19501.0207 of the Government Code, do hereby order as follows:

1. The attached language of 22010.18, Title 23 of the Administrative Rules and Regulations of the Government of Guam, relating to the wholesaler's exemption from Business Privilege Tax, duly adopted by the Director of the Department of Revenue and Taxation, is approved and promulgated, to be effective forty-five (45) days after the filing thereof with the Legislative Secretary.

2. All prior rules, regulations, policies, memoranda or executive orders in conflict with this Order are hereby superseded.

Signed and promulgated at Agana, Guam this 31st day of December,
1985.


RICARDO J. BORDALLO
Governor of Guam

COUNTERSIGNED:


EDWARD D. REYES
Lieutenant Governor of Guam

ADMINISTRATIVE RULES AND REGULATIONS
OF
THE GOVERNMENT OF GUAM

Title 23 – Revenue and Taxation
Division 1 – Tax Commissioner
Chapter 2 – General Tax
Subchapter A – Business Privilege Tax

§22010.18 – Exemption of Amounts Received from Engaging or Continuing in Business
as a Wholesaler

(a) The purpose of this Section is to implement §19541.0102 of the Government Code, as amended by Public Law 18-2, and §19543.1022 of the Government Code, as enacted by Public Law 18-2.

§19541.0102 provides as follows:

"§19541.0102. Provided, that any person engaging or continuing in business as a retailer and a wholesaler shall pay the tax required solely on the gross proceeds of sales of the retail business, and that his books must be kept so as to show separately the gross proceeds of each business."

§19543.1022 provides an exemption from tax for amounts described as follows:

"§19543.1022. Amounts received from engaging or continuing in business as a wholesaler, except that if such persons are, in addition, engaging or continuing in business as a retailer, the provisions of this Subchapter and the taxes levied thereunder shall apply to that part of the businesses of such persons that involve retail."

(b) The exemption from tax applies only to amounts received from sales of tangible personal property by a wholesaler to another wholesaler or to a retailer for the purpose of resale. For a sale to qualify for the exemption from tax, it is necessary that the following three (3) requirements be satisfied:

(1) That the sale of tangible personal property was made by a "wholesaler". For purposes of this requirement, a "wholesaler" means a person doing a regularly organized wholesale business, known to the trade as such, and licensed to do business in Guam as such.

(2) That such sale was made to another "wholesaler" or to a "retailer". For purposes of this requirement, the definition of "wholesaler" is the same as in paragraph (1) above. A "retailer" means either (A) a person doing a regularly organized retail business, known to the trade as such, and licensed to do business in Guam as such, or (b) a person engaged in carrying on a service business and licensed to do business in Guam as such, provided that the resale of such tangible property in essentially the same form as when purchased is a necessary function of the service business, as for example, the sale of food and beverages by a restaurant.

(3) That such sale was made for the purpose of resale in the regular course of the purchaser's business. A sale shall be so treated if either (A) the seller timely takes or has taken a certificate from the purchaser that property of the kind purchased is purchased for resale in the regular course of the purchaser's business and the taking of the certificate and the certificate meet the requirements stated in section (e); or (B) the seller presents other satisfactory evidence meeting the requirements stated in section (f) that the sale was made for the purpose of resale in the regular course of the purchaser's business.

(c) The burden of establishing that the three (3) requirements stated in subsection (b) are satisfied with respect to any sale is upon the seller.

(d) In order to be entitled to the exemption, any person engaging or continuing in business both as a retailer and a wholesaler must keep his books so as to show separately and accurately the gross proceeds of each business. If the books are kept in this manner, the tax shall not apply to amounts received from sales which

meet the requirements stated in section (b). If books are not kept in this manner, the exemption described in this section shall not apply to any sales proceeds of the wholesale business.

(e) (1) The seller's burden of proving that a sale of tangible personal property is made for the purpose of resale in the regular course of the purchaser's business is met if the seller timely takes or has taken a good and sufficient certificate from the purchaser that the property of such kind is purchased for resale. If timely taken in good faith from a person who is engaged in the business of selling tangible personal property and who holds a license to do business as a wholesaler or retailer in Guam, the certificate relieves the seller from liability for the gross receipts tax and the duty of collecting the use tax. A certificate will be considered timely if it is taken at any time before the seller bills the purchaser for the property, or any time within the seller's normal billing and payment cycle, or any time at or prior to delivery of the property to the purchaser.

(2) If a purchaser who gives a resale certificate for property makes any storage or use of the property other than retention, demonstration, or display while holding it for sale in the regular course of business, the storage or use is taxable as of the time the property is first so stored or used. The use tax must be reported and paid by the purchaser with the purchaser's tax return for the period in which the property is first so stored and used. The purchaser cannot retroactively rescind or revoke the resale certificate and thereby cause the transaction to be subject to gross receipts tax rather than use tax.

(3) Property shall not be regarded as purchased for resale if it is not resold by the purchaser in essentially the same form as when purchased by the purchaser. Property which is subjected by the purchaser to any manufacturing process, or becomes a component of other property before its sale by the purchaser does not qualify for the exemption from tax, as for example, building materials purchased

by a building contractor. On the other hand, property which is divided or cut into smaller units for purposes of sale, as for example, a side of beef into smaller cuts of beef, shall be regarded as essentially in the same form as when purchased by a retail food store. Similarly, food dishes and beverages sold by a restaurant shall be regarded as essentially in the same form as when purchased.

(4) Property shall not be regarded as purchased for resale if it is sold in connection with a service provided by the purchaser to a customer, and the price of the property is not separately identified to the customer. For example, a medication furnished by a physician to his patient shall not be regarded as purchased by the physician for resale if the charge for the medication is not identified to the patient in a bill or receipt of the physician. On the other hand, charges for food and beverages sold by a restaurant need not be separately identified since such are in distinguishable from restaurant service.

(5) Any document, such as a letter or purchase order, timely provided by the purchaser to the seller will be regarded as a resale certificate with respect to the sale of the property described in the document if it contains all of the following essential elements:

(A) The signature of the purchaser or an agent or employee of the purchaser.

(B) The name and address of the purchaser.

(C) The number of the seller's Guam business license held by the purchaser.

(D) A statement that the property described in the document is purchased for resale in the same form purchased without alteration of any kind. The document must contain the phrase "for resale". The use of phrases such as "nontaxable", "exempt", or similar terminology is not acceptable.

(E) Date of execution of document. (An otherwise valid resale certificate will be considered invalid solely on the ground that it is undated.)

(6) A document containing the essential elements described in (5) above is the minimum form which will be regarded as resale certificate. However, in order to preclude potential controversy, the seller should timely obtain from the purchaser a certificate substantially in the following form:

GUAM RESALE CERTIFICATE

(Name of Purchaser)

(Address of Purchaser)

I HEREBY CERTIFY: That _____, the purchaser, holds Guam Business License No. _____ issued pursuant to the Business License Law; That I am authorized to execute this certificate in behalf of the purchaser; That the purchaser is engaged in the business of selling _____: that the tangible personal property described herein which purchaser shall purchase from: _____ will be resold by purchaser to a customer or customers in essentially the same form purchased by purchaser in the regular course of purchaser's business and at a price which will be identified to the customer or customers; provided, however, that in the event any of such property issued for any purpose other than retention, demonstration, or display while holding it for sale in the regular course of business, or the property is not sold by the purchaser in the manner stated herein, it is understood that the purchaser is required by the Use Tax Law to report and pay tax, measured by the purchase price of such property or other authorized amount.

Description of property to be purchased: _____

I declare under penalty of perjury that the foregoing is true and correct.

Executed on Date: _____ 19 _____

(Signature of Purchaser or Authorized Agent)

(Title)

Under "Description of property to be purchased" there may appear:

(A) Either an itemized list of the particular property to be purchased for resale, or

(B) A general description of the kind of property to be purchased for resale. (A certificate, thus describing the property is good until revoked in writing.)

The foregoing form may be altered to the form of an affidavit under oath taken before a notary public or other person qualified to administer oaths in Guam.

(7) If a purchaser issues a general (blanket) resale certificate which provides a general description of the items to be purchased at one or more times in the future, and subsequently issues a purchase order which indicates that the transaction covered by the purchased order is taxable, the resale certificate does not apply with respect to that transaction. In such case, the gross receipts tax with respect to the sale to the purchaser must be reported and paid by the seller with the seller's tax return for the period in which the purchase order is first received by the seller.

(8) If a purchaser wishes to designate on each purchase order that the property is for resale, the seller should obtain a qualified resale certificate, i.e., one that states "see purchase order" in the space provided for a description of the property to be purchased. Each purchase order must then specify whether the property covered by the order is purchased for resale or whether tax applies to the order. If each purchase order does not so specify, it will be assumed that the property covered by that purchase order was purchased for use, and not for resale. If the purchase order includes both items to be resold and items to be used, the purchase order must specify which items are purchased for resale and which items are purchased for use. For example, a purchase order issued for produced parts for resale and also for tooling used to produce the parts should specify that the parts are purchased for resale and that the sale of the tooling is subject to tax.

(9) If the seller does not timely obtain a resale certificate, the fact that the purchaser provides the purchaser's business license number to the seller, or informs the seller that the transaction is "not taxable" does not relieve the seller from liability for the tax nor from the burden of proving the sale was for resale.

(f) OTHER EVIDENCE TO REBUT PRESUMPTION OF TAXABILITY. A sale meeting the requirements of section (b) is not subject to the gross receipts tax. However, a resale certificate which is not timely taken is not retroactive and will not relieve the seller of the liability for the tax. Consequently, if the seller does not timely obtain a resale certificate, the seller will be relieved of liability for the tax only if the seller presents satisfactory evidence that the specific property sold:

(1) Was in fact resold by the purchaser and was not used by the purchaser for any purpose other than retention, demonstration, or display while holding it for sale in the regular course of business, or

(2) Is being held for resale by the purchaser and has not been used by the purchaser for any purpose other than retention, demonstration, or display while holding it for sale in the regular course of business, or

(3) Has been used or consumed by the purchaser and the purchaser has paid the use tax directly to the Department of Revenue and Taxation.

(g) GOOD FAITH. A seller will be presumed to have taken a resale certificate in good faith in the absence of evidence to the contrary. If the purchaser insists that the purchaser is buying for resale property of a kind not normally resold in the purchaser's business, the seller should require a resale certificate containing a statement that the specific property is being purchased for resale in the regular course of business.

(h) IMPROPER USE OF CERTIFICATE. Except when a resale certificate is issued in accordance with the terms of section (e) of this regulation:

(1) A purchaser may be guilty of committing one or more misdemeanors if the purchaser gives a resale certificate for property which the purchaser knows at the time of purchase will be used rather than resold. See Government Code §19516.03; 9 G.C.A. §52.20; and 6 G.C.A. §4308.

(2) Any person who gives a resale certificate for property which he knows at the time of purchase is not to be resold by him in the regular course of business is liable to the Government of Guam for the use tax and any penalties that may apply with respect to such purchase.