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MULTI-STATE REGULATORY
REVIEW COMMISSION

JAMES R. BIERY
President, CEO & Treasurer
Phone 717.255.6911
Fax 717.233.6362
jbiery@pabanker.com
www.pabanker.com

January 17, 2006 (via hand-delivery of hard-copy)

Mary R. Sprunk
Office of Chief Counsel
PA Department of Revenue
Dept. 281061
Harrisburg, PA 17128-1061

Re: Revision of Construction Contractors; Sales Tax Requirements: Proposal to amend 61 Pa. Code §§ 31.11 and 31.12 (relating to definitions; and imposition of tax) and delete §§ 46.2, 46.3, 46.6 and 46.9, to read as set forth in Annex A.

Dear Ms. Sprunk:

Thank you for the opportunity to provide comments on behalf of the Pennsylvania Bankers Association on the Department of Revenue's proposed regulation *above* described by the Secretary's notice published in the December 17, 2005 edition of the *Pennsylvania Bulletin* as an effort to avoid duplication of information.

The Pennsylvania Bankers Association represents 205 national and state banks, bank and trust companies, savings banks and savings associations and affiliates of these institutions in the Commonwealth. Its membership hold over 99% of Pennsylvania's banking assets.

The Department's publication of this proposal describes the purpose of this change as follows:

During normal review of its regulations, the Department determined that deleting §§ 46.2, 46.3, 46.6 and 46.9 in their entirety not only rids 61 Pa. Code of duplicated regulations, it also alleviates any possible confusion to those who read Chapters 31 and 46 (relating to imposition; and construction contractors). This proposed rulemaking amends § 31.11 by transferring to it a specific list of financial institution security equipment from § 46.9 (relating to financial institution security equipment) whose installation constitutes a construction activity. The list of financial institution security equipment is now being properly placed in § 31.11 under construction activities. In addition, § 31.12(b)(1) is amended to include language transferred from § 46.6 (relating to contractors renting equipment to others) and will be properly placed in Chapter 31.

The Department further explains that:

When the Pennsylvania Sales and Use Tax regulations were originally adopted in 1972, 61 Pa. Code Part I, Subpart B., Article II (relating to sales and use tax), was divided into two divisions: regulations and rulings. At that time, regulations provided general guidance and rulings were issued to respond to specific questions. In 1993, the Department deleted the antiquated distinction between the two types of documents in Article II; however, the Department did not delete documents that had been classified as rulings even though the information contained in a ruling was also set forth in a regulation. In the case of § 46.9 (relating to financial institution security equipment), the

rules governing all construction contracts including the sale, installation and repair of financial institution security equipment were already addressed in §§ 31.11--31.16 (relating to construction contractors).

The Department wants to avoid the duplication of information and believes that the guidelines that financial institutions (banks) and contractors need to know on the timing of the taxation of security equipment is set forth as it is for all other contractors in §§ 31.11--31.16.

Specifically, the Department's proposal would make the following changes:

Section	Name	Duplicated in 61 Pa. Code
<u>46.2</u>	Construction of exempt public utility facilities	§ 32.34(a)(3)(ii)
<u>46.3</u>	Construction contractor installing stained glass windows	§ 31.12(c)
<u>46.6</u>	Contractors renting equipment to others	§ 34.1 § 31.12(b)(1) proposed amendment
<u>46.9</u>	Financial institution security equipment	§§ 31.11--31.16 proposed amendments

As PBA stated in its November 11, 2004 letter commenting on the Department's initial draft of this proposal, we believe that the Department's proposed amendment would be viewed as far more than an administrative clean up because it would eliminate long-standing definitions and examples currently contained in 61 Pa Code § 46.9(b):

§ 46.9. Financial institution security equipment.

(a) *General.* This ruling pertains to the sale, installation and repair of security equipment utilized by financial institutions. The effective date of this ruling is the date of adoption. Its effect is, therefore, prospective only, and it applies only to transactions involving security equipment consummated after the date of its adoption.

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

Financial institution—A corporation or association, such as a bank, a bank and trust company, a trust company, a savings bank, a mutual banking association, a savings and loan association, a finance company, a credit union, or other similar institution, which maintains a place of business in this Commonwealth.

Installation—An attachment or affixation of security equipment to real estate by means of one of the following:

- (i) A hook, bolt, screw, nail or other similar method.
- (ii) Inserting equipment through a building wall or floor, or mounting it upon a specially prepared foundation, the removal of which may result in damage to the real estate.
- (iii) Wire which is integrated into an electrical system.

Security equipment—Systems, devices and equipment, and their components, utilized by a financial institution for its protection or convenience in conducting financial transactions.

(c) *Sales and installation.* Sales and installation shall conform with the following:

- (1) A sale of security equipment which is also installed, as defined in subsection (b), by the seller or the seller's designee is a construction contract. The seller-installer may not charge sales tax of the Commonwealth to his customer upon the contract price. Rather, the seller-installer, as a construction contractor, is considered to be the consumer of property transferred in connection with the construction contract. He shall pay the applicable sales or use tax upon his purchase price of the installed equipment, or upon his purchase price of material acquired and incorporated into the installed equipment during the process by which it is produced by the seller-installer, in accordance with §§ 33.1 and 33.2 (relating to definitions; and scope).

Examples. "S" Seller purchases 10,000 lbs. of material at \$1 per pound from "C" Company. The invoice submitted by "C" to "S" includes a \$10,000 charge for the material and a \$100 charge for the delivery of the material.

"S" then produces a vault door with 100 lbs. of the material, sells the vault door to "T" Trust Company, and installs it. "S" should not charge sales tax to "T". Rather, "S" is himself liable for the payment of sales or use tax on his purchase price of the material incorporated into the door, or \$101—the price which "S" paid for the material plus a proportionate amount of the charge incidental to the delivery of the material.

"S" Seller sells a drive-in teller window to "B" Bank. Prior to delivery of the window, "S" sends "B" specifications for construction of the wall in which the drive-in teller window will be installed. "S" does not prepare the wall into which the window will be installed. After the wall has been constructed by "B", "S" delivers the drive-in teller window, inserts it into the previously prepared opening, and bolts it into position. "S" is a construction contractor and is required to pay the applicable sales and use tax of the Commonwealth upon his purchase price of the drive-in teller window installed in "B" Bank.

(2) As a construction contractor, a seller-installer shall also pay tax upon all property, such as tools, equipment and supplies, which is used in the performance of a construction contract, but which is not transferred to a customer, in accordance with § § 33.1 and 33.2 and § 46.7 (relating to nonresident contractors).

(d) *Straight sale.* A straight sale is one in which security equipment of a type which does not require installation, as defined in subsection (b) is transferred, or one in which any type of security equipment is sold directly to a customer without installation by the seller or a designee. A straight sale is a taxable transfer of tangible personal property, and the seller shall register with the Department, to collect tax upon the total purchase price paid by a customer for security equipment, and to remit the tax collected to the Department.

(e) *Maintenance.* Maintenance shall conform with the following:

(1) Maintenance of installed security equipment on the premises in which it is installed, or maintenance of installed security equipment by a person who removes it from the premises for the work and later reinstalls it, is a construction contract. As a construction contract, the work is a nontaxable service to real estate, and the person performing the service may not charge tax to his customer upon the contract price. Rather, the person performing the service is responsible for the payment of tax upon the purchase price of any part or other tangible personal property which is transferred to the customer in the course of the service.

(2) Maintenance of security equipment which is the subject of a straight sale because it does not require installation as defined in subsection (b), or maintenance of installed security equipment which is removed by the owner or a designee and taken to the service premises, is a taxable service to tangible personal property. The person rendering the service shall register with the Department and collect tax upon both the labor charge and the charge for any part or other tangible personal property which is transferred to the customer in the course of the service. The resale exemption from tax is available to the serviceman upon the purchase of property which is to be transferred.

(f) *Categories of security equipment.* Examples of security equipment upon the transfer of which the seller is liable for the payment of tax when installed by him or his designee are as follows:

Accelerated cash terminals or cash guards.

Access control systems.

After-hour depositories.

Alarm systems (burglar, police, fire, and the like).

Automatic banking systems.

Bandit reserve barriers.

Bulletproof windows.

Customer convenience counters.

Drive-in windows (bay, flush, counter, and the like).

- Fire doors.
- Quick depositories.
- Receiving lockers, heads or chests.
- Safes.
- Safety deposit boxes.
- Surveillance and security systems.
- Television banking systems.
- Teller rails and lockers.
- Vaults.
- Vault doors (automatic, manual, emergency, and the like).
- Vault ventilators.

The definitions above would be eliminated by the proposed amendment to § 31.11:

CONSTRUCTION CONTRACTORS

§ 31.11. Definitions.

The following words and terms, when used in this section and §§ 31.12--31.16, have the following meanings, unless the context clearly indicates otherwise:

* * * * *

Construction activities--An activity resulting from an agreement or contract under which a contractor attaches or affixes tangible personal property to real estate so as to become a permanent part thereof. Construction activities also include the service of repairing real estate even though tangible personal property is not transferred by a contractor in conjunction with the repairs which he makes. In the absence of satisfactory evidence to the contrary, the following items are presumed to become a permanent part of real estate:

* * * * *

Financial institution security equipment, including:

- Accelerated cash terminals or cash guards**
- Access control systems**
- After-hour depositories**
- Alarm systems (burglar, police, fire and the like)**
- Automatic banking systems**
- Bandit reserve barriers**
- Bulletproof windows**
- Customer convenience counters**
- Drive-in windows (bay, flush, counter and the like)**

Fire doors

Quick depositories

Receiving lockers, heads or chests

Safes

Safety deposit boxes

Surveillance and security systems

Television banking systems

Teller rails and lockers

Vaults

Vault doors (automatic, manual, emergency and the like)

Vault ventilators

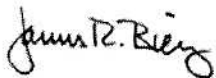
A comparison of the current regulation to the proposed amended regulation clearly shows the proposed deletions of a general provision and definitions that have long provided a degree of clarity regarding application of the sales tax to financial institution security equipment transactions.

The proposed change can be interpreted as being more than simply administrative cleanup, but as a substantive change affecting the tax status of certain items not currently subject to tax.

While PBA would like to accept the Department's assurance that no substantive change is intended, we are concerned that the change will foster confusion - and misinterpretation of the regulation. Thus, we strongly oppose the proposed amendment as currently drafted regarding financial institution security equipment.

Thank you again for the opportunity to share our concern. We would appreciate the opportunity for dialogue with the Department regarding this issue.

Sincerely,



cc:

The Honorable Jane M. Earll, Majority Chair, Senate Finance Committee
 The Honorable John N. Wozniak, Minority Chair, Senate Finance Committee
 The Honorable Gibson E. Armstrong, Majority Chair, Senate Banking and Insurance Committee
 The Honorable Michael J. Stack, III, Minority Chair, Senate Banking and Insurance Committee
 The Honorable Dennis E. Leh, Majority Chair, House Finance Committee
 The Honorable David K. Levdansky, Minority Chair, House Finance Committee
 The Honorable George C. Hasay, Majority Chair, House Commerce Committee
 The Honorable Joseph E. Markosek, Minority Chair, House Commerce Committee
 The Honorable John R. McGinley Jr., Chair, Independent Regulatory Review Commission
 The Honorable William A. Schenck, Secretary of Banking