

701—107.9(423B,423E) Sales not subject to local option tax, including transactions subject to Iowa use tax. The local option sales and service tax is imposed upon the same basis as the Iowa state sales and service tax, with six exceptions:

1. The sales price from the sale of or service of providing motor fuel or special fuel as defined under Iowa Code chapter 452A is subject to local option tax. However, the sales price from the sale or service of these types of fuels is exempt from local option tax if all of the following criteria are met:

- The motor or special fuel must be consumed by a motor vehicle for highway use, or used in watercraft or aircraft;

- Fuel tax must have been paid on the transaction; and

- A refund has not been or will not be allowed.

2. For taxes imposed prior to July 1, 2005, the sales price from the rental of rooms, apartments, or other lodging which was taxed under Iowa Code chapter 422A during the period in which the hotel and motel tax was imposed under that chapter shall be exempt from local option sales tax. As of July 1, 2005, the sales price of lodging is no longer subject to the sales tax imposed by Iowa Code chapter 423; thus, the sales price of lodging is not subject to the local option sales tax. Also, as of July 1, 2005, Iowa Code chapter 422A is repealed. See 701—Chapter 241 for a description of the new state-imposed tax on lodging; see 701—Chapters 103, 104, and 105 for a description of the new local option hotel and motel tax.

3. The sales price from the sale of natural gas or electricity in a city or county is exempt from tax if the sales price is subject to a franchise or user fee during the period the franchise or user fee is imposed.

4. A local taxing jurisdiction is prohibited from taxing the sales price from a pay television service consisting of a direct-to-home satellite service. Section 602 of the federal government's Telecommunications Act of 1996 defines a "direct-to-home satellite service" as "only programming transmitted or broadcast by satellite directly to the subscribers' premises or in the uplink process to the satellite." A "local taxing jurisdiction" is "any municipality, city, county, township, parish, transportation district, or assessment jurisdiction, or any other local jurisdiction in the territorial jurisdiction of the United States, with the authority to impose a tax or fee, but does not include a state."

5. The sales price from sales of equipment by the Iowa state department of transportation is exempt from local option sales tax.

6. Certain construction-related equipment and other items are exempt.

The general application of this exception is as follows: The sales price from the sale of self-propelled building equipment, pile drivers, motorized scaffolding, or attachments that are customarily drawn or attached to self-propelled building equipment, motorized scaffolding, including auxiliary attachments which improve the performance, safety, operation, or efficiency of the equipment, and replacement parts, and that are directly and primarily used by contractors, subcontractors, and builders for new construction, reconstruction, alterations, expansion, or remodeling of real property or structures is exempt from local option sales tax. As of July 1, 2005, taxation of the above-mentioned machinery and equipment is removed from Iowa Code chapter 423 and thus is not subject to the local option sales tax. See 701—Chapter 241, division II, for an explanation of the new state excise tax imposed on sales of construction machinery and equipment.

The following definitions apply to this rule:

"Directly used" includes equipment used by contractors, subcontractors, and builders for new construction, reconstruction, alterations, expansion, or remodeling of real property or structures. To determine if equipment is "directly used," one must first ensure that the equipment is used during the specified activity and not before that process has begun or after it has ended. If the machinery or equipment is used in new construction, reconstruction, alterations, expansion, or remodeling of real property or structures, to be "directly used," it must constitute an integral and essential part of such activity as distinguished from a use in such an activity that is incidental, merely convenient, or is remote. The fact that the machinery or equipment is essential or necessary to new construction, reconstruction, alterations, expansion, or remodeling of real property or structures does not mean that it is also "directly used" in such an activity. Machinery or equipment may be necessary to one of the previously mentioned activities, but so remote from it that it is not directly used in the activity.

In determining whether machinery or equipment is used directly, consideration should be given to the following factors:

1. The physical proximity of the machinery or equipment to other machinery or equipment whose direct use is unarguable. The closer the machinery or equipment whose direct use is questionable is to the machinery or equipment whose direct use is not questionable, the more likely it is that the former is directly used in new construction, reconstruction, alterations, expansion, or remodeling of real property or structures.

2. The proximity in time of the use of machinery or equipment whose direct use is questionable to the use of machinery whose direct use is not questionable. The closer in time the use, the more likely that the questionable machinery or equipment's use is direct rather than remote.

3. The active causal relationship between the use of the machinery or equipment in new construction, reconstruction, alterations, expansion, or remodeling of real property or structures.

The fewer intervening causes between the use of the machinery or equipment and the production of the product, the more likely it is that the machinery or equipment is directly used in the activities at issue.

"Equipment" means tangible personal property (other than a machine) directly and primarily used in new construction, reconstruction, alterations, expansion, or remodeling of real property or structures. *"Equipment"* may be characterized as property which performs a specialized function, which, of itself, has no moving parts, or if it does possess moving parts, its source of power is external to it.

"Primarily used" includes machinery and equipment utilized in new construction, reconstruction, alterations, expansion, or remodeling of real property or structures. Machinery or equipment is *"primarily used"* in new construction, reconstruction, alterations, expansion, or remodeling of real property or structures if more than 50 percent of the total time the machinery or equipment is used in the activity at issue (new construction, reconstruction, alterations, expansion, or remodeling of real property or structures). If a unit of machinery or equipment is used more than 50 percent of the time for the activity at issue and the balance of time for other business purposes, the exemption applies. If a unit of machinery or equipment is used 50 percent or more of the time for business purposes and not being used in new construction, reconstruction, alterations, expansion, or remodeling of real property or structures, the exemption does not apply.

"Real property" includes the earth, the ground, a building, structure and other tangible personal property incorporated into the ground or a building that becomes a part of the ground, structure or the building if removal of the property from the ground or building will substantially damage the property, ground, or building or substantially diminish the value of the property, ground, or building. The ground or the earth is not machinery or equipment. A building is not machinery or equipment. *Mid-American Growers, Inc. v. Dept. of Revenue*, 493 N.E.2d 1097 (Ill. App. Ct. 1986). Instead, a building or structure that is affixed to the ground is considered to be real property. Fence posts embedded in concrete and electrical wiring, light fixtures, fuse boxes, and switches are examples of property sold for incorporation into the ground or a building, respectively. A test which can be applied to differentiate between equipment and real property is the following: If property is sold to a contractor, and the retailer would be required to consider the property *"building material"* and charge the contractor sales tax upon the purchase of this building material, then sale of the property is not exempt from local option tax.

"Replacement parts" means those parts essential to any repair or reconstruction necessary to self-propelled building equipment, pile drivers, motorized scaffolding, or attachments customarily drawn or attached to self-propelled building equipment, motorized scaffolding, including auxiliary attachments which improve the performance, safety, operation, or efficiency of such equipment or equipment's exempt use in new construction, reconstruction, alterations, expansion, or remodeling of real property or structures. *"Replacement parts"* does not include attachments and accessories not essential to the operation of the machinery or equipment itself (except when sold as part of the assembled unit) such as cigarette lighters, radios, canopies, air-conditioning units, cabs, deluxe seats, and tools or utility boxes.

"Self-propelled building equipment" has the same meaning as that in 701—subrule 17.9(5), paragraph *"c,"* where the term is defined as an implement which is capable of movement from one

place to another under its own power. “Self-propelled building equipment” includes, but is not limited to, skid-loaders, earthmovers and tractors.

Since the local option tax is imposed only on the same basis and not on any greater basis than the Iowa sales and service tax, local option tax is not imposed on any transactions subject to Iowa use tax, including use tax applicable to vehicles subject to registration or subject only to the issuance of a certificate of title. Also, exemptions which are applicable only to Iowa use tax cannot be claimed to exempt any transaction subject to local option sales tax. However, if a transaction involves the use of natural gas, natural gas service, electricity, or electric service, then local excise tax is imposed on the same basis as Iowa use tax under Iowa Code chapter 423. Local excise tax is to be collected and administered in the same manner as local option sales and service tax. Except as otherwise provided in this chapter, all rules governing local option sales and service tax also apply to local excise tax.

When tangible personal property is sold within a local option sales tax jurisdiction and the seller is obligated to transport it to a point outside Iowa or to transfer it to a common carrier or to the mails or parcel post for subsequent movement to a point outside Iowa, the sales price from the sale is exempt from local option sales tax provided the property is not returned to any point within Iowa except solely in the course of interstate commerce or transportation. (Iowa Code subsection 423.3(43)). Property sold in a local option sales tax jurisdiction for subsequent transport to a point outside the jurisdiction but otherwise within the borders of Iowa is not exempt from tax.

This rule is intended to implement 2005 Iowa Code Supplement sections 423B.5 and 423E.3.