

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-05(7)S
Sales Tax
March 11, 2005

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S040218A

On February 18, 2004, the Department of Taxation and Finance received a Petition for Advisory Opinion from First Service Networks, Inc., 939 Elkridge Landing Road, Suite 300, Linthicum, Maryland, 21090.

The issue raised by Petitioner, First Service Networks, Inc., is whether Petitioner is required to collect New York State and local sales taxes on its sales of HVAC service contracts in New York.

Petitioner submits the following facts as the basis for this Advisory Opinion.

Petitioner is a Maryland corporation incorporated on January 12, 2001, with headquarters in Linthicum, Maryland. All of Petitioner's assets are located in Maryland. Petitioner has one employee who resides in New York. This employee provides site analysis and survey services for Petitioner's customers nationwide. Petitioner does not maintain any office or place of business in New York. Petitioner is registered for sales and use tax purposes in New York.

Petitioner contracts with multi-location businesses to provide nationwide installation, maintenance and repairs primarily for heating, ventilation and air conditioning (HVAC) systems. Once Petitioner secures a service contract, it contracts with unrelated direct service providers (subcontractors) in the same geographic areas as the customer locations covered under the service contract. The subcontractor agrees to perform a menu of services for agreed upon fees.

In the performance of these services, the subcontractors often purchase replacement parts, or if the contract is for an initial installation, all of the required initial equipment and parts. When the work is performed, the subcontractor bills Petitioner for the repair or other service at its agreed upon fee plus amounts for equipment and parts purchased by the subcontractor.

Petitioner periodically (e.g., monthly) bills its customer for services performed both within and without New York State pursuant to its contract with that customer. This bill is for an amount that is greater than the amounts the subcontractor bills Petitioner. This differential is meant to cover the services provided by Petitioner at its Maryland location that include managing the contractor network (hiring, firing and dispute resolution) and customer service (negotiation, drafting and entering into contracts, monitoring contract performance and problem resolution). In addition to the approximately 100 employees at the Maryland location who perform these services, Petitioner also maintains in its Maryland offices an advanced computer system, which Petitioner custom designed, to manage its information requirements.

Petitioner currently provides its New York subcontractors with a resale certificate. When the subcontractor bills Petitioner, no sales tax is charged. When Petitioner bills its customer, sales tax is charged on the entire amount billed to its customer and remitted to the Tax Department.

Applicable law and regulations

Section 1101(b) of the Tax Law provides, in part:

When used in this article for the purposes of the taxes imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and by section eleven hundred ten, the following terms shall mean:

* * *

(3) Receipt. The amount of the sale price of any property and the charge for any service taxable under this article . . . valued in money, whether received in money or otherwise, including any amount for which credit is allowed by the vendor to the purchaser, without any deduction for expenses. . . .

* * *

(4) Retail sale. (i) A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property, or (B) for use by that person in performing the services subject to tax under paragraphs (1), (2), (3), (5), (7) and (8) of subdivision (c) of section eleven hundred five where the property so sold becomes a physical component part of the property upon which the services are performed or where the property so sold is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax. Notwithstanding the preceding provisions of this subparagraph, a sale of any tangible personal property to a contractor, subcontractor or repairman for use or consumption in erecting structures or buildings, or building on, or otherwise adding to, altering, improving, maintaining, servicing or repairing real property, property or land, as the terms real property, property or land are defined in the real property tax law, is deemed to be a retail sale regardless of whether the tangible personal property is to be resold as such before it is so used or consumed. . . .

* * *

(5) Sale, selling or purchase. Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume . . . conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor,

including the rendering of any service, taxable under this article, for a consideration or any agreement therefor.

* * *

(8) Vendor.

(i) The term "vendor" includes:

(A) A person making sales of tangible personal property or services, the receipts from which are taxed by this article;

* * *

(C) A person who solicits business either:

(I) by employees, independent contractors, agents or other representatives; or

(II) by distribution of catalogs or other advertising matter, without regard to whether such distribution is the result of regular or systematic solicitation, if such person has some additional connection with the state which satisfies the nexus requirement of the United States constitution;

and by reason thereof makes sales to persons within the state of tangible personal property or services, the use of which is taxed by this article;

* * *

(9) Capital improvement. (i) An addition or alteration to real property which:

(A) Substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property; and

(B) Becomes part of the real property or is permanently affixed to the real property so that removal would cause material damage to the property or article itself; and

(C) Is intended to become a permanent installation.

Section 1105 of the Tax Law provides, in part:

Imposition of sales tax On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax . . . upon:

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

* * *

(c) The receipts from every sale, except for resale, of the following services:

* * *

(3) Installing tangible personal property . . . or maintaining, servicing or repairing tangible personal property . . . not held for sale in the regular course of business, whether or not the services are performed directly or by means of coin operated equipment or by any other means, and whether or not any tangible personal property is transferred in conjunction therewith, except:

* * *

(iii) for installing property which, when installed, will constitute an addition or capital improvement to real property, property or land, as the terms real property, property or land are defined in the real property tax law as such term capital improvement is defined in paragraph nine of subdivision (b) of section eleven hundred one of this chapter . . .

* * *

(5) Maintaining, servicing or repairing real property, property or land, as such terms are defined in the real property tax law, whether the services are performed in or outside of a building, as distinguished from adding to or improving such real property, property or land, by a capital improvement as such term capital improvement is defined in paragraph nine of subdivision (b) of section eleven hundred one of this article. . . .

Section 1115(a) of the Tax Law provides, in part:

Exemptions from sales and use taxes (a) Receipts from the following shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten:

* * *

(15) Tangible personal property sold to a contractor, subcontractor or repairman for use in (i) erecting a structure or building (A) of an organization described in subdivision (a) of section eleven hundred sixteen or (B) used predominantly either in the production phase of farming or in a commercial horse boarding operation, or in both, or

(ii) adding to, altering or improving real property, property or land (A) of such an organization or (B) used predominantly either in the production phase of farming or in a commercial horse boarding operation, or in both, as the terms real property, property or land are defined in the real property tax law; provided, however, no exemption shall exist under this paragraph unless such tangible personal property is to become an integral component part of such structure, building or real property.

(16) Tangible personal property sold to a contractor, subcontractor or repairman for use in maintaining, servicing or repairing real property, property or land (i) of an organization described in subdivision (a) of section eleven hundred sixteen or (ii) used predominantly either in the production phase of farming or in a commercial horse boarding operation, or in both, as the terms real property, property or land are defined in the real property tax law; provided, however, no exemption shall exist under this paragraph unless such tangible personal property is to become an integral component part of such structure, building or real property.

Section 525.2 of the Sales and Use Tax Regulations provides, in part:

Nature of tax. (a) Sales tax. (1) (i) Except as specifically exempted or excluded, sales tax is imposed on the receipts from:

(a) every retail sale of tangible personal property, as provided in section 1105(a) of the Tax Law;

(b) every sale, other than a sale for resale, of specifically enumerated services, as provided in sections 1105(b) and (c); . . .

* * *

(2) Except as specifically provided otherwise, the sales tax is a "transactions tax," with the liability for the tax occurring at the time of the transaction. Generally, a taxed transaction is an act resulting in the receipt of consideration for the transfer of title to or possession of (or both) tangible personal property or for the rendition of an enumerated service. The time or method of payment is generally immaterial, since the tax becomes due at the time of transfer of title to or possession of (or both) the property or the rendition of such service. . . .

(3) Except as specifically provided otherwise, the sales tax is a "destination tax." The point of delivery or point at which possession is transferred by the vendor to the purchaser, or the purchaser's designee, controls both the tax incidence and the tax rate.

Section 526.5 of the Sales and Use Tax Regulations provides, in part:

Receipt (a) *Definition.* The word *receipt* means the amount of the sale price of any property and the charge for any service taxable under articles 28 and 29 of the Tax Law, valued in money, whether received in money or otherwise. The following subdivisions of this section discuss elements of a receipt.

* * *

(e) **Expenses.** All expenses, including telephone and telegraph and other service charges, incurred by a vendor in making a sale, regardless of their taxable status and regardless of whether they are billed to a customer are not deductible from the receipts.

Example 1: A photographer contracts with a customer to furnish photographs at \$50 each in addition to expenses.

The customer is billed as follows:

Photographs (2)	\$100
Model fees	60
Meals	10
Travel	25
Props (Flowers)	5
Total due	\$200

Receipt subject to tax is \$200

Example 2: An appliance repairman charges \$10 per hour plus expenses when on a service call. The customer is billed as follows:

3 hrs. at \$10	\$30
Travel	15
Parts	20
Meals	5
Total due	\$70

Receipt subject to tax is \$70

Section 526.6 of the Sales and Use Tax Regulations provides, in part:

Retail sale (a) The term *retail sale* or *sale at retail* means the sale of tangible personal property to any person for any purpose, except as specifically excluded.

(b) Special rule--sales specifically included as retail sales. (1) A sale of any tangible personal property to a contractor, subcontractor or repairman for use or consumption in erecting structures or buildings or adding to, altering, improving, maintaining, servicing or repairing real property, property or land, is deemed to be a retail sale, regardless of whether the tangible personal property is to be resold as such before it is used or consumed.

Section 526.10(a)(4) of the Sales and Use Tax Regulations provides, in part:

(i) A person who solicits business by the distribution of catalogs or other advertising matter, without regard to whether such distribution is the result of regular or systematic solicitation, if such person has some additional connection with the State which satisfies the nexus requirement of the United States Constitution and by reason thereof makes sales to persons within the State of tangible personal property or services the use of which is subject to tax, is a vendor.

(ii) For purposes of subparagraph (i) of this paragraph, the additional connection with the State a person may have in order to qualify as a vendor shall include, but not be limited to:

(a) the operation of retail stores in the State;

(b) the presence of traveling sales representatives in the State;

(c) the presence of employees, independent contractors or agents in the State;

Section 527.5(c) of the Sales and Use Tax Regulations provides, in part:

Maintenance and service contracts. (1) The purchase of a maintenance or service contract is a taxable transaction.

(2) The vendor making sales of such contracts may purchase for resale any tangible personal property which is transferred to his customer in connection with the services rendered.

(3) Any charge made for services rendered in addition to the purchase price of the maintenance or service contract is taxable.

Example 1: A vendor selling home appliances also offers a 12-month extended service contract with unlimited parts and labor. The charge for the service contract is taxable.

Example 2: The same vendor also offers a service contract for the price of \$50 under which the purchaser will receive one service call at no additional charge, including parts and labor, and each additional service call will cost the purchaser \$5 for parts and labor. All the charges are receipts subject to tax.

Section 527.7 of the Sales and Use Tax Regulations provides, in part:

Maintaining, servicing or repairing real property.

(a) Definitions. (1) *Maintaining, servicing and repairing* are terms which are used to cover all activities that relate to keeping real property in a condition of fitness, efficiency, readiness or safety or restoring it to such condition. Among the services included are services on a building itself such as painting; services to the grounds, such as lawn services, tree removal and spraying; trash and garbage removal and sewerage service and snow removal.

* * *

(b) Imposition. (1) The tax is imposed on receipts from every sale of the services of maintaining, servicing or repairing real property, whether inside or outside of a building.

* * *

(3) When the service of maintaining, servicing or repairing real property is performed in conjunction with the transfer of title to tangible personal property, the price of the tangible personal property is also subject to tax.

* * *

Example 8: A customer has a maintenance contract with a heating and air conditioning company to supply all parts and emergency services for his heating and air conditioning system for one year for a set fee. The cost of the contract is taxable, whether or not any services or parts are actually furnished, as it is a contract for maintenance of real property. The company may apply for a refund or credit of any tax paid on parts purchased for use under the contract which become part of the property serviced for resale, or are transferred to the purchaser in performance of the service.

Section 541.2 of the Sales and Use Tax Regulations provides, in part:

Definitions. The words, terms and phrases used in this Part have the following definitions except when the context clearly indicates a different meaning:

(a) Construction contract. (1) A *construction contract* means a contract to erect, construct, alter, repair or maintain any building or other structure, project, development or other improvement on or to real property, property or land.

* * *

(d) A *construction contractor* means any person who engages in erecting, constructing, adding to, altering, improving, repairing, servicing, maintaining, demolishing or excavating any building or other structure, property, development, or other improvement on or to real property, property or land.

(e) *Contractor* means a construction contractor, subcontractor or repairman.

Opinion

Petitioner is a Maryland corporation with headquarters in Linthicum, Maryland. Petitioner contracts with multi-location businesses to provide nationwide installation, maintenance and repairs primarily for heating, ventilation and air conditioning (HVAC) systems. Petitioner uses subcontractors in the same geographic areas as the customer locations to perform a menu of services for agreed upon fees. In the performance of these services, the subcontractors often purchase replacement parts, or if the contract is for an initial installation, all of the required initial equipment and parts. When the work is performed, the subcontractor bills Petitioner for the repair or other service at its agreed upon fee plus amounts for equipment and parts purchased by the subcontractor. Petitioner bills its customer for services performed both within and without New York State on a periodic basis pursuant to its contract with that customer.

Petitioner is, in many instances, making sales to its customers of services to real property. For purposes of the sales tax, Petitioner is providing the services of a construction contractor as defined in section 541.2(d) and (e) of the Sales and Use Tax Regulations. Petitioner hires subcontractors to do the work Petitioner has contracted with its customers to perform. The subcontractors are delivering, on Petitioner's behalf, services to its customers in New York. At least a portion of these services are subject to sales tax pursuant to section 1105(c)(3) or 1105(c)(5) of the Tax Law. The conduct of economic activities performed in a taxing state by a vendor's personnel or on a vendor's behalf demonstrates a sufficient physical presence to subject a vendor to the state's requirements to collect tax. See *Orvis v Tax Appeals Tribunal*, 86 NY2d 165 [1995], cert denied 516 US 989[1995]; *Scripto, Inc. v Carson*, 362 US 207 [1970]. Accordingly, Petitioner is a vendor for purposes of section 1101(b)(8)(i)(A) of the Tax Law and has sufficient nexus with New York to be required to register to collect and remit the tax on its

taxable sales in New York. See also *Mark S. Klein, Esq.*, Adv Op Comm T & F, October 13, 2000, TSB-A-00(42)S.

The services performed by Petitioner's subcontractors will constitute *capital improvements* to Petitioner's customer's real property, property or land, if all three of the conditions in section 1101(b)(9) of the Tax Law are met. If a subcontractor installs property or performs a repair or maintenance which does not meet the three conditions set forth in section 1101(b)(9) of the Tax Law, the services performed by the subcontractor may be subject to tax under section 1105(c) of the Tax Law. See *Sales and Use Tax Classifications of Capital Improvements and Repairs to Real Property*, Publication 862 (4/01) for additional information. If the service performed by a subcontractor for Petitioner constitutes a capital improvement to Petitioner's customer's real property, Petitioner should obtain a properly completed *Certificate of Capital Improvement* (Form ST-124) from its customer in order to substantiate the tax exempt nature of the services. Copies of this certificate should be provided to all subcontractors involved in performing the particular capital improvement service to which the certificate pertains. Petitioner is not required to collect sales tax from its customers for services resulting in a capital improvement to real property. See sections 1105(c)(3)(iii) and 1105(c)(5) of the Tax Law. Petitioner's subcontractors must pay the sales or use tax on any purchases of materials incorporated into the capital improvement project at the rate in effect where such use occurs, except where such materials are incorporated into the real property of an entity exempt from sales tax pursuant to section 1116(a) of the Tax Law. See section 1115(a)(15) and (16) of the Tax Law. Sales tax paid on such materials is an expense incurred by the subcontractor which may be included in its material costs when billing Petitioner. Any tools or supplies used or consumed by a subcontractor in the performance of a capital improvement project are subject to sales tax at the time of purchase.

If Petitioner's subcontractor provides repair, maintenance or installation services which do not qualify as capital improvements, the subcontractor should collect sales tax on its total charges to Petitioner unless Petitioner provides the subcontractor with a properly completed *Contractor Exempt Purchase Certificate* (Form ST-120.1) indicating that the services are to be resold by Petitioner. A *Resale Certificate* (Form ST-120) is not a valid exemption certificate for purchases of materials or services by construction contractors. See section 526.6(b) of the Sales and Use Tax Regulations. Petitioner must collect sales tax on the total amount of charges for repair, maintenance or installation services to its customers, except where the customer claims exemption pursuant to section 1115 or 1116(a) of the Tax Law. In those cases, Petitioner must obtain the appropriate and properly completed exemption certificate or other documentation (such as a governmental purchase order) from its customer. See section 1132(c) of the Tax Law. Petitioner's subcontractors may obtain a refund or credit for sales tax paid on their purchases of materials which become a physical component of the real property being repaired or maintained. Materials which retain their identity as tangible personal property after installation may be purchased by Petitioner or its subcontractor for resale by issuing a properly completed *Contractor Exempt Purchase Certificate* (Form ST-120.1) to its supplier. Any tools or supplies

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used or consumed by the subcontractors in the performance of the repair or maintenance work are subject to sales tax.

Petitioner's periodic bills to its customers are for the actual services performed plus a mark-up to cover Petitioner's administrative and other costs. If Petitioner's bill itemizes both taxable services and exempt capital improvement services, and separately states the charges for the services, Petitioner need not collect sales tax on any charges to its customer for the performance of capital improvement services. Petitioner should obtain certificates of capital improvement from customers on whose real property capital improvement services are performed. See *AA Nursery*, Adv Op St Tx Comm, August 21, 1985, TSB-A-85(32)S. If the project qualifies for exemption from tax pursuant to section 1115(a) of the Tax Law or if Petitioner's customer is an organization exempt from sales tax pursuant to section 1116(a) of the Tax Law, Petitioner need not collect sales tax on any portion of its bill or invoice to such customer.

However, Petitioner must collect sales tax on the full amount of its charges for any taxable repair, maintenance or installation services performed on property located in New York State. The taxable receipts may not be reduced by Petitioner's costs of managing the contractor network (hiring, firing and dispute resolution), customer service costs and any other costs incurred by Petitioner in the administration and performance of its service contracts with its customers. Such expenses are not deductible from the taxable receipt. See section 1101(b)(3) of the Tax Law and section 526.5(e) of the Sales and Use Tax Regulations. Petitioner must collect sales tax at the rate in effect at the location where the services are performed or delivered. The address to which Petitioner's bill or invoice is mailed to its customer is irrelevant in determining the taxable status of a receipt or the tax rate. Any repair, maintenance or installation services performed on real property at locations outside New York State are not subject to New York State and local sales taxes. See section 525.2(a)(2) and (3) of the Sales and Use Tax Regulations.

DATED: March 11, 2005

/s/
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NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.