

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

TSB-A-07(4)S
Sales Tax
February 8, 2007

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S060925A

On September 25, 2006, the Department of Taxation and Finance received a Petition for Advisory Opinion from Michaels Prospect Plaza, LLC, c/o Arthur Brown, Esq., Levine, Staller, Sklar, Chan, Brown & Donnelly, P. A., 3030 Atlantic Avenue, Atlantic City, New Jersey 08401. Petitioner, Michaels Prospect Plaza, LLC, provided additional information pertaining to the Petition on October 17, 2006, and December 26, 2006.

The issue raised by Petitioner is whether tangible personal property purchased by Petitioner, its contractors and its subcontractors that becomes an integral component part of the premises leased by Petitioner from the New York City Housing Authority is subject to sales tax.

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

Petitioner is a developer and a contractor engaged in the complete rehabilitation of three high-rise buildings containing approximately 450 apartment units and a community center. The rehabilitated apartments and community center (Project) will be rented to low-income households. The land and buildings to be rehabilitated are owned by the New York City Housing Authority (Authority). The Authority has legal title to all buildings and other real property improvements constructed on or under the land. Pursuant to section 401 of the New York Public Housing Law, the Authority is a public corporation of New York State.

The Authority, as lessor, will lease the land, buildings and improvements to Petitioner, as lessee, pursuant to a long-term (50 years or more) lease. Pursuant to the lease, title to all improvements installed by Petitioner, its contractors and its subcontractors will vest in the Authority immediately upon installation.

All tangible personal property incorporated or installed in the Project will be permanently affixed to the real property. It is presumed for purposes of this Opinion that such tangible personal property becomes an integral component part of the real property.

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:

* * *

(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

Section 1105 of the Tax Law provides, in part:

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, excluding a mobile home, or maintaining, servicing or repairing tangible personal property, including a mobile home, 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

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

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 (ii) adding to, altering or improving real property, property or land (A) of such an organization . . . 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 . . . 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 1116(a) of the Tax Law provides, in part:

Except as otherwise provided in this section, any sale . . . to any of the following or any use or occupancy by any of the following shall not be subject to the sales and compensating use taxes imposed under this article:

(1) The state of New York, or any of its agencies, instrumentalities, public corporations (including a public corporation created pursuant to agreement or compact with another state or Canada) or political subdivisions where it is the purchaser, user or consumer . . . ;

Section 1132(c)(1) of the Tax Law provides, in part:

For the purpose of the proper administration of this article and to prevent evasion of the tax hereby imposed, it shall be presumed that all receipts for property or services of any type mentioned in subdivisions (a), (b), (c) and (d) of section eleven hundred five . . . are subject to tax until the contrary is established, and the burden of proving that any receipt . . . is not taxable hereunder shall be upon the person required to collect tax or the customer. . . . unless (i) a vendor, not later than ninety days after delivery of the property or the rendition of the service, shall have taken from the purchaser a resale or exemption certificate in such form as the commissioner may prescribe, signed by the purchaser and setting forth the purchaser's name and address and, except as otherwise provided by regulation of the commissioner, the number of the purchaser's certificate of authority, together with such other information as the commissioner may require, to the effect that the property or service was purchased for resale or for some use by reason of which the sale is exempt from tax under the provisions of section eleven hundred fifteen, and, where such resale or exemption certificate requires the inclusion of the purchaser's certificate of authority number or other identification number required by regulations of the commissioner, that the purchaser's certificate of authority has not been suspended or revoked and has not expired as provided in section eleven hundred thirty-four, or (ii) the purchaser, not later than ninety days after delivery of the property or the rendition of the service, furnishes to the vendor: any affidavit, statement or additional evidence, documentary or otherwise, which the commissioner may require demonstrating that the purchaser is an exempt organization described in section eleven hundred sixteen, the sale shall be deemed a taxable sale at retail. . . .

Section 529.2(a) of the Sales and Use Tax Regulations provides:

Governmental entities. (1) *Agencies and instrumentalities of the State* as used in this section means any authority, commission or independent board created by an act of the Legislature for a public purpose.

(2) *A public corporation* as used in this section means any corporation created by an act of the Legislature for a public purpose or pursuant to an agreement or compact with another state or Canada.

Example: Urban Development Corporations and Industrial Development Agencies are public corporations and may purchase tangible personal property exempt from the sales and use taxes.

Section 541.1 of the Sales and Use Tax Regulations provides, in part:

(b) The principal distinguishing feature of a sale to a contractor, as compared to a sale to other vendors who purchase tangible personal property for resale, is that the sale of tangible personal property to a contractor for use or consumption in construction is a retail sale and subject to sales and use tax, regardless of whether tangible personal property is to be resold as such or incorporated into real property as a capital improvement or repair. Whenever a contractor uses materials, on which the contractor has paid sales tax, in a repair or maintenance contract . . . subject to the sales tax on services under section 1105(c) of the Tax Law, the contractor may be entitled to a refund or credit of the portion of the tax he paid attributable to the materials transferred to the customer.

* * *

(e) Tangible personal property purchased by a contractor that is to become an integral component part of real property owned by an organization described in section 1116(a) of the Tax Law is exempt from the New York State and local sales tax. . . .

Section 541.3(d) of the Sales and Use Tax Regulations provides, in part:

Contracts with exempt organizations. (1) Tangible personal property incorporated into real property owned by a governmental entity or by an exempt organization is exempt, whether the contract is on a lump sum, time and material, cost-plus, or other basis.

(2) Purchase for contracts (other than agency contracts).

(i) Tangible personal property sold to a contractor, subcontractor, or repairman for use in erecting, repairing, adding to, or altering a structure or building owned by an exempt organization, described in section 1116(a) of the Tax Law, is exempt when it is to become an integral component part of such structure or building.

* * *

(iv) Except for agency contracts, contractors' purchases of construction supplies which do not become part of an exempt organization's real property and are used or consumed by the contractor, as well as purchases of taxable services, such as electricity used by the contractor, are subject to the tax.

* * *

(v) Documents. (a) If the customer is a governmental entity, copies of signed contracts and government purchase orders are sufficient evidence to establish the exempt status of the job between the governmental entity and the prime contractor. With respect

to the documents required between a prime contractor and the subcontractors, a signed document between them which identifies the project, location, and exempt owner, will form the basis for tax exemption of tangible personal property purchased for incorporation into the exempt project. When purchasing such tangible personal property for the exempt project, the contractor or subcontractor will issue a properly completed contractor exempt purchase certificate to the supplier.

Opinion

In general, a purchase by a contractor or subcontractor of any material that is actually incorporated into and becomes an integral component part of real property is subject to sales tax as a retail purchase by such contractor or subcontractor. See section 1101(b)(4) of the Tax Law. Such material is considered to be used or consumed by the contractor or subcontractor in the performance of its contract. See section 541.1(b) of the Sales and Use Tax Regulations. However, a contractor or subcontractor may purchase materials exempt from tax when the material becomes an integral component part of real property of an entity or organization that is exempt from sales tax pursuant to section 1116(a) of the Tax Law. See sections 1115(a)(15) and (16) of the Tax Law.

In the present case, Petitioner is a developer and a contractor engaged in the complete rehabilitation of three high-rise buildings owned by the New York City Housing Authority (Authority). The Authority, as lessor, will lease the land, buildings, and improvements to Petitioner pursuant to a long-term lease. Pursuant to the lease, title to all improvements made by Petitioner, its contractors and its subcontractors will vest in the Authority immediately when such items are installed and become part of the premises.

The Authority is a governmental entity exempt from sales tax under section 1116(a)(1) of the Tax Law. See section 401 of the New York Public Housing Law and section 529.2 of the Sales and Use Tax Regulations. Section 1115(a)(15) of the Tax Law provides that tangible personal property sold to a contractor, subcontractor, or repairman for use in adding to, altering, or improving real property, property, or land of an organization described in section 1116(a) of the Tax Law can be purchased by the contractor, subcontractor, or repairman without the payment of sales tax, provided such tangible personal property becomes an integral component part of the structure, building, or real property. See section 541.1(e) of the Sales and Use Tax Regulations.

Materials purchased for installation by Petitioner, its contractors or its subcontractors become integral component parts of the real property owned by the Authority. The Authority takes immediate title to and possession of such materials upon installation. Therefore, the purchase of such materials by Petitioner, its contractors or its subcontractors is exempt from sales and use tax as provided under section 1115(a)(15) of the Tax Law. See *450 Lexington Venture*, Adv Op Comm T & F, March 7, 1989, TSB-A-89(8)S; *Insurance Services Office, Inc.*, Adv Op Comm T & F, February 22, 1991, TSB-A-91(23)S. It is noted that charges to Petitioner

TSB-A-07(4)S
Sales Tax
February 8, 2007

for the services of installing tangible personal property or maintaining or repairing real property when such services do not result in a capital improvement to real property are subject to sales tax under section 1105(c)(3) or 1105(c)(5) of the Tax Law. See *E. E. Root & Sons, Inc.*, Adv Op Comm T & F, August 1, 2005, TSB-A-05(30)S.

Petitioner, its contractors, and its subcontractors should furnish each supplier with a properly completed *Contractor Exempt Purchase Certificate* (Form ST-120.1) when purchasing tangible personal property to be incorporated as integral component parts of the real property owned by the Authority in order to purchase such tangible personal property exempt from sales tax. See section 1132(c)(1) of the Tax Law. Petitioner should maintain in its records a copy of the lease between Petitioner and the Authority to substantiate the exempt nature of the transactions. See *450 Lexington Venture, supra*. Petitioner's contracts with its contractors and its subcontractors identifying the project, location, and exempt owner will form the basis for the sales tax exemption for tangible personal property purchased by Petitioner's contractors and subcontractors for incorporation into the Project. See section 541.3(d)(2)(v) of the Sales and Use Tax Regulations.

DATED: February 8, 2007

/s/
Jonathan Pessen
Tax Regulations Specialist IV
Technical Services Division

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