

**New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Taxpayer Guidance Division**

TSB-A-08(25)S
Sales Tax
June 6, 2008

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S071227C

On December 27, 2007, the Department of Taxation and Finance received a Petition for Advisory Opinion from Jamie Smarr, New York City Educational Construction Fund, 30-30 Thomson Avenue, Suite 4021, Long Island City, NY 11101.

The issue raised by Petitioner, Jamie Smarr, is whether tangible personal property sold to a contractor for use in erecting a building on the property of a sales tax exempt organization remains exempt from sales tax when the completed building will be used for both public and private purposes.

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

Petitioner is Executive Director of an organization that is a governmental entity exempt from sales tax under section 1116(a)(1) of the Tax Law. The exempt organization is the owner of real property situated in New York on which it intends to construct a building. Petitioner has entered into contracts with a private developer to construct a mixed-use building on the exempt organization's property. The building will have both public (schools) and private (residential cooperative units, residential rental units, and retail units) uses. The developer will pay for the construction of the private-use portion of the building, and the exempt organization will pay for the construction of the public-use portion of the building. Construction costs for certain portions of the building, for example the common foundation, will be shared by the exempt organization and the private developer. The exempt organization will retain ownership of the entire building and will lease the private-use portion of the building to the developer or to another private third party.

Applicable law and regulations

Section 1101(b)(4)(i) of the Tax Law defines the term *retail sale*, in part, to mean:

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, except that a sale of a new mobile home to a contractor, subcontractor or repairman who, in such capacity, installs such property is not a retail sale. . . .

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.

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.

Section 1116 of the Tax Law provides, in part:

Exempt organizations. (a) Except as otherwise provided in this section, any sale or amusement charge by or 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, or where it is a vendor of services or property of a kind not ordinarily sold by private persons;

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) Purchases 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.

Example 1: An exempt organization contracts to have a building erected on its land. Purchases by its contractor of tangible personal property, such as nails, sheetrock, and plywood that become part of the structure are exempt.

* * *

(ii) Purchases of tangible personal property incorporated into the real property of an exempt organization by subcontractors and repairmen are accorded the same treatment as purchases by the prime contractor.

(iii) Tangible personal property purchased by a contractor, which remains tangible personal property after installation, is exempt from the tax when purchased for and sold to an exempt organization.

* * *

(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.

The following types of property and services are representative, but not intended to be all-inclusive, of contractor's purchases which are subject to tax, irrespective of whether the contractor has a time and material, lump sum, or other type of contract (except agency contract), with an exempt organization:

(a) construction machinery and equipment, including rentals and repair parts;

(b) contractors' office supplies;

(c) contractors' supplies, tools, and miscellaneous equipment, whether purchased or rented, including materials to make forms and scaffolding; and

(d) any other items purchased or rented by a contractor for his use in performing the contract and not incorporated into the realty.

Example 7: Lumber and other materials which are used to build forms are not exempt since they do not become a component part of the structure.

Example 8: Equipment rentals under the dominion and control of the contractor, such as rentals of cranes, bulldozers, backhoes, etc. for use in building a structure for an exempt organization are subject to 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.

Section 541.9(a) of the Sales and Use Tax Regulations provides, in part:

The purchase, rental, lease or license to use construction equipment . . . by a contractor is subject to sales and use tax.

Section 541.9(c)(1) of the Sales and Use Tax Regulations provides, in part:

Rentals and leases of equipment to contractors.

(i) Where a contractor leases equipment, the contractor is liable for the combined State and local sales and use tax on the total charges at the highest rate in effect in any jurisdiction in which the equipment is used during the lease payment period, (*e.g.*, daily, weekly, monthly, depending on the frequency of payment).

Opinion

Petitioner is Executive Director of an organization that is a governmental entity exempt from payment of sales tax under section 1116(a)(1) of the Tax Law. The exempt organization will enter into contracts with a private developer to construct a mixed-use building on real property owned by the exempt organization. The exempt organization will pay for the construction of the public-use portion of the building, the developer will pay for the construction of the private-use portion, and both parties will share the cost of the common areas of the building, such as the shared foundation. The exempt organization will retain ownership of the real property and building and will lease the private-use portion of the building to the developer or to another private third party.

Section 1116(a)(1) of the Tax Law provides that purchases made by New York governmental entities are exempt from sales tax. Therefore, all purchases made by Petitioner's organization that are related to the construction of the building, including purchases or leases of construction machinery and equipment, are exempt from sales tax.

Section 1115(a)(15) of the Tax Law provides that tangible personal property incorporated into a structure, building, or real property owned by a governmental entity, or by an organization, exempt from tax under section 1116(a) is exempt, whether the construction contract is on a lump-sum, time-and-material, cost-plus, or other basis. See section 541.3 of the Sales and Use Tax Regulations. Therefore, in the present case, the developer's purchases of tangible personal property that are incorporated into the exempt organization's building or real property are not subject to sales tax. The exemption is granted because of the exempt organization's ownership of the building and real property and applies to purchases made for both the public and private-use portions of the building. The developer and its subcontractors may purchase the property exempt from tax by presenting vendors with a properly completed Form ST-120.1, *Contractor Exempt Purchase Certificate*.

Equipment leased or purchased and supplies purchased by the developer do not become an integral component part of the exempt organization's real property. Equipment and supplies are considered to be used or consumed by the developer in the performance of its contracts. No tax exemption applies to such equipment leased or purchased and supplies purchased for the developer's own use. Therefore, the developer must pay sales tax under section 1105(a) of the Tax Law on equipment, supplies, and any other property purchased for use in complying with its contractual obligations (other than agency contracts) that are not incorporated into the realty of

the exempt organization. See section 1101(b)(4)(i) of the Tax Law and section 541.3(d)(2) of the Sales and Use Tax Regulations.

DATED: June 6, 2008

/s/
Jonathan Pessen
Tax Regulations Specialist IV
Taxpayer Guidance Division

NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.