

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

TSB-A-08(33)S
Sales Tax
July 23, 2008

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S070928A

On September 28, 2007, the Department of Taxation and Finance received a Petition for Advisory Opinion from Macro Integration Services, Inc., 311 S. Regional Rd, Greensboro, NC 27409. Petitioner, Macro Integration Services, Inc., provided additional information with respect to the Petition on January 28, 2008, and March 4, 2008.

The issues raised by Petitioner are:

1. Whether the service of installing point-of-sale cash register systems is subject to sales tax.
2. Whether ancillary services sold in conjunction with the installation of cash register systems are subject to sales tax.

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

Petitioner is a North Carolina based company that installs point-of-sale cash register systems in grocery stores and similar retail establishments. Petitioner does not sell the cash register systems. Customers purchase the cash register systems from third party vendors. The equipment purchased by the customers is delivered to Petitioner at its staging area with software already uploaded onto the registers. Petitioner tests the equipment and software before installing the equipment at customers' retail locations which are located both within and without New York State. In addition, Petitioner provides an on-site survey which tests the power supply and cable requirements at the customer's retail location to ensure electrical needs are met. Petitioner, at the customer's retail location, drills holes into the countertops and runs necessary cabling to hook up equipment to the power supply.

Petitioner sells uninterrupted power supply (UPS) equipment, which is delivered and installed at the customer's site location which may or may not be located within New York State. Petitioner also provides cable, jacks, power strips, and other necessary computer hardware peripherals such as a keyboard and mouse, for which items the customer is separately billed. In certain circumstances, Petitioner will charge for the removal and storage of old equipment.

All charges for delivery of hardware, hardware installation services, staging services, and removal and storage services of used equipment are separately stated on the bill or invoice to the customer. Petitioner provided sample copies of invoices along with a "Scope of Work" document which instructs each technician what to do at each store.

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 ... without any deduction for expenses or early payment discounts and also including any charges by the vendor to the purchaser for shipping or delivery,...

* * *

(5) Sale, selling or purchase. Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume (including, with respect to computer software, merely the right to reproduce), conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefore, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor.

(6) Tangible personal property. Corporeal personal property of any nature. However, except for purposes of the tax imposed by subdivision (b) of section eleven hundred five, such term shall not include gas, electricity, refrigeration and steam. Such term shall also include pre-written computer software, whether sold as part of a package, as a separate component, or otherwise, and regardless of the medium by means of which such software is conveyed to a purchaser . . .

* * *

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

(A) Substantially adds to the value of 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,...

* * *

(4) Storing all tangible personal property not held for sale in the regular course of business and the rental of safe deposit boxes or similar space.

(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(o) of the Tax Law provides:

Services otherwise taxable under subdivision (c) of section eleven hundred five or under section eleven hundred ten shall be exempt from tax under this article where

performed on computer software of any nature; provided, however, that where such services are provided to a customer in conjunction with the sale of tangible personal property any charge for such services shall be exempt only when such charge is reasonable and separately stated on an invoice or other statement of the price given to the purchaser.

Section 1119(a) of the Tax Law provides:

Subject to the conditions and limitations provided herein, a refund or credit shall be allowed for a tax paid pursuant to subdivision (a) of section eleven hundred five or section eleven hundred ten

(1) sale or use of tangible personal property if the purchaser or user, in the performance of a contract, later incorporates that tangible personal property into real property located outside this state.

Section 525.2 (a)(3) of the Sales and Use Tax Regulations provides, in part:

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:

(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....

* * *

(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.

Section 527.1 of the Sales and Use Tax Regulation provides, in part:

(a) *Imposition.* The sales tax is imposed on the receipts from every retail sale of tangible personal property delivered by the vendor to the purchaser or the purchaser's designee in this State, unless specifically exempt or excluded under the Tax Law.

(b) *Taxable and exempt items sold as a single unit.* When tangible personal property, composed of taxable and exempt items sold as a single unit, the tax shall be collected on the total price.

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

(a) Imposition. (1)The tax is imposed on receipts from every sale of the services of installing, maintaining, servicing or repairing tangible personal property, by any means including coin-operated machines, whether or not any tangible personal property is transferred in conjunction with the services.

(2) Installing means setting up tangible personal property or putting it in place for use.

* * *

(3) Maintaining, servicing and repairing are terms used to cover all activities that relate to keeping tangible personal property in a condition of fitness, efficiency, readiness or safety or restoring it to such condition.

* * *

Example 6: A company operates a diagnostic service in which it tests an appliance for a set fee, but does not repair the appliance. The charge for the diagnostic service is taxable.

Technical Services Bureau Memorandum, *State and Local Sales and Compensating Use Taxes Imposed on Certain Sales of Computer Software*, March 1, 1993, TSB-M-93(3)S, provides, in part:

Prewritten computer software is any computer software that is not designed and developed by the author or other creator to the specifications of a specific purchaser.

* * *

Customer Support and Related Services

Services taxable under section 1105(c) of the Tax law are exempt from tax under section 1115(o) of the Tax Law where performed on any computer software. However, where such services to be performed on software are sold in conjunction with the sale of tangible personal property, such as prewritten software, the charge for such services is exempt only if it is reasonable and separately stated on the invoice or billing statement given to the customer.

Thus, charges for customer (user) support or for information services provided by a vendor to a customer, either in person or by some type of telecommunications arrangement (e.g., telephone, modem, facsimile machine, etc.), in the nature of training,

consulting, instructing or other diagnostic or troubleshooting services related to prewritten software are exempt from sales and use taxes where the charges are reasonable and separately stated. Charges for the service of installing, repairing, maintaining or servicing prewritten software are also exempt from sales and use taxes where the charges are reasonable and separately stated on the invoice. Of course, any charges for the above described services sold in conjunction with custom software are exempt from tax.

Opinion

Petitioner installs point-of-sale cash register systems at its customers' retail store locations. The equipment is purchased by the customer from other vendors and delivered to Petitioner at its staging area. The equipment together with software, already owned by the customer and uploaded onto the cash register, is tested by Petitioner while the equipment is in Petitioner's staging area to ensure proper operation once the equipment is installed on site.

Petitioner also sells and installs UPS power supply equipment and related peripheral equipment to customers, which is delivered to the customer's retail site location which may or may not be located within New York State. Petitioner may also make charges for the removal and storage of old equipment.

Petitioner drills holes into the countertops and runs necessary cabling to hook up the point-of-sale cash registers to the power supply. Petitioner's services of installing the point-of-sale cash registers and peripheral items such as a keyboard and mouse, constitute the installation of computer hardware. Sales of the services of installing computer hardware are subject to sales tax under section 1105(c)(3) of the Tax Law. Petitioner's sales of computer hardware or peripheral items such as a keyboard and mouse are subject to sales tax under section 1105(a) of the Tax Law.

The installation of UPS equipment, cable, and other power supply items, may qualify as a capital improvement to real property and not be subject to New York State and local sales tax if certain conditions are met. See section 1101(b)(9) of the Tax Law. *Sales and Use Tax Classifications of Capital Improvements and Repairs to Real Property*, Publication 862 (4/01), lists certain installations that will qualify as a capital improvement to real property provided all of the conditions are met. The complete wiring or rewiring of structures; original installation of circuit breakers, outlets, and switches; along with the original installation or complete replacement of multi-outlet strips, breaker panels, and wiring are examples of some types of work that may qualify as a capital improvement. If the installation of the UPS equipment, cable, and other power supply items, meets the definition of a capital improvement, and the charges for such installation are reasonable and separately stated on the bill or invoice to the customer, this portion of the charges to the customer will be exempt from New York State and local sales and use taxes. See sections 1105(c)(3)(iii) and 1115(a)(17) of the Tax Law. If the charges for taxable and nontaxable property or services provided to a customer are not reasonable and

separately stated on the bill or invoice to the customer, then the entire charge is subject to sales tax. See section 527.1(b) of the Sales and Use Tax Regulations.

It should be noted that installations made for the purpose of conducting the business of one who is not the owner of the real property (e.g., a tenant, licensee, or franchisee) are presumed not to be permanent, but made for the sole use and enjoyment of the person who owns the business and not for the purpose of the landlord's estate. See *Matter of Flah's of Syracuse v Tully*, 89 AD2d 729. Such installations, therefore, are presumed not to be capital improvements. An installation made for a tenant may nevertheless qualify as a capital improvement if the lease provides that title to the improvement is to vest in the landlord upon installation and that the improvement is to become a part of the premises and remain on the premises upon the termination of the lease. See Publication 862, *supra*, and *Beaman Corporation*, Adv Op St Tx Comm, August 19, 1982, TSB-A-82(32)S. If the installation of the UPS equipment, cable, and other power supply items does not constitute a capital improvement, the sale and installation of such UPS equipment and other items are all subject to sales tax under sections 1105(a) and 1105(c)(3) of the Tax Law when delivered and installed in New York State. Though the sale of some of the equipment may ultimately be for delivery and use outside of New York, the receipts for all such sales delivered within New York State are subject to tax. See section 525.2(a)(3) of the Sales and Use Tax Regulations. Petitioner may be eligible for a credit or refund of sales tax for any property which New York State sales tax was paid upon, and was subsequently installed at an out of state location. See section 1119 of the Tax Law.

Petitioner tests the point-of-sale cash registers before installing them at customer locations. Petitioner also provides an on-site survey which tests the power supply and cable requirements at the customer's location to ensure electrical needs are met. Maintaining, servicing, or repairing are terms used to cover all activities that relate to keeping property in a condition of fitness, efficiency, readiness or safety or restoring it to such condition. The equipment testing and the on-site survey, which is comprised of electronic testing of the on-site cabling to ensure proper capacity needs are met, are considered to be services to real and tangible personal property subject to sales tax under section 1105(c)(3) and/or 1105(c)(5) of the Tax Law. See section 527.5(a)(3), Example 6, of the Sales and Use Tax Regulations.

The taxable services enumerated under section 1105(c) of the Tax Law are not subject to sales tax when performed on computer software. See section 1115(o) of the Tax Law. Petitioner tests the software which was uploaded onto the cash register by a separate third-party vendor. Such service is considered to be maintaining and servicing pre-written computer software. Provided Petitioners' charges are reasonable and separately stated on the bill or invoice to the customer, the charges for testing the software are not subject to sales tax. See 1115(o) of the Tax Law. If the charges for software testing are not reasonable and separately stated from the charges for testing the cash register equipment, then the entire charge for such testing services will be subject to tax.

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Charges for the removal and storage of old equipment are subject to sales tax regardless of whether the charges are separately stated on the customer's bill or invoice if the storage is performed in New York. See section 1105(c)(4) of the Tax Law.

DATED: July 23, 2008

/s/
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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.