

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

TSB-A-08(44)S  
Sales Tax  
October 3, 2008

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S080529A

On May 29, 2008, the Department of Taxation and Finance received a Petition for Advisory Opinion from JetBlue Airways Corporation, 19 Old Kings Highway, Suite 23, Darien, Connecticut 06820. Petitioner, JetBlue Airways Corporation, provided additional information pertaining to the Petition on July 1, 2008.

The issues raised by Petitioner are:

1. Whether the portion of a contractor's bill to Petitioner as a tenant in an airport terminal for repairs and maintenance to the terminal that represents the cost of materials incorporated into the real property is subject to sales tax.
2. Whether Petitioner's purchase of materials that are used to repair or maintain the airport terminal, with the repair and maintenance services being performed either by Petitioner's employees or a third party contractor hired by Petitioner to perform the repairs and maintenance, are subject to sales tax.

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

Petitioner is the prime tenant at Terminal 6 at John F. Kennedy International Airport (JFK) and currently operates out of Terminal 6. JFK is owned by the city of New York and is operated by the Port Authority of New York and New Jersey (Port Authority). Petitioner is a commercial air carrier, which began operating from JFK in January 2000. Petitioner's lease mandated that it spend at least \$4 million to improve Terminal 6. Petitioner hires contractors who perform capital improvements or repair and maintenance services to its leasehold. Title to all construction work vests in the city of New York when the property is erected, constructed, or installed or otherwise becomes part of the premises.

**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...including any amount for which credit is allowed by the vendor to the purchaser, without any deduction for expenses for early payment discounts and also including any charges by the vendor to the purchaser for shipping or delivery,...

(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 . . . 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:

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 . . . 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:

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 for exemption from the sales and compensating use taxes with respect to purchases by New York State governmental entities, United States governmental entities, certain nonprofit organizations and other entities who have received New York State sales tax exempt organization status.

Section 525.2(a)(4) of the Sales and Use Tax Regulations provides:

The sales tax is generally a “consumer tax.” That is, the person required to collect tax must collect the tax from the customer (i.e., the consumer) when collecting the taxable receipt, rent or amusement charge to which the tax applies. The customer cannot shift the liability for payment of the tax to another person nor otherwise be relieved of such liability. The vendor, or other person required to collect the tax, collects the tax as trustee for and on account of the State and is also personally liable for the tax required to be collected.

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

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 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.

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

New York State, agencies, instrumentalities, public corporations, and political subdivisions thereof. (Tax Law, § 1116(a)(1))

(a) 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.

\* \* \*

(3) A *political subdivision* as used in this section means a county, town, city, village, school district, fire district, special district corporation and board of cooperative educational services of this State.

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.

\* \* \*

(d) Receipts from the services of repairing, maintaining or servicing of real property . . . and tangible personal property, and the receipts from the installation of tangible personal property that remains tangible personal property are subject to the New York State and local sales tax unless otherwise exempt.

(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. . . .

## **Opinion**

Petitioner is the prime tenant at Terminal 6 at John F. Kennedy International Airport (JFK) which is owned by the city of New York and operated by the Port Authority of New York and New Jersey (Port Authority). Petitioner hires contractors who perform capital improvements or repair and maintenance services to its leasehold. All construction work becomes the property of the city of New York upon completion. Both the city of New York and the Port Authority are governmental entities exempt from the sales tax pursuant to section 1116(a) of the Tax Law. See section 529.2(a) of the Sales and Use Tax Regulations.

## Issue 1

Section 1101(b)(4)(i) of the Tax Law provides that 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 is a retail sale to the contractor regardless of whether the tangible personal property ( hereinafter referred to as “building materials”) is to be resold as such before it is so used or consumed. Section 525.2(a)(4) of the Sales and Use Tax Regulations provides that the sales tax is generally a “consumer tax.” That is, the person required to collect tax must collect the tax from the customer (i.e., the consumer) when collecting the taxable receipt, rent or amusement charge to which the tax applies. Taken together, section 1101(b)(4) of the Tax Law and section 525.2(a)(4) of the Sales and Use Tax Regulations provide that contractors, subcontractors and repairmen are the users or consumers of building materials that they purchase. See section 526.6(b) of the Sales and Use Tax Regulations.

Section 1105(a) of the Tax Law imposes sales tax on all sales of tangible personal property unless specifically exempted and section 1105(c) imposes sales tax on certain enumerated services. Section 1105(c)(5) of the Tax Law imposes the tax on the services of maintaining, servicing, or repairing real property, property or land. When contractors, subcontractors, and repairmen perform these services, they are not making a sale of tangible personal property in the form of building materials taxable to the contractor’s customer under section 1105(a) of the Tax Law. Rather, contractors, subcontractors, and repairmen are performing services that may be taxable under section 1105(c) of the Tax Law. See sections 527.7 and 541.1(b) of the Sales and Use Tax Regulations. In performing these services, they may use or consume tangible personal property in the form of building materials. See *Michaels Prospect Plaza, LLC, c/o Arthur Brown, Esq., Levine, Staller, Sklar, Chan, Brown & Donnelly, P. A.*, Adv Op Comm T & F, February 8, 2007, TSB-A-07(4)S.

Accordingly, when a property owner or tenant purchases the services of a contractor, subcontractor, or repairman to maintain, service or repair real property, property or land, regardless of the type of contract (e.g., lump sum, time and materials, etc.), the property owner or tenant is purchasing services that are taxable under section 1105(c) of the Tax Law. In such instance, the contractor, subcontractor, or repairman is not making a sale of tangible personal property (i.e., building materials) to the property owner or tenant taxable under section 1105(a) of the Tax Law. Rather, the contractor, subcontractor, or repairman is the user or consumer of such building materials in the performance of its contract.

If the contract is for repair or maintenance of real property, the contractor, subcontractor, or repairman must collect sales tax based on its entire receipt for the services performed for its customer, including any portion of the receipt that may be attributable to the contractor’s cost of building materials. See section 1101(b)(3) of the Tax Law. If, however, the customer is an entity or organization exempt from sales tax pursuant to section 1116(a) of the Tax Law, the contractor, subcontractor, or repairman may accept a properly completed *Exempt Organization*

*Exempt Purchase Certificate* (Form ST-119.1) in lieu of collecting the sales tax from the customer. The contractor, subcontractor, or repairman may purchase building materials that become an integral component part of the real property of an entity exempt from tax pursuant to the provisions of section 1116(a), without payment of sales tax. See section 1115(a)(16) of the Tax Law. However, the provisions of sections 1115(a)(16) and 1116(a) have no bearing on the charge to a customer, which is not an entity exempt from tax pursuant to the provisions of section 1116(a), for a repair or maintenance service subject to tax under section 1105(c)(5) of the Tax Law.

Therefore, when Petitioner is the purchaser under a contract for repair or maintenance services that do not qualify as capital improvement services to real property, there is no exemption provided in the Tax Law for such services from the taxes imposed under section 1105(c)(3) or (5) of the Tax Law. The contractor must collect sales tax from Petitioner on the entire receipt for the repair or maintenance service including any portion of the receipt that may be attributable to the contractor's cost of building materials.

## **Issue 2**

Sections 1115(a)(15) and (16) of the Tax Law provide exemptions from sales tax on the purchase by a contractor, subcontractor or repairman of building materials when the building materials become an integral component part of the property of an entity exempt from sales tax under section 1116(a) of the Tax Law. See section 541.1(e) of the Sales and Use Tax Regulations. In the present case, Petitioner wishes to purchase the materials and use them itself or hire a subcontractor to install the materials, as part of a repair or maintenance project. Petitioner will, in effect, be acting as its own prime contractor. Petitioner's purchases of materials for use in the repair or maintenance project will qualify for exemption from sales tax under section 1115(a)(16) of the Tax Law, provided that such materials become an integral component part of real property owned by New York City. Provided that Petitioner is registered for sales tax purposes and has a valid *Certificate of Authority* for sales tax, it is authorized to issue a properly completed *Contractor Exempt Purchase Certificate* (Form ST-120.1) in lieu of paying sales tax to the building material supplier on the purchase of such materials. Petitioner may then, independent of its purchase of materials that are to be incorporated into the property, hire a subcontractor to install the purchased materials in the course of the subcontractor's performance of the repair or maintenance project. Any charge to Petitioner by the subcontractor for repair or maintenance services to Petitioner's landlord's real property (i.e., to Terminal 6 owned by the city of New York) is subject to sales tax under section 1105(c)(3) or 1105(c)(5) of the Tax Law, including any portion of the charge by the subcontractor representing the subcontractor's cost of materials.

Lastly it is noted that any purchases by Petitioner of tangible personal property used or consumed by Petitioner or its subcontractors in the performance of repair or maintenance

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contracts that are not incorporated into the realty as an integral component part of such property are subject to sales tax.

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/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