

New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-10(42)S
Sales Tax
September 22, 2010

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S100611A

On June 11, 2010, a Petition for Advisory Opinion was received from [REDACTED]. Petitioner asks whether it is liable for sales or use tax on purchases of materials used to fabricate windows, or on sales and installation of the windows.

We conclude that (1) Petitioner's purchases of materials for fabricating windows that Petitioner will install are subject to sales or use tax, unless the windows will be installed in property owned by an exempt organization or government entity; (2) Petitioner's purchases of materials for fabricating windows that it will sell to contractors or property owners, but not install, are subject to tax, but Petitioner is entitled to a refund or credit of the tax paid; (3) Petitioner's sales of windows that it will install for customers are not subject to tax; and (4) Petitioner's sales of windows that it will not install are subject to tax, unless the windows will be installed in property of an exempt organization or government entity, or the windows are sold directly to an exempt organization or government entity.

Facts

Petitioner operates a factory in [REDACTED] where windows are fabricated. The sales and administrative office is located in [REDACTED] New York. Petitioner purchases materials (aluminum and other metal parts and extrusions, hardware and glass) and uses them to manufacture windows. These windows are all custom designed and fabricated to meet the project architect's specifications. Petitioner stores the windows until they are ready to be installed. Petitioner does not maintain any windows in inventory that are not manufactured to the customer's specifications. Almost all of these windows are installed by Petitioner or its subcontractors in new or existing buildings located within and without New York State. Some of the windows are sold directly to either the owner or the contractor for installation by it. Some of the buildings are located outside of New York State. Some of the buildings located within New York State are owned by entities that are exempt from sales tax as either exempt organizations or as governmental entities. The other buildings are owned by for-profit entities.

Analysis

General background

The installation or entire replacement of complete windows (i.e., frames and sashes) is a capital improvement to real property. *See* Publication 862, *Sales and Use Tax Classifications of Capital Improvements and Repairs to Real Property* (4/01), at p. 25. Accordingly, a contractor's charges for the sale and installation of windows in new or existing buildings are not subject to sales tax. Tax Law §§1105(c)(3)(iii), 1115(a)(17).

Fabricators and manufacturers who install their fabricated or manufactured product into real property are contractors. *See* 20 NYCRR §541.11(a). Accordingly, Petitioner is a contractor for sales tax

purposes. A contractor's purchases of tangible personal property for use or consumption in performing a capital improvement are retail purchases subject to sales tax under Tax Law §1105(a). *See* Tax Law §1101(b)(4)(i). These purchases will be exempt if the tangible personal property becomes an integral component part of real property owned by an organization or governmental entity exempt from tax under Tax Law §1116(a). *See* Tax Law §1115(a)(15).

A contractor who manufactures a product, like a window, and then fabricates and installs the product to the specifications of a capital improvement is making a use of the product subject to compensating use tax under Tax Law §1110(a)(B). The basis on which the use tax is computed depends on whether the contractor offers items of the same kind of tangible personal property for sale in the regular course of business. If items of the same kind are offered for sale in the regular course of business the use tax is based on the sale price of the items that would be charged to an unrelated contractor, prior to fabrication. The value added by fabricating the product to the specifications of a capital improvement is not subject to use tax. *See* Tax Law §§1110(a)(B)(i) and 1110(c),(e); 20 NYCRR §531.3(b)(2).

20 NYCRR §531.3(b)(1)(i)(a) provides:

Items of the same kind mean that items belong to an identifiable class, but need not be identical.

Example 2: Windows are items of the same kind when they are a standard size and materials whether or not they are sold from inventory or produced to order from a catalog description. A manufacturer of windows produces from a catalog description square, round and hexagon shaped windows from various materials. The windows regardless of shape, size or materials are considered to be items of the same kind.

When items which are not standard or cataloged are made to the specifications of a particular job, these will not be considered items of the same kind with catalog or inventory sales.

Items made to the specifications of a particular job will not be considered items of the same kind as items made to the specifications of another particular job.

If a contractor manufactures and fabricates a product for installation by the contractor in a capital improvement, and the contractor does not offer items of the same kind for sale in the regular course of business, the use tax is based on the consideration given for the tangible personal property manufactured into the product the use of which is subject to tax, including any charges for shipping or delivery of the tangible personal property. The value added by the contractor by fabricating the product to the specifications of a capital improvement is not subject to use tax. *See* Tax Law §§1110(a)(B)(ii) and 1110(d),(e); 20 NYCRR §531.3(b)(2).

The applicable rate of use tax is the tax rate in effect in the locality where the product is installed. *See* 20 NYCRR §541.13(b). When paying the combined State and local use tax on the product, a contractor may take a credit for the State and local sales or use taxes paid on its purchase of the tangible personal property manufactured into the product the use of which is subject to tax. *See* 20 NYCRR §531.3(b)(1); *Custom Design Kitchens, Inc.*, Adv Op Comm T&F, October 7, 1996, TSB-A-96(66)S.

Petitioner asks the following four questions:

Question 1 – If the building is owned by a nonexempt entity and is located outside of New York State, and the windows are delivered and installed by Petitioner outside New York, is sales or use tax due on the

cost of the materials, the fabricated cost of the windows, or on the price charged for furnishing and installing the windows?

Answer – Petitioner’s purchases of materials for use in manufacturing the windows are retail purchases subject to sales tax under Tax Law §1105(a), provided that the materials are delivered to Petitioner in New York. *See* Tax Law §1101(b)(4)(i). Because the materials are incorporated into real property located outside New York, Petitioner is allowed a refund or credit for the tax paid on the materials. *See* Tax Law §1119(a)(1),(4). The windows manufactured by Petitioner are not subject to use tax because the windows are installed in a building located outside New York. Accordingly, the fabricated cost of the windows is not subject to tax. The sales tax is a “destination tax.” The point of delivery or point at which possession is transferred by the vendor to the purchaser controls both the tax incidence and the tax rate. 20 NYCRR §525.2(a)(3). Accordingly, the price charged by Petitioner for furnishing and installing the windows in a building located outside New York is not subject to sales tax.

Question 2 – If the building is owned by an exempt organization or governmental entity and is located in New York State, and the windows are manufactured, delivered, and installed by Petitioner in New York, is sales or use tax due on the cost of the materials, the fabricated cost of the windows, or on the price charged for furnishing and installing the windows?

Answer – The materials purchased by Petitioner in this case become an integral component part of a building owned by an exempt organization or governmental entity. Assuming that the organization or entity is exempt from tax under Tax Law §1116(a), Petitioner’s purchases of the materials are exempt from sales tax under Tax Law §1115(a)(15). The windows manufactured by Petitioner in this case are used in New York. Because Petitioner’s purchases of the windows would be exempt from sales tax under section 1115(a)(15) because they become an integral component part of the building owned by the exempt organization or governmental entity, Petitioner’s use of the windows is exempt from use tax. *See* Tax Law §1118(3). Accordingly, the fabricated cost of the windows is not subject to tax. Assuming that Petitioner is installing complete windows, including frames and sashes, Petitioner’s installation of the windows constitutes a capital improvement. Accordingly, the price charged by Petitioner for furnishing and installing the windows is exempt from sales tax. Petitioner should receive a properly completed Certificate of Capital Improvement (Form ST-124) from its customer in order to be relieved of the duty to collect sales tax on the sale and installation of the windows. Petitioner should also obtain an Exempt Organization Exempt Purchase Certificate, or government purchase order or voucher, whichever is applicable, in order to substantiate that its purchases of materials are exempt. *See* 20 NYCRR §§541.3(d)(2), 541.5(b).

Question 3 - If the building is owned by a nonexempt entity and is located in New York State, and the windows are manufactured, delivered, and installed by Petitioner in New York, is sales or use tax due on the cost of the materials, the fabricated cost of the windows, or on the price charged for furnishing and installing the windows?

Answer – Petitioner’s purchases of materials for use in manufacturing the windows are retail purchases subject to sales tax under Tax Law §1105(a), provided that the materials are delivered to Petitioner in New York. *See* Tax Law §1101(b)(4)(i). The windows manufactured by Petitioner in this case are used in New York. If the windows are manufactured by Petitioner to the specifications of a particular job rather than sold from inventory or produced to order from a catalog description, then items of the same kind are not offered for sale by Petitioner in the regular course of business. *See* 20 NYCRR §531.3(b)(1)(i)(a). The use tax would be based on the consideration given for the materials that are manufactured by Petitioner into the windows. *See* Tax Law §1110(d). However, if Petitioner produces

the windows to order from a catalog description, then items of the same kind may be offered for sale by Petitioner in the regular course of business despite the fact that Petitioner fabricates the windows to the specifications of a particular job. The use tax would be based on the price Petitioner would charge an unrelated contractor for the sale of the windows prior to fabrication. See Tax Law §§1110(c), (e); 20 NYCRR §§531.3(b)(1)(i)(a),(b), 531.3(b)(2).

The applicable rate of use tax is the tax rate in effect in the locality where the windows are installed. See 20 NYCRR §541.13 (b). When paying the combined State and local use tax on the windows, Petitioner may take a credit for the State and local sales or use taxes paid on its purchase of the window materials. See 20 NYCRR §531.3(b)(1); *Custom Design Kitchens, Inc., supra*. No use tax is due on the value added to the windows by fabricating them to the specifications of the capital improvement. See Tax Law §1110(e); 20 NYCRR §531.3(b)(2)(i). The price charged by Petitioner for furnishing and installing the windows as a capital improvement is exempt from tax. See *Answer to Question 2*.

Question 4 – If Petitioner fabricates custom windows for sale to the building owner or its contractor on an uninstalled basis, and ships the windows to a location in New York State for installation by the owner or contractor, is sales or use tax due on the cost of the materials or on the total selling price of the windows?

Answer – Because Petitioner is a contractor, Petitioner’s purchases of the materials in this case are retail purchases subject to sales tax, provided the materials are delivered to Petitioner in New York. See Tax Law §1101(b)(4)(i)(A). The total selling price of the windows that Petitioner sells on an uninstalled basis, including the value added by fabricating the windows to the specifications of the capital improvement, is subject to sales tax under Tax Law §1105(a). See 20 NYCRR §541.11(b)(2). Petitioner would be entitled to a refund or credit of the tax paid on materials that become a physical component part of the windows. See Tax Law §1119(c); *Custom Design Kitchens, Inc., supra*. Petitioner’s sale of the windows to a contractor will be exempt from tax if the windows are installed in a building that is owned by an organization or governmental entity exempt under Tax Law §1116(a). See Tax Law §1115(a)(15). Petitioner should receive a properly completed *Contractor Exempt Purchase Certificate* (Form ST-120.1) from the purchaser in order to be relieved of the duty to collect sales tax on the sale of the windows. Petitioner’s sales of windows directly to an organization or government entity exempt under Tax Law §1116 may also be exempt from tax. Petitioner should receive an exemption document or government purchase order from the purchaser to be relieved of the duty to collect tax. See Tax Law §1132(c); 20 NYCRR Part 529.

DATED: September 22, 2010

/S/

DANIEL SMIRLOCK
Deputy Commissioner and Counsel

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.