

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-81(44)S
Sales Tax
November 2, 1981

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S810622A

On June 22, 1981, a Petition for Advisory Opinion was received from Harron's Electric Service, Inc., 80 West Main Street, Gouverneur, New York 13642.

The issue raised is whether the Department of Taxation and Finance may seek to recover the sales tax from Petitioner where Petitioner, in good faith, accepted from its customers: (i) a Certificate of Capital Improvement (Form ST-124) certifying that the work performed was a capital improvement, or (2) an Exempt Use Certificate (Form ST-121) certifying that the work performed was for a purpose which was exempt from sales or use tax, or (3) a Direct Payment Permit (Form ST-123).

Petitioner, an electrical contractor, performed jobs for various customers where the customers furnished Petitioner properly completed Certificates of Capital Improvement or Exempt Use Certificates or Direct Payment Permits. Petitioner, in good faith, accepted these certificates in lieu of collecting sales tax.

Section 1132(c) of the Tax Law states, 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 (1) a vendor shall have taken from the purchaser a certificate in such form as the tax commission may prescribe . . . to the effect that the property or service was purchased . . . for some use by reason of which the sale is exempt from tax under the provisions of section eleven hundred fifteen, . . . the sale shall be deemed a taxable sale at retail. Where such a certificate or statement has been furnished to the vendor the burden of proving that the receipt . . . is not taxable . . . shall be solely upon the customer Provided however, the tax commission may authorize a purchaser, who acquires tangible personal property or services under circumstances which make it impossible at the time of acquisition to determine the manner in which the tangible personal property or services will be used, to pay the tax directly to the tax commission and waive collection of the tax by the vendor. No such authority shall be granted or exercised except upon application to the tax commission and the issuance . . . of a direct payment permit."

In defining the term "retail sale", the Tax Law states, in relevant part: ". . . A sale of any tangible personal property to a contractor . . . for use or consumption in erecting structures or buildings, or building on, or otherwise adding to, altering, improving . . . real property, property or land, as such terms are defined in the real property tax law, is deemed to be a retail sale" Tax Law §1101(b)(4).

The Sales and Use Tax Regulations state, in relevant part: "Any contractor who is making a capital improvement must pay a tax on the cost of materials to him, as he is the ultimate consumer of the tangible personal property. 20 NYCRR 527.7(b)(5).

A contractor (or other person) may accept a Direct Payment Permit where the tax obligation rests with the issuer as consumer. A contractor accepting a Direct Payment Permit from his customer is not relieved of any sales tax liability when under the contract terms, or by law, he is the consumer of the tangible personal property purchased for a contract.

For example, a contractor or subcontractor performing a capital improvement contract may not accept a Direct Payment Permit from his customer. Likewise, a contractor may not issue a Direct Payment Permit to a subcontractor who is furnishing and installing tangible personal property which constitutes a capital improvement after installation.

However, a contractor holding a Direct Payment Permit may issue copies of his permit to his suppliers when purchasing tangible personal property for use in his business.

In a recent Appellate Division Decision (Saf-Tee Plumbing Corp. v. Tully, 77 AD 2d 1) the court ruled that "Respondent's position would virtually emasculate the language contained in Section 1132 (subd. (c)) relating to certificates for capital improvements, since vendors receiving them could still be held personally liable for sales taxes they failed to collect in reliance on certificates later found to have been improvidently issued. A vendor should not be required to police or investigate his customers (see RAC Corp. v. Gallman, 39 AD2d 57, 61) and respondent's fear that such a rule will lead to abuse is unfounded so long as it required that the vendor be found to have accepted the certificate in good faith, a finding which was specifically made by respondent in the instant proceeding. Furthermore, it must be pointed out that while this result may relieve the vendor from tax liability in certain situations, it does not alter the liability of customers who are ultimately determined to have made repairs to their property rather than capital improvements."

Counsel's Opinion dated January 31, 1967 deals with resale certificates but it will also apply to exemption documents described in Section 1132(c). The Opinion states, in part: ". . . In my opinion, if a purchaser furnishes the vendor with properly completed resale certificate . . ., the vendor cannot be held liable for sales or use tax unless the vendor has actual knowledge that the articles or services purchased were not for resale

A vendor is not under a duty to investigate or police his customers Where there is no actual knowledge, mere suspicion or belief that the sales are taxable is insufficient to make a vendor subject to the sales or use tax where he is presented with a certificate properly filled out. On the other hand, where the vendor has actual knowledge that the articles or services are not purchased for the sole purpose of resale, the vendor is liable for the sales or use tax"

Accordingly, when Petitioner, in good faith, accepts a properly completed Certificate of Capital Improvement, Exempt Use Certificate or Direct Payment Permit (in conjunction with a repair job) without actual knowledge that the Certificate has been issued erroneously, the Department of

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Taxation and Finance may not seek to recover uncollected sales tax from Petitioner. However, when Petitioner accepts a Direct Payment Permit from a customer, Petitioner is not relieved of any sales tax liability when under the contract terms, or by law, Petitioner is the consumer of the tangible personal property purchased for the contract, as in the case of a capital improvement.

Likewise, the acceptance of a Certificate of Capital Improvement by Petitioner from a customer does not relieve Petitioner of liability for tax on its purchases of tangible personal property for use in performing the capital improvement. Tax Law §1101(b)(4) and 20 NYCRR 527.7(b)(5).

DATED: October 14, 1981

s/LOUIS ETLINGER
Deputy Director
Technical Services Bureau