

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

TSB-A-86(23)S
Sales Tax
June 9, 1986

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S860115A

On January 15, 1986, a Petition for Advisory Opinion was received from Superior Restaurant Equipment Co. Inc., 830 Atlantic Avenue, Baldwin, New York 11510.

Petitioner is engaged in the sales of commercial restaurant equipment. Petitioner's typical sales include broilers, ovens, ranges, exhaust hoods and work tables.

The issues are: (1) does a certificate of capital improvement supplied by Petitioner's customer relieve Petitioner of the duty to collect tax on its sales of such equipment; (2) if a customer refuses to pay sales tax, is Petitioner or his customer liable for such tax; and (3) if Petitioner is in possession of a capital improvement certificate, does it have any legal means of collecting tax other than a law suit?

Petitioner normally consolidates all of the equipment ordered in its warehouse and then delivers it to the job site, at which time it is un-crated, brought inside, and put in its proper place. It is then hooked up to gas, electric and plumbing lines by the respective trades. These trades have no affiliation with Petitioner and are hired directly by Petitioner's customers.

Inasmuch as Petitioner merely sells equipment on an uninstalled basis, Petitioner is considered to be a supplier of tangible personal property and is not performing a capital improvement to real property.

Issue I

Section 541.5(b)(1) of the Sales and Use Tax Regulations provide that "[A]ll purchases of tangible personal property... which are incorporated into and become part of the realty or are used or consumed in performing the contract are subject to tax at the time of purchase by the contractor or any other purchaser. A certificate of capital improvement may not be validly given by any person or accepted by a supplier to exempt the purchase of these materials." 20 NYCRR 541.5.

Inasmuch as Petitioner is merely a supplier of tangible personal property, it may not accept a certificate of capital improvement to exempt the purchase of such materials. The acceptance of such a certificate by Petitioner does not relieve Petitioner of its duty to collect tax.

Issue II

Section 532.1(a)(1) of the Sales and Use Tax Regulations provides that "[E]very person required to collect tax shall collect the tax from the customer when collecting the price... to which it applies." 20 NYCRR 532.1.

Section 532.3(a)(1) of the Sales and Use Tax Regulations provides that "[E]very person required to collect any tax imposed by article 28 and pursuant to the authority of article 29 of the Tax Law shall be personally liable for the tax imposed, collected or required to be collected. Any officer or employee of a corporation or a dissolved corporation who is required to collect, truthfully account for, or pay over the tax, and any person who is a member of a partnership may be held personally liable for the tax as a person required to collect tax." 20 NYCRR 532.3.

Section 532.1(e) of the Sales and Use Tax Regulations provides that "[W]here any customer has failed to pay sales tax imposed by article 28 and pursuant to the authority of article 29 of the Tax Law to the person required to collect the tax, such tax shall be payable by the customer directly to the Tax Commission, and it shall be the duty of the customer to file a return with the Tax Commission and to pay the tax within 20 days of the date the tax was required to be paid." 20 NYCRR 532.1.

Accordingly, if a customer refuses to pay sales tax, both Petitioner and its customer are liable for the amount of sales tax which should have been collected.

Issue III

Section 532.1(d) of the Sales and Use Tax Regulations provides that "[E]very person required to collect any tax imposed by article 28 and pursuant to the authority of article 29 of the Tax Law shall have the same right in respect to collecting the tax from his customer or in respect to nonpayment of the tax by the customer as if the tax were a part of the purchase price of the property or service, amusement charge or rent, as the case may be, and payable at the same time; provided, however, that the Tax Commission shall be joined as a party in any action or proceeding brought to collect the tax.

(2) The joining of the Tax Commission as a party in any action or proceeding brought to collect the tax shall be effected by service upon the Tax Commission of a summons and complaint naming the Tax Commission as a plaintiff or defendant thereon." 20 NYCRR 532.1(d).

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Accordingly, under the circumstances in question, whether in possession of a certificate of capital improvement or not, Petitioner's only means of collecting from its customers sales tax which should have been collected at the time of sale is an action or proceeding in a court of law as provided in regulation section 532.1.

DATED: June 9, 1986

s/Frank J. Puccia
Director
Technical Services Bureau

NOTE: The opinions expressed in Advisory Opinions
are limited to the facts set forth therein.