

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

TSB-A-92 (76) S
Sales Tax
November 4, 1992

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S920803A

On August 3, 1992, a Petition for Advisory Opinion was received from Armor Elevator Company, Inc., 12540 Westport Road, Louisville, Kentucky 40245.

The issues raised by Petitioner, Armor Elevator Company, Inc., are:

1. Whether use tax must be paid on materials and supplies that are used in maintenance service contracts or repair orders for elevators and escalators.
2. Whether a refund or credit for the use tax paid on materials and supplies that are used in maintenance service contracts or repair orders for elevators and escalators may be claimed.

Petitioner is an elevator company which offers a full line of services in elevator and escalator products. The services provided include service maintenance contracts, repairs, modernization to equipment and construction (new installation) of new elevators and escalators.

Sales tax is collected from customers on the total value of repair and service contracts, which includes both material and labor costs. In addition, Petitioner accrues and remits use tax to New York State on all material and supplies purchased and used on jobs both directly and incidentally.

Section 1105(c) of the Tax Law imposes sales tax on the receipts from every sale, except for resale, of the following services:

* * *

(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 chapter, but excluding services rendered by an individual who is not in a regular trade or business offering his services to the public.

Section 1139(a) of the Tax Law provides, in pertinent part, as follows:

Sec. 1139. Refunds.--(a) In the matter provided in this section the tax commission shall refund or credit any tax, penalty or interest erroneously, illegally or unconstitutionally collected or paid if application therefor shall be filed with the tax commission (i) in the case of tax paid by the applicant to a person required to

collect tax, within three years after the date when the tax was payable by such person to the tax commission as provided in section eleven hundred thirty-seven, or (ii) in the case of a tax, penalty or interest paid by the applicant to the tax commission, within three years after the date when such amount was payable under this article, or ...

Section 527.7(b) of the Sales and Use Tax Relations provides, in part, as follows:

(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.

* * *

Example 2: Company A enters into an agreement to provide periodic maintenance services on elevators and escalators belonging to its customers. The contract provides for inspection, lubrication and the performance of necessary repairs. These services are taxable as maintaining, servicing of real property which is subject to the sales tax.

* * *

(3) When the servicing of maintaining, servicing or repairing real property is performed in conjunction with the transfer of title to tangible personal property, the price of the tangible personal property is also subject to tax.

Example 8: A customer has a maintenance contract with a heating and air conditioning company to supply all parts and emergency services for his heating and air conditioning system for one year for a set fee. The cost of the contract is taxable, whether or not any services or parts are actually furnished, as it is a contract for maintenance of real property. The company may apply for a refund or credit of any tax paid on parts purchased for use under the contract which become part of the property serviced for resale, or are transferred to the purchaser in performance of the service. (emphasis added)

Section 541.5(d) of the Sales and Use Tax Regulations provides, in part, as follows:

* * *

(d) Maintaining, installing, repairing, and servicing tangible personal property and real property.--(1) Tangible Personal Property. (i) Charges for repair, service, maintenance, and installation of tangible personal property which retains its identity as tangible personal property are taxable to the customer based on the full invoice price.

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(3) Purchases. Purchases of any tangible personal property (excluding qualifying production machinery and equipment exempt under section 1115 of the Tax Law) made by a contractor, subcontractor, or repairman for use or consumption in maintaining, servicing, or repairing real or personal property of others are subject to tax. The contractor is entitled to a refund or credit of tax paid on such materials incorporated into real property where such property is later transferred to the purchaser in conjunction with the performance of a service subject to the tax.

Example 6: The repainting of a building is not a capital improvement. The customer must pay tax on the total contract charge for this service. The painter is liable for the tax on the materials, tools and supplies he uses for painting (e.g., paint, spackling, brushes and drop cloths), subject to a right of refund or credit for the tax paid on the cost of the materials incorporated into the real property (e.g., paint, spackling).

Accordingly, pursuant to Section 1105(c)(5) of the Tax Law and Sections 527.7(b) and 541.5(d) of the Sales and Use Tax Regulations, Petitioner's charges for maintaining, installing, repairing and servicing elevators and escalators are subject to sales tax based on the full invoice price billed to the customer except in those instances when the installation constitutes a capital improvement. Petitioner, however, may apply for a refund or credit of any sales tax paid on materials and supplies purchased for use under the maintenance service contracts or repair orders which become part of the property serviced for resale, or transferred to the purchaser in performance of the service. Petitioner's purchases of materials used in capital improvements are subject to sales tax. Pursuant to Section 1139(a) of the Tax Law such refund or credit must be claimed within three years after the date when the tax was paid.

DATED: November 4, 1992

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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