

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

TSB-A-93 (29)S
Sales Tax
April 21, 1993

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S930127A

On January 27, 1993, a Petition for Advisory Opinion was received from Dierks Heating Company, Inc., 43-32 33rd Street, Long Island City, New York 11101.

The issue raised by Petitioner, Dierks Heating Company, Inc., is whether sales or use tax is owed by a contractor when it leases temporary boilers to provide heat to exempt organizations' buildings during the period that it is installing a permanent heating systems in said buildings.

Petitioner installs heating, air conditioning and ventilation systems. While in the process of installing boilers, Petitioner is under contract to provide temporary heat to the occupants of a building. Petitioner leases mobile boilers from a lessor for this purpose. No sales tax is charged by the lessor. The mobile boilers are used in an existing building owned by the New York City Housing Authority, an exempt organization, to provide heat to its occupants.

Section 1105(a) of the Tax Law imposes a tax on the receipts from every retail sale of tangible personal property, except as otherwise provided. Section 1101(b)(5) of the Tax Law defines the term "sale" to include "[a]ny... rental, lease "

Section 1115 of the Tax Law provides, in part, as follows:

Sec. 1115. Exemptions from sales and use taxes.- - (a) 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 erecting a structure or building of an organization described in subdivision (a) of section eleven hundred sixteen, or adding to, altering, improving real property, property or land 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. (emphasis added)

Section 528.16(a)(1) of the Sales and Use Tax Regulations provides, in part, as follows:

Reg. Sec. 528.16. Tangible personal property sold to contractors for use in erecting structures of tax exempt organizations.- - (Tax Law, Sec. 1115(a)(15)). (a) Exemption. (1) Tangible personal property sold to a contractor, subcontractor or repairman for use in erecting a structure or building of an organization described in Part 529 of this Title, is exempt when it is to become an integral component part of such structure or building.

Example 1: An exempt organization contracts to have a building erected on its land. Purchases by its contractor of tangible personal property, such as nails, sheet rock and plywood that become part of the structure are exempt.

* * *

Example 5: Lumber and other materials that are used to build forms are not exempt since they do not become a component part of the structure.

Example 6: Equipment rentals such as cranes, bulldozers, back hoes, etc. for use in building a structure for an exempt organization are subject to tax. (emphasis added)

Section 541.3(d) of the Sales and Use Tax Regulations provides, in pertinent part, as follows:

(d) Contracts with exempt organizations. (1) Effective September 1, 1974 all tangible personal property incorporated into real property owned by a governmental entity or an exempt organization is exempt, whether the contract is on a lump sum, time and material, cost-plus, or other basis.

(2) Purchases for contracts (other than agency contracts). (i) Tangible personal property sold to a contractor, subcontractor, or repairman for use in erecting, repairing, adding to, or altering a structure or building owned by an exempt organization, described in section 1116(a) of the Tax Law, is exempt when it is to become an integral component part of such structure or building.

* * *

(iv) Except for agency contracts, contractors' purchases of construction supplies which do not become part of an exempt organization's real property and are used or consumed by the contractor, as well as purchases of taxable services, such as electricity used by the contractor, are subject to the tax.

* * *

The following types of property and services are representative, but not intended to be all inclusive, of contractors' purchases which are subject to tax, irrespective of whether the contractor has a time and material, lump sum, or other type of contract (except agency contract), with an exempt organization:

- (a) construction machinery and equipment, including rentals and repair parts;
- (b) contractors' office supplies;
- (c) contractors' supplies, tools, and miscellaneous equipment, whether purchases or rented, including materials to make forms and scaffolding; and
- (d) any other items purchased or rented by a contractor for his use in performing the contract and not incorporated into the realty.

Example 7: Lumber and other materials which are used to build forms are not exempt since they do not become a component part of the structure.

Example 8: Equipment rentals under the dominion and control of the contractor, such as rentals of cranes, bulldozers, backhoes, etc. for use in building a structure for an exempt organization are subject to tax. (emphasis added)

Section 541.8 of the Sales and Use Tax Regulations provides, in part, that:

Reg. Sec. 541.8. Charges for temporary facilities at constructions sites.- - (Tax Law, Sec. 1105(c)(3), (5)). (a) General. Subcontracts to provide temporary facilities at construction sites, which are a necessary prerequisite to the construction of a capital improvement to real property, are considered a part of the capital improvement to real property. Charges for installation of materials and the labor to provide temporary heat, temporary electric service, temporary protective pedestrian walkways, and temporary plumbing by a subcontractor are therefore not subject to tax provided the subcontractor receives a copy of the properly completed certificate of capital improvement issued by the customer to the contractor.

Example 1: A subcontractor agrees to furnish to the prime contractor the materials and labor necessary to furnish temporary light and electrical facilities throughout a building under construction so that the various trades may have light, communications and power facilities necessary for them to perform their work and operate their tools. The charges are a constituent part of the capital improvement and are not subject to tax.

(b) The subcontractor is liable, however, for the tax on the purchase of the materials used to provide the temporary facilities at construction sites described in subdivision (a) of this section.

TSB-A-93 (29)S
Sales Tax
April 21, 1993

Example 2: A subcontractor agrees to furnish temporary site plumbing service to the prime contractor engaged in the construction of an office building. The subcontractor must purchase a quantity of pipes, pumps, and fittings in order to provide the temporary service. The services is a constituent part of the capital improvement, thus, the subcontractor's charge for the temporary plumbing services are not subject to tax. However, the subcontractor is liable for the tax due on his purchase of all materials needed to provide the temporary plumbing service. (emphasis added)

Therefore in accordance with Sections 1105(a), 1105(b) and 1115(15) of the Tax Law and Sections 526.16(a)(1), 541.3(d) and 541.8 of the Sales and Use Tax Regulations, while the service of providing the temporary heat to an exempt organization is not subject to sales and use taxes, the rental of the mobile boilers by the Petitioner is taxable since such boilers do not become an integral component part of the structure, building or real property of the exempt organization. Therefore, in the instant case, Petitioner is liable for sales or use tax on the rental of the mobile boilers needed to provide the temporary heating service.

It is also noted that the leasing of the temporary boilers by the Petitioner is not exempt from sales tax pursuant to Section 1115(a)(12) of the Tax Law which provides an exemption for machinery and equipment used predominantly and directly in the production of steam for sale, since the Petitioner does not sell the steam produced by the temporary boilers to the exempt organizations.

DATED: April 21, 1993

/s/
PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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