

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

TSB-A-97(27)S
Sales Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S961206B

On December 6, 1996, a Petition for Advisory Opinion was received from Marvin Rosenthal, 88 Sunnyside Boulevard, Plainview, New York 11803. Petitioner, Marvin Rosenthal, submitted additional information pertaining to the Petition on February 26, 1997.

The issue raised by Petitioner, Marvin Rosenthal, is whether his client is a general contractor or a retailer of cabinets that are installed in kitchens and bathrooms.

Petitioner submits the following facts.

Petitioner's client (hereinafter referred to as "Company A") operates a kitchen and bathroom renovation firm. Company A draws plans, negotiates the price of the renovation and manages and schedules the renovation work. Company A's customers sign an agreement that states that Company A is only selling the customer cabinets and Corian countertops for a certain amount. Tax is charged on the price of the cabinets and Corian countertops. Company A maintains no inventory and only orders cabinets and countertops as needed for each job. Company A has customers sign agreements with carpenters, electricians and other tradespeople selected by Company A for an amount that in total will equal the negotiated price of the renovation. The customer must use only Company A's carpenter, electrician or his other tradespeople for the renovation work, including the installation of the Corian countertops.

Applicable Law and Regulations

Section 1101(b) of the Sales and Compensating Use Tax Law provides, in part:

When used in this article for the purposes of the taxes imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and by section eleven hundred ten, the following terms shall mean:

(4) Retail sale. (i) A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property, or (B) for use by that person in performing the services subject to tax under paragraphs (1), (2), (3), (5), (7) and (8) of subdivision (c) of section eleven hundred five where the property so sold becomes a physical component part of the property upon which the services are performed or where the property so sold is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax. Notwithstanding the preceding provisions of this subparagraph, a sale of any tangible personal property to a contractor, subcontractor or repairman for

use or consumption in erecting structures or buildings, or building on, or otherwise adding to, altering, improving, maintaining, servicing or repairing real property, property or land, as the terms real property, property or land are defined in the real property tax law, is deemed to be a retail sale regardless of whether the tangible personal property is to be resold as such before it is so used or consumed, . . .

* * *

(9) Capital improvement. (i) An addition or alteration to real property which:

(A) Substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property; and

(B) Becomes part of the real property or is permanently affixed to the real property so that removal would cause material damage to the property or article itself; and

(C) Is intended to become a permanent installation.

Section 527.7(a)(3)(i) of the Sales and Use Tax Regulations provides:

A capital improvement is an addition or alteration to real property:

(a) which substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property;

(b) which becomes part of the real property or is permanently affixed to the real property so that removal would cause material damage to the property or article itself; and

(c) is intended to become a permanent installation.

Section 532.4(f) of the Sales and Use Tax Regulations provides:

(f) Certificate of capital improvement. (1) A certificate of capital improvement is used to claim exemption from State and local sales tax on the purchase of a capital improvement as defined in section 527.7(a)(3) of this Title. (Emphasis added)

(2) A certificate of capital improvement is properly completed when it complies with the provisions of subparagraph (ii) of subdivision (b) (2) of this section.

Section 541.1(b) of the Sales and Use Tax Regulations provides:

(b) The principal distinguishing feature of a sale to a contractor, as compared to a sale to other vendors who purchase tangible personal property for resale, is that the sale of tangible personal property to a contractor for use or consumption in construction is

a retail sale and subject to sales and use tax, regardless of whether tangible personal property is to be resold as such or incorporated into real property as a capital improvement or repair. Whenever a contractor uses materials, on which the contractor has paid sales tax, in a repair or maintenance contract (except interior cleaning and maintenance contracts of 30 days or more) subject to the sales tax on services under section 1105(c) of the Tax Law, the contractor may be entitled to a refund or credit of the portion of the tax he paid attributable to the materials transferred to the customer.

Section 541.2 of the Sales and Use Tax Regulations provides in part:

(d) A construction contractor means any person who engages in erecting, constructing, adding to, altering, improving, repairing, servicing, maintaining, demolishing or excavating any building or other structure, property, development, or other improvement on or to real property, property or land. (Emphasis added)

(e) Contractor means a construction contractor, subcontractor or repairman. (Emphasis added)

* * *

(g) Capital improvement. . . .

(2)(i) A capital improvement does not include a contract for the sale and installation of tangible personal property which when installed remains tangible personal property.

(ii) A capital improvement does not include the sale of tangible property to a customer under contract if the contractor who sells the tangible personal property is not responsible for the affixation or installation of the tangible personal property furnished.

Example 4: A customer enters into an agreement with a supplier to supply all materials necessary for the framing of a home and enters into a separate and distinct agreement with a contractor for the installation of the materials purchased from the supplier. The customer is liable for the payment of tax on all of the materials purchased from the supplier as the purchase is a purchase of tangible personal property and not the purchase of a capital improvement. Upon the issuance of a capital improvement certificate by the customer to the contractor, no tax is due on the labor charge for installing the materials.

Section 541.5(b) of the Sales and Use Tax Regulations provides:

(2) Labor and material charges. All charges by a contractor to the customer for adding to or improving real property by a capital improvement are not subject to tax provided the customer supplies the contractor with a properly completed certificate of capital improvement. (Emphasis added)

Opinion

Section 1101(b)(9) of the Tax Law and Section 527.7 of the Sales and Use Tax Regulations define a capital improvement. Paragraphs (d) and (e) of Section 541.2 of the Sales and Use Tax Regulations defines a construction contractor and a contractor. Publication 862 titled, New York State and Local Sales and Use Tax Classifications of Capital Improvements and Repairs to Real Property classifies the installation or replacement of countertop and kitchen or bathroom cabinets as capital improvements to real property.

The renovation work performed for Company A's customers in this case may result in a capital improvement. Every aspect of the renovation project is controlled by Company A, including the renovation design, the type of cabinets and countertops, the negotiation of the price for the entire renovation, and supervision of the various tradespeople needed for the completion of the project. Company A's customers are required to sign contracts only with tradespeople selected by Company A. Therefore, Company A is a contractor as defined in Section 541.2 of the Sales and Use Tax Regulations.

Company A, as a contractor, is the retail purchaser of the countertops and cabinets and is required to pay sales and compensating use tax on their purchase, as well as the purchase of other materials used or consumed in its renovation projects. See Section 1101(b)(4)(i) of the Tax Law and Section 541.1(b) of the Sales and Use Tax Regulations. Since Company A is a contractor performing capital improvements for its customers, Company A is not required to collect sales and compensating use tax on the sale to its customers of the kitchen renovations described above, if the customer supplies Company A with a properly completed certificate of capital improvement (Form ST-124) which is accepted in good faith by Company A. See Section 1115(a)(17) of the Tax Law and Section 541.5(b)(2) of the Sales and Use Tax Regulations.

DATED: April 24, 1997

/s/
JOHN W. BARTLETT
Deputy Director
Technical Services Bureau

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