

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

TSB-A-97(78)S
Sales Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S970922C

On September 22, 1997, the Department of Taxation and Finance received a Petition for Advisory Opinion from Andrew S. Hollander, CPA, 18 Haven Avenue, Port Washington, NY 11050.

The issues raised by Petitioner, Andrew S. Hollander, CPA, are:

1) Whether Petitioner's client, a wholesale supplier of heating and plumbing products, can accept resale certificates (Form ST-120) from contractors.

2) Whether Petitioner's client is under any obligation to make sure that the purchases made are for the purposes enumerated on the resale certificate (Form ST-120) or on any other authorized exemption document.

Petitioner submits the following facts as the basis for this Advisory Opinion.

Petitioner's client is a wholesale supplier of heating and plumbing products. Petitioner's client's customers are contractors who purchase various materials and supplies for use in performing capital improvement jobs and for use in performing taxable maintenance and repair work. Petitioner's client's customers (i.e., contractors) wish to present Petitioner's client with a resale certificate (Form ST-120) when purchasing materials and supplies. Petitioner's client's customers state that they are purchasing tangible personal property for use in performing taxable services, and such property becomes a component part of the property upon which their services will be performed. Petitioner notes that the resale certificate states at the top of the form that "This certificate cannot be used by contractors to purchase materials and supplies".

Applicable Law and Regulations

Section 1101(b) (4) of the Tax Law provides, in part:

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 the purchaser 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, ... 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, ... (emphasis added)

Section 1132(c)(1) of the Tax Law provides, 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 ... of any type mentioned in subdivisions (a) ... 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. Except as provided in subdivision (h) or (k) of this section, unless ... the purchaser, not later than ninety days after delivery of the property ... furnishes to the vendor: any affidavit, statement or additional evidence, documentary or otherwise, which the commissioner may require demonstrating that the purchaser is an exempt organization described in section eleven hundred sixteen, the sale shall be deemed a taxable sale at retail. Where ... an affidavit, statement or additional evidence referred to in the previous sentence is received within the time limit set forth therein, but is deficient in some material manner, and where such deficiency is thereafter removed, the receipt of ... such affidavit, statement or additional evidence shall be deemed to have satisfied all of the requirements of the preceding sentence. Where such ... an affidavit, statement or additional evidence has been furnished to the vendor, the burden of proving that the receipt ... is not taxable hereunder shall be solely upon the customer. The vendor shall not be required to collect tax from purchasers who furnish ... such an affidavit, statement or additional evidence in proper form

Section 526.6 of the Sales and Use Tax Regulations provides, in part:

Retail Sale (a) The term retail sale or sale at retail means the sale of tangible personal property to any person for any purpose, except as specifically excluded.

(b) Special rule - sales specifically included as retail sales. (1) A sale of any tangible personal property to a contractor, subcontractor or repairman for use or consumption in erecting structures or buildings or adding to, altering, improving, maintaining, servicing or repairing real property, property or land, is deemed to be a retail sale, regardless of whether the tangible personal property is to be resold as such before it is used or consumed.

Section 532.4 of the Sales and Use Tax Regulations provides, in part:

(b) Burden of proof. (1) The burden of proving that any receipt, amusement charge, or rent is not taxable shall be upon the person required to collect the tax and the customer.

(2) A vendor who in good faith accepts from a purchaser a properly completed exemption certificate or, as authorized by the Department, other documentation evidencing exemption from tax not later than 90 days after delivery of the property or the rendition of the service is relieved of liability for failure to collect the sales tax with respect to that transaction. ...

(i) A certificate or other document is "accepted in good faith" when a vendor has no knowledge that the exemption certificate or other document issued by the purchaser is false or is fraudulently presented. If reasonable ordinary due care is exercised, knowledge will not be imputed to the seller required to collect the tax.

* * *

(5) A vendor is not relieved of the burden of proof when it failed to obtain an exemption certificate or accepted an improper certificate, or had knowledge that the exemption certificate issued by the purchaser was false or fraudulently presented. (emphasis added)

* * *

(d) Resale certificate. (1) A resale certificate is used to claim exemption from tax on purchases of tangible personal property or services which will be resold or transferred to a customer when the:

(i) tangible personal property is for resale as such or as a physical component part of tangible personal property;

(ii) tangible personal property is for use in performing taxable services under paragraph (1), (2), (3) or (5) of subdivision (c) of section 1105 of the Tax Law where such property becomes a physical component part of the tangible personal property upon which the services are performed or will be actually transferred to the purchaser of the service in conjunction with the performance of the service; or

(iii) service is for resale.

* * *

(5) Contractors who are purchasing tangible personal property for use in performing capital improvement work or repairs on real property are not permitted to use a resale certificate. (emphasis added)

Opinion

In accordance with Section 1101(b)(4)(i) of the Tax Law and Section 532.4(d)(5) of the regulations, Petitioner's client cannot accept resale certificates (Form ST-120) from customers which are contractors, and such customers are not authorized or permitted to issue such certificates (Form ST-120), for purchases of tangible personal property for use in performing capital improvement work or repairs on real property. Petitioner's client must collect sales tax on all its sales of materials and supplies made to contractors for these purposes.

In accordance with Section 1132(c) of the Tax Law and Section 532.4 of the Sales and Use Tax Regulations, the burden of proving that Petitioner's client's sale of materials and supplies are not subject to sales tax is upon Petitioner's client and its customers. If Petitioner's client, in good faith, timely accepts a properly completed resale or other exemption certificate, Petitioner's client is relieved of its liability to collect the sales tax with respect to the applicable sale, and the burden of proving whether the sale is taxable rests solely upon the customer. Petitioner's client is not relieved of this duty to collect tax if Petitioner's client has actual knowledge (i.e., more than a mere suspicion or belief) that the resale or exemption certificate is false or fraudulent. Where Petitioner's client accepts the certificate in good faith, it is under no duty to investigate or police the customer or to debate the taxability of the sale with the customer. Accordingly, Petitioner's client may not accept a resale certificate from a contractor if Petitioner's client has actual knowledge that the purchaser is a contractor and will use the materials and supplies purchased in performing capital improvement work or repairs on real property.

DATED: December 4, 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.