

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

TSB-A-98(63)S
Sales Tax
September 9, 1998

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S980122B

On January 22, 1998, the Department of Taxation and Finance received a Petition for Advisory Opinion from Price Waterhouse LLP, 400 South Hope Street, Los Angeles, California, 90071-2889. Petitioner, Price Waterhouse LLP, submitted additional information relating to the Petition on February 13, 1998.

The issues raised by Petitioner, Price Waterhouse LLP, are the following:

1. Whether sales of security alarm systems used in providing monitoring services are exempt from sales tax as capital improvements.
2. Whether charges for installation of security alarm systems are exempt from sales tax as capital improvements.
3. Whether fees paid for the use of security alarm systems and monitoring services are subject to sales or compensating use tax.
4. Whether purchases of security alarm equipment used in providing protective services are exempt from sales tax as sales for resale.
5. Whether fees charged for maintenance and repair of security alarm systems are subject to sales tax.

Petitioner submitted the following facts as the basis for this advisory opinion.

Petitioner's client, Company A, is headquartered outside New York State with offices in several states. Company A recently began providing security alarm systems and monitoring services to commercial customers located in New York. The security alarm systems generally consist of a microprocessor based video transmitter, closed circuit television cameras, sensors, motion detectors, an alarm, control panel, keypad and electrical wiring. The security system is connected to a remote visual command center located in the state where Company A is headquartered where the monitoring services are provided. Integrated voice communications allow the command center and the remote site to communicate interactively. Company A employees in the visual command center are able to adjust certain camera features, motorized gates, electric door locks, lights, and environmental controls.

Company A provides commercial customers with both security systems and monitoring services for a stated fee. The systems are either sold to customers or provided for a specified period of time in accordance with the terms of a service contract. Under the terms of the service contract, title to the security system remains with Company A. The length of time of service contracts is anticipated to be three to five years, and the customer will have the option of renewing indefinitely. At the end of the service contract, the system will be

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returned to Company A. Service contract customers will only obtain the right to use the system for the period during which the monitoring services are being provided.

Service contract customers are billed on a monthly, quarterly, or semi-annual basis. Each billing includes separately stated charges for the use of the system and a monitoring service fee.

Customers who purchase the security systems are required to purchase the monitoring service and installation from Company A. The monitoring service may not be purchased from another service provider. The equipment must be used exclusively with Company A monitoring services. Customers who purchase the security system are responsible to remit periodic payments to Company A for the monitoring service.

Company A purchases the systems in a completed condition. Company A estimates the material cost of the system to be less than 20% of the total service contract fee. Company A supplies completed, turn-key installed systems with no manufacturing or assembly performed by Company A. None of the equipment is permanently affixed or becomes part of the real property, and removal of this equipment does not cause damage to the property. Upon termination of a service contract, all equipment is removed except for communications cables which are left in the ceilings or the walls.

Company A subcontracts the majority of the installation. However, there will be cases when Company A employees will install the equipment and perform repair service and training.

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 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.

Section 1101(b) (5) of the Tax Law provides, in part:

Sale, selling or purchase. Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume (including, with respect to computer software, merely the right to reproduce), conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement

therefor, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor.

Section 1101(b) (9) of the Tax Law provides the following definition:

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

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

(ii) 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 the article itself; and

(iii) Is intended to become a permanent installation.

Section 1105(a) of the Tax Law imposes sales tax on the receipts of every retail sale of tangible personal property, except as otherwise provided.

Section 1105(c) of the Tax Law imposes a sales tax on the following:

The receipts from every sale, except for resale, of the following services:

* * *

(3) Installing tangible personal property, excluding a mobile home, or maintaining, servicing or repairing tangible personal property, including a mobile home, not held for sale in the regular course of business, whether or not the services are performed directly or by means of coin-operated equipment or by any other means, and whether or not any tangible personal property is transferred in conjunction therewith, except:

* * *

(iii) for installing property which, when installed, will constitute an addition or capital improvement to real property, property or land, as the terms real property, property or land are defined in the real property tax law as such term capital improvement is defined in paragraph nine of subdivision (b) of section eleven hundred one of this chapter;

* * *

(8) Protective and detective services, including, but not limited to, all services provided by or through alarm or protective systems of every nature, including, but not limited to, protection against burglary, theft, fire, water damage or any malfunction of industrial processes or any other malfunction or damage to property

or injury to persons, detective agencies, armored car services and guard, patrol and watchman services of every nature other than the performance of such services by a port watchman licensed by the waterfront commission of New York harbor, whether or not tangible personal property is transferred in conjunction therewith.

Section 1115(a)(17) of the Tax Law provides an exemption from sales tax for the following:

Tangible personal property sold by a contractor, subcontractor or repairman to a person other than an organization described in subdivision (a) of section eleven hundred sixteen, for whom he is adding to, or improving real property, property or land by a capital improvement, or for whom he is about to do any of the foregoing, if such tangible personal property is to become an integral component part of such structure, building or real property; provided, however, that if such sale is made pursuant to a contract irrevocably entered into before September first, nineteen hundred sixty-nine, no exemption shall exist under this paragraph.

Section 1118(7)(a) of the Tax Law provides:

In respect to the use of property or services to the extent that a retail sales or use tax was legally due and paid thereon, without any right to a refund or credit thereof, to any other state or jurisdiction within any other state but only when it is shown that such other state or jurisdiction allows a corresponding exemption with respect to the sale or use of tangible personal property or services upon which such a sales tax or compensating use tax was paid to this state. To the extent that the tax imposed by this article is at a higher rate than the rate of tax in the first taxing jurisdiction, this exemption shall be inapplicable and the tax imposed by section eleven hundred ten of this chapter shall apply to the extent of the difference in such rates, except as provided in paragraph (b) of this subdivision.

Section 526.6(c)(6) of the Sales and Use Tax Regulations provides:

Tangible personal property purchased for use in performing services which are taxable under section 1105(c)(1), (2), (3), (5), (7) and (8) of the Tax Law is purchased for resale and not subject to tax at the time of purchase, where the property so sold (i) becomes a physical component part of the property upon which the services are performed, or (ii) is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax.

* * *

Example 9: A painter purchases plastic drop cloths and sandpaper and after painting a customer's premises, leaves the used drop cloths

and sandpaper at the premises. The drop cloths and sandpaper, even though limited or no use after the painting, have not been purchased for resale as they are items used by the painter in performance of a taxable service. The drop cloths and sandpaper are not actually transferred to the purchaser of the service in conjunction with the performance of the service.

Opinion

Issue 1

For sales of tangible personal property to qualify for exemption from sales tax as a capital improvement, the property must substantially add to the value of the real property or prolong its useful life, become part of the real property or be permanently installed on the real property so that it cannot be removed without material damage to the real property or the tangible personal property itself, and be intended to be a permanent installation. See Section 1101(b)(9) of the Tax Law. The security systems sold by Company A, except for the electrical wiring and communications cables, are not permanently affixed to the real property, do not become part of the real property, and can be removed without damage to the underlying real property or system components. Since the installed property must meet all the requirements of Section 1101(b)(9) to qualify as a capital improvement, Petitioner's security systems are not exempt from sales tax when sold to the customer, except for the wiring and communications cables as discussed below.

Separately stated charges for wires and cables are exempt as capital improvements when sold to an owner of commercial property, but are presumed not to be permanent and to be taxable when sales are made to a commercial tenant. See Matter of 100 Park Avenue v. Boyland, 144 NYS 2d 88, affd 309 NY 685. This presumption of impermanence may be overcome if the property is permanently affixed to the real property and lease provisions indicate that title passes to the landlord upon installation. (Matter of Flah's of Syracuse v. Tully, 89 AD2d 729)

Security systems provided in accordance with a service contract are not capital improvements since Company A retains title to the system.

Issue 2

Charges for installation of tangible personal property which do not constitute capital improvements are subject to sales tax under Section 1105(c)(3) of the Tax Law. Since this security alarm system does not meet the requirements of a capital improvement, except for the wiring and cables discussed above, charges for its installation are subject to sales tax. When Company A hires a subcontractor for installing the equipment, sales tax would not be paid by Company A since the purchase of the installation would constitute a sale for resale, but Company A would collect the sales tax from its customers. If the wiring and cables are capital improvements, as discussed in Issue 1, separately stated charges for their installation will not be subject to tax. See Section 1105(c)(3)(iii) of the Tax Law.

Issue 3

Payments received by Company A for the use of security alarm systems and monitoring services are taxable receipts from protective and detective services. Under Section 1105(c)(8) of the Tax Law, all services provided by or through alarm or protective systems of every nature are taxable protective and detective services. Since these payments are receipts from services provided through an alarm system, they are subject to sales tax.

Issue 4

Company A is providing taxable protective and detective services as described in Section 1105(c)(8) of the Tax Law. To provide this service, Company A either sells security alarm systems to its customers or provides the systems for a specified period of time in accordance with a service contract. These security alarm and monitoring systems link Company A's customers to its communications center outside New York (i.e., a central station alarm system). Under Section 1101(b)(4)(i)(B) of the Tax Law and Section 526.6(c)(6) of the Sales and Use Tax Regulations, purchases of tangible personal property for use in performing services which are subject to sales tax may be excluded from sales tax as sales for resale under certain conditions. To qualify for this resale exclusion, tangible personal property must become a component part of the property upon which the services are performed, or tangible personal property must be later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax. The security alarm equipment provided by Company A for the term of the service contract for use in performing its protective services remains the property of Company A and service contract customers only obtain the right to use the system for the period during which the monitoring services are being provided. Since it is well settled that tangible personal property purchased by a vendor and supplied to its customers as a component of its services to its customers is not purchased for resale within the meaning of Section 1101(b)(4) of the Tax Law, then the equipment provided by Company A is not actually transferred to the purchaser of the services but is used by Company A in performance of a taxable service. See Matter of Albany Calcium Light v. State Tax Commission, 44 NY2d 987. Accordingly, purchases of security alarm systems by Company A which are not sold to the customer, for use in providing its detective and protective services do not qualify as purchases for resale as described in Section 526.6(c)(6) of the Sales and Use Tax Regulations and are subject to sales or compensating use tax when purchased by Company A.

If such equipment is purchased outside New York for use within New York, use tax would be due on the purchase price of the equipment under Section 1110(A) of the Tax Law. If sales tax is paid on the equipment to another jurisdiction, a credit would be allowed to the extent of the tax paid if the other taxing jurisdiction does not allow for a credit or refund of the sales tax paid, and if the other taxing jurisdiction allows a corresponding credit for sales taxes paid to New York. If the rate of tax imposed by New York is higher than that of the jurisdiction in which the sales tax was paid, use tax would be due to the extent of the difference in the two rates. (See Section 1118(7)(a) of the Tax Law).

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When Company A sells the security system to a customer, Company A may purchase the system exempt from sales tax, as a purchase for resale. Company A must furnish the seller of such equipment with a properly completed Resale Certificate (Form ST-120) within 90 days of the date of delivery to make a nontaxable purchase for resale. When Company A sells such equipment to its customers, Company A would collect the applicable sales tax. However, purchases of wiring and communication cables will not qualify for the resale exclusion if the wiring and cables are installed as capital improvements.

Issue 5

Fees charged by Company A for maintenance and repair of the security alarm systems are subject to sales tax. Under Section 1105(c)(3) of the Tax Law, sales tax is imposed on the services of maintaining, servicing or repairing tangible personal property.

DATED: September 9, 1998

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

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