

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

TSB-A-99(56)S  
Sales Tax  
December 1, 1999

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S990304A

On March 4, 1999, the Department of Taxation and Finance received a Petition for Advisory Opinion from William J. McAteer, CPA, c/o Goldenberg Rosenthal, LLP, PO Box 458, Jenkintown, PA 19046-0458. Petitioner, William J. McAteer, CPA, submitted additional information by telephone pertaining to the Petition on March 30, 1999.

The issues raised by Petitioner are:

1. Whether Petitioner's clients are responsible for the collection and/or payment of New York State and local sales or compensating use tax on their products which are sold on an installed basis as described below.
2. Whether a Certificate of Capital Improvement (Form ST-124) should be obtained from the property owner or general contractor if Petitioner's clients do installation work for subcontractors on a capital improvement project.

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

Petitioner has several clients in Pennsylvania and New Jersey that fabricate products to be installed as component parts of real property, e.g., kitchen cabinets and counter tops. At times, Petitioner's clients install the products they fabricate.

When Petitioner's clients purchase materials used to make their product, they do not pay sales tax. Petitioner's clients do not make any purchases of materials in New York.

Petitioner's clients' installations of their product have not previously occurred in New York. However, they have received requests to install their products in New York. It is assumed for purposes of this Advisory Opinion that such installation will result in a capital improvement to real property.

**Applicable Law and Regulations**

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

... 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 ....

Section 1101(b)(9)(i) of the Tax Law defines the term "capital improvement" to mean:

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 1105 of the Tax Law provides, in part:

On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax of four percent upon:

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

\* \* \*

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

\* \* \*

(3) Installing tangible personal property . . . or maintaining, servicing or repairing tangible personal property . . . not held for sale in the regular course of business ... 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 . . . .

Section 1110 of the Tax Law provides, in part:

(a) Except to the extent that property or services have already been or will be subject to the sales tax under this article, there is hereby imposed on every person a use tax for the use within this state on and after June first, nineteen hundred seventy-one except as otherwise exempted under this article, (A) of any tangible personal property purchased at retail, (B) of any tangible personal property (other than computer software used by the author or other creator) manufactured, processed or assembled by the user, (i) if items of the same kind of tangible personal property are offered for sale by him in the regular course of business or (ii) if items are used as such or incorporated into a structure, building or real property by a contractor, subcontractor or repairman 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, if items of the same kind are not offered for sale as such by such contractor, subcontractor or repairman or other user in the regular course of business, . . .

\* \* \*

(c) For purposes of subclause (i) of clause (B) of subdivision (a) of this section, the tax shall be at the rate of four percent of the price at which items of the same kind of tangible personal property are offered for sale by the user, and the mere storage, keeping, retention or withdrawal from storage of tangible personal property by the person who manufactured, processed or assembled such property shall not be deemed a taxable use by him.

(d) For purposes of subclause (ii) of clause (B) of subdivision (a) of this section, the tax shall be at the rate of four percent of the consideration given or contracted to be given for the tangible personal property manufactured, processed or assembled into the tangible personal property the use of which is subject to tax, including any charges for shipping or delivery as described in paragraph three of subdivision (b) of section eleven hundred one.

(e) Notwithstanding the foregoing, provisions of this section, for purposes of clause (B) of subdivision (a) of this section, there shall be no tax on any portion of such price which represents the value added by the user to tangible personal property which he fabricates and installs to the specifications of 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, over and above the prevailing normal purchase price prior to such fabrication of such tangible personal property which a manufacturer, producer or assembler would charge an unrelated contractor who

similarly fabricated and installed such tangible personal property to the specifications of an addition or capital improvement to such real property, property or land.

Section 1115(a) of the Tax Law provides, in part:

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:

\* \* \*

(17) 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 527.7(b)(5) of the Sales and Use Tax Regulations provides:

Any contractor who is making a capital improvement must pay a tax on the cost of materials to him, as he is the ultimate consumer of the tangible personal property.

Section 531.1(a) of the Sales and Use Tax Regulations provides, in part:

Imposition. The compensating use tax is imposed on every person for the use within New York State of tangible personal property and certain services described in subdivision (b) of this section, except to the extent they have been or will be subject to sales tax and except to the extent they are exempt from use tax.

Section 531.3(b) of the Sales and Use Tax Regulations provides, in part:

(b) Tangible personal property manufactured, processed or assembled by the user.

(1) A compensating use tax is imposed when a manufacturer, processor or assembler uses its product as such in New York State or incorporates the product into real property in New York State. This is so whether or not it offers items of the same kind for sale in the regular course of business and whether the product was

manufactured, processed or assembled inside or outside New York State. The basis on which compensating use tax is computed, however, depends on whether the user offers items of the same kind for sale in the regular course of business. A compensating use tax is not imposed, however, to the extent the user was required to pay sales tax without a right to a refund or credit upon the purchase of the ingredients, parts or materials manufactured, processed or assembled into the product the use of which is subject to tax.

Example 1: Company A, located in Suffolk County, manufactures and sells its own brand of garage doors. Approximately 80 percent of the doors are installed by Company A; the balance of the doors are installed by the purchaser.

Company A pays sales tax to its New York State suppliers of wood and glass that become part of the doors. When determining the amount of use tax it owes Company A may take credit for the New York State and local sales taxes paid on these materials.

(i) If the user offers items of the same kind for sale in the regular course of business, the basis on which use tax is computed is the price at which items of the same kind of tangible personal property are offered for sale by the user. The price at which items are offered for sale is evidenced by a price list, catalog price or record of sales. In the absence of a catalog price or price list, the average of the prices charged various customers will be deemed to be the price at which the user would sell such item during the regular course of business.

(a) Items of the same kind mean that items belong to an identifiable class, but need not be identical.

Example 2: Windows are items of the same kind when they are a standard size and materials whether or not they are sold from inventory or produced to order from a catalog description. A manufacturer of windows produces from a catalog description square, round and hexagon shaped windows from various materials. The windows regardless of shape, size or materials are considered to be items of the same kind.

When items which are not standard or cataloged are made to the specifications of a particular job, these will not be considered items of the same kind with catalog or inventory sales.

Items made to the specifications of a particular job will not be considered items of the same kind as items made to the specifications of another particular job.

\* \* \*

Example 4: A manufacturer produces standard type pre-cast steps (all of which are installed by the manufacturer), concrete block and various ornamental pre-cast items.

For purposes of identifying items of the same kind sold by this manufacturer, the three distinct types of products must be considered separately. Therefore, the steps, the blocks and the ornamentals are each items of the same kind.

(b) Offered for sale in the regular course of business means that a person sells in excess of 10 percent of his product for each 12 month period beginning December 1st, measured by weight, volume, size or other unit on which the price is based, to persons other than organizations exempt under section 1116(a) of the Tax Law. For the purpose of this calculation, the amount of product sold to all persons except exempt organizations will constitute the numerator of the fraction and the total amount of the product sold and used in performing work for others, with the exclusion of products sold to or used in performing work for exempt organizations, will constitute the denominator. When it is determined that a person is selling in excess of 10 percent of his product in the regular course of business as defined herein, he will be considered a person required to pay compensating use tax on the basis set forth in subparagraph (i) of this paragraph. . . .

\* \* \*

(ii) If the user does not offer items of the same kind for sale in the regular course of business as described in subparagraph (i) of this paragraph, the basis on which use tax is computed is the consideration given or contracted to be given for the tangible personal property manufactured, processed or assembled into the tangible personal property the use of which is subject to tax, including any charges by the user's seller to the user for shipping or delivery of that property to the user.

\* \* \*

Example 12: Company A produces factory manufactured homes at its plant in Vermont. The components are manufactured in Vermont and the homes are shipped in sections to customer prepared

sites where Company A erects the home. Company A only sells its product on an installed basis. It does not sell the individual components.

Company A owes use tax on the individual building components manufactured at its plant in Vermont which were used in erecting homes of customers in New York. The use tax is based on the cost to Company A of the raw materials it used to manufacture the building components. The tax due is computed by multiplying the cost of the raw materials by the tax rate in effect at the site in New York where the home is erected.

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

Capital improvements contracts. (1) Purchases. All purchases of tangible personal property (excluding qualifying production machinery and equipment exempt under section 1115(a)(12) of the Tax Law) which are incorporated into, and become part of the realty or are used or consumed in performing the contract are subject to tax at the time of purchase by the contractor or any other purchaser. A certificate of capital improvement may not be validly given by any person or accepted by a supplier to exempt the purchase of these materials.

(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.

\* \* \*

(4) Documents; capital improvement contracts. (i) When a properly completed certificate of capital improvement has been furnished to the contractor, the burden of proving the job or transaction is not taxable and the liability for the tax rests solely upon the customer.

(a) The prime contractor should obtain a certificate of capital improvement from the customer and retain it as part of his records. Copies of such certificate must be furnished to all subcontractors on the job and retained as part of their records.

(b) A certificate of capital improvement may not be issued by a contractor, subcontractor or any other person to a supplier on the purchase of tangible personal property.

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**Opinion**

In the case where one of Petitioner's clients sells kitchen cabinets or other products on an installed basis in New York State, which results in a capital improvement upon installation, Petitioner's client is not required to collect sales tax from its customers. Petitioner's client would, however, owe a compensating use tax on the cabinets or other products that it manufactures and uses in making installations as capital improvements. See Custom Design Kitchens, Inc., Adv Op Comm T&F, October 7, 1996, TSB-A-96(66)S. If Petitioner's client offers uninstalled products of the same kind for sale in its regular course of business, pursuant to Section 1110(c) of the Tax Law Petitioner's client is required to pay a compensating use tax with respect to such products based on the price at which Petitioner's client offers such uninstalled products for sale. If Petitioner's client does not offer uninstalled products of the same kind for sale in its regular course of business, in accordance with Section 1110(d) of the Tax Law the compensating use tax would be based on the cost of the materials contained in the cabinets including any charges for shipping or delivery of such materials to Petitioner's client. See Section 531.3(b)(1) of the Sales and Use Tax Regulations. The applicable rate of use tax is the combined State and local tax rate in effect in the locality where the product is installed.

It is noted that pursuant to Section 531.3(b)(1)(i)(b) of the Sales and Use Tax Regulations, "offered for sale in the regular course of business" means that a person sells more than 10 percent of a product during each 12 month period beginning December 1st, measured by weight, volume, size or other unit on which the price is based, to persons other than organizations exempt under Section 1116(a) of the Tax Law.

Petitioner's client should receive from its customer a Certificate of Capital Improvement (Form ST-124), within 90 days from the date of performing the capital improvement, or Petitioner's client may be found to be liable for tax on the sale. See Section 1132(c) of the Tax Law and Section 532.4 of the Sales and Use Tax Regulations. When Petitioner's client acts as a subcontractor on a project, it should obtain Form ST-124 from the general contractor. See Section 541.5(b) of the Sales and Use Tax Regulations.

DATED: December 1, 1999

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

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