



Sales Tax Treatment of Certain Temporary Facilities Provided at Construction Sites

This memorandum explains the Tax Department's application of sales and use taxes (sales tax) to temporary scaffolding, temporary pedestrian walkways (sidewalk bridges), and temporary hoisting systems installed at construction sites.

The purpose of this TSB-M is to clarify the Tax Department's policy regarding the application of New York State and local sales and use taxes (sales tax) to temporary scaffolding, temporary protective pedestrian walkways, and temporary hoisting systems (referred to collectively as *scaffolding systems*) that are used in construction projects. The TSB-M reflects the decision of the Tax Appeals Tribunal in *Matter of L & L Painting Co. Inc.* (June 2, 2011) regarding the exclusion from sales tax for the installation of a "temporary facility" at a construction site, and sets forth rules and guidelines with respect to other related sales tax issues affecting the scaffolding systems industry. To the extent that the department's policy concerning any of these other related issues is new, it will be **effective January 1, 2015**. Any other statements previously issued by the department that suggest contrary conclusions than those reached in this TSB-M do not represent current policy and can no longer be relied upon.

Note: Any statements issued by the department prior to January 1, 2015, remain in effect for the duration of any contracts entered into before such date. That is, the department's policies applicable to transactions made under a contract entered into before January 1, 2015, remain applicable to transactions made under that contract after January 1, 2015.

General

For purposes of this memorandum, the term *scaffolding systems* means fixed structures that are used to support, protect, or convey people or materials during the construction or repair of buildings and other real property. Among the qualifying structures considered in this classification are shoring and suspended scaffolding. Hoisting systems included within the meaning of *scaffolding systems* are only those types that are similar to elevators and other conveyances found in permanent structures. Other types of hoisting systems do not qualify. In addition, the term *scaffolding systems* does not include construction equipment that can be readily moved within a construction site (e.g., on wheels or casters), including scaffolding, pedestrian walkways, cranes, or hoists.

Scaffolding systems are necessary components of most major construction projects. Construction projects may result in exempt capital improvements to real property or taxable installation, maintenance, servicing, and repair jobs. Generally a prime contractor on a major construction project will enter into a subcontract with a scaffolding systems provider that is typically structured to include charges for the rental of the scaffolding system and for the labor to install and dismantle it. These charges are billed on either:

- a lump sum basis for all aspects of the service, including but not limited to, rental, installation, and dismantling of the scaffolding system; or
- a separately stated basis that reflects itemization of the various rental and labor components (the rental charge is typically a minority percentage of the total charge for the contract).

A subcontract to furnish, install, and dismantle a scaffolding system at a construction site is considered to be a subcontract to provide a service (*scaffolding service*), irrespective of whether the subcontract is billed on a lump sum or a separately stated basis. The subcontractor would owe sales tax on its purchases or rentals of scaffolding materials, and would be ineligible to claim the resale exclusion (i.e., cannot provide its supplier with Form ST-120, *Resale Certificate*).

Applicable tax law and regulations

For construction projects in general, a contractor's receipts from the sale of installing tangible personal property are subject to sales tax under Tax Law section 1105(c)(3), and receipts from the sale of maintaining, servicing, or repairing real property are subject to sales tax under section 1105(c)(5). However, sales tax is not imposed on services for the installation or construction of a capital improvement to real property.

In order for a construction project to constitute a capital improvement, the criteria in Tax Law section 1101(b)(9) must be satisfied. To constitute a capital improvement, section 1101(b)(9) requires that the construction project result in an addition or alteration to real property that:

- substantially adds to the property's value or appreciably prolongs its useful life;
- becomes part of the property or is permanently affixed so that removal would cause material damage to the property or article itself; and
- is intended to be a permanent installation.

Capital improvements to real property are distinguished from maintaining, servicing, and repairing real property by the "end result" test. If the end result of the services is the repair or maintenance of real property, the services are taxable. If the end result of the same services is a capital improvement to the property, the services are not taxable (20 NYCRR 527.7[b][4]).

The exclusion from sales tax on the services of installing or constructing a capital improvement extends to charges for the "installation of materials and labor" to provide "temporary facilities at construction sites," including temporary protective pedestrian walkways, where the temporary facility is a necessary prerequisite to the construction of the capital improvement. The following provisions of section 541.8(a) of the regulations pertain to subcontracts to provide certain temporary facilities at capital improvement construction sites:

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.

Accordingly, the determination of whether the installation of a temporary facility is subject to sales tax depends on the nature of the underlying work being performed at the construction site where the facility is installed. If the construction project qualifies as a capital improvement, then the charges for the installation of the temporary facility are not subject to sales tax. If the construction project does not qualify as a capital improvement, then the charges for the installation are subject to sales tax.

Tax Department policy

The following sections describe the Tax Department's policy with respect to charges for temporary facilities at construction sites and the applicability of section 541.8 of the sales tax regulations to the taxability of scaffolding systems.

Scaffolding services provided in capital improvement projects

When provided in connection with a capital improvement project, a scaffolding service is one of the services covered by the exclusion from sales tax described in section 541.8(a) of the regulations. As a result, amounts charged by a subcontractor for scaffolding services qualify as charges for a "temporary facility" that are not subject to sales tax provided that the underlying construction project qualifies as a capital improvement. Accordingly, all charges made by a subcontractor for materials and labor necessary to provide a scaffolding service at a construction site are not subject to sales tax if the end result of the underlying construction project, when viewed as a whole, qualifies as a capital improvement and is supported by the issuance of a valid Form ST-124, *Certificate of Capital Improvement*. Both lump sum and separately stated contracts are treated the same for sales tax purposes.

When a subcontractor provides scaffolding services in connection with a construction project that qualifies as a capital improvement, the subcontractor is, however, liable for the payment of sales tax on its own purchases or rentals of materials acquired to provide the scaffolding service because these purchases and rentals do not qualify as purchases for resale (20 NYCRR 541.8[b]). This sales tax liability also applies to purchases and rentals of materials from a related entity. That is, if the subcontractor purchases or rents a scaffolding system from a related entity, the charge for the purchase or rental is subject to tax. Moreover, the charge must be reasonable in view of prevailing market sale or rental prices for the scaffolding system.

Example 1: *A subcontractor contracts with a prime contractor constructing an office building to provide the materials and labor necessary to furnish a temporary scaffolding system to support the various trades in performing their work. The contract includes separately stated charges for rental, installation, and dismantling of the scaffolding system. The subcontractor must purchase a quantity of tubing, clamps, and platforms in*

order to provide the scaffolding service. The scaffolding service is considered a necessary prerequisite to the construction of a capital improvement and, therefore, the subcontractor's separately stated charges to the prime contractor for rental, installation, and dismantling of the scaffolding system are not subject to sales tax. However, the subcontractor must pay the sales tax due on its purchases of all materials needed to provide the scaffolding service, even if purchased from a company that is the subcontractor's wholly-owned affiliate. Charges by the affiliate to the subcontractor for the materials must be reasonable, reflecting a fair market value.

Scaffolding services provided in installation, maintenance, servicing, or repair projects

A scaffolding service provided as part of a taxable installation, maintenance, servicing, or repair project is a taxable service and is subject to sales tax whether billed on either a lump sum or separately stated basis. The rental, installation, and dismantling of the scaffolding system are all elements of the total receipts for the scaffolding service that are subject to sales tax. The subcontractor or repairman must charge sales tax to the prime contractor on the complete lump sum charged for the scaffolding service or, alternatively, on all of the separately stated charges including dismantling of the scaffolding system.

When a subcontractor or repairman provides scaffolding services in connection with a taxable installation, maintenance, servicing, or repair project, the subcontractor or repairman is liable for payment of sales tax on its purchases of the materials obtained to provide the scaffolding service because the subcontractor or repairman is using the materials for its own purposes to perform construction activities subject to tax. The materials do not become a "physical component part" of the property serviced and are not actually transferred to the customer as required for application of the exclusion from tax under Tax Law section 1101(b)(4)(i). Moreover, the purchase of the scaffolding service by the prime contractor does not qualify as a purchase for resale because the prime contractor is using the service for its own purposes and will not be reselling it.

Example 2: *The facts are the same as in Example 1 except the work being performed by the prime contractor is a taxable repair job and not a capital improvement. In this situation the scaffolding service itself is a taxable service and therefore the subcontractor's separately stated charges to the prime contractor for rental, installation, and dismantling of the scaffolding system are subject to sales tax. The subcontractor is liable for the sales tax due on its purchases or rentals of all materials obtained to provide the scaffolding service.*

Scaffolding materials purchased outside of New York State

A subcontractor's out-of-state purchases or rentals of materials that are used to provide scaffolding services within this state are subject to use tax on the date the materials are first brought into New York State. The tax is based on the purchase price of the materials, unless:

- the materials are used outside this state by the subcontractor for more than six months prior to their use in New York, in which case the tax is based on the lesser of the

- purchase price or the fair market value of the materials (but not to exceed their cost) at the time of first use in New York; or
- the materials brought into New York (other than for complete consumption) will be used for a period of less than six months, in which case the subcontractor may elect to pay the use tax based on the fair rental value of the materials for the period of use within New York.

The subcontractor may be eligible for a reciprocal tax credit against the use tax due for sales or use tax paid in another state, provided the other state provides a reciprocal credit for sales or use taxes paid to New York State. For more information on claiming and calculating a reciprocal credit for sales or use taxes paid to another state, see Tax Bulletin *Reciprocal Credit for Sales or Use Taxes Paid to Other Taxing Jurisdictions* (TB-ST-765).

Scaffolding materials purchased by persons other than contractors, subcontractors, or repairmen

When scaffolding materials are purchased by a person exclusively for the purpose of reselling or renting the scaffolding materials to others (i.e., without the lessor providing any accompanying services), the scaffolding materials may be purchased for resale without payment of sales tax. The purchaser should furnish its supplier with a properly completed Form ST-120, *Resale Certificate*. Charges by the purchaser for the sale or rental of the scaffolding materials to a related entity must be reasonable in view of prevailing market sale or rental prices.

NOTE: A TSB-M is an informational statement of existing department policies or of changes to the law, regulations, or department policies. It is accurate on the date issued. Subsequent changes in the law or regulations, judicial decisions, Tax Appeals Tribunal decisions, or changes in department policies could affect the validity of the information presented in a TSB-M.