

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED] (Petitioner) asking whether sales tax is imposed on its receipts for the sales and installations of commercial lighting fixtures. Petitioner also asks how these sales should be sourced for corporation tax apportionment purposes. We conclude, as more fully detailed below, that Petitioner must pay sales or use tax on fixtures sold on an installed basis where installation occurs in New York. Petitioner also must collect sales tax on fixtures sold without installation where it delivers the fixture to the customer or its designee in New York. We further conclude that where Petitioner transfers possession of the fixtures to the purchaser within New York State or the final destination of the property is a point in New York State, the receipts for the sale of those fixtures must be apportioned to New York for corporation tax purposes.

**Facts**

Petitioner is a New York corporation that sells commercial lighting fixtures, sometimes on an installed basis. Petitioner accepts orders for lighting fixtures from its New York office and purchases the fixtures from affiliated manufacturers in Europe. After making a sale in New York, the commercial lighting fixtures are transported to Petitioner's customers in a variety of ways. When the customer arranges for shipment of the fixtures, Petitioner asserts that it does not have information about the method of shipment or the location of delivery. However, Petitioner provided two representative sample purchase orders; one included installation of the fixtures and the other did not. Both purchase orders identified the place where the fixtures would ultimately be delivered and installed.

Scenario 1

The customer takes title to the fixture in Europe at the factory dock. The customer hires a common carrier to transport the fixture from the factory dock to a European seaport. Under customer control, the fixture is transferred to a ship that also is a common carrier for transport to a New York port. At the New York port, under customer control, the fixture is transferred to a truck that also is a common carrier for delivery to the eventual site of its installation, which may be within or outside New York State.

Scenario 2

This scenario is the same as Scenario 1, except Petitioner arranges all transportation.

### Scenario 3

The customer takes title to the fixture in Europe at the factory dock. The customer hires a private carrier to transport the fixture from the factory dock to a European seaport. Under customer control, the fixture is transferred to a ship that is a common carrier for transport to a New York port. At the New York port, under customer control, the fixture is transferred to a truck that also is a common carrier for delivery to the eventual site of its installation, which may be within or outside New York State.

### Scenario 4

This scenario is the same as Scenario 3, except Petitioner arranges all transportation.

### Scenario 5

The customer takes title to the fixture in Europe at the factory dock. The customer hires a common carrier to transport the fixture from the factory dock to a European seaport. Under customer control, the fixture is transferred to a ship that also is a common carrier for transport to a New York port. At the New York port, under customer control, the fixture is transferred to a truck that is a private carrier for delivery to the eventual site of its installation, which may be within or outside New York State.

### Scenario 6

This scenario is the same as Scenario 5, except Petitioner arranges all transportation.

Petitioner asserts that it collects New York State and local sales tax on installed sales where the installation occurs in New York and asks for confirmation that these sales are subject to sales tax.

## **Analysis**

### Application of State and Local Sales Tax

Tax Law § 1105(a) imposes sales tax on the receipts from every retail sale of tangible personal property (“TPP”). Sales tax is a “destination tax” and the point of delivery or point at which possession is transferred by the vendor to the purchaser, or the purchaser’s designee, controls both the tax incidence and the tax rate. *See* 20 NYCRR 525.2(a)(3). A sale is taxable at the place where the TPP is delivered or the point at which possession is transferred by the vendor to the purchaser or its designee. *See* 20 NYCRR 526.7(e)(1).

In each of the scenarios posed by Petitioner, the lighting fixture is shipped from the European manufacturer by a series of common or private carriers for delivery to the customer, either within or outside New York. In some of these scenarios, the transportation is arranged by the customer and in others it is arranged by the Petitioner. These details affect the point at which possession is transferred and, accordingly, the incidence and rate of sales tax. In general, where a

lighting fixture is sold without installation and either Petitioner or the customer arranges for transportation by common carrier, the place of delivery by the common carrier to the customer or its designee is the location of the sale for sales tax purposes. A common carrier is not considered to be a designee of the purchaser, regardless of which party arranges for transportation.

If Petitioner transfers a fixture sold without installation to a private or contract carrier hired by the purchaser, the carrier is the designee of the purchaser and the sale takes place where Petitioner transfers the fixture to the carrier, regardless of the ultimate destination of the fixture. Conversely, if Petitioner engages a private or contract carrier to deliver a fixture sold without installation, that carrier is not a designee of purchaser, and the sale takes place at the location where the carrier delivers the fixture to the purchaser or its designee.

Tax Law § 1132 presumes that all of Petitioner's receipts for the sales of commercial lighting fixtures are subject to sales tax and the burden to prove otherwise rests with Petitioner. Accordingly, it is Petitioner's burden to show that delivery occurred outside New York State and that sales tax does not apply, regardless of which party arranges for transportation. Petitioner must keep records to substantiate the place of delivery to the customer or its designee and, if that place is in New York, must collect the combined State and local sales taxes in effect in at that location. *See* Tax Law § 1135; 20 NYCRR 533.2. Petitioner contends that when its customer arranges for transportation, it does not always know whether the carriers involved are common or contract carriers. In those circumstances, Petitioner either should request documentation from the customer to satisfy its burden of proof that delivery took place outside New York State, or collect sales tax.

The following analysis of Petitioner's scenarios applies when the lighting fixtures are sold without installation:

In Scenario 1, the customer arranges for all transportation and engages a common carrier to pick up the fixture at the factory dock in Europe and deliver it by truck to a ship at a European seaport. The ship, also a common carrier, delivers the fixture to a port in New York, where it is delivered to a common carrier to transport the fixture by truck to the customer. In this scenario, the sale takes place at the point of delivery to the customer. If delivery takes place in New York, the sale is subject to sales tax based on the combined State and local sales tax rates in effect in the jurisdiction where the delivery takes place. Petitioner must maintain records to substantiate the common carrier's place of delivery and must collect sales tax from the customer if that place is in New York.

Scenario 2 is identical to Scenario 1, except that transportation is arranged by Petitioner. Because all the carriers in that scenario are common carriers, the result in Scenario 1 does not change based on which party arranged for the transportation. The sales takes place where the final common carrier delivers the fixture to the customer. Petitioner must maintain records to substantiate the common carrier's place of delivery and must collect sales tax from the customer if that location is in New York.

In Scenario 3, Petitioner's customer arranges for all transportation and engages a private carrier to take possession of the lighting fixture at the European factory dock. The private carrier

delivers the fixture by truck to a ship, which is a common carrier, at a European seaport. The ship delivers the fixture to a port in New York, where it is delivered to a common carrier to transport the fixture by truck to the customer. In this scenario, the private carrier is the purchaser's designee because the purchaser arranged the transportation. Delivery to the purchaser's designee takes place at the factory dock in Europe where the designee takes possession. Accordingly, the sale occurs at the factory dock for sales tax purposes and Petitioner is not required to collect New York State and local sales taxes.

Scenario 4 is identical to Scenario 3, except that transportation is arranged by Petitioner. Although the first leg of the transportation is provided by private carrier, because that carrier is engaged by Petitioner, it is not a designee of the purchaser. Consequently, the sales takes place where the final common carrier delivers the fixture to the customer. Petitioner must collect sales tax from the customer if that location is in New York.

In Scenario 5, the customer arranges all transportation and engages a common carrier to pick up the fixture at the factory dock in Europe and deliver it by truck to a ship at a European seaport. The ship, also a common carrier, delivers the fixture to a port in New York, where it is delivered to a private carrier to transport the fixture by truck to the customer. In this case, because the private carrier that accepts the fixture at the New York port is the designee of the purchaser, the sale takes place in New York and Petitioner must collect the applicable rate of State and local sales tax in effect at the New York port where delivery to the private carrier takes place.

Scenario 6 is identical to Scenario 5, except that transportation is arranged by Petitioner. Although the final leg of the transportation is provided by private carrier, because that carrier is engaged by Petitioner, it is not a designee of the purchaser. Accordingly, the sale takes place where the private carrier delivers the fixture to the customer. Petitioner must collect sales tax from the customer if that location is in New York.

The following analysis applies to Petitioner's sales of lighting fixtures that include installation at a location within New York State:

Sales tax is imposed on certain services, including the service of installing TPP, but excludes the installation of property that when installed would be a capital improvement to real property. *See* Tax Law § 1105(c)(3). A capital improvement is defined as an addition or alteration to real property that: (A) substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property; (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. *See* Tax Law § 1101(b)(9)(i). Petitioner has not provided information about the method or circumstances of its installations. Thus, we are unable to opine on whether those installations constitute capital improvements. However, in most cases, the original hard-wired installation of lighting fixtures would qualify as a capital improvement, so long as the installation is intended to be permanent. *See* Publication 862, *Sales and Use Tax Classifications of Capital Improvement and Repairs to Real Property*.

When Petitioner sells lighting fixtures with installation, it is acting as a contractor and must pay sales tax on its purchase of the fixture and any other TPP to be installed, whether or not the installation results in a capital improvement. *See* Tax Law § 1101(b)(4)(i). Petitioner may not issue a resale certificate to purchase such property exempt from sales tax. If Petitioner is installing fixtures or other property from its own inventory and the installation results in a capital improvement, it must pay use tax based on its cost for the property at the State and local rate in effect in the jurisdiction where the property will be installed. *See* 20 NYCRR 541.13.

If Petitioner, in good faith, receives a properly completed Form ST-124, *Certificate of Capital Improvement* from the customer within 90 days after the completion of the capital improvement, it is relieved of the obligation to collect sales tax from its customer. *See* Tax Law § 1132(c). While Petitioner is not prohibited from passing on its cost of paying the sales tax on its purchases as part of the sale price of the installed fixture, it cannot collect sales tax on the sale of the fixture or other TPP installed as part of a capital improvement.

Where Petitioner's installation of a lighting fixture does not result in a capital improvement, or where the customer does not timely provide a properly completed Form ST-124, Petitioner must charge sales tax to its customer on the entire charge for the fixture and its installation. In that situation, Petitioner may take a credit for sales tax it paid on its purchases of property that did not become part of a capital improvement. *See* 20 NYCRR 534.5.

#### Apportionment of the Receipts for Corporate Franchise Tax Purposes

For taxable years beginning on or after January 1, 2015, business income is apportioned to New York by the business apportionment factor determined pursuant to Tax Law § 210-A. Tax Law § 210-A(2)(a) provides that, for such taxable years, receipts from the sale of tangible personal property (TPP) are apportioned to New York if such TPP is shipped to a point within New York State or the final destination of such TPP is a point within New York State. All such receipts must be included in the denominator of the business apportionment factor.

Under the facts provided by Petitioner, in the six scenarios, at least some of the receipts are from the sale of TPP where the final destination of the TPP is within New York State. For any such sales, the receipts must be apportioned to New York.

Where possession of the TPP is transferred to Petitioner's customer at a point outside New York State and the final destination of the TPP is within New York State, the receipts must be apportioned to New York. Where possession of the TPP is transferred to Petitioner's customer at a point outside New York State, the destination is presumed to be a point outside New York State. Such presumption will be rebutted by sufficient evidence that the destination of the TPP is a point within New York State, including, but not limited to, a bill of lading or other shipping document designating the destination location, or a purchase invoice designating the destination location. *See* 20 NYCRR 4-2.1; *see also* TSB-M-00(03)C.<sup>1</sup>

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<sup>1</sup> Tax Law § 210, as in effect through taxable year 2014, provided that a taxpayer's receipts allocable to New York include "sales of its tangible personal property where shipments are made to points within this state." Tax Law § 210(3)(a)(2)(A), as in effect through taxable year 2014. Because the rule for sourcing TPP generally did not change

Under the facts provided by Petitioner, in all six scenarios, where possession of the property is transferred to the purchaser or the purchaser's designee at a point outside New York State, if the final destination of the property is a point within the state, then the receipts for the sales must be apportioned to New York.

Under these facts, including the representative sample purchase orders Petitioner has provided, if the purchase order designates the destination location as a point within New York State, that would constitute sufficient evidence to rebut the presumption that the destination of the property is a point outside the state, and the receipts for the sale must be apportioned to New York. Alternatively, if the purchase order does not show the destination location as a point within New York State and, in the absence of such information or other evidence demonstrating the destination location, the presumption that the final destination of the property is a point outside New York State will not be rebutted. Further, in scenarios two, four and six, Petitioner provides for transportation of the TPP and, therefore, will have shipping documents designating the destination location. If such documents or other evidence demonstrates that the destination location is a point within New York State, then the receipts for the sale must be apportioned to New York.

The representative sample purchase orders provided by Petitioner also identify the place where Petitioner's TPP is to be installed. If Petitioner installs the TPP, or otherwise has documentation demonstrating that the destination location of the property is a point within New York State, such evidence will rebut the presumption that the final destination of the property is a point outside New York State, and the receipts must be apportioned to New York.

DATED: July 30, 2024

/s/

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NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.

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with the enactment of Tax Law § 210-A, effective for taxable years 2015 and forward, this TSB-M may still be relied upon.