New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-03(23)S
Sales Tax
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STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. S020905A

On September 5, 2002, the Department of Taxation and Finance received a Petition for Advisory Opinion from United Marble, Inc., 98 Lincoln Avenue, PO Box 366, Sayville, NY 11782. Petitioner, United Marble, Inc., provided additional information pertaining to the Petition on October 10, 2002.

Petitioner sets forth a number of questions concerning the application of sales and compensating use taxes to the installation of custom kitchen counter tops by manufacturers, contractors, and subcontractors.

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

Petitioner is a wholesale manufacturer located in Suffolk County on Long, Island, NY. Petitioner manufactures a cultured marble product that is generally sold to retail outlets. The product is produced by mixing and casting a resin-filled material into molds. Its main use is in bathrooms in the form of bathroom sinks and accessories.

Another part of Petitioner's business is the wholesale fabrication of Dupont Corian and other similar products. The Corian is delivered to Petitioner in the form of sheets of raw material. Petitioner cuts, routes, glues, polishes, and seams together this material. The finished product could be a bathroom vanity top or a kitchen counter top. In order to pass along a ten-year warranty, Dupont requires that Petitioner install the product. Petitioner installs these kitchens and bathrooms by using its own employees and by hiring subcontractors.

Petitioner's customers include various plumbing supply companies, tile stores, kitchen and bath dealers, builders, and contractors. When a new customer contracts with Petitioner it supplies a resale certificate or, if Petitioner does not receive such certificate, Petitioner collects sales tax on all jobs performed for that customer. When Petitioner receives a capital improvement certificate, it pays sales and use tax on the materials that are used to fabricate the finished product.

Petitioner describes four transactions involving its sales of custom kitchen counter top installations and inquires as to the sales tax obligations and liabilities in each instance. These transactions are described in the opinion portion of this Advisory Opinion.

Applicable Law and Regulations

Section 1101(b)(4)(i) of the Tax Law defines "retail sale," in part, as:

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

Section 1105(c) of the Tax Law imposes a tax on the receipts from every sale, except for resale, of the following services:

* * *

> (3) Installing 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. . . .

* * *

> (5) Maintaining, servicing or repairing real property, property or land, as such terms are defined in the real property tax law, whether the services are performed in or outside of a building. . . .

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 . . . 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 . . . 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. . . .

(b) For purposes of clause (A) 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 such property, or for the use of such property, including any charges for shipping or delivery. . . .

* * *

(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. . . .

(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. . . .

Section 1119(c) of the Tax Law provides, in part:

A refund or credit . . . of sales or compensating use tax . . . paid on the sale or use of tangible personal property, shall be allowed the purchaser where such property is later used by the purchaser in performing a service subject to tax under paragraph (1), (2), (3), (5), (7) or (8) of subdivision (c) of section eleven hundred five or under section eleven hundred ten and such property has become a physical component part of the property upon which the service is performed or has been transferred to the purchaser of the service in conjunction with the performance of the service subject to tax or if a contractor, subcontractor or repairman purchases tangible personal property and later makes a retail sale of such tangible personal property, the acquisition of which would not have been a sale at retail to him but for the second to last sentence of subparagraph (i) of paragraph (4) of subdivision (b) of section eleven hundred one. . . .

Section 1132 of the Tax Law provides, in part:

(a)(1) Every person required to collect the tax shall collect the tax from the customer when collecting the price . . . to which it applies. . . .

* * *

(c)(1) 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 or services of any type mentioned in subdivisions (a), (b), (c) and (d) 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 (i) a vendor, not later than ninety days after delivery of the property or the rendition of the service, shall have taken from the purchaser

a resale or exemption certificate in such form as the commissioner may prescribe, signed by the purchaser and setting forth the purchaser's name and address and, except as otherwise provided by regulation of the commissioner, the number of the purchaser's certificate of authority, together with such other information as the commissioner may require, to the effect that the property or service was purchased for resale or for some use by reason of which the sale is exempt from tax under the provisions of section eleven hundred fifteen, and, where such resale or exemption certificate requires the inclusion of the purchaser's certificate of authority number or other identification number required by regulations of the commissioner, that the purchaser's certificate of authority has not been suspended or revoked and has not expired as provided in section eleven hundred thirty-four . . . the sale shall be deemed a taxable sale at retail . . . Where such a resale or exemption certificate . . . 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 a resale or exemption certificate . . . in proper form. . . .

Section 1139 of the Tax Law provides, in part:

(a) . . . the tax commission shall refund or credit any tax, penalty or interest erroneously, illegally or unconstitutionally collected or paid if application therefor shall be filed with the tax commission (i) in the case of tax paid by the applicant to a person required to collect tax, within three years after the date when the tax was payable by such person to the tax commission as provided in section eleven hundred thirty-seven . . . Such application shall be in such form as the tax commission shall prescribe. . . .

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

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

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.

* * *

(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: . . . 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. The formula to be used in determining whether the product is being sold in the regular course of business is:

$$\frac{\text{Tot. amt. sold minus amt. sold to exempt organizations}}{\text{Tot. amt. sold and used minus (amt. sold to plus amt. used for ex. organ.)}}$$

* * *

(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.

* * *

(2)(i) Where a manufacturer, processor or assembler fabricates its manufactured, processed or assembled product and installs it to the specifications of a capital improvement to real property, the value added by this fabrication is not included in the basis on which compensating use tax is computed. However, the installation by the manufacturer, processor or assembler of its fabricated product to

the specifications of a capital improvement to real property is a use of the product subject to compensating use tax. The basis on which the use tax is computed depends on whether the manufacturer, processor or assembler offers its fabricated product for sale in the regular course of business.

* * *

(iii) If the manufacturer, processor or assembler does not offer its fabricated product for sale in the regular course of business, 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 the raw material to the user.

Section 541.1 of the Sales and Use Tax Regulations provides, in part:

* * *

(b) The principal distinguishing feature of a sale to a contractor, as compared to a sale to other vendors who purchase tangible personal property for resale, is that the sale of tangible personal property to a contractor for use or consumption in construction is a retail sale and subject to sales and use tax, regardless of whether tangible personal property is to be resold as such or incorporated into real property as a capital improvement or repair. . . .

* * *

(c) Receipts from the performance of a capital improvement to real property by a contractor are not subject to the sales tax.

* * *

(g) *Guarantee and warranty work*. (1) Payments by a contractor to another contractor to perform maintenance, service and repair of real and tangible personal property when purchased to fulfill a guarantee or warranty are not subject to tax.

(2) Where a contractor services real or tangible personal property and a charge is made to the customer, the charge is subject to the tax even though some of the work is performed partially under a guarantee or warranty.

(3)(i) The contractor is not entitled to a refund or credit of the tax paid on the purchase of tangible personal property used in guarantee or warranty work in the performance of a capital improvement.

(ii) If the guarantee or warranty work is on a repair to real property, tangible personal property or tangible personal property that remains tangible personal property after installation, a refund or credit may be claimed by the contractor for the tax paid on the materials and parts transferred to the customer, whether or not a charge is made to the customer for the guarantee or warranty work, providing the claim is timely submitted as set forth in Part 534 of this Title. However, if any charge is made to the customer, the charge is subject to tax.

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

* * *

(b) *Capital improvements contracts*. (1) Purchases. All purchases of tangible personal property . . . 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)(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. (Emphasis added)

(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.

(ii) Where a contractor does not receive a capital improvement certificate from a customer, the contract or other records of the transaction will prevail. In such case:

(a) where the contractor does not receive a capital improvement certificate, collects tax on the full invoice price and the job is a capital improvement to real property, the contractor is liable for the tax on the cost of materials incorporated into the job, plus the tax collected from the customer. The customer is entitled to a refund of the tax paid to the contractor; or

(b) where the contractor does not receive a capital improvement certificate, collects no tax on the charges billed to the customer and the job is a capital improvement to real property, the contractor is liable for the tax on the cost of materials incorporated into the job performed.

(iii) If a contract includes the sale of tangible personal property which remains tangible personal property after installation, the contractor must collect the appropriate New York State and local taxes from the customer on the selling price, including any charge for installation, of the tangible personal property unless a properly completed exemption certificate is issued by the customer. The contractor may apply for a credit or refund of taxes he has paid on purchases of the tangible personal property that remain tangible personal property after installation.

* * *

(d)(1)(i) Charges for . . . installation of tangible personal property which retains its identity as tangible personal property are taxable to the customer based on the full invoice price.

(ii) Some items of tangible personal property that retain their identity as tangible personal property after installation are:

* * *

(c) free-standing shelves, counters, bars . . .

* * *

(iii) A subcontractor must collect tax on all his charges to a prime contractor for . . . installation of tangible personal property unless the prime contractor issues a properly completed exemption certificate or a capital improvement certificate to the subcontractor.

Section 541.11 of the Sales and Use Tax Regulations provides, in part:

(a) Fabricators and manufacturers who install their fabricated or manufactured product into real property are contractors.

(b) *Fabricators as contractors*. (1) When a contractor-fabricator purchases tangible personal property which he fabricates and installs to the specifications of a capital improvement, the value added by such fabrication is not subject to the use tax.

Opinion

Transaction 1

Petitioner contracts with a customer to measure and install a custom kitchen counter top. The job is measured by one of Petitioner's employees or subcontractors who ultimately installs the counter top after it is fabricated. Petitioner currently maintains a blanket resale certificate on file for the customer since the customer also buys and stocks other products that are not installed by Petitioner. Petitioner bills its customer for the fabrication and installation and does not charge sales tax on the job. If a subcontractor is used, the subcontractor bills Petitioner to install the job. Petitioner's customer charges its customer (the ultimate consumer or contractor) sales tax on the installed job.

Question 1

(a) *Should Petitioner charge sales tax for this job and to whom? If so, what part of the job is taxable?*

Answer In this transaction, Petitioner's customer is acting in the capacity of a general contractor and Petitioner is acting as its customer's subcontractor. See Affordable Homes, Inc., Adv Op State Tax Commission, May 28, 1986, TSB-A-86(21)S. The taxability of charges by a contractor to a customer depends on the nature of the job (capital improvement or installation of tangible personal property) being performed. The installation of the custom-made counter top by Petitioner generally constitutes a capital improvement to real property where the installation is intended to be permanent. See Custom Design Kitchens, Inc., Adv Op Comm T&F, October 7, 1996, TSB-A-96(66)S. In that case, Petitioner is not required to collect sales tax from its customer on the sale of the installed, permanent counter top, provided Petitioner obtains a copy of Form ST-124, *Certificate of Capital Improvement*, from its customer, within 90 days from the date of performing the capital improvement. See William J. McAteer, CPA, Adv Op Comm T&F, December 1, 1999, TSB-A-99(56)S; G & I Homes, Inc., Adv Op Comm T&F, April 21, 1995, TSB-A-95(11)S; Affordable Homes, Inc., supra. If Petitioner obtains such a timely and properly completed exemption document in good faith, Petitioner cannot be held liable for sales tax it did not collect from its customer. See Section 1132(c) of the Tax Law. (It is noted that the use of Form ST-120, *Resale Certificate*, for this transaction is not appropriate).

Any contractor who is making a capital improvement must pay tax on the cost of materials to him, as he is the ultimate consumer of the tangible personal property. See Section 527.7(b)(5) of the Sales and Use Tax Regulations. Generally the contractor must pay sales tax on such materials at the time of purchase in accordance with Section 1101(b)(4) of the Tax Law. Therefore, if Petitioner has not paid sales tax on its purchase of materials used to fabricate a counter top it installs as a capital improvement, Petitioner is subsequently required to pay tax on such materials. See William J. McAteer, CPA, supra; Custom Design Kitchens, Inc., supra; Affordable Homes, Inc., supra.

If Petitioner's installation of the custom counter top does not qualify as a capital improvement because the counter top is not intended to be permanent, then Petitioner's entire charge (for both materials and labor) to its customer is subject to State and local sales and use taxes. Custom Design Kitchens, Inc., supra. Petitioner must collect tax on such total charge (unless its customer provides substantiation that an exemption from tax exists), and Petitioner would then be entitled to a refund or credit of the tax paid on those materials incorporated into real property or later transferred to the customer in conjunction with Petitioner's performance of this taxable installation service. See Section 1119(c) of the Tax Law.

(b) *Should Petitioner be paying tax on materials used to fabricate this custom counter top? If so, is Petitioner entitled to any credit for taxes collected by its customer?*

Answer Yes. Petitioner is required to pay sales and use tax based on the cost of the materials contained in the counter top including any charges for shipping or delivery of such materials.

When Petitioner installs a counter top that does not qualify as a capital improvement to real property, Petitioner is entitled to a refund or credit of sales and use tax which Petitioner has paid on the purchase of materials used to make such counter top, in accordance with Section 1119(c) of the Tax Law.

The basis on which use tax is computed depends on whether Petitioner offers items of the same kind for sale in the regular course of business. For purposes of identifying items of the same kind sold by Petitioner, since the cultured marble and the Corian (and similar) products are two distinct types of products, they must be considered separately. Since the custom counter top is an item made to the specifications of a particular job, it is not considered an item of the same kind with catalog or inventory sales. See Section 531.3(b)(1)(i)(a) of the Sales and Use Tax Regulations. Since Petitioner is required to install the Corian in order for the manufacturer's warranty to apply, it is assumed that Petitioner is not selling in excess of 10% of the Corian without installation. Therefore, provided Petitioner is not selling (without providing installation) in excess of 10% of "similar products" which

would necessitate the alternative computation for the basis of use tax, as described in Section 531.3(b)(1)(i)(b) of the Sales and Use Tax Regulations, its use tax may be computed on the consideration given for the cost of the materials. See Section 531.3(b)(1)(ii) of the Sales and Use Tax Regulations.

It is noted that if the portion of Petitioner's sales of any standardized items of its cultured marble product is more than 10%, then the basis on which use tax would be computed for such items of the same kind being installed by Petitioner would be based on the retail selling price of the product and not the cost of materials.

(c) *Should there be any tax charges by or to Petitioner's subcontractor who installs the job?*

Answer A subcontractor must collect tax on all its charges to a prime contractor for installing real and tangible personal property unless the prime contractor issues a timely and properly completed exemption document to the subcontractor. See Section 1132(c) of the Tax Law.

In this case, the subcontractor's charge to Petitioner for the installation of a counter top which qualifies as a capital improvement is not subject to New York State and local sales and use taxes. Petitioner should provide the subcontractor with a copy of the Form ST-124, *Certificate of Capital Improvement*, that was provided to Petitioner by its customer. See William J. McAteer, CPA, supra; G & I Homes, Inc., supra. The subcontractor must retain a copy of this form for its records. The subcontractor is responsible for the tax on its materials incorporated into the job as discussed in *Question 1(a)* above.

With regard to the installation of a counter top that does not qualify as a capital improvement, Petitioner may purchase the subcontractor's service exempt from tax. Petitioner should issue the subcontractor a timely and properly completed Form ST-120.1, *Contractor Exempt Purchase Certificate* indicating that the service will be resold. As discussed in *Question 1(a)* above, the subcontractor would then be entitled to a refund or credit of sales or use tax which it has paid on the purchase of materials used to perform such installation.

(d) *Would the answers to the above three questions be the same if Petitioner's customer is a builder who is building a house to sell at a later date?*

Answer Yes.

(e) *If Petitioner's customer is such a builder, can the builder issue Petitioner a capital improvement or a resale certificate?*

Answer Form ST-120, *Resale Certificate*, should only be used by retailers, not contractors. See New York State Department of Taxation and Finance Sales and Use Tax Classifications of Capital Improvements and Repairs to Real Property, Publication 862 (4/01), page 6. As a contractor and property owner in this case, the builder may issue Petitioner Form ST-124, *Capital Improvement Certificate*, when purchasing the installation of a counter top that constitutes a capital improvement to such property.

Transaction 2

The same facts as Transaction 1 except Petitioner does not have a resale certificate on file for the customer, nor does the customer provide any type of exemption certificate. Petitioner installs the custom counter top and charges sales tax on the entire job to the customer.

Question 2

(a) *Should Petitioner be charging sales tax for this job? If so, what part of the job is taxable?*

Answer Having received no documentation from its customer to verify that the installation of the counter top is eligible for the capital improvement exclusion provided in Section 1105(c)(3)(iii) of the Tax Law, or that the installation is being purchased for resale, Petitioner's total charge (labor and materials) to its customer for such installation is presumptively subject to tax. See Crystal Telecom, Corp., Adv Op Comm T&F, July 25, 2002, TSB-A-02(37)S. However, where a contractor does not receive a *Certificate of Capital Improvement* from a customer for a qualifying capital improvement job, or a *Contractor Exempt Purchase Certificate*, the contract or other records of the transaction will prevail. See Section 541.5(b)(4)(ii) of the Sales and Use Tax Regulations. Petitioner's failure to receive an exemption certificate from its customer does not preclude Petitioner from proving the nontaxability of the transaction by the presentation of other documentation. See Section 532.4(b)(6) of the Sales and Use Tax Regulations.

(b) *Should Petitioner be paying tax on materials to fabricate this custom counter top? If so, is Petitioner entitled to any credit for sales tax which it collected from its customer?*

Answer Petitioner is required to pay sales and compensating use tax on materials used if it is performing a capital improvement contract.

If the contract includes the sale of a counter top which remains tangible personal property after installation, in the absence of a properly completed exemption document Petitioner must collect and remit the appropriate New York State and local sales taxes on the total charge to its customer. Crystal Telecom, Corp., supra. Petitioner may then apply for a credit or refund of taxes it has paid on the portion of

the materials used in the performance of this taxable installation service. See Section 541.5(b)(4) of the Sales and Use Tax Regulations.

(c) *Should there be any tax charged by or to Petitioner's subcontractor who installed the job?*

Answer The subcontractor should collect tax on all its charges to Petitioner for installing tangible personal property, unless Petitioner issues a timely and properly completed exemption document to the subcontractor.

For installations that are capital improvements, the subcontractor's charge to Petitioner is not subject to sales and use tax. Petitioner should furnish the subcontractor with a copy of Form ST-124, *Certificate of Capital Improvement*, which was provided to Petitioner by its customer. The subcontractor is responsible for the tax on its materials incorporated into the job.

For installations that are not capital improvements, Petitioner may purchase the subcontractor's service exempt from tax. Petitioner should furnish the subcontractor a timely and properly completed Form ST-120.1, *Contractor Exempt Purchase Certificate*. The subcontractor would then be entitled to a refund or credit of sales or use tax which it has paid on the purchase of materials used to perform the installation. See *Question 1(c)*.

Transaction 3

Petitioner does warranty work for another manufacturer. The other manufacturer (Petitioner's customer) provides all material for the job, such as replacement parts. Petitioner will replace or fix the warranty item in question. Petitioner will bill its customer, not the consumer for whom the work is ultimately being done.

Question 3

(a) *Should Petitioner be charging sales tax for this job?*

Answer Since Petitioner's customer (the manufacturer) is required to provide the warranty repair and maintenance work (whether as part of the original sale or an extended warranty), such work, when done by Petitioner is considered for resale. See Matter of Castomatic, Division of Arwood Corp., State Tax Commission, April 14, 1983, TSB-H-83(62)S. Accordingly, the repair and maintenance warranty work Petitioner provides to the manufacturer are services the manufacturer purchases for resale and are not subject to tax. In some instances the warranty work performed by Petitioner may not be taxable due to the fact that it constitutes part of a capital improvement. The manufacturer should timely furnish Petitioner with a properly completed

exemption document. See British Telecom (CBP) Inc., Adv Op St Tx Comm, January 18, 1990, TSB-A-90(3)S; Castomatic, Division of Arwood Corp., supra.

(b) *May Petitioner accept a resale certificate or capital improvement certificate from the customer?*

Answer If the manufacturer is a retailer (sells uninstalled products at retail), Petitioner may accept Form ST-120, *Resale Certificate*, from the manufacturer. If the manufacturer is a contractor (sells installed products as part of capital improvement projects), Petitioner should obtain an ST-120.1, C*ontractor Exempt Purchase Certificate*, instead. If the warranty work constitutes part of a capital improvement, Petitioner should obtain Form ST-124, *Certificate of Capital Improvement*. See discussion below with respect to purchases of materials by Petitioner for use in performing warranty work.

Transaction 4

The same facts apply from **Transaction 3** above, except Petitioner uses some materials, such as lumber and adhesives, that are not provided by its customer.

Question 1

(a) *Should Petitioner be charging sales tax for this job?*

Answer No, provided it receives a timely and properly completed exemption document from its customer. *See Question 3(a)*.

(b) *Should Petitioner be paying sales and use tax on materials used on this job?*

Answer Yes, if the warranty repair materials are constituent parts of a qualifying capital improvement project. Petitioner is not entitled to a refund or credit of any tax paid on the purchase of materials used in warranty work made in conjunction with a qualifying capital improvement. See Section 541.1(g)(3)(i) of the Sales and Use Tax Regulations.

If the warranty work performed is not in conjunction with a qualifying capital improvement, but rather is a repair, Petitioner may claim a refund or credit for tax paid on materials and parts transferred to its customer in connection with the repair and maintenance service provided under the warranty agreement. See Section 541.1(g)(3)(ii) of the Sales and Use Tax Regulations.

(c) *May Petitioner accept a resale certificate or capital improvement certificate from its customer?*

Answer With respect to work performed by Petitioner to fulfill its customer's warranty, Petitioner's customer should furnish Petitioner with either a resale certificate or a contractor exempt purchase certificate or capital improvement certificate as explained in *Question 3(b)* above.

DATED: May 12, 2003

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