

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

TSB-A-06(12)S  
Sales Tax  
April 6, 2006

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S050916A

On September 16, 2005, the Department of Taxation and Finance received a Petition for Advisory Opinion from Brooke Greenhouse, 451 East Lake Road, Dryden, New York, 13053. Petitioner, Brooke Greenhouse, provided additional information pertaining to the Petition on November 1, 2005.

The issue raised by Petitioner is whether a dealer/builder of factory-manufactured (hereinafter "modular") homes is liable to collect or remit sales or compensating use tax on its sales of modular homes under any of the following hypothetical scenarios.

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

*Scenario 1*

A dealer/builder of modular homes contracts with the owner of real property to provide and install a modular home. The dealer/builder orders the home from a manufacturer. The contract between the dealer/builder and the manufacturer includes installation of the home by the manufacturer onto the home's foundation. The manufacturer, as a subcontractor, either installs the home using its own personnel or contracts directly with a subcontractor for the complete installation. Portions of the installation (i.e., electrical and plumbing hookups, roofing, siding, etc.) may also be subcontracted by the manufacturer or the dealer/builder to other subcontractors. The installing subcontractor may be selected by the dealer/builder but always signs a contract with the manufacturer for the installation.

The contract between the dealer/builder and the manufacturer may provide for a fixed price for the installation or may include a budget or allowance for the amount the manufacturer will pay the subcontractor who actually performs the installation. If the installation costs exceed the budget or allowance amount, the manufacturer can, if allowed for in the installation contract, require the dealer/builder to pay the excess amount to either the manufacturer or directly to the installing subcontractor. The contract also provides that the manufacturer can pass through any reduced installation charge (where the actual installation cost is less than the budget or allowance amount) to the dealer/builder. Depending on the contract between the dealer/builder and the real property owner, the excess or reduced charge may be passed through to the real property owner.

*Scenario 2*

A dealer/builder of modular homes contracts with the owner of real property to provide and install a modular home. The dealer/builder purchases the home from a manufacturer without installation. The dealer/builder either installs the home using its own personnel or contracts with

a subcontractor for the complete installation. If the dealer/builder installs the modular home, portions of the installation (i.e., electrical and plumbing hookups, roofing, siding, etc.) may be subcontracted by the dealer/builder to other subcontractors.

*Scenario 3*

A dealer/builder of modular homes contracts with the owner of real property to provide and install a modular home. The dealer/builder purchases the modular home from a manufacturer without installation. The manufacturer's invoice to the dealer/builder for the modular home shows an allowance toward the cost of installing the home. The dealer/builder either installs the modular home using its own personnel or contracts with a subcontractor for installation.

*Scenario 4*

A dealer/builder of modular homes purchases a modular home from a manufacturer without installation. The modular home is delivered to the dealer/builder's sales lot. The dealer/builder either stores the modular home for installation at a later date or installs it temporarily on its sales lot for use as a model or for some other use. The modular home is not permanently installed on the dealer/builder's lot.

**Applicable law and regulations**

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

When used in this article for the purposes of the taxes imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and by section eleven hundred ten, the following terms shall mean:

(1) Purchase at retail. A purchase by any person for any purpose other than those set forth in clauses (A) and (B) of subparagraph (i) of paragraph (4) of this subdivision.

\* \* \*

(4) 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. Notwithstanding the preceding provisions of this subparagraph, 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, except that a sale of a new mobile home to a contractor, subcontractor or repairman who, in such capacity, installs such property is not a retail sale. . . .

\* \* \*

(9) Capital improvement. (i) 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:

Imposition of sales tax. On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax . . . 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 . . . 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:

Imposition of compensating use tax (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, 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 [computed on] the price at which items of the same kind of tangible personal property are offered for sale by the user, . . .

(d) For purposes of subclause (ii) of clause (B) of subdivision (a) of this section, the tax shall be [computed on] 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.

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

Subject to the conditions and limitations provided for herein, a refund or credit shall be allowed for a tax paid pursuant to subdivision (a) of section eleven hundred five or section eleven hundred ten (1) on the sale or use of tangible personal property if the purchaser or user, in the performance of a contract, later incorporates that tangible personal property into real property located outside this state, . . .

Section 1235 of the Tax Law provides, in part:

Taxes paid to other jurisdictions (a) With respect to taxes imposed pursuant to subdivision (a) of section twelve hundred ten and pursuant to section twelve hundred eleven, the use of tangible personal property purchased at retail and of any of the services subject to the sales tax shall be exempt from the compensating use tax authorized under subdivision (a) of such section twelve hundred ten and under section twelve hundred eleven, to the extent that a retail sales tax or a compensating use tax was legally due and paid thereon, without any right to a refund or credit thereof, to (1) any municipal corporation in this state or (2) 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 of any of the services upon which such a sale or compensating use tax was paid to this state and any of its municipal corporations, except as provided in subdivision (b) of this section.

Section 526.5(d)(2) of the Sales and Use Tax Regulations provides, in part:

Discounts which represent a reduction in price, such as a trade discount, volume discount or cash and carry discount are deductible in computing receipts.

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

Retail sale. (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 534.3 of the Sales and Use Tax Regulations provides, in part:

Refunds and credits based on certain uses.

\* \* \*

(b) Property incorporated into realty outside of New York State. (1) A purchaser or user who has paid the tax on tangible personal property may claim a refund or credit for such tax provided:

(i) he incorporates the property into real property located outside of this State; and

(ii) such incorporation is pursuant to a contract.

Example: A contractor purchases a quantity of lumber in New York State to use for a construction contract in Vermont. At the time the contractor purchases the lumber and accepts delivery in New York State he is liable for sales tax. To the extent the lumber is incorporated into real property in Vermont, a refund or credit of the sales tax paid by the contractor on such lumber is allowable.

(iii) If the tangible personal property is moved from New York County A to County B, and it meets the conditions outlined in subparagraphs (i) and (ii) of this paragraph, any County A local tax paid on the tangible personal property may be claimed by the contractor as a refund or credit. However, any local compensating use tax imposed by County B is due on the material.

Section 541.2 of the Sales and Use Tax Regulations provides, in part:

Definitions. The words, terms and phrases used in this Part have the following definitions except when the context clearly indicates a different meaning:

\* \* \*

(d) A *construction contractor* means any person who engages in erecting, constructing, adding to, altering, improving, repairing, servicing, maintaining, demolishing or excavating any building or other structure, property, development, or other improvement on or to real property, property or land.

\* \* \*

(g) Capital improvement.

\* \* \*

(2)(i) A capital improvement does not include a contract for the sale and installation of tangible personal property which when installed remains tangible personal property.

(ii) A capital improvement does not include the sale of tangible property to a customer under contract if the contractor who sells the tangible personal property is not responsible for the affixation or installation of the tangible personal property furnished.

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

Contracts with customers other than exempt organizations.

\* \* \*

(b) 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.

## **Opinion**

As a general matter, work performed on real property will qualify as a capital improvement to real property if all of the conditions set forth in section 1101(b)(9)(i) of the Tax Law are met. The installation of a permanent building or structure (including a modular home) for the owner of real property will qualify as a capital improvement to real property, and the prime contractor should not charge sales tax to the customer for building materials or labor on the capital improvement project. The prime contractor should obtain for its records a properly completed *Certificate of Capital Improvement* (Form ST-124) from its customer in order to be relieved of the burden of proving that the transaction is not subject to sales tax. In order to be properly completed, a *Certificate of Capital Improvement* must contain all the information required on the form and must contain the name, address and Certificate of Authority number (if any) of the prime contractor. A contractor is considered to be the consumer of all building materials used in a capital improvement and generally must pay sales tax on the materials at the time of purchase. See section 541.5(b)(1) of the Sales and Use Tax Regulations. Sales tax paid by a contractor on building materials used in a capital improvement may be included in the cost of materials and passed through to the customer.

### *Scenario 1*

A dealer/builder of factory-built (modular) homes signs a contract with a real property owner that includes the provision and installation of a modular home. The dealer/builder is, therefore, the prime contractor for sales tax purposes.

The dealer/builder's sale and installation of the modular home is not subject to sales tax because the installation results in a capital improvement to real property. See sections 1105(c)(3)(iii) and 1115(a)(17) of the Tax Law. The property owner in such case should provide the dealer/builder with a properly completed *Certificate of Capital Improvement* (Form ST-124). Acceptance of this certificate by the dealer/builder in good faith relieves the dealer/builder of its obligation to collect sales tax from the property owner. In this scenario, the dealer/builder in turn enters into a contract with the manufacturer whereby the manufacturer will provide the modular home and install it. The dealer/builder should provide the manufacturer with a copy of the *Certificate of Capital Improvement* issued by the property owner. See section 541.5(b)(4)(a) of the Sales and Use Tax Regulations. Acceptance by the manufacturer in good faith of a properly completed *Certificate of Capital Improvement* relieves the manufacturer of its obligation to collect sales tax from the dealer/builder on its charges for the provision of a modular home on an



installed basis. The manufacturer may contract with other subcontractors to perform the actual work. The manufacturer should provide any of its subcontractors with a copy of the *Certificate of Capital Improvement* that it received from the dealer/builder. It is immaterial for sales tax purposes whether such subcontractor is selected from a pre-approved list submitted by the manufacturer to the dealer/builder or directly by the dealer/builder, provided that the contract is between the manufacturer and the subcontractor.

The contract between the dealer/builder and the manufacturer may provide a fixed price for the installation or may include a budget or allowance for the amount the manufacturer will pay the subcontractor who actually performs the installation. Regardless of whether the contract provides a fixed price or a budget or allowance, the manufacturer will not be required to collect sales tax from the dealer/builder if the dealer/builder furnishes a *Certificate of Capital Improvement* as described above.

The manufacturer and any subcontractors are liable for sales or use tax on their purchases of materials used or consumed in the installation of the modular home. See section 541.5(b)(1) of the Sales and Use Tax Regulations. In addition, the manufacturer is liable for use tax, computed as provided in section 1110 of the Tax Law, on the modular home that it sold permanently installed to the dealer/builder and it may pass through the amount of this tax to the dealer/builder as one of its costs.

#### *Scenario 2*

As discussed in Scenario 1, the dealer/builder does not collect sales tax from the property owner on its charges for the sale and installation of a modular home because the installation results in a capital improvement. The dealer/builder should receive a *Certificate of Capital Improvement* (Form ST-124) from its customer to substantiate that the modular home was installed as a capital improvement. Sales of building materials, including a modular home, without installation are retail sales of tangible personal property that are subject to sales tax. See section 541.5(b)(1) of the Sales and Use Tax Regulations. In this scenario, the manufacturer sells the modular home to the dealer/builder without installation. Therefore, such sale is a sale of tangible personal property at retail and the dealer/builder is liable for sales or use tax computed on the total amount that it pays for the modular home. A *Certificate of Capital Improvement* is not a valid exemption certificate for the purchase of a modular home by a dealer/builder where the contract for such purchase does not include installation. Sales tax paid by the dealer/builder on its retail purchase of the modular home and any building materials used in its installation may be included in the dealer's cost of materials and passed through to the property owner as described above.

The dealer/builder may install the modular home using its own personnel, or it may contract with a third party (subcontractor) to perform the installation of the modular home. Since, in this scenario, the dealer/builder has a contract with the property owner to provide and install the modular home, it is the prime contractor in this project. If the dealer/builder has a

contract with a subcontractor to actually install the modular home, the dealer/builder should provide the subcontractor with a copy of the *Certificate of Capital Improvement* issued to it by the property owner. This document relieves the subcontractor of its obligation to collect sales tax on its installation charges to the dealer/builder. Any building materials purchased by the subcontractor that become a part of the installation are retail purchases of tangible personal property by the subcontractor and are subject to sales tax. Sales tax paid on building materials incorporated into the project by any subcontractor working on the capital improvement project may be included in the cost of materials the subcontractor charges the dealer/builder.

### *Scenario 3*

As in scenario 2, the manufacturer sells a modular home without installation to the dealer/builder. The manufacturer's invoice shows an allowance (i.e., a reduction in the amount to be paid by the dealer/builder) representing part of the cost of installing the modular home. The dealer/builder either installs the modular home or contracts directly with a subcontractor for installation. As in scenario 2, the sale of the modular home to the dealer/builder is a sale of tangible personal property at retail and the dealer/builder is liable for sales or use tax computed on the total amount that it pays for the modular home. Assuming the allowance represents a real discount in the price of the modular home sold by the manufacturer, the dealer/builder owes sales or use tax on the discounted price. See section 526.5(d)(2) of the Sales and Use Tax Regulations.

Charges by a subcontractor to the dealer/builder for installation of the modular home are not subject to sales tax because the installation results in a capital improvement to real property.

### *Scenario 4*

In this scenario, the dealer/builder purchases a modular home from the manufacturer without installation. As in scenarios 2 and 3, such purchase is a purchase of tangible personal property at retail and the dealer/builder is liable for sales or use tax computed on the purchase price of the modular home. The dealer/builder may use the modular home as a model home or for some other use (e.g., sales office). If the modular home is installed on the dealer/builder's sales lot on a temporary basis, the installation does not result in a capital improvement. Accordingly, installation charges paid by the dealer/builder to a third party are subject to sales tax under section 1105(c)(3) of the Tax Law. See *Lake City Manufactured Housing, Inc. v Tax Appeals Tribunal*, 184 AD2d 33 (3d Dept). If the dealer/builder later sells the modular home on an installed basis to a property owner, it may incorporate the sales tax that it paid on its purchase price of the modular home into its sales price when charging its customer. The dealer/builder should obtain a properly completed *Certificate of Capital Improvement* from the property owner and furnish copies of such certificate to any subcontractors on the installation project as described above.

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It is noted that sales tax on tangible personal property, including a modular home, is due at the rate in effect at the location where the tangible personal property is delivered. For example, where a modular home is initially delivered to a location other than the building site (e.g., the dealer/builder's sales lot) the dealer/builder must pay sales tax at the rate in effect at that location. If the dealer/builder later installs the modular home as a capital improvement on a building site in a different locality, the dealer/builder must pay tax at the rate in effect at the location of the building site. In this case, the dealer/builder may be eligible for a refund of the local sales tax it paid on such modular home when it received the home at its sales lot. See section 1119(a)(1) of the Tax Law and section 534.3(b) of the Sales and Use Tax Regulations. The refund applies if the dealer/builder uses the modular home as a model home since that use is incidental to holding the home for resale. If the dealer/builder uses the modular home for any other purpose (e.g., as an office), and then sells and installs the home on a building site in a different locality, a refund of the tax paid upon the delivery of the modular home to the dealer/builder's sales lot is not available. In such case, the dealer/builder's use of the modular home in the new locality may be exempt from the local tax imposed in such locality to the extent that the dealer/builder paid local sales or use tax to the locality where the modular home was first delivered to the dealer/builder. See section 1235 of the Tax Law.

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