New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Taxpayer Guidance Division

TSB-A-08(29)S
Sales Tax
July 21, 2008

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. S061114A

On November 14, 2006, the Department of Taxation and Finance received a Petition for Advisory Opinion from Eye Mall Media (USA), LLC, 3701 Bee Cave Road, Suite 101, Austin, Texas 78746-5364. Petitioner, Eye Mall Media (USA), LLC, provided additional information pertaining to the Petition on March 19, 2007.

The issues raised by Petitioner are:

1. Whether its installations of shopping mall directories (display units) qualify as capital improvements to real property.

2. Whether its sale of advertising space on these display units is subject to sales tax.

3. Whether Petitioner's expenses incurred in installing and maintaining the display units are subject to sales tax.

4. Whether shipping or delivery charges incurred by Petitioner in purchasing materials for its display units are deductible from the receipt subject to sales or use tax.

5. Whether Petitioner has an obligation to register for sales and use tax purposes in New York State.

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

Petitioner is a Delaware company located in Austin, Texas. Petitioner installs double-sided or triple-sided display units in shopping malls in spaces leased by Petitioner from shopping malls. The display units are installed by being bolted to the floor. The display units are removed by reversing the installation procedure, in some cases requiring minor repair to the floor. On one side of the display unit is the mall directory; the other side or sides are available as advertising space, which Petitioner sells to its clients. Petitioner is not an advertising agency and does not design advertisements. Petitioner's clients provide the advertising materials to be placed within the display units. Independent contractors hired by Petitioner install, repair, and maintain the display units; update the directory; and replace advertisements in the display units. Petitioner purchases materials to assemble the display units, which materials are shipped from an out-of-state location for use in shopping malls in New York. The shipping charges for these materials are separately stated on the sellers' invoices.

Petitioner retains ownership of the display units during the term of its lease with the shopping mall. At the end of the lease with the shopping mall, Petitioner has the option to renew its lease. If Petitioner decides not to renew the lease, it relinquishes the display units to the shopping mall. Petitioner's display units are currently installed in two shopping malls in two different counties in New York.

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:
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> (3) Receipt. The amount of the sale price of any property and the charge for any service taxable under this article, including gas and gas service and electricity and electric service of whatever nature, valued in money, whether received in money or otherwise, including any amount for which credit is allowed by the vendor to the purchaser, without any deduction for expenses or early payment discounts and also including any charges by the vendor to the purchaser for shipping or delivery, . . .
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> (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 . . . 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. . . .
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> (8) Vendor. (i) The term "vendor" includes:

(A) A person making sales of tangible personal property or services, the receipts from which are taxed by this article;

* * *

(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:

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, excluding a mobile home, or maintaining, servicing or repairing tangible personal property, including a mobile home, not held for sale in the regular course of business, whether or not the services are performed directly or by means of coin-operated equipment or by any other means, and whether or not any tangible personal property is transferred in conjunction therewith, 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, as distinguished from adding to or improving such real property, property or land, by a capital improvement . . . .

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) 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. . . .

Section 1118 of the Tax Law provides, in part:

The following uses of property and services shall not be subject to the compensating use tax imposed under this article:

* * *

(7)(a) In respect to the use of property or services to the extent that a retail sales or use tax was legally due and paid thereon, without any right to a refund or credit thereof, to 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 services upon which such a sales tax or compensating use tax was paid to this state. To the extent that the tax imposed by this article is at a higher rate than the rate of tax in the first taxing jurisdiction, this exemption shall be inapplicable and the tax imposed by section eleven hundred ten of this chapter shall apply to the extent of the difference in such rates, except as provided in paragraph (b) of this subdivision.

(b) To the extent that the compensating use tax imposed by this article and a compensating use tax imposed pursuant to article twenty-nine are at a higher aggregate rate than the rate of tax imposed in the first taxing jurisdiction, the exemption provided in paragraph (a) of this subdivision shall be inapplicable and the taxes imposed by this article and pursuant to article twenty-nine shall apply to the extent of the difference between such aggregate rate and the rate paid in the first taxing jurisdiction. In such event, the amount payable shall be allocated between the tax imposed by this article and the tax imposed pursuant to article twenty-nine in proportion to the respective rates of such taxes.

Section 525.2(a)(3) of the Sales and Use Tax Regulations provides:

Except as specifically provided otherwise, the sales tax is a "destination tax." 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.

Section 527.5 of the Sales and Use Tax Regulations provides, in part:

Installing, repairing, servicing and maintaining tangible personal property. (a) Imposition. (1) The tax is imposed on receipts from every sale of the services of installing, maintaining, servicing or repairing tangible personal property, by any means including coin-operated machines, whether or not any tangible personal property is transferred in conjunction with the services.

(2) Installing means setting up tangible personal property or putting it in place for use.

* * *

(3) Maintaining, servicing and repairing are terms used to cover all activities that relate to keeping tangible personal property in a condition of fitness, efficiency, readiness or safety or restoring it to such condition.

Opinion

Issue 1

Petitioner hires independent contractors to install double-sided or triple-sided directory and advertising display units in shopping malls in spaces leased by Petitioner from shopping malls. The display units are bolted to the floor.

The first condition for an installation to be considered a capital improvement as set forth in section 1101(b)(9)(i)(A) of the Tax Law requires that the installation substantially add to the value of the real property or appreciably prolong the useful life of the real property. The display units described by Petitioner do not appreciably prolong the useful life of the real property. However, it is possible that such display units may substantially add to the value of the real property.

The second condition for a capital improvement set forth in section 1101(b)(9)(i)(B) of the Tax Law requires that the display unit be installed in such a manner as to become part of the real property or be permanently affixed to the real property so that removal would cause material damage to the property or the display itself. Although most forms of equipment, including signage, normally require some form of affixation to real property, the courts have held that the mere bolting of equipment to real property does not, in and of itself, create the degree of permanence necessary to establish that a particular installation is a capital improvement. See *Matter of Charles R. Wood Enterprises, Inc. v State Tax Commn.*, 67 AD 2d 1042; *Matter of West Mountain Corp. v Miner*, 85 Misc 2d 416. In *Cornwell Energy Management, Inc.*, Adv Op Comm T & F, May 8, 2003, TSB-A-03(22)S, the Tax Department opined that motor controllers that were wired to a motor and bolted to real property and required only unwiring and unbolting to be removed for service or repair did not have the degree of permanence necessary to establish a capital improvement.

The primary method of affixing Petitioner's display units to the real property is using bolts to attach them to a floor. The display units are removed by reversing the installation procedure, in some cases requiring minor repair to the floor. Similar to the stools in *Empire Vision Center, Inc.*, Dec Tx App Trib, November 7, 1991, DTA No. 805767, these display units can be removed from the bolts without destroying the display unit. Therefore, Petitioner's floor-mounted display units fail to meet the second condition of the capital improvement test. See *Apco Graphics, Inc.*, Adv Op Comm T&F, January 28, 1999, TSB-A-99(5)S.

The third condition for a capital improvement set forth in section 1101(b)(9)(i)(C) of the Tax Law requires that the installation of the display unit be intended to be permanent. Since Petitioner leases space from the shopping mall and retains ownership of the display unit during the term of the lease, it does not appear that the installation of the display unit is intended to be permanent. See *Matter of Flah's of Syracuse, Inc. v James H. Tully, Jr. et al*, 89 AD 2d 729; *Beaman Corporation*, Adv Op St Tx Comm, September 6, 1982, TSB-A-82(32)S.

Section 1101(b)(9)(i) of the Tax Law requires that all three of the conditions set forth be met in order for an installation to be considered a capital improvement to real property. If the installation of display units fails to meet one or more of these conditions, such installation cannot qualify as a capital improvement to real property. Based on the facts and circumstances described in this Opinion with respect to the display units, it appears the installation of Petitioner's display units does not meet the second or third condition for a capital improvement to

real property. Such installation is, therefore, considered to be an installation of tangible personal property that remains tangible personal property after installation. Accordingly, charges for the installation of Petitioner's display units, including labor and materials, are subject to sales tax under sections 1105(a) and 1105(c)(3) of the Tax Law.

Issue 2

Petitioner sells advertising space on the display units to clients. Petitioner's sales of advertising space on its display units are sales of a service not enumerated as taxable in section 1105(c) of the Tax Law. Therefore, Petitioner's charges to a client for displaying advertising on a display unit are charges for the sale of advertising services that are not subject to sales tax. See *Matter of Ruth Outdoor Advertising Co.*, Dec State Tax Comm, April 3, 1981, TSB-H-81(102)S; *Stillman Advertising Inc.*, Adv Op Comm T&F, May 26, 1988, TSB-A-88(30)S; *Spot and Company of Manhattan, Inc.*, Adv Op Comm T&F, January 7, 2008, TSB-A-08(1)S.

Issue 3

Petitioner hires independent contractors to install, repair, and maintain the display units, replace the advertisements in the display units, and update the directories. Sales tax is imposed on the installation, repair, maintenance, or servicing of tangible personal property. See section 1105(c)(3) of the Tax Law. Therefore, charges by independent contractors to Petitioner for the above services to the display units are subject to sales tax. See section 527.5 of the Sales and Use Tax Regulations. Contractors performing such work in New York are required to be registered for sales tax purposes and collect the applicable sales tax from Petitioner on the work described above. See section 1101(b)(8) of the Tax Law.

Issue 4

Petitioner has materials used in erecting its display units in shopping malls in New York shipped from an out-of-state location. The shipping and delivery charges for these materials are separately stated on the vendors' invoices. Petitioner is liable for the New York State and local sales or compensating use tax computed on the full amount of the receipt, including any charges for shipping and delivery, on its purchase of materials delivered to a location in New York State. See section 1101(b)(3) of the Tax Law. If the vendor of the materials is registered for sales and use tax purposes in New York, the vendor is required to collect New York State and local sales or use tax from Petitioner. If, for any reason, New York State and local sales or use tax is not collected from Petitioner by the vendor on receipts from the sale of materials used to construct and install the display units, Petitioner must pay the tax itself directly to the Tax Department. The rate and incidence of the local tax is determined by the point of delivery of the materials from the vendor to Petitioner. See section 525.2(a)(3) of the Sales and Use Tax Regulations. Petitioner may also be liable for local compensating use tax based on the purchase price for the materials it purchases (including the charges for shipping and delivery) if the materials are used

and installed by Petitioner in a local jurisdiction other than the jurisdiction where the materials were initially delivered to Petitioner by the vendor. See *Custom Design Kitchens, Inc.*, Adv Op Comm T & F, October 7, 1996, TSB-A-96(66)S.

Issue 5

Petitioner's sales of advertising space on its display units are sales of a service not enumerated as taxable in section 1105(c) of the Tax Law. See *Spot and Company of Manhattan, Inc., supra*. Based on the facts in this Opinion, it appears that Petitioner is not making sales of tangible personal property or services the receipts from which are taxed under section 1105. Therefore, it appears that Petitioner is not a vendor for sales tax purposes and is not required to register for sales tax purposes in New York State. See section 1101(b)(8) of the Tax Law.

DATED: July 21, 2008

/s/
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Taxpayer Guidance Division

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.