

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

TSB-A-08(32)S
Sales Tax
July 21, 2008

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S070911C

On September 11, 2007, the Department of Taxation and Finance received a Petition for Advisory Opinion from Vector Construction Corp., 6364 Island Road, Cicero, New York 13039.

The issue raised by Petitioner, Vector Construction Corp., is whether the provision of a crane to Petitioner constitutes a rental of tangible personal property or the provision of a construction service.

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

Petitioner is a construction company that occasionally requires the use of a crane in its construction projects. Petitioner obtains cranes with operators from a third party when a crane is needed. Petitioner does not use its own employees to operate the cranes. The cranes are set-up, torn down and operated by the employees of the crane provider. The crane provider maintains the right to hire and fire the crane operators and uses its own discretion in performing the work. Petitioner will tell the operator what has to be picked up and where the items should be placed but does not control how the crane operator accomplishes the task. The crane provider retains responsibility for the operation of the crane, directs the work, and pays all costs associated with operating and maintaining the cranes, including the crane operator's wages, insurance, and fuel.

Applicable law and regulations

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.

Section 541.2(a)(1) of the Sales and Use Tax Regulations provides:

A construction contract means a contract to erect, construct, alter, repair or maintain any building or other structure, project, development or other improvement on or to real property, property or land.

Section 541.2(d) of the Sales and Use Tax Regulations provides:

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.

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

Rental, lease and license to use. (1) The terms *rental*, *lease* and *license to use* refer to all transactions in which there is a transfer of possession of tangible personal property without a transfer of title to the property.

(2) For the purposes of this Part, when a rental, lease or license to use a vehicle or equipment includes the services of a driver or operator, such transaction is presumptively the sale of a service, rather than the rental of tangible personal property, where dominion and control over the vehicle or equipment remain with the owner or lessor of the vehicle or equipment. Dominion and control remain with the owner or lessor of the vehicle or equipment when pursuant to an agreement or contract the lessor:

(i) does not transfer possession, control and/or use of the equipment or vehicle to the lessee during the term of the agreement or contract;

(ii) maintains the right to hire and fire the drivers and operators;

(iii) uses his own discretion in performing the work (even though the lessee may designate the area where material is to be picked up and delivered) and generally selects his own routes;

(iv) retains responsibility for the operation of the equipment or vehicle;
and

(v) directs the work, pays all operating expenses, including drivers' and/or operators' wages, insurance, tolls and fuels.

Whether a transaction is a sale (license to use, rental or lease) of a vehicle or equipment or is the sale of a service, such as a transportation service, must be determined in accordance with the facts and circumstances of the particular transaction and provisions of the agreement between the contractor and his customer.

Section 541.5(d)(1) of the Sales and Use Tax Regulations provides, in part:

(i) Charges for repair, service, maintenance, and installation of tangible personal property which retains its identity as tangible personal property are taxable to the customer based on the full invoice price.

* * *

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

Section 541.9 (c)(1) of the Sales and Use Tax Regulations provides, in part:

(ii) When dominion and control of equipment supplied with an operator or driver remains with the lessor, there is no rental or lease of equipment to the contractor, but the service performed may be subject to the tax pursuant to section 1105(c)(3) and (5) of the Tax Law. The method of payment (for example, a rate per hour, day, week, month, or job or trip) is not relevant in determining whether the transaction is a service or a taxable rental or lease of equipment.

(a) If the service performed constitutes a capital improvement to real property, for example, a foundation excavation, the charge for such service is not taxable.

(b) If the service performed constitutes a repair, maintenance or service to tangible personal property or to real property, the service is subject to the tax.

(c) However, the owner-operator of the equipment must pay tax on the equipment used to perform the forgoing services.

(iii) When dominion and control of equipment supplied with an operator or driver transfers to the contractor, there is a rental or lease of tangible personal property and the charge is subject to the tax. If the operator's or driver's wages are separately stated and reasonable in relation to prevailing wage rates, such wages may be excluded from the receipts subject to the tax. If the operator's or driver's wages are not separately stated the total charge is subject to the tax. If the operator's or driver's wages are not reasonable in relation to prevailing wage rates, the "wages" must be included in the receipts subject to the tax until the contractor satisfies his burden, under section 1132(c) of the Tax Law, or [sic] proving that the taxable receipts are less than the total charge.

Opinion

Petitioner is a construction company that occasionally requires the use of a crane in its construction projects. Petitioner obtains cranes with operators from a third party when a crane is needed. The question of whether Petitioner is purchasing services or is leasing tangible personal property hinges on whether dominion and control of the crane is actually transferred to Petitioner. Petitioner states that the cranes are set up, torn down and operated by the employees of the crane provider; the crane provider maintains the right to hire and fire the crane operators and uses its own discretion in performing the work; and that the crane provider retains responsibility for the operation of the crane, directs the work, and pays all costs associated with operating and maintaining the cranes, including the crane operator's wages, insurance, and fuel.

Section 541.2(p)(2) of the Sales and Use Tax Regulations provides that when a rental, lease or license to use a vehicle or equipment includes the services of a driver or operator, such transaction is presumptively the sale of a service, rather than the rental of tangible personal property, where dominion and control over the vehicle or equipment remain with the owner or lessor of the vehicle or equipment. Where dominion and control over the vehicle or equipment are transferred to the customer, then the transaction is considered to be a rental of tangible personal property subject to sales tax under section 1105(a) of the Tax Law. It does not appear from the facts provided that Petitioner has met any of the requirements set forth under section 541.2(p)(2) to gain dominion and control over the crane. However, whether a particular transaction is a taxable rental of tangible personal property or the purchase of a service, such as a construction service, can only be determined in accordance with the facts and circumstances of the particular transaction and provisions of the agreement between the lessor or contractor and its customer. Therefore, if Petitioner has a contract for services with the crane provider and dominion and control of the crane are not transferred to Petitioner by such agreement, the crane provider appears to be performing services for Petitioner. Whether Petitioner is required to pay sales tax on the charges for such services will depend on the nature of the contracted services.

In the case where Petitioner has hired a crane provider to perform construction services as contemplated in section 541.2(a)(1) of the Sales and Use Tax Regulations and Petitioner's contract with its customer is for a project that results in a capital improvement to real property, in order to relieve the crane provider of its obligation to collect sales tax on its sale of services, Petitioner should provide the crane provider with a copy of the properly completed *Certificate of Capital Improvement* (Form ST-124) provided by the property owner to the prime contractor. If Petitioner's contract with its customer is for a project that does not result in a capital improvement to real property, Petitioner should provide the crane provider with a properly

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completed *Contractor Exempt Purchase Certificate* (Form ST-120.1) in lieu of paying sales tax on the construction services. See section 541.5(d)(1)(iii) of the Sales and Use Tax Regulations.

DATED: July 21, 2008

/s/
Jonathan Pessen
Tax Regulations Specialist IV
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.