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

TSB-A-08(35)S
Sales Tax
July 28, 2008

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. S070515A

On May 15, 2007, the Department of Taxation and Finance received a Petition for Advisory Opinion from G&T Conveyor Company, Inc., P. O. Box 487, Tavares, Florida 32778. Petitioner, G&T Conveyor Company, Inc., provided additional information pertaining to the Petition on August 1, 2007.

The issue raised by Petitioner is whether sales tax is due on materials, labor, and other expenses incurred by Petitioner in installing its baggage-handling systems as described below.

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

Petitioner manufactures and installs baggage-handling systems at airport terminals. Petitioner contracts with airlines, or in some cases, subcontracts with general contractors who contract with airlines, to perform installations of Petitioner's systems. The baggage-handling systems (i.e., carousels and conveyors) are permanently bolted and/or welded to the terminal building structure. Extensive electrical work is required during installation to integrate a baggage-handling system with a terminal's electrical system. A baggage-handling system as installed is custom designed for its particular location. Once installed, it cannot be removed without causing material damage to both the system and the terminal building. Petitioner states that an installed baggage-handling system is intended to be a permanent installation.

Petitioner manufactures the baggage-handling systems in Florida and ships them via common carrier to the site where they will be installed. Petitioner incurs the costs of labor to install the system, engineering services to fit the product to the terminal, and project management at the airport. Petitioner may hire subcontractors to install the mechanical and electrical portions of the equipment at the site. Petitioner rarely sells a baggage-handling system without installation; such sales do not exceed 10% of Petitioner's total sales.

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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> * * *
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> (4)(i) . . . 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. . . .

* * *

(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 imposes tax on retail sales of tangible personal property and sales of certain enumerated services, and 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 (other than computer software used by the author or other creator) 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,…

(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 as described in paragraph three of subdivision (b) of section eleven hundred one, but excluding any credit for tangible personal property accepted in part payment and intended for resale.

(c) For purposes of subclause (i) of clause (B) of subdivision (a) of this section, the tax shall be at the rate of four percent of the price at which items of the same kind of tangible personal property are offered for sale by the user, and the mere storage, keeping, retention or withdrawal from storage of tangible personal property by the person who manufactured, processed or assembled such property shall not be deemed a taxable use by him; provided, however, that if the user uses such an item itself on its own premises (not including making a gift of such tangible personal property), solely in the conduct of the user's own business operations, and the item retains its characteristic as tangible personal property when so used, the tax shall be at the rate, and on the consideration, described in subdivision (d) of this section.

(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 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:

* * *

(15) Tangible personal property sold to a contractor, subcontractor or repairman for use in (i) erecting a structure or building (A) of an organization described in subdivision (a) of section eleven hundred sixteen . . . or (ii) adding to, altering or improving real property, property or land (A) of such an organization . . . as the terms real property, property or land are defined in the real property tax law; provided, however, no exemption shall exist under this paragraph unless such tangible personal property is to become an integral component part of such structure, building or real property.

(16) Tangible personal property sold to a contractor, subcontractor or repairman for use in maintaining, servicing or repairing real property, property or land (i) of an organization described in subdivision (a) of section eleven hundred sixteen . . . as the terms real property, property or land are defined in the real property tax law; provided, however, no exemption shall exist under this paragraph unless such tangible personal property is to become an integral component part of such structure, building or real property.

Section 1116(a) of the Tax Law provides, in part:

Except as otherwise provided in this section, any sale . . . to any of the following or any use or occupancy by any of the following shall not be subject to the sales and compensating use taxes imposed under this article:

(1) The state of New York, or any of its agencies, instrumentalities, public corporations (including a public corporation created pursuant to agreement or compact with another state or Canada) or political subdivisions where it is the purchaser, user or consumer, . . .

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

A refund or credit equal to the amount of sales or compensating use tax imposed by this article and pursuant to the authority of article twenty nine, and paid on the sale or use of tangible personal property, shall be allowed . . . 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. An application for the refund or credit provided for herein must be filed with the commissioner of taxation and finance within the time provided by subdivision (a) of section eleven hundred thirty nine. Such application shall be in such form as the commissioner may prescribe. Where an application for credit has been filed, the applicant may immediately take such credit on the return which is due coincident with or immediately subsequent to the time that he files his application for credit. However, the taking of the credit on the return shall be deemed to be part of the application for credit. The procedure for granting or denying such applications for refund or credit and review of such determinations shall be as provided in subdivision (e) of section eleven hundred thirty nine.

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 527.7(b)(4) of the Sales and Use Tax Regulations provides:

The imposition of tax on services performed on real property depends on the end result of such service. If the end result of the services is the repair or maintenance of real property, such services are taxable. If the end result of the same service is a capital improvement to the real property, such services are not taxable.

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.

> Example 1: Company A, located in Suffolk County, manufactures and sells its own brand of garage doors. Approximately 80 percent of the doors are installed by Company A; the balance of the doors are installed by the purchaser.
>
> Company A pays sales tax to its New York State suppliers of wood and glass that become part of the doors. When determining the amount of use tax it owes Company A may take credit for the New York State and local sales taxes paid on these materials.

(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.

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.

* * *

(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.

Example 1: A contractor sells a building he has constructed and, as a part of the sale agreement, installs free standing water fountains which remain tangible personal property when installed. The contractor's billing to his customer must separately state all charges for tangible personal property included in the sales agreement. The New York State and applicable local tax rate must be collected on the total charges for the water fountains including any installation charges. In this instance, the contractor may purchase the water fountains tax-free using a contractor exempt purchase certificate. If he pays the tax to his supplier, he is entitled to a refund or credit of the tax paid on the purchase of the water fountains.

Opinion

Petitioner manufactures and installs baggage-handling systems at airport terminals. Petitioner contracts with airlines, or in some cases, subcontracts with general contractors who contract with airlines, to perform installations of Petitioner's systems. The baggage-handling systems (i.e., carousels and conveyors) are permanently bolted and/or welded to the terminal building structure. Extensive electrical work is required during installation to integrate a baggage-handling system with a terminal's electrical system. A baggage-handling system as installed is custom designed for its particular location. Once installed, it cannot be removed without causing material damage to both the system and the terminal building.

It will be presumed for purposes of this Opinion that Petitioner contracts with airlines that are leasing the premises on which the baggage-handling systems are to be installed and that such premises are generally the property of New York State or one of its political subdivisions.

Section 1101(b)(9)(i) of the Tax Law provides that an installation must meet all of the following conditions in order to constitute a capital improvement:

1) The installation must substantially add to the value of the real property, or appreciably prolong the useful life of the real property;

2) The installation must 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 article itself; and

3) The installation must be intended to be a permanent installation.

Section 1105(c)(3)(iii) of the Tax Law provides that charges for the service of installing tangible personal property that results in a capital improvement to real property are not subject to sales tax. Section 527.7(b) of the Sales and Use Tax Regulations further provides that the imposition of sales tax on services performed on real property depends on the end result of the service. If the end result of the services is the repair or maintenance of real property, the service is taxable. If the end result of the same service is a capital improvement to the real property, the

service is not taxable. The installation of an airline baggage-handling system, as described in this Opinion, will generally meet the conditions set forth in section 1101(b)(9)(i) of the Tax Law for a capital improvement. See *JetBlue Airways Corporation*, Adv Op Comm T & F, June 21, 2007, TSB-A-07(15)S.

When the owner of the real property makes improvements to the real property that meet the conditions set forth in section 1101(b)(9)(i) of the Tax Law, the installation is presumably a permanent one. However, for installations made by tenants, though similar or identical to those made by the owner of the premises, a different presumption arises. Installations made for the purpose of conducting the business of one who is not the owner of the real property (e.g., a tenant, licensee, or franchisee) are presumed not to be permanent, but made for the sole use and enjoyment of the person who owns the business and not for the purpose of the landlord's estate. See *Matter of Flah's of Syracuse v Tully*, 89 AD2d 729. An installation made for a tenant may nevertheless qualify as a capital improvement if the lease provides that title to the improvement is to vest in the landlord upon installation and that the improvement is to become a part of the premises and remain on the premises upon the termination of the lease. See *Beaman Corporation*, Adv Op St Tx Comm, August 19, 1982, TSB-A-82(32)S. Petitioner can substantiate that the installation is permanent by having its customer (the airline) provide a copy of the appropriate provisions of its lease with the landlord indicating that the baggage-handling system becomes the landlord's property upon installation.

Provided that Petitioner's installation of the baggage-handling system meets the conditions set forth in section 1101(b)(9)(i) of the Tax Law and becomes the property of the landlord upon installation and will remain on the premises upon the termination of the lease, such installation will be a capital improvement that is exempt from sales tax. The airline should, in addition to the above documentation, provide Petitioner with a properly completed *Certificate of Capital Improvement* (Form ST-124). Such certificate relieves Petitioner of its obligation to collect sales tax on its charges to its customer for installation of the baggage-handling system. See section 541.5(b) of the Sales and Use Tax Regulations.

Purchases by Petitioner or its subcontractors of components and materials that become part of the baggage-handling systems that qualify as capital improvements upon installation are subject to New York sales and use tax as a retail purchase of tangible personal property when such property is delivered in New York State or a taxable use of tangible personal property if purchased outside the State but installed into realty in New York. See section 1101(b)(4)(i) of the Tax Law and section 541.5(b) of the Sales and Use Tax Regulations. Petitioner or its subcontractors may not issue a resale certificate to purchase such items without the payment of sales tax. However, sections 1115(a)(15) and (16) of the Tax Law provide an exemption from sales and use tax for purchases or use by a contractor, subcontractor, or repairman of tangible personal property incorporated into real property owned by New York State or one of its political subdivisions. Provided that Petitioner can show that the baggage-handling system becomes the property of New York State, one of its political subdivisions, or another entity exempt from sales tax under section 1116(a) of the Tax Law upon installation, materials which are actually incorporated into the real property may be purchased or used by Petitioner without the payment

of sales or use tax pursuant to sections 1115(a)(15) and (16). See *Trans World Airlines, Inc.*, Adv Op Comm T & F, March 26, 1992, TSB-A-92(30)S; *JetBlue Airways Corporation, supra*.

Petitioner incurs costs for labor to install the system, engineering services to fit the product to the terminal, and project management at the airport. Installation services purchased by Petitioner from subcontractors in connection with a capital improvement project are not subject to sales tax pursuant to section 1105(c)(3)(iii) of the Tax Law. Petitioner should provide subcontractors with documentation including a photocopy of the *Certificate of Capital Improvement* received from its customer to relieve the subcontractor of its obligation to collect sales tax on its charges to Petitioner for installing the system. See section 541.5(b)(4) of the Sales and Use Tax Regulations. Petitioner's purchase of engineering services to fit the product to the terminal and project management services at the airport in connection with the capital improvement are not subject to sales tax.

When Petitioner works as a subcontractor, it should obtain a copy of the *Certificate of Capital Improvement* provided to the prime contractor by the airline and documentation as described above indicating that the improvement will become the property of the landlord upon installation and will remain on the property upon the termination of the lease. Provided that Petitioner obtains documentation that the landlord is exempt from sales tax under section 1116(a) of the Tax Law, Petitioner is not liable for sales or use tax on materials which are incorporated into the landlord’s real property.

It is noted that if an installation meeting the conditions to qualify as a capital improvement is performed upon real property, property, or land not owned by an entity exempt from sales tax pursuant to section 1116(a) of the Tax Law, Petitioner (and its subcontractors) owes sales or use tax on the purchase or use of materials incorporated into the real property. See section 1101(b)(4)(i) of the Tax Law. Such tax paid by Petitioner (and its subcontractors) may be included in Petitioner's charges to its customer for the sale of such installation.

If the materials do not become the property of the owner of the realty upon installation or the installation otherwise fails to meet the conditions set forth above to qualify as a capital improvement to real property, Petitioner (and its subcontractors) is making sales of and performing an installation of tangible personal property that remains tangible personal property after installation. All charges by Petitioner to a tenant for the installation of materials that retain their identity as tangible personal property upon installation are subject to sales tax under section 1105(c)(3) of the Tax Law regardless of whether the underlying real property, property, or land is property of an entity exempt from sales tax pursuant to section 1116(a) of the Tax Law. The purchase or use of materials by Petitioner or its subcontractor in such case is not exempt under sections 1115(a)(15) and (16) of the Tax Law. However, in this case Petitioner or its subcontractor is entitled to a credit or refund of any New York State and local sales and use tax it paid on the purchase of tangible personal property used in such installation and actually transferred to the customer as a component part of the baggage-handling system. Alternatively, in lieu of paying the sales tax and claiming a credit or refund, Petitioner or its subcontractor may issue a Contractor Exempt Purchase Certificate (Form ST-120.1) to its vendor for purchases of

materials that it will incorporate into the installed baggage-handling system that will remain tangible personal property after installation. See section 1119(c) of the Tax Law and section 541.5(b)(4)(iii), Example 1 of the Sales and Use Tax Regulations. Petitioner's purchases of installation services from a subcontractor in such case are exempt from tax as purchases for resale. Petitioner's purchases of engineering and project management services are also exempt from tax.

It should be noted that section 1118(7) of the Tax Law provides for an exemption from New York State and local use tax imposed on the use of tangible personal property or services to the extent that a retail sales or use tax was legally due and paid on such property or services, without any right to a refund or credit, to any other state or jurisdiction within any other state, but only when such other state or jurisdiction allows a corresponding exemption with respect to sales or use tax paid to New York State. If Petitioner has already paid a sales or use tax to the state of Florida on the baggage-handling system and other materials installed as a capital improvement in New York without any right to a refund or credit, under section 1118(7) of the Tax Law Petitioner may take a credit against the use tax Petitioner is required to pay to New York for the tax paid to Florida on those materials. See *A Guide to New York State Reciprocal Credits for Sales Taxes Paid to Other State*, Publication 39 (8/04); and *Bell Signs, Inc.*, Adv Op Comm T & F, April 30, 2008, TSB-A-08(21)S.

DATED: July 28, 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.