New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-09(42)S
Sales Tax
September 22, 2009

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. S090619A

Petitioner [redacted] requested an advisory opinion regarding the application of the sales and use tax to materials used and consumed by an automobile body repair shop, and whether a repair shop may pass through to its customer as part of a bill for the taxable service of repairing a damaged automobile the costs (including sales tax) paid by the repair shop on items used by the shop in the repair process, and collect sales tax on the total bill including those costs.

We conclude that to the extent items consumed by a repair shop in performing a repair to an automobile are property purchased at retail by the repair shop, the costs for such items, including the tax paid thereon, may be included and recouped in the taxable receipt charged its customers.

Facts

Petitioner recently had an automobile repair performed on his vehicle. The cost of Petitioner's repair was paid or reimbursed by an insurance company. Petitioner's invoice for the repair reflected that the total cost for the repair was subject to sales tax. Included within that taxable receipt were items consumed or used by the automobile body repair shop in the course of the repair upon which the shop was required to pay sales or use tax. These items include plastic sheeting, sand paper, masking tape, and tack cloth. Petitioner asserts that inclusion of the sales tax paid by the repair shop on its consumable items in computing the customer's taxable receipt for the purchase of goods and services constitutes an impermissible pyramiding of "tax on tax."

Analysis

The Tax Law imposes sales tax on sales, unless for resale or otherwise exempt, of tangible personal property and certain enumerated services (Tax Law section 1105). If the sales tax was not paid upon purchase, the use tax is imposed on most items and services that are subject to sales tax when purchased within the State (Tax Law section 1110). The resale exclusion applies to property and services purchased for (i) resale as such, (ii) resale as physical component parts of tangible personal property, or (iii) use in performing certain taxable services, including maintenance and repair services, if the property becomes a physical component part of the property upon which the services were performed or the property is later actually transferred to the purchaser of the service in conjunction with the performance of the service.

Property purchased by a vendor and supplied to its customers as a component part of its taxable services to its customers is not purchased for resale when the vendor retains ownership of the property (*Matter of Albany Calcium Light v State Tax Commn*., 44 NY2d 986). Though a

vendor retains ownership of property in rental situations and may purchase rental property for resale as such, if the property furnished to customers is inseparably connected to the service being provided it cannot be considered to be separately sold or rented for sales tax purposes. Thus, if property provided by a vendor to a customer is an integral and inseparable component of the vendor's service and the charges relating to the provision of that property cannot be reasonably construed as arising from a separate transaction, then the property is not purchased by the vendor for resale unless the property becomes a physical component part of the property upon which the services are performed or is actually (i.e., permanently) transferred to the purchaser of the service in conjunction with the performance of the services. Thus, dumpsters and trash compactors purchased by companies selling waste removal services (*U-Need-A-Roll Off Corp. v. New York State Tax Commn.* 67 NY2d 690), gas cylinders purchased by companies selling gases and gas service (*Matter of Albany Calcium Light v State Tax Commn, supra*), plastic cards purchased by a company selling prepaid phone service (*US Telecom* Dec Tx App Trib DTA 820160, December 7, 2006), and straws and napkins purchased by vendors selling restaurant (fast food) services (*Celestial Food of Massapequa Corp. v. N Y S Tax Commn. supra*) are retail purchases notwithstanding that the costs for these items, including the tax paid by the vendors on those purchases, is passed through and included in the cost of the taxable services charged their customers. *See* TSB-M-81(8)S, *Taxable Status of Supplies Used by Auto Body Repair Shops*, May 11, 1981, for guidance on whether specific supply items are considered to be actually transferred to the customer in connection with the rendering of taxable auto body repair services.

Unless a specific statutory exemption applies, vendors must pay sales tax on their purchase of items used and consumed by them in their performance of taxable services. If sales tax was not paid at the time of purchase, the vendor is required to self-assess and pay the applicable use tax. When vendors are required to pay tax on their retail purchases of the property they use and consume in the performance of their services, there is nothing illegal or improper if they pass the costs of these items, including the applicable sales and use taxes, along to their customers as part of the customers' charge for the purchase of property and services from the vendor.

All expenses incurred by a vendor in making a taxable sale that are passed through to the customer are included in the taxable receipts from the sale. *See* Tax Law §1101(b)(3) and 20 NYCRR 526.5(e). Both the cost of items used and consumed by a vendor in providing taxable automobile repair services and the sales tax paid by the vendor on its purchases of these items are expenses incurred by the vendor in providing the services. Accordingly, since these expenses are passed through to the customer, the expenses, including sales and use taxes paid and accrued by the vendor on those expense items, are included in the taxable receipts for the sale.

For taxable sales, section 1132(a)(1) of the Tax Law requires that tax on the price for a sale be stated, charged, and separately shown on the sales slip, invoice, receipt, etc. given the customer. There are no requirements in the law as to how or whether a vendor should reflect its expenses on the sales slips, invoice, receipts, etc. given its customer. The fact that the vendor's consumable items are separately stated on the invoice presented to the customer is not determinative of whether the items are considered to be resold or are an expense item. Also, the fact that the item, for example $5.00 of masking tape, is shown on the invoice as costing $5.00 plus $0.40 sales tax (assuming an 8% State and local tax rate), or as $5.40 (without acknowledging payment of the tax), or as $6.00 (the vendor having marked up the item to cover its cost including the tax), has no effect

on the tax treatment of the transaction to the customer. The customer is not actually being charged tax on the consumable items since the customer is not the purchaser, user, or consumer of the items; the customer is reimbursing the vendor's costs for the consumable items used in making the sale of the taxable property or service purchased by the customer. Tax was properly due from and paid by the repair shop on the expense items whether or not the repair is ultimately subject to tax. Even if the receipt for the purchase of the repair service is ultimately not subject to tax (e.g., purchased by an exempt organization), the vendor would still be required to pay sales tax on its purchase and use of the consumables, and the costs for the consumables, including the tax, would be passed along and borne by the customer.

DATED: September 22, 2009

/S/
Jonathan Pessen
Director of Advisory Opinions
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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.