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

TSB-A-09(9)S
Sales Tax
February 26, 2009

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. S080814A

Petitioner, [redacted] requests an advisory opinion regarding the following questions:

1. Is the rental of scaffolding, hoisting equipment, safety netting, and temporary pedestrian walkways (specified construction equipment) subject to tax?

2. Is the rental of the specified construction equipment ever considered a component of a capital improvement project, and therefore not a taxable sale?

3. Under what circumstances is a charge for disassembling scaffolding or temporary pedestrian walkways taxable?

4. Do petitioner's purchases of the specified construction equipment qualify for the resale exclusion from sales and use tax?

We conclude that: (1) petitioner's rental of the specified construction equipment is subject to tax under Tax Law section 1105(a); (2) a rental of the specified construction equipment does not qualify as a component part of a capital improvement because a rental is taxable as a sale of tangible personal property, not as a Tax Law section 1105(c)(3) installation service or a section 1105(c)(5) service to real property that qualifies for the capital improvement exclusion; (3) a separate charge for disassembly done in conjunction with a rental or a taxable installation is taxable; and (4) petitioner's purchases of the specified construction equipment qualify for the resale exclusion because petitioner is not a construction contractor and is purchasing the property exclusively for resale.

Facts

Petitioner is a New York corporation located in Bronx County, in the City of New York. Petitioner is in the business of renting the specified construction equipment to both general contractors and property owners located in various counties throughout the State of New York. All transactions are governed by written rental agreements, which have terms ranging from a few months to one or more years. All rental agreements set forth a monthly rental fee as well as certain additional fees associated with the rental of the particular equipment. The rental agreements specifically provide that petitioner is not responsible for the maintenance, insurance or upkeep of the equipment once the equipment has been installed and approved by the appropriate governmental agencies. Petitioner does not maintain workers at the subject site once the equipment has been installed or erected. This Advisory Opinion assumes that "hoisting equipment" refers to temporary elevators that have no operators.

Petitioner's customers are most often general contractors involved in some form of building construction or capital improvement relating to the exterior of the subject premises. In other instances, petitioner's customers are private property owners or governmental agencies. At the end of the term of the rental agreement, petitioner's employees dismantle and remove all equipment and related items from the job site.

Analysis

Question 1: Is the rental of specified construction equipment subject to tax?

Yes, except when the sale is to an entity exempt under Tax Law section 1116. Sales tax is imposed on the retail sale of tangible personal property delivered in New York (Tax Law section 1105(a)). The term "sale" includes a rental (Tax Law § 1101(b)(5)).

Question 2: Is the rental of the specified construction equipment ever considered a component of a capital improvement project and therefore not a taxable sale?

Tax Law section 1105(c)(3)(iii) excludes the installation of a capital improvement from the tax on the installation or maintenance of tangible personal property. Likewise, section 1105(c)(5) of the Tax Law also excludes the performance of a capital improvement from the tax on the services of maintaining, servicing, repairing or altering real property. An equipment rental subject to tax pursuant to section 1105(a) of the Tax Law is not a service to tangible personal property under section 1105(c)(3) or to realty under section 1105(c)(5). Thus, a contract for the rental of the specified construction equipment would never be exempt as a component of a capital improvement. In deciding whether a contract qualifies as a rental of tangible personal property, as distinguished from a contract to provide a service using the property, the determinative factor is whether the vendor maintains dominion and control of the property (Sales Tax Reg. section 541.9(c)(1)(ii)). While the issue of dominion and control is a question of fact that cannot be determined in the context of an Advisory Opinion, it appears here that petitioner does not maintain dominion and control of the specified construction equipment it transfers to its contractor customers, because petitioner's rental contracts provide that petitioner is not responsible for the maintenance, insurance, or upkeep of the equipment once the equipment has been installed and approved by the appropriate governmental agencies.

Section 541.8(a) of the Sales and Use Tax Regulations provides an exclusion from tax for charges for "the installation of materials and the labor" to provide "temporary facilities at construction sites," including temporary pedestrian walkways, where the temporary facility is a necessary prerequisite to the construction of a capital improvement to real property. The taxability of the installation or disassembly of a temporary facility depends on the nature of the job being performed at the construction site where the facility is installed. Thus, under that regulation, if the job is a capital improvement, then the charges for the installation and disassembly of the temporary pedestrian walkway are not subject to tax; conversely, if the underlying construction project is a repair to real property, then the charges for the installation and disassembly of the temporary pedestrian walkway are taxable. The provisions of Sales Tax Reg. § 541.8(a) apply to contracts for the performance of a service of the installation of temporary facilities at a construction site, and do not apply to contracts for the rental of tangible personal property.

Question 3: Under what circumstances is a charge for disassembly of scaffolding or temporary pedestrian walkways taxable?

Disassembly is not one of the enumerated services subject to tax under Tax Law section 1105(c). However, when disassembly is done as part of a rental of scaffolding or a temporary pedestrian walkway, it is an integral part of that rental, and therefore a separate charge for disassembly is taxable (Tax Law section 1101[b][3]; Penfold v. State Tax Commission, 114 AD2d 696 [1985]; Sales Tax Reg. section 541.9[c][1][iv]). Similarly, when a subcontractor provides the service of installing and disassembling a temporary pedestrian walkway at a construction

site where the work being performed is a repair to real property, a charge for disassembly is considered part of the repair and is taxable.

Question 4: Is petitioner entitled to provide its suppliers with resale certificates (Form ST-120) in order to purchase the components of the scaffolding and temporary pedestrian walkways exempt from tax?

Petitioner's purchases of scaffolding and walkway components qualify for the resale exclusion from sales and use tax only if petitioner is not a construction contractor and it uses the components exclusively for resale (Sales Tax Reg. sections 541.9[a] and [b][1][ii]; Micheli Contracting Corp. v. New York State Tax Com'n, 109 A.D.2d 957 [1985]). Thus, if, as appears to be the case here, petitioner exclusively uses the scaffolding and temporary pedestrian walkway components to lease them, then the exclusivity requirement is met and petitioner may provide its suppliers with a resale certificate and purchase those materials without paying sales and use tax. However, if petitioner sometimes uses the scaffolding and temporary pedestrian walkway components to perform a service, petitioner must pay tax on the purchase of the components (Sales Tax Reg. sections 541.8[b]; 541.9[b][1]).

These conclusions represent the current position of the Department and supersede any contrary advice.

DATED: February 26, 2009

/S/
Jonathan Pessen
Director of Advisory Opinions
Office of Counsel

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