

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

TSB-A-10(4)S
Sales Tax
February 10, 2010

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S091130A

Petitioner [REDACTED], requested an advisory opinion as to whether the waste or spillage portion of granite, marble, and stone slabs used in connection with a capital improvement is subject to sales or use tax.

We conclude that the waste or spillage portion of granite, marble, or stone slabs used in connection with a capital improvement is subject to sales or use tax.

Facts

Petitioner is a general contractor that does stone and masonry work in connection with the installation of kitchen countertops, walkways, and patios. Petitioner purchases slabs of granite, marble, and stone and fabricates them according to the job specifications for a customer. Alternatively, Petitioner may purchase slabs and pay the supplier an additional amount to fabricate the slabs. The fabrication of the slabs yields a waste or spillage portion of the slab that is discarded. Petitioner charges customers based on the square footage of the installed portion of the slab, not the entire slab that was purchased by Petitioner.

It is assumed for purposes of this Opinion that Petitioner uses the slabs only in capital improvement projects.

Analysis

A contractor's purchase of tangible personal property for use in performing a capital improvement is a purchase at retail subject to sales tax if the property is delivered to the contractor in New York. *See* Tax Law §1101(b)(4)(i) and 20 NYCRR 541.1(b). If a contractor purchases tangible personal property outside New York and subsequently uses the property in New York in performing a capital improvement, the use of the property is subject to use tax. *See* Tax Law §1110(a)(A). The use tax is based on the consideration paid for the property, including any charges for shipping or delivery. *See* Tax Law §1110(b). Accordingly, Petitioner's purchases of slabs for use in capital improvement projects are subject to sales or use tax. The tax is based on the sales price paid by Petitioner for the entire slab.

The service of fabricating tangible personal property is subject to sales tax when performed in New York for a person who furnishes the property to the service provider. *See* Tax Law §1105(c)(2). If the fabricating services are performed outside New York on tangible personal property that is subsequently used in New York, use tax is due on the property based on the consideration paid for the fabricating service, including any charges for shipping and delivery. *See* Tax Law §§1110(a)(D) and (f). Accordingly, any additional amounts paid by Petitioner for the service of fabricating the slabs are subject to sales or use tax.

There are no provisions in Article 28 of the Tax Law or the Sales and Use Tax Regulations for a refund or credit based upon the excess of material used in the fabrication process that is discarded after fabrication. *See Striker Sheet Metal, Inc.*, Adv Op Comm Tx & Fin, November 10, 1999, TSB-A-99(45)S. Accordingly, Petitioner's purchases of slabs for use in capital improvement projects are subject to sales or use tax based on the amount paid for the entire slab, including the waste or spillage portion of the slab that is discarded after fabrication. Petitioner's purchases of fabrication services on the slabs are subject to tax on the amount paid for the service, with no refund or credit based on the waste or spillage portion of the slab.

DATED: February 10, 2010

/S/

Jonathan Pessen
Director of Advisory Opinions
Office of Counsel

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.