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

TSB-A-12(6)S
Sales Tax
March 19, 2012

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. S110406A

The Department of Taxation and Finance received a Petition for Advisory Opinion from Petitioner [redacted]. Petitioner is a manufacturer and installer of stairs and railings and it asks about the application of the sales and use tax to its purchases and sales. We conclude that (1) as a contractor, Petitioner must pay sales tax on its purchases of the supplies to manufacture the stairs and railings that it will install unless it will be installing the stairs and railings in property owned by an exempt organization or government entity; (2) Petitioner's purchases of materials for manufacturing stairs and railings that it will sell to contractors or property owners, but not install, are subject to tax, but Petitioner is entitled to a refund or credit of the tax paid on the materials; (3) Petitioner's original installation or entire replacement of stairs generally qualify as capital improvements and are thus not taxable; (4) Petitioner's sales of stairs and railings that it will not install are subject to tax, unless the stairs and railings will be installed in property of an exempt organization or government entity, or the stairs and railings are sold directly to an exempt organization or government entity; and (5) as a manufacturer and installer of the stairs and railings, Petitioner must accrue use tax when it installs stairs and railings that it has manufactured.

Facts

Petitioner is a stairs and handrail manufacturer and installer doing business in New York. Petitioner purchases the necessary materials (boards, sections of railing screws, etc), manufactures the stairs in its shop, and then brings them onsite to install. Petitioner also sells stairs without also installing them, by assembling the stairs for pick-up or delivery. With regard to railings, Petitioner brings sections of railings to a building site where it installs them. It also sells handrail parts for a homeowner or another contractor to install.

Analysis

Sales Tax Applied to Petitioner's Sales

The installation or entire replacement of stairs is generally a capital improvement to real property (*see* Publication 862, *Sales and Use Tax Classifications of Capital Improvements and Repairs to Real Property* [4/01], at p. 11). Accordingly, Petitioner's charges for the sale and installation of stairs and railings in new or existing buildings are not subject to sales tax (*see* Tax Law §§ 1105[c][3][iii]; 1115[a][17]). Petitioner's receipts from the repair of part of a riser or part of a railing would be taxable as the maintenance of real property (*see* Tax Law § 1105[c][5]).

Sales Tax Applied to Petitioner's Purchases

Fabricators and manufacturers who install their fabricated or manufactured product into real property are contractors (*see* 20 NYCRR § 541.11[a]). Accordingly, Petitioner is a contractor for sales tax

purposes. A contractor's purchases of tangible personal property for use or consumption in construction are retail purchases subject to sales tax under Tax Law § 1105(a) (*see* 20 NYCRR § 541.1[a][1]). These purchases will be exempt only if the tangible personal property becomes an integral component part of real property owned by an organization or governmental entity exempt from tax under Tax Law § 1116(a) (*see* Tax Law § 1115[a][15]).

Petitioner would be entitled to a refund of New York sales and use tax it paid on the materials used to make the stairs and railings to the extent it sold the stairs and railings on an uninstalled basis or it installed them in a building owned by an exempt organization described by section 1116(a) and they became an integral component part of the realty (Tax Law § 1119[c]).

Use Tax Applied to Petitioner's Installed Sales as a Contractor-Manufacturer

When Petitioner manufactures stairs to the specifications of a particular capital improvement, and installs the stairs, it is making a use of the stairs subject to compensating use tax under Tax Law section 1110(a)(B). The basis on which the use tax is computed depends on whether Petitioner offers items of the same kind of tangible personal property for sale in the regular course of business. If Petitioner offers for sale items of the same kind in the regular course of business, the use tax is based on the sale price of the items that would be charged to an unrelated contractor, prior to fabrication. The value added by fabricating the product to the specifications of a capital improvement is not subject to use tax (*see* Tax Law §§ 1110[a][B][i]; 1110[c], [e]; 20 NYCRR § 531.3[b][2]). 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 list, the average of the prices charged to various customers will be deemed to be the price at which the user would sell such item during the regular course of business (*see* 20 NYCRR § 531.3[b][1][i]). If items of the same kind are not offered by the contractor in the regular course of business, then the amount subject to tax is the amount paid or agreed to be paid (including transportation costs) for the materials used in manufacturing, processing or assembling the stairs.

Thus, the determination of the proper use tax base depends on the correct application of two concepts, "items of the same kind" and "offered for sale in the regular course of business." The sales tax regulations provide that the term "[I]tems of the same kind" means that the "items belong to an identifiable class, but need not be identical" and that "[i]tems made to the specifications of a particular job will not be considered items of the same kind as items made to the specifications of another particular job" (20 NYCRR §531.3[b][1][i][a]). Section 531.3(b)(1)(b) of the regulations explains the "offered for sale in the regular course of business" concept as follows:

> *Offered for sale in the regular course of business* means that a person sells in excess of 10 percent of his product for each 12 month period beginning December 1st, measured by weight, volume, size or other unit on which the price is based, to persons other than organizations exempt under section 1116(a) of the Tax Law. For the purpose of this calculation, the amount of product sold to all persons except exempt organizations will constitute the numerator of the fraction and the total amount of the product sold and used in performing work for others, with the exclusion of products sold to or used in performing work for exempt organizations, will constitute the denominator.

Here, Petitioner assembles in its workshop each set of stairs to the specifications of a particular capital improvement. Thus, the stairs are not items of the same kind offered in the regular course of

business (*see* TSB-A-03[23]S [kitchen countertop manufacturer and installer held not to sell items of the same kind because each countertop was built to the specifications of a particular kitchen]). Accordingly, the base of the use tax that Petitioner must accrue on the stairs that it installs is based on the consideration given for the raw materials manufactured into the stairs, including any charges for shipping or delivery of those raw materials (*see* 20 NYCRR § 531.3[b][2][iii]). But the value added by Petitioner in fabricating the stairs to the specifications of the particular capital improvement is not subject to use tax (s*ee* Tax Law §§ 1110[a][B][i]; 1110[d],[e]; 20 NYCRR § 531.3[b][2][i]).

Petitioner installs the railings by bringing lengths of railings to the site and installing them there to fit the particular stairs. The railings are items of the same kind (*see* 20 NYCRR section 531.3[b][1][i][a][Example 2]["Windows are items of the same kind when they are of a standard size and materials"]). Thus, the basis for the use tax that Petitioner must accrue in regard to railings depends on whether it is offering the railings for sale "in the regular course of business," i.e., whether the value of the railings it sells on an uninstalled basis exceeds 10% of the total value of the railings it sells or installs. The computation necessary to make this determination is described above. To the extent that Petitioner meets or exceeds the 10% threshold, it would accrue use tax based on its average selling price for railings, as evidenced by its catalog price, or, if it does not sell through a catalog, its sales records.

The applicable rate of use tax is the tax rate in effect in the locality where the product is installed (*see* 20 NYCRR § 531.3[b]). When determining the amount of use tax it owes, Petitioner may take credit for the New York State and local sales taxes paid on the materials used to manufacture the stairs and railing (*see* 20 NYCRR § 531.3[b][1]; TSB-A-96[66]S).

It should be noted that if Petitioner erroneously collects sales tax from its customer on the cost of the installed stairs and railings, it cannot apply that erroneously collected sales tax against the amount of use tax it owes on the installed materials (*see Darien Lake Fun Country, Inc. v. State Tax Com'n,* 68 NY2d 630 [1986]).

DATED: March 19, 2012

/S/
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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. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.