

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

TSB-A-13(11)S
Sales Tax
April 11, 2013

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S120730A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED] (Petitioner). Petitioner asks whether it must collect sales and use tax on the installation, rental, and dismantling of temporary pedestrian walkways for use with capital improvements when the price charged is a lump sum for all services and the rental.

We conclude that the lump sum of the rental and the service of installing scaffolding, safety netting, hoisting equipment, and temporary pedestrian walkways is subject to sales tax when the installation is not a “temporary facility” at a construction site that is a necessary prerequisite to the construction of a capital improvement to real property. If the temporary pedestrian walkway is a “temporary facility” at a construction site that is a necessary prerequisite to the construction of a capital improvement to real property, the lump sum of the rental and services would not be taxable. If the rental of the temporary pedestrian walkway is separately charged, that charge would be subject to sales tax as a rental of tangible personal property.

Facts

Petitioner is a scaffolding company that installs, rents, and then dismantles temporary pedestrian walkways for its customers. Petitioner typically enters into a contract that includes a charge for rental of the temporary pedestrian walkway and all labor to install and disassemble the walkway. Petitioner’s contracts provide for a lump sum amount due, and the invoices state that the amounts due are for installation and dismantling and the rental and permits. Petitioner collects sales tax on the lump sum for the services, rental and permits.

The Petitioner asks two questions. First, it asks whether it must collect sales tax on the charges for permits, and the installation, rental, and dismantling of temporary pedestrian walkways for use with capital improvements when the price charged is a lump sum. Second, it asks whether the services of installation and dismantling of the temporary pedestrian walkways would be exempt from sales tax if they were separately stated on the invoice.

Analysis

This analysis relies on the Petitioner’s representation that the underlying work for which the temporary pedestrian walkways are rented, installed, and dismantled are only for use with a capital improvement.

Petitioner’s lump sum charge is primarily for the provision of the service of installing and dismantling temporary pedestrian walkways for its customers. The installation of materials and

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 is not subject to sales tax. *See* 20 NYCRR § 541.8(a). In such case, the total lump sum would not be subject to sales tax. Under this scenario, the Petitioner would have to pay sales or use tax on the equipment it obtained to provide the service or rental to its customers (including the components of the temporary pedestrian walkway) because the purchase of the equipment would not qualify as a purchase for resale.

If the temporary facility is not a prerequisite to the construction of a capital improvement to real property, then the complete lump sum is subject to sales and use tax. *See* Tax Law § 1105(c)(3) and (5).

If Petitioner decides to separately state the charge for the service of installation and dismantling of the temporary pedestrian walkway that is a necessary prerequisite to a capital improvement, that charge will not be subject to sales tax if the separately stated charges are reasonable in relation to the total price. However, the separate charge for the rental of the temporary pedestrian walkway would be subject to sales tax. In this case, when Petitioner purchases the components of the temporary pedestrian walkway, it would be purchasing them for resale and it would be eligible to provide its supplier with a resale certificate in order to purchase the components without payment of sales tax. *See* 20 NYCRR § 541.9(b)(1)(ii).

Based upon the representations made by Petitioner, it may have collected sales or use tax in certain cases when not due as stated above. Petitioner can claim a refund or credit for any sales tax it has refunded to its customers. It should be noted that Petitioner may file the claim for refund or credit in a case only when the tax has actually been refunded to the customer. *See* 20 NYCRR §534.6(a)(2). Petitioner should maintain adequate documentation to support its refund claim(s). Those refund claims must be filed within three years after the date when the tax was payable by the Petitioner to the Department.

DATED: April 11, 2013

/S/

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