

**New York State Department of Taxation and Finance  
Office of Counsel**

TSB-A-15(48)S  
Sales Tax  
November 20, 2015

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S120917A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED] (Petitioner). Petitioner asks whether, as a subcontractor, it should collect sales tax on its charges for various services to a prime contractor where the prime contractor's customer is an exempt organization or where the job is a capital improvement for a non-exempt customer, what type of exemption certificates Petitioner may accept in either of those cases, and whether it should receive the appropriate exemption certificates from the prime contractor or from the prime contractor's customer. Petitioner also asks, if its job as a subcontractor is taxable, whether its materials and services and certain other expenses it incurs to provide those services are subject to tax.

We conclude that Petitioner need not collect sales tax as a subcontractor on its charges to a prime contractor if the job is for an exempt organization or is for a capital improvement and it receives the appropriate exemption certificate. In either case, petitioner as subcontractor should receive copies of the exemption certificates from the prime contractor, and, if Petitioner hires its own subcontractor, Petitioner should give a copy of the exemption certificate that it receives from the prime contractor to its subcontractor. When Petitioner's job is taxable, it should collect sales tax on its charges to the customer for any tangible personal property or fabrication or other taxable service it sells, including its charges to its customer for shipping or delivering the property it sold or upon which it performed a taxable service, and any other amounts it charges the customer for its taxable sales of property or services to recover its expenses related to those sales. If Petitioner purchases steel installation services from a subcontractor for a taxable job, Petitioner may give its subcontractor an exempt purchase certificate in lieu of paying tax on its purchase.

**Facts**

Petitioner is registered for sales tax purposes. It is a materials supply and steel fabrication business. It maintains an inventory of steel products, insulated concrete forms, and other products and sells them from inventory. It also provides the service of fabricating steel products, and it acts as a subcontractor to prime contractors to install fabricated steel products it supplies as part of the contract. As a subcontractor, it might supply the steel material, labor in its shop, outside labor involving shop drawings or steel installation, delivery of materials by truck to the work site, and on-site supervision. As a subcontractor, it hires (sub-subcontracts with) other firms to install its fabricated steel products. Some of its business with prime contractors is ultimately for exempt organizations or constitutes capital improvements for non-exempt customers.

**Analysis**

## CONTRACTS FOR EXEMPT ORGANIZATIONS

Building materials are tangible personal property. *See* Tax Law § 1101(b)(6). Tax Law § 1105(a) imposes sales tax on retail sales of tangible personal property, unless an exemption or exclusion applies. While sales of tangible personal property for resale are not subject to tax, a sale of tangible personal property to a contractor for use or consumption in erecting structures or buildings, or building on, or otherwise adding to, altering, improving, maintaining, servicing or repairing real property is deemed to be a retail sale (and not a sale for resale), regardless of whether the contractor will resell the property as such before it is so used or consumed. *See* Tax Law § 1101(b)(4)(i). Although a contractor or subcontractor cannot purchase building materials for resale and generally must pay tax on its purchases of building materials, tangible personal property sold to a contractor or subcontractor for use in erecting, repairing, adding to, or altering a structure or building owned by an exempt organization described in Tax Law § 1116(a) is exempt when it is to become an integral component part of such organization's structure or building. In addition, tangible personal property purchased by a contractor that remains tangible personal property after installation is exempt from tax when purchased for and sold to an exempt organization. *See* Tax Law § 1115(a)(15) and (16); 20 NYCRR § 541.3(d). Thus, a contractor or subcontractor may purchase building materials exempt from tax if it will use them to erect, repair, add to, or alter a structure or building owned by an exempt organization, provided that the materials become an integral component part of the structure or building.

When Petitioner purchases steel or other materials as inventory for its materials supply business, it may give its suppliers a resale certificate so that it need not pay sales tax on its purchases if it intends to resell the materials as such to its customers. When it sells the materials at retail, it should collect sales tax unless the customer gives it a valid exemption document. Where Petitioner sells materials to a contractor or subcontractor, it generally must collect tax from the contractor or subcontractor, because contractors and subcontractors are not allowed to purchase materials for resale. However, Petitioner may sell materials to a contractor or subcontractor that has a contract with an exempt organization without collecting sales tax, if the contractor or subcontractor gives Petitioner proper exemption certificates, as described below.

When Petitioner engages in erecting, constructing, adding to, altering, or improving, buildings, other structures, or improvements on or to real property, it is a construction contractor for sales tax purposes. *See* 20 NYCRR § 541.2(d). Thus, if Petitioner takes any materials from its inventory and, as a contractor or subcontractor, installs them or agrees to install them as an integral component part of a customer's property, it is a contractor for sales tax purposes and would owe tax on its purchases of the materials (just as a contractor would have had to pay tax on materials it purchases), unless the customer is an exempt organization and Petitioner receives a properly completed exemption document as described below. Likewise, if Petitioner purchases materials that it knows it will install as a contractor or subcontractor (rather than purchase as inventory to be resold as such to others), then it cannot purchase them for resale and must pay tax on those purchases, unless Petitioner purchases the materials knowing it will install them under a contract for an exempt organization and Petitioner receives a proper exemption certificate, as described below.

In order for a contractor or subcontractor to purchase materials that it will install for an exempt organization customer without paying sales tax, the exempt organization must give the

contractor an appropriate exemption document. If the contractor's customer is a governmental entity, copies of signed contracts between the governmental entity and the contractor or of government purchase orders to the contractor are sufficient evidence to establish the exempt status of the job between the governmental entity and the prime contractor. With respect to the documents required between a prime contractor and any subcontractor, a signed document between them that identifies the project, location, and exempt owner will form the basis for tax exemption of tangible personal property purchased for incorporation into the exempt project. When purchasing such tangible personal property for the exempt project, the contractor or subcontractor should give its supplier a properly completed Form ST-120.1, *Contractor Exempt Purchase Certificate*. See 20 NYCRR § 541.3(d)(2)(v)(a).

If the contractor's customer is an exempt organization other than a governmental entity, the prime contractor must obtain Form ST-119.1, *Exempt Organization Exempt Purchase Certificate*, from its customer and retain it as part of its records. The prime contractor must give copies of the *Exempt Organization Exempt Purchase Certificate* to all subcontractors on the job. Each subcontractor must retain a copy of the certificate in its records with a copy of the contract that identifies the project and the location. When purchasing tangible personal property for incorporation into the exempt project, the prime contractor or subcontractor should give its supplier a properly completed Form ST-120.1, *Contractor Exempt Purchase Certificate*. See 20 NYCRR § 541.3(d)(2)(v)(b).

Thus, if Petitioner, as subcontractor, contracts with another firm as sub-subcontractor to perform the installation services that Petitioner agreed with the prime contractor to perform, Petitioner should give to its sub-subcontractor a copy of the Form ST-119.1 it received from the prime contractor.

## CAPITAL IMPROVEMENTS and OTHER SERVICES

Tax Law § 1115(a)(17) exempts from sales and compensating use taxes tangible personal property sold by a contractor, subcontractor or repairperson to a person, other than an exempt organization, for whom it is performing a capital improvement, provided that the property is to become an integral component part of the structure, building or real property.

Tax Law § 1105(c)(3) imposes sales tax on receipts from every sale, except for resale, of the service of installing tangible personal property, except when such installed property will be a capital improvement to real property. "Capital improvement" means an addition or alteration to real property that (1) substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property; (2) becomes part of the real property or is permanently affixed to the real property so that removal would cause material damage to the property or article itself; and (3) is intended to become a permanent installation. See Tax Law § 1101(b)(9)(i). A contractor's receipts from the performance of a capital improvement to real property (that is, its charges to its customer for materials and for the services to install those materials as a capital improvement) are not subject to sales tax. See 20 NYCRR § 541.1(c).

Tax Law § 1105(c)(2) imposes sales tax on receipts from every sale, except for resale, of the service of fabricating or processing tangible personal property, performed for a person who directly or indirectly furnishes the tangible personal property, not purchased by him for resale,

upon which services are performed. "Fabrication" is the alteration or modification of tangible personal property to the specifications of the owner without a change in the identity of the product. Fabrication includes cutting, perforating, and similar operations. See 20 NYCRR § 541.2(m).

"Receipts" subject to sales tax include the vendor's charge to its customer for shipping or delivering taxable tangible personal property to the customer, if the sale of the property is subject to tax or if taxable services were performed on the property, regardless of whether the vendor separately states such charges in a written contract or on an invoice and regardless of whether the vendor ships or delivers the property itself or hires a third party to ship or deliver the property. Similarly, a vendor's charges to its customer for picking up the customer's property upon which the vendor is to perform a taxable service are part of the vendor's receipt from the sale of the service subject to tax. In addition, a vendor's charge to its customer for the cost of transportation of the property from a supplier, manufacturer, warehouse, or other distribution point to the vendor's place of business is also part of the vendor's receipt from the sale of the property to the customer subject to tax, whether the charge is designated as transportation, shipping, handling, or in some other manner. See 20 NYCRR § 526.5(g)(1) and (2).

The imposition of tax on services performed on real property depends on the end result of the service. If the end result of the service is the repair or maintenance of real property, the service is taxable. If the end result of the same service is a capital improvement to the real property, the service is not taxable. See 20 NYCRR § 527.7(b)(4). The prime contractor on a capital improvement contract should obtain a properly completed Form ST-124, *Certificate of Capital Improvement*, from the customer and retain it as part of its records. The prime contractor must give a copy of that certificate to each subcontractor on the job and the subcontractor must retain it as part of its records. See 20 NYCRR § 541.5(b)(4)(a).

Thus, when Petitioner is providing materials and services as a subcontractor on a capital improvement, it should not charge sales tax on its charges to the prime contractor. It should obtain from the prime contractor a copy of the capital improvement certificate that the prime contractor received from its customer. Petitioner must retain the certificate copy as part of its records and maintain a method of associating an exempt sale made to a particular customer with the exemption certificate on file for that customer. See Tax Bulletin, *Recordkeeping Requirements for Sales Tax Vendors* (TB-ST-770). If Petitioner, as subcontractor, contracts with another firm as sub-subcontractor to perform the steel installation services on a capital improvement project that Petitioner agreed with the prime contractor to perform, Petitioner should give a copy of the capital improvement certificate it received from the prime contractor to its sub-subcontractor.

When Petitioner is a subcontractor on a taxable project, it should collect sales tax on its charge for the installation services it sells (including the materials actually transferred to the customer as part of the taxable service). Petitioner's receipts subject to tax would include its charges for the steel materials and any fabrication services, as well as any charges to its customer to ship or deliver the materials to the site, whether it does the shipping or delivery itself or pays someone else to ship or deliver. Petitioner's receipts subject to tax also would include its charges to its customer to recover its expenses paid for shop drawings, its labor both in-shop and

on-site for others to install the steel, as well as its supervision on-site. However, if the prime contractor purchases Petitioner's installation service for resale to its customer and gives Petitioner a properly completed Form ST-120.1, *Contractor Exempt Purchase Certificate*, Petitioner may sell its installation service (including the materials actually transferred to the customer as part of the taxable service and any fabrication service to the materials) to the prime contractor for resale and not collect tax. If Petitioner engages in erecting, constructing, adding to, altering, or improving, real property when it performs (or agrees to perform) its installation service, it is a contractor and must pay tax on the materials actually transferred to its customer. However, it may apply for a refund or credit of the amount of tax it paid when it purchased those materials. See Tax Law § 1119(c); Tax Bulletin, *Contractors-Sales Tax Credits* (TB-ST-130). If Petitioner as subcontractor contracts with another firm to perform the installation service that Petitioner agreed with the prime contractor to perform, Petitioner should give a properly completed *Contractor Exempt Purchase Certificate* to its sub-subcontractor so that it may purchase the sub-subcontractor's installation services for resale.

DATED: November 20, 2015

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DEBORAH R. LIEBMAN  
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.