

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

TSB-A-16(11)S
Sales Tax
April 22, 2016

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S130905A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. Petitioner asks under what circumstances it is required to collect sales tax on its charges for scaffold sales, rental, and installation to its customers when its customers are contractors working on construction projects for exempt organizations.

We conclude that Petitioner is not required to collect sales tax on its charges for scaffolding services provided to a contractor if the scaffolding qualifies as a “temporary facility” that is a necessary prerequisite to a capital improvement, or the job is for an exempt organization and the contractor provides Petitioner with appropriate documentation to substantiate that the contractor is an agent of the exempt organization.

FACTS

Petitioner rents and sells scaffolding. On most occasions, it also provides erection and dismantling services to its customers, as well as accessory items such as debris netting and trash chutes. Petitioner’s customers typically are general contractors on construction projects. Petitioner asks under what circumstances it is required to collect sales tax for scaffolding sales, rental, and associated services provided in accordance with contracts entered into on or after January 1, 2015 in cases where its customer is a contractor working for an exempt organization.

ANALYSIS

The term “scaffolding systems” includes “fixed structures that are used to support, protect, or convey people or materials during the construction or repair of buildings and other real property,” including “shoring and suspended scaffolding” and “hoisting systems” that are “similar to elevators,” but not including “construction equipment that can be readily moved within a construction site (*e.g.*, on wheels or casters)...” TSB-M-14(15)S, *Sales Tax Treatment of Certain Temporary Facilities Provided at Construction Sites*. On and after January 1, 2015, the rental or sale of scaffolding systems, when provided in conjunction with installation and/or dismantling services, is considered a service, regardless of whether or not the installation or dismantling charges are separately stated. *Id.*

If the construction project Petitioner is working on is not considered a capital improvement under Tax Law § 1101(b)(9), Petitioner’s services normally would be subject to sales tax. *See* TSB-M-14(15)S. However, Petitioner’s services would not be taxable if the

scaffolding constitutes a “temporary facility” that is “a necessary prerequisite to the construction to a capital improvement to real property,” and therefore considered to be “a part of the capital improvement.” 20 NYCRR § 541.8; *see* TSB-M-14(15)S; *see also* *L & L Painting Co.*, Tax Appeals Tribunal (June 2, 2011). If Petitioner is hired to provide scaffolding on a construction project that is considered a capital improvement under Tax Law § 1101(b)(9) and Petitioner timely receives in good faith a copy of a properly completed valid Form ST-124, *Certificate of Capital Improvement* provided by the contractor’s customer to the contractor, Petitioner is relieved of the obligation to collect sales tax.

In cases where Petitioner rents or sells scaffolding without providing any associated services, its receipts from scaffolding rentals and sales would be treated as receipts from the sale of tangible personal property, and, accordingly, would be subject to sales tax, even for a capital improvement project. TSB-M-14(15)S.

If Petitioner’s customer (*i.e.*, the contractor) is performing work for an organization that is exempt from sales tax under Tax Law § 1116(a), Petitioner’s scaffolding services generally would be taxable if the project is not a capital improvement. However, the contractor could purchase property or services from Petitioner exempt from sales tax if it is the properly appointed agent of the exempt organization. *See* 20 NYCRR § 541.3(d)(4)(i); *see also* Publication 765, *Sales and Fuel Excise Tax Information for Properly Appointed Agents of New York Governmental Entities* (2005) at 10-11.

In order for a principal/agent relationship to exist between an exempt organization and a contractor, the following conditions must be satisfied:

- (a) purchases must be billed or invoiced by the vendor to the exempt organization or to the contractor specifying that the contractor is acting as agent for the exempt organization (e.g. X contractor, as agent for Y, name of exempt organization) and identify the place of delivery;
- (b) payment must be made by the exempt organization or by the contractor, acting as agent, directly to the vendor from a special fund created by the exempt organization for this specific purpose;
- (c) deliveries must be made to the job site; and
- (d) the contractor must furnish the vendor with the exempt organization certificate when acting as agent for such organization.

20 NYCRR § 541.3(d)(4)(i). Petitioner’s sale or rental of scaffolding without accompanying services to a contractor working for an exempt organization would be exempt from tax when the contractor’s contract with the exempt organization meets the requirements described above. 20 NYCRR § 541.3(d)(4)(ii). In the case of a government entity, Petitioner would need to obtain copies of signed contracts and government purchase orders from the contractor to establish the exempt status of the transaction since government entities do not have exempt organization certificates. *See* 20 NYCRR § 541.3(d)(2)(v)(a).

