

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

The Department of Taxation and Finance received a Petition for an Advisory Opinion from [REDACTED] (Petitioner A) and [REDACTED] (Petitioner B). Petitioners sell and install commercial and residential solar energy systems. Petitioners asked questions about the applicability of the state and local sales and use tax to its purchase, sale and installation of solar energy systems, including the applicability of the exemptions in Tax Law § 1115(ee) and (ii).

Facts

Petitioners A and B are both owned by the same partners. Petitioner A sells commercial and residential solar energy systems to customers primarily located in upstate New York. Petitioner A procures and provides solar modules, inverters, and racking components required for the installation of the solar energy systems. Petitioner B is responsible for the transportation and installation of the solar energy systems at the customers' sites. Neither Petitioner is engaged in the sale of electricity under a written Solar Power Purchase Agreement. Petitioner B is responsible for procuring items known as "Balance of System" components that typically include items like electrical conduit, wire, straps, fittings, connectors and miscellaneous supplies like roofing sealant, fuses and breakers. Petitioner B, in performing the installation of the system, is acting informally as a sub-contractor to Petitioner A, who acts as the contractor and arranges for the sales of the solar energy systems to the customers. There is no formal contractor-subcontractor relationship between the Petitioners because the two entities are owned by the same partners. Petitioners sometimes buy the components in bulk and sometimes buy the components for the installation of a residential or commercial solar energy system for a specific customer.

Analysis

Tax Law § 1105 (a) generally imposes sales tax on every sale, except sales for resale, of all tangible personal property otherwise exempt. Generally, sales of tangible personal property to contractors (including sub-contractors) for use or consumption in construction are treated as retail sales and subject to sales and use tax, regardless of whether tangible personal property is to resold as such or incorporated into real property as a capital improvement. 20 NYCRR 541.1(b). Accordingly, a contractor is not allowed to give a vendor a resale certificate (Form ST-120). In contrast, sales to other vendors potentially may be treated as sales for resale. Whenever a contractor uses materials on which the contractor has paid sales tax in the course of performing services subject to tax under Tax Law § 1105(c), the contractor may be entitled to a refund or credit of the portion of the tax paid by the contractor attributable to materials transferred to a

customer, provided the contractor is required to collect sales tax from the customer. 20 NYCRR 541.1(b). Receipts from the performance of a capital improvement to real property by a contractor are not subject to sales tax. 20 NYCRR 541.1(c).

Retail sales and installations of residential solar energy systems equipment and commercial solar energy systems equipment are exempt from the 4% New York State sales tax and the 3/8% sales tax rate imposed in the Metropolitan Commuter Transportation District (MCTD). *See* Tax Law § 1115 (ee) & (ii). Such sales and installations are exempt from local sales and use taxes only if the jurisdiction specifically enacts the exemption. *See* Tax Law § 1210(a)(1). Publication 718-S, *Local Sales and Use Tax Rates on Sales and Installations of Residential Solar Energy Systems Equipment* and Publication 718-CS, *Local Sales and Use Tax Rates on Sales and Installations of Commercial Solar Energy Systems Equipment*, provide information about which jurisdictions have enacted the exemptions for residential and commercial solar energy systems equipment.

Residential solar energy systems equipment means an arrangement or combination of components installed in a residence that utilizes solar radiation to produce energy designed to provide heating, cooling, hot water, or electricity. *See* Tax Law § 1115 (ee) (1). For purposes of this exemption, the Department of Taxation and Finance has defined a “*residence*” as a dwelling, whether owned or rented. It includes a single-family house, a multi-family building which consists exclusively of residential dwelling units, or a residential dwelling unit or units within such a multi-family building, including an apartment, a cooperative apartment or a condominium unit. *See* TSB-M-05(11)S.

Commercial solar energy systems equipment means as an arrangement or combination of components installed upon nonresidential premises that utilize solar radiation to produce energy designed to provide heating, cooling, hot water and/or electricity. Tax Law § 1115 (ii) (1).

Both residential and commercial solar energy systems equipment exclude items such as pipes, controls, insulation, or other equipment that are part of a conventional non-solar energy system, such as a gas, oil, or electric heating or cooling system. *See* Tax Law §§ 1115 (ee) (1) & (ii) (1).

Based on the foregoing, we conclude that Petitioners’ “modules, racking and inverters” will qualify as residential or commercial solar energy systems equipment when purchased for installation in the residence or non-residential, i.e. commercial premises of a particular customer. These components, when installed, will be exempt from the State and MCTD sales taxes, and may be exempt from local sales tax if the jurisdiction where this equipment is installed has enacted the applicable exemption. In order to purchase this equipment exempt from sales tax, Petitioners would need to first obtain a properly completed Form ST-121, *Exempt Use Certificate* from the customer in whose residence or commercial premises the equipment is to be installed, and then present Form ST-120.1, *Contractor Exempt Purchase Certificate* to its vendor. If Petitioners do not know at the time of purchase where qualifying solar energy systems equipment will be installed, as would be the case when they purchase the equipment in bulk, the

exemptions in Tax Law § 1115(ee) and (ii) would not apply and they must pay sales tax on the purchase. These exemptions do not apply to the “Balance of System” equipment purchased by Petitioner B because these items of equipment also would be part of non-solar energy systems, and Petitioner B must pay sales tax on the purchase of these items. Petitioners, because they are contractors, cannot use a resale certificate (Form ST-120) when purchasing any of the components.

Tax Law § 1105 (c) imposes tax upon the receipts from every sale, except for resale, of certain enumerated services. Included in the services subject to sales tax is the service of installing tangible personal property, except where the installed property will constitute an addition or capital improvement to real property. *See* Tax Law § 1105 (c) (3). However, because the exemptions in § 1115(ee) and (ii) apply to the installation of qualifying solar energy systems equipment, Tax Law § 1105(c) does not apply to the installation of the modules, racking and invertors and Petitioners are not required to collect state sales tax, or local sales tax if the installation is in a locality that has elected to allow the exemptions, from its customers for the installation of the solar energy systems, whether or not the solar energy systems qualify as capital improvements. These exemptions do not apply to the installation of the Balance of System equipment, and Petitioners are required to collect tax on the installation of those items if Petitioners charge a separate installation charge for such items.

If the installation of the solar energy system, and the Balance of System equipment if there is a separate charge for the installation of that equipment, is in a locality that has not elected to exempt solar energy systems, the installation will be subject to local sales tax as a receipt from the service of installing tangible personal property unless the installation of the system qualifies as a capital improvement. Tax Law § 1105(c)(3).

A capital improvement is defined as follows:

- (i) An addition or alteration to real property which:
 - (A) Substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property; and
 - (B) 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
 - (C) Is intended to become a permanent installation.

Tax Law § 1101 (b) (9); 20 NYCRR 541.2(g). The installation or replacement of permanent residential or commercial solar energy systems, and additions to permanent solar energy systems, will be considered capital improvements if they meet these criteria. *See* Publication 862. If the systems qualify as capital improvements, Petitioners would not be required to collect the local sales tax on the installation of the solar energy system and the Balance of System equipment if a separate installation charge is imposed. In this instance, Petitioners would be required to obtain a properly completed certificate of capital improvement (Form ST-124) from the customer. If the solar energy system does not qualify as a capital improvement, Petitioners would be required to collect the local sales tax on the installation, but would be entitled to a credit or refund of the portion of tax they paid attributable to the components of the system.

A sale is taxable at the place where the tangible personal property or service is delivered or the point at which possession is transferred by the vendor to the purchaser or his designee. *See* 20 NYCRR 526.7(e). The applicable rate of use tax to be paid by the contractor is the tax rate in effect in the locality where the product is installed. *See* 20 NYCRR 541.13(b). Consequently, when tangible personal property is later incorporated into real property in a different jurisdiction from the point of delivery, the tax due is then based on the point of installation. Additional tax would be due if the rate in effect at the point of installation is higher than that previously paid or if no tax was previously paid. If it is lower, a refund or credit would apply. *See* TB-ST-130.

When buying the components in bulk, Petitioners will owe State and local sales tax on the purchased equipment at the combined rate in effect where it is delivered. If either of the Petitioners receives the equipment in one jurisdiction (the delivery jurisdiction), but installs it in a different jurisdiction (the installation jurisdiction), Petitioner should take a full credit for the local sales tax paid in the delivery jurisdiction and report full local use tax for the installation jurisdiction. Petitioner must pay the difference in additional tax if the local rate in effect is higher in the installation jurisdiction than that paid in the delivery jurisdiction. If the local rate in effect is lower in the installation jurisdiction than that paid in the delivery jurisdiction, Petitioner may be entitled to a refund or credit in the amount of the difference.

DATED: October 27, 2020

/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.