

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

TSB-A-20(7)S
Sales Tax
May 19, 2020

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

The Department of Taxation and Finance received a Petition for Advisory Opinion from

[REDACTED] (Petitioner). Petitioner asks whether receipts from the sales of installation of cellulose and spray foam insulation, in circumstances where a subcontractor installs the insulation within attic spaces or in basement rim joist areas of residential homes or commercial buildings, are subject to sales tax. We conclude that the installation of insulation qualifies as a capital improvement. Accordingly, Petitioner's receipts are exempt from sales tax.

Facts

Petitioner performs energy audits of existing homes and commercial buildings. It sometimes finds no insulation or insufficient insulation in attics or in basement rim joist areas. To remedy the lack of appropriate insulation, Petitioner is asked by the property owner to install cellulose or foam insulation.

Petitioner subcontracts such insulation installation. The subcontractor purchases the insulation material from a vendor, who collects sales tax from the subcontractor. The subcontractor then installs the insulation and bills Petitioner for its work. The subcontractor does not charge or collect any sales tax from Petitioner. Petitioner bills the property owner, who supplies a Certificate of Capital Improvement for the insulation work.

In addition to energy audits of existing structures, Petitioner expects to perform energy audits for new construction of homes and commercial buildings in the future. Similarly, it expects to subcontract insulation installation within those homes and buildings as well.

Analysis

Sales tax is imposed on the retail sale of tangible personal property, which includes insulation materials. Tax Law §§ 1105(a); 1101(b)(6). Further, the installation of such tangible personal property is a taxable service. Tax Law § 1105(c)(3). However, these receipts are exempt from sales tax where the installation qualifies as a capital improvement to real property. Tax Law § 1105(c)(3). A capital improvement is 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; and (2) becomes part of the real property or is permanently affixed to the real property such that removal would cause material damage to the property or article itself; and (3) is intended to become a permanent installation. Tax Law § 1101(b)(9)(i).

The installation of insulation makes a structure more energy efficient and adds to the value of the real property. Also, the insulation is intended to be permanent and becomes part of the real property because removal is not contemplated at the time of its installation or at the time of a subsequent sale of the real property. Accordingly, Petitioner's installation of insulation qualifies as a capital improvement. Petitioner's receipts from its sales of installed insulation are exempt from sales tax.

Petitioner is acting as a contractor when it agrees to install insulation for property owners. Accordingly, Petitioner is a construction contractor for sales tax purposes. 20 NYCRR 541.2(d). Sales tax is not imposed on Petitioner's receipts because the installation qualifies as a capital improvement to real property. 20 NYCRR 541.1(c); 20 NYCRR 541.5(b)(2). Petitioner, acting as the general (or prime) contractor, must obtain a properly completed Certificate of Capital Improvement from its customer and retain it as part of its records. TB-ST-113. Petitioner, in lieu of paying sales tax for materials and work performed by its subcontractor (*see generally* 20 NYCRR 541.2(g) (Example 3)), must provide a copy of that certificate to its subcontractor, who must also retain it as part of its own records. 20 NYCRR 541.5(b)(4)(i)(a); 20 NYCRR 541.5(d)(1)(iii); TSB-A-96(37)S.

It must be noted that any sale of tangible personal property to a contractor or subcontractor for use or consumption in construction is a retail sale and subject to sales and use tax, regardless of whether the tangible personal property is to be incorporated into real property as a capital improvement. Tax Law § 1101(b)(4)(i); 20 NYCRR 541.1(b); 20 NYCRR 541.5(b)(1). Therefore, sales and use tax must be paid on the initial purchase of insulation materials.

In conclusion, sales tax must be paid on the initial purchase of insulation by Petitioner's subcontractor. Petitioner's installation of insulation for the property owner is then exempt from sales tax as a capital improvement pursuant to Tax Law §§ 1105(c)(3) and 1101(b)(9)(i). Petitioner must obtain from its customer a properly completed Certificate of Capital Improvement. The certificate must be retained separately by Petitioner and its subcontractor.

DATED: May 19, 2020

/S/

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.