

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-86(21)S
Sales Tax
May 28, 1986

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S851212B

On December 12, 1985, a Petition for Advisory Opinion was received from Affordable Homes, Inc., Route 11, Cicero, New York 13039.

The issues raised are (I) whether a modular home sold by Petitioner qualifies as a mobile home for purposes of section 1101(b)(10) of the Tax Law, (II) who is liable for collection of the sales and use tax on the sale of such a modular home and (III) how is the applicable tax to be calculated.

Petitioner is a mobile home dealer who is about to commence selling modular homes. The modular home in question is made in two pieces which are delivered to the installation site by truck and thereafter affixed to a permanent foundation. The modular home is not built on a permanent chassis, comprised of a frame and wheels but rather on a returnable chassis upon which Petitioner has paid a deposit. The manufacturer of the modular home will install it in its permanent location for Petitioner.

Issue I

Section 1101(b)(10) of the Tax Law sets forth the characteristics of a "mobile home" for purposes of the sales and use tax. It provides:

(10) Mobile home. (i) A structure which is:

- (A) A type of manufactured housing; and
- (B) Not self-propelled; and
- (C) Transportable in one or more sections:
 - (I) that may be folded, collapsed or telescoped when being towed and expanded later to provide additional cubic capacity, or
 - (II) that may be separately towable and designed to be joined into one integral structure capable of being again separated into the sections for repeated towing; and
- (D) Built on a permanent chassis, comprised of frame and wheels, that is to be connected to utilities; and
- (E) Designed to be used as a permanent dwelling, with or without permanent foundation; and

- (F) Used for residential or commercial purposes.
- (ii) The term "mobile home" shall also include structures commonly called "double wides".
- (iii) The term "mobile home" shall not include:
 - (A) Structures designed and constructed primarily for temporary living quarters, recreations, camping or travel; or
 - (B) Furniture, fixtures, furnishings, appliances, attachments or similar tangible personal property not incorporated as component parts of a mobile home at the time of manufacture.

Inasmuch as the modular home to be sold by Petitioner is not built on a permanent chassis, comprised of a frame and wheels, it does not meet the definition of "mobile home" and does not come within the special provisions of the Tax Law applicable to mobile homes.

Issues II & III

Section 1105(a) of the Tax Law imposes a tax upon the receipts from every retail sale of tangible personal property, except as otherwise provided.

Section 1101(b)(4) of the Tax Law defines "retail sale" as "[A] sale of tangible personal property to any person for any purpose, other than for resale as such . . . (provide however) a sale of any tangible personal property to a contractor, subcontractor or repairman for use or consumption in erecting structures or buildings, or building on, or otherwise adding to altering, improving . . . real property . . . is deemed to be a retail sale regardless of whether the tangible personal property is to be resold as such"

Section 1101(b)(9) of the Tax Law defines "capital improvement" as "[A]n addition or alteration to real property which: (i) Substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property; and (ii) 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 (iii) Is intended to become a permanent installation"

Section 531.3(b)(1) of the sales and use tax regulations provides, in part, that "[A] compensating use tax is imposed on the use of any tangible personal property which was manufactured, processed or assembled by the user, if items of the same kind of tangible personal property are offered for sale by him in the regular course of business'(ii)Offered for sale in the regular course of business' means that a person sells in excess of 10 percent of his product for each 12 month period beginning December 1st, measured by weight, volume, size or other unit on which the price is based, to persons other than organizations exempt under section 1116(a) of the Tax Law.

For the purpose of this calculation, the amount of product sold to all persons except exempt organizations will constitute the numerator of the fraction and the total amount of the product sold and used in performing work for others, with the exclusion of products sold to or used in performing work for exempt organizations, will constitute the denominator. When it is determined that a person is selling in excess of 10 percent of his product in the regular course of business as defined herein, he will be considered a person required to pay compensating use tax on the basis set forth in paragraph (3) of this subdivision...." 20 NYCRR 531.3.

Section 531.3(b)(3) of the sales and use tax regulations provides, in part, that "[W]here the user sells items of the same kind to other persons in the regular course of business, the basis of the tax on the use of tangible personal property which is manufactured, processed or assembled by the user is the price at which such items are sold as evidenced by a price list, catalog price or record of sale. In the absence of a catalog price or price list, the average of the prices charged various customers will be deemed the price which the user would sell such item to the persons during the regular course of business...." 20 NYCRR 531.3.

Section 531.3(b)(5) of the sales and use tax regulations provides, in part, that [W]hen it is determined that a person is not selling in the regular course of business, as defined in subparagraph (ii) of paragraph (1) of this subdivision, he is required to pay a tax on the cost of the materials he used in manufacturing, processing or assembling the product he used...." 20 NYCRR 531.3.

In the instant case, Petitioner is acting in the capacity of a general contractor. The modular home manufacturer is acting as Petitioner's subcontractor and is considered to be the user of the modular home since it is using the modular home in performing a capital improvement. Petitioner, as general contractor, is not under any duty to collect sales tax. However, the manufacturer, as user of the modular home within the meaning of regulation section 531.3, is required to pay use tax. If the manufacturer sells in excess of ten percent of its modular homes on an uninstalled basis as computed under regulation section 531.3(b)(1)(ii), the manufacturer's use tax will be calculated on the uninstalled price of such modular homes as evidenced by a price list, catalog price or record of sales. If the manufacturer does not sell in excess of 10% of its modular homes on an uninstalled basis as computed under regulation section 531.3(b)(1)(ii), its use tax is based upon the cost of materials used by the manufacturer in manufacturing the modular home. In either event, the applicable rate of tax is the rate in effect where the modular home is installed by the manufacturer. The manufacturer is not required to collect sales tax on the receipts from its sales to Petitioner. However, the manufacturer may, if it wishes, pass on to the Petitioner the use tax it paid as one of the elements of its cost.

It should be noted that if Petitioner contracts with its customer to sell to the customer a modular home installed by Petitioner or by another individual (other than the manufacturer) acting as the agent of the Petitioner, the Petitioner's purchase of the modular home from the manufacturer is considered to be the purchase of tangible personal property and is subject to sales tax. The

manufacturer is required to collect sales tax from Petitioner on such a purchase. The tax is based upon the total sales price of the modular home charged by the manufacturer less separately stated freight charges and any frame deposit to the extent that such deposit will be refunded to Petitioner upon return of the frame. 20 NYCRR 526.5(g), (j); Tax Law section 1105(c)(3)(iii). The applicable rate of tax is the rate in effect in the locality where the modular home is delivered by the manufacturer to the Petitioner or to the Petitioner's designee.

If the locality where Petitioner takes delivery of the modular home and the locality where the modular home is installed are not the same, then Petitioner must also pay use tax for the difference if the rate is higher in the locality of installation and may claim a credit for the difference if the rate is lower in the locality of installation.

Petitioner's sale of the modular home to Petitioner's customer under these circumstances is not subject to sales tax inasmuch as it constitutes a capital improvement.

It should also be noted that if Petitioner contracts with his customer to sell to the customer a modular home on an uninstalled basis, with the customer arranging for installation, then it is the customer who is deemed to be the contractor. In such a case, the Petitioner may purchase the modular home from the manufacturer without payment of sales tax. However, Petitioner must collect sales tax on his sale of the modular home to his customer since such sale is a retail sale subject to tax. The tax is based upon the total sales price of the modular home charged by Petitioner less any separately stated freight charges charged by Petitioner and any deposit which is refunded to the customer. 20 NYCRR 526.5(g),(j). The applicable rate is the rate of sales tax in effect in the locality where the modular home is delivered by Petitioner or his agent to Petitioner's customer.

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Additionally, it should be noted that, in all cases, property included in the modular home which is not incorporated as a component part of the structure (e.g. freestanding furniture or appliances) may never become a capital improvement. Thus, the sale of such property by the manufacturer to the Petitioner is not subject to tax (provided the Petitioner furnishes to the manufacturer a properly completed resale certificate) but the sale of such property by the Petitioner to the customer is a retail sale subject to tax.

DATED: May 28, 1986

s/FRANK J. PUCCIA

Director

Technical Services Bureau

NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.