

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

TSB-A-87(31)S
Sales Tax
August 31, 1987

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S870623A

On June 23, 1987, a Petition for Advisory Opinion was received from Sullivan Humes Painting, 4454 Genesee Street, Buffalo, New York 14225.

The issue raised is whether a contractor's purchases of sand for sandblasting structures preparatory to painting, pursuant to a contract with a tax exempt entity, are exempt from tax because the sand, after use, is left at the construction site as fill.

Under the Tax Law the principal distinguishing feature of a sale to a contractor, as compared to other vendors who purchase tangible personal property for sale, is that the sale of such property to a contractor for use in construction is deemed a retail sale (§1101[a][4]) and subject to sales tax (§1105[a]) regardless of whether the tangible personal property is to be resold as such or incorporated into real property as a capital improvement or repair.

Section 1115 of the Tax Law, however, exempts from such tax the receipts from the purchase of tangible personal property by a contractor, subcontractor or repairman for use in adding to, altering or improving real property of certain exempt entities or for use in maintaining, servicing or repairing real property of such exempt entities where the tangible personal property in question is intended to become an integral component part of such structure, building or real property. Tax Law, §1115(a)(15) and (16). The exempt entities here referred to include the State of New York and any of its agencies, instrumentalities, public corporations, or political subdivisions. Tax Law, §1116(a)(1).

The painting of new structures, buildings or additions constitutes a capital improvement to real property; but the painting of existing structures, or parts thereof, is considered repair and maintenance. See Department of Taxation and Finance Publication 862, Classifications of Improvements and Repairs to Real Property for Sales Tax Purposes.

The Sales and Use Tax Regulations of the State Tax Commission in Part 541, Contractors, define "tangible personal property" as "corporeal personal property of any nature . . . including but not limited to materials, tools, . . . equipment and supplies". Additionally, the Regulations differentiate between building materials and contractors' supplies:

- (i) The term materials means those items which become a physical component part of real or personal property such as lumber, bricks and steel .
. . . .
- (k) The term supplies means those items which are consumed by a contractor in the performance of a contract and which are not incorporated into real property such as lubricating oils, sanding disks . . . 20 NYCRR 541.2 (i), (k).

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This distinction is necessary because, notwithstanding the above quoted section 1101(a)(4) of the Tax Law, materials intended for incorporation into structures of an exempt entity may be purchased exempt by use of a Contractor's Exempt Purchase Certificate (Form ST-120.1) and tax paid on materials actually transferred to a customer in the performance of a repair and maintenance contract may be refunded to the contractor; but no tax exemption applies to supplies purchased for the contractor's use. 20 NYCRR 541.1(b); 541.3(d)(2)(iv).

Regulation Section 526.6 (c)(6) explains further:

Example 9: A painter purchases plastic drop cloths and sandpaper and after painting a customer's premises, leaves the used drop cloths and sandpaper at the premises. The drop cloths and sandpaper, even though of limited or no use after the painting, have not been purchased for resale as they are items used by the painter in performing a . . . service. The drop cloths and sandpaper are not actually transferred to the purchaser of the service in conjunction with the performance of the service. (Emphasis added).

Accordingly, sand for sandblasting - whether used in capital construction or repair and maintenance projects - is taxable because it is purchased by the Petitioner as a supply necessary for the performance of its contract. The fact that it may be more expedient, after the sandblasting operation, to leave the used sand on site as fill rather than dispose of it in any other manner, does not relieve the Petitioner of its tax liability as the ultimate taxpayer and user in accordance with the above quoted provisions of the Tax Law and Regulations.

Petitioner complains that some customers will not allow it to charge them for the sales tax paid on blasting sand. When the contract is with an exempt entity, however, the classification of such tax as a cost item is entirely a matter of agreement between the Petitioner and its customer and is immaterial to the functioning of the Tax Law.

It should be noted that, were the Petitioner to enter into an agency contract with an exempt entity, its purchases of blasting sand would be made on behalf of the customer and therefore would be exempt from sales tax if the principal/agent relationship fully complies with the requirements set forth in Regulations Section 541.3 (d)(4).

DATED: August 31, 1987

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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