

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

TSB-A-90(53)S
Sales Tax
October 23, 1990

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S900911A

On September 11, 1990 a Petition for Advisory Opinion was received from The Michaels Group, Inc., 6 Century Hill Drive, Latham, New York 12110.

The issues raised by Petitioner, The Michaels Group, Inc., are:

1) Whether Petitioner pursuant to a construction contract with a subcontractor, is required to pay New York State sales tax on materials and supplies purchased and used by subcontractors to build, and which become a component part of, roads which, as required by the subdivision approval process, are to be deeded over to New York State, a municipality, or other organization exempt from sales tax pursuant to section 1116(a) of the Tax Law after the construction of the roads are completed.

2) Whether the result would be different if the land on which the roads are to be constructed are deeded to the exempt organization prior to the construction of the roads.

Petitioner, a land developer and builder of residential homes, proposes to build a new residential subdivision. As part of the proposed subdivision, the Petitioner identifies roads which are to be built. As part of the approval of the subdivision, the Petitioner agrees to deed the title to these roads over to New York State, a municipality, or other exempt organization for public use. This agreement is a condition of the approval of the subdivision. Petitioner contracts with a construction contractor (the subcontractor) to build the subject roads using the requisite materials and supplies and in accordance with the specifications as approved in the subdivision plat. The subcontractor invoices the Petitioner for the costs of materials and supplies, as well as the labor incurred, in connection with road construction in accordance with the construction contract.

Upon completion of the subdivision, these roads are deeded over to the municipality which is an exempt organization. The materials and supplies used to build these roads then become an integral part of real property owned by an exempt organization. At the time of the subdivision approval, there is no speculation as to whether the roads will be deeded over to the municipality; the approval for the subdivision is conditioned on this transfer. In addition, if the roads are not deeded over, the municipality could claim the roads through its power of eminent domain, and no compensation would be necessary.

Section 1105(a) of the Tax Law imposes sales tax upon "[t]he receipts from every retail sale of tangible personal property, except as otherwise provided in this article."

Section 1101(b)(4)(i) of the Tax Law in part defines a "retail sale" as:

. . . 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, maintaining, servicing or repairing real property, property or land, as the terms real property, property or land are defined in the real property tax law, is deemed to be a retail sale regardless of whether the tangible personal property is to be resold as such before it is so used or consumed. . . .

Section 1115(a)(15) of the Tax Law provides an exemption from the sales tax imposed by section 1105(a) of the Tax Law for:

Tangible personal property sold to a contractor, subcontractor or repairman for use in erecting a structure or building of an organization described in subdivision (a) of section eleven hundred sixteen, or adding to, altering or improving real property, property or land of such an organization, as the terms real property, property or land are defined in the real property tax law; provided, however, no exemption shall exist under this paragraph unless such tangible personal property is to become an integral component part of such structure, building or real property.

Section 1115(a)(16) of the Tax Law provides an exemption from the sales tax imposed by Section 1105(c) of the Tax Law for:

Tangible personal property sold to a contractor, subcontractor or repairman for use in maintaining, servicing or repairing real property, property or land of an organization described in subdivision (a) of section eleven hundred sixteen, as the terms real property, property or land are defined in the real property tax law; provided, however, no exemption shall exist under this paragraph unless such tangible personal property is to become an integral component part of such structure, building or real property.

Section 1116(a)(1) of the Tax Law provides that a sale shall not be subject to sales tax when it is made to:

The state of New York, or any of its agencies, instrumentalities, public corporations (including a public corporation created pursuant to agreement or compact with another state or Canada) or political subdivisions where it is the purchaser, user or consumer, or where it is a vendor of services or property of a kind not ordinarily sold by private persons;

Section 541.1(e) of the Sales and Use Tax Regulations provides that:

Tangible personal property purchased by a contractor that is to become an integral component part of real property owned by an organization described in section 1116(a) of the Tax Law is exempt from the New York State and

local sales tax. (For contracts with exempt organizations, see section 541.3 of this Part.)

In the instant case when the Petitioner's subcontractors construct the roads, prior to deeding them to the municipality, there is no municipal public works project involved. The roads are being built for the purpose of providing access to homes being built in the development. The only relationship that the municipality has to the roads is that it will accept them as a gift from the Petitioner after they are built and thereafter maintain them. In the meantime they are a private facility being constructed on private land with private money. By the time the roads are to be conveyed to the municipality, all of the materials used in the construction of the roads will have been converted into real property. See 1973 Op St Compt #73-30.

Thus the sale of the materials and supplies used in the construction of roads to Petitioner's subcontractors are retail sales pursuant to Section 1101(b)(4)(i) of the Tax Law and subject to tax pursuant to Section 1105(a) of the Tax Law, since they are not, at the time they are incorporated into the realty, used in constructing a facility for an organization exempt from tax pursuant to Section 1116(a)(1) of the Tax Law as required by Sections 1115(a)(15) and 1115(a)(16) of the Tax Law. Section 541.1(e) of the Sales and Use Tax Regulations requires that the real property be owned by the municipality at the time the materials and supplies are incorporated into the project. The fact that the Petitioner may be required at a future time to deed the roads to the municipality in order to obtain subdivision approval does not satisfy the statutory and regulatory requirements needed to obtain exemption from sales tax.

However if the real property upon which the roads are to be constructed are deeded by the Petitioner to the municipality prior to the incorporation of the materials and supplies into the real property, then the conditions set forth for exemption in sections 1115(a)(15) and 1115(a)(16) of the Tax Law and Section 541.1(e) of the Sales and Use Tax Regulations would have been met and therefore the purchase of such materials and supplies would be exempt from the sales tax imposed by Section 1105(a) of the Tax Law.

DATED: October 23, 1990

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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