

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

TSB-A-92(57) S
Sales Tax
July 29, 1992

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S920422E

On April 22, 1992 a Petitioner for Advisory Opinion was received from Beechcraft East, Inc., Hangar B, Republic Airport, East Farmingdale, New York 11735-1579.

The issue raised by Petitioner, Beechcraft East, Inc., is whether it is liable for payment of sales tax on charges for the removal of five existing 3500 gallon heating oil tanks and for installation of five replacement 3000 gallon heating oil tanks located at Petitioner's leased facility at Republic Airport, East Farmingdale, New York.

Petitioner leased from the New York State Department of Transportation certain areas at Republic Airport, East Farmingdale, New York. Petitioner had five existing 3500 gallon heating oil tanks removed and replaced by five 3000 gallon heating oil tanks. The tanks were removed and replaced with upgraded tanks to comply with current Department of Health sanitary codes.

An invoice submitted by Petitioner, dated January 9, 1992, indicates that the contractor installed five 3000 gallon doublewall aboveground tanks, electronic leak detection and overflow alarms, suction and return lines connected to existing piping inside the building, all necessary wiring and conduit and fill spill boxes. The contractor also epoxy coated the new tanks, located the new tanks at the existing tank locations, removed and disposed of the existing five 3500 gallon fuel oil storage tanks and all concrete and block around the tanks, provided all necessary drawings to the Suffolk County Health Department and obtained all required permits.

Petitioner is presently leasing the premises from New York State Department of Transportation and must maintain the premises in accordance with the lease agreement dated December 8, 1987.

Section 2.1.3 of Article 2 of the lease between Petitioner and the New York State Department of Transportation states, in part: ". . . Complete and unencumbered title to all Improvements hereby vests in the Department (except for trade fixtures paid for solely by Lessee) free and clear of all claims by Lessee or third party interests."

Section 5.6 of Article 5 of such lease states, in part: "Upon the completion of construction or installation and subject to the Lessee's leasehold interest therein, the complete and unencumbered title to all Improvements located on the Leased Premises shall immediately vest in the Department free and clear of all claims on the part of the Lessee on account of any repair or improvement work done or to be done under the terms hereof by the Lessee. This vesting of title in the Department at the time specified is a part of the consideration for this lease."

Section 20.1 of Article 20 of the lease provides, in part: "Upon the expiration, cancellation or termination of this Agreement pursuant to any terms hereof, the Lessee agrees peaceable to surrender up the Leased Premises to the Department in the same condition as they are at the time of the commencement of the term hereof, and as they may hereafter be repaired and improved by the Lessee; . . . Upon such cancellation or termination, the Department may re-enter and repossess the Leased Premises together with all improvements and additions thereto, or pursue any remedy permitted by law for the enforcement of any of the provisions of this Agreement, at the Department's election. Furthermore, upon such cancellation or termination, and for a reasonable time thereafter (not exceeding thirty (30) days after such cancellation or termination, and for which period the Lessee will pay to the Department current lease rentals), or during the term of this Agreement, if the Lessee is not in default in rentals or any other charges or obligations due the Department, the Lessee shall have the right to remove its personal property, fixtures and trade equipment which it may have on the Leased Premises, provided the removal thereof does not impair, limit or destroy the utility of said Leased Premises or building for the purpose for which they were constructed or improved, and provided, further, that the Lessee repairs all damages that might be occasioned by such removal, and restore the building and site to the condition above required."

Section 1116(a)(1) of the Tax Law provides for an exemption from sales and compensating use taxes with respect 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 of property of a kind not ordinarily sold by private persons" Based on the provisions of Section 1116(a)(1) of the Tax Law the New York State Department of Transportation constitutes an agency exempt from sales and compensating use taxes.

Section 1115(a) of the Tax law provides, in part, that receipts from the following shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten:

* * *

(15) 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.

In the instant case the New York State Department of Transportation is an organization described in Section 1116(a)(1) of the Tax Law. Pursuant to Section 5.6 of Article 5 of the lease, title to the oil tanks vested in the New York State Department of Transportation upon completion of the

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construction and installation subject to Petitioner's leasehold interest therein. Also pursuant to Section 2.1.3 of Article 2 of the lease, complete and unencumbered title to all improvements vested in the Department, and pursuant to Section 20.1 of Article 20 of the lease, Petitioner, upon the expiration, cancellation or termination of the lease agreed to surrender the leased premises to the lessor in the same condition as at the commencement of the lease, plus any repairs and improvements.

Accordingly, since in the instant case the New York State Department of Transportation is an organization described in Section 1116(a)(1) of the Tax Law and pursuant to Section 5.6 of Article 5 of the lease, title to the oil tanks vested in the New York State Department of Transportation upon completion of their installation, therefore pursuant to Section 1115(a)(15) of the Tax Law the removal of the old oil tanks and the purchase and installation of the new oil tanks by Petitioner was not subject to sales and use taxes. 450 Lexington Venture, Adv Op Comm T&F, March 7, 1989, TSB-A-89(8)S; Salamon, Inc., Adv Op Comm T&F, November 20, 1989, TSB-A-89(46)S; Trans World Airlines, Inc., Adv Op Comm T&F March 26, 1992, TSB-A-92(30)S.

Petitioner should furnish the contractor with a copy of the relevant portions of the lease between Petitioner and New York State Department of Transportation as substantiation that the construction performed was exempt from sales and use tax under Section 1115(a)(15) of the Tax Law.

DATED: July 29, 1992

/s/
PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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