

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

TSB-A-95 (11)S
Sales Tax
April 21, 1995

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S941017D

On October 17, 1994, a Petition for Advisory Opinion was received from G & I Homes, Inc., RD #3, Frankfort, New York 13340.

The issues raised by Petitioner, G & I Homes, Inc., are:

1. Whether it is responsible for collecting or paying sales tax on the sale of factory-manufactured homes; and
2. Whether the installation of factory manufactured homes by a corporation which is 100% owned by the adult children of the shareholders of Petitioner are subject to sales tax.

Petitioner is in the business of selling factory-manufactured homes. These homes are not mobile homes. One of the components of the sales transaction with Petitioner's customers is that the installation of the homes is generally done by the manufacturer. The manufacturer usually hires a subcontractor (never the Petitioner) to perform the installation. Petitioner also purchases factory-manufactured homes for display on its sales lot.

Another corporation, DPR&R Enterprises, Inc., (hereinafter "DPR&R"), owned 100% by the adult children of the shareholders of the Petitioner, is in the business of installing factory manufactured homes. DPR&R has its own employees, management, offices, and equipment to perform the installations. No employees of DPR&R work for Petitioner or have any ownership interest in Petitioner.

DPR&R contracts directly with various manufacturers to install factory-manufactured homes. DPR&R also installs mobile homes and does factory warranty and customer paid service on various lines of manufactured and mobile housing.

A typical installation is performed as follows: DPR&R owns several tractor trailers which are used to transport the factory-manufactured home from the plant to the installation site. It also owns two cranes which are used to install the homes at the site. It supplies all the labor and the crane operator to perform the installation. It bills the manufacturer for "turn-key" installation of the manufactured home. The home is permanently affixed to the foundation and/or basement on the ultimate user's real property.

Section 1101(b)(9) of the Tax Law defines a capital improvement as an addition or alteration to real property which substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property; 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 is intended to become a permanent installation.

Section 544.4(b) of the Sales and Use Tax Regulations which pertains to factory-manufactured homes states as follows:

(b) Factory manufactured homes. (1) If the installation of a factory manufactured home results in a capital improvement, charges for the installation of such factory manufactured home are not subject to the sales tax, and the installer is liable for the sales and use tax on any materials used or consumed in such installation. (Emphasis supplied)

(2) If a factory manufactured home is installed upon real property under such circumstances that the installation does not constitute a capital improvement, the charges for such installation including labor and materials (including the charge for the factory manufactured home if applicable) is subject to tax. In such event, a contractor may claim a refund or credit of the sales and compensating use tax it paid upon its purchase of those materials which were subsequently resold.

Therefore, with reference to issue "1", Petitioner's purchases of factory manufactured homes which are installed on foundations of Petitioner's customers by the manufacturer are the purchases of capital improvements and are not subject to sales tax. Petitioner's subsequent sales to its customers are likewise the sale of capital improvements. Petitioner's purchases of factory manufactured homes which are used for display purposes would be subject to the provisions of Section 544.4(b)(2) of the Sales and Use Tax Regulation since the installation of display models are not generally intended to become permanent. When Petitioner purchases a home for resale that it obtains from the manufacturer on an installed basis, it is purchasing a capital improvement. The subsequent sale to its customer is also the sale of a capital improvement. In this situation, the manufacturer is liable for the use tax on the materials. When Petitioner buys a home and subsequently arranges for the manufacturer or another to install it, Petitioner is liable for the tax on the materials.

Section 1105(c)(3) of the Tax Law imposes a tax upon" [I]nstalling tangible personal property, excluding a mobile home, or maintaining, servicing or repairing tangible personal property, including a mobile home, not held for sale in the regular course of business, . . . whether or not any tangible personal property is transferred in conjunction therewith. . ." (emphasis supplied)

Section 541.1(f) and (g) of the Sales and Use Tax Regulations, which discuss corrective and warranty work performed by a contractor, states:

(f) Corrective work receives the same tax treatment as the original work to which the corrective work relates. Thus, for example, if the original contract was a capital improvement and the contractor is required to repair windows broken in installation to make work acceptable to a customer, the repair is considered a part of the original capital improvement contract.

TSB-A-95 (11)S
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(g) Guarantee and warranty work. (1) Payments by a contractor to another contractor to perform maintenance, service and repair of real and tangible personal property when purchased to fulfill a guarantee or warranty are not subject to tax.

(2) Where a contractor services real or tangible personal property and a charge is made to the customer, the charge is subject to the tax even though some of the work is performed partially under a guarantee or warranty.

Therefore, DPR&R is not required to collect sales tax where it is acting as a subcontractor for a manufacturer installing a factory manufactured home in accordance with the intent of Section 1101(b)(9) of the Tax Law. However, where it provides a "customer paid service" that does not qualify as a capital improvement as described in Sections 541.1(f) and (g) of the Sales and Use Tax Regulations, such service is subject to sales tax pursuant to Section 1105(c)(3) of the Tax Law. The fact that DPR&R is a corporation which is 100% owned by the children of the shareholders of Petitioner has no relevance to the taxability of the services provided by it.

DATED: April 21, 1995

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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