

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

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Sales Tax
October 7, 1996

STATE OF NEW YORK

COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO.S951128A

On November 28, 1995, a Petition for Advisory Opinion was received from Custom Design Kitchens, Inc., 219 Nott Terrace, Schenectady, NY 12307-1025.

The issues raised by Petitioner, Custom Design Kitchens, Inc., are:

1. Whether materials purchased by Petitioner to manufacture kitchen cabinets and counter tops are subject to sales or compensating use tax.
2. Whether kitchen cabinets and counter tops to be sold on an installed or uninstalled basis are subject to sales or compensating use tax.

Petitioner presents the following facts. Petitioner is a manufacturer of kitchen cabinets. Materials needed to construct the cabinets are purchased by Petitioner both within and without New York State. The kitchen cabinets may be purchased by Petitioner's customers on an installed or uninstalled basis. Approximately fifty percent of the kitchen cabinets sold by Petitioner are sold uninstalled.

Petitioner also manufactures custom counter tops known as Corian Counters. These counter tops are not available through a catalog. Petitioner displays the counter tops in its showroom. If a customer desires to purchase the counter tops, Petitioner goes to the customer's home and makes cardboard templates of the counter tops fitted to the dimensions of the customer's kitchen. From these templates, Petitioner custom manufactures counter tops to fit the customer's kitchen. Materials needed to construct these counter tops may be purchased by Petitioner both within and without New York State. These counter tops, as well as other counter tops sold by Petitioner, may only be purchased on an installed basis.

Applicable Law and Regulations

Section 1101(b)(4)(i) of the Tax Law provides, in part, as follows:

... 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 1101(b)(9)(i) of the Tax Law defines the term "capital improvement" to mean:

An addition or alteration to real property which:

(A) Substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property; and

(B) 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

(C) Is intended to become a permanent installation.

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

Section 1110 of the Tax Law provides, in part, as follows:

(a) Except to the extent that property or services have already been or will be subject to the sales tax under this article, there is hereby imposed on every person a use tax for the use within this state on and after June first, nineteen hundred seventy-one except as otherwise exempted under this article, (A) of any tangible personal property purchased at retail, (B) of any tangible personal property (other than computer software used by the author or other creator) manufactured, processed or assembled by the user, (i) if items of the same kind of tangible personal property are offered for sale by him in the regular course of business or (ii) if items are used as such or incorporated into a structure, building or real property by a contractor, subcontractor or repairman 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, if items of the same kind are not offered for sale as such by such contractor, subcontractor or repairman or other user in the regular course of business, . . .

* * *

(c) For purposes of subclause (i) of clause (B) of subdivision (a) of this section, the tax shall be at the rate of four percent of the price at which items of the same kind of tangible personal property are offered for sale by the user, and the mere storage, keeping, retention or withdrawal from storage of tangible personal property by the person who manufactured, processed or assembled such property shall not be deemed a taxable use by him.

(d) For purposes of subclause (ii) of clause (B) of subdivision (a) of this section, the tax shall be at the rate of four percent of the consideration given or contracted to be given for the tangible personal property manufactured,

processed or assembled into the tangible personal property the use of which is subject to tax, including any charges for shipping or delivery as described in paragraph three of subdivision (b) of section eleven hundred one.

(e) Notwithstanding the foregoing, provisions of this section, for purposes of clause (B) of subdivision (a) of this section, there shall be no tax on any portion of such price which represents the value added by the user to tangible personal property which he fabricates and installs to the specifications of an addition or capital improvement to real property, property or land, as the terms real property, property or land are defined in the real property tax law, over and above the prevailing normal purchase price prior to such fabrication of such tangible personal property which a manufacturer, producer or assembler would charge an unrelated contractor who similarly fabricated and installed such tangible personal property to the specifications of an addition or capital improvement to such real property, property or land.

Section 1115(a) of the Tax Law provides in part:

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:

* * *

(17) Tangible personal property sold by a contractor, subcontractor or repairman to a person other than an organization described in subdivision (a) of section eleven hundred sixteen, for whom he is adding to, or improving real property, property or land by a capital improvement, or for whom he is about to do any of the foregoing, if such tangible personal property is to become an integral component part of such structure, building or real property; provided, however, that if such sale is made pursuant to a contract irrevocably entered into before September first, nineteen hundred sixty-nine, no exemption shall exist under this paragraph.

Section 1118 of the Tax Law provides in part:

The following uses of property shall not be subject to the compensating use tax imposed under this article:

* * *

(7)(a) In respect to the use of property or services to the extent that a retail sales or use tax was legally due and paid thereon, without any right to a refund or credit thereof, to any other state or jurisdiction within any other state but only when

it is shown that such other state or jurisdiction allows a corresponding exemption with respect to the sale or use of tangible personal property or services upon which such a sales tax or compensating use tax was paid to this state. To the extent that the tax imposed by this article is at a higher rate than the rate of tax in the first taxing jurisdiction, this exemption shall be inapplicable and the tax imposed by section eleven hundred ten of this chapter shall apply to the extent of the difference in such rates, except as provided in paragraph (b) of this subdivision.

(b) To the extent that the compensating use tax imposed by this article and a compensating use tax imposed pursuant to article twenty-nine are at a higher aggregate rate than the rate of tax imposed in the first taxing jurisdiction, the exemption provided in paragraph (a) of this subdivision shall be inapplicable and the taxes imposed by this article and pursuant to article twenty-nine shall apply to the extent of the difference between such aggregate rate and the rate paid in the first taxing jurisdiction. In such event, the amount payable shall be allocated between the tax imposed by this article and the tax imposed pursuant to article twenty-nine in proportion to the respective rates of such taxes.

Section 1119(c) of the Tax Law provides a refund or credit of sales or compensating use tax paid on the sale or use of tangible personal property "if a contractor, subcontractor or repairman purchases tangible personal property and later makes a retail sale of such tangible personal property, the acquisition of which would not have been a sale at retail to him but for the second to last sentence of subparagraph (i) of paragraph (4) of subdivision (b) of section eleven hundred one."

Section 527.7(b)(5) of the Sales and Use Tax Regulations provides as follows:

(5) Any contractor who is making a capital improvement must pay a tax on the cost of materials to him, as he is the ultimate consumer of the tangible personal property.

Section 531.1(a) of the Sales and Use Tax Regulations provides as follows:

(a) Imposition. The compensating use tax is imposed on every person for the use within New York State of tangible personal property and certain services described in subdivision (b) of this section, except to the extent they have been or will be subject to sales tax and except to the extent they are exempt from use tax.

Example 1: A lumber yard in New York State purchases, for resale, a carload of lumber from a west coast supplier who is not a registered vendor and who will deliver the lumber to the purchaser by rail with this State. No tax is collected by the supplier. Upon delivery of the lumber, the purchaser withdraws enough lumber to construct workbenches

and shelves in its milling room. The lumber withdrawn for use by the lumber yard is subject to a compensating use tax on its cost.

Section 531.3(b) of the Sales and Use Tax Regulations provides, in part, as follows:

(b) Tangible personal property manufactured, processed or assembled by the user. (1) A compensating use tax is imposed when a manufacturer, processor or assembler uses its product as such in New York State or incorporates the product into real property in New York State. This is so whether or not it offers items of the same kind for sale in the regular course of business and whether the product was manufactured, processed or assembled inside or outside New York State. The basis on which compensating use tax is computed, however, depends on whether the user offers items of the same kind for sale in the regular course of business. A compensating use tax is not imposed, however, to the extent the user was required to pay sales tax without a right to a refund or credit upon the purchase of the ingredients, parts or materials manufactured, processed or assembled into the product the use of which is subject to tax.

Example 1: Company A, located in Suffolk County, manufactures and sells its own brand of garage doors. Approximately 80 percent of the doors are installed by Company A; the balance of the doors are installed by the purchaser. Company A pays sales tax to its New York State suppliers of wood and glass that become part of the doors. When determining the amount of use tax it owes Company A may take credit for the New York State and local sales taxes paid on these materials.

(i) If the user offers items of the same kind for sale in the regular course of business, the basis on which use tax is computed is the price at which items of the same kind of tangible personal property are offered for sale by the user. The price at which items are offered for sale is evidenced by a price list, catalog price or record of sales. In the absence of a catalog price or price list, the average of the prices charged various customers will be deemed to be the price at which the user would sell such item during the regular course of business.

(a) Items of the same kind mean that items belong to an identifiable class, but need not be identical.

Example 2: Windows are items of the same kind when they are a standard size and materials whether or not they are sold from inventory or produced to order from a catalog description. A manufacturer of windows produces from a catalog description square, round and hexagon

shaped windows from various materials. The windows regardless of shape, size or materials are considered to be items of the same kind.

When items which are not standard or cataloged are made to the specifications of a particular job, these will not be considered items of the same kind with catalog or inventory sales.

Items made to the specifications of a particular job will not be considered items of the same kind as items made to the specifications of another particular job.

* * *

Example 4: A manufacturer produces standard type pre-cast steps (all of which are installed by the manufacturer), concrete block and various ornamental pre-cast items.

For purposes of identifying items of the same kind sold by this manufacturer, the three distinct types of products must be considered separately. Therefore, the steps, the blocks and the ornamentals are each items of the same kind.

* * *

(b) 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. ...

Section 531.3(b)(1)(ii) of the Sales and Use Tax Regulations provides, in part, as follows:

(ii) If the user does not offer items of the same kind for sale in the regular course of business as described in subparagraph (i) of this paragraph, the basis on which use tax is computed is the consideration given or contracted to be given for the tangible personal property manufactured, processed or assembled into the tangible personal property the use of which is subject to tax, including any charges by the user's seller to the user for shipping or delivery of that property to the user.

* * *

Example 12: Company A produces factory manufactured homes at its plant in Vermont. The components are manufactured in Vermont and the homes are shipped in sections to customer prepared sites where Company A erects the home.

Company A only sells its product on an installed basis. It does not sell the individual components.

Company A owes use tax on the individual building components manufactured at its plant in Vermont which were used in erecting homes of customers in New York. The use tax is based on the cost to Company A of the raw materials it used to manufacture the building components. The tax due is computed by multiplying the cost of the raw materials by the tax rate in effect at the site in New York where the home is erected.

Section 534.5(b) of the Sales and Use Tax Regulations provides as follows:

(b) Contractor retail sales. A contractor, subcontractor or repairman who makes a retail sale of tangible personal property upon which tax was required to be paid when purchased by the contractor, subcontractor or repairman pursuant to the provisions of section 1101(b)(4) of the Tax Law may apply for a credit or refund of such tax.

Example 5: Construction contractor A has surplus roofing shingles on which tax has been paid. Contractor B purchases the surplus shingles at retail from contractor A and pays sales tax. Contractor A is entitled to a refund or credit for the tax paid by him on the shingles sold to B.

Section 541.1(b) of the Sales and Use Tax Regulations provides as follows:

(b) The principal distinguishing feature of a sale to a contractor, as compared to a sale to other vendors who purchase tangible personal property for resale, is that the sale of tangible personal property to a contractor for use or consumption in construction is a retail sale and subject to sales and use tax, regardless of whether tangible personal property is to be resold as such or incorporated into real property as a capital improvement or repair

Opinion

In this case, Petitioner is a manufacturer of kitchen cabinets and counter tops. Materials needed to construct the cabinets and the counter tops are purchased by Petitioner both within and without New York State. Once completed, the kitchen cabinets may be purchased by Petitioner's customers with or without installation. The counter tops may only be purchased on an installed basis.

Kitchen Cabinets - Uninstalled

In a transaction where Petitioner sells kitchen cabinets without installation, Petitioner is required to collect the sales tax imposed under Section 1105(a) of the Tax Law and any local sales tax imposed pursuant to the authority of Article 29 of the Tax Law.

Petitioner must also pay sales tax on any materials it purchased within New York State. As a contractor, Petitioner is not entitled to purchase the material to construct the kitchen cabinets exempt as a purchase for resale. See Section 541.1(b) of the Sales and Use Tax Regulations.

Petitioner must also pay a compensating use tax on any materials it purchased outside of New York State for use in this State. The use tax is based on the cost of the materials including any charges for shipping or delivery. See Section 1110(b) of the Tax Law. Petitioner may take a credit against the use tax due if it paid sales or use tax on the materials to another state without any right to a refund or credit, and the other state allows a corresponding credit for sales or use tax paid to New York State. See Section 1118(7) of the Tax Law.

Petitioner would be entitled to a refund or credit of any sales or use tax which it paid on the purchase or use of such materials used to construct kitchen cabinets for sale on an uninstalled basis, in accordance with the provisions of Section 1119(c) of the Tax Law and Section 534.5(b) of the Sales and Use Tax Regulations.

Kitchen Cabinets - Installed

In those cases where Petitioner sells the kitchen cabinets on an installed basis, Petitioner is providing a capital improvement upon installation of the kitchen cabinets and, therefore, is not required to collect sales tax from its customers. Petitioner is required to pay sales tax on its purchases within New York of the materials used or consumed to construct the kitchen cabinets in accordance with Section 541.1(b) of the Sales and Use Tax Regulations. Petitioner is also required to pay compensating use tax on its purchases of material outside of New York State, based on the cost of the materials. A credit may be taken against the use tax due for sales or use tax paid to another state, as stated above.

In addition, Petitioner owes compensating use tax on the cabinets that it manufactures and uses in making installations as capital improvements. Since Petitioner offers uninstalled kitchen cabinets of the same kind for sale in its regular course of business, pursuant to Section 1110(c) of the Tax Law Petitioner is required to pay a compensating use tax with respect to such cabinets based on the price at which Petitioner offers such uninstalled cabinets for sale. See Section 531.3(b)(i) of the Sales and Use Tax Regulations. The applicable rate of use tax is the tax rate in effect in the locality where the kitchen cabinet is installed. When paying the combined State and local use tax on the cabinets, Petitioner may take a credit for the State and local sales or use taxes paid on its purchase of the cabinet materials.

Counter Tops - Installed

The custom made Corian Counter Tops can only be purchased on an installed basis. The installation of the counter tops by Petitioner would constitute a capital improvement where the installation is intended to be permanent. In that case, Petitioner is not required to collect sales tax from its customers on the sale of the installed, permanent counter tops.

Petitioner, however, would be required to pay sales tax on its purchases within New York of the materials to construct the counter tops in accordance with Sections 527.7(b) and 541.1(b) of the Sales and Use Tax Regulations. As in the circumstances described above, Petitioner is also required to pay a compensating use tax on its purchases of material outside of New York State for use in this State. A credit may be taken against the use tax for sales or use tax paid to another state on the material, as stated above.

In addition, Petitioner would owe compensating use tax on the counter tops that it manufactures and installs as a capital improvement. If Petitioner does not offer uninstalled counter tops of the same kind for sale in the regular course of business, the compensating use tax would be based on the cost of the materials contained in the counter tops including any charges for shipping or delivery. See Section 1110(d) of the Tax Law. The rate of the use tax would be the combined state and local tax rate in effect in the locality where the counter tops are installed. Petitioner may take a credit against the compensating use tax on the counter tops for New York State and local sales or use taxes paid on its purchase or use of materials.

If Petitioner's installation of Corian Counter Tops does not qualify as a capital improvement because the counter tops are not intended to be permanent, then Petitioner's entire charge to its customer in New York for installation would be subject to State and local sales and use taxes.

In that case, Petitioner should collect tax from its customer and Petitioner would be subject to State and local sales and use taxes. Petitioner would be entitled to a refund or credit of sales or use tax which Petitioner paid on the purchase of materials used to make such counter tops, in accordance with Section 1119(c) of the Tax Law.

DATED: October 7, 1996

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

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