

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

TSB-A-97(46)S
Sales Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S970425B

On April 25, 1997, the Department of Taxation and Finance received a Petition for Advisory Opinion from Bedford Hills Supply, Inc., 332 Adams Street, Bedford Hills, NY 10507. Petitioner, Bedford Hills Supply, Inc., provided additional information pertaining to the Petition on May 6, 1997.

The issue raised by Petitioner is whether charges to contractors for the items listed below are subject to sales and use taxes when the contractors purchase the items from Petitioner pursuant to their contracts with tax exempt entities.

Petitioner is a plumbing supplier whose customers are plumbing and mechanical contractors. These contractors' services include capital improvements and repairs performed for exempt organizations.

Petitioner submitted the following list of items for which its customers provide a *Contractor Exempt Purchase Certificate* (Form ST-120.1) to Petitioner:

1. Sand cloth and grit cloth - abrasive type products used to rough up and clean copper tubing and PVC pipe fittings
2. Flux - an acid type cleaner used to clean fittings and copper tubing
3. Solder - spools of lead used to put pipe and fittings together
4. Fitting cleaning brushes - brushes used to clean joint fittings before flux is applied
5. Scotch copper cleaning pads - abrasive pads used for cleaning copper tubing
6. Flux brush - brush used to apply flux to piping and fittings
7. Pipe joint compounds - materials applied to the fittings of steel pipe to ensure a tight seal
8. Teflon tape - tape that is wrapped around the threads on steel pipe to ensure a tight seal
9. Wicking - when using joint compounds, this material goes around the thread to make an even tighter seal; used especially in steam and other high pressure lines
10. Cutting oils - lubricants used to decrease friction on machines used to cut and thread pipes

11. PVC cement - an adhesive that secures PVC pipe to fittings
12. PVC primer - a cleaner, similar to flux, used to clean PVC pipe and fittings prior to the application of PVC cement
13. Oakum - a hard, burlap-like material used in soil pipe (cast iron) joints, which is required by law to be packed into the fittings
14. Strip of lead - type of lead poured over the soil pipe joints to hold the joint together after the oakum is packed in; must be used in conjunction with oakum
15. Acetylene and Mapp gas - fuel filled in tanks brought in by the customer, used to create heat required to melt the lead for soldering PVC and copper joints
16. Propane gas - same as # 15, only melts the lead for soil pipe joints

Applicable Law and Regulations

Section 1105(a) of the Tax Law imposes a tax on the "receipts from every retail sale of tangible personal property. . . ."

Section 1110 of the Tax Law imposes a use tax "for the use within this state . . . of any tangible personal property purchased at retail. . . ."

Section 1101(b) (4) (i) of the Tax Law defines "retail sale," in part, 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 . . . regardless of whether the tangible personal property is to be resold as such before it is so used or consumed. . . .

Section 1115(a) of the Tax Law exempts from the sales tax imposed by Section 1105(a) of the Tax Law and from the compensating use tax imposed under Section 1110:

(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.

(16) 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) of the Tax Law provides for exemption from sales and compensating use taxes with respect to New York State governmental entities, United States governmental entities, United Nations and certain international organizations of which the United States is a member, and certain nonprofit organizations and Indian nations and tribes that have received New York State exempt organization status.

Section 1119(c) of the Tax Law provides, in part:

A refund or credit . . . of sales or compensating use tax . . . paid on the sale or use of tangible personal property, shall be allowed the purchaser where such property is later used by the purchaser in performing a service subject to tax under paragraph (1), (2), (3), (5), (7) or (8) of subdivision (c) of section eleven hundred five or under section eleven hundred ten and such property has become a physical component part of the property upon which the service is performed or has been transferred to the purchaser of the service in conjunction with the performance of the service subject to tax or 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 541.2 of the Sales and Use Tax Regulations provides, in part:

The words, terms and phrases used in this Part have the following definitions except when the context clearly indicates a different meaning:

(c) An *agency contract* means an agreement which permits a contractor and subcontractor to act as an agent of, that is, in the place of the principal, his customer . . . All purchases (including rentals of contractor's tools, supplies, machinery and equipment) made by the agent-contractor or agent-subcontractor on behalf of the principal are treated in the same manner as if the purchases were made by the principal.

* * *

(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, gasoline used to operate power equipment and safety apparel. (Emphasis added)

Section 541.3(d)(2) of the Sales and Use Tax Regulations provides, in part:

Purchase for contracts (other than agency contracts).

(i) Tangible personal property sold to a contractor, subcontractor, or repairman for use in erecting, repairing, adding to, or altering a structure or building owned by an exempt organization, described in section 1116(a) of the Tax Law, is exempt when it is to become an integral component part of such structure or building.

* * *

(iv) Except for agency contracts, contractors' purchases of construction supplies which do not become part of an exempt organization's real property and are used or consumed by the contractor, as well as purchases of taxable services, such as electricity used by the contractor, are subject to tax.

* * *

The following types of property and services are representative, but not intended to be all-inclusive, of contractor's purchases which are subject to tax, irrespective of whether the contractor has a . . . contract (except agency contract), with an exempt organization:

* * *

(c) contractors' supplies, tools, and miscellaneous equipment, whether purchased or rented, including materials to make forms and scaffolding; and

(d) any other items purchased or rented by a contractor for his use in performing the contract and not incorporated into the realty.

Opinion

Petitioner's customers (contractors) purchase supplies and materials from Petitioner which are used in both capital construction and repair and maintenance contracts performed for tax exempt entities described in Section 1116(a) of the Tax Law. Section 1115(a)(15) and section 1115(a)(16) of the Tax Law provide exemptions from sales and use taxes for property sold to contractors, subcontractors or repairmen for use or consumption as described in Section 1101(b)(4) of the Tax Law, if such property is to become an integral component part of the structure, building or real property of such exempt organization (see Hendrickson Bros., Inc., Adv Op Comm T&F, May 18, 1993, TSB-A-93(34)S).

Section 541.2 of the Sales and Use Tax Regulations differentiates between building materials and contractors' supplies. The distinction is necessary because, notwithstanding Section 1101(b)(4) of the Tax Law, materials which become an integral component part of structures, buildings or real property of an exempt entity may be purchased tax exempt. If the contractor paid tax on materials, which are transferred to any business or residential customer in the performance of a repair and maintenance contract, the contractor may apply for a refund or credit of such tax under Section 1119(c) of the Tax Law. But no tax exemption applies to supplies purchased for the contractor's own use (see Sullivan Humes Painting, Adv Op Comm T&F, August 31, 1987, TSB-A-87(31)S).

Accordingly, materials purchased by the contractors which become an integral component part of an exempt entity's structure, building or real property, such as flux, solder, pipe joint compounds, teflon tape, wicking, PVC cement, PVC primer, oakum and strips of lead poured over soil pipe joints are considered to become an integral component part of the real property. If these items are purchased to be incorporated into the real property of an organization described in Section 1116(a) of the Tax Law, the contractor's purchase of them would be exempt from sales and compensating use tax as provided under Sections 1115(a)(15) and 1115(a)(16) of the Tax Law. A properly completed *Contractor Exempt Purchase Certificate* (Form ST-120.1) should be furnished to Petitioner by its customers for these items.

Supplies purchased by Petitioner's customers are not considered to become an integral component part of the exempt organizations' real property, but are considered to be used or consumed by the contractors in the performance of their contracts (see Suffolk County Department of Parks, Adv Op Comm T&F, July 11, 1994, TSB-A-94(29)S; Sullivan Humes Painting, supra). Therefore, the sand cloth, grit cloth, fitting cleaning brushes, scotch copper cleaning pads, flux brushes, cutting oils, and the acetylene, mapp and propane gases purchased by Petitioner's customers do not qualify for the exemptions under Sections 1115(a)(15) and 1115(a)(16) of the Tax Law and thus are subject to State and local sales and use taxes. Petitioner is required to collect sales and use taxes when it sells the items to its customers.

It should be noted that, if Petitioner's customers were to enter into an agency contract with an exempt entity, the customers' purchases from Petitioner which are made as agent for the exempt entity would be exempt from sales and use tax. To establish an agency relationship there must be a "manifestation" that Petitioner's customer consents to act as agent on behalf of the exempt entity,

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subject to its control, and that the exempt entity authorizes the fiduciary relationship. (See, Matter of Hooper Holmes v Wetzler, 152 AD2d 871, lv den, 75 NY2d 706; Matter of Swet, Dec Tax App Trib, February 22, 1991, TSB-D-91(10)S.) Whether Petitioner's customer acts as an agent of an exempt entity is a question of fact that must be resolved based upon the circumstances in each case. See Sales Tax Regulations Section 541.3(d)(4) for requirements respecting agency contracts with exempt organizations.

DATED: July 23, 1997

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

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