

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

TSB-A-97(72)S
Sales Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S960712A

On July 12, 1996, the Department of Taxation and Finance received a Petition for Advisory Opinion from Dierks Heating Company, Inc., 43-32 33rd Street, Long Island City, New York 11101. Petitioner, Dierks Heating Company, Inc., submitted additional information pertaining to the Petition on November 26, 1996. It is noted that this Advisory Opinion does not modify an earlier Advisory Opinion issued to Petitioner, dated April 21, 1993 (TSB-A-93(29)S). The present Advisory Opinion is based on new facts and issues submitted by Petitioner.

The issues raised by Petitioner are:

1. Whether temporary boilers rented to or purchased by Petitioner may be purchased for resale for sales tax purposes where the boilers are installed at projects to provide heat for tenants and are operated only by Petitioner's customer's personnel during the replacement of existing boilers.
2. Whether sales tax should be collected by Petitioner on the itemized rental cost plus installation of a temporary boiler rented or purchased by Petitioner and installed at a customer's premises. The temporary boilers in this instance are not being operated by Petitioner once they are installed at the customer's premises.

Petitioner submits the following facts as the basis for this Advisory Opinion.

Petitioner is a mechanical contractor who enters into contracts to remove existing boilers and install new boilers. These contracts specifically provide that Petitioner shall provide temporary boilers to maintain tenants' hot water and heating requirements while new permanent boilers are being installed.

Petitioner rents or purchases temporary boilers. These temporary boilers are usually delivered on site to be installed by Petitioner. The site is often a tax exempt project. Once installed, the temporary boilers are operated by New York City personnel at Housing Authority Projects and schools to provide heat and hot water for tenants while new permanent boilers are being installed. The temporary boilers remain tangible personal property.

Some contracts only provide for the replacement of the existing boilers by Petitioner. However, if the need arises for temporary boilers to be installed, a change order, i.e., an amendment to the contract, will be made to provide for the installation of the temporary boilers.

The charges for the temporary boilers are separately itemized on the contract, or the amendment to the contract, which is based on bid documents specifically requiring temporary boilers to be installed and in use until the new boilers pass inspection and can be certified.

Petitioner does not operate the boilers. The designated operators, licensed and unionized steam fitters, are not employed by Petitioner but are employees of the Housing Authority or the non-exempt customer of Petitioner. Petitioner does not supply fuel for the boilers to its customers. Customers are responsible for obtaining fuel from third party suppliers.

The temporary boilers are not necessary to provide temporary heating for Petitioner or other contractors in the performance of a capital improvement. The temporary boilers are solely intended to provide heat and hot water for the tenants.

Applicable Law and Regulations

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

Section 1101(b)(4) of the Tax Law defines the term "retail sale", in part, to mean "(i) A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property . . . "

Section 1116 of the Tax Law provides, in part:

Sec. 1116. Exempt organizations. (a) Except as otherwise provided in this section, any sale or amusement charge by or to any of the following or any use or occupancy by any of the following shall not be subject to the sales and compensating use taxes imposed under this article:

(1) 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 526.6 of the Sales and Use Tax Regulations provides, in part, as follows:

(a) The term "retail sale" or "sale at retail" means the sale of tangible personal property to any person for any purpose except as specifically excluded.

* * *

(c) Resale exclusion. (1) Where a person, in the course of business operations, purchases tangible personal property or services which he intends to sell, either in the form in which purchased, or as a component part of other property or services, the property or services which he has purchased will be considered as purchased for resale and therefore not subject to tax until he has transferred the property to his customer.

Section 541.5(b)(4) of the Sales and Use Tax Regulations provides, in part:

(iii) If a contract includes the sale of tangible personal property which remains tangible personal property after installation, the contractor must collect the appropriate New York State and local taxes from the customer on the selling price, including any charge for installation, of the tangible personal property unless a properly completed exemption certificate is issued by the customer. The contractor may apply for a credit or refund of taxes he has paid on purchases of the tangible personal property that remain tangible personal property after installation.

* * *

Example 1: A contractor sells a building he has constructed and, as a part of the sale agreement, installs free standing water fountains which remain tangible personal property when installed. The contractor's billing to his customer must separately state all charges for tangible personal property included in the sales agreement. The New York State and applicable local tax rate must be collected on the total charges for the water fountains including any installation charges. In this instance, the contractor may purchase the water fountains tax-free using a contractor exempt purchase certificate. If he pays the tax to his supplier, he is entitled to a refund or credit of the tax paid on the purchase of the water fountains.

Section 541.8 of the Sales and Use Tax Regulations provides, in part:

Reg. Sec. 541.8. Charges for temporary facilities at construction sites.--(Tax Law, Sec. 1105(c)(3), (5)). (a) General. Subcontracts to provide temporary facilities at construction sites, which are a necessary prerequisite to the construction of a capital improvement to real property, are considered a part of the capital improvement to real property. Charges for installation of materials and the labor to provide temporary heat, temporary electric service, temporary protective pedestrian walkways, and temporary plumbing by a subcontractor are therefore not subject to tax provided the subcontractor receives a copy of the properly completed certificate of capital improvement issued by the customer to the contractor.

Example 1: A subcontractor agrees to furnish to the prime contractor the materials and labor necessary to furnish temporary light and electrical facilities throughout a building under construction so that the various trades may have light, communications and power facilities necessary for them to perform their work and operate their tools. The charges are a constituent part of the capital improvement and are not subject to tax.

(b) The subcontractor is liable, however, for the tax on the purchase of the materials used to provide the temporary facilities at construction sites described in subdivision (a) of this section.

Example 2: A subcontractor agrees to furnish temporary site plumbing service to the prime contractor engaged in the construction of an office building. The subcontractor must purchase a quantity of pipes, pumps, and fittings in order to provide the temporary service. The services is a constituent part of the capital improvement, thus, the subcontractor's charge for the temporary plumbing services are not subject to tax. However, the subcontractor is liable for the tax due on his purchase of all materials needed to provide the temporary plumbing service.

Opinion

Pursuant to Section 541.8 of the Sales and Use Tax Regulations, the installation of temporary heating facilities qualifies as a capital improvement and therefore is not subject to sales tax when the temporary facilities are used to generate heat as a necessary prerequisite to the construction of the capital improvement to real property. But, in the instant case, Petitioner has indicated that it is renting or purchasing temporary boilers to be installed in buildings solely for the tenants' use to provide heat during replacement of existing boilers. The temporary boilers are not operated by Petitioner's employees, but rather by Housing Authority personnel or employees of Petitioner's non-exempt customers. Petitioner's customers are responsible for obtaining heating fuel from third party suppliers. The charges for the temporary boilers are separately stated in the contract, and the bid documents for Petitioner's projects specifically require temporary boilers to be installed for use until the new permanent boilers can be certified. Therefore, the temporary boilers are purchased or rented by Petitioner for resale rather than as a prerequisite to the construction of the capital improvement to real property, provided that Petitioner does not use the temporary boilers for any purpose other than resale. For example, if Petitioner uses the same temporary boiler also as a prerequisite to the construction of a capital improvement, then this boiler would not be purchased for resale and Petitioner would be liable for tax on this boiler.

Accordingly, with respect to issues "1" and "2", a person who, in the course of business operations, purchases (or rents) tangible personal property for sale (or rental), in either the form in which it was purchased (or rented), or as a component part of other property, will be considered to have made a non-taxable purchase for resale, provided the purchaser does not make any self-use of the purchased (or rented) property. See Section 1101(b)(4) of the Tax Law and Section 526.6(c) of the Sales and Use Tax Regulations. Petitioner may purchase

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for resale tangible personal property which remains tangible personal property after installation, if Petitioner furnishes its supplier with a properly completed contractor exempt purchase certificate (Form ST-120.1) within 90 days of the purchase date. See Section 541.5(b)(4)(iii), Example 1 of the Sales and Use Tax Regulations. Therefore, sales tax is not due on the purchase or rental of the temporary boilers by Petitioner, but must be collected on the rental and installation of the temporary boiler when installed at Petitioner's customer's premises. It should be noted, however, that, where the temporary boiler and installation service are sold to a government entity or other organization exempt from tax under Section 1116 of the Tax Law, the charges for rental and installation of the temporary boiler will not be subject to sales tax, provided the governmental agency or exempt organization presents Petitioner with a properly completed official purchase order (exemption document). The documentation substantiating the exempt transaction must be retained by the vendor for at least three years following the date the transaction was required to be reported to the Department of Taxation and Finance. See Part 529 of the Sales and Use Tax Regulations.

DATED: November 19, 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.