

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

TSB-A-99(45)S
Sales Tax
November 10, 1999

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S990125A

On January 25, 1999, the Department of Taxation and Finance received a Petition for Advisory Opinion from Striker Sheet Metal, Inc., 266 Middle Island Road, Medford, New York 11763.

The issue raised by Petitioner, Striker Sheet Metal, Inc., is whether a refund or credit of sales and compensating use tax may be allowed with respect to material which is scrapped or returned to inventory by Petitioner as described below.

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

Petitioner is in the sheet metal industry. Members of the sheet metal construction trade usually contract with the general contractor or heating, ventilating and air conditioning (HVAC) contractor of a building construction project. The functions performed by Petitioner include:

- a) design and drawing of fabrication blueprints to specifications for the project;
- b) the fabrication of the specified duct work; and
- c) the installation of the duct work on the job site.

Duct work is fabricated out of sheet steel that is bought in individual sheets or as a coil of approximately 10,000 pounds. Sheet steel is sold by the pound by gauge (thickness). The duct work is cut from the sheet steel by machines. Generally, the machines produce two types of cuts: straight cuts for straight rectangular duct work and compound and curved cuts for fabrication of duct work that changes direction or dimension.

The machines that cut the steel are programmed to optimize the cut from the sheet steel. However, there is always a scrap or loss factor on all processes and the loss factor is highest on the cutting of compound or curved cuts. Excess steel is disposed of as scrap or returned to inventory as fractional sheets.

Applicable Law and Regulations

Section 1101(b)(4) of the Tax Law defines the term "retail sale," in part, as follows:

Retail sale. (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, or (B) for use by that person in performing the services subject to

tax under paragraphs (1), (2), (3), (5), (7) and (8) of subdivision (c) of section eleven hundred five where the property so sold becomes a physical component part of the property upon which the services are performed or where the property so sold is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax. Notwithstanding the preceding provisions of this subparagraph, 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, except that a sale of a new mobile home to a contractor, subcontractor or repairman who, in such capacity, installs such property is not a retail sale....

Section 1101(b)(7) of the Tax Law defines the term "use," as follows:

Use. The exercise of any right or power over tangible personal property by the purchaser thereof and includes, but is not limited to, the receiving, storage or any keeping or retention for any length of time, withdrawal from storage, any installation, any affixation to real or personal property, or any consumption of such property. Without limiting the foregoing, use also shall include the distribution of only tangible personal property, such as promotional materials.

Section 1105 of the Tax Law provides, in part:

Imposition of sales tax. On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax of four percent upon:

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

Section 1110(a) of the Tax Law provides, in part:

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 . . . (A) of any tangible personal property purchased at retail

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

TSB-A-99(45)S
Sales Tax
November 10, 1999

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:

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

(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. Whenever a contractor uses materials, on which the contractor has paid sales tax, in a repair or maintenance contract (except interior cleaning and maintenance contracts of 30 days or more) subject to the sales tax on services under section 1105(c) of the Tax Law, the contractor may be entitled to a refund or credit of the portion of the tax he paid attributable to the materials transferred to the customer. Cross-reference: For refund or credit, see section 534.5 of this Title.

(c) Receipts from the performance of a capital improvement to real property by a contractor are not subject to the sales tax.

Cross-reference: For additional information on capital improvements and repairs, see section 527.7 of this Title.

Opinion

Petitioner is the fabricator of duct work which generally is installed by Petitioner as a constituent part of a building construction project. Assuming the project qualifies as a capital improvement under Section 1101(b)(9) of the Tax Law, Petitioner is not required to collect sales tax from its customers for the sale of the duct work or installation services. See Section 541.1(c) of the Sales and Use Tax Regulations. Petitioner, however, would be required to pay sales tax on its purchases within New York of materials used in fabricating the duct work in accordance with Section 1101(b)(4)(i) of the Tax Law and Sections 527.7(b) and 541.1(b) of the Sales and Use Tax Regulations. Petitioner must pay a compensating use tax on any materials it purchases outside of

TSB-A-99(45)S
Sales Tax
November 10, 1999

New York State when it uses such materials in this State. See Section 1110 of the Tax Law. Petitioner would also owe local compensating use tax if it purchases the materials in one local taxing jurisdiction and then uses the materials in another local taxing jurisdiction with a higher local rate, to the extent of the difference in the rates. There are no provisions in Article 28 of the Tax Law or the Sales and Use Tax Regulations in the above circumstances for a refund or credit based upon the excess of material used in the fabrication or installation process that is scrapped or returned to Petitioner's inventory for future sale or use.

DATED: November 10, 1999

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

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