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

TSB-A-99(5)S
Sales Tax
January 28, 1999

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. S980709A

On July 9, 1998, the Department of Taxation and Finance received a Petition for Advisory Opinion from Apco Graphics, Inc., 388 Grant Street SE, Atlanta, GA 30312. Petitioner, Apco Graphics, Inc., provided additional information pertaining to the petition on July 21, 1998 and July 28, 1998.

The issue raised by Petitioner is whether receipts from the sale of its architectural signage are subject to tax as receipts from sales of tangible personal property or exempt from tax as receipts from sales of capital improvements to real property, as defined in Section 1101(b)(9) of the Tax Law, and whether the installation of the signs is excluded from sales tax under Section 1105(c)(3)(iii) of the Tax Law.

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

Petitioner is an architectural signage company whose customers are building owners/tenants, contractors, architects and designers. Petitioner makes signs for both initial construction and renovation projects. The signs are attached to real property. One of the primary functions of Petitioner's signs is "way finding," i.e., they provide direction to specified locations in buildings and on campuses.

The sign out front identifies the building. The directory in the lobby denotes specific office and floor numbers. The way finding system on the floor provides direction to the proper hallway. The office number sign marks a particular destination. In many cases, signage is legally required to maintain building permits. The necessity of the signs points to the intent that they be installed permanently. By law, the signs very often require raised letters and Braille.

Generally, Petitioner does not perform the installation of the signage, although it does offer the service and prefers to do so. Some installations are done in New York State.

Petitioner has categorized its signs into the following five groups. As part of its petition, Petitioner submitted engineering drawings and a detailed analysis of each of the groups and its product catalogue which provides pictures of each type of sign.

1) Wall Mounted Directories

There are two types of wall mounts, (a) semi or full-recessed and (b) surface mounted. For the semi and full-recessed directories, the wall is not finished behind the directory and it is mounted into the wall cavity. If the directory is removed, the wall has to be rebuilt over the entire area of the directory. For the surface mounted directory, the mounting surface must be smooth and flat. Anchor hardware such as lag screws, star anchors and toggles are selected and provided by the installer depending on the varying surface conditions (e.g., hollow walls, hollow walls with wood studs, stone and masonry walls). All of these fasteners leave holes in the wall that have to be repaired if the directory is removed.

2) Floor Mounted Directories

These are directories which are screwed onto pedestals anchored to the floor with leg brackets and anchor bolts. Carpeting or floor covering is first removed in the area of installation to expose the concrete. Leg brackets are secured to the floor by anchor bolts installed in the concrete, and the pedestal is placed over and screwed into the bracket. If the item were to be removed, the anchor bolts would have to be removed from the concrete and the remaining holes filled. The floor covering or carpet would have to be patched.

3) Single Signs Attached to Doors and Walls

These are signs that provide messages of general importance such as "Restroom," "Conference Room," "Quiet Please," office numbers and personnel applications. The signs are installed by screwing them into the wall and/or using double-sided adhesive tape. To install a sign with tape, the tape cover is removed and the sign is stuck to the wall. In lieu of or in addition to the tape, wall anchors can be drilled and screwed through mounting holes in the sign frame.

In either case, the wall requires repair if the sign is removed. With the wall anchors, holes are left in the wall. With the tape, upon removal of the sign the surface of the wall is ripped.

4) Single Signs Attached to Ceilings

These signs are commonly found in hospitals. Ceiling materials and conditions vary and require on-site assessment as to appropriate fasteners for each sign and additional above-ceiling support. In all cases, the process of installing calls for drilling a hole in the ceiling tile. For heavy signs, a wire is attached to the structure that the ceiling is suspended from. There is a hole left in the ceiling if the sign is removed.

5) Exterior Signs

Exterior signs are installed deep into the ground to withstand 100 mile per hour winds. They are installed into concrete footings and are built to last the life of the structure, which is 20 - 30 years. Total removal would require cutting of the signage and excavation of the concrete in which it is embedded.

Applicable Law and Regulations

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

. . . 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 . . . 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 on the receipts from every retail sale of tangible personal property, except as otherwise provided.

Section 1105(c) of the Tax Law imposes a tax on the receipts from every sale, except for resale, of the following services:

* * *

(3) Installing 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 the services are performed directly or by means of coin-operated equipment or by any other means, and whether or not any tangible personal property is transferred in conjunction therewith, except:

* * *

(iii) for installing property which, when installed, will constitute 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 as such term capital improvement is defined in paragraph nine of subdivision (b) of section eleven hundred one of this chapter. . . .

Section 1110 of the Tax Law provides, in part:

(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 . . . 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 . . . 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 . . .

(b) For purposes of clause (A) 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

such property, or for the use of such property, including any charges for shipping or delivery. . . .

(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. . . .

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 527.5(b)(4) of the Sales and Use Tax Regulations provides:

Tax is not imposed on the charge for installation of tangible personal property which, when installed, will be an addition or capital improvement to real property. . . .

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 531.1(b) of the Sales and Use Tax Regulations provides that compensating use tax is imposed on the use within New York State of the following tangible personal property and services.

(1) Tangible personal property purchased at retail.

(2)(i) Tangible personal property manufactured, processed or assembled by the user;

(a) if items of the same kind are offered for sale by him in the regular course of business; or

(b) 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 . . . 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.

(ii) In essence, when a manufacturer, processor or assembler uses its product as such or incorporates the product into real property it has made a use of the property subject to the compensating use tax. This is so whether or not it offers items of the same kind for sale in regular course of business and whether the product was manufactured, processed or assemble inside or outside New York State.

* * *

Example 3: Company C manufacturers and installs custom designed, in-ground swimming pools. The pools are manufactured at Company C's plant in New Jersey and are transported to the customer's site where Company C installs the pool. Company C only sells the pools on an installed basis. When Company C installs its pool at a customer's site in New York State, Company C has made a use of its manufactured product within New York State.

(iii) While the use of tangible personal property manufactured, processed or assembled by the user is subject to compensating use tax, the base on which the use tax is computed varies depending on whether the manufacturer, processor or assembler offers items of the same kind for sale in the regular course of business.

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

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. . . . 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.

* * *

(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.

* * *

(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.

Section 541.1(b) of the Sales and Use Tax Regulations provides, in part:

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

Section 1105(c)(3)(iii) of the Tax Law provides an exclusion from sales tax for the installation of tangible personal property which, when installed, will constitute a capital improvement. In order for the installation to constitute a capital improvement, it must meet all three criteria of a capital improvement as described in Section 1101(b)(9) of the Tax Law and Section 527.7(a)(3) of the Sales and Use Tax Regulations (see Clestra Hauserman, Inc., Adv Op Comm T&F, September 16, 1994, TSB-A-94(43)S).

Petitioner's signage described in category numbers (1)(b), (2), (3) and (4), when installed, do not constitute capital improvements, because they fail to satisfy the second prong of the statutory test. The signs in categories (1)(b), surface mounted wall directories and (3), single signs attached

to doors and walls by tape and/or screws, are not affixed in such a way that their removal would cause material damage to the signage or to the real property to which they are affixed. The floor mounted directories in category (2) are affixed to bolts which are embedded into a concrete floor. Similar to the stools in Empire Vision Center, Inc., Dec Tx App Trib, November 7, 1991, TSB-D-91(87)S, these directories can be removed from the bolts without destroying the structure or its base (pedestal). Therefore, floor mounted directories fail to meet the second prong of the test, since their removal would not cause material damage to the property they are affixed to or to the items themselves (Empire Vision Center, Inc., supra). The signs in category (4), single signs attached to ceilings, are merely mounted with mechanical fasteners to aluminum tracks that are attached to the real property. They are not affixed to such a degree that they lose their separate identity and become part of the real property where removal would cause material damage to the signs or the ceilings(see T.G. Elliott Associates, Inc., Adv Op Comm T&F, December 17, 1996, TSB-A-96(80)S; Empire Vision Center, Inc., supra). Accordingly, the sale and installation of Petitioner's signage in categories (1)(b), (2), (3) and (4) do not qualify as capital improvements and are subject to sales and compensating use tax.

Petitioner's signage listed as item numbers (1)(a), semi or full-recessed wall mounted directories, and (5), exterior signs, substantially add to the value of the real property to which they are affixed, thus satisfying the first prong of the three-part test in Section 1101(b)(9) of the Tax Law. With regard to the second statutory requirement, these wall mounted directories are recessed into the wall and bolted to specifically located framing members. Total removal would require rebuilding of the wall in the entire area of the directory. The exterior signs are sunk in concrete footings and total removal would require cutting of the signage and excavation of the concrete in which the structures are imbedded. Where an owner of real property makes improvements of these types to the real property, the installation is presumably a permanent one. However, where the installation is made by a tenant, a different presumption arises. Installations made for the purpose of conducting the business of one who is not the owner of the real property, e.g., a tenant, licensee or franchisee, are presumed not to be permanent, but made for the sole use and enjoyment of the person who owns the business and not for the purpose of the landlord's estate. See Matter of Flah's of Syracuse v. Tully, 89 AD2d 729. Moreover, when a lessee or licensee of property reserves the right to remove the installed property, a finding of permanency is unlikely. Where the lessee is obligated to remove the improvement upon the lessor's demand, the evidence is even stronger that the improvement is intended to be other than permanent (Empire Vision Center, Inc., supra). Therefore, where improvements of the type listed in categories (1)(a) and (5) are made by the owner of the underlying real property, the second and third statutory requirements are also satisfied, in that the semi and full-recessed wall mounted directories and exterior signs become part of the real property and are installed with the requisite intention of permanence. Where such an installation is made for a tenant of real property, the installation would presumably not constitute a capital improvement. Presumptions, however, may be overcome by appropriate lease terms or facts. The tenant's intent must be deduced from all the facts and circumstances at the time the improvement is installed (Empire Vision Center, Inc., supra).

In a transaction where Petitioner sells its signs without installation to customers within New York State, Petitioner is required to collect the State and local sales and use taxes imposed under Sections 1105(a) and 1110(a)(A) and pursuant to the authority of Article 29 of the Tax Law, unless it receives from a contractor a properly completed Form ST-120.1, Contractor Exempt Purchase Certificate, or, in the case of an architect or a designer who does not act as a contractor, a properly completed Form ST-120, Resale Certificate, within ninety days of the date of delivery. See Section 1132(c) of the Tax Law. Section 1115(a)(15) of the Tax Law grants an exemption from tax for materials purchased by a contractor, subcontractor or repairman for use in erecting a structure or building of an exempt organization, as defined in section eleven hundred sixteen of the Tax Law. However, this exemption does not apply unless such tangible personal property becomes an integral component part of the structure, building or real property. Also, effective June 1, 1999, if Petitioner is a materialman primarily engaged in selling building materials to contractors, subcontractors or repairmen for the improvement of real property, it may meet the qualifications for remitting State and local sales and compensating use taxes on sales of such materials and related services at the time it actually receives the purchase price, or each portion thereof, from the customer or within one year of the date of the sale, whichever is earlier. See Sections 1132(a) and 1135(f) of the Tax Law.

In those cases where Petitioner sells signs on an installed basis, Petitioner is considered to be performing a capital improvement if such installation meets the definition of capital improvement in Section 1101(b)(9)(i), (ii) and (iii) of the Tax Law. Accordingly, when Petitioner installs the signs described in categories (1)(a) and (5), Petitioner is not required to collect sales tax on the charges to its customers, provided the customer furnishes Petitioner a properly completed Form ST-124, Capital Improvement Certificate within ninety days after completion of the installation. However, Petitioner, as a contractor, owes compensating use tax on the signs that it manufactures and uses in making installations as capital improvements. If Petitioner offers uninstalled signs of the same kind for sale in the 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 signs based on the price at which Petitioner offers similar uninstalled signs for sale (see Custom Design Kitchens, Inc., Adv Op Comm T&F, October 7, 1996, TSB-A-96(66)S). If Petitioner does not offer signs of the same kind for sale in the regular course of business, pursuant to Section 1110(d) of the Tax Law, the basis on which the use tax is computed is the consideration given or contracted to be given for the tangible personal property manufactured, processed or assembled into the signs, including any charges by Petitioner's seller for shipping or delivery to Petitioner. The applicable rate of use tax is the combined State and local tax rate in effect in the locality where the sign is installed. When paying the combined State and local use tax on the signs, Petitioner may take a credit for any sales or use tax paid to any other state or jurisdiction within any other state without any right to a refund or credit, provided that such other state or jurisdiction allows a corresponding credit for sales or use tax paid to New York State. See Section 1118(7)(a) of the Tax Law.

Charges by Petitioner for the installation of signs described in categories (1)(b), (2), (3) and (4), which do not qualify as capital improvements, as well as charges for the signs themselves, are

taxable under Section 1105 of the Tax Law, unless the installation is purchased for resale by the customer who provides Petitioner with a properly completed Form ST-120.1 within ninety days after completion of the installation, or unless the purchaser is an exempt organization under Section 1116(a) of the Tax Law and furnishes an Exempt Organization Certification (Form ST-119.1).

DATED: January 28, 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.