

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-02(30)S
Sales Tax
July 12, 2002

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S010716A

On July 16, 2001, the Department of Taxation and Finance received a Petition for Advisory Opinion from Shroid Construction, Inc., 46-10 11th Street, Long Island City, New York, 11101.

The issue raised by Petitioner, Shroid Construction, is whether charges for the rental, including installation and dismantling, of temporary protective pedestrian walkways in a capital improvement project are subject to sales and compensating use tax.

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

Petitioner is a general contractor primarily engaged in the business of installing or building exterior and interior walls. These installations generally qualify as capital improvements to real property for sales tax purposes. In the course of the performance of its contracts, Petitioner is often required to install temporary protective pedestrian walkways. Petitioner contracts with unrelated third parties to install, rent and dismantle the walkway. Upon completion of the capital improvement job the temporary protective pedestrian walkway is dismantled by the third party.

Applicable Law and Regulations

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

When used in this article for the purposes of the taxes imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and by section eleven hundred ten, the following terms shall mean:

(1) Purchase at retail. A purchase by any person for any purpose other than those set forth in clauses (A) and (B) of subparagraph (i) of paragraph (4) of this subdivision.

* * *

(3) Receipt. The amount of the sale price of any property and the charge for any service taxable under this article . . . valued in money, whether received in money or otherwise, including any amount for which credit is allowed by the vendor to the purchaser, without any deduction for expenses or early payment discounts and also including any charges by the vendor to the purchaser for shipping or delivery . . . regardless of whether such charges are separately stated in the written contract, if any, or on the bill rendered to such purchaser and regardless of whether such shipping or delivery . . . is provided by such vendor or a third party, but excluding

any credit for tangible personal property accepted in part payment and intended for resale. . . .

(4) 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. . . .

(5) Sale, selling or purchase. Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume (including, with respect to computer software, merely the right to reproduce), conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor.

* * *

(9) Capital improvement. (i) 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 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:

* * *

(c) 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 526.5(e) of the Sales and Use Tax Regulations provides, in part:

Expenses. All expenses, including telephone and telegraph and other service charges, incurred by a vendor in making a sale, regardless of their taxable status and regardless of whether they are billed to a customer are not deductible from the receipts.

Example: 1: A photographer contracts with a customer to furnish photographs at \$50 each in addition to expenses.

The customer is billed as follows:

Photographs (2)	\$100
Model fees	60
Meals	10
Travel	25
Props (Flowers)	<u>5</u>
Total due	\$200

Receipt subject to tax is \$200

Section 526.6 of the Sales and Use Tax Regulations provides, in part:

(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.

(b) Special rule--sales specifically included as retail sales.

(1) A sale of any tangible personal property to a contractor, subcontractor or repairman for use or consumption in erecting structures or buildings or 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 used or consumed. (See Part 541 of this Subchapter.)

Section 527.1(b) of the Sales and Use Tax Regulations provides, in part:

Taxable and exempt items sold as a single unit. When tangible personal property, composed of taxable and exempt items is sold as a single unit, the tax shall be collected on the total price.

Section 541.2(p) of the Sales and Use Tax Regulations states, in part:

Rental, lease and license to use. (1) The terms rental, lease and license to use refer to all transactions in which there is a transfer of possession of tangible personal property without a transfer of title to the property.

(2) For the purposes of this Part, when a rental, lease or license to use a vehicle or equipment includes the services of a driver or operator, such transaction is presumptively the sale of a service, rather than the rental of tangible personal property, where dominion and control over the vehicle or equipment remain with the owner or lessor of the vehicle or equipment. . . .

* * *

Whether a transaction is a sale (license to use, rental or lease) of . . . equipment or is the sale of a service . . . must be determined in accordance with the facts and circumstances of the particular transaction and provisions of the agreement between the contractor and his customer.

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

Capital improvements contracts. (1) Purchases. All purchases of tangible personal property (excluding qualifying production machinery and equipment exempt under section 1115(a)(12) of the Tax Law) which are incorporated into and become part of the realty or are used or consumed in performing the contract are subject to tax at the time of purchase by the contractor or any other purchaser. A certificate of capital improvement may not be validly given by any person or accepted by a supplier to exempt the purchase of these materials.

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

Charges for temporary facilities at construction sites. (Tax Law, §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: 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, communication 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 1: 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 service 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.

Section 541.9(a) of the Sales and Use Tax Regulations provides, in part:

General. The purchase, rental, lease or license to use construction equipment . . . by a contractor is subject to sales and use tax.

Section 541.9(c)(1) of the Sales and Use Tax Regulations provides, in part:

Rentals and leases of equipment to contractors.

(i) Where a contractor leases equipment, the contractor is liable for the combined State and local sales and use tax on the total charges at the highest rate in effect in any jurisdiction in which the equipment is used during the lease payment period, (e.g., daily, weekly, monthly, depending on the frequency of payment).

* * *

(iv) All expenses incurred by a lessor in determining the amount charged for rental of tangible personal property to a contractor, such as: setting up, assembling, installing and/or dismantling, are elements of the total receipt subject to tax, regardless of their taxable status and whether they are separately billed to the lessee.

Opinion

Receipts from contractor rentals of equipment used in construction activities which result in a capital improvement to real property are subject to the combined State and local sales and use tax at the rate in effect in the jurisdiction in which such equipment is used. See Section 541.9(c)(1)(i) of the Sales and Use Tax Regulations. Expenses incurred by a vendor in making a sale are not deductible from the receipt subject to tax. See Section 1101(b)(3) of the Tax Law and Section 526.5(e) of the Sales and Use Tax Regulations. Section 541.8(a) of the Sales and Use Tax Regulations provides an exclusion from tax for “. . . (c)harges for *installation* of materials and the *labor to provide* temporary heat, temporary electric service, *temporary protective pedestrian walkways*, and temporary plumbing by a subcontractor . . .”, where the temporary heat, electric service, pedestrian walkway or plumbing is a necessary prerequisite to the construction of a capital improvement to real property (emphasis added). The provisions of this section of the regulations, however, do not apply to the subcontract here regarding the rental of tangible personal property. Rentals of tangible personal property described in Section 541.9(c)(1)(i) of the Sales and Use Tax Regulations are distinguishable from the provision of services described in Section 541.8(a) of such Regulations. Accordingly, because the agreement between Petitioner and the subcontractor is for the rental of tangible personal property used by Petitioner to provide temporary pedestrian walkways, the subcontractor is required to collect the tax on the total receipts from such equipment rentals. Where the subcontractor charges for installation or installation and subsequent removal of

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the rented pedestrian walkways, whether or not such charges are separately stated, the entire charge is subject to tax. See Section 541.9(c)(1)(iv) of the Sales and Use Tax Regulations.

Where the agreement between Petitioner and the subcontractor calls for the subcontractor to perform a service of providing and maintaining temporary pedestrian walkways for the capital improvement project, rather than the mere rental of the walkways described above, the charge for such service, including any expenses for the materials and labor necessary to provide the walkways, would be a constituent part of the capital improvement project not subject to sales tax. However, the subcontractor would be liable for tax on the materials purchased for use in performing the nontaxable service. See Section 541.8 of the Sales and Use Tax Regulations.

DATED: July 12, 2002

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