

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Taxpayer Guidance Division

TSB-A-08(15)S
Sales Tax
March 19, 2008

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S070702A

On July 2, 2007, the Department of Taxation and Finance received a Petition for Advisory Opinion from Pro Line Group Inc, P. O. Box 264, Mastic Beach, New York 11951.

The issue raised by Petitioner, Pro Line Group Inc, is whether the installation of its “chimney chase covers” are subject to New York State sales tax or if such installation qualifies as a capital improvement to real property for sales tax purposes.

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

A chimney chase is a structure, generally constructed of the same building materials as the rest of the building to which it is attached, that encloses a prefabricated, metal chimney and is tied into the structural elements (e.g., roof trusses or rafters) of a building, sealed as needed at the roof/chase junction, and covered with appropriate exterior cladding materials to make the chase weather tight and to complement the building’s appearance. The purpose of a chimney chase is to support, protect, insulate, and weatherproof a prefabricated, metal chimney and to keep out pests. A chimney chase serves to increase the chimney’s efficiency, and improve its appearance. The sides of the chase are often clad with the same or similar materials as the rest of the building.

The top of the chimney chase is called the chimney chase cover. The chimney chase cover is often made of galvanized sheet metal or aluminum. The galvanized sheet metal and aluminum covers are prone to corrosion or other damage and may need to be replaced over the lifetime of the building. Petitioner completely removes the galvanized sheet metal or aluminum covers and replaces them with stainless steel covers that will not corrode. Petitioner completely replaces the chase cover and, if necessary, may also replace the chimney cap, part of the prefabricated chimney, and parts of the chase. The new stainless steel chase cover is affixed to the chimney chase by screws and caulking.

Applicable law and regulations

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

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, . . .

Section 1105 of the Tax Law provides, in part:

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

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

* * *

(c) The receipts from every sale, except for resale, of the following services:

* * *

(3) Installing tangible personal property . . . or maintaining, servicing or repairing tangible personal property . . . 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;

* * *

(5) Maintaining, servicing or repairing real property, property or land, as such terms are defined in the real property tax law, whether the services are performed in or outside of a building, as distinguished from adding to or improving such real property, property or land, by a capital improvement as such term capital improvement is defined in paragraph nine of subdivision (b) of section eleven hundred one of this article, . . .

Section 1119(c) of the Tax Law provides:

A refund or credit equal to the amount of sales or compensating use tax imposed by this article and pursuant to the authority of article twenty-nine, and 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. An application for the refund or credit provided for herein must be filed with the commissioner of taxation and finance within the time provided by subdivision (a) of section eleven hundred thirty-nine. Such application shall be in such form as the commissioner may prescribe. Where an application for credit has been filed, the applicant may immediately take such credit on the return which is due coincident with or immediately subsequent to the time that he files his application for credit. However, the taking of the credit on the return shall be deemed to be part of the application for credit. The procedure for granting or denying such applications for refund or credit and review of such determinations shall be as provided in subdivision (e) of section eleven hundred thirty-nine.

Section 527.7 of the Sales and Use Tax Regulations provides, in part:

Maintaining, servicing or repairing real property. (a) Definitions. (1) *Maintaining, servicing* and *repairing* are terms which are used to cover all activities that relate to keeping real property in a condition of fitness, efficiency, readiness or safety or restoring it to such condition. Among the services included are services on a building itself such as painting; services to the grounds, such as lawn services, tree removal and spraying; trash and garbage removal and sewerage service and snow removal.

* * *

(b) Imposition. (1) The tax is imposed on receipts from every sale of the services of maintaining, servicing or repairing real property, whether inside or outside of a building.

* * *

(3) When the service of maintaining, servicing or repairing real property is performed in conjunction with the transfer of title to tangible personal property, the price of the tangible personal property is also subject to tax.

Section 541.2 of the Sales and Use Tax Regulations provides, in part:

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

* * *

(d) A *construction contractor* means any person who engages in erecting, constructing, adding to, altering, improving, repairing, servicing, maintaining, demolishing or excavating any building or other structure, property, development, or other improvement on or to real property, property or land.

Opinion

When Petitioner performs a service for a real property owner that results in keeping real property in a condition of fitness, efficiency, readiness or safety or restoring it to such condition, Petitioner has performed a repair or maintenance service to the real property. Repair or maintenance services to real property are subject to sales tax under section 1105(c)(5) of the Tax Law.

Replacement of a chimney chase cover is similar in nature to the replacement of a chimney cap and chimney flashings. Replacement of these latter items is described in *Sales and Use Tax Classifications of Capital Improvements and Repairs to Real Property*, Publication 862 (4/01), as a taxable repair or maintenance to real property. See section 1105(c)(5) of the Tax Law and section 527.7 of the Sales and Use Tax Regulations.

Accordingly, Petitioner's replacement of a chimney chase cover is considered to be a repair or maintenance to real property, and, as such, charges for such replacement are subject to sales tax under section 1105(c)(5) of the Tax Law.

Petitioner is considered to be a *construction contractor* for sales tax purposes since it is performing services to its customers' real property. See section 541.2(d) of the Sales and Use Tax Regulations. Therefore, Petitioner's purchases of building materials for use in replacing chimney chase covers are purchases at retail, and Petitioner is required to pay sales tax on such purchases pursuant to section 1105(a) of the Tax Law. See section 1101(b)(4)(i) of the Tax Law. Petitioner may take a credit on its periodic sales tax return for the tax it has paid on its purchases

of such building materials used to perform its taxable repair services against the tax that it collects from its customers for such repairs. See section 1119(c) of the Tax Law.

DATED: March 19, 2008

/s/
Jonathan Pessen
Tax Regulations Specialist IV
Taxpayer Guidance Division

NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.