

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

TSB-A-92(53) S
Sales Tax
July 1, 1992

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S920309C

On March 9, 1992, a Petition for Advisory Opinion was received from D'Agostino General Contractors, Inc., 365 North Washington Street, PO Box 25086, Rochester, New York 14625.

The issue raised by Petitioner, D'Agostino General Contractors, Inc., is whether a vendor is relieved from his duty to collect sales tax if he accepts in good faith a properly completed exemption certificate.

Petitioner, a small contractor, was hired to do manufacturing related work for a large manufacturing company with factories in several locations. The work completed consisted of building trenches to carry chemicals from one part of a building to the next processing area, installing a concrete dike for a Peroxide Pump, extending the height of a concrete retaining wall of the Hypo-Acid Dike, installing tank foundations and removing and repouring a concrete slab west of a scale support slab.

Petitioner accepted a properly completed Exempt Use Certificate, Form ST-121, from its customer for the work to be completed. The only box checked on the certificates provided that:

"SUBJECT TO THE NEW YORK CITY TAX AND ALL OTHER LOCAL SALES AND USE TAX, BUT EXEMPT FROM STATEWIDE TAX

- (i) The services of installing, repairing maintaining or servicing machinery and equipment used directly and predominantly in the production; telephone and telegraph control office equipment and station apparatus used directly and predominantly in receiving at destination or initiating and switching telephone or telegraph communication and; parts, tools, and supplies used in connection with this machinery, equipment and apparatus."

In addition, the customer typed on the Certificate that labor was subject to a 3% tax.

Section 1132(c) of the Tax Law states, in part:

For the purpose of the proper administration of this article and to prevent evasion of the tax hereby imposed, it shall be presumed that all receipts for property or services of any type mentioned in subdivisions (a), (b), (c) and (d) of section eleven hundred five. . .are subject to tax until the contrary is established, and the burden of proving that any receipt. . .is not taxable hereunder shall be upon the person required to collect tax or the customer. . .unless (1) a vendor. . .shall have taken from the purchaser a certificate in such form as the tax commission may prescribe. . .to the effect that the property or service was purchased. . .for some use by reason of which

the sale is exempt from tax under the provisions of section eleven hundred fifteen, . . .the sale shall be deemed a taxable sale at retail. . . .Where such a certificate or statement has been furnished to the vendor, the burden of proving that the receipt. . .is not taxable. . .shall be solely upon the customer

Section 532.4 of the Sales and Use Tax Regulations provides, in part, as follows:

Presumption of Taxability

(a) General. (1) It shall be presumed that all receipts for property or services of any type mentioned in subdivision (a). . .of section 1105 of the Tax Law. . .[viz., sales of tangible personal property] are subject to tax until the contrary is established.

* * *

(b) Burden of proof. (1) The burden of proving that any receipt,. . .is not taxable shall be upon the person required to collect tax or the customer.

(2) A vendor who in good faith accepts from a purchaser a properly completed exemption certificate or, as authorized by the Department, other documentation evidencing exemption from tax not later than 90 days after delivery of the property or the rendition of the service is relieved of liability for failure to collect the sales tax with respect to that transaction. The timely receipt of the certificate or documentation itself will satisfy the vendor's burden of proving the nontaxability of the transaction and relieve the vendor of responsibility for collecting tax from the customer.

(i) A certificate or other document is "accepted in good faith" when a vendor has no knowledge that the exemption certificate or other document issued by the purchaser is false or is fraudulently presented. If reasonable ordinary due care is exercised, knowledge will not be imputed to the seller required to collect the tax.

* * *

Example 2: The Brown Manufacturing company purchased machinery and equipment which could be used for production or distribution for its New York plant from Ajax company, a multistate business. Brown Manufacturing purchased the machinery and equipment, which Brown intended to be used in its distribution area, from Ajax's New York State sales representative. By virtue of its size and weight, the machinery and equipment cannot be completely assembled prior to delivery to the customer's place of business. Ajax company sent its New Jersey based installation crew to the Brown Manufacturing company location to perform the on-site assembly. Within 90 days of the date of the completion of the on-site assembly, the Brown

Manufacturing company issued an exemption certificate to the Ajax company's Accounts Receivable Department located in Ohio, and did not pay the tax on the purchase of the machinery and equipment. The Ajax company's Account Receivable Department accepted, in good faith, the completed exemption certificate as it was not in a position to determine whether or not the machinery and equipment was really being used in the production of tangible personal property for sale and had no reason to question the claimed exempt status. Therefore, Ajax is not liable for the uncollected tax.

Example 3: Mr. Jones, who was not a registered sales tax vendor, purchase vinyl siding from XYZ Building and Supply company to install on a house which he owns. Upon picking up the siding, Mr. Jones improperly issued a contractor's exempt purchase certificate to the vendor, complete with an apparently valid identification number, and did not pay the tax on the purchase price. Subsequently, the Tax Department audited XYZ's non-taxable sales and determined Mr. Jones had issued a false contractor's exempt purchase certificate. Although the certificate issued by Mr. Jones was false, XYZ Building and Supply company accepted the completed certificate in good faith as it appeared to be properly completed and XYZ had no knowledge that the certificate was false. XYZ Building and Supply company is therefore relieved of liability for failure to collect tax on this transaction.

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(ii) An exemption certificate or other document is considered to be properly completed when it contains the:

- (a) date prepared;
- (b) name and address of the purchaser;
- (c) name and address of the vendor;

(d) identification number of the purchaser as shown on its certificate of authority, or exempt organization number as shown on the exempt organization certificate, if any such numbers are required by the certificate or document. The farmer's exemption certificate does not have such a number. Also, the exemption certificate for tractors, trailers or semitrailers does not require the number of the purchaser's certificate of authority in all instances. However, if the purchaser completing an exemption certificate for tractors, trailers or semitrailers does not have a certificate of authority, such exemption certificate must show the purchaser's highway use tax identification number unless the purchaser is a certificated household goods mover, in which instance it must show its Interstate Commerce Commission or New York State Department of Transportation identification number. Absent such identifying numbers, the exemption certificate for tractors, trailers or semitrailers is incomplete.

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(e) Signature of the purchaser or the purchaser's authorized representative;
and

(f) any other information required to be completed on the particular certificate or document. (emphasis added)

In Sharon P. Sheinfeld, Adv Op Comm T&F, August 7, 1990, TSB-A-90(39)S the Commissioner advised that while a Contractor Exempt Purchaser Certificate was the correct certificate to be used in a certain transaction, the fact that a Resale Certificate received by Petitioners' client was properly completed and accepted in good faith was enough to relieve the vendor of his duty to collect tax.

Moreover, where a vendor has accepted in good faith a Certificate of Capital Improvement it is not under a duty to investigate or police its customers and the vendor has no duty to debate with its customers as to whether the work performed constitutes a capital improvement or a repair. (See: Saf-Tee Plumbing v State Tax Commission, 77 AD2d 1).

Accordingly, pursuant to Section 1132(c) of the Tax Law and Section 532.4 of the Sales and Use Tax Regulations in absence of fraud, the acceptance by Petitioner of a properly completed exemption certificate in good faith is sufficient to relieve the Petitioner of his duty to collect tax from his customer. Sharon P. Sheinfeld and Saf-Tee Plumbing v. State Tax Commission, supra.

In the instant case, the questions of whether fraud was involved or whether a properly completed exemption certificate was accepted in good faith are factual questions which cannot be determined in an Advisory Opinion. An Advisory Opinion merely sets forth the applicability of pertinent statutory and regulatory provision to a "specified set of facts." Tax Law, section 171, subd. twenty-fourth; 20 NYCRR 2376.1(a).

It is also noted that if it is determined that the work performed by Petitioner constituted capital improvements, the customer would be entitled to a refund of sales tax paid on labor charges and Petitioner would be liable for sales and use taxes on materials used to perform such capital improvements.

DATED: July 1, 1992

/s/
PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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