

New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-14(17)S
Sales Tax
July 8, 2014

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S110802A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. Petitioner asks whether its services to New York based customers are subject to sales tax as the sale of servicing real property in New York.

We conclude that the Petitioner is performing taxable repair and maintenance services to personal or real property in New York through the use of subcontractors. Therefore, all its receipts from the sale of these services in New York are subject to sales tax.

Facts

Petitioner, a Florida-based company, provides services related to the repair and servicing of HVAC and refrigeration systems. Petitioner's clients generally are retail stores. Petitioner has contracted with HVAC and refrigeration systems service providers located around the country. When a client contacts Petitioner to request that its HVAC and refrigeration equipment be serviced, Petitioner arranges for one of these service contractors to go to the client's location to perform the service work. After the service contractor finishes the service call, the Petitioner bills the client directly.

Petitioner provided samples of its contracts with clients ("HVAC Service Agreement") and its contracts with its third-party service contractors ("Partner Agreement"). Under the HVAC Service Agreement, Petitioner's clients can purchase two types of services: preventative maintenance and emergency service.

For preventative maintenance services, Petitioner sets the rates the clients are charged. Petitioner maintains the schedule of when its clients' units need maintenance, and arranges for its affiliated service contractors to perform these maintenance services in accordance with the schedule. The maintenance service for each client includes a detailed list of tasks that must be completed, such as changing filters, inspecting wires, and testing safety switches. Service contractors are required to obtain a purchase order (PO) from Petitioner before beginning any preventative maintenance work. Petitioner's Partner Agreement provides that the fixed price for annual preventative maintenance services billed by service contractors to Petitioner should include any applicable sales tax.

For emergency service calls, Petitioner dispatches a service contractor to perform repair work. As part of the dispatch, Petitioner authorizes the service contractor to perform work only up to a specified dollar amount, referred to in the contract as a "Not To Exceed (NTE)" dollar

limit. If the work necessary to repair the unit will exceed the NTE limit, the service contractor must submit a written quote to Petitioner and wait for the quote to be approved before continuing work. After completion of the work, the service contractor submits an invoice to Petitioner, which must include a cost breakdown for labor (hours x rate), materials and sales tax.

The service contractors never bill clients directly. For emergency services, Petitioner sends an invoice to the client that includes the charges for labor and materials billed by the service contractor, plus an additional management fee that is a percentage of the labor and materials charge. For preventive maintenance services, Petitioner sends an invoice to the client pursuant to a schedule that is part of the HVAC Service Agreement.

Petitioner's clients always make payment directly to Petitioner. According to the Partner Agreement, Petitioner will not pay a service contractor invoice until Petitioner receives payment from the client for the work. The Partner Agreement contains no declaration of agency, *i.e.* that Petitioner acts on behalf of each service contractor in engaging for the provision of service work. Instead, the Partner Agreement states that the service contractor acts as an independent contractor in performing services.

Analysis

Petitioner's receipts from its sales of the services described above to its clients, including its separately stated management fees, are taxable under Tax Law § 1105(c)(3) as receipts from the sale of installing, maintaining, servicing, or repairing tangible personal property, or taxable under Tax Law § 1105(c)(5) as receipts from the sale of installing, maintaining, servicing, or repairing real property or land, depending on whether the property upon which the services are performed is personal or real property. Petitioner is the retail vendor servicing its clients' HVAC equipment. Its "partners," who perform the work at clients' locations, are subcontractors whose services Petitioner resells to its customers.

The clients, which are the retail customers, contract with Petitioner, not the service contractors who perform the work. The HVAC Service Agreement obligates Petitioner "to provide the following services to" its clients "for HVAC maintenance." The Partner Agreement states that the service contractors are independent contractors, not agents of Petitioner, and prohibits the service contractors from entering into contractual relationships with Petitioner's clients or even contacting the clients directly.

Petitioner bills its clients for the services provided by the service contractors, and the clients pay Petitioner, not the service contractors, for the work performed. For preventative maintenance work, Petitioner, rather than the service contractors, sets the rates charged to clients. For emergency services, a service contractor needs authorization from Petitioner to do work if the service contractor's estimate exceeds a predetermined dollar amount. Therefore, the service contractors are subcontractors of Petitioner, whose services Petitioner is reselling to its clients.

Because Petitioner is the retail vendor of the repair and maintenance services, all its receipts from its sale of these services, including its management fee, are subject to sales tax. The fee is merely an itemized expense of the service. *See* 20 NYCRR § 526.5; *also see* TSB-A-05(7)S.

Petitioner should provide each subcontractor with a resale certificate (Form ST-120). A subcontractor's receipt in good faith of a properly completed resale certificate from Petitioner would release it from the obligation to collect sales tax from Petitioner.

DATED: July 8, 2014

/S/

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