

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

TSB-A-89(7)S
Sales Tax
February 16, 1989

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. S881101A

On November 1, 1988, a Petition for Advisory Opinion was received from the City of Gloversville, City Hall, Frontage Road, Gloversville, New York 12078.

The issue raised is whether contractors are required to pay sales tax on purchases of materials which will be used in performing services on privately owned homes and rental property, when such materials are purchased with funds made available by the New York State Division of Housing and Renewal and the United States Department of Housing and Urban Development.

The Community Development Agency for the City of Gloversville administers Federal and State funded programs under which contracts for the rehabilitation and improvement of property belonging to qualified property owners are awarded to the lowest bidders. Upon completion and inspection of the work, the Community Development Agency distributes the appropriate funds to the contractors.

Section 1105(a) of the Tax Law imposes the State sales tax on the "...receipts from every retail sale of tangible personal property, except as otherwise provided in this article."

Section 1101(b)(4)(i) of the Tax Law defines the term "retail sale" to include:

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, ...regardless of whether the tangible personal property is to be resold as such before it is so used or consumed."

Section 527.7 of the Sales and Use Tax Regulations states:

Maintaining, servicing or repairing real property. [Tax Law, § 1105(c)(5)]

(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.

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- (4) The imposition of tax on services performed on real property depends on the end result of such service. If the end result of the service is the repair or maintenance of real property, such services are taxable. If the end result of the same service is a

capital improvement to the real property, such services are not taxable.

- (5) 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 1116(a)(1) of the Tax Law provides for an exemption from sales and compensating use taxes with respect to the "state of New York, or any of its agencies...or political subdivisions where it is the purchaser, user or consumer, or where it is a vendor of services or property of a kind not ordinarily sold by private persons." Section 1116(a)(2) of the Tax Law provides an exemption from sales and compensating use taxes with respect to the "United States of America, and any of its agencies...insofar as it is immune from taxation where it is the purchaser, user or consumer, or where it sells services or property of a kind not ordinarily sold by private persons."

Section 1115(a)(15) of the Tax Law exempts from sales and use tax receipts from the following:

Tangible personal property sold to a contractor, subcontractor or repairman for use in erecting a structure or building of an organization described in subdivision (a) of section eleven hundred sixteen, or adding to, altering or improving real property, property or land of such an organization, as the terms real property, property or land are defined in the real property tax law; provided, however, no exemption shall exist under this paragraph unless such tangible personal property is to become an integral component part of such structure, building or real property.

Section 1115(a)(16) of the Tax Law exempts from sales and use tax receipts from the following:

Tangible personal property sold to a contractor, subcontractor or repairman for use in maintaining, servicing or repairing real property, property or land of an organization described in subdivision (a) of section eleven hundred sixteen, as the terms real property, property or land are defined in the real property tax law; provided, however, no exemption shall exist under this paragraph unless such tangible personal property is to become an integral component part of such structure, building or real property.

Under the provisions of Section 1115(a)(15) and (16) of the Tax Law a contractor is allowed to make tax exempt purchases of tangible personal property only if the tangible personal property is actually incorporated into the structure, building or real property of an exempt organization as described in section 1116(a) of the Tax Law.

In the instant case, the rehabilitation and improvements are not being performed on property belonging to the State of New York, any of its agencies or political subdivisions nor the United States of America of any of its agencies. Instead, the rehabilitation and improvements are being performed on property belonging to a property owner who is not an exempt organization as described

in Section 1116(a) of the Tax Law. Accordingly, the contractor's purchases of building materials, for use in rehabilitating and improving property under the programs administered by the Community Development Agency for the City of Gloversville, will not qualify for the sales and use tax exemption provided under Section 1115(a)(15) and (16) of the Tax Law.

Inasmuch as the building materials will be incorporated into the real property belonging to a property owner who is not described as an exempt organization under Section 1116(a) of the Tax Law, the sale of such materials to the contractor will be considered a "retail sale", as defined under Section 1101(b)(4)(i) of the Tax Law, subject to the tax imposed under Section 1105(a) of the Tax Law. Accordingly, the contractor must pay sales tax on the purchase of the materials whether the work results in a capital improvement or a repair to real property.

The facts that the funding is from state and federal sources and that the programs and funds are administered by the Community Development Agency for the City of Gloversville does not have any bearing on the sales tax liabilities incurred by the contractor or the property owner.

However, it is noted that inasmuch as the contractors must collect sales tax from the property owner when the work results in a repair to the property, the contractor may be entitled to a credit for the sales tax paid on the purchase price of the materials incorporated into the job. The credit must be claimed on the sales and use tax return filed for the period in which the repair job was performed. In lieu of claiming a credit on the sales and use tax return, the contractor may claim a refund or credit by filing a Form AU-11, Application for Credit or Refund of State and Local Sales and Use Tax.

DATED: February 16, 1989

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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