

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

TSB-A-91 (67)S
Sales Tax
October 16, 1991

STATE OF NEW YORK

COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S910620C

On June 20, 1991 a Petition for Advisory Opinion was received from Action Scale Co., Inc. 6 Interstate Ave., Albany, New York 12205.

The issue raised by Petitioner, Action Scale Co., Inc., is whether a customer can submit to Petitioner a Certificate of Capital Improvement after a binding contract has been entered into.

On April 1, 1990 Petitioner's customer signed a contract with Petitioner for a fixed amount. The customer did not know at the time the contract was entered into whether or not the project was a capital improvement. The contract provided that the customer would pay any applicable sales tax that would be due and that the fixed amount of the contract would be plus any sales tax due. The first invoice submitted by Petitioner to the customer included sales tax and was paid by the customer. On May 4, 1990 the customer submitted a Certificate of Capital Improvement to the Petitioner and refused to pay sales tax on any future invoices.

Section 1132 of the Tax Law provides, in part, as follows:

(c) 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. . . [u]nless (1) a vendor, not later than ninety days after delivery of the property or the rendition of the service, shall have taken from the purchaser a certificate in such form as the tax commission may prescribe.

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

Presumption of taxability. (a) General. It shall be presumed that all receipts from sales of property of service of any type mentioned in subdivisions (a), (b), (c) and (d) of section 1105 of the Tax Law, all rents for occupancy of the type mentioned in subdivision (e) of said section, and all amusement charges of any type mentioned in subdivision (f) of said section, are subject to tax until the contrary is established.

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

(2) When the vendor makes a sale which is exempt because the property purchased is for resale, or for an exempt use, or the purchaser is an exempt organization, as proof of the exemption the vendor shall, at the time of sale, obtain a properly completed exemption certificate from the purchaser and retain the certificate in his files. Such certificate satisfies the vendor's Burden of proof.

(3) When the vendor is furnished with a properly completed exemption certificate, the burden of proving a transaction is not taxable shall be solely upon the customer.

(4) the vendor shall not be relieved of the burden of proof when no exemption certificate or an improper certificate has been furnished him, or when the vendor has actual knowledge that a certificate furnished is false or fraudulent.

(c) Use of exemption certificates. (1) To enable purchasers entitled to an exemption from the sales and compensating use tax to avail themselves of the exemption and for administrative purposes, the Department of Taxation and Finance provides various exemption forms, the use of which is governed by the conditions under which they are issued. A vendor is not required to collect tax from a purchaser who furnishes a properly completed exemption certificate.

* * *

(f) Certificate of capital improvement. (1) A certificate of capital improvement is used to claim exemption from State and local sales tax on the purchase of a capital improvement as defined in section 527.7(a)(2) of this Title.

(2) A certificate of capital improvement is properly completed when it complies with the provisions of paragraph (c)(2) of this section.

Further, Section 541.5(b)(4) of the Sales and Use Tax Regulations provides, in part, as follows:

* * *

(ii) Where a contractor does not receive a capital improvement certificate from a customer, the contract or other records of the transaction will prevail. In such case:

(a) where the contractor does not receive a capital improvement certificate, collects tax on the full invoice price and the job is a capital improvement to real property, the contractor is liable for the tax on the cost of materials incorporated into the job, plus the tax collected from the customer. The customer is entitled to a refund of the tax paid to the contractor, or

(b) where the contractor does not receive a capital improvement certificate, collects no tax on the charges billed to the customer and the job is a capital improvement to real property, the contractor is liable for the tax on the cost of materials incorporated into the job performed.

(iii) If a contract includes the sale of tangible personal property which remains tangible personal property after installation, the contractor must collect the appropriate New York State and local taxes from the customer on the selling price, including any charge for installation, of the tangible personal property unless a properly completed exemption certificate is issued by the customer. The contractor may apply for a credit or refund of taxes he has paid on purchases of the tangible personal property that remain tangible personal property after installation.

Accordingly, pursuant to Section 1132(c) of the Tax Law and Section 532.4 of the Sales and Use Tax Regulations, it is incumbent upon the customer to establish that the transaction is exempt from sales tax by presenting Petitioner with a properly completed exemption certificate. Pursuant to Section 1132(c) of the Tax Law and Sections 532.4 and 541.5(b)(4) of the Sales and Use Tax Regulations, Petitioner must collect sales tax from its customer unless a properly completed exemption certificate is furnished. As set forth in Saf-Tee Plumbing v. State Tax Commission, 77 AD2d 1, Petitioner is under no duty to investigate or police its customers and has no duty to debate with its customers as to what constitutes a capital improvement. Therefore, when presented with a properly completed exemption certificate, Petitioner is not liable for collecting sales tax. However, pursuant to Section 541.5(b)(4) of the Sales and Use Tax Regulations, regardless of whether a customer agrees that Petitioner performed a capital improvement, if Petitioner performed a capital improvement Petitioner is liable for sales or use tax on the cost of material incorporated into the job performed. Mark S. Klein, Adv Op Comm of T&F, May 9, 1991, TSB-A-91-(38)S.

It is a matter of fact and law to be litigated between Petitioner and its customer as to whether, under the terms of the contract between the Petitioner and its customer, the customer is liable for the

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payment to Petitioner of any sales or use tax that must be paid by the Petitioner if the project is considered to be a capital improvement. It is not a question that can be answered through an Advisory Opinion.

DATED: October 16, 1991

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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