

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

TSB-A-92 (45) S
Sales Tax
June 4, 1992

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S920220A

On February 20, 1992, a Petition for Advisory Opinion was received from The Grisanzio Corporation d/b/a North East Homes, 5012 Express Drive South, Ronkonkoma, New York 11779.

The issue in the instant case is whether Petitioner, The Grisanzio Corporation d/b/a North East Homes, is liable for sales tax on the purchase of manufactured homes from Ritz-Craft Corporation of PA., Inc. (hereinafter "Ritz-Craft"), a Pennsylvania corporation.

In 1983, Petitioner opened an office to build residential, one family homes. Rather than engage in the customary construction of the homes, Petitioner selected a factory to manufacture them.

The following are Petitioner's contentions as set forth in its Petition. Each home was completed in the factory by Ritz-Craft, placed on a home carrier and attached to a Ritz-Craft tractor that then delivered the home to the site. The home was then lifted off the carrier by a crane crew at the site and placed on the foundation. The crane crew was supplied, contracted and paid for by Ritz-Craft. Once the home was placed on the foundation, Petitioner then took possession. Petitioner completed the home to the last detail so a certificate of occupancy could be issued and a closing could take place to transfer title to the contracted buyer.

Petitioner contends that every invoice received from Ritz-Craft for each home manufactured included the following:

1. A charge for the base price of the home.
2. A charge for additional options added.
3. A freight charge for delivery of the home to the site.
4. New York State sales tax, based and computed on 65% of the total invoice, representing the tax due on material used in the home, excluding labor.
5. A charge for Ritz-Craft to set or place the home permanently on the foundation.

The charges set forth on the invoice were totaled and a check was due and payable to Ritz-Craft by Petitioner 15 days after the home was delivered to the site.

In an audit conducted by the Department of Taxation and Finance, the auditor contends that the crane operator was hired by and paid for by Petitioner. The auditor states that from 1984 to 1988 Petitioner's books reflect such transactions.

The auditor further contends that the crane operator billed separately for the crane rental plus sales tax and for the labor costs for the crane operator and an oiler, the crane operator's son. The crane operator had no other payroll. The crane operator charged approximately \$1,400.00 for each job. Petitioner was reimbursed \$600.00 from the manufacturer for each setting.

In addition, the auditor contends that the setting of a house required four or five persons in addition to the crane operator and the oiler. Petitioner supplied a crew for each job. A video viewed by the auditor and her supervisor showed four employees of Petitioner actively involved with the setting of the home on the foundation.

The auditor also contends that an officer of Apollo Crane, Inc., the crane operator, stated that no agreement between crane company and Ritz-Craft for the setting of the homes on the foundation existed until 1992. The crane operator further stated the four or five man crew to set each house were not supplied by him, but rather he believed they were employees of Petitioner.

Section 1105(a) of the Tax Law provides that the receipts from every retail sale of tangible personal property is subject to sales tax except as otherwise provided.

Section 544.3(b) of the Sales and Use Tax Regulations provides as follows:

(b) Sales of Factory manufactured homes. (1) The sale of a factory manufactured home which has not been installed on real property as a capital improvement is subject to the sales and compensating use taxes as the sale of tangible personal property. Upon a retail sale, tax is computed on the total sales price. The "70 percent rule" described in subparagraph (a)(2)(i) of this section does not apply to the sale or use of a factory manufactured home.

(2) The sale of a factory manufactured home to a contractor, subcontractor or repairman to be installed as a capital improvement by such contractor, subcontractor or repairman is subject to sales and compensating use tax as a retail sale of tangible personal property. (emphasis added)

Section 544.4(b) of the Sales and Use Tax Regulations concerning the imposition of sales tax on charges of installing factory manufactured homes provides as follows:

(b) Factory manufactured homes. (1) If the installation of a factory manufactured home results in a capital improvement, charges for the installation of such factory manufactured home are not subject to the sales tax, and the installer is liable for the sales and use tax on any materials used or consumed in such installation.

(2) If a factory manufactured home is installed upon real property under such circumstances that the installation does not constitute a capital improvement, the charges for such installation including labor and materials (including the charge for

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the factory manufactured home if applicable) is subject to tax. In such event, a contractor may claim a refund or credit of the sales and compensating use tax it paid upon its purchase of those materials which were subsequently resold.

The sale of an uninstalled factory manufactured home is subject to sales tax. Conversely, the sale of an installed factory manufactured home, i.e., sale of an uninstalled home where installation is a component of the sales transaction, is not subject to sales tax. It is possible for a buyer to purchase a factory manufactured home from the manufacturer but to make arrangements to have it installed by another party. The sale of the home would, thus, be subject to sales tax because the home was purchased on an uninstalled basis. Though the home will ultimately be installed on the real property of the buyer, thereby constituting a capital improvement, the steps taken to reach this do not trigger the exemption from sales tax because installation was secured independent of the sale of the home. Lake City Manufactured Housing, Inc., Dec. Tax App Trib., November 14, 1991. (emphasis added)

Accordingly, pursuant to Section 1105(a) of the Tax Law, Sections 544.3(b) and 544.4(b) of the Sales and Use Tax Regulations and Lake City Manufactured Housing, Inc., supra, in the instant case if Petitioner hired and paid the crane company to install the manufactured homes on the foundations, the purchase of the manufactured homes would constitute the purchase of tangible personal property and the entire sale would be subject to sales tax. On the other hand, if as a component of the sale to Petitioner, Ritz-Craft hired and paid the crane company to install the manufactured homes on the foundations, resulting in capital improvements, the installation by Ritz-Craft would not be subject to sales tax. However, Ritz-Craft would be liable for the use tax on any material used in constructing the manufactured homes.

A determination of whether Petitioner or Ritz-Craft hired and paid the crane company to install the manufactured homes on the foundations is a factual question which cannot be determined in an Advisory Opinion. An Advisory Opinion merely sets forth the applicability of pertinent statutory and regulatory provisions to a "specified set of facts." Tax Law, section 171, subd. twenty-fourth; 20 NYCRR 23716.1(a).

DATED: June 4, 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.