

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

TSB-A-96 (37)S
Sales Tax
July 2, 1996

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S960122C

On January 22, 1996, the Department of Taxation and Finance received a Petition for Advisory Opinion from Ang Pallaria, 414 Valley View Road., New Hartford, New York 13413.

The issue raised by Petitioner, Ang Pallaria, is whether he must pay sales tax to a subcontractor he hired or may he issue a Contractor Exempt Purchase Certificate in lieu of paying the sales tax.

Petitioner submits the following facts as the basis for this Advisory Opinion. Petitioner is hired to do work for the owner of a pool. Petitioner hires two subcontractors before doing any of his work. The two subcontractors are a plumber and a mason. Petitioner stated that he will bill the pool owner for his work, including charges for the two subcontractors' work and the sales tax.

Section 1101(b)(9) of the Tax Law defines a capital improvement as follows:

- (i) An addition or alteration to real property which:
 - (A) Substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property; and
 - (B) Becomes part of the real property or is permanently affixed to the real property so that removal would cause material damage to the property or article itself; and
 - (C) Is intended to become a permanent installation.

Section 1105 of the Tax Law provides in part:

Sec. 1105. Imposition of sales tax.--..., there is hereby imposed and there shall be paid a tax ... upon:

* * *

- (c) The receipts from every sale, except for resale, of the following services:

* * *

(3) Installing tangible personal property, excluding a mobile home, or maintaining, servicing or repairing tangible personal property, including a mobile home, not held for sale in the regular course of business, whether or not the services are performed directly or by means of coin-operated equipment or by any other means, and whether or not any tangible personal property is transferred in conjunction therewith, except:

* * *

(iii) for installing property which, when installed, will constitute an addition or capital improvement to real property, property or land, as the terms real property, property or land are defined in the real property tax law as such term capital improvement is defined in paragraph nine of subdivision (b) of section eleven hundred one of this chapter, ...

* * *

(5) Maintaining, servicing or repairing real property, property or land, as such terms are defined in the real property tax law, whether the services are performed in or outside of a building, as distinguished from adding to or improving such real property, property or land, by a capital improvement as such term capital improvement is defined in paragraph nine of subdivision (b) of section eleven hundred one of this chapter, but excluding services rendered by an individual who is not in a regular trade or business offering his services to the public

Section 1132(c)(1) of the Tax Law provides in part:

For the purpose of 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. Except as provided in subdivision (h) or (k) of this section, unless (i) 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 resale or exemption certificate in such form as the commissioner may prescribe . . . the sale shall be deemed a taxable sale at retail. Where such . . . a resale or exemption certificate . . . has been furnished to the vendor, the burden of proving that the receipt . . . is not taxable hereunder shall be solely upon the customer. . . .

Petitioner may give to his subcontractor a Contractor Exempt Purchase Certificate, Form ST-120.1 in order to purchase services exempt from tax which Petitioner will resell to his customer. Petitioner should not use Form ST-120.1 unless Petitioner is performing a taxable service for its customer, and is purchasing services from a subcontractor for resale. Examples of taxable services are (1) the installation of tangible personal property that does not become a part of real property upon installation and (2) repairs of real property. See Section 1105(c)(3) and (5) of the Tax Law. Petitioner must be registered with the New York State Department of Taxation and Finance as a person required to collect sales tax in order to furnish Form ST-120.1 to his subcontractors.

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Petitioner should not use Form ST-120.1 if Petitioner is performing work for his customer that constitutes a capital improvement to real property. See Section 1101(b)(9) of the Tax Law and Section 541.2 (g) of the Sales and Use Tax Regulations for definition of capital improvement. In this case, Petitioner should receive from his customer a properly completed Certificate of Capital Improvement, Form ST-124, and give a copy of this completed certificate to each of his subcontractors. See Section 541.5(b)(4) of the Sales and Use Tax Regulations.

Where Petitioner's subcontractors have accepted in good faith a properly completed exemption certificate issued by him within 90 days after the completion of the service provided, they are under no duty to investigate the certificate and they are not liable for the sales tax that may arise out of misuse of the certificate. See Section 532.4 of the Sales and Use Tax Regulations. It should be noted that the Tax Law contains no provision that requires a vendor, such as a subcontractor, to accept any exemption documents. If a subcontractor refuses to accept an exemption certificate and Petitioner pays sales tax to the subcontractor on a service purchased for resale or which constitutes a capital improvement, Petitioner may apply for a refund or credit as provided in section 1139 of the Tax Law.

DATED: July 2, 1996

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

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