

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

TSB-A-98(44)S
Sales Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S980129A

On January 29, 1998, the Department of Taxation and Finance received a Petition for Advisory Opinion from Koepke-Vragel, 176 Anderson Ave., Rochester, New York, 14607. Petitioner, Koepke-Vragel, provided additional information pertaining to the Petition on February 13, 1998.

The issue raised by Petitioner is whether its purchases of supplies in connection with repair projects are subject to tax where it receives a Direct Payment Permit from its customer.

Petitioner submits the following facts as the basis for this advisory opinion.

Petitioner is a construction contractor. Petitioner's work for its customer falls into the category of either repairs and maintenance to real property or capital improvements. The customer presents Petitioner with a Direct Payment Permit (AU-297) for the repair and maintenance services performed, indicating that the customer is paying the sales tax directly to the Department of Taxation and Finance. The customer presents Petitioner with a Certificate of Capital Improvement (ST-124) when the services performed involve a capital improvement.

Applicable Law and Regulations

Section 1101(b) of the Tax Law provides, in part:

When used in this article for the purposes of the taxes imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and by section eleven hundred ten, the following terms shall mean:

* * *

(4) Retail sale. (i) A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property, or (B) for use by that person in performing the services subject to tax under paragraphs (1), (2), (3), (5), (7) and (8) of subdivision (c) of section eleven hundred five where the property so sold becomes a physical component part of the property upon which the services are performed or where the property so sold is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax. Notwithstanding the preceding provisions of this subparagraph, 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, is deemed to be a retail sale regardless of whether the tangible personal property is to be resold as such before it is so used or consumed.... [See, 20 NYCRR 526.6.]

Section 1105(a) of the Tax Law imposes sales tax upon receipts from every retail sale of tangible personal property, except as otherwise provided.

Section 1105(c)(5) of the Tax Law imposes sales tax upon receipts from every sale, except for resale, of the following services:

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 1119(c) of the Tax Law provides:

A refund or credit equal to the amount of sales or compensating use tax imposed by this article and pursuant to the authority of article twenty-nine, and paid on the sale or use of tangible personal property, shall be allowed the purchaser where such property is later used by the purchaser in performing a service subject to tax under paragraph (1), (2), (3), (5), (7) or (8) of subdivision (c) of section eleven hundred five or under section eleven hundred ten and such property has become a physical component part of the property upon which the service is performed or has been transferred to the purchaser of the service in conjunction with the performance of the service subject to tax or if a contractor, subcontractor or repairman purchases tangible personal property and later makes a retail sale of such tangible personal property, the acquisition of which would not have been a sale at retail to him but for the second to last sentence of subparagraph (i) of paragraph (4) of subdivision (b) of section eleven hundred one. An application for the refund or credit provided for herein must be filed with the commissioner of taxation and finance within the time provided by subdivision (a) of section eleven hundred thirty-nine. Such application shall be in such form as the commissioner may prescribe. Where an application for credit has been filed, the applicant may immediately take such credit on the return which is due coincident with or immediately subsequent to the time that he files his application for credit. However, the taking of the credit on the

return shall be deemed to be part of the application for credit. The procedure for granting or denying such application for refund or credit and review of such determinations shall be as provided in subdivision (e) of section eleven hundred thirty-nine. [See, 20 NYCRR 534.5.]

Section 1132 of the Tax Law provides, in part:

(c) (1) 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 subdivision (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.

* * *

(2) Notwithstanding paragraph one of this subdivision or any other law to the contrary, the commissioner may authorize a purchaser, who acquires tangible personal property or services under circumstances which make it impossible at the time of acquisition to determine the manner in which tangible personal property or services will be used, to pay the tax directly to the commissioner and waive the collection of the tax by the vendor....The commissioner may suspend or revoke a direct payment permit where the permit holder fails to comply with any of the provisions of this article or any rule promulgated by the commissioner with respect to this article. The notice and hearing provisions applicable to the revocation and suspension of certificates of authority under section eleven hundred and thirty-four shall apply to the suspension and revocation of direct payment permits. A vendor shall not be required to collect tax from a purchaser who furnishes a direct payment permit in proper form,...

Section 532.5 of the Sales and Use Tax Regulations provides, in part:

(a) *General.* A direct payment permit is a notice to a vendor that the holder thereof is authorized to pay directly to the Department of Taxation and Finance any tax due on purchases made. The vendor's responsibility for the collection of tax from the permit holder is waived upon receipt of such permit.

(b) *Eligibility for a direct payment permit.* In order to be eligible for a direct payment permit, a purchaser must meet the following conditions:

(1) at the time tangible personal property or services are acquired by a purchaser, it is impossible to determine the manner in which the property or services will be used; ...

* * *

(e) *Use of direct payment permits.* (1) A direct payment permit may only be used by the holder who makes purchases of tangible personal property or services, the use of which is unknown to him at the time of purchase.

Example 1: A manufacturer-contractor purchases ingredients for use in the production of concrete septic tanks. Some of the septic tanks will be sold without installation, while others are to be sold installed. Since the manufacturer-contractor does not know the number of tanks that will be installed, he may use a direct payment permit when purchasing the ingredients.

(2) A direct payment permit may not be used:

(i) as a device to defer payment of the sales tax on purchases;

(ii) as a substitute for a resale certificate or other exemption certificates; or

(iii) as a device to transfer the permit holder's privileges to another person.

Example 2: The holder of a direct payment permit purchasing display cases for use in his showroom gives his supplier a copy of his direct payment permit to defer payment of tax on his purchase which is taxable. This is a use of the permit which is prohibited.

Example 3: The holder of a direct payment permit engages a contractor to erect a warehouse and gives the contractor a copy of his direct payment permit. The contractor may not use the direct payment permit to defer his payment of tax on purchases which are for use by him in the erection of the warehouse. The contractor's liability for the tax on his purchases is not relieved by his customer's direct payment permit. This is a use of the permit which is prohibited.

* * *

(g) *Revocation.* (1) A direct payment permit may be revoked for:

(i) failure by the holder thereof to timely file his sales and use tax returns and timely pay any tax due;

(ii) any misuse of the privileges granted by the permit or failure to comply with any requirement with respect to the permit;

(iii) a change in business operations, so that it is possible to determine the use of purchases at the time made.

Section 541.1(b) of the Sales and Use Tax Regulations provides, in part:

The principal distinguishing feature of a sale to a contractor, as compared to a sale to other vendors who purchase tangible personal property for resale, is that the sale of tangible personal property to a contractor for use or consumption in construction is a retail sale and subject to sales and use tax, regardless of whether tangible personal property is to be resold as such or incorporated into real property as a capital improvement or repair. Whenever a contractor uses materials, on which the contractor has paid sales tax, in a repair or maintenance contract... subject to the sales tax on services under section 1105(c) of the Tax Law, the contractor may be entitled to a refund or credit of the portion of the tax he paid attributable to the materials transferred to the customer.

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

Capital improvements contracts. (1) Purchases. All purchases of tangible personal property ... which are incorporated into and become part of the realty or are used or consumed in performing the contract are subject to tax at the time of purchase by the contractor or any other purchaser. A certificate of capital improvement may not be validly given by any person or accepted by a supplier to exempt the purchase of these materials.

(2) Labor and material charges. All charges by a contractor to the customer for adding to or improving real property by a capital improvement are not subject to tax provided the customer supplies the contractor with a properly completed certificate of capital improvement.

(3) Direct payment permit. A direct payment permit cannot be used as a device to defer payment of the sales tax on purchases which are taxable. A contractor who receives a direct payment permit from a customer cannot use such permit to defer his payment of tax on purchases used by him or incorporated into a capital improvement to real property. The contractor's liability for the tax on his purchases are not relieved by his customer's direct payment permit.

(4) Documents; capital improvement contracts.

(i) When a properly completed certificate of capital improvement has been furnished to the contractor, the burden of proving the job or transaction is not taxable and the liability for the tax rests solely upon the customer.

(a) The prime contractor should obtain a certificate of capital improvement from the customer and retain it as part of his records. Copies of such certificate must be furnished to all subcontractors on the job and retained as part of their records.

(b) A certificate of capital improvement may not be issued by a contractor, subcontractor or any other person to a supplier on the purchase of tangible personal property.

Section 541.5(d)(3) of the Sales and Use Tax Regulations provides, in part:

Purchases. Purchases of any tangible personal property ... made by a contractor, subcontractor, or repairman for use or consumption in maintaining, servicing, or repairing real or personal property of others are subject to tax. The contractor is entitled to a refund or credit of tax paid on such materials incorporated into real property where such property is later transferred to the purchaser in conjunction with the performance of a service subject to the tax.

Opinion

Petitioner's purchases from its suppliers constitute retail sales pursuant to Section 1101(b)(4) of the Tax Law and, therefore, are properly subject to tax under Section 1105(a) of the Tax Law. As a contractor, Petitioner is not allowed to use a resale certificate when purchasing tangible personal property for use in performing capital improvement work or repairs and maintenance to real property in accordance with Section 541.1(b) of the Sales and Use Tax Regulations.

Petitioner may not claim a refund or credit for taxes paid on the purchase of tangible personal property used in performing a capital improvement. Petitioner is eligible for a refund or credit in accordance with Section 1119(c) of the Tax Law and Section 541.1(b) of the Sales and Use Tax Regulations for any sales tax paid upon the purchase of tangible personal property used in providing repairs and maintenance services to real property to the extent that the property is transferred to the customer in conjunction with the repair and maintenance service. Petitioner is not eligible for a refund or credit to the extent that the tangible personal property purchased by Petitioner in connection with providing repairs and maintenance services is consumed by Petitioner in the performance of the services and is not transferred to the customer in conjunction with the repair and maintenance service.

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Under Section 1132(c)(2) of the Tax Law and Section 532.5 of the Sales and Use Tax Regulations Petitioner is not required to collect tax from its customer where a Direct Payment Permit is given. Nevertheless, Petitioner may be eligible for a refund or credit in accordance with Section 1119(c) of the Tax Law and Section 541.1(b) of the Sales and Use Tax Regulations of any sales tax paid upon the purchase of tangible personal property used in providing taxable repairs and maintenance services to real property, although Petitioner received a Direct Payment Permit from the company and did not collect tax on the services.

It should be noted that a Direct Payment Permit may not be used to defer payment of sales tax on purchases of services that are clearly taxable. Misuse of a Direct Payment Permit in this manner by the permit holder may be grounds for revocation of the permit. See Section 532.5(g) of the Sales and Use Tax Regulations.

DATED: July 1, 1998

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

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