

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-01(1)S
Sales Tax
January 10, 2001

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S000831A

On August 31, 2000, the Department of Taxation and Finance received a Petition for Advisory Opinion from Carolyn Mazzenga, CPA, 130 Crossways Park Drive, Woodbury, NY 11797.

Petitioner, Carolyn Mazzenga, CPA, has presented the following questions relating to her client's acceptance of resale certificates from customers who are purchasing home improvement materials and whose names contain the word "Contracting" or "Contractor":

- (1) When Petitioner's client receives a resale certificate from a business, what responsibility does it have if the word "Contracting" or "Contractor" is in the customer's name?
- (2) Is Petitioner's client precluded from accepting a resale certificate in good faith if either of these words is contained in the customer's name?
- (3) Is Petitioner's client required to obtain any documentation from such customer substantiating that the customer is legally allowed to give a resale certificate?

Petitioner submitted the following facts as the basis for this Advisory Opinion.

Petitioner's client sells home improvement materials. Its customers include homeowners, contractors, and other retail stores. Petitioner's client always charges sales tax on its sales to homeowners. It receives resale certificates from the retail stores and does not charge them sales tax.

In many situations, Petitioner's client receives resale certificates from businesses that may or may not be contractors. Some retail stores have the word "contracting" in their names. Some contractors do not have the word "contracting" in their names.

Petitioner's client delivers its home improvement materials to a number of different locations including retail stores, homeowners, job sites, and centralized storage areas. Also, the materials may be picked up at Petitioner's client's store. Accordingly, Petitioner's client is not able to determine by the delivery address whether or not a customer is a retail store or a contractor.

In almost all cases, Petitioner's client's home improvement materials are used in capital improvements. It is unlikely that the home improvement materials Petitioner's client sells would be used in a taxable repair.

Applicable Law and Regulations

Section 1101(b)(4)(i) of the Tax Law provides, in part:

. . . 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 . . . 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.
. . . (Emphasis added)

Section 1132 of the Tax Law provides, in part:

(a)(1) Every person required to collect the tax shall collect the tax from the customer when collecting the price . . . to which it applies. . . .

* * *

(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 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, signed by the purchaser and setting forth the purchaser's name and address and, except as otherwise provided by regulation of the commissioner, the number of the purchaser's certificate of authority, together with such other information as the commissioner may require, to the effect that the property or service was purchased for resale or for some use by reason of which the sale is exempt from tax under the provisions of section eleven hundred fifteen, and, where such resale or exemption certificate requires the inclusion of the purchaser's certificate of authority number or other identification number required by regulations of the commissioner, that the purchaser's certificate of authority has not been suspended or revoked and has not expired as provided in section eleven hundred thirty-four, or (ii) the purchaser, not later than ninety days after delivery of the property or the rendition of the service, furnishes to the vendor: any affidavit, statement or additional evidence, documentary or otherwise, which the commissioner may require demonstrating that the purchaser is an exempt organization described in section eleven hundred sixteen, the sale shall

be deemed a taxable sale at retail . . . Where such a resale or exemption certificate or such an affidavit, statement or additional evidence has been furnished to the vendor, the burden of proving that the receipt . . . is not taxable hereunder shall be solely upon the customer. The vendor shall not be required to collect tax from purchasers who furnish a resale or exemption certificate, or such an affidavit, statement or additional evidence in proper form, unless, in the case of a resale or exemption certificate described in clause (i) of the second sentence of this paragraph whereon the purchaser's certificate of authority number, or other identification number required by regulation of the commissioner, is required to be included, such purchaser's certificate of authority is invalid because it has been suspended or revoked as provided in section eleven hundred thirty-four, and the commissioner has furnished registered vendors with information identifying those persons whose certificates of authority have been suspended or revoked, or unless such purchaser's certificate of authority is invalid because it has expired, and the commissioner has provided registered vendors with a means of determining whether such expiration has occurred. Where the vendor accepts such a resale or exemption certificate from a person identified by the commissioner as one whose certificate of authority has been suspended or revoked or from a person whose certificate of authority has been identified as having expired, the receipt . . . from such transaction shall be deemed to be a taxable sale at retail.

Section 526.6 of the Sales and Use Tax Regulations provides, in part:

(a) The term *retail sale* or *sale at retail* means the sale of tangible personal property to any person for any purpose, except as specifically excluded.

(b) *Special rule – sales specifically included as retail sales.* (1) A sale of any tangible personal property to a contractor, subcontractor or repairman for use or consumption in erecting structures or buildings or adding to, altering, improving, maintaining, servicing or repairing real property, property or land, is deemed to be a retail sale, regardless of whether the tangible personal property is to be resold as such before it is used or consumed. . . .

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

* * *

(b) *Burden of proof.* (1) The burden of proving that any receipt . . . is not taxable shall be upon the person required to collect the tax and the customer.

(2) A vendor who in good faith accepts from a purchaser a properly completed exemption certificate or, as authorized by the Department, other documentation evidencing exemption from tax not later than 90 days after delivery of the property or the rendition of the service is relieved of liability for failure to collect the sales tax with respect to that transaction. The timely receipt of the certificate or documentation itself will satisfy the vendor's burden of proving the nontaxability of the transaction and relieve the vendor of responsibility for collecting tax from the customer.

(i) A certificate or other document is "accepted in good faith" when a vendor has no knowledge that the exemption certificate or other document issued by the purchaser is false or is fraudulently presented. If reasonable ordinary due care is exercised, knowledge will not be imputed to the seller required to collect the tax.

* * *

(3) When a vendor has met the criteria in paragraph (2) of this subdivision, it is protected from liability for failure to have collected tax from the purchaser and the burden of proving the nontaxability of such transaction rests solely on the purchaser.

* * *

(5) A vendor is not relieved of the burden of proof when it failed to obtain an exemption certificate or accepted an improper certificate, or had knowledge that the exemption certificate issued by the purchaser was false or fraudulently presented.

* * *

(d) *Resale certificate.* (1) A resale certificate is used to claim exemption from tax on purchases of tangible personal property or services which will be resold or transferred to a customer when the:

(i) tangible personal property is for resale as such or as a physical component part of tangible personal property;

(ii) tangible personal property is for use in performing taxable services under paragraph (1), (2), (3) or (5) of subdivision (c) of section 1105 of the Tax Law where such property becomes a physical component part of the tangible personal property upon which the services are performed or will be actually transferred to the purchaser of the service in conjunction with the performance of the service; or

(iii) service is for resale.

* * *

(5) Contractors who are purchasing tangible personal property for use in performing capital improvement work or repairs on real property are not permitted to use a resale certificate. (Emphasis added)

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. . . .

Opinion

Petitioner has presented three specific questions that actually relate to the general rules that apply to her client's acceptance of resale certificates in lieu of collecting sales tax from customers who are purchasing home improvement materials and whose names contain the word "Contracting" or "Contractor." Petitioner's concerns seem to center primarily on her client's relief from tax liability on transactions which may later prove to be non-exempt.

In accordance with Section 1101(b)(4)(i) of the Tax Law and Section 532.4(d)(5) of the Sales and Use Tax Regulations, contractors are not authorized or permitted to issue Form ST-120, *Resale Certificate*, for purchases of tangible personal property used in performing capital improvement work or repairs to real property. Therefore, Petitioner's client must collect sales tax on all of its sales of materials and supplies made to contractors for these purposes and may not accept resale certificates from contractors for such sales. See Andrew S. Hollander, CPA, Adv Op Comm T&F, December 4, 1997, TSB-A-97(78)S. However, a contractor may be a retailer, if it maintains a retail outlet. A contractor who purchases tangible personal property that is to be resold through a retail outlet may make purchases exempt from tax with a properly completed Form ST-120, *Resale Certificate*.

Petitioner's client, as well as its customers, bears the burden of substantiating sales which are not subject to sales tax. The customer must properly complete and timely submit an exemption certificate to relieve Petitioner's client of its liability to collect the tax. See Section 1132(c)(1) of the Tax Law and Section 532.4(b) of the Sales and Use Tax Regulations. Therefore, if Petitioner's client, in good faith, timely accepts properly completed resale certificates from its customers,

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Petitioner's client is relieved of its liability for failure to collect sales tax with respect to the applicable sales, and the burden of proving that the sales are not taxable rests solely upon the customers. Petitioner's client is not relieved of this duty to collect tax if it has knowledge (i.e., more than a mere suspicion or belief) that the resale certificates are false or fraudulent. See Costco Wholesale Corporation and The Price Co., Inc., Adv Op Comm T&F, March 28, 1997, TSB-A-97(20)S. Where Petitioner's client accepts a resale certificate in good faith, it is under no duty to investigate or police its customers or to debate the taxability of the sales with such customers. See Matter of Saf-Tee Plumbing Corp. v. Tully, 77 AD2d 1; Matter of RAC Corp. v. Gallman, 39 AD2d 57. There is no provision in the Tax Law or the Sales and Use Tax Regulations that requires Petitioner's client to require further substantiation from its customer. Likewise, there is no statutory requirement that Petitioner's client accept a resale certificate if it does not wish to do so.

In conclusion, while a resale certificate that has the word "Contracting" or "Contractor" in the customer's name is not necessarily invalid and may be accepted in good faith, Petitioner's client will not be deemed to have accepted a resale certificate in good faith from a customer if it has knowledge that the customer is a contractor who will use the materials and supplies purchased in performing capital improvement work or repairs on real property. See Andrew S. Hollander, CPA, supra. Whether Petitioner's client has such knowledge is a fact 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. See Jeffrey J. Coren, CPA, Adv Op Comm T&F, November 3, 1999, TSB-A-99(42)S; Costco Wholesale Corporation, supra.

DATED: January 10, 2001

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