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

TSB-A-02(6)S
Sales Tax
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STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. S001024A

On October 24, 2000, the Department of Taxation and Finance received a Petition for Advisory Opinion from Aaron M. Feinberg, 1777 East 10th Street, Brooklyn, New York 11223.

Petitioner, Aaron M. Feinberg, sets forth a number of questions concerning the application of sales and compensating use tax to a contractor's purchase of appliances for a construction project and the subsequent sale and installation of the appliances by the contractor.

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

Petitioner's client (Client) is a construction contractor who primarily installs new kitchens and appliances. Client's customers include hotels, large institutions, tax exempt organizations such as schools and cities, and homeowners. The general construction contract does not separate the cost of the tangible property from the cost of the project. Petitioner presents the following two scenarios involving Client.

Scenario 1

A large institution contracts to install a commercial kitchen, including refrigerators, dishwashers, freezers, ovens, stoves, sinks, cabinets, and hood exhausts. The contract provides for payment as work is being done. When Client receives the appliances from the supplier, a certain percentage of the allocable cost to such appliances is billed to the customer and collected. When the appliances are delivered to the customer, an additional amount is billed and collected. When the appliances are installed additional charges are made so that upon installation approximately 95% of the final amount due has been billed and collected. In some cases, the appliance is installed and can function, but certain racks, handles, or hinges are missing or broken and Client must order and replace them. In some instances, 100% of the cost of the appliances will be billed if the customer "signs off" on that part of the contract. However, after installation of the appliances there will still be other work required under the contract that is not yet complete and will be billed later on a percentage basis. When the contract is almost complete, the customer and Client prepare an "open-list," called a "punch list." Until Client resolves all the items on the punch list, the contract is not completed. Title to the appliances and liability for them remains with Client until the contract is complete.

Scenario 2

Same as in Scenario 1, except that title to the appliances is transferred to the customer by written agreement before completion of the contract, as work is billed. However, Client retains a lien on the appliances, and is fully responsible for all losses (including fire and theft) until the entire project is completed, approved by the customer, and billed in total. Title is transferred before completion of the project because the customers want protection in the event Client goes out of business. Under this scenario, some of Client's customers are tax exempt organizations such as schools or cities.

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:
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> (1) Purchase at retail. A purchase by any person for any purpose other than those set forth in clauses (A) and (B) of subparagraph (i) of paragraph (4) of this subdivision.
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> (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, except that a sale of a new mobile home to a contractor, subcontractor or repairman who, in such capacity, installs such property is not a retail sale. . . .
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> * * *

(5) Sale, selling or purchase. Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume (including, with respect to computer software, merely the right to reproduce), conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor.

* * *

(9) Capital improvement. (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:

Imposition of sales tax. On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax of four percent 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 . . . .

Section 1115(a) of the Tax Law provides, in part:

Receipts from the following shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten:

* * *

(15) Tangible personal property sold to a contractor, subcontractor or repairman for use in (i) erecting a structure or building (A) of an organization described in subdivision (a) of section eleven hundred sixteen or (B) used predominantly either in the production phase of farming or in a commercial horse boarding operation, or in both, or (ii) adding to, altering or improving real property, property or land (A) of such an organization or (B) used predominantly either in the production phase of farming or in a commercial horse boarding operation, or in both, as the terms real property, property or land are defined in the real property tax law; provided, however, no exemption shall exist under this paragraph unless such tangible personal property is to become an integral component part of such structure, building or real property.

(16) Tangible personal property sold to a contractor, subcontractor or repairman for use in maintaining, servicing or repairing real property, property or land (i) of an organization described in subdivision (a) of section eleven hundred sixteen or (ii) used predominantly either in the production phase of farming or in a commercial horse boarding operation, or in both, as the terms real property, property or land are defined in the real property tax law; provided, however, no exemption shall exist under this paragraph unless such tangible personal property is to become an integral component part of such structure, building or real property.

(17) Tangible personal property sold by a contractor, subcontractor or repairman to a person other than an organization described in subdivision (a) of section eleven hundred sixteen, for whom he is adding to, or improving real property, property or land by a capital improvement, or for whom he is about to do any of the foregoing, if such tangible personal property is to become an integral component part of such structure, building or real property; provided, however, that if such sale is

made pursuant to a contract irrevocably entered into before September first, nineteen hundred sixty-nine, no exemption shall exist under this paragraph.

Section 1116(a) of the Tax Law provides, in part:

Except as otherwise provided in this section, any sale or amusement charge by or to any of the following or any use or occupancy by any of the following shall not be subject to the sales and compensating use taxes imposed under this article:

(1) The state of New York, or any of its agencies, instrumentalities, public corporations (including a public corporation created pursuant to agreement or compact with another state or Canada) or political subdivisions where it is the purchaser, user or consumer, or where it is a vendor of services or property of a kind not ordinarily sold by private persons;

* * *

(4) Any corporation, association, trust, or community chest, fund or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation, (except as otherwise provided in subsection (h) of section five hundred one of the United States internal revenue code of nineteen hundred fifty-four, as amended), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office....

Section 541.2(g)(2)(i) of the Sales and Use Tax Regulations provides:

A capital improvement does not include a contract for the sale and installation of tangible personal property which when installed remains tangible personal property.

Section 541.3(d) of the Sales and Use Tax Regulations provides, in part:

Contracts with exempt organizations.

* * *

(2) Purchase for contracts (other than agency contracts).

* * *

(v) Documents. (a) If the customer is a governmental entity, copies of signed contracts and government purchase orders are sufficient evidence to establish the exempt status of the job between the governmental entity and the prime contractor. With respect to the documents required between a prime contractor and the subcontractors, a signed document between them which identifies the project, location and exempt owner, will form the basis for tax exemption of tangible personal property purchased for incorporation into the exempt project. When purchasing such tangible personal property for the exempt project, the contractor or subcontractor will issue a properly completed contractor exempt purchase certificate to the supplier.

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

Contracts with customers other than exempt organizations. (a) The term customers in this classification includes, but is not limited to:

(1) residential customers; and

(2) business customers.

(b) Capital improvements contracts. (1) Purchases. All purchases of tangible personal property (excluding qualifying production machinery and equipment exempt under section 1115(a)(12) of the Tax Law) 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.

* * *

(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.

(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.

> Example 1: A contractor sells a building he has constructed and, as a part of the sale agreement, installs free standing water fountains which remain tangible personal property when installed. The contractor's billing to his customer must separately state all charges for tangible personal property included in the sales agreement. The New York State and applicable local tax rate must be collected on the total charges for the water fountains including any installation charges. In this instance, the contractor may purchase the water fountains tax-free using a contractor exempt purchase certificate. If he

pays the tax to his supplier, he is entitled to a refund or credit of the tax paid on the purchase of the water fountains.

Opinion

Petitioner presented the following questions about Scenarios 1 and 2 described above.

Scenario 1

Question 1. Will free standing dishwashers, refrigerators, ovens, and stoves be subject to New York State Sales tax?

Answer: Yes. Free standing dishwashers, refrigerators, ovens, and stoves qualify as installations of tangible personal property which remain tangible personal property after installation. Such installations do not meet the conditions set forth in Section 1101(b)(9) of the Tax Law to qualify as capital improvements to real property. As stated in Section 541.5(b)(4)(iii) of the Sales and Use Tax Regulations, "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." (Emphasis added) Contractors may purchase such tangible personal property for resale without the payment of sales tax by issuing a properly completed Contractor Exempt Purchase Certificate (Form ST-120.1) to the supplier.

Question 2. If Client pays sales tax on the purchase of these items, will they be subject to any additional tax when included as a part of the total construction job? Client includes a mark-up when pricing the job.

Answer: Client is required to collect tax from its customer on the total amount charged to the customer for the appliances discussed in Question 1, including any mark-up and amounts charged for expenses, whether or not Client has paid tax on its material purchases or issued a properly completed Contractor Exempt Purchase Certificate. If the charge by Client to its customer for the appliances includes the amount of sales tax paid by Client on its purchase of the appliances, then Client must collect tax on the total amount charged for the appliances. If Client pays sales tax when it purchases such tangible personal property, as stated in the answer to Question 1, Client may apply for a refund or credit of the sales tax paid to the supplier. Since Client is entitled to a refund or credit of any sales tax paid on the purchase of appliances which are not capital improvements when installed, Client need not include the tax paid by it in computing its cost of materials when arriving at a price to charge its customer.

Question 3. (a) If the answer to Question 2 is yes, is the original cost of the appliances or Client's marked-up price included in internal estimate calculations used as the taxable base? (b) Is the tax due on completion of the entire project, or when the installation of the appliances is completed and billed?

Answer: (a) When Client bills the customer for the sale of tangible personal property that remains tangible personal property after installation, the total charge by Client to the customer for such tangible personal property, including any markup or expenses, are included in the receipts subject to tax.

(b) The sales tax is due and payable by Client on the sales tax return covering the period in which the contract is completed. Amounts paid to the contractor by his customer prior to the completion of the contract should be treated as amounts paid on account. Tax should be collected from the customer upon completion of the contract with the final billing.

Question 4. If Client uses a Contractor Exempt Purchase Certificate and does not pay sales tax on the purchase of the appliances described in Question 1, is the tax due on this purchase upon completion of the entire project or when the installation of the appliances is completed and billed?

Answer: As noted in the answer to Question 3(b), sales tax due on the sale of the appliances must be collected from the customer upon completion of the project. Client's purchase of these appliances using a Contractor Exempt Purchase Certificate is a purchase for resale and is not subject to tax.

Question 5. Will cabinets, sinks, built-in dishwashers, built-in wall or counter stoves and ovens, built-in refrigerators, walk-in refrigerators and freezers, and ducted hoods be considered part of the entire capital improvement and therefore, not subject to tax when sold to Client's customer?

Answer: Generally, yes. Client's charges to the customer for performing a capital improvement, including charges for these appliances and their installation, are not subject to sales and use tax provided that the conditions set forth in Section 1101(b)(9)(i) of the Tax Law are met. See Sections 1105(c)(3)(iii) and 1115(a)(17) of the Tax Law. Generally, the installation of these items will qualify as capital improvements when installed for the property owner. Client will not be required to collect tax on the sale and installation of these appliances if it accepts in good faith from the customer a properly completed *Certificate of Capital Improvement* (Form ST-124) within 90 days of completion of the contract. See Section 1132(c) of the Tax Law and Sections 532.4 and 541.5(b)(4) of the Sales and Use Tax Regulations. Client is liable for sales tax on purchases of those appliances that qualify as capital improvements when installed. See Section 1101(b)(4)(i) of the Tax Law and Section 541.5(b)(i) of the Sales and Use Tax Regulations. Sales tax paid by Client on these purchases may be included as part of the cost of materials when Client quotes a price to its customer.

It should be noted that commercial installations of stoves, ovens, dishwashers and similar appliances may be done for tenants rather than the property owner. Items which are installed for a tenant which would otherwise be a capital improvement may not qualify as a capital improvement depending on the terms of the tenant's lease. See Matter of Flah's of Syracuse, Inc. v. James H. Tully, Jr. et al, 89 AD 2d 729. Additions or alterations to real property for or by a tenant of such property will be presumed to be temporary in nature for purposes of the definition of capital improvement set forth in Section 1101(b)(9)(i) of the Tax Law, unless a contrary intention is demonstrated. A specific lease provision which states that: 1) immediately upon installation, title to such installation vests in the lessor, and 2) the addition or alteration becomes part of and remains with the premises after the termination of the lease, will demonstrate an intention to make the installation permanent. A provision granting the lessor the right to require removal of the improvement will not negate this demonstration of intention of permanence; nor will a provision which states that the improvement becomes the property of the lessor upon expiration of the lease or upon termination of the tenancy. In the absence of a lease provision, other factors such as the nature of the installation, or written agreements other than a lease provision may be considered in determining the intention of the parties with respect to the permanence of the installation. Factors which may indicate that a tenant installation is not intended to be permanent include a lease provision requiring that the leased premises be restored to its original condition at the termination of the lease; or the rental of the installed property by the tenant from someone other than the lessor of the premises. See Technical Service Bureau Memorandum, Taxable Status of Leasehold Improvements for or by Tenants, June 15, 1983, TSB-M-83(17)S, and Publication 862, Sales and Use Tax Classifications of Capital Improvements and Repairs to Real Property (4/01) for further details.

Question 6. Does Client's liability change if a portion of the contract price remains unpaid by the customer upon completion of the contract?

Answer: No. Client remains liable for sales tax due on the total amount charged to the customer for the sale and installation of appliances that do not qualify as capital improvements. See Section 1132(e) of the Tax Law and Section 534.7 of the Sales and Use Tax Regulations for information concerning refunds and credits of sales tax attributable to bad debts.

Scenario 2

Question 1. Do the answers under Scenario 1 change as a result of title transfer?

Answer: In general, no. With respect to Question 3(b) above, where title to appliances is transferred before completion of the contract and Client retains a lien on the appliances and is responsible for all losses until completion of the project, any applicable tax will generally still be due on completion of the contract with the final billing. However, if it appears from the facts in a particular case that the transfer of title to appliances should be treated as a sale separate and apart

from the rest of the project, Client may be required to remit the tax on the sales tax return for the period in which the sale was made.

Question 2. Do the answers change if the customer is a tax exempt entity?

Answer: Yes. Where Client bills a customer which is exempt from sales tax under 1116(a) of the Tax Law, Client may purchase tangible personal property which is actually transferred to the customer and becomes an integral component part of the project without payment of tax. See Section 1115(a) (15), (16) of the Tax Law. Client should issue a properly completed Contractor Exempt Purchase Certificate (Form ST-120.1) to suppliers. If Client's customer is an exempt governmental entity, Client should keep a signed copy of the contract between Client and the customer as evidence of the exempt status of the project. A signed contract between Client and any subcontractor identifying the project, location and exempt governmental entity will form the basis for tax exemption of tangible personal property purchased by subcontractors for incorporation into the exempt project. In the case of a contract with an exempt organization other than a governmental entity, Client should obtain a properly completed Exempt Organization Certification (Form ST-119.1) from the exempt organization and provide a photocopy of such exemption document to all subcontractors on the project. See Section 541.3(d)(2)(v) of the Sales and Use Tax Regulations.

It should be noted that charges for the sale of tangible personal property, including appliances, and charges for installation of tangible personal property to organizations exempt under Section 1116(a) of the Tax Law are not subject to sales or use tax, regardless of whether the installation qualifies as a capital improvement. Client should receive a properly completed Exempt Organization Certification from the organization claiming exemption, or in the case of a government entity, a government purchase order or other appropriate exemption document. See Part 529 of the Sales and Use Tax Regulations. As discussed above, Client may make tax exempt purchases of tangible personal property for installation into a project for an organization exempt under Section 1116(a) of the Tax Law by providing the supplier or subcontractor with a properly completed Contractor Exempt Purchase Certificate.

DATED: April 12, 2002

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