

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

TSB-A-06(31)S
Sales Tax
December 14, 2006

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S040818B

On August 18, 2004, the Department of Taxation and Finance received a Petition for Advisory Opinion from Mutual Central Alarm Services, Inc., 110 West 46th Street, New York, NY 10036.

The issue raised by Petitioner, Mutual Central Alarm Services, Inc., is whether Petitioner's purchase of burglar and fire alarm equipment that is installed in customers' premises in conjunction with providing a central station monitoring service qualifies for exemption from sales and use tax as a purchase for resale.

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

Petitioner provides commercial customers with security systems with or without monitoring and/or maintenance services for a stated fee. The security systems consist of burglar alarm security systems, fire alarm systems, closed circuit television camera systems, and access control systems.

Burglar alarm systems generally consist of a control panel, keypads, sensors, and electrical wiring. Fire alarm systems generally consist of the same or similar equipment with additional devices such as smoke detectors and pull stations. Closed circuit television systems generally consist of cameras, viewing control stations, monitors, and wiring. Access control systems generally consist of control panels, computer software and hardware, door hardware, and wiring.

The burglar and fire alarm equipment can be provided to Petitioner's customers with or without the customer additionally purchasing the monitoring service. If the customer contracts for the monitoring service, the customer is considered by Petitioner to have purchased the central station alarm service. If the customer leases the equipment but does not also contract for the monitoring service, the customer is considered to have purchased the local alarm service. Petitioner also provides monitoring services to customers who do not receive equipment from Petitioner.

In the case of the local alarm service, the alarm rings only at the customer's premises. In the case of the central station alarm service, the alarm rings in Petitioner's office and a "response person" or the appropriate authority is dispatched to the customer's premises. Customers with either service may also contract with Petitioner for maintenance of the system. The equipment is generally the same whether it is for local alarm service or central station alarm service.

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, 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.

* * *

(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 ... upon:

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

* * *

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

* * *

(8) Protective and detective services, including, but not limited to, all services provided by or through alarm or protective systems of every nature, including, but not limited to, protection against burglary, theft, fire, water damage or any malfunction of industrial processes or any other malfunction of or damage to property or injury to persons, detective agencies, armored car services and guard, patrol and watchman services of every nature other than the performance of such services by a port watchman licensed by the waterfront commission of New York harbor, whether or not tangible personal property is transferred in conjunction therewith.

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.

* * *

(c) *Resale exclusion.* (1) Where a person, in the course of his business operations purchases tangible personal property or services which he intends to sell, either in the form in which purchased, or as a component part of other property or services, the property or services which he has purchased will be considered as purchased for resale, and therefore not subject to tax until he has transferred the property to his customer.

* * *

(2) A sale for resale will be recognized only if the vendor receives a properly completed resale certificate. See sections 532.4 and 532.6 of this Title.

(3) Receipts from the sale of property purchased under a resale certificate are not subject to tax at the time of purchase by the person who will resell the property. The receipts are subject to tax at the time of the retail sale.

* * *

(6) Tangible personal property purchased for use in performing services which are taxable under section 1105(c)(1), (2), (3) and (5) of the Tax Law is purchased for resale and not subject to tax at the time of purchase, where the property so sold (i) becomes a physical component part of the property upon which the services are performed, or (ii) is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax.

Section 541.5 of the New York State Sales and Use Tax Regulations provides, in relevant part:

(b) *Capital Improvement 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 the performance of the contract are subject to tax at the time of purchase by the contractor and 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.

Section 541.5(b)(4)(iii) of the Sales and Use Tax Regulations provides:

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 is in the business of providing burglar and fire alarm equipment and monitoring services to commercial customers. The equipment can be provided by Petitioner separately or in conjunction with a central station alarm service. Petitioner also provides maintenance service for the alarm equipment and monitoring services to customers who do not receive equipment from Petitioner.

When Petitioner installs equipment in conjunction with a customer's contract for Petitioner's central station alarm service, and Petitioner retains ownership or the right to remove the equipment, and if the equipment is not otherwise functional as a local alarm service or in conjunction with central office services offered by other providers, then the installation is considered to be part of the charge for Petitioner's provision of protective services taxable pursuant to section 1105(c)(8) of the Tax Law. In such case, Petitioner is considered to be the user and consumer of the equipment in the performance of Petitioner's service. The property is not considered to be sold or leased to the customer as such or to be actually (i.e. permanently) transferred to the customer in conjunction with the sale of the protective service. See *Waste Management of New York, Inc.*, Dec Tax App Trib, March 21, 1991, DTA No. 805791, aff'd 185 AD2d 479 (3d Dept 1992). Any separate charge for such installation or rental of the equipment is part of the charge for Petitioner's service and is taxable. Since the equipment is consumed by Petitioner in the performance of its service, the purchase of the equipment fails to qualify as a purchase for resale as such or as property actually transferred to the customer in performance of the service for the purposes of section 1101(b)(4)(i) of the Tax Law. See *Baker Protective Services, Inc. d/b/a Wells Fargo Alarm Services, Inc.*, Dec Tax App Trib, November 1, 2001, DTA No. 816899; and *John Lombardi*, Adv Ops Comm T & F, February 27, 2004, TSB-A-04(5)S.

However, when Petitioner installs equipment in conjunction with the customer's contract for Petitioner's central station alarm service, and Petitioner retains ownership or the right to remove the equipment and if the equipment remains functional and could be rented by the customer for use as a local alarm service or in conjunction with central alarm services offered by other providers, then Petitioner is leasing its equipment to customers separate from Petitioner's provision of protective services. Assuming Petitioner's charges for such rentals are reasonable based on Petitioner's charges for like equipment to customers who rent only equipment without also contracting for Petitioner's central station alarm services, the rentals, even when made in conjunction with the provision of central alarm services, qualify as distinct sales or leases to customers separate from the provision of protective services. In these circumstances, the equipment, when installed, does not constitute a capital improvement but retains its identity as

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tangible personal property after installation. Under these circumstances, Petitioner's purchases of the equipment are purchases for resale as such to its customers and are exempt from sales tax. See *Matter of C.I.D. Refuse*, Dec Tax App Trib, August 31, 1995, DTA No. 809934; and section 541.5(b)(4)(iii), Example 1 of the Sales and Use Tax Regulations.

DATED: December 14, 2006

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