

**New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit**

TSB-A-12(18)S
Sales Tax
August 3, 2012

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S110624A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED] (Petitioner). Petitioner asks whether a firm that does not sell or rent out tangible personal property must collect sales tax on the services of installing and dismantling scaffolding, safety netting, hoisting equipment, and temporary pedestrian walkways.

We conclude that the service of installing scaffolding, safety netting, hoisting equipment, and temporary pedestrian walkways is subject to sales tax under either Tax Law sections 1105(c)(3) or 1105(c)(5) when the installation is not a temporary facility at a construction site that is a necessary prerequisite to the construction of a capital improvement to real property. If installation is a temporary facility at a construction site that is a necessary prerequisite to the construction of a capital improvement to real property, the installation service would not be subject to sales tax. Safety netting and temporary pedestrian walkways qualify as temporary facilities. However, mobile scaffolding, cranes and similar hoisting equipment do not qualify as temporary facilities because they constitute construction equipment; therefore, the installation of such equipment would be subject to sales tax even when the installation is done at a capital improvement project. The service of dismantling scaffolding, safety netting, hoisting equipment, and temporary pedestrian walkways is not subject to sales tax.

Facts

Petitioner is currently in the business of providing and installing construction equipment including scaffolding, safety netting, hoisting equipment, and temporary pedestrian walkways for general contractors and property owners at construction sites. Currently, Petitioner provides its services under agreements that include a charge for rental of equipment and all labor to install and dismantle the equipment. Petitioner estimates that 90 percent of the jobs at which it supplies and installs equipment are projects for capital improvements to real property.

A separate company affiliated with the Petitioner (the businesses have common ownership) currently operates a store-front rental business in the same facility in which Petitioner now runs its equipment rental/installation business. The affiliate provides the same equipment as Petitioner, but does not install or dismantle equipment.

Petitioner plans to change its contracting method so that it will operate strictly as a sub-contractor performing installation and related services, i.e., it will no longer rent out any equipment. Under this plan, the affiliate would rent equipment but not offer any services. If a

customer of the affiliate were to need installation and related services, it would have to contract with a firm offering those services. The customer would be free to contract with any firm offering those services. The customer of the affiliate would not be required to contract with Petitioner.

A customer renting equipment from the affiliate would sign a contract with just the affiliate and sign a contract with Petitioner only if Petitioner was hired to perform services.

The affiliate and Petitioner will issue separate invoices if a customer contracts with both entities.

The affiliate and Petitioner will maintain separate books, file separate income tax returns and have separate sales tax registrations.

Analysis

Installing tangible personal property is subject to sales tax under Tax Law section 1105(c)(3). However, the dismantling of tangible personal property is not one of the services taxed under section 1105(c) of the Tax Law. Therefore, Petitioner's charge for dismantling construction equipment such as scaffolding and netting will not be subject to sales tax if the charge is reasonable in relation to the charges for other services provided, the dismantling service may be purchased from Petitioner separately from the other services provided, and the charge is shown separately on the invoice or receipt given to Petitioner's customer. *See* TSB-A-09(9)S.

Tax Law section 1105(c)(3)(iii) excludes the installation of a capital improvement from the sales tax imposed on the receipts for the installation or maintenance of tangible personal property. Likewise, section 1105(c)(5) of the Tax Law also excludes the installation of a capital improvement from the tax on the services of maintaining, servicing, repairing or altering real property.

Section 541.8(a) of the Sales and Use Tax Regulations provides an exclusion from tax for charges for "the installation of materials and the labor" to provide "temporary facilities at construction sites," including temporary pedestrian walkways, where the temporary facility is a necessary prerequisite to the construction of a capital improvement to real property. The taxability of the installation of a temporary facility depends on the nature of the job being performed at the construction site where the facility is installed. Thus, under that regulation, if the job is a capital improvement, then the charges for the installation of the temporary facility is not subject to tax; conversely, if the underlying construction project is a repair to real property, then the charges for the installation of the temporary facility is taxable.

Installed safety netting and temporary pedestrian walkways constitute temporary facilities. Scaffolding that is a fixed structure is a temporary facility. *Cf Matter of L & L Painting Co. Inc.*, Tax Appeals Tribunal, June 2, 2011. However, movable scaffolding (i.e., scaffolding that can be readily moved within a construction site such as scaffolding with wheels)

constitute construction equipment and, thus, would not qualify as a temporary facility. The only types of hoisting systems that would qualify as temporary facilities would be those similar to elevators and other conveyances found in permanent structures. Cranes do not qualify as temporary facilities under this test; they are construction equipment.

The exclusion from sales tax pertaining to temporary facilities only applies to the installation services. The sale or lease of material that is used to construct a temporary facility is subject to sales and use tax as the sale of tangible personal property at retail. *See* TSB-A-09(9)S. Therefore, the leasing of tangible personal property by Petitioner's affiliate would be subject to sales tax. Because a customer may purchase Petitioner's installation service without leasing tangible personal property from the affiliate and a customer may lease tangible personal property from the affiliate without purchasing Petitioner's installation service, the transactions are distinct for purposes of sales tax. *Cf. Matter of C.I.D. Refuse Service, Inc.*, Tax Appeals Tribunal, August 31, 1995.

If Petitioner is installing a temporary facility that is a necessary prerequisite to the construction of a capital improvement to real property, it should obtain from the contractor a copy of the *Certificate of Capital Improvement* that was issued by the contractor's customer. *See* 20 NYCRR § 541.5(a)(4).

DATED: August 3, 2012

/S/

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NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.