

**New York State Department of Taxation and Finance
Office of Counsel**

TSB-A-16(10)S
Sales Tax
March 30, 2016

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S150113A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED] (hereinafter “Petitioner”). Petitioner asks whether the sale and installation of its new product (the “Product”), which is used to organize closets, are subject to sales and use tax.

We conclude that the sale and installation of the Product are subject to sales and use tax because the Product as installed does not constitute a capital improvement to real property.

Facts

Petitioner is a retailer of home organizational products and is introducing the Product to organize customers’ closets. The Product is placed on the floor but is not attached to the floor. It can be enhanced to include drawers, hanging rods, retractable dressing mirrors, tie and belt racks, jewelry trays, hampers and other organizational amenities. Decorative trim can also be added to give the appearance of built-in cabinetry.

The Product is designed to a customer’s specifications using the customer’s closet measurements. After the Product is designed, the customer is billed fifty percent of the total cost for the Product materials and installation charges. Upon receipt of the initial payment, the Petitioner orders the Product from a supplier, who custom builds the components to the design specifications. Once the Product components are built, they are shipped to the customer’s location to be assembled by Petitioner’s subcontractor.

The Product can be positioned against a wall or freestanding in the center of a room. When the Product is placed against a wall, an anti-tip bracket is used to connect it to the wall with two screws. The anti-tip bracket is used to prevent damage and injury from tipping. Generally, one anti-tip bracket is used for each wall. When the Product is free standing, no anti-tip brackets are used.

Rear paneling can also be added when the Product is positioned against the wall to give the appearance of an enclosed cabinet. Without rear paneling, the wall the Product is positioned against is visible between shelves. If rear paneling is used, it is positioned on the floor against the wall and is secured to the wall using 2 or 4 finishing nails to prevent shifting and tipping. After the rear paneling is secured to the wall, the Product is placed on the floor adjacent to the rear paneling and an anti-tip bracket is used to secure the Product to the paneling.

Once the Product installation is complete, the remaining balance due is collected from the customer. Petitioner gives the customer a final receipt that separately states charges for the installation of the Product and Petitioner's cost for purchasing the Product materials from its supplier. Both the installation and Product material costs include a profit markup.

Disassembly and removal of the Product are performed by reversing the installation procedure. When the Product is removed, the only damage to the wall is two screw holes for each anti-tipping bracket installed and two or four small holes from finishing nails if the customer used rear paneling.

Analysis

Sales tax is imposed on the sale, except for resale, of tangible personal property. Tax Law § 1105(a). When tangible personal property has not or will not be subject to sales tax, unless exempted, it is subject to use tax for use within this state. Tax Law § 1110(a). Tangible personal property sold by a contractor who is adding to or improving real property by a capital improvement is exempt from sales and use tax if the tangible personal property is to become an integral component part of the real property. Tax Law § 1115(a)(17). Buildings and other articles and structures are included in the definition of real property. Real Property Tax Law § 102(12).

Additionally, Tax Law § 1105(c) imposes tax upon the receipts from every sale, except for resale, of certain enumerated services. Included in the services subject to sales tax is the service of installing tangible personal property, whether or not any tangible personal property is transferred in conjunction therewith, except where the installed property will constitute an addition or capital improvement to real property. Tax Law § 1105(c)(3). A capital improvement is defined as follows:

- (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.

Tax Law § 1101(b)(9); 20 NYCRR § 541.2(g). Installations will only be capital improvements if they meet all three criteria listed in Tax Law § 1101(b)(9). *See* TSB-A-06(9)S.

When installed by a builder or general contractor in conjunction with the construction of a new home or commercial building, a custom closet storage system permanently attached to withstand loads, and to last the life of the structure, will be deemed part of the capital improvement project and the charges for the sale and installation of the closet storage system by

a contractor will not be subject to sales tax. *See* TSB-A-96(32)S; *see also* TSB-A-06(a)S. However, “[t]he mere anchoring of shelving to an interior wall does not necessarily result in a capital improvement.” TSB-A-96(32)S. Shelving is not a capital improvement to real property if its removal would not cause material damage to the real property or to the shelving itself. *See id.* “[I]t [is] necessary to review the specific manner of installation in each case to determine whether a capital improvement results.” *Id.* Additionally, where shelving is free standing and is only fastened to the wall for safety purposes, the installation would not be intended to be permanent as required by Tax Law § 1101(b)(9)(i)(C). *See* TSB-A-89(15)S.

Here, when the Product is removed, the only damage to the wall is two screw holes for each anti-tipping bracket installed and two or four small holes from finishing nails if the customer used rear paneling. Removal of the Product would not cause material damage to the real property or to the Product as required by Tax Law § 1101(b)(9)(i)(B). *See* TSB-A-96(32)S. Additionally, because the Product is fastened to the wall to prevent damage and injury from tipping, it is not intended to be permanent as required by Tax Law § 1101(b)(9)(i)(C). *See* TSB-A-89(15)S. Therefore, installation of the Product does not result in a capital improvement and the sale and installation of the Product are generally subject to sales and use tax as the sale and installation of tangible personal property. *See* TSB-A-96(32)S.

If the Product is sold to a builder or general contractor in conjunction with a capital improvement project, such as the construction of a new home, then the contractor can use Form ST-120.1 to purchase the Product from Petitioner exempt from sales tax. However, the contractor must collect sales tax on the charge it imposes on its customer for the Product. *See* TB-ST-104.

DATED: March 30, 2016

/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.