

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

TSB-A-16(4)S
Sales Tax
February 22, 2016

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S130305A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED] (“Petitioner”). Petitioner asks whether it may issue resale certificates to New York vendors to allow it to purchase raw materials without paying sales tax. Petitioner also asks whether it must register for sales tax purposes. Finally, Petitioner asks whether it may apply for a refund of tax paid on its purchases of materials if it resells them to its affiliate in New York (“Affiliate”).

We conclude Petitioner must register for sales tax purposes, but may issue resale certificates to its suppliers and not pay tax on purchases of materials that it intends to resell. If Petitioner pays sales tax on materials it purchases and then resells them without using them itself, Petitioner may apply for a refund or credit of New York State or local tax it paid.

Facts

Petitioner operates in Canada as a contractor. Its activities include selling and installing curtain walls, window walls, and other products, solely in Canada. It does not construct, service, repair, or install tangible personal property in New York State. It does not have any payroll or property in New York, other than the raw materials described below. It does not sell any property to anyone in New York other than the raw materials it sells to its affiliate, a manufacturer located in New York (“Affiliate”). Petitioner and Affiliate are related corporations. Petitioner is not currently registered for sales tax purposes in New York.

Petitioner purchases raw materials from third-party vendors located both inside and outside New York. Petitioner has its suppliers drop-ship the materials to Affiliate in New York. In some cases, Petitioner retains ownership of the raw materials while they are stored at Affiliate's warehouse in New York and through Affiliate's manufacturing process. In other cases, Petitioner stores the materials at Affiliate's warehouse and then sells them to Affiliate. Affiliate uses the materials to manufacture the curtain walls, window walls, and other products, and Affiliate then sells the finished products to Petitioner. In either case, Affiliate ships the finished products to Petitioner in Canada, for Petitioner's use in its business there. If Petitioner sells the raw materials to Affiliate, Affiliate pays Petitioner for them by means of inter-company charges. Petitioner pays Affiliate for the finished products, or for its manufacturing services, also by inter-company charges.

Analysis

Tax Law § 1105 (a) imposes sales tax on retail sales of tangible personal property, unless an exemption or exclusion applies. As relevant here, Tax Law § 1101 (b) (4) (i) (A) defines “retail sale” as the sale of tangible personal property to a person for any purpose, other than for resale as such or as a physical component part of tangible personal property. However, a sale of tangible personal property to a contractor for use or consumption in erecting structures or buildings, or building on, or otherwise adding to, altering, improving, maintaining, servicing or repairing real property 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. A person that engages in erecting, constructing, adding to, altering, improving, repairing, servicing, or maintaining, buildings, other structures, or improvements on or to real property is a contractor for sales tax purposes. *See* 20 NYCRR § 541.2 (d).

The sales tax is a "destination tax." The point of delivery or point at which possession is transferred by the vendor to the purchaser, or to the purchaser's designee, controls both the tax incidence and the tax rate. *See* 20 NYCRR § 525.2 (a) (3). Thus, if a vendor sells property and delivers it in this State, New York sales tax would apply, but if the vendor delivers the property to the purchaser outside the State, New York sales tax would not apply.

Tax Law § 1110(a)(A) imposes compensating use tax on the use of any tangible personal property purchased at retail. Section 1101(b)(1) defines “purchase at retail” as a purchase by any person for any purpose other than, as relevant here, for resale as such. Resale “as such,” for purposes of both the sales tax and the use tax, means the person who bought the property for resale does not itself make any use of the property (other than holding it in inventory) before it sells the item, in which case the person can purchase the item for resale, not subject to tax. If the person does make some use of the item, then the person cannot purchase the item for resale. *See, e.g., Matter of Mendoza Fur Dyeing Works, Inc. v. Taylor*, 272 NY 275 (1936).

Petitioner is a contractor with respect to its building activities in Canada. However, Petitioner is not acting as a contractor in New York when it purchases raw materials to be made into finished products by Affiliate in New York. Petitioner’s purchases of raw materials are purchases of tangible personal property, and those purchases would be subject to sales tax, because Petitioner has the materials delivered in New York to its designee, Affiliate, unless an exemption or exclusion exists. If Petitioner retains ownership of the materials during the manufacturing process, it is not reselling them to Affiliate, and the resale exclusion would not apply.

If Petitioner resells materials it purchases to Affiliate, Petitioner would be a vendor required to register for sales tax purposes, because it is making sales of tangible personal property delivered in New York, the receipts from which are taxable. *See* Tax Law §§ 1101 (b) (8), 1131, 1134. As a person registered for sales tax purposes, and notwithstanding that it is a contractor in Canada, Petitioner could purchase the materials for resale, so long as (1) at the time it purchases them it intends to resell them to Affiliate and (2) it does not make any use of the materials itself other than to hold them for resale to Affiliate. Once it is registered, Petitioner may timely give its suppliers a properly completed Form ST-120, *Resale Certificate*, in order to purchase the materials intended exclusively for resale without paying tax. If, at the time it purchases materials, Petitioner does not intend to resell them to Affiliate, or expects that it will use them itself before reselling them, it may not give the supplier a resale certificate. Intent is

generally determined at the time of sale. However, later activities, while not determinative, may be relevant to ascertaining a purchaser's intent at the time of sale. *See Matter of D.J.H. Construction v. Chu*, 145 AD2d 716 (3d Dep't 1988).

Petitioner would be required to collect sales tax when it sells the materials to Affiliate, unless Petitioner timely receives in good faith a properly completed exemption or resale certificate from Affiliate. We note that Petitioner would not be authorized to accept Affiliate's resale certificate in lieu of collecting sales tax from Affiliate, unless Petitioner is registered for sales tax purposes. *See* Tax Law § 1132 (c). To the extent that any sales between Petitioner and Affiliate are taxable, the intercompany charges between them plus any other consideration given or promised to be given, including any charges made by the seller to ship or deliver the property sold, would be the measure on which any tax due would be calculated. *See* Tax Law §§ 1101 (b) (3), 1110 (b).

If Petitioner purchases materials and pays New York State or local tax on its purchases, and it has the materials delivered to Affiliate in New York and resells them to Affiliate, Petitioner may apply for a refund or credit of the New York State or local tax it paid, so long as it does not make any use of the materials other than to hold them for resale. *See* Tax Law § 1139.

In addition to the resale exemption, Petitioner may be entitled to a refund if it retains ownership of the materials but later incorporates them into real property outside New York in its performance of a contract, or if its use of the materials in the State is limited to fabricating tangible personal property (including incorporating the materials into or assembling them with other tangible personal property) that is shipped outside the State for use outside the State. *See* Tax Law § 1119 (a) (1), (4).

DATED: February 22, 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.