

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

The Department of Taxation and Finance received Petitions for Advisory Opinion from [REDACTED] (“Petitioner”) asking whether the installation of curtain walls fabricated by Petitioner and purchased by a contractor for installation in buildings in New York State constitutes a capital improvement. Petitioner also asks whether the tax due on the curtain walls fabricated outside the United States is based only on the cost of its raw materials.¹

We conclude that installation of the curtain walls constitutes a capital improvement, but that Petitioner’s sale of the curtain walls is a retail sale and is subject to sales tax on the entire charge to the contractor.

Facts

Petitioner is a non-US firm that plans, produces, and constructs glass and steel structures, façades and curtain walls that are incorporated into the construction of private and commercial buildings, industrial complexes, bridges and other structures. Curtain walls are permanent outer coverings of a structure that connect to the floors or columns. A curtain walls is designed to resist air, water and light infiltration, thereby reducing the cost of heating, cooling and lighting of a building.

In 2013 and 2015, Petitioner’s curtain wall design was selected to be implemented into two construction projects located in New York State. In both instances, Petitioner fabricated the curtain walls outside the US using the building specifications provided by each of the construction projects’ design teams. Petitioner shipped the curtain walls via a 3rd party trucking company to the project location in New York for installation onto real property by the Façade Contractor (FC) selected by the General Contractor (GC). Neither the GC or FC are subsidiaries of Petitioner. The materials, including the curtain walls, are paid for by the GC. Petitioner states that for both projects, it assigned the supervision of the installation to its wholly owned US subsidiary. Petitioner posits that because it is the fabricator of the curtain walls, it only needs to remit the use tax on the purchases of raw materials used to construct the curtain walls installed into real property in this State and does not owe sales tax on any other portion of the transactions described in its petitions.

Analysis

Tax Law§1105(c)(3) imposes sales tax on the receipts from every installation of tangible personal property but exempts from tax the installation of property that will constitute a capital

¹ Petitioner submitted two petitions describing the same facts and posing the same questions. Both petitions have been consolidated for purposes of this Advisory Opinion.

improvement to real property. Tax Law § 1101(b)(9) defines a capital improvement as an addition to real property that: (A) substantially adds to the value of the real property; (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. *See generally* TSB-A-11(24) S.

The installation of Petitioner's curtain walls onto real property is considered a capital improvement because it satisfies the three-prong test under Tax Law § 1101(b)(9). The installation of Petitioner's curtain walls makes a structure more energy efficient and adds to the value of the real property. Curtain walls are permanently affixed to a building where removal of the curtain walls would cause material damage to the building itself. The curtain walls are intended to be permanent. Accordingly, the installation of Petitioner's curtain walls constitutes a capital improvement. *See* 20 NYCRR 541.1(c) and 541.5(b)(2).

However, the sale of tangible personal property to a contractor for use in construction is a retail sale and subject to sales and use tax, regardless of whether tangible personal property is to be resold as such or incorporated into real property as a capital improvement or a repair. *See* Tax Law § 1101(b)(4)(i); 20 NYCRR 541.1(b). A sale is defined as a "transfer of title or possession or both . . . for a consideration . . ." Here, Petitioner sells curtain walls to the GC. The GC pays Petitioner for the curtain walls, and they are delivered to the GC in New York for installation. Because there is transfer of possession in New York to the GC, and the GC pays for the curtain walls, Petitioner has sold tangible personal property to the GC. And, because the sale of the curtain walls is made to a contractor, it is a retail sale regardless of whether the installation will result in a capital improvement. Petitioner must collect sales and use taxes on the entire amount charged to the GC. *Id.*

Petitioner misunderstands the law and the Department's guidance related to fabrication. There is an exclusion from use tax for the value added by the user of tangible personal property that the user fabricates *and* installs as part of a capital improvement. *See* Tax Law § 1110(e). If a fabricator sells a completed item it fabricated to a contractor, the entire charge to the contractor is subject to sales tax. It is only where a contractor purchases raw materials that it will fabricate into construction materials and install within the State as part of a capital improvement that the use tax applies only to the raw materials and not the value added by the contractor or its employees during the fabrication process. *See* Tax Law § 1110 (e); TSB-A-02(31) S. Because FC – not Petitioner – installs the curtain walls, this provision does not apply and the entire charge for the curtain walls is subject to sales tax.

DATED: June 24, 2024

/s/

MARY ELLEN LADOUCEUR

Principal Attorney

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.