

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-81 (15) S
Sales Tax
September 1, 1981

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S810401E

On April 1, 1981 a Petition for Advisory Opinion was received from A. Tomassi Co., Inc., 9 Valley Road, Port Washington, New York 11050.

Petitioner is an excavating contractor which owns heavy equipment which is both used by it in the performance of capital improvement contracts and rented to others. Ninety per cent of its use is by such leases.

Petitioner raises a number of issues with respect to the application of the Tax Law to its purchase and use of the equipment here referred to. Each issue will be dealt with in turn.

(1) Are Petitioner's purchases of heavy equipment subject to sales tax?

Section 1105(a) of the Tax Law imposes a tax on

"The receipts from every retail sale of tangible personal property, except as otherwise provided in this article "

Section 1101(b)(4)(i) of the Tax Law defines the term "retail sale" as follows:

". . . 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) and (5) of subdivision (c) of section 1105 "

Inasmuch as the equipment in question is used not only for rental purposes but also for the provision by Petitioner of capital improvement services not subject to the sales tax, the sale of the equipment to Petitioner constitutes a retail sale the receipts from which are subject to tax.

(2) May Petitioner use some type of percentage breakdown to determine if it is liable for sales tax on only a portion of the cost of the equipment which it purchases?

The Tax Law contains no provision for a partial resale exclusion where tangible personal property is used for both rental and other purposes. Petitioner must therefore pay sales tax on the entire cost of the heavy equipment it purchases.

(3) What is Petitioner's sales tax liability for the cost of major repairs to the equipment and the cost of replacement parts which have a useful life of more than one year?

Section 1105(c)(3) of the Tax Law imposes a tax on receipts from the sale of the following service:

"Installing tangible personal property, or maintaining, servicing or repairing tangible personal property not held for sale in the regular course of business "

While the equipment repaired is at times rented by Petitioner, the phrase "not held for sale in the regular course of business" means not held exclusively for such sale. Accordingly, the repairs to Petitioner's equipment constitute a service, described in section 1105(c)(3) of the Tax Law, the receipts from which are subject to tax. The receipts from the sale to Petitioner of replacement parts are subject to tax pursuant to section 1105(a) of the Tax Law, quoted above. It is to be noted that while the Tax Law contains certain exemption with respect to repairs to and the purchase of parts for production equipment, these exemptions are applicable to equipment used in the production of tangible personal property for sale. Tax Law §§1105-B,1115(a)(12). Petitioner's equipment is not so used for production and such exemption provisions are accordingly not applicable.

(4) When Petitioner is hired as a sub-contractor to perform a capital improvement, must Petitioner collect sales tax from the general contractor?

The service of performing capital improvements is not subject to sales tax. Accordingly, Petitioner need not collect sales tax from a general contractor when performing a capital improvement contract for it.

(5) Must Petitioner collect sales tax when performing a capital improvement for a homeowner or the owner of a building?

The answer here is the same as in the situation where Petitioner performs a capital improvement for a general contractor. Petitioner does not have to collect sales tax on its receipts for performing capital improvements for owners of homes or other buildings.

(6) When Petitioner rents machinery to the owner of a tract of land who is building a number of homes to sell to the public, is Petitioner liable for collecting sales tax on the rental?

Section 1101(b)(5) defines the term "sale" as "Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume "Rentals of property thus constitute sales of property for purposes of the sales tax. Petitioner's rentals of machinery to builders are therefore retail sales of tangible personal property, and Petitioner must collect sales tax on the receipts from these rentals.

DATED: August 14, 1981

s/LOUIS ETLINGER
Deputy Director
Technical Services Bureau