

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

TSB-A-91 (38)S  
Sales Tax  
May 9, 1991

STATE OF NEW YORK

COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S901219A

On December 19, 1990, a Petition for Advisory Opinion was received from Mark S. Klein, Hodgson, Russ, Andrews, Woods and Goodyear, 1800 One M & T Plaza, Buffalo, New York 14203-2391.

The issues raised by Petitioner, Mark S. Klein, are:

1. Whether Petitioner's client is correctly collecting sales tax from its customer where the customer does not provide a Certificate of Capital Improvement and whether the client may in the future be required to pay a use tax on its original purchase of equipment and supplies.
2. Whether Petitioner's client is correctly accepting a tax exempt certificate where the client believes it has performed a capital improvement and whether the client may in the future be required to pay a use tax on its original purchase of equipment.
3. Whether Petitioner's client can rely upon customer's classification of work that client performs and that, if the customer provides client with a Direct Pay Permit, client can rely upon that Permit in the event it is audited.
4. Whether Petitioner's client when acting as a contractor can purchase for resale repair service of rental equipment used in performing improvements where such service is being resold to its customer as part of a taxable transaction.

X, is a seller of refrigeration, heating and cooling equipment who occasionally provides services (repair or installation work) in connection with the equipment. Since X never knows when its services will be required, it keeps an inventory of items in its offices. All equipment is purchased for resale with the recognition that, if X performs a capital improvement, a use tax is due on all parts and supplies. If X's services are not capital improvements, X charges its customers sales tax for its work. X either receives the tax payment from its customer (and remits it to the Tax Department) or receives an exemption certificate or direct pay certificate, if applicable.

X performs the following transactions:

1. X performs services that it believes are capital improvements. However, its customer either fails or refuses to provide a certificate of capital improvement within 90 days. In these situations, X invoices its customers for tax on the full cost of the job (labor and materials). Petitioner requests confirmation that X is correctly collecting tax from its clients and will not be required to, itself, pay a use tax on its original purchase of equipment and supplies.

2. X performs services that it believes are capital improvements. However, its customer either fails or refuses to provide a certificate or capital improvement within 90 days. Instead, the customer provides an exemption certificate (e.g. stating that the property is used in manufacturing or for research and development) to X. Petitioner requests confirmation that X is correctly accepting tax exempt certificates and will not be required to, itself, pay a use tax on its original purchase of the equipment.

3. X performs services that its clients tell it are not capital improvements. For example, X may install a rooftop air conditioning unit (which is generally considered a capital improvement) but is advised by its customer that it will be removed after one or two years of use without damage to it or the roof. Instead of providing X with a certificate of capital improvement, X's customers provide it with a direct pay permit based on the customer's position that the work does not constitute a capital improvement, because it is not intended to be a capital improvement and is fully taxable, but that it may be exempt on some other basis (e.g. possibly manufacturing equipment or research and development equipment). Petitioner requests confirmation that it may rely on its customer's classification of the work and that, if the customer provides it with a direct pay permit, X can rely upon that permit in the event it is audited.

4. In connection with its services X rents a piece of equipment and charges this cost to its customer. During the performance of its services, the rented property becomes damaged and must be repaired. X is billed for the repair. At the conclusion of the work, X bills its customer for the service, the rental of the equipment and for the repair to the equipment. Petitioner requests confirmation that X may properly purchase the repair service for resale as it is being resold to its customer as part of a taxable transaction.

Section 1132 of the Tax Law provides, in part, as follows:

(c) For the purpose of the proper administration of this article and to prevent evasion of the tax hereby imposed, it shall be presumed that all receipts for property or services of any type mentioned in subdivisions (a), (b), (c) and (d) of section eleven hundred five, . . . are subject to tax until the contrary is established, and the burden of proving that any receipt, . . . is not taxable hereunder shall be upon the person required to collect tax or the customer. .[u]nless (1) a vendor, not later than ninety days after delivery of the property or the rendition of the service, shall have taken from the purchaser a certificate in such form as the tax commission may prescribe.

Section 532.4 of the Sales and Use Tax Regulations provides, in part, as follows:

Presumption of taxability. (a) General. It shall be presumed that all receipts from sales of property or service of any type mentioned in subdivisions (a), (b), (c) and (d) of section 1105 of the Tax Law, all rents for occupancy of the type mentioned in subdivision (e) of said section, and all amusement charges of any type mentioned in subdivision (f) of said section, are subject to tax until the contrary is established.

(b) Burden of proof. (1) The burden of proving that any receipt, amusement charge, or rent is not taxable shall be upon the person required to collect tax or the customer.

(2) When the vendor makes a sale which is exempt because the property purchased is for resale, or for an exempt use, or the purchaser is an exempt organization, as proof of the exemption the vendor shall, at the time of sale, obtain a properly completed exemption certificate from the purchaser and retain the certificate in his files. Such certificate satisfies the vendor's burden of proof.

(3) When the vendor is furnished with a properly completed exemption certificate, the burden of proving a transaction is not taxable shall be solely upon the customer.

(4) The vendor shall not be relieved of the burden of proof when no exemption certificate or an improper certificate has been furnished him, or when the vendor has actual knowledge that a certificate furnished is false or fraudulent.

(c) Use of exemption certificates. (1) To enable purchasers entitled to an exemption from the sales and compensating use tax to avail themselves of the exemption and for administrative purposes, the Department of Taxation and Finance provides various exemption forms, the use of which is governed by the conditions under which they are issued. A vendor is not required to collect tax from a purchaser who furnishes a properly completed exemption certificate.

\* \* \*

(d) Resale certificate. (1) A resale certificate is used to claim exemption from tax on purchases of tangible personal property or services which will be resold or transferred to a customer when the:

(i) tangible personal property is for resale as such or as a physical component part of tangible personal property;

(ii) tangible personal property is for use in performing taxable services under paragraph (1), (2), (3) or (5) of subdivision (c) of section 1105 of the Tax Law where such property becomes a physical component part of the tangible personal property upon which the services are performed or will be actually transferred to the purchaser of the service in conjunction with the performance of the service; or

\* \* \*

(3) When property or services are intended for resale and purchased tax exempt with a resale certificate, but later are used or consumed rather than resold, the purchaser must pay a tax on the purchase price.

\* \* \*

(e) Exempt use certificate. (1) In exempt use certificate is used to claim exemption from State and local sales tax on purchases of tangible personal property or services to be used for an exempt purpose.

\* \* \*

(f) Certificate of capital improvement. (1) A certificate of capital improvement is used to claim exemption from State and local sales tax on the purchase of a capital improvement as defined in section 527.7(a)(2) of this Title.

(2) A certificate of capital improvement is properly completed when it complies with the provisions of paragraph (c)(2) of this section.

Further, Section 541.5(b)(4) of the Sales and Use Tax Regulations provides, in part, as follows:

\* \* \*

(ii) Where a contractor does not receive a capital improvement certificate from a customer, the contract or other records of the transaction will prevail. In such case:

(a) where the contractor does not receive a capital improvement certificate, collects tax on the full invoice price and the job is a capital improvement to real property, the contractor is liable for the tax on the cost of materials incorporated into the job, plus the tax collected from the customer. The customer is entitled to a refund of the tax paid to the contractor, or

(b) where the contractor does not receive a capital improvement certificate, collects no tax on the charges billed to the customer and the job is a capital improvement to real property, the contractor is liable for the tax on the cost of materials incorporated into the job performed.

(iii) If a contract includes the sale of tangible personal property which remains tangible personal property after installation, the contractor must collect the appropriate New York State and local taxes from the customer on the selling price, including any charge for installation, of the tangible personal property unless a

properly completed exemption certificate is issued by the customer. The contractor may apply for a credit or refund of taxes he has paid on purchases of the tangible personal property that remain tangible personal property after installation.

Section 541.9(d)(4) of the Sales and Use Tax Regulations provides:

Charges for repairs on rented or leased equipment and motor vehicles are taxable to the contractor-lessee when the contractor is responsible for any repairs incurred. The contractor owes the tax due on repairs performed on the equipment and motor vehicles made within this State and, if such equipment or motor vehicle is repaired outside this State for a resident contractor, when the equipment or motor vehicle is subsequently returned to this State.

Section 526.5 of the Sales and Use Tax Regulations provides, in part, as follows:

(e) Expenses. All expenses, including telephone and telegraph and other service charges, incurred by a vendor in making a sale, regardless of their taxable status and regardless of whether they are billed to a customer are not deductible from the receipts.

\* \* \*

Example 2: An appliance repairman charges \$10 per hour plus expenses when on a service call. The customer is billed as follows:

3 hrs. at \$10	\$30
Travel	15
Parts	20
Meals	<u>5</u>
Total due	\$70

Receipt subject to tax is \$70

In the matter, Saf-Tee Plumbing v. State Tax Commission, 77 AD2d 1, the court held that where a contractor accepted in good faith a Certificate of Capital Improvement within 90 days of the service performed, the contractor was not under any duty to investigate or police its customer and had no duty to debate with its customer as to what constituted a capital improvement.

Accordingly, pursuant to Section 1132(c) of the Tax Law and Section 532.4 of the Sales and Use Tax Regulations, in transactions "1", "2" and "3" it is incumbent upon the customer to establish that the transaction is exempt from sales tax by presenting X with a properly completed exemption certificate. Pursuant to Section 1132(c) of the Tax Law and Sections 532.4 and 541.5(b)(4) of the Sales and Use Tax Regulations, X must collect sales tax from its customer unless a properly completed exemption certificate is furnished. As set forth in Saf-Tee Plumbing v. State Tax Commission, X is under no duty to investigate or police its customers and has no duty to debate with its customers as to what constitutes a capital improvement. Therefore, when presented with a properly completed exemption certificate, X is not liable for collecting sales tax. However, pursuant

to Section 541.5(b)(4) of the Sales and Use Tax Regulations regardless of whether a customer concurs that X performed a capital improvement, if X performs a capital improvement X is liable for use tax on the cost of material incorporated into the job performed.

Therefore, in transaction "1" X is correct in collecting sales tax from its customer in those cases in which the customer does not present a certificate of capital improvement. However, if the customer pays the sales tax to X on the improvement performed and it is subsequently determined that the work done was a capital improvement and that the customer is entitled to a refund of the sales tax paid to X, then in such a case X would be required to pay use tax based on its cost on the materials incorporated into the capital improvement in accordance with Section 541.5(b)(4)(ii)(a) of the Sales and Use Tax Regulations.

Similarly, in transaction "2" X is correct in not collecting sales tax from its customer in those cases in which the customer presents an exemption certificate. However if it is subsequently determined that the customer was not entitled to issue an exemption certificate, other than a certificate of capital improvement, then in such a case X would be required to pay use tax based on its cost on the materials incorporated into the capital improvement in accordance with Section 541.5(b)(4)(ii)(b) of the Sales and Use Tax Regulations.

Likewise, in transaction "3" X is correct in not collecting sales tax from its customer in those cases in which the customer presents a direct pay permit instead of a capital improvement certificate, based upon the customer's representation that the work done does not constitute a capital improvement. However, if it is subsequently determined that the customer was not entitled to issue a direct pay permit, but should instead have issued a certificate of capital improvement, then X would be required to pay use tax based on its cost on the materials incorporated into the capital improvement in accordance with Section 541.5(b)(4)(ii)(6) of the Sales and Use Tax Regulations.

Concerning transaction "4", if X is acting as a contractor and it leases equipment to perform the contract, and it maintains dominion and control over the equipment, then it must pay sales tax on any repairs that it has done on the equipment pursuant to Section 541.9(d)(4) of the Sales and Use Tax Regulations.

X is required to pay the sales tax on the repair, even if in billing its customer it separately states its charge for the service and its charge for the repair, since the repair is an expense incurred by X in connection with its sale of its service and thus the repair service may not be resold in accordance with Section 526.5(e) of the Sales and Use Tax Regulations.

DATED: May 9, 1991

s/PAUL B. COBURN  
Deputy Director  
Taxpayer Services Division

NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.