

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

TSB-A-98(37)S
Sales Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S970908A

On September 8, 1997, the Department of Taxation and Finance received a Petition for Advisory Opinion from Tractel Ltd. Swingstage Division, 1615 Warden Avenue, Scarborough, Ontario M1R 2T3. Petitioner, Tractel Ltd. Swingstage Division, submitted additional information pertaining to the Petition on November 5, 1997.

Petitioner asks what is the basis to be used to calculate the compensating use tax due on its window washing and maintenance equipment.

Petitioner submits the following facts as the basis for this Advisory Opinion.

Petitioner is a custom manufacturer of window washing and maintenance equipment for high-rise construction. The equipment is designed and manufactured in Petitioner's Scarborough, Ontario plant. Petitioner sells the window washing and maintenance equipment to the general contractor for a high-rise construction project. It is then shipped to the site for installation by an outside subcontractor. The equipment is permanently attached to the building.

The buildings are generally new construction. Occasionally, Petitioner's equipment is used for a retrofit project. Petitioner's engineering staff works with the project architect to design the equipment to building specifications and to New York State Code.

Applicable Law and Regulations

Section 1101(b)(4)(i) of the Tax Law provides, in part, as follows:

... a sale of any tangible personal property to a contractor, subcontractor or repairman for use or consumption in erecting structures or buildings, or building on, or otherwise adding to, altering, improving, maintaining, servicing or repairing real property, property or land, as the terms real property, property or land are defined in the real property tax law, 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
(emphasis added)

Section 1105(a) of the Tax Law imposes sales tax upon the receipts from every retail sale of tangible personal property, except as otherwise provided.

Section 1110 of the Tax Law provides, in part, as follows:

(a) Except to the extent that property or services have already been or will be subject to the sales tax under this article, there is hereby imposed on every person a use tax for the use within this state on and after June first, nineteen hundred seventy-one except as otherwise exempted under this article, (A) of any tangible personal property purchased at retail, (B) of any tangible personal property (other than computer software used by the author or other creator) manufactured, processed or assembled by the user, . . .

(b) For purposes of clause (A) of subdivision (a) of this section, the tax shall be at the rate of four percent of the consideration given or contracted to be given for such property, or for the use of such property, including any charges for shipping or delivery as described in paragraph three of subdivision (b) of section eleven hundred one of this chapter, but excluding any credit for tangible personal property accepted in part payment and intended for resale.

Section 1115(a) (15) of the Tax Law provides:

Tangible personal property sold to a contractor, subcontractor or repairman for use in erecting a structure or building of an organization described in subdivision (a) of section eleven hundred sixteen, or adding to, altering or improving real property, property or land of such an organization, as the terms real property, property or land are defined in the real property tax law; provided, however, no exemption shall exist under this paragraph unless such tangible personal property is to become an integral component part of such structure, building or real property.

Section 1116(a) of the Tax Law provides:

Exempt organizations. (a) Except as otherwise provided in this section, any sale or amusement charge by or to any of the following or any use or occupancy by any of the following shall not be subject to the sales and compensating use taxes imposed under this article:

(1) The state of New York, or any of its agencies, instrumentalities, public corporations (including a public corporation created pursuant to agreement or compact with another state or Canada) or political subdivisions where it is the purchaser, user or consumer, or where it is a vendor of services or property of a kind not ordinarily sold by private persons;

(2) The United States of America, and any of its agencies and instrumentalities, insofar as it is immune from taxation where it is the purchaser, user or consumer, or where it sells services or property of a kind not ordinarily sold by private persons;

(3) The United Nations or any international organization of which the United States of America is a member where it is the purchaser, user or consumer, or where it sells services or property of a kind not ordinarily sold by private persons;

(4) Any corporation, association, trust, or community chest, fund or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation, (except as otherwise provided in subsection (h) of section five hundred one of the United States internal revenue code of nineteen hundred fifty-four, as amended), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office;

(5) A post or organization of past or present members of the armed forces of the United States, or an auxiliary unit or society of, or a trust or foundation for, any such post or organization:

(A) organized in this state,

(B) at least seventy-five percent of the members of which are past or present members of the armed forces of the United States and substantially all of the other members of which are individuals who are cadets or are spouses, widows, or widowers of past or present members of the armed forces of the United States or of cadets, and

(C) no part of the net earnings of which inures to the benefit of any private shareholder or individual; and

(6) The following Indian nations or tribes residing in New York state: Cayuga, Oneida, Onondaga, Poospatuck, Saint Regis Mohawk, Seneca, Shinnecock, Tonawanda and Tuscarora, where it is the purchaser, user or consumer.

(7) A not-for-profit corporation operating as a health maintenance organization subject to the provisions of article forty-four of the public health law.

(8) Cooperative and foreign corporations doing business in this state pursuant to the rural electric cooperative law.

Section 1132(c) of the Tax Law provides, in part:

(1) 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, 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, and the burden of proving that any receipt, amusement charge or rent is not taxable hereunder shall be upon the person required to collect tax or the customer. Except as provided in subdivision (h) or (k) of this section, unless (i) 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 resale or exemption certificate in such form as the commissioner may prescribe, signed by the purchaser and setting forth the purchaser's name and address and, except as otherwise provided by regulation of the commissioner, the number of the purchaser's certificate of authority, together with such other information as the commissioner may require, to the effect that the property or service was purchased for resale or for some use by reason of which the sale is exempt from tax under the provisions of section eleven hundred fifteen, and, where such resale or exemption certificate requires the inclusion of the purchaser's certificate of authority number or other identification number required by regulations of the commissioner, that the purchaser's certificate of authority has not been suspended or revoked and has not expired as provided in section eleven hundred thirty-four . . .

Section 527.7(b)(5) of the Sales and Use Tax Regulations provides as follows:

(5) Any contractor who is making a capital improvement must pay a tax on the cost of materials to him, as he is the ultimate consumer of the tangible personal property.

Section 531.1(a) of the Sales and Use Tax Regulations provides as follows:

(a) Imposition. The compensating use tax is imposed on every person for the use within New York State of tangible personal property and certain services described in subdivision (b) of this section, except to the extent they have been or will be subject to sales tax and except to the extent they are exempt from use tax.

Section 531.3 of the New York State Sales and Use Tax Regulations provides, in part:

Basis of Tax--(a) Tangible personal property purchased at retail. (1) The compensating use tax is due upon the use of tangible personal property in this State which has been purchased out of state. The applicable tax rate is imposed on the consideration given or contracted to be given for the property or the use of the property, including any charges by the seller to the

user for shipping or delivery of the property to the user. Credit is allowed for tangible personal property accepted in part payment and intended for resale in the same manner as the computation of a receipt for sales tax purposes. See section 526.5(f) of this Title.

Opinion

Petitioner is a custom manufacturer of window washing and maintenance equipment for high-rise construction. The equipment is designed and manufactured in its Scarborough, Ontario plant. Petitioner sells the window washing and maintenance equipment to the general contractor for the high-rise buildings. The equipment is then shipped to the construction site for installation by an outside subcontractor. The equipment is permanently attached to the building.

Pursuant to Section 1101(b)(4)(i) of the Tax Law, the sale by Petitioner of its window washing and maintenance equipment to the general contractor for use or consumption in erecting the high-rise building is deemed to be a retail sale of tangible personal property. Pursuant to Section 1110(a)(A) of the Tax Law, the use of tangible personal property purchased at retail, unless otherwise exempt, is subject to compensating use tax. In accordance with Section 1110(b) of the Tax Law and Sections 527.5(b)(5) and 531.3 of the New York State Sales and Use Tax Regulations, the compensating use tax is based on the consideration given or contracted to be given for the tangible personal property, including shipping or delivery charges. If Petitioner qualifies as a vendor under Section 1101(b)(8) of the Tax Law, then Petitioner must collect the sales and compensating use tax from the general contractor for the window washing and maintenance equipment delivered to sites in New York State.

It should be noted, however, that in instances where the window washing and maintenance equipment is to become an integral component part of a building or structure of an exempt organization described in Section 1116(a) of the Tax Law, no sales or use tax would be due. See Section 1115(a)(15) of the Tax Law. If a contractor presents Petitioner with a properly completed Contractor Exempt Purchase Certificate (Form ST-120.1) within 90 days after the date of delivery, Petitioner is not required to collect tax on such sale of tangible personal property. See Section 1132(c) of the Tax Law.

DATED: May 19, 1998

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

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