

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

TSB-A-99(50)S  
Sales Tax  
November 17, 1999

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S990201A

On February 1, 1999, the Department of Taxation and Finance received a Petition for Advisory Opinion from Cover-All Shelter Systems of New York, Inc., RR #1, Lucknow, Ontario, Canada N0G 2H0.

Petitioner, Cover-All Shelter Systems of New York, Inc., submits the following facts as the basis for this Advisory Opinion.

Petitioner is a supplier of economic, alternative buildings called cover-all shelters. The buildings serve a wide variety of applications including hay, straw, commodity and equipment storage; sheep, swine, cattle and other livestock barns; riding arenas; and recycling, manufacturing, warehousing and other commercial, industrial and institutional uses. Specific agricultural uses include storing hay, grain and farm equipment, housing cattle, and serving as horse stables and riding arenas.

These buildings consist of tubular steel truss arches covered by a polyethylene cover. They vary in size, with the minimum being 20 feet by 20 feet. Mounting and foundations vary, although typically the buildings are mounted on the ground by bolting them into concrete foundations or on top of wooden post foundations. They are engineered so that they may be used by customers as permanent buildings, but their design also makes them portable.

In constructing the wood foundation, pressure-treated wooden posts (to which the shelters are bolted) are driven into the ground. The pockets in which the posts are resting are filled with concrete and the entire area is then covered with dirt. The construction of the concrete foundations, with or without the addition of concrete sidewalls, may involve land excavation and the pouring of concrete footings or floors.

Petitioner sets forth six questions, which are found in the opinion portion of this advisory opinion, concerning the application of the New York State sales and use tax law to the sale and/or installation of its cover-all shelters.

**Applicable Law and Regulations**

Section 1101(b)(4)(i) of the Tax Law defines retail sale, in part, as:

A sale of tangible personal property to any person for any purpose, other than (A) for resale as such . . . Notwithstanding the preceding provisions of this subparagraph, 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 . . . 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. . . .

Section 1101(b)(9)(i) of the Tax Law defines the term “capital improvement” to mean:

An addition or alteration to real property which:

(A) Substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property; and

(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.

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

Section 1105(c) of the Tax Law imposes a tax on the receipts from every sale, except for resale, of the following services:

\* \* \*

(3) Installing tangible personal property, excluding a mobile home, or maintaining, servicing or repairing tangible personal property, including a mobile home, not held for sale in the regular course of business, whether or not the services are performed directly or by means of coin-operated equipment or by any other means, and whether or not any tangible personal property is transferred in conjunction therewith, except:

\* \* \*

(iii) for installing property which, when installed, will constitute an addition or capital improvement to real property, property or land, as the terms real property, property or land are defined in the real property tax law as such term capital improvement is defined in paragraph nine of subdivision (b) of section eleven hundred one of this chapter. . . .

\* \* \*

(vi) such services rendered on or after September first, nineteen hundred eighty-two with respect to tangible personal property for use or consumption directly and predominantly in the production for sale of tangible personal property by farming, as such tangible personal property is specified in paragraph six of subdivision (a) of section eleven hundred fifteen of this article. The exemption provided by this subparagraph (vi) shall not apply to the taxes imposed pursuant to section eleven hundred seven of this article.

Section 1110 of the Tax Law provides, in part:

(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 . . . manufactured, processed or assembled by the user, (i) if items of the same kind of tangible personal property are offered for sale by him in the regular course of business or (ii) if items are used as such or incorporated into a structure, building or real property by a contractor, subcontractor or repairman in erecting structures or buildings, or building on, or otherwise adding to, altering, improving, maintaining, servicing or repairing real property . . . if items of the same kind are not offered for sale as such by such contractor, subcontractor or repairman or other user in the regular course of business. . . .

(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. . . .

(c) For purposes of subclause (i) of clause (B) of subdivision (a) of this section, the tax shall be at the rate of four percent of the price at which items of the same kind of tangible personal property are offered for sale by the user, and the mere storage, keeping, retention or withdrawal from storage of tangible personal property by the person who manufactured, processed or assembled such property shall not be deemed a taxable use by him.

(d) For purposes of subclause (ii) of clause (B) 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 the tangible personal property manufactured, processed or

assembled into the tangible personal property the use of which is subject to tax, including any charges for shipping or delivery. . . .

Section 1115(a) of the Tax Law provides, in part:

Receipts from the following shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten:

\* \* \*

(6) Tangible personal property, except property incorporated in a building or structure . . . for use or consumption directly and predominantly in the production for sale of tangible personal property by farming, including stock, dairy , poultry, fruit, fur bearing animal, graping and truck farming. The term farming shall also include ranching, operating nurseries, greenhouses, vineyard trellises or other similar structures used primarily for the raising of agricultural, horticultural, vinicultural, viticultural or floricultural commodities, and operating orchards. In addition, tangible personal property for use in erecting, adding to, altering or improving a silo used in farming to make and store silage on a farm, provided such tangible personal property is to become an integral component part of such silo.

\* \* \*

(17) Tangible personal property sold by a contractor, subcontractor or repairman to a person other than an organization described in subdivision (a) of section eleven hundred sixteen, for whom he is adding to, or improving real property, property or land by a capital improvement, or for whom he is about to do any of the foregoing, if such tangible personal property is to become an integral component part of such structure, building or real property; provided, however, that if such sale is made pursuant to a contract irrevocably entered into before September first, nineteen hundred sixty-nine, no exemption shall exist under this paragraph.

Section 527.5(b)(4) of the Sales and Use Tax Regulations provides:

Tax is not imposed on the charge for installation of tangible personal property which, when installed, will be an addition or capital improvement to real property. . . .

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

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 528.7 of the Sales and Use Tax Regulations provides, in part:

(a) *Exemption.* (1)

(i) All tangible personal property for use or consumption directly and predominantly in the production for sale of tangible personal property by farming, with the exception of property which will be incorporated into a building or structure is exempt from the sales and compensating use tax.

\* \* \*

(2) Effective September 1, 1982, the services of installing, maintaining, servicing and repairing the tangible personal property specified as exempt in paragraph (1) of this subdivision are exempt from the New York State and local sales and compensating use taxes. However, this exemption does not apply to the sales and compensating use taxes imposed in New York City under section 1107 of the Tax Law.  
...

\* \* \*

(4) Tangible personal property and services eligible for exemption may be purchased without payment of tax upon the issuance to the vendor of a timely filed and properly completed Farmer's Exemption Certificate. . . .

Section 541.1(b) of the Sales and Use Tax Regulations provides, in part:

The principal distinguishing feature of a sale to a contractor, as compared to a sale to other vendors who purchase tangible personal property for resale, is that the sale of tangible personal property to a contractor for use or consumption 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 repair. . . .

**Opinion**

The following are the questions presented by Petitioner concerning its activities and the appropriate answers:

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**1. Q. Are these shelters considered real property or tangible personal property pursuant to the New York State sales and use tax law?**

A. An exclusion from the imposition of sales tax is provided in Section 1105(c)(3)(iii) of the Tax Law for an installation of tangible personal property which, when installed, will constitute a capital improvement to real property, property or land. In order for the installation to constitute a capital improvement, it must meet all three criteria of a capital improvement as described in Section 1101(b)(9) of the Tax Law and Section 527.7(a)(3) of the Sales and Use Tax Regulations (see Apco Graphics, Inc., Adv Op Comm T&F, January 28, 1999, TSB-A-99(5)S; Clestra Hauserman, Inc., Adv Op Comm T&F, September 16, 1994, TSB-A-94(43)S). In Petitioner's case, if the shelters in question satisfy the definitional requirements of the term "capital improvement" at the time of installation, then they necessarily become real property and will remain such for purposes of applying the definition of "tangible personal property." See Section 526.8(c)(1) of the Sales and Use Tax Regulations.

The shelters consist of tubular steel truss arches covered by a polyethylene cover. In constructing the shelters, the frame is assembled using bolts rather than permanent welds. The shelters vary in size, with the minimum being 20 feet by 20 feet. Although engineered to be permanent, the shelters are designed to be portable.

The shelters are not capital improvements because they fail to satisfy the second prong of the statutory test in that they do not become part of the real property nor are they permanently affixed to the real property so that their removal would cause damage to the property or to the shelters themselves. The primary method of affixing the shelters to the real property is bolting. This connection can be disassembled by removing the bolts and the shelters can be removed by simply reversing the procedure used to install them. The mere bolting of equipment to real property does not, in and of itself, create the degree of permanence necessary to establish that a particular installation is a capital improvement (see Matter of Charles R. Wood Enterprises, Inc., v. State Tax Commn., 67 AD 2d 1042; Matter of West Mountain Corp. v. Miner, 85 Misc 2d 416). Furthermore, Petitioner states that the shelters are designed to be portable. Structures which can be removed without material damage and transported as an entity or in separate sections lack the degree of permanence necessary to establish that a particular installation is a capital improvement (see Hudson River Estates, Inc., Adv Op Comm T&F, April 5, 1985, TSB-A-85(2)S). Accordingly, the shelters, when installed, do not qualify as capital improvements and their sale and installation are subject to sales and compensating use tax unless they qualify for a specific exemption. For example, the shelters would be exempt if they are used directly and predominantly in farming to produce goods for sale. See Section 1105(c)(3)(vi) of the Tax Law and Section 528.7 of the Sales and Use Tax Regulations.

**2. Q. Is the foundation (wood or concrete) considered real property or tangible personal property pursuant to New York State sales and use tax law?**

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A. If the foundation meets all three criteria of a capital improvement as described in Section 1101(b)(9) of the Tax Law and Section 527.7(a)(3) of the Sales and Use Tax Regulations at the time it is installed, then the foundation constitutes real property, not tangible personal property. If the foundation does not qualify as a capital improvement at the time it is installed, then it would remain tangible personal property.

Petitioner has provided a limited description of some typical, but not all, mounting procedures for the shelters. In constructing the wood foundation, pressure-treated wooden posts (to which the shelters are bolted) are driven into the ground. The pockets in which the posts are resting are filled with concrete and the entire area is then covered with dirt. The construction of concrete foundations, with or without the addition of concrete sidewalls, may involve land excavation and the pouring of concrete footings or floors.

New York State Department of Taxation and Finance Publication 862(5/98), *Sales and Use Tax Classifications of Capital Improvements and Repairs to Real Property*, at page 6, states that the construction of a foundation is a capital improvement to real property. Moreover, foundational supports which require ground excavation into which concrete footings are sunk or concrete slabs are poured, and which cannot be removed without substantial demolition and dismantling, meet each of the criteria for qualification as capital improvements to real property (see Peek 'n Peak Recreation, Inc., Adv Op Comm T&F, July 9, 1987, TSB-A-87(24)S; Multi-View Communications, Inc., Adv Op State Tax Commn., April 30, 1986, TSB-A-86(12)S; Home Cable Concepts, Inc., Adv Op Comm T&F, March 7, 1994, TSB-A-94(5)S).

Accordingly, since the installations of both the wood and the concrete foundations described by Petitioner substantially add to the value of the real property, are permanently affixed to the real property so that removal would cause material damage to the property or to the articles themselves, and are intended to become permanent installations, such installations constitute capital improvements as defined in Section 1101(b)(9)(i) of the Tax Law. However, if by using other installation methods these three criteria are not met, a foundation would not qualify as a capital improvement and would remain tangible personal property.

**3. Q. Can a farmer purchase a shelter (either installed or uninstalled) exempt from sales or use tax for purposes of housing productive farm animals and/or storing hay or grain for productive farm animals?**

A. A sales and use tax exemption is provided with respect to all tangible personal property purchased for use or consumption directly and predominantly in the production of tangible personal property for sale by farming, except tangible personal property incorporated into a building or structure. See Section 1115(a)(6) of the Tax Law and Sections 528.7(c) and (d) of the Sales and Use Tax Regulations. The installation of such property is also excluded from

the imposition of sales or compensating use tax, except where performed in the City of New York. See Section 1105(c)(3)(vi) of the Tax Law and Section 528.7(a)(2) of the Sales and Use Tax Regulations.

New York State Department of Taxation and Finance Publication 844 (5/96), entitled *New York State and Local Sales Tax Information for Farmers*, at page 5, states that taxability of the tangible personal property is determined according to use and method of installation (permanent vs. nonpermanent), and that property which is either portable in nature or is installed to be removable without substantial damage to the property (e.g., attached via removable bolts, etc.) will generally be recognized as nonpermanent. Farming includes breeding, raising and feeding productive farm animals and farm production begins with, in the case of animals, the beginning of the life cycle. See Sections 528.7(b) and (c) of the Sales and Use Tax Regulations. Accordingly, since the shelters in question are designed to be portable and can easily be removed after installation without damage to the shelter or the realty, a farmer's purchase of a shelter, either uninstalled or installed outside of New York City, that is used directly and predominantly (more than 50% of the time) to house and/or store hay or grain for productive farm animals is exempt from sales and compensating use taxes (see *Sales Tax Information for Farmers, supra*). In order to claim this exemption, the farmer must present Petitioner with a properly completed Form ST-125, *Farmer's Exemption Certificate*, within ninety days of the purchase.

It is noted, however, that shelters which are not used directly and predominantly in farming to produce goods for sale, such as a stable, or arena, for riding horses, do not qualify for this exemption (see *Sales Tax Information for Farmers, supra*).

**4. Q. If a farmer purchases a shelter installed, how does New York State sales and use tax apply to the cost of the foundation?**

**A.** The installation of the foundation, as described in Question # 2 above, may result in a capital improvement to real property. Any contractor who is making a capital improvement to real property must pay a tax on the cost of materials to him, as he is the ultimate consumer of the tangible personal property. See Section 527.7(b)(5) of the Sales and Use Tax Regulations. If the foundation qualifies as a capital improvement, Petitioner will not be required to collect sales tax on the charges to the farmer for the foundation, provided the farmer furnishes Petitioner with a properly completed Form ST-124, *Capital Improvement Certificate*. However, Petitioner is required to pay sales tax on its purchases within New York of the materials used or consumed to construct the foundation in accordance with Section 541.1(b) of the Sales and Use Tax Regulations. Petitioner is also required to pay compensating use tax on the cost of materials purchased outside of New York State that are used in New York to construct the foundation.



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If the foundation, as described in Question #2 above, remains tangible personal property, charges by Petitioner for the installation of the foundation (except where performed in the City of New York), as well as charges for the foundation itself, are exempt from sales tax, provided the foundation is used directly and predominantly in farming to produce goods for sale and Petitioner receives a properly completed Form ST-125, *Farmer's Exemption Certificate*, within ninety days of the rendition of the service. See Section 1105(c)(3)(vi) of the Tax Law and Section 528.7(a)(2) of the Sales and Use Tax Regulations.

**5. Q. How does New York State sales and use tax apply to the cost of repairing these shelters? Is the treatment the same for farmers?**

**A.** Pursuant to Section 1105(c)(3) of the Tax Law, the services of maintaining, servicing or repairing tangible personal property are subject to sales tax. However, these services are exempt from tax, except the local tax imposed by the City of New York, if rendered with respect to tangible personal property exempt under Section 1115(a)(6) of the Tax Law. When the shelters qualify for the farmer's exemption under Section 1115(a)(6) of the Tax Law (see Question # 3 above), charges to farmers for the service of repairing the shelters outside of New York City are exempt from tax.

**6. Q. How does New York State sales and use tax apply to the following sales of Petitioner's shelters?**

**a) Sales to a customer as a building kit to be erected by him or someone that he hires.**

**A.** When Petitioner sells a shelter as a building kit to a customer, uninstalled, and such customer will install the shelter or hire a third-party contractor to perform the installation, Petitioner is considered to be selling the customer tangible personal property which is subject to sales and compensating use taxes unless the shelter is for use directly and predominantly in the production of tangible personal property for sale by farming. In that case, sales tax is not due on the sale of the shelter as a building kit, provided Petitioner receives a properly completed Form ST-125, *Farmer's Exemption Certificate*, within ninety days of the sale.

**b) Sales to a customer as a building to be erected by Petitioner's employees.**

**A.** Pursuant to Section 1105(c)(3) of the Tax Law, the installation of tangible personal property is subject to sales tax. Section 1105(c)(3)(vi) of the Tax Law provides an exemption from state and local sales taxes (except local tax imposed by the City of New York) for the purchase of the service of installing tangible personal property used directly and predominantly in the production of tangible personal property for sale by farming. Petitioner's shelters, as described in Question # 3 above, qualify as such tangible personal property since they are

portable in nature and can easily be removed without damage to the shelter or the realty. Accordingly, charges by Petitioner for the installation of the shelters, as well as charges for the shelters themselves, are subject to sales tax unless they are used directly and predominantly in the production for sale of tangible personal property by farming, and Petitioner receives a properly completed Form ST-125, *Farmer's Exemption Certificate*, within ninety days of the rendition of the service. Petitioner can purchase shelter materials exempt from tax by presenting Form ST-120.1, *Contractor Exempt Purchase Certificate*, to its supplier.

Likewise, Petitioner is not required to collect sales tax on the charges to its customer for the sale or installation of a foundation which qualifies as a capital improvement, as described in Question # 2 above, provided the customer furnishes Petitioner with a properly completed Form ST-124, *Capital Improvement Certificate*, within ninety days after completion of the installation. Petitioner, as contractor, would be subject to sales or compensating use tax on its purchase or use of materials used in making such installations as capital improvements. See Section 541.1(b) of the Sales and Use Tax Regulations.

**c. Sales to a customer where Petitioner engages a sub-contractor to erect the building.**

**A.** In this case, Petitioner is acting in the capacity of a prime contractor. If Petitioner's sub-contractor is performing a capital improvement for Petitioner, i.e., the installation of a qualifying foundation, Petitioner is not required to pay sales tax on the charges for the installation, provided it supplies a copy of Form ST-124, *Certificate of Capital Improvement*, to the subcontractor which was issued to Petitioner by the customer. See Section 541.5(b)(4) of the Sales and Use Tax Regulations. However, the subcontractor is required to pay sales or use tax on its purchase or use of materials which are used in installing the foundation.

Installation of the shelters is taxable under Section 1105(c)(3) of the Tax Law unless the shelters are for use directly and predominantly in the production of tangible personal property for sale by farming. Petitioner may purchase such installation for resale to its customer if Petitioner supplies the subcontractor with a properly completed Form ST-120.1, *Contractor Exempt Purchase Certificate*, within ninety days after completion of the installation.

**d. Sales to a dealer for resale to its customer.**

**A.** Petitioner must collect the State and local sales or compensating use tax on all shelter sales delivered to dealers within New York State, unless Petitioner receives a properly completed Form ST-120, *Resale Certificate*, within ninety days of the date of delivery. See Section 1132(c) of the Tax Law and Section 532.4 of the Sales and Use Tax Regulations.

**e. Sales to a contractor for resale and installation to its customer.**

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A. See d. above, except in the case of a contractor, a properly completed Form ST-120.1, *Contractor Exempt Purchase Certificate*, should be furnished to Petitioner in order to make an exempt purchase.

DATED: November 17, 1999

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

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