

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
WILLIAM E. CARL : DETERMINATION
 : DTA NO. 828109
for Revision of a Determination or for Refund of Sales and :
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period August 1, 2014 through January 21, 2016. :

Petitioner, William E. Carl, filed a petition for revision of a determination or for refund of sales and use taxes under articles 28 and 29 of the Tax Law for the period August 1, 2014 through January 21, 2016.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, in Albany, New York, on December 6, 2018, at 10:30 a.m., with all briefs to be submitted by April 23, 2019, which date commenced the six-month period for issuance of this determination. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Justine Clarke Caplan, Esq., of counsel).

ISSUE

Whether petitioner has established that the Division of Taxation erroneously denied his claim for refund of sales tax.

FINDINGS OF FACT

1. On August 1, 2014, petitioner, William E. Carl, placed an order for a 16 foot wide by 28 foot long by 52 inch deep Radiant Oval swimming pool. The swimming pool contract (Contract) entered into between petitioner, as the buyer, and Islander Pools and Spas, Inc.

(Islander), lists on its face the pool size and model, and all of the component swimming pool parts and materials petitioner was purchasing, including the vinyl liner, filter system, plumbing kit, ladder, start-up chemical kit, accessories (skimmer, cleaning equipment, auto chlorinator, solar and winter covers), and alarm. The Contract lists the total price for the foregoing items as \$9,495.00, and sets forth the same in columnar format as follows:

MATERIALS

Sub Total	\$ 9,495.00
Tax <u>8%</u>	<u>759.60</u>
Total	\$10,254.60
Deposit	<u>2,000.00</u>
Balance Due	\$8,254.60

2. The face of the Contract includes a separate section entitled “INSTALLATION: Estimate Only - Not Included in Price of Pool,” beneath which appears the statement “Installation fee is paid directly to the installer, not Islander.” This section lists the estimated cost of installation in columnar format as follows:

LABOR

Pool Install	\$4,700.00
Tax <u>8%</u>	<u>376.00</u>
Balance Due	\$5,076.00

Directly beneath the foregoing information is the statement:

“Expect Installation On or About: 8/19/14 See Reverse”

3. Page 2 of the Contract lists “Additional Terms And Conditions To This Agreement.” The first section, headed “Things Buyer Must Do,” recites obligations of the buyer of the pool. These obligations include deciding upon and marking the pool location, locating underground utilities and other underground items, obtaining a building permit, arranging for gas line and

electrical work, and the like. The following paragraph is set forth under the list of buyer's obligations:

“Islander works closely with the manufacturer and the installer to make your pool installation an easy process. The manufacturer makes all warranties for pool parts. Islander makes no warranties or guarantees, either expressed or implied. *Installation is warranted by the installer under the terms of the agreement between the buyer and the installer. Islander does not assume any responsibility for labor, water or any other miscellaneous costs involved in the project.*”
(emphasis added)

An additional page, entitled “Radiant Pools Slope/Inground Installation Issues,” lists potential matters that may arise during the installation of a Radiant pool, including subsurface issues such as water table control, shale, rock and hard pan soil issues, excess material haul away, fencing, backfill material, access and the like. Review of this page reveals that each of the potential issues are to be discussed and resolved between the buyer and the installer, as opposed to the buyer and Islander.

4. Regarding installation of the pool, petitioner stated that “I did not know who to go to – anybody for installation.” Upon petitioner’s inquiry, Islander recommended Hoyt Development LLC to install the pool. Handwritten on the top of the front page of the Contract is the notation “- Install - Bob - Hoyt Develop.” Petitioner testified to his belief that Islander contacted Mr. Hoyt to arrange for installation. Petitioner noted that Mr. Hoyt was Islander’s recommended installer, and that petitioner did not contact or meet with Mr. Hoyt until he arrived at petitioner’s premises to install the pool.

5. Mr. Hoyt and two assistants arrived at petitioner’s premises on August 19, 2014, the expected installation date set forth on the Contract (*see* finding of fact 2). They proceeded to install the pool, including excavation, wall setup, concrete pouring, plumbing, electrical wiring, deck installation, and the like, using the components purchased by petitioner under the Contract between petitioner and Islander. The installation occurred over two days, August 19 and 20,

2014. As part of completing the pool installation, Hoyt Development LLC hauled away five loads of excess fill, at a cost of \$150.00 per load.

6. Petitioner explained that the type of pool he purchased, a Radiant pool, is capable of being installed as an above-ground pool, or as a partially above-ground pool, or as an entirely in-ground pool. As confirmed by petitioner's testimony, and by a series of photographs showing the process of installation, petitioner's pool was installed as an in-ground pool, whereby the pool walls and braces were bolted together, were fully located below the ground level, and were surrounded (locked in place) by concrete poured around the base of the pool. The pool is surrounded by a block deck set at ground level.¹ As constructed, there is no question that the pool constituted a capital improvement (*see* Tax Law § 1101 [b] [9]).

7. A building permit (No. 201401214) was issued to petitioner by the Town of Colonie, New York, Building Department allowing construction of the pool. This permit, dated August 11, 2014, described the "proposed use" as "Residential - Above Ground Pool." A subsequent correcting letter, dated May 11, 2016, was issued to petitioner by the Building Department, confirming that the pool was mistakenly labeled on the permit as an above ground pool, and that upon inspection, the pool is an in-ground pool.

8. Petitioner issued two checks in payment of the amount he owed to Islander under the Contract. The first, in the amount of \$2,000.00, is dated August 1, 2014, and represents the amount of the deposit called for under the Contract. The second, in the amount of \$8,254.60, is dated August 20, 2014, and represents the remaining amount owed to Islander under the Contract, including sales tax in the amount of \$759.60, as set forth in the Contract.

¹ The photographs of the pool installation process were submitted by petitioner, post-hearing, as anticipated and agreed to at the time of the hearing. The photographs were marked and accepted into evidence, and are labelled as Exhibit 8.

9. As to the cost of installation, petitioner provided a one-page document, bearing the heading "Proposal," and listing Hoyt Development LLC, and Bob Hoyt, with an address in Amsterdam, New York. Petitioner identified this document as his receipt for payment, in cash, of the cost of installation of the pool. The receipt is dated August 19 and 20, 2014, and specifies as follows:

“Excavate and prepare site for new pool installation. Install 16' x 28' Radiant oval in-ground pool. Assemble pump and filter equipment. Rough machine grade and backfill around pool area.	\$4,700
5 loads of excess fill hauled away @ 150 per load.	\$750
Islander Pools Balance	\$8,254.60.”

10. The receipt reflects the total amount paid for installation as \$5,450.00, consisting of the originally estimated installation amount of \$4,700.00, plus the additional amount charged for removal of the excess fill. The amount paid did not include any sales tax, either as computed on the amount actually paid for installation ($\$5,450.00 \times 8\% = \436.00), or as computed based on the estimated cost of installation ($\$4,700.00 \times 8\% = \376.00), as shown on the face of the Contract. The receipt bears the handwritten legend "Paid in Full," and a signature. The signature is illegible, but is presumably that of Bob Hoyt.

11. Petitioner stated that he paid Hoyt Development LLC in cash, and obtained the foregoing receipt as proof of his payment for installation of the pool. Petitioner did not provide any information detailing the reason he paid Islander by checks, but paid Hoyt Development LLC in cash. As to the Islander Pool Balance (\$8,254.60), petitioner stated he was advised by Islander that Mr. Hoyt would collect such amount for Islander when the installation of the pool was completed.

12. Petitioner submitted to the Division of Taxation (Division) an application for refund or credit of sales or use tax (form AU-11). This refund claim is dated as signed by petitioner on December 13, 2015, and seeks a refund in the amount of \$1,135.00. This claimed refund amount equals the \$759.60 amount of sales tax on materials, as shown on the face of the Contract, plus the \$376.00 estimated amount of tax on installation, as also shown on the face of the Contract (the 60 cent difference was apparently ignored).

13. On March 23, 2016, the Division issued to petitioner a refund claim determination notice that denied his claimed refund in full. In explanation, the denial notice stated that “[a]n above ground pool and installation do not qualify as a capital improvement and are taxable.” The Division’s auditor who reviewed petitioner’s refund claim testified that in the course of his review, he contacted Islander by telephone and was advised, upon his inquiry, that Islander does not install pools, but does provide the names of pool installers to its customers.

14. At the hearing, petitioner clarified that he only seeks a refund in the amount of \$759.60, representing the amount of sales tax he paid to Islander on the cost of the swimming pool materials provided and installed. Petitioner does not seek a refund of sales tax on installation charges, and indeed the record makes clear that no sales tax was paid on the cost of installing petitioner’s pool (*see* findings of fact 9 and 10).²

² The difference between the dollar amount of the refund claim, as submitted and as denied (\$1,135.00), versus the amount of refund now sought by petitioner (\$759.60), appears to stem from a misapprehension concerning whether an above-ground or an in-ground pool was, in fact, installed. This confusion may have resulted from the inclusion of tax on the estimated installation cost, as set forth on the face of the Contract, or upon the fact that a Radiant pool may be installed either as an above-ground or as in-ground pool, or upon the type of building permit issued (*see* findings of fact 2, 6 and 7). Each of these factors may have been relevant if the actual decision as to how the pool would be installed was not made until the time of installation, or more obviously, if the pool had been installed as an above-ground pool. In any event, the record is clear that the pool in question is an in-ground pool, constitutes a capital improvement, and that no sales tax was due, imposed or paid on the cost of its installation (*see* findings of fact 6, 10 and 14).

CONCLUSIONS OF LAW

A. In general, sales tax is imposed on the receipts from every retail sale of tangible personal property (*see* Tax Law § 1105 [a]), with tangible personal property purchased for resale excluded from the definition of a retail sale (*see* Tax Law § 1101 [b] [4]). There is no dispute that the component items and materials set forth on the face of the Contract were items of tangible personal property.

B. Sales of tangible personal property to a contractor for use or consumption in construction is a retail sale, and is subject to sales and use tax, regardless of whether such tangible personal property is to be resold as such, or is to be incorporated into real property as a capital improvement or a repair (*see* Tax Law § 1105 [c]; *Matter of Swet*, Tax Appeals Tribunal, February 22, 1991; 20 NYCRR 5431.1 [b]). Purchases of materials that, when installed, will be classified as a capital improvement are taxable, whether a property owner or a contractor buys them (*see* Tax Law § 1101 [b] [4]). Moreover, the sales tax regulation at 20 NYCRR 527.7 (b) (5) provides that “[a]ny contractor who is making a capital improvement must pay tax on the cost of materials to him, as he is the ultimate consumer of the tangible personal property.”

C. Where a contractor purchases tangible personal property for use in performing a capital improvement for a customer, that contractor, as the purchaser, is liable for the sales tax, with the tax typically passed along to the customer as part of the total price for the capital improvement project. Likewise, where a property owner purchases tangible personal property for use in performing a capital improvement, and installs such tangible personal property, either on their own or, as here, through a separate party hired for that purpose, the property owner is the final purchaser of the tangible personal property and is liable for the sales tax due thereon (*see Matter of Costabile, Costabile and Delponte*, Tax Appeals Tribunal, April 14, 2017). Under the

Contract here, Islander sold tangible personal property as a retail seller, to petitioner, and petitioner then employed Hoyt Development LLC to install that tangible personal property in constructing the pool. Petitioner was thus the ultimate purchaser of the tangible personal property, and was liable for the sales tax due thereon, which Islander properly collected from petitioner.

D. Petitioner argues that since the pool qualified as a capital improvement, the materials incorporated therein should be exempt from sales tax. More specifically, petitioner claims that his contract with Islander called for Islander to furnish a complete, installed in-ground swimming pool. That is, petitioner maintains Islander agreed to provide all of the necessary swimming pool component parts and materials, and through its subcontractor, Hoyt Development LLC, installed the same at petitioner's premises. Petitioner thus argues that Islander was the contractor that purchased the necessary tangible personal property (from its supplier), and installed the same at petitioner's premises in a manner that resulted in the construction of a capital improvement. Petitioner's position is that Islander, as the purchaser of the tangible personal property it used or consumed in its construction of a capital improvement, was the party responsible for the payment of tax on its purchases of such tangible personal property. Petitioner maintains that Islander should not have charged or collected tax from petitioner under the Contract, and that he is entitled to a refund of such tax.

E. Petitioner's position is not supported by the Contract, or by the facts of the case. In particular, the Contract between Islander and petitioner clearly identifies and sets forth the price for the component parts and materials required for the construction of the pool, with sales tax imposed thereon. Petitioner is identified as the buyer under the Contract. As to installation of those component parts, the Contract includes a separate section entitled "INSTALLATION:

Estimate Only - Not Included in Price of Pool,” beneath which appears the statement “Installation fee is paid directly to the installer, not Islander.” The facts show that petitioner directly paid Hoyt Development LLC for the cost of installation (*see* findings of fact 9 and 10). In addition, and as detailed in finding of fact 3, the Contract further discusses items that are the buyer’s responsibility, and identifies the same as matters to be discussed and determined by and between the buyer and the buyer’s installer. In particular, the Contract specifies that “[i]nstallation is warranted by the installer under the terms of the agreement between the buyer and the installer. Islander does not assume any responsibility for labor, water or any other miscellaneous costs involved in the project.” The facts that Islander: a) works closely with manufacturers and installers “to make pool installation an easy process;” b) that in this case Islander recommended Hoyt Development LLC to petitioner, in response to petitioner’s admission that “he did not know who to go to for installation;” and c) arranged for Hoyt Development LLC to provide the installation of petitioner’s pool (*see* finding of fact 4), do not establish that Islander was the contractor in the transaction here at issue, or transform the relationship between Islander and Hoyt Development LLC into that of a contractor and subcontractor. Similarly, the fact that Bob Hoyt accepted physical possession of petitioner’s check to Islander in payment of the balance due under the Contract for the component parts and materials petitioner purchased from Islander clearly represents simply an accommodation allowing for the physical transfer of the payment owed to Islander by petitioner. This payment for materials under the Contract between petitioner and Islander is clearly separate and apart from the payment for installation made by petitioner to Hoyt Development LLC.

F. The facts establish that two transactions occurred. First, petitioner purchased, from Islander, tangible personal property, consisting of the component parts and materials necessary

for the construction and installation of a swimming pool. Second, petitioner purchased and paid for the services of Hoyt Development LLC to carry out the installation of those component parts and materials in the construction and installation of a capital improvement, i.e., the pool. As pointed out by the Division, the statute does not provide an exemption from sales tax on the purchase of materials used in the construction of a capital improvement. Therefore, sales tax was properly imposed by Islander on its sale of the pool materials to petitioner as the purchaser of those materials, and such tax was correctly set forth on the Contract. In this case, petitioner was, under the Contract, the purchaser and consumer of the component parts and materials that were installed by Hoyt Development LLC, the entity recommended by Islander and utilized by petitioner to perform the installation of those parts and materials in the construction of the pool. Accordingly, the sales tax petitioner paid on his purchase of the pool component parts from Islander resulted from a purchase of tangible personal property that was subject to tax, and petitioner's claim for refund thereof was properly denied.

G. The petition of William E. Carl is hereby denied and the Division's refund claim determination notice, dated March 23, 2016, is sustained.

DATED: Albany, New York
October 17, 2019

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE