

**New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division**

TSB-A-03(40)S
Sales Tax
November 19, 2003

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S030212A

On February 12, 2003, the Department of Taxation and Finance received a Petition for Advisory Opinion from R. J. Schickler Inc., P. O. Box 32, 370 Scottsville-Chili Road, Scottsville, New York, 14546.

The issue raised by Petitioner, R. J. Schickler Inc., is whether it is entitled to a refund of sales or use tax paid on its purchase of rock salt used as described below.

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

Petitioner provides rock salt spreading service to its customers. Petitioner purchases rock salt in bulk form and spreads the salt on its customers' walkways and driving surfaces. Petitioner has paid sales or use tax on its purchases of rock salt. The rock salt is meant to increase the coefficient of friction of those surfaces even before it begins to chemically act on any existing snow or ice. Petitioner contends that in most cases the rock salt, in bulk form, lasts many times longer than the duration of the act of the spreading service. The rock salt usually is used more as a precautionary measure to increase grip and traction, in a physical manner similar to the use of an aggregate such as sand, rather than as a chemical agent to remove any remaining snow that was not removed by snow blade or push blade. Petitioner may spread the rock salt before the actual buildup of ice occurs. Petitioner bids, sells, and bills its salt spreading service wholly separately from snow removal and plowing.

Applicable law and regulations

Section 1101(b) of the Tax Law provides, in part:

When used in this article for the purposes of the taxes imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and by section eleven hundred ten, the following terms shall mean:

* * *

(3) Receipt. The amount of the sale price of any property and the charge for any service taxable under this article, including gas and gas service and electricity and electric service of whatever nature, valued in money, whether received in money or otherwise, including any amount for which credit is allowed by the vendor to the purchaser, without any deduction for expenses or early payment discounts and also including any charges by the vendor to the purchaser for shipping or delivery. . . .

(4) Retail sale.

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(i) 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), (5), (7) and (8) of subdivision (c) of section eleven hundred five where the property so sold becomes a physical component part of the property upon which the services are performed or where the property so sold is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax. 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, 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

Section 1105 of the Tax Law provides, in part:

Imposition of sales tax -- On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax . . . upon:

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

* * *

(c) The receipts from every sale, except for resale, of the following services:

* * *

(5) Maintaining, servicing or repairing real property, property or land, as such terms are defined in the real property tax law, whether the services are performed in or outside of a building, as distinguished from adding to or improving such real property, property or land, by a capital improvement as such term capital improvement is defined in paragraph nine of subdivision (b) of section eleven hundred one of this article. . . .

Section 1119(c) of the Tax Law provides, in part:

A refund or credit equal to the amount of sales or compensating use tax imposed by this article and pursuant to the authority of article twenty-nine, and paid on the sale or use of tangible personal property, shall be allowed the purchaser where such property is later used by the purchaser in performing a service subject to tax under paragraph (1), (2), (3), (5), (7) or (8) of subdivision (c) of section eleven hundred five or under section eleven hundred ten and such property has become a physical component part of the property upon which the service is performed or has been transferred to the purchaser of the service in conjunction with the performance of the service subject to tax or if a contractor, subcontractor or

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repairman purchases tangible personal property and later makes a retail sale of such tangible personal property, the acquisition of which would not have been a sale at retail to him but for the second to last sentence of subparagraph (i) of paragraph (4) of subdivision (b) of section eleven hundred one. . . .

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

Receipt.

(a) Definition. The word receipt means the amount of the sale price of any property and the charge for any service taxable under articles 28 and 29 of the Tax Law, valued in money, whether received in money or otherwise. The following subdivisions of this section discuss elements of a receipt.

* * *

(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.

Section 526.6 of the Sales and Use Tax Regulations provides, in part:

Retail sale. (a) The term retail sale or sale at retail means the sale of tangible personal property to any person for any purpose, except as specifically excluded.

(b) Special rule--sales specifically included as retail sales.

(1) A sale of any tangible personal property to a contractor, subcontractor or repairman for use or consumption in erecting structures or buildings or 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 used or consumed. . . .

* * *

(c) Resale exclusion.

* * *

(6) Tangible personal property purchased for use in performing services which are taxable under section 1105(c)(1), (2), (3) and (5) of the Tax Law is purchased for resale and not subject to tax at the time of purchase, where the property so sold (i) becomes a physical component part of the property upon which the services are performed, or (ii) is later

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actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax.

Section 527.7 of the Sales and Use Tax Regulations provides, in part:

Maintaining, servicing or repairing real property.

(a) Definitions.

(1) Maintaining, servicing and repairing are terms which are used to cover all activities that relate to keeping real property in a condition of fitness, efficiency, readiness or safety or restoring it to such condition. Among the services included are services on a building itself such as painting; services to the grounds, such as lawn services, tree removal and spraying; trash and garbage removal and sewerage service and snow removal.

* * *

(b) Imposition.

(1) The tax is imposed on receipts from every sale of the services of maintaining, servicing or repairing real property, whether inside or outside of a building.

Opinion

Petitioner contracts with its customers to provide rock salt spreading services, which include the provision of rock salt, on its customers' real property without the provision of snow removal services. Petitioner accomplishes this by spreading rock salt on its customers' driveways, parking lots and walkways or wherever loss of traction caused by ice may be a problem. Petitioner may spread the rock salt before the actual buildup of ice occurs.

Petitioner asserts that its application of rock salt to its customers' real property is not in conjunction with snow removal services and that the rock salt becomes a physical component part of its customers' real property after its application or, in the alternative, the rock salt is resold to Petitioner's customer as such. Petitioner, therefore, contends that tax paid on its purchase of rock salt should be refundable since it purchases the rock salt for resale.

In *Ruston Paving Co.*, Dec State Tax Commn., September 15, 1986, TSB-H-87(222)S, the petitioner provided rock salt spreading service in conjunction with the provision of snow removal services. The petitioner argued that the rock salt was, in effect, purchased by it for resale since the rock salt was transferred by the petitioner to its customers as such. The Tax Commission found that:

. . . the rock salt purchased by petitioner was purchased for use in performing the taxable service of snow removal. Such purchases were therefore clearly not for resale. It is likewise clear that the rock salt did not become a physical component part of petitioner's

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customer's property, nor was the rock salt actually transferred to petitioner's customers in conjunction with the performance of petitioner's snow removal activities. Any rock salt which remained on a customer's property was merely incidental to petitioner's snow removal activities and was of no use to the customer.

While *Ruston Paving Co., supra*, refers specifically to snow removal services, such services are merely one of many services which result in the maintenance of real property. Section 527.7(a)(1) of the Sales and Use Tax Regulations, in part, provides that, "Maintaining, servicing and repairing are terms which are used to cover *all* activities that relate to keeping real property in a condition of fitness, efficiency, readiness or safety or restoring it to such condition. *Among* the services included are services . . . to the grounds, such as . . . snow removal." (Emphasis added.) While the regulation intends to provide some clear examples of what is meant by "maintaining, servicing and repairing," it makes no attempt to provide an all-inclusive list of these activities.

In the instant case, Petitioner clearly performs a maintenance or servicing activity for its customers by applying rock salt to their real property. That the maintenance service performed by Petitioner is not in conjunction with snow removal services is immaterial in determining whether Petitioner's rock salt is a supply purchased for use in a service subject to sales tax under section 1105(c)(5) of the Tax Law. The Tax Commission in *Ruston Paving Co., supra*, determined that rock salt used in maintaining real property does not become a physical component part of the real property. The rock salt is not actually transferred to the owner of the real property in conjunction with the performance of a maintenance service, because the rock salt does not necessarily have a continued value to the customer, since any rock salt applied to snow or ice will quickly dissipate and become useless. The rock salt purchased by Petitioner is, therefore, a supply consumed by Petitioner in the provision of its maintenance service. The rock salt is not a building material which becomes a physical component part of the customer's real property, and is not tangible personal property sold to the customer as such or actually transferred to the customer. Accordingly, Petitioner's purchase of rock salt is for use and consumption in providing its maintenance service, and is subject to sales and use tax without a right to a refund or credit.

Petitioner's entire charges to its customer for rock salt spreading service, including any separately stated charges for supplies such as rock salt, fuel or other expenses incurred by Petitioner, are also subject to sales tax. See sections 1101(b)(3) and 1105(c)(5) of the Tax Law, and section 526.5(e) of the Sales and Use Tax Regulations.

DATED: November 19, 2003

/s/

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