

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Taxpayer Guidance Division

TSB-A-08(31)S
Sales Tax
July 21, 2008

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S070823A

On August 23, 2007, the Department of Taxation and Finance received a Petition for Advisory Opinion from Brian G. Cunningham, Esq., Cunningham & Cunningham LLP, 451 Park Avenue South, New York, New York 10016.

The issue raised by Petitioner, Brian G. Cunningham, Esq., is whether purchases by a general contractor of the services described below are subject to sales tax.

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

Petitioner represents general contractors and subcontractors in the New York City metropolitan area. The majority of projects performed by Petitioner's clients are either office renovations or the construction of new buildings. Projects are performed for either private clients or tax exempt organizations. It is presumed for purposes of this Advisory Opinion that all projects performed are capital improvements to real property.

On all of these capital improvement projects, the general or prime contractor is required by contract to remove trash and debris from the project site. The general contractor enters into a subcontract agreement with a subcontractor to perform this portion of the work. These contracts require the subcontractor to provide containers and dumpsters. The contracts also require the subcontractor to remove the debris from the construction site. This is performed either by emptying the containers into a garbage truck or removing the full dumpsters from the job site.

Some contracts require the subcontractor to provide labor to pick up construction debris on the site and place it in the containers or dumpsters on a daily basis. In other cases, the general contractor will supply the labor to fill the containers and dumpsters. In those cases, the subcontractor's only responsibilities are to supply the containers and dumpsters, empty them into a garbage truck or remove the full dumpsters from the job site, and haul the trash or debris from the project site.

In some cases the contract with the subcontractor indicates that the containers and dumpsters are being rented on a monthly basis to the general contractor, and there is a separate charge by the subcontractor for the actual debris removal service.

Applicable law and regulations

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 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)(2) All services of trash or garbage removal are taxable, whether from inside or outside of a building or vacant land.

Example 3: A carting firm picks up trash and garbage at its customers' premises and dumps the materials at sites away from its customers' premises. Receipts from the sale of this service are taxable.

Example 4: A contractor who is erecting a building engages a carter to haul away the debris resulting from the construction activities. The amounts paid to the carter are not taxable.

Example 5: A contractor enters into an agreement with a farmer to demolish an old farm structure and haul away the resulting debris. The charge for demolition and debris removal is not subject to the tax.

Section 541.5(b)(2) of the Sales and Use Tax Regulations provides:

Labor and material charges. All charges by a contractor to the customer for adding to or improving real property by a capital improvement are not subject to tax provided the customer supplies the contractor with a properly completed certificate of capital improvement.

Section 541.7 of the Sales and Use Tax Regulations provides:

(a) *Services to real property.* A contractor may purchase the service of trash or debris removal without payment of tax as a purchase for resale provided that:

(1) the contractor generated the trash or debris being removed from real property, property or land as a result of the contractor's performance of the service of maintaining, servicing or repairing such real property, property or land;

(2) the contractor's agreement with the owner or authorized occupant of such real property, property or land for whom the contractor performed such service provides that the contractor is responsible to have such trash or debris removed; and

(3) the contractor furnishes to the person performing such trash or debris removal service a properly completed contractor's exempt purchase certificate.

In such circumstances, the contractor's total charges to such owner or authorized occupant for such service of maintaining, servicing or repairing such property and for such trash or debris removal service are subject to tax. However, if the purchaser is an exempt organization described in section 1116(a) of the Tax Law and gives the contractor a properly completed exempt organization certification, then such service would be exempt.

(b) *Capital improvements.* A contractor may purchase the service of trash or debris removal without payment of tax where:

(1) the contractor performs work which constitutes a capital improvement, to real property, property or land;

(2) the contractor generated the trash or debris to be removed from such real property, property or land as a result of such work;

(3) the contractor obtains a properly completed certificate of capital improvement from the contractor's customer; and

(4) the contractor or such customer furnishes a copy of such certificate to the person performing such trash or debris removal service.

Since the contractor's purchase of the trash or debris removal service is in conjunction with the performance of a capital improvement, the contractor's total charge to its customer for the capital improvement is not subject to tax.

Opinion

Petitioner's clients are general contractors who perform capital improvement projects in the New York City metropolitan area. In the course of their capital improvement contracts, these general contractors generate construction debris that must be collected and removed from the construction site in order to allow construction to proceed. In *Building Contractors Ass'n, Inc. v Tully*, (87 AD2d 909), demolition and construction debris removal services in connection with capital improvement projects were determined not to fit within the definition of "maintaining, servicing or repairing real property" because such services did not keep real property in a condition of fitness, efficiency, readiness or safety or restore it to such condition. Rather, such services related to the preparation of a work site for future construction of a capital improvement.

Section 541.7(b) of the Sales and Use Tax Regulations states, in part, that contractors performing capital improvements may purchase the service of trash or debris removal without payment of State and local sales taxes when:

- the contractor performs work which constitutes a capital improvement to real property, property, or land;
- the contractor generated the trash or debris to be removed from the real property, property, or land as a result of the work;
- the contractor obtains a properly completed Certificate of Capital Improvement from the contractor's customer; and,
- the contractor or the customer furnishes a copy of the Certificate of Capital Improvement to the person performing the trash or debris removal service.

In the present case, the contractor's purchase of the trash or debris removal service is in conjunction with the performance of a capital improvement. Accordingly, where a subcontractor is hired to remove debris from a construction site upon which a capital improvement to real property is being performed, such services are considered part of the overall capital improvement service being performed on the real property and receipts from the sale of such services are exempt from sales tax. See section 541.7(b) of the Sales and Use Tax Regulations.

Services which involve collecting the construction debris on the site and placing the debris in containers or dumpsters are not trash or debris removal services. These services are akin to cleaning services. However, when such cleaning services are performed by a subcontractor in conjunction with a capital improvement project, such services are likewise considered as having been performed in conjunction with the capital improvement and are similarly not subject to sales tax. See *Imowitz Koenig & Co., LLP*, Adv Op Comm T & F, December 13, 2002, TSB-A-02(60)S. The general or prime contractor should provide the subcontractor with a photocopy of the *Certificate of Capital Improvement* (Form ST-124) provided to it by the property owner to purchase such cleaning services without payment of sales tax.

Subcontractors may also be engaged in the rental and leasing of dumpsters and other trash receptacles, and separately charge for such rentals. In this case, the dumpsters may remain at the construction site for an extended period and the subcontractor who rented the dumpsters to the general contractor or another subcontractor hired by the general contractor will periodically empty or swap the dumpsters. Receipts from the rental of a dumpster are subject to the sales tax imposed by section 1105(a) of the Tax Law at the rate in effect in the locality where the construction site is located. When a dumpster is provided to the general contractor in conjunction with debris removal services, the dumpster will not be considered to be rented separately to the contractor unless the dumpster may be rented to customers who do not purchase the debris removal services, and there is a specified charge to the customer for the rental of the container and such charge is reasonable. Otherwise, the dumpster will be considered to be provided as part of the debris removal services. If the dumpster is separately rented to the general contractor and the general contractor also purchases debris removal services from the same subcontractor who provides the containers or dumpsters, a separately stated and reasonable charge for debris removal from the construction site in connection with a capital improvement project will not be subject to sales tax. See *Matter of C.I.D. Refuse Service*, Dec Tax App Trib, August 31, 1995, DTA No. 809934.

It should be emphasized that the exemption for debris removal applies only to construction debris removed from the construction site on which it was generated. Otherwise, the removal of debris from another location would not be considered part of the capital improvement project. For example, assume a contractor removes construction debris from construction sites to a dumpster on its own premises, and then has the trash and debris removed by a third party from its premises rather than having it removed from the property upon which

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the contractor was performing the capital improvement. The contractor in this case is not purchasing the service of trash or debris removal service in conjunction with the performance of a capital improvement. Rather, it is purchasing trash and debris removal services which result in the maintenance of the contractor's own property. These services are subject to sales tax as provided for in section 1105(c)(5) of the Tax Law and section 527.7(b)(2) of the Sales and Use Tax Regulations. See *Ronald Webb Builder and Contractor Inc.*, Adv Op Comm T&F, January 24, 2003, TSB-A-03(2)S.

DATED: July 21, 2008

/s/
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NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.