

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

TSB-A-02(60)S
Sales Tax
December 13, 2002

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S011102B

On June 26, 2001, the Department of Taxation and Finance received a Petition for Advisory Opinion from Imowitz Koenig & Co., LLP, 125 Park Avenue, New York, New York 10017.

The issue raised by Petitioner, Imowitz Koenig & Co., is whether cleaning services purchased by its client, XYZ Limited Partnership (XYZ), are subject to sales and compensating use tax when such services are used in completing a capital improvement contract.

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

XYZ is the owner/developer of a luxury condominium building located in New York City. XYZ has entered into an agreement with a contractor to clean all apartment units during the construction of this new residential building.

Cleaning will occur during the completion of the building and prior to the occupancy of the apartment units. This type of cleaning is known in the construction industry as “cleaning-up after the trades.” The purpose of the cleaning is to remove all construction residue from the apartments including packaging and protective materials, plaster, paint, compound and dust.

The agreement between XYZ and the cleaning contractor provides the following:

“The Contractor shall provide all labor and material to clean all apartment interiors. This Scope of Work shall include but not be limited to the following:

- a) Construction clean, (prior to punchlist) of apartment bathrooms, powder rooms, and kitchens. All tile and countertops to be cleaned, inclusive of cabinets and vanities (inside & out). Removal of all packing materials, stickers or protective coatings from cabinetry. A second cleaning (Final) of Kitchens and Bath will occur after punchlist is completed.
- b) Final clean (after punchlist) of apartment interiors, windows and window frames.
- c) Final cleaning includes removal of all dust from cabinets and cabinet drawers. Removal of all packing materials, stickers or protective coatings from all appliances. Includes the removal of any residue left from tape and/or adhesive.

- d) Cleaning of all parts of the bathtubs/shower enclosures, toilets, sinks, mirrors, and medicine cabinets. Included cleaning of marble and tile surfaces.
- e) Remove any excess plaster, paint or compound.
- f) Includes all sweeping, dry mopping of floors.
- g) Includes cleaning of all light fixtures and grilles, closet shelving and mirrored slider doors.
- h) Includes cleaning of hopper window gasket and closing it.
- i) All debris will be placed in plastic bags supplied by contractor and left in an area to be determined.”

The cleaning contract in question relates only to the construction of the new building. Any cleaning required after the construction of the building (i.e., janitorial cleaning or routine maintenance) will be performed either by the owner of the unit or by XYZ under a separate contract.

Applicable Law and Regulations

Section 1101(b)(9) of the Tax Law provides, in part:

Capital improvement. (i) 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(c) of the Tax Law, in part, imposes tax upon:

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

* * *

(3) Installing tangible personal property ... or maintaining, servicing or repairing tangible personal property ... 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 article....

* * *

(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 chapter....

Section 527.7(b)(4) of the Sales and Use Tax Regulations provides, in part:

The imposition of tax on services performed on real property depends on the end result of such service. If the end result of the services is the repair or maintenance of real property, such services are taxable. If the end result of the same service is a capital improvement to the real property, such services are not taxable. (Emphasis added)

Section 541.7(b) of the Sales and Use Tax Regulations provides, in part:

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. (Emphasis added)

Opinion

XYZ is the owner/developer of a luxury condominium building located in New York City. XYZ has entered into an agreement with a contractor to clean the units during the construction of the building.

Cleaning will occur during the completion of construction of the building and prior to the occupancy of the apartment units. This type of cleaning is known in the construction industry as “cleaning-up after the trades.” The purpose of the cleaning is to remove all construction residue from the apartments including packaging and protective materials, plaster, paint, compound and dust.

In Building Contractors Association, Inc. v. Tully, 87 AD2d 909, 449 NYS2d 547, April 1, 1982, TSB-H-78(8.3)S, demolition and construction debris removal services were determined to be related to the preparation of a work site for future construction or part of the ongoing construction of a capital improvement. The court stated in part:

“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” (20 NYCRR 527.7[a][1]) (emphasis added). The removal of debris resulting from demolition or construction at a capital improvement project hardly fits within that definition.

* * *

It is true that the “capital improvement” tax exemption for sales of tangible personal property (Tax Law, §1115, subd. [a], par. [17]) applies only when the personal property becomes part of the realty. . . . Almost by definition, personal property cannot constitute a capital improvement unless it becomes part of the realty. In the case of capital improvement-related services, however, such a physical test cannot be applied, and the Tax Commission has instead incorporated the criterion of the “end result” of the service to determine taxability (20 NYCRR 527.7[b][4]). Since the completion of a capital improvement project generally cannot be accomplished without removal of construction and demolition debris, the services at issue here fall well within the commission’s “end result” test for exemption from the tax. (Emphasis added)

TSB-A-02(60)S
Sales Tax
December 13, 2002

Extending the court's rationale to the facts presented here, the services rendered under the agreement between XYZ and the cleaning contractor during construction will qualify as part of the capital improvement. Under the facts of this Opinion, these services will not be subject to sales tax. Therefore, the charges to XYZ for cleaning services related to construction of the building will be exempt. XYZ should issue a Capital Improvement Certificate to the cleaning contractor.

This opinion does not address the taxability of cleaning services when provided in other circumstances such as in conjunction with repair and maintenance services or as routine janitorial services. Generally, services to real property, including cleaning services, not performed as part of a capital improvement are taxable under Section 1105(c)(5) of the Tax Law.

DATED: December 13, 2002

/s/
Jonathan Pessen
Tax Regulations Specialist IV
Technical Services Division

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