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

TSB-A-03(47)S
Sales Tax
December 31, 2003

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. S030422C

On April 22, 2003, the Department of Taxation and Finance received a Petition for Advisory Opinion from Brendan P. McCafferty, Esq., CPA, 613 Ashland Avenue, Buffalo, New York 14222.

The issues raised by Petitioner, Brendan P. McCafferty, Esq., CPA, are:

1. Whether charges by a trucking company to a construction contractor under the circumstances described below are subject to sales tax.

2. What documentation must be obtained by the trucking company to substantiate the exempt nature of a transaction.

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

"Truck Co." is a trucking services company and "Contractor" is a general construction contractor. Both entities operate in and are qualified to do business in New York State. All the construction work being performed by Contractor qualifies as a capital improvement to realty under Article 28 of the Tax Law.

Truck Co. provides dump trucks and drivers for hire to Contractor. The drivers do not perform any activities other than operation of the trucks. Truck Co. charges for the use of the trucks and operators by the hour and states the hourly charges for the trucks and the drivers separately on customer invoices. The material hauled by the truck and driver is not purchased or resold by Truck Co. and at no time is the material the property of Truck Co.

Truck Co. owns the fleet of dump trucks. Truck Co. is responsible for all costs of operating and maintaining the trucks, including fuel, maintenance, registration and insurance, as well as the salaries and other compensation for the truck drivers. The truck drivers are employees of Truck Co. and Truck Co. retains the right to hire and fire the drivers. Amounts billed to Contractor for the drivers' services reasonably represent the drivers' actual compensation.

Contractor hires a truck and driver from Truck Co. to haul excess dirt fill, excess concrete, or other refuse from an excavation at either a residential or commercial construction site managed by Contractor. Contractor instructs the driver that the fill is to be removed from the site and may or may not provide the driver with instructions regarding disposition of the fill. When the driver does not receive instructions regarding disposition of the fill, the driver hauls the fill to a site of his/her own choosing or to one designated by Truck Co.

In some instances, the truck and driver are contracted to operate at a construction site moving material from one location on the site to another, all at the direction of Contractor.

Petitioner inquires whether the sales tax consequences would be different if Truck Co. subcontracts the hauling job to a single independent owner/operator or a trucking service company that owns a fleet of dump trucks operated by its employees. Truck Co. in such case would arrange with its trucking subcontractor to provide trucks and drivers on specific jobs, and would bill Contractor for each job. The trucking subcontractors would in turn bill Truck Co. for their trucks and services.

Petitioner further inquires whether the sales tax consequences would be different if the above described work were performed on property owned by an entity exempt pursuant to section 1116(a) of the Tax Law, and what documents would be appropriate to substantiate the exempt nature of the transaction.

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:
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> * * *
>
> (4) Retail sale. (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, except that a sale of a new mobile home to a contractor, subcontractor or repairman who, in such capacity, installs such property is not a retail sale....

* * *

(5) Sale, selling or purchase. Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume . . . conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor.

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:

* * *

(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; . . .

* * *

(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 526.5(g) of the Sales and Use Tax Regulations provides, in part:

Shipping or delivery.

* * *

(3) A charge for transporting or delivering property by a transportation or delivery company to the person or business requesting that the property be transported or delivered is not a receipt subject to tax, since transportation and delivery are not themselves services subject to tax.

* * *

Example 6: A delivery service company makes available to the general public an area in its warehouse where customers may drop off packages to be delivered to persons or businesses in the United States for a fee. The customer dropping off a package for delivery is required to complete an invoice stating his or her name and address, the name and address where such package is to be delivered, and the contents and value of the package. The delivery service company charges a fee to the customer for delivering the package. This fee is based on the weight and value of the package and the distance it is to be delivered. The company's charge to the customer for shipping the package is not subject to sales tax. This is purely a transportation service, which is not a taxable service.

Section 526.7 of the Sales and Use Tax Regulations provides, in part:

(a) Definition. (1) The words sale, selling or purchase mean any transaction in which there is a transfer of title or possession, or both, of tangible personal property for a consideration.

(2) Among the transactions included in the words sale, selling or purchase are exchanges, barters, rentals, leases or licenses to use or consume tangible personal property.

* * *

(c) Rentals, leases, licenses to use. (1) The terms rental, lease and license to use refer to all transactions in which there is a transfer for a consideration of possession of tangible personal property without a transfer of title to the property. Whether a transaction is a "sale"

or a "rental, lease or license to use" shall be determined in accordance with the provisions of the agreement....

* * *

(e) Transfer of possession. (1) Except as otherwise provided in paragraph (3) of this subdivision, a sale is taxable at the place where the tangible personal property or service is delivered, or the point at which possession is transferred by the vendor to the purchaser or his designee.

* * *

(4) Transfer of possession with respect to a rental, lease or license to use, means that one of the following attributes of property ownership has been transferred:

(i) custody or possession of the tangible personal property, actual or constructive;

(ii) the right to custody or possession of the tangible personal property;

(iii) the right to use, or control or direct the use of, tangible personal property.

* * *

(6) When a lease of equipment includes the services of an operator, possession is deemed to be transferred where the lessee has the right to direct and control the use of the equipment. The operator's wages, when separately stated, are excludible from the receipt of the lease, provided they reflect prevailing wage rates.

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.

* * *

(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.

* * *

(4) 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.

Section 541.2 of the Sales and Use Tax Regulations provides, in part:

Definitions. The words, terms and phrases used in this Part have the following definitions except when the context clearly indicates a different meaning:

* * *

(d) A construction contractor means any person who engages in erecting, constructing, adding to, altering, improving, repairing, servicing, maintaining, demolishing or excavating any building or other structure, property, development, or other improvement on or to real property, property or land.

(e) Contractor means a construction contractor, subcontractor or repairman.

* * *

(p) Rental, lease and license to use. (1) The terms rental, lease and license to use refer to all transactions in which there is a transfer of possession of tangible personal property without a transfer of title to the property.

(2) For the purposes of this Part, when a rental, lease or license to use a vehicle or equipment includes the services of a driver or operator, such transaction is presumptively the sale of a service, rather than the rental of tangible personal property, where dominion and control over the vehicle or equipment remain with the owner or lessor of the vehicle or equipment. Dominion and control remain with the owner or lessor of the vehicle or equipment when pursuant to an agreement or contract the lessor:

(i) does not transfer possession, control and/or use of the equipment or vehicle to the lessee during the term of the agreement or contract;

(ii) maintains the right to hire and fire the drivers and operators;

(iii) uses his own discretion in performing the work (even though the lessee may designate the area where material is to be picked up and delivered) and generally selects his own routes;

(iv) retains responsibility for the operation of the equipment or vehicle; and

(v) directs the work, pays all operating expenses, including drivers' and/or operators' wages, insurance, tolls and fuels.

Whether a transaction is a sale (license to use, rental or lease) of a vehicle or equipment or is the sale of a service, such as a transportation service, must be determined in accordance with the facts and circumstances of the particular transaction and provisions of the agreement between the contractor and his customer.

Example 6: A company enters into an agreement to lease a crane, together with the services of the operator of the crane. The operator will take instructions from the company's foreman, and the company determines the working hours and locations. The operator's wages are separately stated. This transaction is within the definition of sale, as the transfer of possession has occurred by reason of the company foreman's right to direct and control the operator's use of the equipment. The separately stated operator's wages are excludable from the taxable receipts.

Section 541.3 of the Sales and Use Tax Regulations provides, in part:

(d) Contracts with exempt organizations.

* * *

(2) Purchase for contracts (other than agency contracts).

* * *

(iv) Except for agency contracts, contractors' purchases of construction supplies which do not become part of an exempt organization's real property and are used or consumed by the contractor, as well as purchases of taxable services, such as electricity used by the contractor, are subject to the tax.

The following types of property and services are representative, but not intended to be all-inclusive, of contractor's purchases which are subject to tax, irrespective of whether the contractor has a time and material, lump sum, or other type of contract (except agency contract), with an exempt organization:

(a) construction machinery and equipment, including rentals and repair parts;

* * *

Example 8: Equipment rentals under the dominion and control of the contractor, such as rentals of cranes, bulldozers, backhoes, etc. for use in building a structure for an exempt organization are subject to tax.

Section 541.5 of the Sales and Use Tax Regulations provides, in part:

Contracts with customers other than exempt organizations.

* * *

(b) Capital improvements contracts.

* * *

(4) Documents; capital improvement contracts.

(i) When a properly completed certificate of capital improvement has been furnished to the contractor, the burden of proving the job or transaction is not taxable and the liability for the tax rests solely upon the customer.

(a) The prime contractor should obtain a certificate of capital improvement from the customer and retain it as part of his records. Copies of such certificate must be furnished to all subcontractors on the job and retained as part of their records.

Section 541.7 of the Sales and Use Tax Regulations provides:

Trash and debris removal.

(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.

Section 541.9 of the Sales and Use Tax Regulations provides, in part:

Contractor's purchase, rental, repair, and use of equipment and vehicles.

(a) General. The purchase, rental, lease or license to use construction equipment and motor vehicles by a contractor is subject to sales and use tax.

* * *

(c) Rentals and leases of equipment and motor vehicles to contractors. (1) Rentals and leases of equipment to contractors.

* * *

(ii) When dominion and control of equipment supplied with an operator or driver remains with the lessor, there is no rental or lease of equipment to the contractor, but the service performed may be subject to the tax pursuant to section 1105(c)(3) and (5) of the Tax Law. The method of payment (for example, a rate per hour, day, week, month, or job or trip) is not relevant in determining whether the transaction is a service or a taxable rental or lease of equipment.

* * *

(2) Contractor rentals and leases of motor vehicles.

* * *

(iv) When dominion and control of a motor vehicle furnished with a driver transfers to the contractor, there is a rental or lease of tangible personal property and the charge is subject to the tax. If the driver's and any helper's wages are separately stated and reasonable in relation to prevailing wage rates, such wages may be excluded from the receipts subject to the tax. If the driver's and helper's wages are not separately stated the total charge is subject to the tax. If the driver's and helper's wages are not reasonable in relation to prevailing wage rates, the "wages" must be included in the receipts subject to the tax until the contractor satisfies his burden, under section 1132(c) of the Tax Law, of proving that the taxable receipts are less than the total charge.

Opinion

Truck Co. provides dump trucks and drivers for hire to Contractor. The drivers do not perform any activities other than operation of the trucks. Truck Co. charges for the use of the trucks and drivers by the hour and states the hourly charges for the trucks and the drivers separately on customer invoices. The material hauled by the truck and driver is not purchased or resold by Truck Co. and at no time is the material the property of Truck Co.

A threshold question in regard to the application of the sales and use tax to the transactions between Truck Co. and Contractor is whether the transaction amounts to a lease or a license to use the trucks provided along with the provision of a driver, or whether the transaction is properly viewed as a sale of services with no lease of equipment.

Whether a transaction where both trucks and drivers are furnished constitutes the rental of tangible personal property or the sale of a service is a question of fact that can only be decided after review of all the facts and circumstances. Whether Contractor purchases services or rents equipment will depend upon its contract with Truck Co. and the facts and circumstances of the transaction. See section 541.2(p)(2) of the Sales and Use Tax Regulations. The key issue is whether Truck Co., in providing the trucks and drivers, is maintaining dominion and control over the trucks or relinquishing dominion and control to Contractor.

Truck Co. is responsible for all costs of operating and maintaining the trucks, including fuel, maintenance, registration and insurance, as well as the salaries and other compensation for the truck drivers. The truck drivers are employees of Truck Co. and Truck Co. retains the right to hire and fire the drivers. These facts suggest that Truck Co. does not transfer dominion and control of the trucks to Contractor. If, in addition to these facts, Truck Co. does not transfer possession, control and/or use of the trucks to Contractor during the term of the agreement or contract, the drivers employed by Truck Co. use their own discretion in performing the work (even though Contractor may designate the area where material is to be picked up and delivered) and Truck Co. retains responsibility for the operation of the trucks, there would be additional support for the conclusion that Truck Co. does not transfer dominion and control of the trucks to Contractor. See section 541.2(p) of the Sales and Use Tax Regulations.

Truck Co. charges for the use of the trucks and operators by the hour and states the hourly charges for the trucks and the drivers separately on the invoice. Amounts billed to Contractor for the drivers' services reasonably represent the drivers' actual compensation. Transportation services are generally computed by the trip, distance, amount of freight being hauled and other factors not related to the amount of time the truck and driver will be available to Contractor. Trash removal services are also generally computed from information regarding the weight or volume of trash being removed from the property. Contractor appears to pay hourly charges whether or not the trucks and drivers are idle or working. However, while an hourly rate for a truck and driver suggests

a lease or rental agreement, this fact is not determinative as to whether dominion and control remains with Truck Co. or is transferred to Contractor.

The terms of the signed agreement between Truck Co. and Contractor, and the control exercised by Truck Co. and/or Contractor over the operation of the trucks would have to be examined to determine whether Truck Co. is leasing property or performing a service. See *Firelands Sewer & Water Construction Co., Inc.*, Dec St Tx Comm, November 17, 1983, TSB-H-83(184)S, for a discussion of factors which may indicate whether a trucking company is renting vehicles or performing a service. Though the State Tax Commission determined after examining the terms of the contract that the trucking company was providing a transportation service and not a truck rental, *Firelands Sewer & Water Construction*, *supra*, illustrates that only by examining all of the terms of a contract can a determination be made as to the nature of an agreement between any two (or more) parties.

For purposes of this Advisory Opinion, the determination whether the contract between Truck Co. and Contractor is for the provision of services or for the rental of tangible personal property can only be made in a particular case after review of all the specific facts and circumstances. Such a determination is not possible in the hypothetical setting presented by Petitioner. Therefore, this Opinion will discuss the application of sales and use tax in circumstances where a service is being performed and in circumstances where a rental with a driver has occurred.

Rentals

To the extent that the transactions between Truck Co. and Contractor constitute the lease or rental of tangible personal property, where Truck Co. is the lessor and Contractor the lessee, such leases or rentals of trucks would be subject to sales or use tax. The driver's wages may be excluded from the taxable receipts if separately stated and reasonable in relation to prevailing wage rates. See sections 526.7(e)(6) and 541.9(c)(2)(iv) of the Sales and Use Tax Regulations. This conclusion is applicable to all of the described circumstances, regardless of whether Contractor's customer is an entity exempt from sales tax pursuant to section 1116(a) of the Tax Law or Truck Co. itself rents or leases trucks and drivers from a trucking subcontractor.

If trucks and drivers are provided by Truck Co.'s subcontractor, the trucks, as well as repairs and supplies, may be purchased by Truck Co. from the subcontractor for resale. In order for Truck Co. to issue a *Resale Certificate* (Form ST-120), Truck Co. must register for New York State sales tax purposes, obtain a *Certificate of Authority* for the collection of sales tax and undertake all of the obligations of a vendor for sales tax purposes such as filing periodic sales and use tax returns and remitting taxes due on its sales or rentals.

Services

To the extent that Truck Co. may be performing a service for Contractor, the taxation of the transaction depends upon the service performed. With respect to the transactions described above,

if Truck Co. is providing a transportation service or a trash or debris removal service where such trash or debris results from the performance of a capital improvement contract, such services are not subject to sales tax.

Trash and debris removal, although taxable in general pursuant to section 1105(c)(5) of the Tax Law, may be purchased without payment of tax by a construction contractor if such service results from a capital improvement. See section 541.7(b) of the Sales and Use Tax Regulations. Contractor should provide Truck Co. with a copy of the *Certificate of Capital Improvement* (Form ST-124) obtained from the property owner in order to relieve Truck Co. of its obligation to collect tax on the service of trash or debris removal from a construction site. See sections 541.5(b)(4) and 541.7(b)(4) of the Sales and Use Tax Regulations. Alternatively, where the property owner is an entity exempt from sales tax pursuant to section 1116(a) of the Tax Law, Contractor may provide Truck Co. with a properly completed *Contractor Exempt Purchase Certificate* (Form ST-120.1).

Generally, where Truck Co. arranges with a subcontractor to provide trucks and drivers on specific jobs, and bills Contractor for each job, Truck Co. is still providing a trash removal service as discussed above whether Truck Co. subcontracts the hauling job to a single independent owner/operator or a trucking service company that owns a fleet of dump trucks operated by the subcontractor's employees.

It is irrelevant for purposes of determining the taxable status of services performed by Truck Co. that the owner of the property on which the construction occurs might be an entity exempt from sales tax under section 1116(a) of the Tax Law.

It appears that Contractor may also purchase a transportation service from Truck Co. or its subcontractor. An example might be where Truck Co. contracts to transport tangible personal property from the construction site to a Contractor designated location where the material is to be stored. If the agreement between Truck Co. and Contractor clearly indicates that the service being provided is a transportation service, Truck Co. is not required to collect tax from Contractor or obtain an exemption document. See section 526.5(g)(3) of the Sales and Use Tax Regulations. However, where the agreement is ambiguous as to the nature of the service or clearly indicates that Truck Co. is providing trash or debris removal service from a construction site, Contractor should provide Truck Co. with the appropriate and properly completed exemption document as described above. See *Cecos Intl. v State Tax Commn.*, 71 NY2d 934, where the court held that hauling waste from a customer’s site to a disposal site constitutes a taxable trash removal service.

Lastly, where Truck Co. is engaged by Contractor to perform the service of moving materials from one part of a construction site to another location on the same construction site, Truck Co. might be operating as a construction subcontractor for Contractor. See section 541.2(d), (e) of the Sales and Use Tax Regulations. Contractor should provide Truck Co. with a copy of the certificate of capital improvement issued by the property owner. Alternatively, where the property owner is an entity exempt from sales tax, Contractor may provide Truck Co. with a contractor exempt purchase certificate.

If Truck Co. is providing transportation, trash and debris removal or other services, all of Truck Co.'s purchases of vehicles, repairs thereto, and supplies consumed in the performance of those services are subject to sales tax as retail purchases. If Truck Co. uses particular vehicles for both rental purposes and for the performance of services, Truck Co.'s purchases of such vehicles would not qualify as purchases for resale and would be subject to sales tax. Individual vehicle rentals from subcontractors by Truck Co. exclusively for re-leasing as part of a specified rental contract would be exempt purchases for resale. See *Micheli Contracting Corp. v New York State Tax Commn*, 109 A.D. 2d 957.

DATED: December 31, 2003

/s/
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Technical Services Division

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