

New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-08(55)S
Sales Tax
August 26, 2008

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S080204B

A petition dated January 28, 2008 requests an advisory opinion about Corp.'s sales and compensating use tax obligation on the following transactions:

- (1) Corp.'s purchases of (a) fiberglass portable toilets, and (b) other tangible personal property that the Corp. uses to manufacture its own portable toilets, which are used in its portable toilet facilities operation (Operation);
- (2) Corp.'s purchases of tangible personal property, such as toilet paper, soap, paper towels, chemicals, and rock salt, that is consumed by its customers during Corp.'s Operation;
- (3) Corp.'s purchases of paint that it uses to maintain its portable toilet facilities (toilets); and
- (4) Corp.'s charges to insure its toilets.

Corp.'s purchases of tangible personal property and paint, described in (1) and (3) respectively, are subject to sales and use tax. Its purchases of tangible personal property described in (2) and its insurance charges described in (4) are not subject to sales and use tax.

Facts

Corp.'s Operation includes the provision of toilets and supplies, such as toilet paper, soap, paper towels, chemicals, and rock salt (when necessary), that are consumed by its customers during use of the toilets, and a weekly on-site cleaning if toilets are provided for at least one week. The charges for all of these items are included in one lump sum. Customers can pay additional fees for more frequent on-site toilet cleanings. Corp. separately states those additional cleaning charges, when applicable, and collects sales tax on them. Corp. also separately charges customers for insuring the toilets upon their request. It does not sell or rent toilets that it does not also undertake to service.

Corp. purchases traditional fiberglass portable toilets from a wholesale distributor; the toilets are then slightly modified and provided to its customers. Corp. also manufactures its own upscale units. Corp. purchases, for example, doors, porcelain toilets, electric heaters, radios, piping and vanities, and builds those upscale units for use in its Operation. Corp. also purchases paint that it uses to maintain the toilets.

Transaction #1

Corp.'s Operation is a taxable waste removal service, not a rental of tangible personal property. Thus, Corp.'s purchases of traditional fiberglass toilets and other tangible personal property that Corp. uses to manufacture its own upscale toilets are retail sales transactions subject to New York State and local sales and compensating use tax.

The receipts from every retail sale of tangible personal property are subject to sales and use tax unless otherwise exempted or excluded. (Tax Law § 1105[a]). Excluded from the definition of "retail sale" are, among other things, purchases of tangible personal property intended to be resold as such or as a physical component of tangible personal property, and purchases in which tangible personal property is actually transferred to the purchaser of a

service described in Tax Law section 1105(c)(5) in conjunction with the performance of that service. (See Tax Law § 1101[b][4][i]). Receipts from the sale of services are generally not taxable unless the service is among those enumerated in Tax Law section 1105(c). The performance of waste removal services is a form of “[m]aintaining, servicing or repairing real property, property or land,” which is an enumerated service, and receipts from its sale are accordingly subject to sales and use tax under Tax Law section 1105(c)(5). (See Waste Management of New York, Inc. [Waste Management], Tax Appeals Tribunal, March 21, 1991).

The provision of portable toilets in conjunction with waste removal services is part of the taxable waste removal service. In Waste Management, the Tribunal treated portable toilet services like trash removal services. There, as in U-Need-A-Roll Off Corp. v. New York State Tax Comm’n (Roll Off), 67 N.Y.2d 690 (1986), the taxpayer performed a waste removal service by supplying waste containers and subsequently removing the accumulated waste. In all cases, the service provider charged its customers a lump sum that was not divided into a service component and a rental component. Charges for both the portable toilet service and the trash removal service were deemed to be charges for waste removal services, and taxable under Tax Law section 1105(c)(5).

These decisions govern Corp.’s situation. Corp. provides toilets and removes the accumulated waste either at the expiration of the service agreement, on a weekly basis for longer agreements, or as separately contracted for by its customers. Supplying receptacles for human waste and subsequently removing that waste is not significantly distinguishable from supplying trash receptacles and removing that accumulated waste. Waste Management, which held that these activities receive the same sales tax treatment, makes this clear. Thus, Corp., like the taxpayers in Waste Management and Roll Off, is selling a waste removal service taxable under Tax Law section 1105(c)(5), and that taxable service includes the provision of waste receptacles.

The two exclusions mentioned above do not render Corp.’s purchases untaxable. The activities of providing the waste removal service and supplying the toilets are inseparable and cannot be considered separate transactions for sales tax purposes. (See Matter of Atlas Linen Supply Co. v. Chu, 149 A.D.2d 824, 826 [3d Dept. 1989], lv denied, 74 N.Y.2d 616). As stated above, Corp. is selling waste removal services, not toilets. Thus, the tangible personal property used in the Corp.’s Operation is not being “resold as such” to its customers, but rather is being provided as part of Corp.’s service.

Nor is Corp. “actually transferring” to its customers the tangible personal property it uses in its Operation. In Waste Management, the Tribunal found that the service provider’s waste receptacles were not “actually transferred” where they were temporarily located on the customers’ property, then reclaimed and reused by the taxpayer to provide trash removal services to other customers. (Waste Management at 12). Transfers of that property therefore do not qualify for the “retail sale” exclusion for property sold in conjunction with the performance of a taxable service. So Corp. must pay sales and use tax on its purchases of tangible personal property, such as fiberglass toilets and other items used to manufacture its own toilets, used in its Operation.

Transaction #2

Corp.’s purchases of tangible personal property that are actually transferred to its customers are not retail sales subject to sales and use tax.

Corp. supplies its customers with items such as toilet paper, soap, paper towels, chemicals, and rock salt (when necessary)¹, which the customer consumes during use of the toilets. These supplies are not being resold as such for the reasons described above. The items, however, are “actually transferred” in conjunction with Corp.’s performance of waste removal services. (See Id.; Tax Law § 1101[b][4][i]). As a result, Corp.’s purchases of those items are not subject to sales and use tax under Tax Law section 1105(a).

Transaction #3

Corp.’s purchases of paint that it uses to maintain its toilets are retail sales transactions subject to sales and use tax.

Corp. purchases paint, which eventually becomes a physical component of the toilets. As discussed above, however, the toilets are provided as part of the waste removal service and, as a result, are not being resold. Thus, the paint does not qualify for the resale exclusion in Tax Law section 1101(b)(4)(i). Corp. also does not “actually transfer” the paint in conjunction with the performance of its taxable waste removal services because the paint becomes a physical part of the toilets and the toilets themselves are never “actually transferred” to its customers. (See Waste Management at 12). As a result, Corp.’s purchases of paint that it uses to maintain its toilets are retail sales subject to sales and use tax under Tax Law section 1105(a).

Transaction #4

Corp. insures the toilets for an additional fee. This separately stated charge is neither a sale of tangible personal property nor a service enumerated by Tax Law section 1105(c). Thus, Corp.’s separately stated insurance charges are not subject to sales and use tax.

DATED: August 26, 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.

¹ The rock salt is “actually transferred” in conjunction with a taxable maintenance or repair service to real property because it has continued value to the customer. This situation is distinguishable from that in R.J. Schickler Inc., TSB-A-03(40)S, November 19, 2003, where the rock salt dissipated so quickly that the Tax Department concluded that it had not been “actually transferred” to the customer.