

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

TSB-A-15(22)S
Sales Tax
May 28, 2015

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S140801A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED] (“Petitioner”). Petitioner asks whether the sale of an oil tank removal or abandonment service, as described herein, done as part of converting a home-heating system from oil to gas, is subject to sales and use tax. We conclude that such a service is subject to sales tax as a real property maintenance service under Tax Law § 1105(c)(5) unless it is done as a constituent part of a capital improvement project as described below.

Facts

Petitioner provides oil tank removal or abandonment services to residential customers, and also performs oil to gas conversions for home heating systems. An oil tank may be located below or above-ground in the basement, or outside, a few inches away from the home. Petitioner performs one of two services in connection with oil tanks that have been placed out of service: a removal service or an abandonment in place service. A removal service involves the cleaning and removal of the disused oil tank along with filling in any void. An abandonment in place service requires cleaning and filling the disused oil tank with sand, foam, or concrete, to ensure that the tank is sealed and rendered harmless, and leaving it in place. In most cases, oil tank removal or abandonment follows a conversion of a home’s heating system from an oil to a gas heating system. Generally, the operation of the new gas system does not necessitate the removal or abandonment of the disused oil tank, as the presence of the disused tank does not interfere with the operation of the new gas system. The purpose of an abandonment in place is to prevent the collapse of a void underground and ensure that no oil is left in the tank, thereby preventing future leakage or contamination of the surrounding real property. The removal or abandonment service is often requested by the property owner right after the conversion. In some cases, however, tank removal or abandonment occurs at a later date, perhaps at the time the home is being sold.

The 2010 Fire Code of New York State requires that an oil tank that is permanently taken out of service be abandoned in place or removed. The required procedures are similar to the removal or abandonment procedures described above. *See* Fire Code of the State of New York § 3404.2.13.3. Executive Law § 379 authorizes local governments to impose “higher or more restrictive standards” than the State Fire Code. The Department of State’s regulations incorporate by reference the 2010 Fire Code of New York State. *See* 19 NYCRR § 1225.1.

Analysis

Tax Law § 1105(c)(3) imposes sales tax on the receipts from the services of installing, maintaining, servicing, or repairing tangible personal property. Sales tax will not apply where the tangible personal property installed becomes part of a capital improvement. *See* § 1105(c)(3)(iii). Tax Law § 1105(c)(5) imposes tax on receipts from the services of 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. The term “capital improvement” is defined as an addition or alteration to real property that (a) substantially adds value to or prolongs the life of real property; (b) becomes part of the real property or is permanently affixed to real property so that removal would cause material damage to the property or article itself; and (c) is intended to become a permanent installation. *See* Tax Law § 1101(b)(9)(i).

The imposition of sales tax on a service performed on real property depends on the end result of such service. *See* 20 N.Y.C.R.R. § 527.7(b)(4). If the end result of the service is the repair or maintenance of real property, such service is taxable. If the end result of the same service is a capital improvement to the real property, such service is not taxable. *Id.* Services that by themselves would be taxable become a component of capital improvement work if the services are integral to, or a constituent part of, a capital improvement. In *Bldg. Contractors Ass'n, Inc. v. Tully* (87 A.D.2d 909, 911 [1982]), the Appellate Division applied the end result test to hold that waste-removal from a construction site is part of the capital improvement “[s]ince the completion of a capital improvement project generally cannot be accomplished without removal of construction and demolition debris.” *See also* TSB-A-13(25)S (“incidental and ancillary repairs or part replacement(s) to real property that are not integral to the construction of a capital improvement constitute distinct repair or maintenance services subject to sales tax”). Under the “end result test,” a capital improvement includes both work that is legally required as part of a capital improvement, as well as work that physically required. *See Matter of Robert Bruce McLane Associates, Inc.*, Tax Appeals Tribunal, August 31, 1995 (*confirmed* 232 AD2d 826 (3d Dep’t 1996)).

Generally, the original installation or replacement of an oil tank, as well as the installation of a gas system, qualify as capital improvements and, accordingly, are not subject to sales tax. *See* Publication 862, *Sales and Use Tax Classification of Capital Improvements and Repairs to Real Property*. Oil tank removal or abandonment in place services constitute “maintaining, servicing or repairing real property” under Tax Law § 1105(c)(5) and will be taxable unless the oil tank removal or abandonment service is a necessary part of a capital improvement under the end result test. *See* 20 N.Y.C.R.R. § 527.7(b)(4); *Bldg. Contractors Ass'n, Inc. supra*. The question here then is when will an oil tank removal or abandonment service be considered sufficiently related to the conversion of an oil-based heating system to a gas system as to qualify as part of that capital improvement under the end result test? The State Fire Code provides that oil tanks that have been out of service for more than a year must be removed or abandoned. *See* State Fire Code §§ 3404.2.13.1.3; 3404.2.13.2.3. Thus, the Department will assume that an abandonment or removal of an oil tank commenced or contracted for within a year of the installation of the new gas heating system is related to and a necessary part of that installation. Removal or abandonment services contracted for more than a

year after the installation of the new gas heating system will not qualify as sufficiently related to that capital improvement unless the property owner can show circumstances that prevented the commencement of the oil tank removal or abandonment service within a year of the completion of the installation of the new gas system. *See* TSB-A-08(48)S [work on real property done in 1999, even if a capital improvement, found to be irrelevant in determining the taxability of remediation work done on the same property nine years later].

DATED: May 28, 2015

/S/

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