

**New York State Department of Taxation and Finance
Office of Counsel**

TSB-A-15(42)S
Sales Tax
November 12, 2015

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S150108A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED] (hereinafter “Petitioner”). Petitioner asks whether the service it provides of removing a sample of a building to be tested for asbestos and then preparing a report showing the results of the test and sending it to the client is subject to tax. Petitioner also asks if the method by which the test results are delivered to the client, e.g., regular mail, e-mail, or personal delivery, can affect the taxability.

We conclude that Petitioner’s service is subject to tax as the maintenance, servicing or repair of real property. The delivery method is irrelevant.

Facts

An architect will contact Petitioner requesting an asbestos inspection so that he may obtain permits. Petitioner will go to the real property, remove a piece of brick or a piece of a wall, and ship it to a lab for analysis. The lab then emails Petitioner the results. Petitioner puts the results in a report and sends it to the client.

Analysis

Tax Law § 1105(c) imposes tax upon the receipts from every sale, except for resale, of certain enumerated services. Pursuant to Tax Law § 1105(c)(5), sales tax is imposed on services relating to maintaining, servicing or repairing real property, property or land (collectively “real property”). Buildings and other articles and structures are included in the definition of real property. *See* Real Property Tax Law § 102(12). “*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(1).

Whether a tax is imposed on services performed on real property depends on the end result of the service. *See* 20 NYCRR § 527.7(4). A service is taxable where the result of the service is the repair or maintenance of real property. *See id.* However, a service is not taxable where the result is a capital improvement to the real property. *See id.*; Tax Law § 1105(c)(5). A capital improvement is, among other things, an addition or alteration to real property that substantially adds value to the real property, or appreciably prolongs the useful life of the real property and becomes part of the real property. *See* Tax Law § 1101(9).

Inspection services performed for the owner of real property constitute the maintenance, servicing or repair of real property and are subject to sales tax under Tax Law § 1105(c)(5). *See* TSB-A-90(12)S; TSB-A-93(49)S. Inspections are diagnostic services for the keeping of real property in a condition of fitness, efficiency, readiness and safety. *See* TSB-A-93(49)S. Testing and monitoring of real property are also included in maintaining, servicing and repairing real property pursuant to Tax Law § 1105(c)(5). *See In re Exxon Mobil Corp.*, Tax Appeals Tribunal, May 23, 2013, *conf'd Exxon Mobil Corp. v. NY Tax Appeals Tribunal*, 126 AD3d 1059 (3d Dep't 2015); TSB-A-96(90)S.

By removing a piece of a building to be tested for asbestos and sending it to a lab for analysis, Petitioner is inspecting and testing real property. Therefore, Petitioner's service constitutes the maintenance, servicing or repair of real property, and generally is subject to tax pursuant to Tax Law § 1105(c)(5). *See* TSB-A-90(12)S; *In re Exxon Mobil Corp.*, *supra*. However, if the architect client is requesting an asbestos inspection because it is part of a project to create a capital improvement on the real property, then the service performed by the Petitioner is not taxable. Petitioner must timely obtain a copy of a properly completed Form ST-124, *Certificate of Capital Improvement*. *See* 20 NYCRR § 532.4; TSB-A-90(16)S.

Because Petitioner's testing service generally is taxable as the maintenance, servicing or repair of real property, the report in which the test results are conveyed to the client is an integral component of the taxable maintenance service. Accordingly, the report is taxable, regardless of whether the charge for it is separately stated. Additionally, the delivery method (i.e., in tangible or electronic form) of the report is irrelevant.

DATED: November 12, 2015

/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. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.