

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

The Department of Taxation and Finance received a Petition for Advisory Opinion from

(Petitioner). Petitioner asks three questions: (1) whether its services relating to environmental testing and the design and monitoring of remediation systems for real property constitute “engineering services” for sales tax purposes; (2) whether its charges for overseeing a third party contractor’s installation of an environmental remediation system are subject to sales tax; and (3) whether its charges for assessing environmental conditions on real property for purposes unconnected with any planned construction, remediation or regulatory action are subject to sales tax.

We conclude that: (1) the design and monitoring of remediation systems constitute nontaxable “engineering services” to the extent that those services are legally required to be performed by a licensed engineer; (2) charges solely for overseeing the installation of remediation systems are not subject to sales tax; (3) the taxability of charges for any sampling and testing services is dependent on the purpose for the sampling and testing services; and (4) charges for consulting services unconnected to any planned remediation are not subject to sales tax.

Facts

Petitioner performs engineering and environmental consulting services at sites throughout New York State. Petitioner’s primary services involve environmental testing and analysis in connection with potentially contaminated real property, sometimes followed by the development, implementation and subsequent monitoring of remediation systems on the site. Petitioner itself is licensed by New York State to provide professional engineering services and Petitioner employs New York State licensed professional engineers and qualified environmental professionals (QEPs).¹

¹ A “qualified environmental professional” is defined by regulation as a person who possesses sufficient specific education, training, and experience necessary to exercise professional judgment to develop opinions and conclusions related to environmental remediation. To qualify as a QEP, an individual must either: (1) hold a professional engineer’s or professional geologist’s license and have three years of full-time experience in environmental site investigation and remediation; or (2) be licensed as a site remediation professional by a state, the federal government or a state-accredited organization to perform site-investigation and remediation tasks and have three years of relevant experience. 6 NYCRR 375-1.2(ak)

The testing and remediation-design projects Petitioner performs generally involve real property on which an environmental condition has resulted in an enforcement action or a stipulation or agreement issued by the New York State Department of Environmental Conservation (DEC) or other regulatory authority requiring a potentially responsible party to address the condition. Petitioner is engaged on such projects to consult with the potentially responsible party (e.g., a site owner) in dealings and negotiations with DEC, as well as to carry out any required site evaluation and, if necessary, environmental remediation in accordance with the DEC's environmental remediation program.

When Petitioner utilizes subcontractors or other outside providers, Petitioner bills such costs to clients as reimbursable expenses. Petitioner may not be hired to complete all phases of a project and not all of the sites result in remediation work. When a remediation plan is implemented or installed on a site, Petitioner does not perform any of the physical work involved, but instead supervises and oversees the work, ensuring it is carried out according to the engineering specifications and objectives developed in the planning stages. Petitioner's services are divided into several distinct phases. Although numerous types of services may be performed during the course of a contract, Petitioner bills its clients a single fee based on time spent on the project. Project phases consist of the following:

1. Client engagement - A client typically engages Petitioner after receiving notice from DEC or a similar agency that the client is potentially responsible for conditions on a site. This generally results in the client entering into an enforcement order or other agreement with DEC or the entity performing the work. Petitioner's work during this phase consists of site visits, communication and consultation with the client, and initial contact with regulators.
2. Information Review - Petitioner obtains and reviews records pertaining to the site, including the site's historical use and prior testing, to assess potential sources of environmental impacts and the client's potential liability.
3. Development of investigative plan - Petitioner prepares a written plan for the sampling, testing, and evaluation that will be necessary to characterize the site's environmental conditions. The plan must be submitted to DEC for approval and be certified by a licensed engineer or QEP. The plan outlines the strategy and schedule for sampling, sets a schedule for the submission of follow-up reports to DEC, and identifies any subcontractors who may assist in performing testing.
4. Implementation of site investigation - Petitioner implements site sampling and testing in accordance with the approved work plan. Petitioner's work at this phase involves collecting samples, performing field tests, and preparing progress reports for DEC and the client. Petitioner may retain subcontractors, such as drilling contractors and laboratories, to assist in gathering and evaluating samples. Such costs are paid by Petitioner and passed to the client as reimbursable expenses, along with Petitioner's own fee.

5. Evaluation of environmental issues - Petitioner prepares a report containing its environmental interpretations and professional opinions based upon Petitioner's review of historical records and its evaluation of the test results. The report must be submitted to DEC for review and must be certified by either a licensed engineer or QEP.

6. Assessment of human health/ecological risk - Petitioner builds on the data from the site investigation to determine human health and ecological risks posed by the site. The data gathered during the investigation and risk-assessment phases may lead to a determination that no remediation is necessary. The risk-assessment report must be submitted to DEC for review and must be certified by either a licensed engineer or QEP.

7. Evaluation of remedial alternatives - Petitioner evaluates the volume or mass of the material impacted and potential health or ecological threats and develops a plan of remedial action objectives. To meet the objectives, Petitioner identifies remedial courses of action and assesses and compares the plans in terms of regulatory standards and guidance. Petitioner then recommends a preferred remedial course of action. A "no-action" alternative is always provided and analyzed as a baseline comparison. Petitioner prepares a feasibility study for submission to DEC and the client, which must be certified by either a licensed engineer or QEP.

8. Development of remedial design or action plan - Petitioner assists in developing the action plan to implement the DEC-selected remedy. This involves pre-design engineering field studies, and the development of plans, specifications and technical drawings. The remedial design documents are required to be submitted to DEC for review. Petitioner also may assist in preparing a request for bids, coordinating the bidding process and preparing contract documents for the remediation work.

9. Plan implementation (construction oversight) - Petitioner supervises and oversees the installation and implementation of the remediation plan and ensures that it is in accordance with the specifications developed in the planning stages. DEC requires that a QEP be present during all field work occurring at a site. Petitioner does not perform any of the physical work itself. Petitioner also submits the final engineering report, which DEC requires to be prepared by a professional engineer who had primary direct responsibility for the implementation of the remedial program. Petitioner may act as a general contractor that hires subcontractors to perform the work, or the client may contract directly with an outside contractor to perform the work. In either case, Petitioner is responsible for submitting progress reports and the final engineering report to DEC.

10. Operation/monitoring of remedial remedy - Petitioner performs ongoing monitoring of the remedial measures installed on a site through periodic sampling and testing of site materials. Petitioner will perform site visits, check and maintain equipment, and gather and

test materials from test-wells and soil samples. Petitioner frequently compiles and reports the information gathered during this ongoing monitoring to DEC.

11. Consulting services unrelated to remediation or construction – Petitioner performs environmental sampling, testing and assessment to determine the nature and extent of contamination on real property that is not connected to any DEC enforcement section, planned construction or remediation. For example, Petitioner may independently evaluate the extent of contamination where a party in litigation requests an expert assessment of site conditions, or a potential purchaser is concerned about potential environmental conditions on a site. The sole objective of the work is the report or assessment of the site conditions.

Analysis

Remediation Related Projects

Tax Law § 1105(c)(5) imposes sales tax on certain enumerated services, including the service of maintaining, servicing or repairing real property. “Maintaining, servicing or repairing real property” are 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]). The testing and monitoring of real property are included in maintaining, servicing and repairing real property regardless of whether the testing and monitoring leads to active remediation. *See* TSB-A-15(42)S; *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 Dept 2015). However, services consisting of the practice of engineering, as defined in Education Law § 7201, that must be performed by a licensed engineer and are rendered by a licensed engineer, are not considered services subject to sales tax. *See* TSB-A-99(9)S; TSB-A-99(53)S.

While Petitioner employs QEPs who may be professional engineers, QEPs are not required to have a professional engineering license. Also, although a business may be registered and licensed to perform professional engineering services in this State, the receipts from the design and monitoring of remediation systems are subject to sales tax unless those services constitute engineering services that are legally required to be performed by a licensed engineer. *See* TSB-A-99(53)S.

Petitioner’s testing, design, and monitoring services constitute the practice of engineering that would not be subject to sales or use tax to the extent that such services: (1) may legally be rendered only by a licensed professional engineer, and (2) in fact are rendered only by a licensed professional engineer. *See* TSB-A-90(4)S; TSB-A-88(22)S. However, DEC allows the services described in items 3, 5, 6, 7, and parts of 9 to be performed by a QEP, who may not be a licensed engineer. Thus, these services may legally be rendered by someone other than an engineer, and the first requirement above is not met. As a result, charges for these services do not constitute charges for the practice of engineering.

Further, if Petitioner solely performs monitoring and testing services for a client for sites on which remediation systems have already been implemented by third parties, such post-remedial monitoring and testing services would still “relate to keeping real property in a condition of fitness, efficiency, readiness or safety or restoring it to such condition.” *See In re Exxon Mobil Corp., supra*; 20 NYCRR § 527.7(a)(1). Therefore, these post-remedial services would be subject to tax, unless such services may legally be rendered only by a licensed engineer and in fact are rendered only by a licensed engineer, as discussed above.

Construction Supervision Services

When Petitioner solely provides supervision services, Petitioner is not actually installing or implementing the remediation system it designs and is not acting in the capacity of a general contractor. Therefore, Petitioner’s charges for supervising a contractor’s work are not charges for an enumerated taxable service. When Petitioner is acting as the general contractor by hiring the necessary contractors to install the environmental system, the taxability of Petitioner’s receipts from the sale of services as a general contractor depends on the end result of the service. If the end result of a project constitutes a repair or maintenance to real or tangible personal property, the receipts from the service are subject to sales tax under Tax Law §§ 1105(c)(3) or 1105(c)(5). If the end result is a capital improvement to real property, as defined in Tax Law § 1101(b)(9), the receipts from the sale of the service are not subject to sales tax.

Sampling and Testing Services Unrelated to Remediation or Construction

Generally, when Petitioner’s sampling and testing services are not related to or performed in conjunction with repairing, maintaining or servicing real or personal property, the charges for such services would not be subject to tax. *See* TSB-A-15(32)S; TSB-A-97(18)S. If the purchaser of the sampling and testing services that Petitioner performs on real property is the owner or lessee of the real property, Petitioner will need to verify that the services are not related to or performed in conjunction with repairing, maintaining or servicing real property before it can conclude that the services are not subject to tax. *See* TSB-A-98(82)S; TSB-A-93(49)S. Thus, for example, if the purchaser of the sampling and testing services is the owner and provides proof to Petitioner that the services are purchased in connection with litigation to which the owner is a party, the services would not be subject to tax. In contrast, if the purchaser of the testing service is not the owner or lessee of the real property that is the subject of the testing, the charge paid by the purchaser generally will not be subject to sales tax and no additional verification by Petitioner is necessary. *See id.*

Consulting services performed by Petitioner, including the provision of expert testimony, are not included among the services taxable under Tax Law § 1105(c), and any corresponding drawings or reports that are furnished as an incident to the non-taxable consulting services are not subject to sales tax. *See* TSB-A-05(11)S; TSB-A-98(48)S; TSB-A-97(85)S.

Finally, if Petitioner charges a single amount for both taxable and nontaxable services, the entire amount is subject to sales tax. However, if Petitioner bills a separate charge for any taxable service that is reasonable in relation to the overall charge, and the service may be purchased separately from the nontaxable services, only that service would be subject to sales tax. *See* TSB-A-15(13)S and TSB-A-97(11)S.

DATED: November 24, 2020

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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.

