



Advisory Opinion: TSB-A-24(53)S

The Department of Taxation and Finance (“the Department”) received a Petition for Advisory Opinion from [REDACTED] (“Petitioner”). Petitioner asks whether its charges to contractors for concrete pumping are subject to sales tax. We conclude that Petitioner is providing a service that is not subject to tax when performed as part of a capital improvement.

Facts

Petitioner owns concrete pumping trucks and is hired by contractors to pump concrete for the construction of high-rise buildings. The trucks do not change the nature or composition of the concrete; no chemicals or water are added. The trucks merely move the concrete from the ground level to a higher floor of a building. The concrete is used by the contractor to create floors, walls, and other parts of the buildings.

When it is hired to pump concrete as described, Petitioner determines how to pump the concrete and its employees operate the equipment to do so. Only Petitioner’s employees are allowed to operate the trucks and associated equipment and Petitioner directs the work of its employees. All of Petitioner’s employees are trained and certified on how to operate the trucks and are required to take classes to learn the safety precautions needed for operating the trucks. Petitioner arranges and pays for all repairs, maintenance, tolls, insurance, and fuel for the pump trucks. Any violations incurred by the trucks or Petitioner’s employees are paid for or disputed by Petitioner.

Petitioner does not provide or sell concrete. Contractors order concrete independently from companies unrelated to Petitioner. A company delivering concrete to a contractor’s job site puts the concrete into a receiving container attached to one of Petitioner’s pump trucks. Petitioner’s employee then pumps the concrete into the building as required by the contractor.

Petitioner charges the contractor a fee for its concrete pumping service, which represents the charge for the truck and the operator.

Analysis

Tax Law § 1105(a) imposes sales tax on the receipts from every retail sale of tangible personal property, except as otherwise provided in Article 28 of the Tax Law. Tax Law § 1105(c) imposes sales tax on the receipts from every sale, except for resale, of certain services. The term “sale” means “the transfer of title or possession or both” for consideration, and includes a rental, lease and license to use. See Tax Law § 1101(b)(5). A lease of a vehicle or equipment with the services of an operator is considered to be a service if dominion and control of the vehicle or equipment remains with the owner or lessor. Dominion and control are maintained where the owner or lessor:

- (1) does not transfer possession, control and/or use of the equipment to the lessee during the term of the agreement or contract;
- (2) maintains the right to hire and fire the drivers and operators;
- (3) uses [their] 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 [their] own routes;
- (4) retains responsibility for the operation of the equipment or vehicle; and
- (5) directs the work, pays all operating expenses, including drivers' and/or operators' wages, insurance, tolls and fuels.

20 NYCRR 541.2(p).

Here, Petitioner maintains dominion and control over the trucks. It does not transfer possession of the trucks to its customer. Only Petitioner's employees may operate the trucks. Petitioner retains the right to hire and fire the operators and direct the manner in which they perform their work. Petitioner is responsible for its equipment and pays all operating expenses. Accordingly, we conclude that Petitioner is providing a service and is not renting equipment to its customers.

In general, the services of installing, repairing, or maintaining tangible personal property are taxable. See Tax Law §1105(c)(3). "Installing means setting up tangible personal property or putting it in place for use." 20 NYCRR 527.5(a)(2). Sales tax is also imposed on the services of "maintaining, servicing or repairing real property, . . . as distinguished from adding to or improving such real property . . . by a capital improvement." Tax Law §1105(c)(5). A capital improvement is an addition or alteration to real property that:

- (A) substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property; and
- (B) becomes part of the real property or is permanently affixed to the real property so that removal would cause material damage to the property or article itself; and
- (C) is intended to become a permanent installation.

Tax Law § 1101(b)(9). Whether a service constitutes a capital improvement "depends on the end result of such service." 20 NYCRR 527.7(4). Here, Petitioner is putting concrete in place to form floors, walls, and other parts of buildings. The installation of concrete in the construction of a building satisfies the capital improvement criteria. Moreover, the end result of the project is a completed building. Therefore, Petitioner's concrete pumping service is not taxable. Petitioner should obtain from the contractor or property owner a properly completed ST-124 -- *Certificate of Capital Improvement* within 90 days after rendering its service. Conversely, if Petitioner pumps concrete on a

project that does not qualify as a capital improvement, it would be performing the service of installing tangible personal property and must collect sales tax from its customer.

DATED: November 12, 2024

/s/

MARY ELLEN LADOUCEUR
Principal Attorney

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.