

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-92 (70) S
Sales Tax
October 22, 1992

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S920810B

On August 10, 1992, a Petition for Advisory Opinion was received from James River II Corporation, 695 West End Avenue, Carthage, New York 13619.

The issue raised by Petitioner, James River II Corporation, is whether labor and material charges paid in connection with the closing of a portion of the Town of Wilna landfill are subject to State and local sales and use taxes.

For several years, beginning in 1979, Petitioner had an informal agreement for disposing of primary paper mill sludge in one portion of the landfill owned by the Town of Wilna in Jefferson County, New York. In return, Petitioner made a commitment to the Town to close that section of the landfill devoted entirely to paper mill sludge. The Town of Wilna is required to close the total landfill by 1993 in accordance with a consent order with the Department of Environmental Conservation (hereinafter "D.E.C."). In turn, Petitioner is required to close its portion of the landfill that was used for paper mill sludge.

Petitioner hired Tisdell Associates as its consultant to design the closure in accordance with D.E.C. regulations. Tug Hill Construction of Felts Mills, New York, was awarded the contract for closure in June 1992. Construction began in July 1992 and will be completed in September 1992. The Town of Wilna also hired Tug Hill to close the main municipal landfill within the same time frame. The Town's part of the closure is tax exempt, since it is a public agency.

The project work to close the landfill will consist of the following:

1. grading of existing waste on approximately 4.0 acres;
2. installation of geotextile fabric overlain by a gas venting sand layer;
3. installation of approximately 500 lineal feet of gas venting lateral and six (6) risers;
4. installation of approximately 28,000 square yards of 40-mil geomembrance cap;
5. installation of approximately 19,000 cubic yards of protective soils;
6. installation of approximately 600 lineal feet of lined drainage swale;
7. construction of approximately 300 lineal feet of municipal/industrial "tie-in";
8. installation of approximately 800 square yards of erosion control fabric;
9. installation of approximately 40 lineal feet of 18-inch corrugated metal pipe;
10. installation, seeding and mulching of a topsoil layer.

The project cost is \$364,520 and will be paid by Petitioner.

Section 1105(a) of the Tax Law imposes a sales tax upon the receipts from every retail sale of tangible personal property unless otherwise excluded or exempt.

Section 1101(b)(4) of the Tax Law which defines the term "retail sale" states, in part: "A sale of any tangible personal property to a contractor, subcontractor or repairman for use or consumption in erecting structures or buildings, or building on, or otherwise adding to, altering, improving, maintaining, servicing or repairing real property, property or land ... is deemed to be a retail sale regardless of whether the tangible personal property is to be sold as such before it is so used or consumed."

Section 1115(a)(15) and Section 1115(a)(16) of the Tax Law provide exemption from the sales tax for property sold to contractors, subcontractors or repairman for use or consumption as described in section 1101(b)(4) of the Tax Law, if such property is to become an integral component part of the structure, building or real property of an organization described in section 1116(a) of the Tax Law.

Section 1116(a)(1) of the Tax Law provides exemption from sales tax for "The State of New York, or any of its agencies, instrumentalities, public corporations (including a public corporation created pursuant to agreement or compact with another state or Canada) or political subdivisions where it is the purchaser, user or consumer, or where it is a vendor of services or property of a kind not ordinarily sold by private persons."

Section 1105(c)(5) of the Tax Law imposes a tax on the receipts from the following services:

"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 as such term capital improvement is defined in paragraph nine of subdivision (b) of section eleven hundred one of this chapter " (emphasis added)

Section 1101(b)(9) of the Tax Law defines capital improvement in relevant part as follows:

(9) Capital improvement. (i) An addition or alteration to real property which:

(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.

Section 527.7(b)(4) of the Sales and Use Tax Regulations provide as follows:

The imposition of tax on services performed on real property depends on the end result of such service. If the end result of the services is the repair or maintenance of real property such services are taxable. If the end result of the same service is a capital improvement to the real property such services are not taxable.

The project work listed to close the landfill constitute a capital improvement to real property pursuant to Section 1101(b)(9) of the Tax Law. Therefore, pursuant to Section 1105(c)(5) of the Tax Law and Section 527.7(b)(4) of the Sales and Use Tax Regulations since the end result of the service performed constitutes a capital improvement, the charges for labor to perform such improvement are not subject to sales tax.

Concerning the materials used to perform the project work, pursuant to Sections 1115(a)(15) and 1115(a)(16) of the Tax Law property sold to contractors or-subcontractors that will become an integral component part of a structure, building or real property of an organization described in Section 1116(a) of the Tax Law is not subject to sales tax. Accordingly, since the Town of Wilna is an organization described in Section 1116(a)(1) of the Tax Law, the purchase by Petitioner of the materials used to close the landfill will not be subject to sales tax.

DATED: October 22, 1992

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

NOTE: The opinions expressed in Advisory Opinions
are limited to the facts set forth therein.