

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

TSB-A-96 (8)S
Sales Tax
February 20, 1996

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S950523A

On May 24, 1995, a Petition for Advisory Opinion was received from Frontier Chemical Royal Avenue Superfund Site, c/o Nixon, Hargrave, Devans & Doyle, Clinton Square, P.O. Box 1051, Rochester, New York 14603.

The issue raised by the Petitioner, Frontier Chemical Royal Avenue Superfund Site, is whether New York State sales and compensating use taxes are imposed on certain remediation services provided at a Superfund Site. Specifically, the issue is whether the services, in conjunction with the overall remediation, would result in a capital improvement to real property and thus be exempt from sales tax.

Petitioner makes the following statement of facts.

Petitioner is a group of companies that are potentially responsible parties under the Comprehensive Environmental Response, Compensation, and Liability Act (commonly known as "Superfund," 42 USCS §§ 9601 et seq.). Petitioner is being required by the Environmental Protection Agency (EPA) to do an environmental cleanup at a former waste processing location that has been designated by the EPA as a Superfund Site (Site). Petitioner plans to remediate the Site in order to improve the Site for sale. Petitioner believes that a potential buyer could use the Site as a waste treatment facility or as part of a manufacturing unit.

Remediation of the Site would be broken down into several phases. For example, Phase I involves the removal of drums containing waste from the Site. Phase II, which is the subject of the Petition for Advisory Opinion, involves the removal and disposal of waste from tanks on the Site and the subsequent decontamination of the tanks. The tanks are real property, property or land as defined in the Real Property Tax Law. Petitioner has hired a contractor to perform these services. In removing the waste from the tanks, the contractor will bring its waste disposal trucks to the Site and pump the waste from the tanks into the trucks. The trucks will then transport the waste to ultimate disposal locations, some of which are in New York State and some of which are out-of-state. After the tanks are emptied, they will be decontaminated. During Phase II, no new tanks, pipes or systems will be installed at the Site.

Once Phase II is completed, the EPA will determine if the land at the Site must be remediated and, if so, what the remediation will consist of. This process involves the EPA making a remedial investigation in which it will determine the extent of any groundwater and/or soil contamination at the Site. The EPA will then require that a feasibility study be prepared that outlines the remediation that must be done. Once the EPA reviews the feasibility study, it will inform Petitioner as to how the Site must be remediated, and give Petitioner a construction design to use in the remediation. Petitioner will then remediate the Site in accordance with the EPA's design. Petitioner indicates and

the EPA confirms that there can be a significant lapse of time between stages of an environmental remediation.

Petitioner believes that there is groundwater and soil contamination at the Site that will almost certainly be required to be remediated. Because the EPA has not yet told the Petitioner how it must remediate the Site, Petitioner is not certain as to what type of remediation will be required. Petitioner believes it is likely that it will be required to remove soil, install air-strippers, install a groundwater treatment system and do any other remediation so that the Site is not deemed to be an imminent threat to human health and the environment.

Section 1101(b)(9) of the Tax Law defines a 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 1105(c)(5) of the Tax Law imposes tax upon receipts from every sale, except for resale, of:

(5) 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, but excluding services rendered by an individual who is not in a regular trade or business offering his services to the public.

Section 1132 of the Tax Law provides, in part:

(a) Every person required to collect the tax shall collect the tax from the customer when collecting the price ... to which it applies....

* * *

(c) For the purpose of the proper administration of this article and to prevent evasion of the tax hereby imposed, it shall be presumed that all receipts for property or services of any type mentioned in subdivisions (a), (b), (c) and (d) of section eleven hundred five ... are subject to tax until the contrary is established, and the burden of proving that any receipt ... is not taxable hereunder shall be upon the person required to collect tax or the customer....

Section 527.7(b) of the Sales and Use Tax Regulations provides, in part:

* * *

(2) All services of trash or garbage removal are taxable, whether from inside or outside of a building or vacant land.

* * *

(4) The imposition of tax on services preformed 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.

Tax Law Section 1105(c)(5) imposes tax on the receipts from the service of maintaining, servicing or repairing real property. Section 527.7(b)(2) of the Sales and Use Tax Regulations provides that receipts from the sale of a trash removal service are taxable under Section 1105(c). The collection, hauling and disposal of industrial and hazardous waste constitute an integrated trash removal service the receipts from which are taxable as the maintenance of real property under Section 1105(c)(5) of the Tax Law. (See: Matter of Rochester Gas and Electric Corporation v. New York State Tax Commission, 128 A.D.2d 238, affd 71 N.Y.2d 931; Matter of Cecos International, Inc. v. State Tax Commission, 126 A.D.2d 884, affd 71 N.Y.2d 934; Matter of Richard C. Penfold, Doing Business as C.I.D. Refuse Service v. State Tax Commission, 114 A.D.2d 696.) Receipts from the sale of the service of decontaminating tanks which qualify as real property as defined in Section 102(12) of the Real Property Tax Law are also taxable under Section 1105(c)(5) of the Tax Law. The services provided for Petitioner by the contractor during Phase II of the remediation (i.e., the removal and disposal of waste and the subsequent decontamination of tanks) constitute, therefore, maintaining, servicing or repairing real property for purposes of Section 1105(c)(5).

However, under the end result rule set forth in Section 527.7(b)(4) of the Sales and Use Tax Regulations, the services described may, under certain circumstances, be considered to be capital improvements that are not subject to sales tax. (See: Matter of Building Contractors Association v. Tully, 87 A.D.2d 909; Stewarts Ice Cream Co., Inc., Adv Op Comm T&F, May 29, 1990, TSB-A-90(27)S.)

In this case, although the Petitioner is almost certain that the EPA will require the installation of certain materials in order to fully remediate the Site and that the end result of the remediation services will be a capital improvement to real property, these events are not determinable at the present time. Given the wide scope in which the EPA is authorized to act in providing for remediation of the Site, in conjunction with the technical nature of a capital improvement, it is not possible for Petitioner to establish that the Phase II services will result in a capital improvement until the facts regarding the remediation are known. Accordingly, the services provided by the contractor during Phase II of the remediation cannot be considered a capital improvement to real property at the time that the services are performed and are subject to tax. Petitioner may not present a certificate of capital improvement for the services provided by the contractor during Phase II in order to purchase such services exempt from tax. However, once it can be established that the end result

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of the remediation services is a capital improvement to the real property, Petitioner may be eligible for a refund of the taxes paid to the Department of Taxation and Finance on the Phase II services in accordance with Section 1139 of the Tax Law.

DATED: February 20, 1996

/s/
DORIS S. BAUMAN
Director
Technical Services Bureau

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