

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Taxpayer Guidance Division

TSB-A-08(48)S
Sales Tax
November 5, 2008

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S080128A

On January 28, 2008, the Department of Taxation and Finance received a Petition for Advisory Opinion from Beach Haven Apartments No. 5, Inc., 227 Nassau Boulevard, Garden City South, New York 11530.

The issue raised by Petitioner, Beach Haven Apartments No. 5, Inc., is whether remediation costs incurred by Petitioner qualify as capital improvements to real property.

Petitioner submitted the following facts as the basis for this Advisory Opinion.

Petitioner owns residential rental property that is currently undergoing environmental remediation procedures. The remediation was mandated by the New York State Department of Environmental Conservation (NYSDEC) in October 2007 after it was discovered there was petroleum contamination in the soil and groundwater on the property. The contamination is the result of an oil leak that had initially occurred during a tank removal in 1999. At that time, Petitioner believed that the contamination had been fully cleaned and no further remediation was necessary.

The current remediation involves excavation and soil removal, the collection of soil and water samples, installation of groundwater monitoring wells, backfilling the excavation with clean soil, and other remediation measures as may be mandated by the NYSDEC. The proposal from Petitioner's contractor specified that the remediation project did "not include restoration of vegetation and public and private sidewalks." A copy of the letter from NYSDEC and the remediation proposal were attached to the Petition.

Applicable law and regulations

Section 1105(a) of the Tax Law imposes sales tax on the receipts from every retail sale of tangible personal property, except as otherwise provided.

Section 1105(c)(5) of the Tax Law imposes a tax on the receipts from every sale, except for resale, of 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 article, . . .

Section 527.7(a)(1) of the Sales and Use Tax Regulations provides:

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. Among the services included are services on a building itself such as painting; services to the grounds, such as lawn services, tree removal and spraying; trash and garbage removal and sewerage service and snow removal.

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

(1) The tax is imposed on receipts from every sale of the services of maintaining, servicing or repairing real property, whether inside or outside of a building.

* * *

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

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(4) 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.

Opinion

Petitioner owns residential rental property that is currently undergoing environmental remediation procedures mandated by the New York State Department of Environmental Conservation (NYSDEC). The remediation activities were initiated in 2007 because of contamination resulting from an oil leak that initially occurred during removal of an oil tank in 1999. The purpose of the remediation is to remove as much of the contaminated soil as possible and to replace it with clean soil.

There is no indication in the Petition or attached remediation proposal that the remediation work is a constituent part of a project that might qualify as a capital improvement to real property, property, or land. The original installation of the oil tank occurred sometime prior to its removal in 1999. No tank was installed or reinstalled upon the removal of the old tank. Whether or not the removal of the tank that occurred in 1999 constituted a capital improvement to real property at that time does not bear on current work performed 9 years later to further remediate the soil contamination.

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Petitioner's contractor proposes to remove contaminated soil at the specified site, collect samples in accordance with NYSDEC protocols which may include the installation of monitoring wells, and, ultimately, once all reasonably accessible contaminated soil has been removed, backfill the excavation with clean soil. The remediation proposal is intended to restore the real property to a condition of fitness, efficiency, readiness or safety. The installation of monitoring wells is an incidental part of such restoration. See *KPMG Peat Marwick, LLP*, Adv Op Comm T & F, September 12, 1996, TSB-A-96(54)S. Therefore, the work performed for Petitioner appears to constitute the services of maintaining, servicing, or repairing real property, which are subject to sales tax under section 1105(c)(5) of the Tax Law. See section 527.7(a)(1) of the Sales and Use Tax Regulations. Accordingly, the contractor is required to collect sales tax from Petitioner on its charges for remediation work.

If Petitioner improved the real property within a reasonable amount of time after the remediation work was performed and such improvement qualified as a capital improvement to real property, to the extent that the remediation work related directly to and was a constituent part of the capital improvement, Petitioner could apply for a refund of the tax it paid on the remediation work. Such application must be made directly to the Tax Department on Form AU-11, *Application for Credit or Refund of Sales or Use Tax*. See *Frontier Chemical Royal Avenue Superfund Site*, Adv Op Comm T & F, February 20, 1996, TSB-A-96(8)S.

DATED: November 5, 2008

/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.