

**New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit**

TSB-A-11(5)S
Sales Tax
February 22, 2011

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S110103B

On January 3, 2011, the Department of Taxation and Finance received a petition from [REDACTED] (Petitioner). Petitioner asks whether the lifeguard and pool maintenance services described below are subject to sales tax. We conclude that the lifeguard services constitute protective services subject to tax under Tax Law section 1105(c)(8), and the pool maintenance services constitute maintaining or servicing real property subject to tax under Tax Law section 1105(c)(5).

Facts

The Petition described four different scenarios:

1. The Petitioner provides lifeguard services for a swimming pool at an hourly rate.
2. The Petitioner provides lifeguard services for a swimming pool at a fixed fee for the entire summer.
3. The Petitioner provides lifeguard services for a swimming pool at a fixed fee for the entire summer and in addition to his/her duties as a lifeguard, the lifeguard walks around the pool upon arriving in the morning and removes any leaves or bugs in the pool.
4. The Petitioner provides a "total pool service," consisting of opening and closing the pool, administering chemicals, providing lifeguard services, and clearing the pool of leaves, bugs, etc. The total pool service is provided for the entire summer for a fixed fee.

In order to be a lifeguard, an individual must be certified by the American Red Cross (or similar accrediting body) as to swimming ability, water safety, water life saving techniques and CPR. The lifeguard's duty is to monitor pool activities to insure the safety of swimmers, and if needed, to rescue anyone in the pool who is having trouble swimming or leaving the water. It should also be noted that the Petitioner carries millions of dollars of liability insurance in case someone is injured when one of the Petitioner's lifeguards is on duty. The lifeguards are employees of the Petitioner. In scenario 4, "opening and closing the pool" refers to the first opening of the pool for the season and the final season closing of the pool. At the beginning of the season, the pool cover needs to be removed, heaters and filters need to be set up, and the pool water treated. At the end of the season, the same process occurs to close the pool (except everything is disassembled rather than assembled.)

Analysis

Tax Law section 1105(c)(8) subjects to tax the receipts from

“[p]rotective and detective services, including, but not limited to, all services provided by or through alarm or protective systems of every nature, including, but not

limited to, protection against burglary, theft, fire, water damage or any malfunction of industrial processes or any other malfunction of or damage to property or injury to persons, detective agencies, armored car services and guard, patrol and watchman services of every nature other than the performance of such services by a port watchman licensed by the waterfront commission of New York harbor, whether or not tangible personal property is transferred in conjunction therewith.”

As noted in the facts, the duty of the lifeguard is to ensure the safety of the swimmers and to rescue anyone in the pool having trouble swimming or leaving the water. These duties provide protection against injury to persons, and as such, fit within the description of protective services in section 1105(c)(8).

In addition, to the extent that the lifeguards remove bugs and leaves from the pool, or administer chemicals to the pool, or Petitioner has staff that opens and closes the pool for the season, Petitioner is maintaining or servicing real property which are services subject to tax under section 1105(c)(5). See Publication 862, *Sales and Use Tax Classifications of Capital Improvements and Repairs to Real Property* (April 2001), p. 24.

Petitioner is required to collect sales tax on the receipts that it receives for the services described above for those pools located in New York State.

DATED: February 22, 2011

/S/

DANIEL SMIRLOCK
Deputy Commissioner and Counsel

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.