

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

TSB-A-12(17)S
Sales Tax
July 11, 2012

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S111219A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. Petitioner asks whether charges for the service and use of its portable toilets to its customers engaging in capital improvements are considered a capital improvement-related service that is excluded from sales and use tax. We conclude that Petitioner's products do not qualify for a capital improvement exclusion.

Facts

Petitioner states that it provides portable toilet facilities to its customers. These facilities range from traditional fiberglass portable toilets to upscale facilities which include tile floors and porcelain sinks. Petitioner charges its customers by the day, week, month, etc. Cleaning and waste removal is provided one time each week and is included in the charge for customers who have the facilities a week or more. Customers may request additional cleaning and waste removal for an additional fee.

Petitioner asks whether its charges to customers for portable toilet facilities are exempt if the customers are in the construction industry and engaged in capital improvement projects as defined under Tax Law §1101(b)(9). Petitioner notes that its customers in this industry provide the facilities to their employees in connection with capital improvement projects because the customers' employees usually work an eight hour day. The projects have no running water or usable toilet facilities. Petitioner further notes that it delivers the facilities to the construction site and that the cleaning and waste removal is done at the construction site when the toilets are there for more than a week.

Analysis

The Department issued an Advisory Opinion (TSB-A-08(55)S), which provided that the "provision of portable toilets in conjunction with waste removal services is part of the taxable waste removal service." The opinion further stated "[c]harges for both the portable toilet service and the trash removal service were deemed to be charges for waste removal services, and taxable under Tax Law section 1105(c)(5)." Petitioner does not contest that opinion; rather, it asks whether the provision of an otherwise taxable service is exempt when provided "in conjunction with the performance of a capital improvement."

Petitioner's charge for the facilities to its customers for their use would be considered subject to sales and use tax. *See* Tax Law § 1105(c)(5). The performance of waste removal

services is a form of “[m]aintaining, servicing or repairing real property, property or land,” which is an enumerated service, and receipts from its sale are accordingly subject to sales and use tax under Tax Law section 1105(c)(5). (*See Waste Management of New York, Inc.* [Waste Management], Tax Appeals Tribunal, March, 21. 1991).

Petitioner claims that, because its customers may be performing capital improvement projects under Tax Law section 1101(b)(9), its charges for portable toilets and related services should be exempt. However, Tax Law sections 1101(b)(9) and 1105(c)(5) and the regulations thereunder (Reg. Sec. 527.7) provide no extension of the capital improvement exclusion to waste removal services that are used in conjunction with capital improvement projects. The examples set forth in Reg. Sec. 527.7 (#4 and #5) are not analogous to the provision of portable toilet facilities. Those examples relate to debris removed from the construction site that was created from actual construction activities or debris removed from the demolition of structures already on the construction site. The provision of the portable toilet facilities and accompanying waste removal is not construction debris removed from the site. Accordingly, the provision of the portable toilet facilities and accompanying waste removal would not qualify for such exemption.

Further, Petitioner’s provision of portable toilet facilities to its customers would not qualify for the exclusion under Reg. Sec. 541.7 as a purchase of the service of trash or debris removal. Reg. Sec. 541.7 provides four criteria for this exclusion to apply, the second of which is that “the contractor generated the trash or debris to be removed from such real property, property or land as a result of such work.” The provision of the portable toilet facilities does not meet that criterion. As a result, this exclusion would not be applicable under these circumstances.

Accordingly, Petitioner’s sales (which includes rentals) of portable toilet facilities and related waste removal services are subject to State and local sales tax.

DATED: July 11, 2012

/S/

DEBORAH R. LIEBMAN
Deputy 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. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.