

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

TSB-A-15(17)S
Sales Tax
May 11, 2015

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S101101C

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED] "Petitioner". Petitioner asks whether it is required to collect sales tax on the receipts for the services it provides to financial institutions that own real property in New York and whether it is required to pay sales and use tax on certain expenditures it makes in providing those services.

We conclude that Petitioner's appraisals, valuations, and broker opinion services are not subject to sales tax. Also, Petitioner's fees for managing real property are not subject to sales tax. Petitioner's receipts for utilities, protective services, and repair and maintenance services of real property in New York are subject to sales tax unless the customer is exempt from sales tax. Because Petitioner is reselling utilities, protective services, and repair and maintenance services, its purchases of these services are not subject to sales or use tax.

Facts

Petitioner provides services to the Federal National Mortgage Association (FNMA) and other financial institutions that own real properties in New York that were obtained through a completed mortgage default. Petitioner's primary responsibility to these customers is to get the properties in a marketable condition and arrange for their sale.

A discrete optional service that Petitioner offers is to arrange for an appraisal, valuation, or broker price opinion, which is similar to an appraisal. Petitioner uses a network of third party licensed real estate professionals and appraisers to perform the appraisals, valuations, and broker price opinions. Petitioner does not purchase these services as agent of its customer. Petitioner reviews and audits these appraisals, valuations, and broker price opinions to ensure quality and performance standards are met.

Petitioner will hire a broker to sell the real property. The broker is responsible for assessing the work needed to be done to protect the property and place the property in a marketable condition. The broker furnishes a report about the work needed to Petitioner, and Petitioner forwards the report to its customer. If the customer and Petitioner approve the work, the broker hires contractors and other service providers to perform the work. The broker does not act as agent for Petitioner or Petitioner's customer in hiring the contractors or other service providers.

Among the purchases made by the broker are utility services subject to sales tax under Tax Law § 1105(b), protective services subject to sales tax under Tax Law § 1105(c)(8), and

services to real property subject to sales tax under Tax Law § 1105(c)(5). The broker pays for these services. After it is presented with a written itemization of the payments made by the broker for these services, Petitioner reimburses the broker at cost for them. The broker does not receive a discrete fee for managing the work on a property, but will receive a commission for selling the property upon the sale of the property, which is the standard fee that a broker in the area would receive for selling a residence.

After the Petitioner has presented to the customer a written itemization of the payments made to the broker, Petitioner is reimbursed at cost by its customer for the payments Petitioner makes to the broker. Petitioner also receives a discrete management fee for all the services that it provides. Petitioner does not act as agent for its customer in hiring the broker or making payments to the broker.

Analysis

Real estate appraisal and real property valuation services are not services subject to sales tax; therefore, neither Petitioner's purchase of real property appraisals, valuations or broker price options is not subject to sales tax. *See* TSB-A-03(42)S.

A person that manages real property for the owner may, in some circumstances, be providing taxable services to its customer. *See* TSB-A-91(43)S. Petitioner's management fee is not to subject sales tax because the fee is for the overall activities of placing a residential property in a marketable condition and arranging for the sale of the property. Arranging for the sale of the real property is not a service subject to sales tax. Nor is the service of identifying the tasks that need to be performed to preserve the value of real property and place real property in a marketable condition subject to sales tax. Such a service does not qualify as a taxable inspection service for purposes of Tax Law § 1105(c)(5) because the services and work being recommended go beyond those needed merely to keep real property in a condition of fitness, efficiency, readiness or safety or restoring it to such condition. Thus, for example, when Petitioner recommends that a protective service be hired to protect real property from vandalism, Petitioner is not providing an inspection service or other service to real property subject to sales tax under Tax Law § 1105(c)(5). In brief, offering recommendations of actions that will place real property in a marketable condition is not the same as offering recommendations of actions that will place real property in a condition of fitness and efficiency. Because arranging the sale of real property and making recommendations as to how specifically to preserve or enhance the value of real property are the predominant elements of Petitioner's service, the discrete management fee Petitioner receives is not subject to sales tax even though Petitioner is also selling taxable services to its customer.

The brokers hired by Petitioner are reselling services to it. Two facts supporting this conclusion are Petitioner's pre-approval of the specific work to be performed on the property and the broker's itemized billing for the work performed.

Utility services covered by Tax Law § 1105(b), protective services covered by Tax Law § 1105(c)(8), or services to real property covered by Tax Law § 1105(c)(5) are subject sales tax when sold at retail. Sales of these services are not subject to sales tax if the service is to be resold as such. *See* Tax Law §§ 1105(b)(1) & 1105(c). The rationale why Petitioner is purchasing

goods and services from a broker (Petitioner's pre-approval of the goods and services to be purchased in advance and the broker's presentation of an itemized bill to Petitioner for the goods and services purchased) is germane to whether Petitioner resells these goods and services. The pre-approval by Petitioner's customer of the specific goods and services to be purchased by Petitioner and Petitioner's presentation of an itemized bill to its customer for the goods and services purchased are indications that Petitioner is reselling the goods and services to its customer. These facts establish resale when coupled with Petitioner's customer receiving the economic benefit of the services in question through an increase in the value of its real property. For all these reasons, Petitioner is the retail vendor of these goods and services.

Because Petitioner is not the retail purchaser of the utility, protective, repair and maintenance services it purchases from the brokers, it does not owe sales or use tax on these purchases. Once Petitioner registers for sales tax purposes, it would be entitled to present a resale certificate to a broker who is selling to Petitioner the taxable services that Petitioner resells. 20 NYCRR § 532.4(d).

Petitioner is selling at retail the utility, protective, and repair and maintenance services it purchases from the brokers. It must collect sales tax on its receipts for these services unless its customer is exempt from sales and use taxes. FNMA and its successor, Federal Housing Finance Agency, are exempt from State and local sales tax by federal statute. 12 U.S.C. § 1723a(c)(2); 12 U.S.C. § 4617(j)(2); *see also County of Oakland v. Federal Housing Finance Agency*, 716 F.3d 935. Therefore, if Petitioner's customer was or is either of these entities, no sales tax is due on the sale. Petitioner should retain documentation from the customer substantiating its exempt status. 20 NYCRR § 529.1(e).

Because Petitioner is selling services subject to sales tax, it is required register with the Department of Taxation and Finance for sales tax purposes, file sales tax returns and remit any sales tax due from its customers. Tax Law §§ 1134, 1136 & 1137. It is required to register and file sales tax returns even if all its customers are exempt from sales and use tax.

DATED: May 11, 2015

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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.