

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

TSB-A-84(24)S  
Sales Tax  
October 15, 1984

STATE OF NEW YORK  
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S840529A

On May 29, 1984 a Petition for Advisory Opinion was received from Fortunato Sons, Inc., 150 Knickerbocker Avenue, Bohemia, New York 11716.

The issue raised is whether certain payments made by a contractor are subject to tax under the circumstances described below.

Petitioner is a general contractor which, in the course of performing capital improvements, subcontracts certain portions of the work. In particular, Petitioner engages an excavating firm to excavate, grade and fill. The excavating firm itself determines the type of equipment to be used and the manner in which the job is to be performed. Petitioner does not direct and control the use of the heavy equipment and the operators thereof do not take instructions from Petitioner's personnel.

Section 1105(a) of the Tax Law imposes a sales tax on the receipts from retail sales (including rentals) of tangible personal property. The term "sale" refers to a transfer of title or possession for a consideration. Tax Law, §1101(b)(5); 20 NYCRR 526.7(a)(1). The term "sale" would thus extend to equipment rentals. However, it is provided at 20 NYCRR 526.7(e)(6) that when "... a lease of equipment includes the services of an operator, possession is deemed to be transferred [and the transaction thus constituted a sale] where the lessee has the right to direct and control the use of the equipment."

In the present matter the requisite right to direct and control being absent, the transaction does not constitute a sale of property the receipts from which are subject to tax. What is sold, rather, is a service. Section 1105(c)(5) of the Tax Law imposes a sales tax on the receipts from the sale of the service of "maintaining, servicing or repairing real property.., as distinguished from adding to or improving such real property . . . , by a capital improvement . . . ." The excavation performed by the Petitioner's subcontractor would not in and of itself constitute the performance of a capital improvement. However, since Petitioner is performing a capital improvement of which the excavation work is a critical element, the same falls under the umbrella created with respect to capital improvements. Building Contractors Association v. Tully, 87 A.D. 2d 909. Accordingly, the receipts from the sale of the excavation service to Petitioner would also not be subject to tax.

DATED: September 24, 1984

s/FRANK J. PUCCIA  
Director  
Technical Services Bureau

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