

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

TSB-A-96 (41)S
Sales Tax
July 9, 1996

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S960205B

On February 5, 1996, the Department of Taxation and Finance received a Petition for Advisory Opinion from Envirotrac Ltd., 561 P. Acorn Street, Deer Park, New York 11729. Petitioner, Envirotrac Ltd., provided additional information pertaining to the Petition on April 17, 1996.

The issue raised by Petitioner is whether its environmental cleanup efforts and restoration of property values via the installations of soil and/or groundwater treatment systems constitute capital improvements to real property, property or land and are thus exempt from sales tax.

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

Petitioner is an environmental consulting and contracting company. Clients may purchase either Petitioner's consulting service or its cleanup service or both services. Petitioner separately charges its clients for these services and raises no questions or concerns regarding its consulting activities. Cleanup efforts include the installation of soil and/or ground-water treatment systems. These systems include pumps and pump houses, water treatment facilities, well installations, and treatment buildings including electric and water hookups. Treatment buildings range in size from nothing more than the size of a dog house to a 12' x 25' free standing wood frame structure. The type of systems provided by Petitioner is similar to a septic system. Petitioner's client base consists of both major oil companies and owners of small gas stations.

Applicable Law and Regulations

Section 1101(b) of the Tax Law provides in part:

When used in this article for the purposes of the taxes imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and by section eleven hundred ten, the following terms shall mean:

* * *

(4) Retail sale. (i) A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property, or (B) for use by that person in performing the services subject to tax under paragraphs (1), (2), (3), (5), (7) and (8) of subdivision (c) of section eleven hundred five where the property so sold becomes a physical component part

of the property upon which the services are performed or where the property so sold is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax. Notwithstanding the preceding provisions of this subparagraph, a sale of any tangible personal property to a contractor, subcontractor or repairman for use or consumption in erecting structures or buildings, or building on, or otherwise adding to, altering, improving, maintaining, servicing or repairing real property, property or land, as the terms real property, property or land are defined in the real property tax law, is deemed to be a retail sale regardless of whether the tangible personal property is to be resold as such before it is so used or consumed

* * *

(9) Capital improvement. (i) An addition or alteration to real property which:

(A) Substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property; and

(B) Becomes part of the real property or is permanently affixed to the real property so that removal would cause material damage to the property or article itself; and

(C) Is intended to become a permanent installation.

Section 1105(a) of the Tax Law imposes tax upon:

The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

Section 1105(c) of the Tax Law imposes tax upon receipts from every sale, except for resale,
of:

* * *

(3) Installing tangible personal property ... or maintaining, servicing or repairing tangible personal property ... not held for sale in the regular course of business, whether or not the services are performed directly or by means of coin-operated equipment or by any other means, and whether or not any tangible personal property is transferred in conjunction therewith, except:

* * *

(iii) for installing property which, when installed, will constitute an addition or capital improvement to real property, property or land, as the terms real property,

property or land are defined in the real property tax law as such term capital improvement is defined in paragraph nine of subdivision (b) of section eleven hundred one of this chapter

* * *

(5) 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 chapter, but excluding services rendered by an individual who is not in a regular trade or business offering his services to the public.

Section 1115(a) of the Tax Law provides in part:

Receipts from the following shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten:

* * *

(17) Tangible personal property sold by a contractor, subcontractor or repairman to a person other than an organization described in subdivision (a) of section eleven hundred sixteen, for whom he is adding to, or improving real property, property or land by a capital improvement, or for whom he is about to do any of the foregoing, if such tangible personal property is to become an integral component part of such structure, building or real property

Section 1119(c) of the Tax Law provides in part:

A refund or credit equal to the amount of sales or compensating use tax imposed by this article and pursuant to the authority of article twenty-nine, and paid on the sale or use of tangible personal property, shall be allowed the purchaser where such property is later used by the purchaser in performing a service subject to tax under paragraph (1), (2), (3), (5), (7) or (8) of subdivision (c) of section eleven hundred five or under section eleven hundred ten and such property has become a physical component part of the property upon which the service is performed or has been transferred to the purchaser of the service in conjunction with the performance of the service subject to tax or if a contractor, subcontractor or repairman purchases tangible personal property and later makes a retail sale of such tangible personal

property, the acquisition of which would not have been a sale at retail to him but for the second to last sentence of subparagraph (i) of paragraph (4) of subdivision (b) of section eleven hundred one

Sections 527.7(a)(3)(i) and 541.2(g)(1) of the Sales and Use Tax Regulations codify the statutory definition of "capital improvement." Section 527.7(b) of the regulations provides in part:

* * *

(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.

(5) Any contractor who is making a capital improvement must pay a tax on the cost of materials to him, as he is the ultimate consumer of the tangible personal property.

Section 541.2(g)(2)(i) of the regulations provides:

A capital improvement does not include a contract for the sale and installation of tangible personal property which when installed remains tangible personal property.

Section 541.5(b)(4)(i) of the regulations provides in part:

When a properly completed certificate of capital improvement has been furnished to the contractor, the burden of proving the job or transaction is not taxable and the liability for the tax rests solely upon the customer.

Section 541.8 of the regulations provides in part:

(a) General. Subcontracts to provide temporary facilities at construction sites, which are a necessary prerequisite to the construction of a capital improvement to real property, are considered a part of the capital improvement to real property. Charges for installation of materials and the labor to provide temporary heat, temporary electric service, temporary protective pedestrian walkways, and temporary plumbing by a subcontractor are therefore not subject to tax provided the subcontractor receives a copy of the properly completed certificate of capital improvement issued by the customer to the contractor.

* * *

(b) The subcontractor is liable, however, for the tax on the purchase of the materials used to provide the temporary facilities at construction sites described in subdivision (a) of this section.

Opinion

A determination as to whether each of Petitioner's installations of soil and/or ground-water treatment systems constitutes a capital improvement is a question of fact based on the circumstances in each instance and cannot be made in an Advisory Opinion. (See, George W. Long, Adv Op Comm T&F, July 24, 1992, TSB-A-92(56)S; Tax Law, Section 171, subd. Twenty-fourth; 20 NYCRR part 2376.) However, to the extent that an installation satisfies each of the three statutory conditions of a capital improvement, or to the extent that the completion of a capital improvement project cannot be accomplished without the installation of a soil and/or ground-water treatment system, receipts from the sale of such an installation are not subject to sales tax. (See, Rochester Gas and Electric v State Tax Commn., 128 AD2d 238, affd 71 NY2d 931; Building Contractors v Tully, 87 AD2d 909.)

Petitioner's environmental cleanup efforts and restoration of property values via the installation of soil and/or ground-water treatment systems no doubt substantially add to the value of real property or appreciably prolong the useful life of the real property as required by the first statutory condition. Whether the systems become part of the real property or are permanently affixed to the real property so that removal would cause material damage to the property or systems themselves (i.e., the second statutory condition) and whether the systems are intended to become permanent installations (i.e., the third condition) will vary with the degree of contamination involved, the client's obligations and preferences, and the client's rights in the real property at issue. (It is noted that a rebuttable presumption exists that tenant-installed fixtures and improvements are not made with the intention of permanency. See, Merit Oil of NY v State Tax Commn., 124 AD2d 326; Flah's of Syracuse v Tully, 89 AD2d 729.)

Accordingly, where Petitioner installs a soil and/or ground-water treatment system to such a degree that it loses its separate identity and becomes part of the real property or that its removal would cause material damage to the real property or system and the installation is intended to be permanent, similar to the installation or replacement of a septic system, the installation would constitute a capital improvement (see, Sales and Use Tax Classifications of Capital Improvements and Repairs to Real Property, Publication 862). In such a case, Petitioner would be liable for sales tax on any tangible personal property purchased at retail for use or consumption in the installation. Conversely, where Petitioner merely installs tangible personal property (such as a portable pump in a free standing wooden structure) and after the installation the property remains tangible personal property, the installation in and of itself would not be a capital improvement. In that case, the service of installing the tangible personal property would be taxable under Section 1105(c)(3) of the Tax Law. Petitioner could claim a refund or credit of sales tax which it paid on tangible personal property transferred to the customer in conjunction with the performance of the taxable service. See Section 1119(c) of the Tax Law.

TSB-A-96 (41)S
Sales Tax
July 9, 1996

Where Petitioner accepts a properly completed Certificate of Capital Improvement (ST-124) in good faith, the burden of proving that an installation of a soil and/or ground-water treatment system is not subject to tax is upon Petitioner's client. (See, Saf-tee Plumbing v Tully, 77 AD2d 1.)

DATED: July 9, 1996

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

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