

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

TSB-A-96 (54)S
Sales Tax
September 12, 1996

STATE OF NEW YORK

COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S940930A

On September 30, 1994, a Petition for Advisory Opinion was received from KPMG Peat Marwick, LLP, 345 Park Avenue, New York, New York 10154. Petitioner, KPMG Peat Marwick, LLP, submitted additional information pertaining to the Petition on September 15, 1995.

The issues raised by Petitioner are as follows:

1. Whether receipts from charges for the remediation services described below are subject to sales tax.
2. Whether receipts from charges for the collection of water/soil samples and review and interpretation services described below are subject to sales tax.
3. Whether receipts from charges for reports which convey the results of the remediation and water/soil sampling services and which are furnished to purchasers of these services are subject to sales tax.

XYZ, Inc. (XYZ) performs environmental consulting and engineering services for various clients at sites throughout New York State. The majority of XYZ's work is performed for oil companies under contract/purchase orders. Generally, the work involves clean up at a gasoline service station that has leakage from an underground petroleum storage system. XYZ designs and installs a remediation system to address the leakage into the soil and water beneath the station. Generally, XYZ contracts to remove contaminated soil, install new fill and repave the ground surface after the installation of the remediation system is completed. As part of its services, XYZ (or a subcontractor of XYZ) will sometimes remove leaking oil tanks or install replacement tanks. XYZ occasionally contracts with the oil company solely to install a remediation system but not to participate in the clean up process.

The remediation systems include equipment such as filters, air venting apparatus and test wells. As part of the remediation services, XYZ monitors the test wells. Additionally, water and soil samples are collected by XYZ personnel and are sent to an outside laboratory for analysis. XYZ does not perform the scientific laboratory analysis of the water and soil samples. All analyses of the water and soil samples are subcontracted to the outside laboratory. Once the analysis is completed, the results are reviewed and interpreted by XYZ's engineers/personnel. XYZ's engineers are not licensed nor do they hold any specialized credentials certifying their testing and/or research services.

The length of time spent by XYZ collecting and analyzing the water and soil samples and monitoring the test wells at a particular site depends on each applicable state's laws and regulations. The sampling and monitoring services are performed on a periodic rather than continuous basis. The charges relating to water and soil sampling services may or may not be separately stated on the

invoices to XYZ's clients.

Generally, the clean up process involves monitoring and observation by XYZ's staff of hydrogeologists and geologists. Once the remediation and water and soil sampling analysis services are completed, reports are issued to XYZ's clients. The reports by XYZ contain interpretations of the data collected from the remediation sites as well as recommendations for actions to be taken for remediation of the sites.

XYZ's clients are required to have these environmental services performed in order to be in compliance with federal and state environmental regulatory requirements.

Applicable Law and Regulations

Section 1101(b) of the Tax Law states, 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:

* * *

(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(c) of the Tax Law imposes sales tax upon "[t]he receipts from every sale, except for resale, of the following services":

* * *

(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

Section 527.7(b)(4) of the Sales and Use Tax Regulations states:

(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.

Opinion

XYZ's receipts from charges to a client for installing a remediation system, or installing a remediation system and performing additional remediation services, will not be subject to the tax imposed under either Section 1105(c)(3) or 1105(c)(5) of the Tax Law provided the installation of the remediation system results in or is performed in conjunction with an addition or alteration to real property which meets the three criteria defining a capital improvement under Section 1101(b)(9)(i) of the Tax Law. See, Building Contractors Association v Tully, 87 AD2d 909, Stewarts Ice Cream Co., Adv Op Comm T&F, May 29, 1990, TSB-A-90(27)S. If the services do not result in a capital improvement, then they may be taxable under Section 1105(c)(3) or 1105(c)(5) as the repair, maintenance or servicing of tangible personal property or real property.

A determination as to whether XYZ's installations of remediation systems constitute capital improvements 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 remediation 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; Contractors v Tully, supra.) If the installation is found to constitute a capital improvement,

then XYZ's purchases of materials to perform the capital improvement are subject to tax, unless the capital improvement is made to property of an exempt organization. (See Sections 1116(a) and 1115(a)(15) and (16) of the Tax Law.)

XYZ's environmental clean up efforts via the installation of remediation systems presumably add to the value of real property or appreciably prolong the useful life of the real property, which, if so, would satisfy the first statutory condition for finding a capital improvement. 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 to the systems themselves (i.e., the second statutory condition) and whether the systems are intended to become permanent installations (i.e., the third condition) can vary with the degree of contamination involved, the client's obligations and preferences, and the client's rights in the real property at issue. (Generally, tenant-installed fixtures and improvements are not made with the intention of permanency where the lease provides that the tenant is to remove them when the lease term is up. See, Merit Oil of NY v State Tax Commn., 124 AD2d 326; Flah's of Syracuse v Tully, 89 AD2d 729.)

Accordingly, where XYZ installs a remediation system which loses its separate identity and becomes part of the real property or which cannot be removed without causing material damage to the real property or to the system and the installation is intended to be permanent, as is generally the case with respect 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, XYZ would be liable for sales tax on its purchases of any tangible personal property purchased at retail for use or consumption in the installation, unless the purchaser or property owner is an exempt organization. (See Sections 1116(a) and 1115(a)(15) and (16) of the Tax Law.) Conversely, where XYZ merely installs tangible personal property 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, or of performing additional remediation services with respect to that property, would be taxable under Section 1105(c)(3) or 1105(c)(5) of the Tax Law, depending on whether the services were rendered with respect to tangible personal property or real property, respectively. XYZ could claim a refund or credit of sales tax which it paid when XYZ purchased the tangible personal property which it later transfers to the client in conjunction with performing the taxable service. See Section 1119(c) of the Tax Law.

The installation of a remediation system, performed along with the removal of leaking fuel tanks and the installation of replacement fuel tanks by XYZ, or a subcontractor of XYZ, will qualify as a capital improvement where the work is performed for the property owner, as well as where it is performed for the lessee of the property, provided there is no stipulation in the lessee's lease with the lessor that the fuel tanks must be removed on termination of the lease, or a municipal law or ordinance that requires the removal of the tanks upon the termination of business of the service station. See, Building Contractors Association v Tully, *supra*, Stewarts Ice Cream, *supra*. Where the

terms of the lease or municipal law or ordinance require removal of the fuel tanks, the installation of the tanks will not meet criterion (C) of Section 1101(b)(9)(i) of the Tax Law since the installation is not intended to be a permanent installation. In this instance, the installation of the fuel tanks will not qualify as a capital improvement. Separate and apart from tank removal and replacement, XYZ's other remediation services may also constitute a capital improvement, if the other remediation system installed by XYZ satisfies the criteria of Section 1101(b)(9).

When XYZ's collection, review and interpretation of water/soil samples are performed in conjunction with XYZ's performance of remediation services, the sales taxability of XYZ's charges to its clients for performing water and soil sampling collection, review and interpretation will be determined by the nature of the remediation service performed by XYZ. If the remediation service results in the performance of a capital improvement, the charge for the water/soil collection, review and interpretation services will not be subject to the tax imposed on receipts from the service of maintaining, servicing or repairing tangible personal property or real property under Section 1105(c)(3) or (5), respectively, of the Tax Law. If the remediation service is determined to be the service of maintaining, servicing or repairing tangible personal property or real property, the charge for the water/soil collection, review and interpretation services will be subject to the tax imposed on receipts from the service of maintaining, servicing or repairing tangible personal property or real property under Section 1105(c)(3) or (5), respectively, of the Tax Law. It should be noted that purchases by XYZ of laboratory analysis reports from outside laboratories are not subject to sales tax. See Technical Services Bureau Memorandum TSB-M-95(8)S dated July 31, 1995, entitled Taxability of Certain Laboratory Reports.

Likewise, the sales tax status of XYZ's separately stated charges to clients for reports conveying the results of the remediation and water/soil sampling services will be determined by the nature of the remediation services. If the remediation services result in the performance of a capital improvement to real property, the charges for the reports will not be subject to the tax imposed under Section 1105(c)(3) or (5) of the Tax Law. However, if the remediation services are determined to be the service of maintaining, servicing or repairing real property, the charges for the reports will be subject to the tax imposed under Section 1105(c)(5) of the Tax Law. See, George Industries, Adv Op Comm T&F, April 16, 1990, TSB-A-90(16)S.

DATED: September 12, 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.