

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

TSB-A-99(53)S  
Sales Tax  
November 30, 1999

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S981113A

On November 13, 1998, the Department of Taxation and Finance received a Petition for Advisory Opinion from Hall & Dettor, LLP, Certified Public Accountants, P.O. Box 423, 551 E. Genesee Street, Fayetteville, New York, 13066.

The issues raised by Petitioner, Hall & Dettor, LLP, Certified Public Accountants, are whether the following services provided by licensed engineers, and the following purchases by such engineers, are subject to the sales tax:

- 1) Professional engineering services;
- 2) Purchases of supporting information and testing services used in providing engineering services;
- 3) Post-construction performance monitoring services for systems designed under a professional engineering services contract, when:
  - a) no construction management services are performed by the engineers;
  - b) engineering oversight services of construction management performed by a third party are performed; and
  - c) construction management services are performed by the engineers.
- 4) Engineering oversight services of construction management performed by a third party; and
- 5) Construction management services in acting as general contractor for the construction of systems designed for the same client under a separate contract for engineering services.

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

XYZ, a New York State limited liability partnership, is registered and licensed to perform professional engineering services in the State of New York. XYZ's practice includes underground engineering and environmental consulting services performed largely for private industry. These engineering and consulting services include design engineering associated with various infrastructure projects and the design of remedial activities and systems to mitigate the presence of soil and/or

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groundwater contamination. Subcontractor support for design engineering activities typically includes the procurement of specialty engineering services from other licensed professionals in addition to the following routine informational subcontractor services:

- a) drilling and testing services including test borings and the installation of test pits, groundwater monitoring wells and/or piezometers;
- b) analytical laboratory services; and
- c) geotechnical laboratory services.

The testing services are performed and used as a source of information for engineering purposes. Occasionally, the pits, wells and/or piezometers installed for the collection of information for the engineering services are used later by the client.

The above service activities result in a work product typically consisting of a written report, including supporting figures, plans, specifications and tables that present and discuss information that is unique and personal in nature to a specific client.

Other services performed by XYZ include construction monitoring activities (oversight) to document that third party construction managers hired by XYZ's client build infrastructure and remediation systems according to the plans and specifications reflected in the above written report. Also, XYZ monitors the post-construction performance of the infrastructure and/or environmental remediation projects.

Construction activities related to the services provided by XYZ are typically contracted directly by XYZ's client with a third party. Occasionally, project and/or client requirements dictate that XYZ become engaged in a construction management role, whereby XYZ will directly subcontract and manage construction services on a turnkey basis for the client. This situation may occur on both infrastructure and environmental remediation projects. This work is often performed for entities with Direct Payment Permits (Form AU 297). Occasionally, this work is performed for smaller industrial or commercial accounts who do not possess Direct Payment Permits. Typical subcontractor support includes various equipment and material suppliers, licensed and non-licensed tradesmen, equipment operators, and providers of specialty drilling and technical services necessary to support the construction related activities. XYZ's construction management activities typically include construction of all or part of an engineered-structure(s), and/or the construction and subsequent operation, maintenance and performance monitoring of remedial measures. The construction management services, including subcontracted support services, are typically contractually separated from any project-related engineering service activities.

**Applicable Law and Regulations**

Section 1101(b)(9)(i) of the Tax Law defines the term capital improvement in part as:

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 of the Tax Law provides, in part:

On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax of four percent upon:

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

\* \* \*

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

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.

Section 532.4(c) of the Sales and Use Tax Regulations states in part:

*Use of exemption certificates.* (1) To enable purchasers entitled to an exemption from the sales and compensating use tax to avail themselves of the exemption and for administrative purposes, the Department of Taxation and Finance provides various exemption certificates. Examples of exemption certificates are forms for:

\* \* \*

(ii) capital improvements....

Section 532.5 of the Sales and Use Tax Regulations states in part:

(a) *General.* A direct payment permit is a notice to a vendor that the holder thereof is authorized to pay directly to the Department of Taxation and Finance any tax due on purchases made. The vendor's responsibility for the collection of tax from the permit holder is waived upon receipt of such permit.

\* \* \*

(e) Use of direct payment permits. (1) A direct payment permit may only be used by the holder who makes purchases of tangible personal property or services, the use of which is unknown to him at the time of purchase.

Example 1: A manufacturer-contractor purchases ingredients for use in the production of concrete septic tanks. Some of the septic tanks will be sold without installation, while others are to be sold installed. Since the manufacturer-contractor does not know the number of tanks that will be sold installed, he may use a direct payment permit when purchasing the ingredients.

(2) A direct payment permit may not be used:

(i) as a device to defer payment of the sales tax on purchases;

(ii) as a substitute for a resale certificate or other exemption certificates;  
or

(iii) as a device to transfer the permit holder's privileges to another person.

Example 2: The holder of a direct payment permit purchasing display cases for use in his showroom gives his supplier a copy of his direct payment permit to defer the payment of tax on his purchase which is taxable. This is a use of the permit which is prohibited.

Example 3: A holder of a direct payment permit engages a contractor to erect a warehouse and gives the contractor a copy of his direct payment permit. The contractor may not use the direct payment permit to defer his payment of tax on purchases which are for use by him in the erection of the warehouse. The contractor's liability for the tax on his purchase is not relieved by his customer's direct payment permit. This is a use of the permit which is prohibited.

(3) Direct payment permit holders are required to notify vendors, from whom they make purchases, of their status by submitting a copy of the direct payment permit with the first purchase order. Each vendor accepting a direct payment permit must, for verification purposes, maintain a method of associating a sale for which the permit was used, with the permit on file.

(4) A direct payment permit holder, who by reason of misusing such permit, fails to pay any tax due when required, shall be liable for penalty and interest in addition to the tax due and revocation of his permit. See Part 536 of this Title for penalties and interest.

Section 7201 of the Education Law provides:

The practice of professional engineering is defined as performing professional service such as consultation, investigation, evaluation, planning, design or supervision of construction or operation in connection with any utilities, structures, buildings, machines, equipment, processes, works, or projects wherein the safeguarding of life, health and property is concerned, when such service or work requires the application of engineering principles and data.

### **Opinion**

Professional engineering services are not considered services subject to sales tax enumerated in Section 1105 of the Tax Law. The furnishing of technical advice by a licensed professional engineer is not deemed to be the sale of tangible personal property or the sale of an enumerated service even if a written report is furnished as an incident to the engineering service being performed. Such a professional service is outside the scope of Sections 1105 and 1110 of the Tax Law and is not subject to sales or use tax. It is noted that this conclusion concerning the taxability of engineering services is limited to engineering services and related reports and documents (e.g., evaluations, specifications, plans and designs) which, being based upon the principles of mathematics and the physical sciences, may legally be rendered only by licensed professional engineers. See 1966 New York Tax Bulletin - Vol. 2, Page 58; R.H McDermott Corp., Adv Op Comm T&F, March 2, 1988, TSB-A-88(22)S, and PCA Engineering, Inc., Adv Op Comm T&F, February 15, 1990, TSB-A-90(4)S. It is also noted that charges for copies of plans, drawings, specifications, etc., pursuant to a separate contract or agreement apart from the contract or agreement for engineering services would be subject to sales or use tax. See Architectural Engineering Investigations, Adv Op Comm T&F, July 31, 1998, TSB-A-98(48)S. Consulting services are not, per se, enumerated services.

XYZ performs design engineering and consulting in conjunction with various infrastructure projects and activities related to implementing remediation systems with respect to soil and/or groundwater contamination. Also, XYZ monitors the construction or implementation of infrastructure and remediation systems in order to ascertain that they are constructed in accordance with the appropriate plans and specifications. XYZ also performs post-construction monitoring and reports on the performance of the newly constructed infrastructure or remediation system. In connection with these services, XYZ provides its customer with a written report, including supporting figures, and, with respect to the design engineering activities, XYZ may also furnish plans, specifications and tables.

To the extent that these design and monitoring services constitute the practice of engineering which are based on principles of mathematical and physical sciences and may legally be rendered

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only by a licensed professional engineer, as provided in Section 7201 of the Education Law, they are not subject to sales or use tax.

In the course of providing its engineering services, XYZ procures drilling and testing services, including test borings and installation of test pits, groundwater monitoring wells and/or piezometers. Analytical and geotechnical laboratory services are also procured. The charges to XYZ for the procurement of drilling services, including the test borings and installation of test pits, groundwater monitoring wells and piezometers are subject to sales tax under Section 1105(c)(5) of the Tax Law. However, if such services are performed in connection with the construction of a capital improvement as defined in Section 1101(b)(9)(i) of the Tax Law, they are not subject to tax in accordance with Section 527.7(b)(4) of the Sales and Use Tax Regulations. In such case a properly completed Capital Improvement Certificate (Form ST-124) should be furnished to the person performing the service. Also, the charges to XYZ for analytical and geotechnical laboratory services are not subject to sales tax. See KPMG Peat Marwick, LLP, Adv Op Comm T&F, September 12, 1996, TSB-A-96(54)S and Technical Services Bureau Memorandum TSB-M-95(8)S dated July 31, 1995, entitled Taxability of Certain Laboratory Reports.

XYZ may also act as the general contractor on its clients' projects, under a separate contract from its contract for engineering services. Under Section 527.7(b)(4) of the Sales and Use Tax Regulations, the taxability of XYZ's receipts from the sale of services as a general contractor depends on the end result of the service. If the end result of a client project constitutes a repair or maintenance to real or tangible personal property, then the receipts from the service are subject to sales tax under Section 1105(c)(3) or 1105(c)(5) of the Tax Law. If the end result is a capital improvement as defined in Section 1101(b)(9) of the Tax Law, then the receipts from the sale of the service are not subject to sales tax. Whether the construction or installation of a client's project constitutes a capital improvement is a question of fact based on the circumstances in each instance. In any case where a client of XYZ timely furnishes a properly completed Certificate of Capital Improvement or Direct Payment Permit, XYZ is relieved of the responsibility for the collection of tax from such client.

The receipts from the charges for the subsequent operation, maintenance and performance monitoring of remedial measures may be subject to sales tax under either Section 1105(c)(3) or Section 1105(c)(5) of the Tax Law, assuming these services are not engineering services that are legally required to be performed by a licensed engineer and depending on the nature of the services performed. However, if services performed with respect to such remedial measures are in the nature of inspection services performed solely for purposes of mandatory governmental code compliance, and are not related to or performed in conjunction with repairing, maintaining or servicing tangible personal property, the charges for such services are not subject to sales tax. (See Elevator Services Companies, Adv Op Comm T&F, October 7, 1996, TSB-A-96(67)S and Richard T. Smokowski,

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Adv Op Comm T&F, March 27, 1997, TSB-A-97(18)S.) Services performed by XYZ consisting solely of the provision of reports containing results of the scientific laboratory analysis of environmental samples are not subject to sales tax. See TSB-M-95(8)S.

DATED: November 30, 1999

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

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