

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

TSB-A-83(2)S
Sales Tax
January 31, 1983

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S820331A

On March 31, 1982 a Petition for Advisory Opinion was received from Michael A. Wargula, 128 Sherburn Drive, Hamburg, New York 14075.

The issue raised is whether Petitioner's back-hoe services are subject to sales tax when Petitioner acts as a subcontractor to a prime contractor who is performing repairs or capital improvements.

In one instance, the prime contractor telephones Petitioner and requests Petitioner to excavate earth from around a water main break. The prime contractor arrives after Petitioner has performed the excavation and proceeds to make the necessary repairs to the water main. Petitioner then backfills the excavation.

In another instance Petitioner is hired by a prime contractor to dig trenches at a new construction project for the installation of water pipes. After reviewing specifications and blue prints supplied by the prime contractor, Petitioner excavates the trenches. After the prime contractor has installed the water pipes, Petitioner covers over the pipes in the trenches and the job is completed. Both of the jobs here described are performed from time to time on real property owned by a private corporation, a hospital or a governmental entity. In each instance Petitioner provides the contractor with an estimate prior to commencing a job, and subsequently submits a bill showing separate charges for the operator and the equipment:.

Section 1105(c)(5) of the Tax Law imposes a tax on the following service:

"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 provides as follows:

"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 526.6(c)(1) of the Sales and Use Tax Regulations provides as follows:

"Where a person, in the course of his business operations, purchases tangible personal property or services which he intends to sell, either in the form in which purchased, or as a component part of other property or services, the property or services which he has purchased will be considered as purchased for resale and therefore not subject to tax until he has transferred the property to his customer."

The term "sale" is defined, in section 1101(b)(5) of the Tax Law, to include the following:

"Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume, conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor."

It should be noted at the outset that if Petitioner relinquishes to the prime contractor the right to direct and control the use of the back-hoe such transaction would constitute a "sale", within the meaning of the above-quoted statutory provision, and Petitioner would be required to collect and remit sales tax on the receipts, in accordance with section 526.7(e)(5) of the Sales and Use Tax Regulations, which provides as follows:

"(5) When a lease of equipment includes the services of an operator, possession is deemed to be transferred where the lessee has the right to direct and control the use of the equipment. The operator's wages, when separately stated, are excludible from the receipt of the lease, provided they reflect prevailing wage rates.

Example 11: A company enters into an agreement to lease a crane, together with the services of the operator of the crane. The operator will take instructions from the company's foreman, and the company determines the working hours and locations. The operator's wages are separately stated. This transaction is within the definition of sale, and the transfer of possession has occurred by reason of the company's right to direct and control the use of the equipment by the operator. The taxable receipt excludes the operator's wages." 20 NYCRR 526.7(e)(5)

Assuming that there is no such relinquishment of direction and control, the following applies. Whether the excavation work performed by Petitioner constitutes a repair service or capital improvement depends on the end result of the service performed by the prime contractor. 20 NYCRR 527.7(b)(4) When the prime contractor is repairing a water pipe, the service performed by Petitioner is a repair of real property. Such a service is taxable unless performed for resale. Since Petitioner provides this service to prime contractors for resale, Petitioner is not required to collect sales tax from the prime contractors under these circumstances. 20 NYCRR 526.6(c)(1) Petitioner should, however, obtain a completed Contractor Exempt Purchase Certificate (Form ST-120.1) from the prime contractor in order to establish the status of the charge.

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When a prime contractor lays water pipes it is making a capital improvement to real property. In this case, the excavation service performed by Petitioner is a capital improvement. Petitioner's service in this case, then, is not taxable under section 1105(c)(5) of the Tax Law, irrespective of whether or not it is sold for resale. Petitioner should obtain a completed Certificate of Capital Improvement (Form ST-124) from the prime contractor, in order to establish the status of the charges.

It should be noted that the fact that Petitioner's billing reflects separate charges for equipment and labor does not of itself establish a rental of the back-hoe. Absent a transfer of direction and control to the prime contractor, the transaction remains the sale of a service. Finally, the status of the prime contractor's customer, whether private corporation, hospital or governmental entity, has no bearing whatever on the conclusion arrived at herein.

DATED: January 14, 1983

s/FRANK J. PUCCIA
Director
Technical Services Bureau