New York State Department of Taxation and Finance

Office of Tax Policy Analysis
Technical Services Division

TSB-A-00(21)S
Sales Tax
April 25, 2000

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. S000128B

On January 28, 2000, the Department of Taxation and Finance received a Petition for Advisory Opinion from Pfohl Brothers Landfill Site Steering Committee, 33300 Five Mile Road, Suite 103, Livonia, Michigan 48154. Petitioner, Pfohl Brothers Landfill Site Steering Committee, provided additional information pertaining to the Petition on February 17, 2000.

The issues raised by Petitioner are:

(1) Whether services performed in connection with the remediation of a State inactive hazardous waste site ("Landfill") will result in a capital improvement to real property and thus be exempt from the imposition of sales tax under Section 1105(c)(5) of the Tax Law.

(2) Whether charges for tangible personal property used in the remediation of the Landfill and purchased by Petitioner are exempt from the imposition of sales tax under Section 1115(a)(17) of the Tax Law.

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

The Landfill is a 140-acre inactive hazardous waste site located in Cheektowaga, New York. The Landfill was operated between about 1930 and 1970 for the disposal of municipal, commercial, and industrial wastes. Studies conducted by the Erie County Health Department, the United States Environmental Protection Agency, and the New York State Department of Environmental Conservation ("NYSDEC") indicated the presence of hazardous substances in soil and groundwater at the Landfill. As a result, the site is listed as a class 2 site in the New York State Registry of Inactive Hazardous Waste Disposal Sites, and NYSDEC is overseeing its environmental cleanup. The Landfill is currently owned by Messrs. William Pfohl, Paul Pfohl, and other private parties, and will be transferred upon completion of the cleanup to an appropriate party such as the Erie County IDA.

Petitioner states that both the Landfill owners and the parties responsible for transporting and/or disposing of hazardous wastes are liable for the cleanup process. Petitioner consists of 21 industrial and public utility companies who allegedly transported and/or disposed of wastes at the Landfill. Through Petitioner, the companies will be participating in certain remediation efforts at the Landfill, according to the terms of a consent order that is to be entered into with NYSDEC. In addition to the companies that comprise Petitioner, site records indicate that the Landfill was also used by the Town of Cheektowaga and by various other private and public entities for the disposal of waste.

Petitioner is currently completing negotiations with NYSDEC regarding the consent order and agreement by which Petitioner will conduct remedial action at the Landfill. The purpose of the remediation is to relocate and/or contain the polluted soil in an effort to protect the environment and the health and well-being of nearby residents. The remedial action plan calls for consolidating landfill wastes into a smaller area and placing an engineered cap over the final landfill configuration. The capping system includes a synthetic membrane and various soil layers. The work on the entire site will include, at a minimum, certain soil grading and excavation services, installation of a perimeter subsurface flow barrier and surface water controls, as well as wetlands mitigation. Specifically, the project work to remediate the Landfill will consist of the following:

1. Consolidation of approximately 30 acres onto the landfill footprint and backfilling with approximately 71,000 cubic yards of cover soil;

2. Installation of approximately 10,000 linear feet of perimeter barrier wall and collection trench piping with approximately 9,500 cubic yards of drainage material, 29 manholes and 6 wet wells;

3. Installation of approximately 990 linear feet of interior drainage system with collection piping;

4. Construction of approximately 960 linear feet of municipal tie-in piping;

5. Clearing and grading of remaining waste on approximately 100 acres;

6. Installation of approximately 79,000 cubic yards of gas venting material;

7. Installation of approximately 473,500 square yards of 40-mil VFPE liner for the landfill cap;

8. Installation of approximately 315,700 cubic yards of protective soils;

9. Installation of approximately 49 gas vents;

10. Installation of approximately 14 monitoring wells with well screens, riser pipes and protective casings;

11. Installation of approximately 75,200 cubic yards of protective soil for lined drainage swales;

12. Landscaping of upland transition zone, wet meadow wetlands and emergent wetland;

13. Reparation of road cuts with approximately 6,600 cubic yards base course aggregate and asphalt;

14. Installation of pre-engineered building and concrete foundations;

15. Installation of groundwater pumping system with electrical equipment and instrumentation;

16. Completion/re-installation of chain-link fence and gates around the perimeter of the landfill;

17. Installation, seeding and mulching of topsoil layer.

Petitioner has retained the services of an environmental engineering company to prepare the remedial design. This design, which is essentially complete and determined to be acceptable to NYSDEC, was used as the basis for a competitive bidding process for remedial action. Through this process, the Committee has tentatively selected a contractor to conduct the remedial action. The environmental engineering company will provide construction monitoring and management. The total (future) cost of remedial action, including environmental engineering and NYSDEC oversight costs, is estimated at more than $20 million.

Following remedial action, the Town of Cheektowaga will conduct routine maintenance of the facility. Petitioner is evaluating means by which lands from which wastes are removed could be redeveloped or reused. Other areas of the Landfill may be available with NYSDEC permission for non intrusive use such as open space and parking, provided the underlying land is protective of the public health and the environment.

Applicable Law and Regulations

Section 1101(b)(4)(i) of the Tax Law provides, in part:

> . . . 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 . . . 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. . . .

Section 1101(b)(9)(i) of the Tax Law defines the term “capital improvement” to mean:

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 sales tax on the receipts from every retail sale of tangible personal property, except as otherwise provided.

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

* * *

(3) Installing tangible personal property, excluding a mobile home, or maintaining, servicing or repairing tangible personal property, including a mobile home, 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 article. . . .

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, <u>if such tangible personal property is to become an integral component part of such structure, building or real property</u>. . . . (Emphasis added)

Section 527.5(b)(4) of the Sales and Use Tax Regulations provides, in part:

Tax is not imposed on the charge for installation of tangible personal property which, when installed, will be an addition or capital improvement to real property. . . .

Section 527.7(b) of the Sales and Use Tax 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 528.18 of the Sales and Use Tax Regulations provides, in part:

Tangible personal property sold by a contractor, subcontractor or repairman to a person, other than an organization exempt pursuant to section 1116(a) of the Tax Law, for whom he is adding to, or improving real property, property or land by a

capital improvement, is exempt, if the property sold by the contractor, subcontractor or repairman becomes an integral component part of the real property.

Section 541.2(g)(2)(i) of the Sales and Use Tax 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) (2) of the Sales and Use Tax Regulations provides:

> Labor and material charges. All charges by a contractor to the customer for adding to or improving real property by a capital improvement are not subject to tax provided the customer supplies the contractor with a properly completed certificate of capital improvement.

Opinion

In accordance with the terms of a consent order to be entered into with NYSDEC, Petitioner plans to conduct remedial action in order to mitigate the presence of soil and groundwater contamination at a New York State Registry “class 2" inactive hazardous waste site (Landfill).

With respect to Issue (1), Section 1105(c)(3) of the Tax Law imposes sales tax upon installing tangible personal property and maintaining, servicing or repairing tangible personal property. Section 1105(c)(5) of the Tax Law imposes tax on the receipts from the service of maintaining, servicing or repairing real property. Charges to Petitioner by its contractor for installation services performed in the remediation of the Landfill will not be subject to the tax imposed under either Section 1105(c)(3) or 1105(c)(5), 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 Matter of Building Contractors Association, Inc. et al v Tully, 87 AD2d 909; KPMG Peat Marwick, LLP, Adv Op Comm T&F, September 12, 1996, TSB-A-96(54)S).

As a result of the remediation activities, the land, which is currently unutilized due to the presence of hazardous substances in the soil and groundwater, will be rendered viable for use as a park, or as a parking lot or some other commercial enterprise. Therefore, the installation of the remediation system will no doubt substantially add to the value of the real property or appreciably prolong the useful life of the real property, thus satisfying the first criterion for qualification as a capital improvement under Section 1101(b)(9) of the Tax Law (see Envirotrac Ltd., Adv Op Comm T&F, July 9, 1996, TSB-A-96(41)S; KPMG Peat Marwick, LLP, supra). Whether the system 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 the system itself (i.e., the second statutory criterion) and whether the system is intended to become a permanent installation (i.e., the third criterion) depends on the degree of contamination involved, Petitioner's obligations and preferences, and Petitioner's rights in the real property at issue (see Envirotrac Ltd., supra; KPMG Peat Marwick, LLP, supra).

Part 375 of the New York State Environmental Conservation Rules and Regulations provides guidance as to the nature and extent of the hazardous waste contamination at the Landfill. In this case, the degree of contamination constitutes a "significant threat" to the environment. See 6 NYCRR §375-1.8(a)(2)(ii) which defines a "class 2" inactive hazardous waste disposal site. The mere presence of hazardous waste at a site or in the environment is not a sufficient basis for constituting a significant threat to the environment. See 6 NYCRR §375-1.4(c). Petitioner's remediation system is designed to eliminate all significant threats to public health and the environment, and consists of extensive grading, contouring, trenching, capping, excavation and construction of groundwater collection facilities which all become an integral component part of the underlying real property. The system is a permanent installation of considerable expense, the removal of which would destroy its components and would require extensive restoration of the real property. It loses its own separate identity much like a septic system and its components include piping/pumping systems, venting, foundations and fencing. The installation or replacement of each of these items constitutes a capital improvement (see New York State and Local Sales and Use Tax Classifications of Capital Improvements and Repairs to Real Property, Publication 862, 5/98). Therefore, the second statutory criterion is also satisfied (see James River II Corporation, Adv Op Comm T&F, October 22, 1992, TSB-A-92(70)S).

With regard to the third criterion, where an owner of real property makes improvements of these types the installation is presumably a permanent one, but improvements made by a person other than the owner of the property, e.g., a tenant, are presumed not to be permanent since they are made for that person's temporary use and enjoyment rather than to permanently enhance the value of the owner's estate (see Matter of Tifft et al v Horton et al, 53 NY 377). However, presumptions of impermanence may be entirely done away with by facts and circumstances which express a contrary intention (see Matter of 100 Park Ave. v Boyland, 144 NYS2d 88, aff'd 309 NY 685; Matter of Merit Oil of NY, Inc. v State Tax Commn., 124 AD2d 326; Matter of Flah's of Syracuse, Inc. v Tully, 89 AD2d 729; Tifft, supra). Petitioner's relation to and interest in the Landfill and the terms of the documents governing the use and remediation of this site are clearly relevant factors in determining Petitioner's intent on the permanency of the installation of the remediation system. Petitioner and the Landfill property owners are being required by NYSDEC to do an environmental cleanup at the Landfill. In keeping with state mandates, Petitioner will carry out the remedial action plan approved by NYSDEC and, upon completion of the project, the property will be transferred by the owners to an appropriate third party. The purpose of the remediation is to render the underlying real property protective of the public health and environment. Neither Petitioner nor the property owners will gain, hold or reserve any right to remove the improvement constructed for this purpose

at any time after its construction. Accordingly, an intention of permanence is found in the unique nature of the relationship between Petitioner, the Landfill owners, and NYSDEC, and the apparent purpose for which the remediation system will be installed; thus the third and final criterion for qualification as a capital improvement under Tax Law Section 1101(b)(9) will be met.

Therefore, the installation of the remediation system meets each of the conditions set forth in Section 1101(b)(9) of the Tax Law. Since the end result of the services performed in installing the system will thus constitute a capital improvement, the charges for labor to perform such improvement are not subject to sales tax (see James River II Corporation, supra; Envirotrac Ltd., supra; KPMG Peat Marwick, LLP, supra).

With respect to Issue (2), since the installation of the remediation system is a capital improvement, Petitioner is exempted under Section 1115(a)(17) of the Tax Law from paying sales tax on charges by its contractor for materials which become part of the remediation system or underlying real property (see Section 528.18 of the Sales and Use Tax Regulations). For purposes of establishing the exempt status of the transaction, Petitioner must give its contractor a properly completed Form ST-124, *Certificate of Capital Improvement*.

It is noted that Section 1115(a)(17) of the Tax Law exempts sales of materials by a contractor for use in performing a capital improvement for a customer rather than to a contractor. Contractors generally must pay tax on their purchases of materials which become part of capital improvements, as the contractors are the ultimate consumers of the tangible personal property. See Section 1101(b)(4)(i) of the Tax Law and Section 527.7(b)(5) of the Sales and Use Tax Regulations.

DATED: April 25, 2000

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

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