

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-03(30)S
Sales Tax
July 16, 2003

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S021008A

On October 8, 2002, the Department of Taxation and Finance received a Petition for Advisory Opinion from PondCleaner, LLC, 8 Horton Street, Hornell, New York 14843.

The issue raised by Petitioner, PondCleaner, LLC, is whether, under the circumstances presented below, the following services offered by Petitioner are subject to sales tax:

1. Weed and debris removal at lake front properties
2. Weed and debris removal at ponds
3. Silt, weed and debris removal at lake front properties
4. Silt, weed and debris removal at ponds
5. Silt removal at ponds and inlet/outlets
6. Consulting
7. Follow-up maintenance performed in succeeding years

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

Petitioner performs aquatic landscaping and pond restoration consulting. Petitioner performs its services for individuals, farmers, homeowners associations, golf courses, corporate properties, and manufacturers. While each client may have specific reasons for purchasing Petitioner's services and the scope of the following tasks may vary from one job site to another, the functions are generally the same, whether the tasks are performed at lakefront properties or ponds.

Weeds

Petitioner identifies nuisance aquatic vegetation that interferes with recreational activities such as boating, swimming and fishing. Petitioner uproots the targeted plants and physically removes them from the job site.

Debris

Petitioner removes underwater debris such as cans, bottles, tires, waterlogged limbs and trees, sunken docks and other foreign elements that may create hazards to boats, boating, or people swimming, wading or working around docks and boat hoists.

Zebra Mussels

Petitioner captures, contains and removes zebra mussels from lake bottoms, docks, boat hoists and water intake lines.

Silt Removal

When ponds are used as a source of water to be used for irrigation or manufacturing purposes, often the only way to increase or re-establish their holding capacity is to remove silt. This is also true of lake inlets and outlets where debris and silt must be removed so that it does not impede the flow of water. In addition, increasing the depth of the water column is an extremely effective method of long-term weed control. If sunlight cannot penetrate to the bottom, weeds will not grow and consequently, will not need to be removed.

Consulting

Silt, weed and debris removal is a semi-permanent treatment and as such requires little, if any, secondary work for a number of years except when winter wave and water current action may naturally re-deposit nuisance materials on lake fronts. In the case of ponds, debris, sediment, and silt may enter the pond from an outside source, especially in times of flooding caused by excessive rain. Petitioner advises its clients of such possibilities and for a nominal consulting fee, will suggest ways of preventing such problems by applying various barriers within the stream or inlet to inhibit the re-entry of nuisance materials. Petitioner seldom performs such work itself.

Maintenance

Maintenance duties normally consist only of locating, targeting, uprooting and removing recurrent nuisance aquatic vegetation and/or zebra mussels. Since debris and silt are rarely accumulated in any significant amount on an annual basis, removal of such is, more often than not, unnecessary. This is particularly true of ponds belonging to one entity where the body of water is treated in its entirety, as opposed to a lake where one property owner has his/her lake front treated and a neighbor does not. As a result, pond maintenance can normally be handled in 2 or 3 year intervals instead of annually at a cost of approximately 10 -20 % of the initial year's cost. Lakefront properties may require annual maintenance costing approximately 10 -20 % of the initial year's cost.

Many projects are classified as "crisis management," i.e., Petitioner is not called in until the aquatic property is so overcome with vegetation or silt that it is in danger of becoming a swamp. In most instances, projects require massive amounts of labor to remove immense quantities of vegetation and/or silt. Often initial projects are too costly for the client to complete in one year and Petitioner will budget a set amount of money to be spent annually. Since debris and/or silt removal need not be redone and weed recurrence is minimal, each year the scope of the area can be increased and after a period of time, the entire area can be covered for the budgeted amount. Although work

of this kind is moderately expensive, the result of such work increases the property value more than the cost of the project.

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:

* * *

(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 the following:

The receipts from every sale, except for resale, of the following services:

* * *

(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, but excluding . . . (ii) services rendered directly with respect to real property, property or land used or consumed directly and predominantly in the production for sale of gas or oil by manufacturing, processing, generating, assembling, refining, mining, or extracting and (iii) services rendered with respect to real property, property or land used or consumed predominantly

either in the production of tangible personal property, for sale, by farming or in a commercial horse boarding operation, or in both. (emphasis added)

Section 1105-B(b) of the Tax Law provides:

Receipts from every sale of the services of installing, repairing, maintaining or servicing the tangible personal property described in paragraph twelve of subdivision (a) of section eleven hundred fifteen of this article . . . to the extent subject to such tax, shall be exempt from the tax on sales imposed under subdivision (c) of section eleven hundred five of this article.

Section 1115(a)(12) of the Tax Law provides an exemption from sales and use tax for:

Machinery or equipment for use or consumption directly and predominantly in the production of tangible personal property, gas, electricity, refrigeration or steam for sale, by manufacturing, processing, generating, assembling, refining, mining or extracting. . . .

Section 527.7 of the Sales and Use Tax Regulations provides, in part:

(a) Definitions. (1) Maintaining, servicing and repairing are terms which are used to cover all activities that relate to keeping real property in a condition of fitness, efficiency, readiness or safety or restoring it to such condition. Among the services included are services on a building itself such as painting; services to the grounds, such as lawn services, tree removal and spraying; trash and garbage removal and sewerage service and snow removal.

* * *

(b) Imposition. (1) The tax is imposed on receipts from every sale of the services of maintaining, servicing or repairing real property, whether inside or outside of a building.

Opinion

Petitioner performs aquatic landscaping and pond restoration consulting for owners of ponds and lake front properties. Petitioner removes debris, weeds, zebra mussels, and silt from these aquatic properties as needed to restore or maintain them.

Petitioner may also advise its clients regarding ways of preventing the natural re-deposit of nuisance materials in these aquatic properties by means of various barriers within the stream or inlet to inhibit the re-entry of nuisance materials. Petitioner, however, seldom performs such work itself.

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Petitioner contends that its services should be considered as “aquatic landscaping.” Equating such aquatic landscaping to “dry land” landscaping services, Petitioner asserts that its initial year of service results in a capital improvement to real property and is nontaxable, while the subsequent years of service are subject to sales tax as maintenance of real property.

In order for Petitioner’s services to be considered nontaxable, these services would have to meet all the requirements of a capital improvement. See section 1101(b)(9) of the Tax Law. While such services may meet the first criteria of prolonging the useful life of these aquatic properties, these services do not meet the second criteria since Petitioner does not make any installation which could be construed to be permanently affixed to the real property so that its removal would damage the property or the article.

Maintaining, servicing and repairing real property are terms which are used to cover all activities that relate to keeping real property in a condition of fitness, efficiency, readiness or safety or restoring it to such condition. See section 527.7(a)(1) of the Sales and Use Tax Regulations. Petitioner’s services (both the initial service and later follow-up) meet this definition. While initial installation of perennials, shrubs, trees, and lawns can qualify as a capital improvement, Petitioner’s services are not unlike the first cutting of a neglected lawn that has gone to seed, which is a maintenance service to real property. Maintaining, servicing and repairing real property are services subject to tax under section 1105(c)(5) of the Tax Law. Therefore, Petitioner must collect the appropriate state and local rate of sales tax on charges for its service.

Although Petitioner’s services are taxable, certain purchasers may employ such services for an exempt purpose. For instance, farmers may maintain their ponds which are used to irrigate their fields or as a water source for dairy cows. If the farmer purchased such services with respect to property or land used predominantly in the production of tangible personal property for sale by farming, then the farmer could issue a properly completed *Farmer’s and Commercial Horse Boarding Operator’s Exemption Certificate*, Form ST-125, within 90 days of the purchase. See sections 1105(c)(5)(iii) and 1132(c) of the Tax Law.

Similarly, to the extent that Petitioner’s services constitute a servicing of machinery and equipment used directly and predominantly in the production of tangible personal property for sale, a manufacturer may issue and Petitioner may accept Form ST -121, *New York State and Local Sales and Use Tax Exempt Use Certificate*, to exempt the receipts from such services from tax. See section 1105-B(b) of the Tax Law.

With regard to charges for consulting services, Petitioner inspects the property and advises its clients how to prevent the re-deposit of nuisance materials by applying various barriers within the stream or inlet. Such inspections and diagnostic services are activities which are part of the process of keeping real property in a state of fitness, efficiency, readiness or safety and are subject

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to sales tax whether or not the work is done. See Mark S. Klein, Adv Op Comm T&F, April 27, 1994, TSB-A-94(21)S.

DATED: July 16, 2003

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