

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

TSB-A-05(11)S
Sales Tax
April 15, 2005

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S030929A

On September 29, 2003, the Department of Taxation and Finance received a Petition for Advisory Opinion from Charles Calderone Associates, Inc., George D. Cattabiani & Associates, Inc., D.T.M. Inc. Elevator Consulting, GMA Consulting, Inc., Hubert H. Hayes, Inc., Landmark Elevator Consultants Inc., Lerch, Bates & Associates, Inc., Lift-Tech-Ltd, J. Martin Associates, Inc., Joseph Neto and Associates, Inc., Howard Nugent & Associates Inc., Sterling Elevator Consultants, LLC, Triboro Technologies Inc., United Elevator Consultants, VDA Associates, Vertical Systems Analysis, and Walsh Associates, LTD, collectively, Elevator Service Companies, George Murray & Associates, Inc., 60 Fire Island Avenue, Babylon, New York, 11702.

The issue raised by Petitioners, Elevator Service Companies, is whether charges for the services performed by Petitioners, as set forth below, are subject to sales tax.

Petitioners submit the following facts as the basis for this Advisory Opinion.

Petitioners are a group of unrelated companies who provide various services to their customers related to the operation of elevators in their customers' buildings. Petitioners do not install, maintain, repair, lubricate or grease any elevators. Petitioners' employees do not carry tools, lubricant or grease. Petitioners assert that the services described below are not performed in conjunction with maintenance, repairs or construction performed by third-party contractors. After analyzing facts pertaining to their customers' elevators, Petitioners generally provide their customers with findings and recommendations in a written report. The services performed by Petitioners are as follows:

1. Some Petitioners are hired to evaluate elevator performance. These evaluations are performed by visual inspection to determine if an elevator meets applicable building code safety requirements. These services are generally performed under the following circumstances:
 - a. In connection with an acquisition of real estate or the financing of a real estate project. This evaluation is generally ordered by a purchaser, financial institution, architect or engineer to determine the remaining life of an elevator.
 - b. In connection with a request for a modernization survey to determine whether to modernize elevator equipment. Such evaluations generally include cost estimates with regard to such modernization.

- c. To determine if maintenance on elevators previously performed by third-party maintenance contractors has allowed the elevators to meet industry and regulatory standards. When necessary, Petitioners will provide a list of corrections to be undertaken by such contractor so that the elevators meet the proper standards.
- d. Annual or semi-annual evaluations of the client's elevators in order for the client to avoid receiving violation notices from the local Building Department upon their inspection. Petitioners' evaluations are performed using the same criteria that a Building Inspector uses when inspecting a building to determine if there are code violations.
- e. For clients in New York City, annual Elevator and Escalator Inspections mandated by New York City Local Law 10/81, to determine if the elevators meet building code standards in accordance with Local Law 10/81. These annual inspections are performed in an identical manner as the inspections described above, except that Petitioners must file a report with the city of New York. Sometimes written reports are given to the client. The punch list used by Petitioners in doing these inspections is identical to that used by a City Building Inspector when giving a violation notice.

With respect to items d. and e. above, Petitioners state that the Elevator Safety Code produced by the American Society of Mechanical Engineers has been adopted by the New York State Department of State and made applicable to the State Uniform Fire Prevention and Building Code (State Building Code). Section 1206 of the Elevator Safety Code details proper maintenance requirements. The State Building Code used throughout the state of New York and New York City Building Code mandate compliance with these detailed maintenance requirements. Under the State Building Code, a property owner is punishable for the failure to have elevator and maintenance inspections as required.

- 2. Some Petitioners provide guidance to clients as to the structuring of maintenance contracts between the client and its third-party maintenance contractor. This includes delineating the specifications of the subject equipment to be maintained and the items of maintenance which must be performed by the contractor.
- 3. Some Petitioners perform studies of the pedestrian traffic capacity of both new and existing buildings to determine the elevator equipment necessary to adequately service the buildings. This study is generally performed by an owner (or developer) in connection with planned building or renovation of an elevator system.

4. After performing the modernization survey described in item 1. b., if a modernization project goes forward, a Petitioner may be requested to put the recommended equipment changes in "book form," by writing up detailed specifications and other information necessary for a contractor to bid on installing the new or updated equipment. Petitioners' responsibilities often also include reviewing and analyzing project bids received by third-party contractors.
5. After the installation of an elevator, Petitioners are often requested to evaluate the elevator to determine if it was properly installed.
6. Some Petitioners are requested on occasion to design and oversee the installation of new elevators. This service usually commences with a study of pedestrian traffic to determine the number of elevators necessary to service the building. Thereafter, a Petitioner often creates blueprints, prepares specifications, and possibly oversees the bidding process. This service may also include approval of shop drawings, attendance at field meetings and supervision of construction. The final step of this service is the final inspection of the newly installed elevator.
7. Some Petitioners are hired by law firms and insurance companies to provide expert witness testimony.
8. Some Petitioners are hired by municipalities to determine whether and to what extent elevators within the municipality are in violation of applicable building codes, and to prepare a written report to the building owner which addresses any violations. Such reports are paid for by the municipality.
9. Some Petitioners are hired by private clients to act as their representative in obtaining a building permit from a municipal building department. This type of service is charged either on an hourly or a fixed fee basis.
10. Some Petitioners are hired by municipalities to determine whether and to what extent elevators within the municipality are in violation of applicable building codes and to prepare written reports to owners which address violations. Such services are billed to and paid by the building owner.

The inspection reports prepared by Petitioners (which are described in items 1, 5, 8 and 10) describe the condition of various components of the elevators, such as hoist, compensating and car governor ropes, emergency lights, exhaust fans, doors and lighting, brake assemblies, alarm bells and buzzers, and two-way communication devices, and recommend appropriate repairs or maintenance. These inspection reports are not intended to be used by the third party contractors which maintain and service the elevators, but are submitted to the building owners for their use. According to Petitioners, contractors conduct their own inspections to determine what maintenance and repairs are necessary for the elevators.

Some Petitioners are hired by architects, engineers or contractors to provide some of the services described herein, for use by the architect, engineer or contractor in performing its contract with its client.

Applicable law and regulations

Section 1105 of the Tax Law provides, in part:

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

* * *

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

(1) The furnishing of information by printed, mimeographed or multigraphed matter or by duplicating written or printed matter in any other manner, including the services of collecting, compiling or analyzing information of any kind or nature and furnishing reports thereof to other persons, but excluding the furnishing of information which is personal or individual in nature and which is not or may not be substantially incorporated in reports furnished to other persons, and excluding the services of advertising or other agents, or other persons acting in a representative capacity, and information services used by newspapers, radio broadcasters and television broadcasters in the collection and dissemination of news, and excluding meteorological 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

* * *

(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 527.5 of the Sales and Use Tax Regulations provides, in part:

Installing, repairing, servicing and maintaining tangible personal property.

(a) Imposition. (1) The tax is imposed on receipts from every sale of the services of installing, maintaining, servicing or repairing tangible personal property, by any means including coin-operated machines, whether or not any tangible personal property is transferred in conjunction with the services.

* * *

(3) Maintaining, servicing and repairing are terms used to cover all activities that relate to keeping tangible personal property in a condition of fitness, efficiency, readiness or safety or restoring it to such condition.

* * *

Example 6: A company operates a diagnostic service in which it tests an appliance for a set fee, but does not repair the appliance. The charge for the diagnostic service is taxable.

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

Maintaining, servicing or repairing real property.

(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

Petitioners are a group of unrelated companies who provide various services, as described above, to their customers related to the operation of elevators in their customers' buildings.

With regard to item 1, Petitioners may evaluate elevator performance in order to determine if an elevator meets applicable building code safety requirements. These are not

inspections required by a governmental entity. Item 1. a. indicates that such an inspection may be done in connection with the sale of the building or structure to determine the remaining life of an elevator.

Item 1. b. indicates that such an inspection may be done in connection with a request for a modernization survey. Such a survey would generally include a cost estimate with regard to such modernization. It is reasonable to conclude that such a survey may result in a recommendation that the elevator equipment should be repaired, replaced or otherwise rehabilitated along with the cost estimates for such recommendation.

Item 1. c. indicates that such an inspection may be performed to determine if maintenance on elevators previously performed by third-party maintenance contractors has allowed the elevators to meet industry and regulatory standards and are, therefore, in a condition of fitness, efficiency, readiness or safety.

Item 1. d. indicates that such an inspection may be performed to determine whether elevators meet the particular locality's building codes, but the inspection is not required by a governmental entity. Rather, these inspection services are performed so that repairs can be made to the elevators prior to the mandatory inspection required for governmental code compliance, thus avoiding fines or other sanctions imposed under those codes.

Item 1. e. indicates that such an inspection is performed as a New York City Local Law 10/81 mandated Elevator and Escalator Inspection.

All of the inspection services described in item 1 are performed to ascertain whether the elevators are in a condition of fitness, efficiency, readiness and safety or need to be restored to such condition. None of the inspection services described in item 1, except for item 1. e., are required by a governmental entity to show compliance with building codes.

The services described in items 1. a. through d. constitute maintenance services to real property. In each case, an inspection is performed to evaluate the state of repair of an elevator for various reasons. In accordance with the rationale set forth in section 527.5(a)(3) of the Sales and Use Tax Regulations, the inspection of elevators is a diagnostic service for keeping real property in a condition of fitness, efficiency, readiness and safety, as contemplated in Example 6 of section 527.5(a)(3) with respect to tangible personal property. See *National Elevator Inspection Services, Inc.*, Adv Op Comm T & F, September 17, 1993, TSB-A-93(49)S. Pursuant to section 1105(c)(5) of the Tax Law, the inspection of elevators constitutes the maintaining of real property. Such service is subject to tax pursuant to section 1105(c)(5) of the Tax Law and section 527.7(b)(1) of the Sales and Use Tax Regulations. The inspection service described in item 1.e., however, is not subject to tax since it is a government mandated inspection for code compliance. See *Elevator Service Companies*, Adv Op Comm T & F, October 7, 1996, TSB-A-96(67)S; *Hall & Dettor, LLP, Certified Public Accountants*, Adv Op Comm T & F, November 30, 1999, TSB-A-99(53)S.

It is noted, however, that if the purchaser of the elevator inspection service is not the owner or lessee of the real property which is the subject of the elevator inspection report, or someone purchasing the inspection service on behalf of such owner or lessee, the charge paid by the purchaser for the service will not be subject to sales tax. See *Joseph A. Matocha*, Adv Op Comm T & F, March 21, 1990, TSB-A-90(12)S.

With regard to item 2, Petitioners may provide guidance to clients as to the structuring of maintenance contracts between the client and its third-party maintenance contractor, including specifying the equipment to be maintained and the items of maintenance which must be performed by the contractor. Such guidance is in the nature of consulting services not enumerated as taxable in section 1105(c) of the Tax Law. Charges for such service are not subject to sales tax.

With regard to item 3, Petitioners may perform studies of the pedestrian traffic capacity of both new and existing buildings to determine the elevator equipment necessary to adequately service the buildings in connection with planned building or renovation of an elevator system. Performance of such studies is in the nature of consulting services not enumerated as taxable in section 1105(c) of the Tax Law. Charges for such service are not subject to sales tax.

With regard to item 4, Petitioners may, if the modernization survey described in item 1. b. determines that a project should go forward, write up detailed specifications and other information necessary for a contractor to bid on installing new or updated equipment, and review and analyze project bids received by third-party contractors. Such services are in the nature of consulting services not enumerated as taxable in section 1105(c) of the Tax Law. Charges for such service are not subject to sales tax.

With regard to item 5, Petitioners may be hired to evaluate an elevator subsequent to its installation. These inspections are performed solely to ascertain whether the elevators have been properly installed.

When performed in conjunction with an installation of an elevator which qualifies as a capital improvement to real property for sales tax purposes, the service described in item 5 is considered part of the capital improvement to the real property. Petitioners should obtain a properly completed *Certificate of Capital Improvement* (Form ST-124) from their customer to substantiate that the charges by Petitioner to its customer are not subject to sales tax. If Petitioners' customer is the contractor making the installation, Petitioners should obtain a copy of the certificate of capital improvement issued by the property owner to the contractor.

With regard to item 6, Petitioners may be hired to design and oversee the installation of new elevators commencing with a study of pedestrian traffic to determine the number of elevators necessary to service the building, subsequently creating blueprints, preparing specifications, overseeing the bidding process, approving shop drawings, attending field

meetings, supervising construction and conducting a final inspection of the newly installed elevator.

If Petitioners are hired by the property owner to design and oversee the installation of new elevators and Petitioners' bill includes the construction of the elevator, charges for such service are in the nature of charges for construction services. If the installation constitutes a capital improvement to real property, Petitioners should obtain a properly completed *Certificate of Capital Improvement* (Form ST-124) from the property owner and provide copies of such certificate to all subcontractors on the job. If Petitioners' customer is the contractor making the installation, and Petitioners are merely designing and overseeing the installation of new elevators, and providing other services described in item 6, Petitioners should obtain a copy of the certificate of capital improvement issued by the property owner to the contractor to substantiate that these services are not subject to sales tax.

With regard to item 7, Petitioners may be hired by law firms and insurance companies to provide expert witness testimony. The provision of expert testimony is in the nature of consulting services not enumerated as taxable in section 1105(c) of the Tax Law. Charges for such service are not subject to sales tax.

With regard to item 8, Petitioners may be hired by municipalities to determine whether and to what extent elevators within the municipality are in violation of applicable building codes and to prepare a written report to the building owner which addresses any violations. Such reports are paid for by the municipality. Charges to a New York State municipality or other governmental entity are exempt from sales tax pursuant to section 1116(a)(1) of the Tax Law. Petitioners should retain the governmental purchase order or copy of the contract with the governmental entity to substantiate the exempt nature of the transaction.

With regard to item 9, Petitioners may be hired by private clients to act as their representative to assist them in obtaining a building permit from a municipal building department. These services are charged either on an hourly or a fixed fee basis. The provision of such assistance is in the nature of consulting services not enumerated as taxable in section 1105(c) of the Tax Law. Charges for such service are not subject to sales tax.

With regard to item 10, Petitioners may be hired by municipalities to determine whether and to what extent elevators within the municipality are in violation of applicable building codes and to prepare written reports to owners which address violations. Such services are billed to and paid by the building owner. If the inspection performed is mandated by a governmental entity for purposes of code compliance, such inspection is not subject to sales tax regardless of whether Petitioners are hired by an exempt governmental entity or a nonexempt private entity. See *Hall & Dettor, LLP, Certified Public Accountants, supra*.

If Petitioners are hired by architects or engineers to perform inspection services of a kind that are subject to tax, for use by architects or engineers in providing professional services to

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their clients, the architects or engineers will generally be required to pay sales tax on their purchases of such services. If Petitioners perform inspection services that are taxable in nature for a contractor, Petitioners will not be required to collect tax if they receive in good faith a properly completed *Contractor Exempt Purchase Certificate* (Form ST-120.1) or other exemption document from the contractor. See section 1132(c) of the Tax Law.

The preceding conclusions in this Advisory Opinion with respect to the taxable status of items 1 through 10 are consistent with the previously issued advisory opinion, *Elevator Service Companies, supra*. *Elevator Service Companies* concluded that certain elevator inspections are not taxable based on the assumption that such services are performed solely for purposes of mandatory governmental code compliance. If elevator inspections are not mandated by a governmental entity for purposes of code compliance, such inspections may be subject to sales tax as discussed above.

If nontaxable services discussed above are sold in conjunction with taxable services, Petitioners need not collect tax on the charges for the nontaxable services provided the charges for such nontaxable services are separately stated on the bill or invoice rendered to the customer and such charges are reasonable in relation to the total charges.

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