

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

TSB-A-05(30)S
Sales Tax
August 1, 2005

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S040203A

On February 3, 2004, the Department of Taxation and Finance received a Petition for Advisory Opinion from E. E. Root & Sons, Inc., 25 Dean Street, Owego, New York, 13827. Petitioner, E. E. Root & Sons, Inc., provided additional information with respect to the Petition on April 29, 2004.

The issues raised by Petitioner are:

1. Whether rentals of equipment used in the construction, repair and maintenance of telecommunications systems are subject to sales tax.
2. Whether purchases of materials used in the construction, installation, repair and maintenance of telecommunications systems are subject to sales tax.
3. What documents must the contractor obtain from the purchaser to substantiate the exempt nature of any exempt transaction.

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

Petitioner installs underground telephone conduit and cable for its customer, a telephone company (hereinafter Phone Company). Petitioner rents construction equipment which it uses to construct, install and repair telecommunications systems. Petitioner excavates a trench, generally alongside of a roadway (rarely in the roadway), places conduit in the trench, runs a cable through the conduit and restores the property. Most of Petitioner's restorations for Phone Company occur on public property after it has installed conduits and cable for Phone Company beneath the property or road surface. Such restoration requires landscaping materials and occasionally road building materials such as soil, gravel and blacktop. Petitioner purchases and uses concrete to install footings for manholes, and purchases the manholes (including manhole covers) that it installs. Petitioner also purchases conduit and telephone cable which it installs, and landscaping and road building materials. The landscaping and road building materials (soil, gravel and blacktop) become the property of the owner of the underlying land upon installation. The concrete footings, manholes, conduit and cable remain the property of Phone Company after installation.

For purposes of this Advisory Opinion, it is presumed that Petitioner is making its installations for Phone Company on easements in the case where such installations cross private property and on franchises where such installations cross public property.

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:

* * *

(4) Retail sale. (i) A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property, or (B) for use by that person in performing the services subject to tax under paragraphs (1), (2), (3), (5), (7) and (8) of subdivision (c) of section eleven hundred five where the property so sold becomes a physical component part of the property upon which the services are performed or where the property so sold is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax. Notwithstanding the preceding provisions of this subparagraph, 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, as the terms real property, property or land are defined in the real property tax law, 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

* * *

(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 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 . . . 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, 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:

* * *

(12-a) Tangible personal property for use or consumption directly and predominantly in the receiving, initiating, amplifying, processing, transmitting, retransmitting, switching or monitoring of switching of telecommunications services for sale or internet access services for sale or any combination thereof. Such tangible personal property exempt under this subdivision shall include, but not be limited to,

tangible personal property used or consumed to upgrade systems to allow for the receiving, initiating, amplifying, processing, transmitting, retransmitting, switching or monitoring of switching of telecommunications services for sale or internet access services for sale or any combination thereof. As used in this paragraph, the term "telecommunications services" shall have the same meaning as defined in paragraph (g) of subdivision one of section one hundred eighty-six-e of this chapter.

* * *

(15) Tangible personal property sold to a contractor, subcontractor or repairman for use in (i) erecting a structure or building (A) of an organization described in subdivision (a) of section eleven hundred sixteen . . . or (ii) adding to, altering or improving real property, property or land (A) of such an organization . . . as the terms real property, property or land are defined in the real property tax law; provided, however, no exemption shall exist under this paragraph unless such tangible personal property is to become an integral component part of such structure, building or real property.

(16) Tangible personal property sold to a contractor, subcontractor or repairman for use in maintaining, servicing or repairing real property, property or land (i) of an organization described in subdivision (a) of section eleven hundred sixteen . . . as the terms real property, property or land are defined in the real property tax law; provided, however, no exemption shall exist under this paragraph unless such tangible personal property is to become an integral component part of such structure, building or real property.

(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, if such tangible personal property is to become an integral component part of such structure, building or real property; provided, however, that if such sale is made pursuant to a contract irrevocably entered into before September first, nineteen hundred sixty-nine, no exemption shall exist under this paragraph.

Section 1116(a) of the Tax Law provides, in part:

Except as otherwise provided in this section, any sale . . . to any of the following . . . shall not be subject to the sales and compensating use taxes imposed under this article:

(1) The state of New York, or any of its agencies, instrumentalities, public corporations (including a public corporation created pursuant to agreement or compact

with another state or Canada) or political subdivisions where it is the purchaser, user or consumer . . .

(2) The United States of America, and any of its agencies and instrumentalities, insofar as it is immune from taxation where it is the purchaser, user or consumer . . .;

Section 1119(c) of the Tax Law provides:

A refund or credit equal to the amount of sales or compensating use tax imposed by this article and pursuant to the authority of article twenty-nine, and paid on the sale or use of tangible personal property, shall be allowed the purchaser where such property is later used by the purchaser in performing a service subject to tax under paragraph (1), (2), (3), (5), (7) or (8) of subdivision (c) of section eleven hundred five or under section eleven hundred ten and such property has become a physical component part of the property upon which the service is performed or has been transferred to the purchaser of the service in conjunction with the performance of the service subject to tax or if a contractor, subcontractor or repairman purchases tangible personal property and later makes a retail sale of such tangible personal property, the acquisition of which would not have been a sale at retail to him but for the second to last sentence of subparagraph (i) of paragraph (4) of subdivision (b) of section eleven hundred one. An application for the refund or credit provided for herein must be filed with the commissioner of taxation and finance within the time provided by subdivision (a) of section eleven hundred thirty-nine. Such application shall be in such form as the commissioner may prescribe. Where an application for credit has been filed, the applicant may immediately take such credit on the return which is due coincident with or immediately subsequent to the time that he files his application for credit. However, the taking of the credit on the return shall be deemed to be part of the application for credit. The procedure for granting or denying such applications for refund or credit and review of such determinations shall be as provided in subdivision (e) of section eleven hundred thirty-nine.

Section 1132 of the Tax Law provides, in part:

(a) (1) Every person required to collect the tax shall collect the tax from the customer when collecting the price, amusement charge or rent to which it applies. If the customer is given any sales slip, invoice, receipt or other statement or memorandum of the price, amusement charge or rent paid or payable, the tax shall be stated, charged and shown separately on the first of such documents given to him. The tax shall be paid to the person required to collect it as trustee for and on account of the state.

* * *

(c)(1) For the purpose of the proper administration of this article and to prevent evasion of the tax hereby imposed, it shall be presumed that all receipts for property or services of any

type mentioned in subdivisions (a), (b), (c) and (d) of section eleven hundred five . . . are subject to tax until the contrary is established, and the burden of proving that any receipt . . . is not taxable hereunder shall be upon the person required to collect tax or the customer. Except as provided in subdivision (h) or (k) of this section, unless (i) a vendor, not later than ninety days after delivery of the property or the rendition of the service, shall have taken from the purchaser a resale or exemption certificate in such form as the commissioner may prescribe, signed by the purchaser and setting forth the purchaser's name and address and, except as otherwise provided by regulation of the commissioner, the number of the purchaser's certificate of authority, together with such other information as the commissioner may require, to the effect that the property or service was purchased for resale or for some use by reason of which the sale is exempt from tax under the provisions of section eleven hundred fifteen, and, where such resale or exemption certificate requires the inclusion of the purchaser's certificate of authority number or other identification number required by regulations of the commissioner, that the purchaser's certificate of authority has not been suspended or revoked . . . or (ii) the purchaser, not later than ninety days after delivery of the property or the rendition of the service, furnishes to the vendor: any affidavit, statement or additional evidence, documentary or otherwise, which the commissioner may require demonstrating that the purchaser is an exempt organization described in section eleven hundred sixteen, the sale shall be deemed a taxable sale at retail. . . .

Section 1139(a) of the Tax Law provides, in part:

In the manner provided in this section the tax commission shall refund or credit any tax, penalty or interest erroneously, illegally or unconstitutionally collected or paid if application therefor shall be filed with the tax commission (i) in the case of tax paid by the applicant to a person required to collect tax, within three years after the date when the tax was payable by such person to the tax commission. . . .

Section 526.6 of the Sales and Use Tax Regulations provides, in part:

Retail sale. (a) The term *retail sale* or *sale at retail* means the sale of tangible personal property to any person for any purpose, except as specifically excluded.

(b) Special rule--sales specifically included as retail sales.

(1) A sale of any tangible personal property to a contractor, subcontractor or repairman for use or consumption in erecting structures or buildings or 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 used or consumed. . . .

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

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.

* * *

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

Presumption of taxability. (a) General. (1) It is presumed that all receipts for property or service of any type mentioned in subdivisions (a), (b), (c) and (d) of section 1105 of the Tax Law, all rents for occupancy of the type mentioned in subdivision (e) of said section, and all amusement charges of any type mentioned in subdivision (f) of said section, are subject to tax until the contrary is established.

* * *

(b) Burden of proof. (1) The burden of proving that any receipt . . . is not taxable shall be upon the person required to collect the tax and the customer.

(2) A vendor who in good faith accepts from a purchaser a properly completed exemption certificate or, as authorized by the Department, other documentation evidencing exemption from tax not later than 90 days after delivery of the property or the rendition of the service is relieved of liability for failure to collect the sales tax with respect to that transaction. The timely receipt of the certificate or documentation itself will satisfy the vendor's burden of proving the nontaxability of the transaction and relieve the vendor of responsibility for collecting tax from the customer.

(i) A certificate or other document is "accepted in good faith" when a vendor has no knowledge that the exemption certificate or other document issued by the purchaser is false or is fraudulently presented. If reasonable ordinary due care is exercised, knowledge will not be imputed to the seller required to collect the tax.

* * *

(5) A vendor is not relieved of the burden of proof when it failed to obtain an exemption certificate or accepted an improper certificate, or had knowledge that the exemption certificate issued by the purchaser was false or fraudulently presented.

Section 541.1(b) of the Sales and Use Tax Regulations provides:

The principal distinguishing feature of a sale to a contractor, as compared to a sale to other vendors who purchase tangible personal property for resale, is that the sale of tangible personal property to a contractor for use or consumption in construction is a retail sale and subject to sales and use tax, regardless of whether tangible personal property is to be resold as such or incorporated into real property as a capital improvement or repair. Whenever a contractor uses materials, on which the contractor has paid sales tax, in a repair or maintenance contract . . . subject to the sales tax on services under section 1105(c) of the Tax Law, the contractor may be entitled to a refund or credit of the portion of the tax he paid attributable to the materials transferred to the customer.

Section 541.5 of the Sales and Use Tax Regulations provides, in part:

Contracts with customers other than exempt organizations.

* * *

(b) Capital improvements contracts. (1) Purchases. All purchases of tangible personal property (excluding qualifying production machinery and equipment exempt under section 1115(a)(12) of the Tax Law) which are incorporated into and become part of the realty or are used or consumed in performing the contract are subject to tax at the time of purchase by the contractor or any other purchaser. A certificate of capital improvement may not be validly given by any person or accepted by a supplier to exempt the purchase of these materials.

(2) 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.

* * *

(4) Documents; capital improvement contracts.

(i) When a properly completed certificate of capital improvement has been furnished to the contractor, the burden of proving the job or transaction is not taxable and the liability for the tax rests solely upon the customer.

(a) The prime contractor should obtain a certificate of capital improvement from the customer and retain it as part of his records. Copies of such certificate must be furnished to all subcontractors on the job and retained as part of their records.

(b) A certificate of capital improvement may not be issued by a contractor, subcontractor or any other person to a supplier on the purchase of tangible personal property.

Section 541.6(a) of the Sales and Use Tax Regulations provides:

Machinery and equipment which becomes realty. If a contractor, in the performance of a contract, is required to purchase and install production machinery and equipment that qualifies for the manufacturer's exemption provided for in section 1115(a)(12) of the Tax Law and such machinery and equipment subsequently becomes part of the real property, the contractor is required to obtain from the customer a properly completed certificate of capital improvement and an exempt use certificate which identifies the machinery and equipment that qualifies for the manufacturer's exemption and which, upon installation, becomes part of the real property. The contractor then may purchase such machinery or equipment exempt from the New York State and local taxes, including the sales and use taxes in New York City, upon issuance of a properly completed contractor exempt purchase certificate to his supplier.

Section 541.9 of the Sales and Use Tax Regulations provides, in part:

(a) General. The purchase, rental, lease or license to use construction equipment and motor vehicles by a contractor is subject to sales and use tax.

* * *

(c)(1) Rentals and leases of equipment to contractors. (i) Where a contractor leases equipment, the contractor is liable for the combined State and local sales and use tax on the total charges at the highest rate in effect in any jurisdiction in which the equipment is used during the lease payment period, (e.g., daily, weekly, monthly, depending on the frequency of payment).

(a) If a lessor does not collect the proper amount of tax based upon the highest rate in any jurisdiction in which the equipment is used, the contractor is liable for payment of any additional tax which must be reported and paid by the contractor to the Department of Taxation and Finance. The contractor may be entitled to a refund or credit if the equipment is used for the whole of a lease payment period in a jurisdiction having a lower combined State and local tax rate than the rate paid to the lessor.

Example 1: A leasing company delivers equipment to a contractor in a taxing jurisdiction with a combined New York State and local tax rate of six percent. The leasing company charges the six percent tax rate on the weekly billings to the contractor. The contractor uses the equipment during a one-week billing period on a job located within a taxing jurisdiction having a combined New York State and

local tax rate of seven percent, and for one complete weekly billing period in a taxing jurisdiction having a combined New York State and local tax rate of five percent. The contractor owes an additional one percent tax on the charge applicable for the use in the seven percent area. However, the contractor may claim a refund or credit of one percent for the complete week of use in the five percent area, based upon the difference between the six percent tax paid and the fixed percent tax due.

(b) The total amount of the lease charge is subject to tax. Interest and other expenses paid by a lessor on the purchase of tangible personal property leased to a contractor, even though separately stated on the bill to the contractor, must be included in the receipts subject to tax.

Opinion

Petitioner rents construction equipment which it uses to construct, install and repair telecommunications systems. The purchase or rental of construction equipment by a contractor is subject to sales and use tax. See section 1101(b)(4)(i) of the Tax Law and section 541.9(a) of the Sales and Use Tax Regulations. Accordingly, Petitioner is liable for the combined State and local sales and use tax on the total charges for the equipment at the highest rate in effect in any jurisdiction in which the equipment is used during the lease payment period. *Lease payment period* generally refers to the periodic time frame (e.g., daily, weekly, monthly, etc.) for which payments for the use of property are made. For example, assume Petitioner leases a piece of equipment on a weekly basis for 2 weeks and the lessor delivers the equipment in Cortland County and collects the tax at the rate in effect in Cortland County (8%) for the entire period of the lease. If Petitioner used the equipment on a project in Cortland County for 3 days and then moved the equipment to a project in Onondaga County (7%) for the remainder of the 2 weeks, it would be liable for 8% rate of tax on the first week's rental and 7% tax on the second week's rental. In this case, Petitioner is entitled to a credit or refund of the excess amount of tax (1%) collected from it during the second week provided it can substantiate that the equipment was used for the entire second week in the county with the lower rate.

Petitioner, in performing an installation project for Phone Company, excavates a trench, places conduit in the trench, runs a cable through the conduit, installs concrete footings, manholes (with manhole covers), and then restores the property disturbed by the excavation. The restorations require landscaping and road building materials such as soil, gravel and blacktop. Petitioner purchases these landscaping and road building materials, concrete to install footings for manholes, manholes and manhole covers, conduit and telephone cable for its use or consumption in projects for Phone Company.

Services performed by construction contractors can generally be placed into one of three categories: *capital improvement, repair or maintenance, or installation of tangible personal property which remains tangible personal property after installation.* The contractor performs a

capital improvement to real property when all three of the conditions in section 1101(b)(9)(i) of the Tax Law are met. If the contractor performs work which becomes an integral component part of the real property but does not meet the three conditions in section 1101(b)(9) of the Tax Law, a *repair or maintenance* service has been performed. Finally, if the contractor performs an installation which does not become an integral component part of the real property, the contractor has performed an *installation of tangible personal property which remains tangible personal property after installation*.

Whether or not work performed constitutes a capital improvement to real property must be determined by application of the three requirements provided in section 1101(b)(9)(i) of the Tax Law. Each of these three requirements must be met in order for an addition or alteration to qualify as a capital improvement. Furthermore, the classification of property as real property under the Real Property Tax Law does not determine whether the installation of such property is a capital improvement for sales tax purposes. See *Matter of Merit Oil v State Tax Commn.*, 124 AD2d 326. Charges for the installation of property which constitutes a capital improvement are not subject to sales tax. See sections 1105(c)(3) and 1115(a)(17) of the Tax Law.

The installation of underground telephone conduit and cable requires that private property owners must grant an easement to the telecommunications utility company whose installation crosses their property. The telecommunications utility company must also compensate the property owner for the easement. An easement endows the telecommunications utility company with certain rights with respect to the use of the property. Easements on private property obtained by public utility companies are “continuous and unlimited as to time.” (*Barber v Hudson River Telephone Co.*, 105 App Div 154) Such easements cannot be unilaterally terminated by the owner of the servient estate (the property owner) (*Zunno v Kiernan*, 170 AD 2d 795). These easements may be conveyed to the utilities’ assigns or successors for a consideration in an instrument similar to a deed. See 49 NY Jur 2d, Easements §§ 146 - 157. See also *Banach v Home Gas Co.*, 12 AD 2d 373.

Phone Company obtains title to the underground telephone conduit and cable, concrete footings, manholes and manhole covers installed by Petitioner. It appears that the easement gives Phone Company the authority to make improvements to the property which enhance the easement’s value to Phone Company. It is reasonable to assume that Phone Company does not intend to remove the underground telephone conduit and cable, concrete footings, manholes and manhole covers in the foreseeable future. In addition, the owners of the underlying property cannot unilaterally terminate the easements or require Phone Company to remove these items.

Therefore, an installation by Petitioner of underground telephone conduit and cable, concrete footings, manholes and manhole covers on private property pursuant to an easement granted by the property owner to Phone Company, as described in this Advisory Opinion, appears to meet the three conditions set forth in section 1101(b)(9)(i) of the Tax Law and, in the absence of any disqualifying provisions in the terms of the easement, qualifies as a capital improvement to real property. As a result, Petitioner may accept from Phone Company a

Certificate of Capital Improvement (Form ST-124) in lieu of collecting sales tax on its charges for installing the underground telephone conduit and cable, concrete footings, manholes and manhole covers on private property subject to an easement. See *Marcum & Kliegman, LLP*, Adv Op Comm T & F, May 27, 2005, TSB-A-05(20)S.

As the end result of such installations is a capital improvement to real property, the excavations of the property, including roadways, etc., prior to the installation and the property restoration performed after the installation constitute activities which result in a capital improvement. See section 527.7(b)(4) of the Sales and Use Tax Regulations; and *Building Contractors Association, Inc. v Tully*, 87 AD 2d 909 [1982]; *Carl A. Morse, Inc.*, Dec St Tx Comm, June 18, 1980, TSB-H-80(144)S. Accordingly, Petitioner will not be required to collect sales tax on its installation service.

A telecommunications utility company generally receives a franchise which permits it to install underground telephone conduit and cable in property owned by New York State or one of its political subdivisions. The franchise bestows rights on the telecommunications utility company which are similar to those granted by an easement. See 60 NY Jur 2d, Franchises §§ 1 - 3; *In re Gillen Place*, 304 NY 215.

In the present case, Phone Company's underground telephone conduit and cable are installed pursuant to a franchise when they are installed on property owned by New York State or one of its political subdivisions. The underground telephone conduit and cable, as well as the concrete footings, manholes and manhole covers, become the property of Phone Company upon installation. It appears that the franchise gives Phone Company the authority to make improvements to the property which enhance the franchise's value to Phone Company. In addition, New York State or one of its political subdivisions cannot unilaterally terminate the franchise. It is reasonable to assume that Phone Company does not intend to remove the underground telephone conduit and cable, concrete footings, manholes and manhole covers from the franchise in the foreseeable future.

If a franchise agreement includes a provision indicating that the installation is not intended to be permanent; for example, a provision giving the municipality the right to require Phone Company to remove the installed property after a fixed period of time, such installation might not qualify as a capital improvement. However, in the absence of any disqualifying provisions in the terms of the franchise agreement, an installation by Petitioner of underground telephone conduit and cable, concrete footings, manholes and manhole covers pursuant to the franchise, as described in this Advisory Opinion, appears to meet the three conditions set forth in section 1101(b)(9)(i) of the Tax Law and qualifies as a capital improvement to real property. See *Brooklyn Union Gas Company*, Adv Op St Tx Comm, May 15, 1985, TSB-A-85(7)S. Petitioner will not be required to collect sales tax on such installations if it obtains from Phone Company properly completed certificates of capital improvement. See *Marcum & Kliegman, LLP, supra*.

Maintaining, servicing or repairing tangible personal property or real property are subject to sales tax under section 1105(c)(3) or section 1105(c)(5) of the Tax Law. Accordingly, where Petitioner repairs or otherwise maintains existing conduit, cable, manholes and manhole covers, Petitioner must collect sales tax on its charges for repair or maintenance services. See section 1105(c)(3) and (5) of the Tax Law. Such charges are subject to sales tax regardless of whether the conduit, cable, manholes and manhole covers are located on public or private property since the repairs are performed on Phone Company's property for Phone Company and on property owned by an exempt entity.

Most of Petitioner's restorations for Phone Company occur on public property after it has installed conduits and cable for Phone Company beneath the property or road surface. In some instances, the restorations are performed on private property. Petitioner purchases landscaping and road building materials (including soil, gravel and blacktop) that it uses to restore public roadways and private property. The exempt governmental entities and private parties who own the underlying property take title to these installed landscaping and road building materials upon installation.

Sections 1115(a)(15) and (16) of the Tax Law provide an exemption from sales tax for tangible personal property purchased by a contractor that becomes an integral component part of real property of an entity exempt from tax pursuant to section 1116(a) of the Tax Law. This exemption applies to tangible personal property used in a capital improvement as well as tangible personal property used to perform maintenance or repairs. A contractor's purchases of such materials may be exempt from sales tax even though the exempt entity does not enter into a construction contract with the contractor. In the present case, some of the landscaping and road building materials purchased by Petitioner are installed in and become part of real property owned by an exempt governmental entity and title to the landscaping and road building materials passes to the exempt entity upon installation. Sections 1115(a)(15) and (16) of the Tax Law allow Petitioner to make purchases of such landscaping and road building materials for use exclusively by Petitioner to restore the real property of an entity exempt from sales tax pursuant to section 1116(a) of the Tax Law without payment of sales tax. When Petitioner purchases materials which are exclusively incorporated into real property owned by an entity exempt from tax pursuant to section 1116(a) of the Tax Law, Petitioner may issue to its supplier a *Contractor Exempt Purchase Certificate* (Form ST-120.1) indicating that the materials will be so incorporated. Petitioner can substantiate that the landscaping and road building materials which it purchases are to become an integral component part of property owned by an entity exempt from sales tax pursuant to section 1116(a) of the Tax Law by relying on a signed document between Petitioner and its customer which identifies the project, location and owner of the real property upon which the work is being performed. Petitioner's records must be sufficient to allow it to associate its purchases of landscaping and road building materials to its installation of such materials in property owned by an entity exempt from sales tax pursuant to section 1116(a).

Petitioner may purchase landscaping and road building materials, including soil, gravel and blacktop, that it uses to restore private property after the installation of conduit and cable for

Phone Company. The property owner takes title to the portion of these landscaping and road building materials used to restore its property upon completion of the project for Phone Company. The purchase by Petitioner of landscaping and road building materials which become an integral component part of private property is a purchase at retail subject to sales tax. See *Marcum & Kliegman, LLP, supra; Ruston Paving Co.*, Dec State Tax Commn., September 15, 1986, TSB-H-87(222)S. If these materials are incorporated into the underlying real property as part of a taxable maintenance or repair service, Petitioner may apply for a refund or credit of tax paid on its purchase of such items. See sections 1119(c) and 1139(a) of the Tax Law.

It should be noted that not all roads are owned by governmental entities. Roads owned by private persons are treated as any other private property. See *The Michaels Group, Inc.*, Adv Op Comm T&F, October 23, 1990, TSB-A-90(53)S. If, at the time of purchase, it is impossible for Petitioner to distinguish between those landscaping and road building materials that will be used to restore the property of an exempt entity and of a nonexempt entity, Petitioner may not issue a contractor exempt purchase certificate and must pay sales tax to its supplier on all landscaping and road building materials purchased. Petitioner may subsequently apply for a refund or credit for the tax paid on those materials incorporated into the property of an exempt entity, provided such application is made within 3 years of the date on which the sales or compensating use tax was payable by Petitioner's supplier. See section 1139(a) of the Tax Law.

In the case of Petitioner's installation of Phone Company's concrete footings, manholes and manhole covers, and conduit, the materials do not become the property of the owner of the underlying real property. Title to the concrete footings, manholes and manhole covers, and conduit remains with Phone Company and is not relinquished to the property owner. The concrete footings, manholes and manhole covers, and conduit, therefore, do not become an integral component part of the underlying property. Petitioner's purchases of these items for use in this manner on public property are not exempt from sales tax under sections 1115(a)(15) and (16) of the Tax Law but, rather, are subject to sales tax the same as any building material purchased by a contractor. Purchases by Petitioner of concrete footings, manholes and manhole covers, and conduit installed on any private property are also subject to sales tax. See *Marcum & Kliegman, LLP, supra*. If these items are used as part of a taxable repair or maintenance service, Petitioner may apply for a refund or credit of tax paid on its purchase of such items. See sections 1119(c) and 1139(a) of the Tax Law.

Section 1115(a)(12-a) of the Tax Law provides that purchases of tangible personal property for use or consumption directly and predominantly in the receiving, initiating, amplifying, processing, transmitting, retransmitting, switching or monitoring of switching of telecommunications services for sale are exempt from sales and use tax. There is no longer a requirement that the tangible personal property constitute "central office equipment."

The concrete, manholes and manhole covers, and conduit purchased by Petitioner are tangible personal property used to construct structures which house Phone Company's cables. Such property is not used or consumed directly and predominantly in the receiving, initiating,

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amplifying, processing, transmitting, retransmitting, switching or monitoring of switching of telecommunications services for sale as contemplated by section 1115(a)(12-a) of the Tax Law. See *Marcum & Kliegman, LLP, supra*. However, telephone cable purchased and installed by Petitioner pursuant to its contract with Phone Company may qualify for the exemption granted under section 1115(a)(12-a) of the Tax Law if such cable is directly and predominantly used by Phone Company in receiving, initiating, amplifying, processing, transmitting, retransmitting, switching or monitoring of switching of telecommunications services for sale. Accordingly, if Petitioner receives a properly completed *Exempt Use Certificate* (Form ST-121) from Phone Company, Petitioner may purchase telephone cable to be used in such installations without payment of sales tax. Petitioner should issue a properly completed *Contractor Exempt Purchase Certificate* (Form ST-120.1) to its supplier to make such purchases exempt from tax. See section 541.6(a) of the Sales and Use Tax Regulations respecting a contractor's purchase of exempt production machinery and equipment.

It is noted that Petitioner's acceptance of a properly completed *Exempt Use Certificate* (Form ST-121) from Phone Company does not relieve Petitioner of the burden of proving that the entire installation is a capital improvement project. Phone Company should provide a properly completed *Certificate of Capital Improvement* (Form ST-124) to this end for each contract for the installation of conduit and cable that constitutes a capital improvement. See section 1132(c)(1) of the Tax Law and section 532.4 of the Sales and Use Tax Regulations.

DATED: August 1, 2005

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