

**New York State Department of Taxation and Finance**  
**Office of Tax Policy Analysis**  
**Taxpayer Guidance Division**

TSB-A-07(18)S  
Sales Tax  
July 26, 2007

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S031023A

On October 23, 2003, the Department of Taxation and Finance received a Petition for Advisory Opinion from Housing Visions Construction Co., Inc., 1201 East Fayette Street, Syracuse, New York 13210. Petitioner, Housing Visions Construction Co., Inc., provided additional information pertaining to the Petition on May 24, 2005.

The issue raised by Petitioner is whether charges for maintenance and repair services for low-income housing projects that are owned by separate for-profit entities are subject to sales tax.

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

Petitioner is a New York not-for-profit corporation under section 402 of the New York Not-for-Profit Corporation Law. Petitioner was formed for the specific purpose of providing construction services in connection with building low- to moderate-income housing projects in order to halt the physical and economic deterioration of urban areas. The sole member of Petitioner is Housing Visions Unlimited, Inc. ("HVU"), a separate New York not-for-profit corporation that was formed in 1990 to develop low- to moderate-income housing projects. HVU is a tax-exempt organization pursuant to section 501(c)(3) of the Internal Revenue Code and has been granted exempt organization status pursuant to section 1116(a)(4) of the Tax Law. Petitioner was added to the HVU group exemption by the federal government in 2002, and, accordingly, Petitioner is also a tax-exempt organization pursuant to section 501(c)(3) of the Internal Revenue Code. Petitioner only performs services for these low- to moderate-income housing projects. Petitioner states that it does not offer or provide services to the general public and that it would lose its tax-exempt status if it were to offer services to the general public. Petitioner has also been granted exempt organization status pursuant to section 1116(a)(4) of the Tax Law.

To date, HVU has developed a number of low-income housing projects in upstate New York. The typical low-income housing project developed by HVU (or one of its affiliates) consists of three or more multi-unit residential properties. In each of these projects, the properties are owned by single-purpose, for-profit general partnerships or limited liability companies of which HVU or one of its affiliated not-for-profit entities serves as the general partner or managing member.

On most of these low-income housing projects, HVU or one of HVU's affiliated not-for-profit entities also serves as the managing agent for the low-income rental units after construction has been completed. Among the responsibilities of the managing agent are leasing the rental units and providing for the ongoing maintenance and repair of those units. The

managing agent often retains Petitioner to provide routine maintenance and repair services as necessary for these projects.

Petitioner provides a range of maintenance and repair services for each of the low-income housing projects that HVU (or one of its affiliates) manages, including without limitation, repairs to the HVAC, electrical, and plumbing systems; roof and exterior repairs; painting; and other routine services that are typical for residential rental units. Petitioner bills the property owner (a for-profit entity) for its services on an hourly basis. Any materials or supplies that are needed on a specific project are purchased directly by the property owner.

**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 of four percent upon:

\* \* \*

(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 1116 of the Tax Law provides, in part:

Exempt organizations. (a) Except as otherwise provided in this section, any sale or amusement charge by or to any of the following or any use or occupancy by any of the following shall not be subject to the sales and compensating use taxes imposed under this article:

\* \* \*

(4) Any corporation, association, trust, or community chest, fund, foundation, or limited liability company, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation, (except as otherwise provided in subsection (h) of section five hundred one of the United States internal revenue code of nineteen hundred fifty-four, as amended), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office;

\* \* \*

(b) Nothing in this section shall exempt:

(1) retail sales of tangible personal property by any shop or store operated by an organization described in paragraph (4), paragraph (5) or paragraph (6) of subdivision (a) of this section;

(2) sales of food or drink in or by a restaurant, tavern or other establishment operated by an organization described in paragraph (1), paragraph (4), paragraph (5) or paragraph (6) of subdivision (a) of this section, other than sales exempt under paragraph (ii) of subdivision (d) of section eleven hundred five, from the taxes imposed hereunder, unless the purchaser is an organization exempt under this section;

(3) sales of the service of providing parking, garaging or storing for motor vehicles by an organization described in paragraph (4) or paragraph (5) of subdivision (a)

of this section operating a garage (other than a garage which is part of premises occupied solely as a private one or two family dwelling), parking lot or other place of business engaged in providing parking, garaging or storing for motor vehicles; . . .

Section 529.1(g) of the Sales and Use Tax Regulations provides:

An officer, employee or member of any organization described in this Part may not make tax exempt purchases or sales for the benefit of a nonexempt private entity. For example, an officer, employee or member of an organization described in this Part who, pursuant to law, acts in the capacity of a receiver to rehabilitate or liquidate a nonexempt private entity or who purchases tangible personal property or services with the funds of the nonexempt private entity is not an agency or instrumentality of the organization described in this Part with respect to the exemptions from the sales and compensating use tax.

Section 529.1(j)(7) of the Sales and Use Tax Regulations provides:

An exempt organization certificate applies only to the organization which requested and was granted such exemption. The use of an exempt organization certificate by any person or any organization that was not issued the exemption is a misuse of such certificate. Such misuse can result in the revocation of the exempt status previously granted to the organization.

Section 529.7(g)(3) of the Sales and Use Tax Regulations provides:

An exempt organization certificate may be revoked for any reason constituting misuse of the exemption granted, or if it is discovered that the organization's application contained misleading or deceptive information, or if the organization has changed its purposes, activities, or organizational structure without notifying the bureau as provided by this subdivision. Where the Department of Taxation and Finance determines it to be appropriate, for example in the case of fraud, intentional misuse and other similar misuses, such revocation may be effective retroactively to the date of such misuse or deception.

Section 529.7(h)(4) of the Sales and Use Tax Regulations provides:

Sales to any member, officer or employee of an exempt organization are subject to the sales and use tax when the sales are for the personal use of the purchaser rather than the organization.

## Opinion

Petitioner is a New York not-for-profit corporation under section 402 of the New York Not-for-Profit Corporation Law. Petitioner was formed for the specific purpose of providing construction services in connection with the building of low- to moderate-income housing projects. The sole member of Petitioner is Housing Visions Unlimited, Inc. ("HVU"), a New York not-for-profit corporation, which was formed to develop low- to moderate-income housing projects. HVU and Petitioner are exempt from sales tax pursuant to section 1116(a)(4) of the Tax Law.

In the typical project, the properties are owned by single-purpose, for-profit general partnerships or limited liability companies of which HVU or one of its affiliated not-for-profit entities serves as general partner or managing member. On most of these projects, after construction has been completed, HVU or one of HVU's affiliated not-for-profit entities also serves as the managing agent for the low-income rental units and retains Petitioner to provide maintenance and repair services as necessary in connection with its management responsibilities. Petitioner bills the property owner, a for-profit entity, for its services on an hourly basis. Any materials or supplies that are needed on a specific project are purchased directly by the property owner.

Many of the services Petitioner may be contracted to perform, such as routine painting; electrical and plumbing repairs; repairs to the heating, ventilation, and air conditioning equipment, etc., constitute the services of installing, maintaining, servicing, or repairing tangible personal property subject to sales tax under section 1105(c)(3) of the Tax Law or the services of maintaining, servicing, or repairing real property subject to tax under section 1105(c)(5) of the Tax Law. Pursuant to section 1116(a) of the Tax Law, exempt organizations are granted exemptions from sales tax on their purchases of tangible personal property and services. However, exempt organizations described in section 1116(a)(4) are required to collect sales tax on their sales of tangible personal property at the organization's shop or store, meals at a restaurant or tavern operated by the exempt organization, and parking and garaging of motor vehicles. See section 1116(b)(1), (2), and (3) of the Tax Law. The provisions of section 1116(b) of the Tax Law that an exempt organization is required to collect sales tax on these specified sales do not require organizations exempt under section 1116(a)(4) to collect sales tax on their sales of services subject to tax under sections 1105(c)(3) and 1105(c)(5) of the Tax Law. See *Alfred University*, Adv Op Comm Tax & Fin, July 24, 1990, TSB-A-90(36)S. Thus Petitioner is not required to collect sales tax on the receipts from its sales of maintenance and repair services.

It should be noted that, depending on the nature and extent of the work to be performed and the reasons and necessity therefore, certain of the services performed by Petitioner, such as replacing heating, ventilation, and air conditioning systems and replacing roofs, might constitute capital improvements to real property. Services resulting in a capital improvement to real property are not subject to sales tax. See sections 1105(c)(3)(iii) and 1105(c)(5) of the Tax Law.

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The above analysis assumes, without deciding, that in selling maintenance services to a for-profit partnership Petitioner is not engaging in substantial non-exempt activities that would be inconsistent with its exempt status under Internal Revenue Code section 501(c)(3) and section 1116(a)(4) of the Tax Law (see *Better Business Bureau of Washington, D.C. v U.S.*, 326 US 279, 283 (1945) ["presence of a single [nonexempt] purpose, if substantial in nature, will destroy the exemption regardless of the number or importance of truly [exempt] purposes."]). If the performance of such services constitutes misuse of its exempt status, or Petitioner's application for exempt status was otherwise misleading, Petitioner's exempt status may be revoked effective retroactively to the date of such misuse or deception. (see section 529.7(g)(3) of the Sales and Use Tax Regulations).

DATED: July 26, 2007

/s/  
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Taxpayer Guidance Division

NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.