

New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-11(29)S
Sales Tax
November 7, 2011

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S110620B

The Department of Taxation and Finance received a Petition for Advisory Opinion from Petitioner [REDACTED]. Petitioner asks whether its lump-sum charge for “routine services” as described below in connection with a contract to operate and manage wastewater and water treatment facilities is subject to sales and use tax.

We conclude that the charge for the routine services is not taxable.

Facts

Petitioner services wastewater treatment and water treatment facilities (the “Facility” or “Facilities”) of public and private entities located in New York. Attached to the petition are contracts with private entities to manage each type of facility. The water treatment contract attached to the petition requires Petitioner to “provide certified, licensed competent administrative, supervisory and technical personnel and a sufficient labor force to operate and maintain the Facilities according to all applicable federal, state, county, and local laws, rules and regulations, through performing routine and non-routine services.” The contract makes Petitioner responsible “for complete operation and administration of the Facilities.” The contract for the waste water treatment plant has similar language. Each contract specifies two different sets of duties, one set referred to as Routine Services and the other set referred to as Non-routine Services.

Routine Services are performed by Petitioner’s employees. If the employees are working in a Wastewater Treatment Plant (WWTP), they are required to be certified and licensed (the “Certified and Licensed Employees”) by the New York State Department of Environmental Conservation (the “DEC”). If they working in a water treatment plant, they must be certified or licensed by the New York State Department of Health (“DOH”). For example, the DEC requires “[e]very operator in New York State who wishes to be certified at any level (Grade 1, 2, 3, or 4) must satisfy the minimum qualifications. The qualifications consist of education, experience at a WWTP, training, laboratory proficiency (except Grade 1), DEC Regional recommendation, and passage of a DEC certification exam.”¹ DOH has similar certification requirements for operators of water treatment plants. See

¹ The DEC explains the need for professional certification for operators of WWTPs as follows:

Billions of dollars have been spent on the abatement of water pollution. Thousands of WWTP's have been built or upgraded in the quest for clean waters. These complex, expensive WWTP's are useless without competent, well-trained individuals to direct and maintain the process and machinery used in modern wastewater treatment. The operator is the first line of defense against waterborne diseases, our guardian of water quality, and the safeguard of public health. We, in New York State, recognize the value of our operators and utilize the certification system to insure that all operators are educated, trained, and experienced individuals.

<http://www.dec.ny.gov/chemical/23831.html>.

<http://www.health.ny.gov/environmental/water/drinking/operate/opcertfs.htm>

In general, the Certified and Licensed Employees average between 2-3 hours per day at a customer's Facility performing Routine Services. Routine Services include such things as: daily or weekly site visits; wastewater quality sampling and reporting to regulatory agencies; water quality sampling and reporting to regulatory agencies; regulatory inspections and meetings; inventory control; alarm monitoring; chemical and fuel ordering; contract administration; monthly report submittals to the regulatory agencies; Facility security checks; assistance in capital and operating budget preparation; and response to regulatory correspondence. Petitioner estimates that a *de minimis* amount of time, i.e., less than 10% of the total time used to perform Routine Services, might involve light equipment upkeep and preventive maintenance.

Petitioner charges a fixed monthly service fee for the Routine Services. Petitioner collected sales tax on a portion of its receipts from the sale of its Routine Services, filed sales tax returns, and reported and remitted the collected tax. It has now filed a refund claim in regard to that tax.

In addition to Routine Services, Petitioner performs Non-Routine Services. Non-Routine Services are generally performed by mechanics, technical specialists and operators who repair and maintain the equipment within the Facility. Non-Routine Services generally involve such things as: Facility repairs; lawns/grounds maintenance; residuals disposal; capital improvements, e.g., installing a water line; replacing a pump; replacing broken feed lines. On occasion, the Non-Routine Services might involve some type of capital expenditure for construction which could include engineering design work.

The charges for Non-Routine Services are separately priced and invoiced to the customer as incurred on a time and materials basis and are not included in the Routine Service Fee. The hourly fee for Non-Routine Service specialists varies depending on the level of skill required for a specific job, e.g., electrical, plumbing, etc. at \$75.00 per hour. Petitioner invoices, collects and remits New York sales tax on the Non-Routine Services that are subject to the tax. The taxability of the Non-Routine Services is not at issue in this Advisory Opinion.

Analysis

The New York State and local sales taxes are imposed on the receipts from every retail sale of tangible personal property, except as otherwise provided, and on the receipts from every sale, except for resale, of certain enumerated services (Tax Law §§ 1105, 1110 and 1210; 20 NYCRR 525.1 and 531.1). Purchases of tangible personal property and the enumerated services are presumed to be subject to tax unless the opposite is shown (Tax Law § 1132[c][1]).

Among the services taxable under the Tax Law are maintaining, servicing and repairing real property, whether the services are performed in or outside of a building (*see* Tax Law § 1105(c)(5); 20 NYCRR § 527.7[b]). In determining the taxability of a service, however, it is important to look at the nature of the service overall and not just at the taxability of individual components (*see Matter of F.W. Woolworth Co.*, Tax Appeals Tribunal, December 1, 1994). Here, it is clear that the Routine Services that Petitioner is required to perform under the two contracts attached to the petition are operation and management services for water or wastewater treatment plants. The service of operating, managing

and maintaining a waste water or water treatment facility is not one of the taxable services enumerated in Tax Law section 1105(c) (*see* TSB-A-09[49])S). Thus, Petitioner's lump sum charges for the Routine Services under the two contracts attached to the petition are not subject to sales tax. Accordingly, Petitioner is eligible for a refund of the sales tax it collected and remitted in relation to the lump sum charge for those services, assuming its refund claims are timely and it has refunded the tax to its customers (*see* Tax Law § 1139).

DATED: November 7, 2011

/S/

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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.