

**New York State Department of Taxation and Finance
Office of Counsel**

TSB-A-15(40)S
Sales Tax
November 13, 2015

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S131106A
PETITION NO. S131212A

The Department of Taxation and Finance received a Petition for Advisory Opinion from Petitioner, [REDACTED] and a Petition for Advisory Opinion from Petitioner, [REDACTED]. Both Petitioners will be referred to as “Petitioner” in this Advisory Opinion. Petitioner asks whether the monthly fee it charges for certain services it performs in regard to sewage treatment plants (“STP”) is subject to sales and use tax. We conclude that the monthly fee is subject to tax as a charge for maintenance services under Tax Law § 1105(c)(3) and (5).

Facts

Petitioner has entered into contracts with owners of certain STPs for apartment/condo complexes in New York. An STP is real property that includes inflow pipes that bring sewage to a series of large holding tanks where the sewage is treated, and outflow pipes that take the decontaminated water to leaching fields. The STPs, which vary in size from approximately 1,500 to 5,000 square feet, run 24 hours a day, 7 days a week. Attached to the petition is a contract between Petitioner and the owner of a particular STP for the provision of these services (the “Contract”).

Petitioner is required under the Contract to send “qualified personnel” to the plant every day “to carry out control, operations, preventative maintenance, testing and record keeping services” and to “operate the plant in accordance with good practices,” pursuant to an operations and maintenance manual to be provided by the plant’s owner. In return for receiving a monthly fee, the Contract requires Petitioner to perform the following activities:

- Provide all preventative maintenance, including: oiling, greasing, routine mechanical adjustments and housekeeping within the STP building. This includes surveying the plant for problems, maintaining daily logs of the plant’s performance and taking samples as detailed below, and attending any meetings on the plant’s operation.
- Complete all the necessary Monthly Discharge Monitoring reports and submit them to the applicable government agency and the owner.
- Notify the owner and arrange for sludge removal by a licensed liquid waste hauler. (Petitioner bills the owner separately for the cost of the sludge removal.)
- Maintain all pump stations located within the facility.

Visits to the STP generally take a minimum of two hours a day. All of the employees making the visits are certified or licensed by the New York State Department of Environmental Conservation. When the employees arrive at the plant, they survey the plant, review the records on the plant computer, and record the plant’s activity. As part of that review, they make any

necessary adjustments in the plant's machinery and equipment to ensure that the plant is operating properly. These adjustments can be necessitated by a variety of factors, including the time of year, weather patterns, or the aging of equipment. To monitor whether the sewage is being properly treated and to meet State and Federal legal requirements, the employees take samples of the plant's output that are sent for analysis to an in-house lab operated by Petitioner. The contract also requires Petitioner to have a company representative present "at all meetings and conferences, and inspections pertaining to the plant's daily operation." In addition, weekly, during one of the visits, the employees will grease and check oil in pumps and generators, make sure generators come on in case of power outages, and clean facility and lab areas. The Contract also requires Petitioner to "maintain all pump stations located within the facility." This entails inspecting the pumps to make sure they are working, and performing any necessary maintenance. Repairs of the pump stations are not included in the monthly fee. These services will be hereafter referred to as Petitioner's "monthly fee activities."

Under the Contract, Petitioner is permitted to separately charge for a number of other required services, including providing 24 x 7 emergency repairs, contracting with waste haulers to remove the sludge generated by the plants, providing labor and parts for repairs and arranging for periodic lab testing of the treated water at outside labs. The taxability of the charges for these additional services is not at issue in this Advisory Opinion. Petitioner asks only whether its monthly fee is subject to sales and use tax under New York law.

Analysis

The Tax Law imposes sales and use tax on retail sales of tangible personal property and certain enumerated services, including maintaining, servicing, or repairing tangible personal property or real property. *See* Tax Law § 1105(c) (3), (c)(5). "Maintaining, servicing, or repairing" are terms used to cover all activities that relate to keeping property in a condition of fitness, efficiency, readiness or safety or restoring it to such condition. *See* 20 NYCRR § 527.7(a)(1). Included in the services subject to tax under Tax Law § 1105(c)(5) are waste-water removal and equipment testing. *See* 20 NYCRR § 527.7(b)(2); TSB-A-08(33)S. Integrated services are to be taxed according to their primary function. *See Penfold v State Tax Commission*, 114 AD 2d 696 (3d Dep't 1985).

Here, the issue is the taxability of Petitioner's daily activities at the STPs for which it receives its monthly fee. On these daily visits, Petitioner's employees physically inspect the plant, review the computer records of the plant's operation and test the decontaminated water produced by the plant. They also perform routine maintenance as necessary, such as oiling the pumps, monitoring the sludge build-up, or making mechanical adjustments to the plant's equipment, such as its pumps. The purpose of these activities appears to be to ensure that the plant is operating as intended and to document that fact by maintaining the necessary records. Thus, the primary function of Petitioner's monthly fee activities is to keep the plant "in a condition of fitness, efficiency, readiness or safety or restoring it to such condition" by ensuring that it is operating as it supposed to. 20 NYCRR § 527.7(a)(1). Therefore, Petitioner's monthly fee is taxable as a maintenance service. *See* Tax Law § 1105(c)(3) and (5); *Matter of Allied Maintenance Corporation v. New York State Tax Commn.*, 115 AD2d 143 (3d Dept 1985) (contract to provide operation, maintenance, repair and inspection services at certain power plants found taxable under former Tax Law § 1105(c)(5), which imposed tax on interior cleaning

and maintenance services; TSB-A-96(90)S (contract to operate and maintain a large apartment building's heating, ventilation, air conditioning and hot water systems and maintain logs thereof found to be a taxable maintenance service.)

DATED: November 13, 2015

/S/

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