

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-94 (1)S
Sales Tax
February 18, 1994

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S920401A

On April 1, 1992, a Petition for Advisory Opinion was received from Ebasco Services Incorporated, Two World Trade Center, New York, New York 10048.

The issue raised by Petitioner, Ebasco Services Incorporated, is whether the cleaning services furnished to Petitioner, pursuant to Section 42 of the Agreement of Lease between the Port Authority of New York and New Jersey (hereinafter "Port") and Petitioner, and more fully described in SCHEDULE B, Part I as "Routine Cleaning in Office Areas" is subject to State and local sales and use taxes.

In accordance with SCHEDULE B of the Agreement of Lease between Petitioner and Port, Port is to supply to Petitioner, and Petitioner is required to take all of the cleaning services described in Part I of SCHEDULE B. Such services include routine office cleaning, routine cleaning in corridor areas, routine cleaning in toilet areas, routine cleaning in passenger elevators, etc.

Petitioner is required to pay Port's cost of supplying the cleaning services as billed by Port on a monthly basis. If at the time of billing Port's cost of performing the services has not been determined, the amount of payment shall be Port's estimate of its cost, subject to later retroactive adjustment when Port's costs are determined.

The cost of the cleaning services described in Part I are determined on an annual per rentable square foot basis. Petitioner's annual rate of payment is the annual per rentable square foot basis in the premises. Petitioner's monthly payments are equal monthly installments of the annual rate, as the same may be charged or adjusted from time to time during the letting, without regard as to whether or not all items of service in Part I are scheduled for performance during a single payment period.

The cost of cleaning services performed at greater frequency than described in Part I and the cost of optional cleaning services described in Schedule B, Part II are determined on a per unit basis for each item of service performed. The SCHEDULE B, Part II cleaning services consist of vacuuming carpets, striping and refinishing floors, spraying and buffing floors, shampooing carpets, removing, cleaning and rehangng draperies, providing plastic liners for waste, specialized porter service and window cleaning service.

Petitioner is currently paying Commercial Rent or Occupancy Tax, imposed by New York City Administrative Code Title 11, Chapter 7, on the cleaning services described in Part I of SCHEDULE B.

Section 1105(c) of the Tax Law provides, in part, as follows:

Sec. 1105. 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:

* * *

(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 chapter, but excluding services rendered by an individual who is not in a regular trade or business offering his services to the public.

In Debevoise & Plimpton v New York State Dept. of Taxation and Finance, 80 NY2d 657, 661, the Court of Appeals held that the tenants' payment for overtime heat, ventilation and air conditioning services was incidental to the rental of the commercial premises and not the sale of a refrigeration and steam service and, therefore, not subject to the sales tax imposed pursuant to Section 1105(b) of the Tax Law.

In Empire State Building Company v New York State Dept. of Taxation and Finance, 81 NY2d ___, the Court of Appeals held that the tenants' payment of an Electricity Rent Inclusion Factor was for an electric service provided only as an incident to the rental of the commercial premises and not as part of "separate transactions which have as their primary purpose the furnishing of utilities or utility services", and therefore, the taxing of such payments as a sale of utility services under Section 1105(b) of the Tax Law was improper.

In the instant case the routine cleaning in office areas described in SCHEDULE B, Part I of the lease between Petitioner and Port are incidental to the rental of the commercial premises and are not part of a separate transaction which has the primary purpose of furnishing an interior cleaning and maintenance service. Accordingly, in accordance with the rationale of Debevoise & Plimpton, supra, and Empire State Building Company, supra, payments by Petitioner to Port for such routine cleaning services are not taxable under Section 1105(c)(5) of the Tax Law.

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It is noted, however, that interior cleaning and maintenance services which may be purchased from Port at the option of Petitioner, such as cleaning services performed at a greater frequency than described in SCHEDULE B, Part I of the lease or as set forth in SCHEDULE B, Part II of the lease, are subject to sales tax pursuant to Section 1105(c)(5) of the Tax Law.

DATED: February 18, 1994

/s/
PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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