

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

TSB-A-96 (67) S  
Sales Tax  
October 7, 1996

STATE OF NEW YORK

COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO.S960328B

On March 28, 1996, the Department of Taxation and Finance received a Petition for Advisory Opinion from Cattabiani and Associates, Charles Calderone Associates, D.T.M., Inc., George Murray & Associates, Hubert H. Hayes, Inc., John A. Van Deusen & Associates, Inc., Joseph Neto and Associates, Inc., Lerch, Bates and Associates, United Elevator, Vertical Systems Analysis, and Walsh Associates, Ltd., collectively, Elevator Service Companies, c/o George Murray & Assoc., 60 Fire Island Avenue, Babylon, New York 11702.

The issues raised by Petitioners, collectively, Elevator Service Companies, are:

1. Whether the services all or some of the Petitioners perform as enumerated within the facts below are subject to State and local sales and use taxes.
2. Whether in performing inspection services, filing fees which must be paid on behalf of Petitioner's client, if separately stated from charges for other services, are subject to State and local sales and use taxes.
3. Whether the services enumerated below would be exempt from tax if performed for:
  - a. A federal, state or governmental entity, a church, or synagogue, or other tax-exempt entity.
  - b. A licensed engineer or architect.
4. Whether the services enumerated below would be exempt if performed for licensed engineers or architects who are themselves rendering services to a tax-exempt entity.

Petitioners submit the following facts as the basis for this Advisory Opinion.

1. Some Petitioners are hired to evaluate elevator performance. These evaluations are performed by visual inspection to determine if an elevator meets applicable building code safety requirements. These services are generally performed under the following circumstances:
  - a. In connection with an acquisition of real estate or the financing of a real estate project. This evaluation is generally ordered by a purchaser, financial institution, architect or engineer to determine the remaining life of an elevator.

- b. In connection with a request for a Petitioner's recommendations as to whether to modernize elevator equipment ("Modernizing Equipment"). Such evaluations generally include cost estimates with regard to such modernization.
- c. To determine if maintenance on elevators previously performed by third-party maintenance contractors has allowed the elevators to meet industry and regulatory standards. When necessary, the Petitioner will provide a list of corrections to be undertaken by such contractors so that the elevators meet the proper standards.

2. Some Petitioners provide guidance to clients as to the structuring of maintenance contracts between the client and its third-party maintenance contractor. This includes delineating the specifications of the subject equipment to be maintained and the items of maintenance which must be performed by the contractor.

3. Some Petitioners perform studies of the pedestrian traffic capacity of both new and existing buildings to determine the elevator equipment necessary to adequately service the buildings. This study is generally performed by an owner (or developer) in connection with planned building or renovation of an elevator system.

4. After performing a Modernization Survey (as discussed in paragraph 2. above), if a modernization project goes forward, a Petitioner may be requested to put the recommended equipment changes and/or new equipment in "book form." Book form constitutes writing detailed specifications and information necessary for a contractor to bid on installing the new or updated equipment. The Petitioner's responsibilities often also include reviewing and analyzing project bids received by third-party contractors.

5. After the installation of an elevator, Petitioners are often requested to evaluate the elevator to determine if it was properly installed.

6. Some Petitioners are requested on occasion to design and oversee the installation of new elevators. This broad-scope consulting service usually commences with a study of pedestrian traffic to determine the number of elevators necessary to service the building. Thereafter, the Petitioner often creates blueprints, prepares specifications, and possibly oversees the bidding process. This service may also include approval of shop drawings, attendance at field meetings and supervision of construction. The final step of this consulting service is the final inspection of the newly-installed elevator.

7. Some Petitioners are hired by law firms and insurance companies to provide expert witness testimony.

8. Some Petitioners are hired by building departments of municipalities to determine whether and to what extent elevators within the municipality are in violation of applicable building codes and to prepare a written report to the building owner which addresses any violations. In addition, there

are occasions when Petitioners are hired by private clients to act as their representatives to assist in obtaining a building permit from a municipality building department. These types of services are charged either on an hourly or a fixed fee basis.

9. Some Petitioners are occasionally requested to evaluate whether elevators satisfy federal, state or local laws (c.f., local law 10-81). These inspections include determining if elevators comply, for example, with applicable fire codes and the Americans With Disabilities Act.

The inspection reports prepared by Petitioners are not submitted to or used by the third party contractors which maintain and service the elevators. Those contractors all conduct their own inspections to determine what maintenance, repairs, lubrication and adjustments are necessary to properly maintain the elevators.

Petitioners do not incorporate the findings and recommendations with respect to a particular client in reports furnished to third parties.

The inspection of elevators are similar to, and performed in a similar manner as those provided by professional engineers and licensed architects.

Section 1105(c) of the Tax Law imposes sales tax, in part, 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.

\* \* \*

(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.

Section 1116 of the Tax Law provides, in part:

Sec. 1116. 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:

(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, or where it is a vendor of services or property of a kind not ordinarily sold by private persons;

(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, or where it sells services or property of a kind not ordinarily sold by private persons;

(3) The United Nations or any international organization of which the United States of America is a member where it is the purchaser, user or consumer, or where it sells services or property of a kind not ordinarily sold by private persons;

(4) Any corporation, association, trust, or community chest, fund or foundation, 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 ....

With respect to issue "1", a number of the services provided by the Petitioners as described above consist of inspections or evaluations of elevators. Under the facts described above, however, these services are not subject to tax under Section 1105(c)(3) or (5) as maintaining, servicing or repairing tangible personal property or real property. The inspection reports prepared by Petitioners are not submitted to or used by the third party contractors which maintain and service the elevators. This Advisory Opinion presumes that the evaluation services numbered 1, 8 and 9 above, are performed solely for the purpose of demonstrating compliance with government building

codes. Inspection services performed solely for purposes of mandatory governmental code compliance, and which are not related to or performed in conjunction with repairing, maintaining or servicing tangible personal property or real property are not enumerated taxable services. The inspections performed in connection with the services numbered 5 and 6 above are incidental to the installation of elevators as a capital improvement to real property. Therefore, the receipts received from the performance of these services are not subject to State and local sales and use taxes. The other kinds of services provided by Petitioner are not included among the enumerated taxable services of Section 1105(c). The receipts from these other services are also not subject to State and local sales and use taxes.

Concerning issue "2", separately stated charges for filing fees are not subject to sales tax.

As for issues "3" and "4", the questions are moot due to the determination that the services are not taxable. We note, however, that services performed for organizations, such as churches or synagogues, or government entities, described in Section 1116(a) of the Tax Law are not subject to sales and use taxes. Otherwise taxable services performed for engineers or architects would not be exempt unless such engineers or architects were members of organizations described in Section 1116(a) of the Tax Law.

With respect to issue "4", otherwise taxable services performed for engineers and architects are exempt only if the engineer or architect is an agent of the exempt organization. To establish agency or representative relationships there must be a "manifestation" that a Petitioner consents to act on behalf of the exempt organization, subject to its control, and that the exempt organization authorizes the fiduciary relationship. (See, Matter of Hooper Holmes v Wetzler, 152 AD2d 871, iv den, 75 NY2d 706; Matter of Swet, Dec Tax App Trib, February 22, 1991, TSB-D-91(10)S.) Whether a Petitioner acts as an agent is a question of fact that must be resolved based upon the circumstances in each case. See also Section 541.5(c) of the Sales and Use Tax Regulations for guidelines on agency contracts.

DATED: October 7, 1996

/s/  
John W. Bartlett  
Deputy Director  
Technical Services Bureau

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