

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

TSB-A-96 (90) S
Sales Tax
December 30, 1996

STATE OF NEW YORK

COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S960306A

On March 6, 1996, the Department of Taxation and Finance received a Petition for Advisory Opinion from The Brooklyn Union Gas Company, One Metrotech Center, Brooklyn, New York 11201.

The issue raised by Petitioner, Brooklyn Union Gas, is whether the service of operating a heating, ventilation, air conditioning and electrical generating plant is subject to sales tax.

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

Petitioner is a public utility providing natural gas service in the New York City area and is expanding into new lines of business which traditionally have not been offered by public utilities. One of these ventures is Energy Management Services (EMS). Generally, the owner of a large commercial or residential building requires round-the-clock staff to operate and maintain the building's heating, ventilation, air conditioning and hot water requirements. The duties required, which include turning on, monitoring, adjusting and shutting down the equipment, are usually performed by the owner's employees who are generally licensed as stationary engineers. In addition, these employees provide routine maintenance on an as-needed basis. Their principal function however, is to operate the equipment. Some building owners who have found it difficult to staff these positions or who would like to rely on Petitioner's expertise in energy management, now wish to have Petitioner perform these functions.

Petitioner proposes to provide operating services which are identical to those provided by the owner's employees. In addition, Petitioner also intends to offer, for a separate fee, routine preventive maintenance of the above equipment. It is anticipated that the fee for maintenance service will not comprise more than 5% of the operating fee. In the service contract that is negotiated and on invoices that it will render, Petitioner intends to offer to the building owner the option to separately purchase the operating service and routine maintenance services.

The operating services that Petitioner will provide to a building's existing central boiler plant, air conditioning, and electric power generation are:

1. 24 hour/day, 365 day/year operating and monitoring of the large boilers and air conditioning units as required by building load and weather.

2. Monitoring of the performance of the equipment and filling out the equipment log.
3. Starting, synchronizing, and stopping the electric generators as required by electrical load and engine operating conditions.

Applicable Law

Section 1105(c) of the Tax Law imposes sales tax upon:

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:

* * *

(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.

Operating and monitoring a building's boilers and air conditioning units; monitoring the performance of this equipment and filling out equipment logs; and starting, synchronizing, and stopping the building's electric generators as required by electrical load and engine operating conditions, are considered to be maintaining, servicing, or repairing real property and thus are subject to sales tax under Section 1105(c)(5) of the Tax Law. See Matter of Allied Maintenance, State Tax Commission, February 29, 1984, TSB-H-84(50)S, confirmed, Matter of Allied Maintenance Corporation v. New York State Tax Commn, 115 AD2d 143. In addition maintaining, servicing or repairing Petitioner's customers' equipment is subject to the tax imposed under section 1105(c) (3)

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or (5) of the Tax Law whether or not the services are performed under a service contract or on a transaction by transaction basis. Accordingly, Petitioner is required to collect sales tax on receipts from the sale of these services when performed in New York State.

DATED: December 30, 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.