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

TSB-M-87 (13)S Sales Tax October 28, 1987

TAXABILITY OF SERVICES PROVIDED BY TEMPORARY SERVICE CONTRACTORS

As a result of the recent Tax Commission decision in the Matter of Wheatfield Properties [TSB-H-87(157)S], this memorandum is being issued to express the Tax Department's policy concerning the taxability of services rendered by individuals through a temporary service contractor. This policy will be effective as of December 1, 1987.

Temporary service contractors can be distinguished from employment agencies in that the temporary service contractor, unlike the employment agency, is the employer of its own staff and is directly responsible for the salaries, withholding of taxes, and the hiring and firing of the individuals who are rendering services to its clients. In addition, the temporary service contractor controls to which of its clients the individual will be assigned.

An employment agency, on the other hand, provides individuals who become the employees of the agency's client and who maintain no further relationship with the agency. The individual does not report, directly or indirectly, to the agency after being hired by the client, nor may the agency terminate the services of the individual or otherwise affect the relationship between the individual and the client. Since an employment agency merely refers personnel, its charges to its clients are not subject to sales or use tax.

Temporary service contractors generally maintain a staff of employees who possess varied expertise, such as engineers, draftsmen, technicians, secretaries, typists, nurses, salesmen, data entry operators, etc., and will determine the charge to their clients based upon those skills. For a fee (usually an hourly charge), the temporary service contractor will provide its client with trained and/or specialized individuals who have the specific job skills requested by the client. These individuals may be assigned on a long- or short-term basis depending upon the needs and desire of the client. Since the temporary service contractor is the employer of the individual performing the service and is responsible for paying such individual's wages, the amounts paid to the temporary service contractor by the client are not salaries or wages within the meaning and intent of the exclusion from tax for employee services contained in Section 1105(c) of the Tax Law.

Section 1105(c) of the Tax Law imposes a tax on certain services. (A partial list of taxable and nontaxable services is included in this memorandum.) When a temporary service contractor provides personnel to perform such taxable services for its client, the fee paid by the client for these services constitutes a receipt subject to tax. Accordingly, the temporary service contractor is required to collect sales tax on the fee charged to the client for such taxable services, regardless of how the charge is arrived at or how much the contractor is required to pay its personnel.

The Tax Commission decision in the hearing concerning Wheatfield Properties sustained the tax due in respect to charges for temporary personnel services.

Example 1. X Corporation wants the names and titles of its executives painted on their office doors. X Corporation requests a commercial painter from Y Corporation, a temporary service contractor. The painter works for three, 8-hour days at X Corporation. Y Corporation bills X Corporation \$360.00 (\$15.00 per hour x 24 hours). Since the service performed by the painter is one of the services enumerated as taxable under the Tax Law, Y Corporation must add a sales tax to the \$360.00 charge.

If the services performed by the temporary service contractor's employee are not subject to tax under Section 1105(c) of the Tax Law, then no tax is to be collected on the charge for these services.

Example 2. Y Corporation, a temporary service contractor, is requested by X Company to furnish X Company with an individual possessing telephone and typing skills to replace X Company's secretary for a four-week period. No tax is required to be collected on the fee Y Corporation charges X Company since the services provided by Y Corporation's employee to X Company are not taxable services under Section 1105(c) of the Tax Law.

Where the taxable service performed by the individual supplied by the temporary service contractor to the client is purchased by the client for resale, or results in a capital improvement to real property, such service is not subject to tax under section 1105(c) of the Tax Law. The temporary service contractor will not be required to collect a sales tax on the fee charged the client if a properly completed exemption certificate is provided by the client within 90 days of the date the services were performed. It should be noted that when services of both a taxable and nontaxable nature are performed, tax is required to be charged on the total amount of the bill unless the charges for taxable and nontaxable services are separately stated.

Example 3. Z company requests XYZ, a temporary service contractor, to furnish a plumber to install a hot water heater in Z Company's office building and to make repairs to the building's plumbing system. The plumber works for an hour on the installation of the hot water heater and spends an additional 2 hours making repairs to the plumbing system. When XYZ bills Z Company, the charge for the installation of the hot water heater (a capital improvement) and the charge for the repairs to the plumbing system (a taxable service) must be separately stated on the bill. In addition, a Certificate of Capital Improvement, Form ST-124, must be received by XYZ from

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Z Company within 90 days of the date the work was completed. XYZ will then charge sales tax only on the portion of the bill that represents charges for the repair work. If XYZ does not receive a *Certificate of Capital Improvement* from Z Company within the appropriate time period, and/or does not separately state the charges on the bill, then a sales tax must be charged on the total amount billed to Z Company.

Example 4. X Company contracts with a customer to repaint the customer's office building. XYZ, a temporary service contractor, is requested by X Company to furnish X Company with painters to assist in performance of the contract. Since the services being furnished by XYZ are for resale by X Company, such services are not subject to tax under Section 1105(c) of the Tax Law, provided that a timely and properly completed Contractor Exempt Purchase Certificate, Form ST-120.1, is furnished to XYZ by X Company.

All vendors are required to keep accurate records that contain all the information necessary to verify the taxable and nontaxable services performed by its employees. The records must include any exemption document (for example, a *Certificate of Capital Improvement, Resale Certificate or Exempt Organization Certification*) received from clients. See Publication 752, *Record Keeping For Sales Tax Vendors*, for additional information on record keeping requirements.

Any vendor who is required to collect sales and use tax on its services must be registered with the Department of Taxation and Finance as a sales tax vendor. A vendor who fails to register and/or properly collect sales and use tax may be subject to substantial penalties under the Tax Law. Registration kits may be obtained by calling the Tax Department toll-free at 1-800-CALL TAX (or 1-518-438-1073 if the call is placed from outside New York State), or by writing to:

NYS Department of Taxation and Finance Taxpayer Assistance Bureau W.A. Harriman Campus Albany, New York 12527

Following is a list of some taxable and nontaxable services (the list is not all-inclusive). Additional information on the taxability of data entry services can be found in TSB-M-81(3)S. Publication 862, Sales and Use Tax Classifications of Capital Improvements and Repairs to Real Property, provides information on capital improvements and repair, maintenance and installation services. These publications can be obtained by calling the telephone number listed above.

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Taxable Services

Data entry

Repairing real property Window cleaning Rodent & pest control

Trash removal

Installing, maintaining or repairing tangible personal property

Mechanic

Interior cleaning & maintenance*

Guard, watchman, and

other security personnel **

Nontaxable Services

Typing Filing

Office clerk

Telephone soliciting

Demonstrator Host/Hostess

Telephone collection Word processing

Receptionist Bookkeeping

Interior cleaning & maintenance*

Services rendered in

producing, fabricating, processing, printing or imprinting tangible personal property that is for resale

- Interior cleaning and maintenance (except for window cleaning, rodent and pest control and trash removal), are nontaxable services when done on a regular contractual basis of 30 days or more.
- ** These services are subject to tax only in New York City which imposes a 4% tax on protective and detective services except when such services are performed by port watchmen.