

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-05(20)S
Sales Tax
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STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S020213A

On February 13, 2002, the Department of Taxation and Finance received a Petition for Advisory Opinion from Marcum & Kliegman, LLP, 130 Crossways Drive, Woodbury, New York, 11714.

The issues raised by Petitioner, Marcum & Kliegman, LLP, relate to sales of services and purchases of construction materials by a construction contractor, as follows:

1. Whether the replacement of existing underground pipes, mains or conduit or the installation of new pipes, mains or conduit as described below constitutes a capital improvement to real property for sales tax purposes.
2. Whether the purchase of road building materials including fill, sand, stone, and asphalt by a construction contractor performing road work for utility companies is subject to sales and use tax if a private property owner (i.e., an individual homeowner, developer, business, etc.) takes title to these materials upon completion of a project.
3. Whether the purchase of road building materials including fill, sand, stone, and asphalt by a construction contractor performing installation work for utility companies is subject to sales and use tax if a governmental entity takes title to these materials upon completion of a project.
4. Whether the purchase of conduit materials by a contractor for installation as infrastructure for the utility company's telecommunications network is subject to sales and use tax when the utility company obtains title to these materials after their installation.
5. Whether a contractor is required to obtain a certificate of capital improvement (Form ST-124) for each project performed for its customers or whether a signed contract is sufficient proof that the work being performed qualifies as a capital improvement.
6. Whether the contract between a contractor and its customers constitutes sufficient proof that the materials described above are used in a project for an exempt governmental entity, or whether additional documentation is required.

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

A construction contractor (hereinafter Contractor) is primarily engaged in the business of installing mains, pipes and conduits used to carry natural gas and communication cables, and, as an incident to such installations, replacing excavated sections of roadway and other property. Contractor's two largest customers are a natural gas utility company (hereinafter Gas Company) and a telecommunications company (hereinafter Phone Company). Contractor does not have contracts with entities exempt from sales tax pursuant to section 1116(a) of the Tax Law for these installations.

For Gas Company, Contractor is engaged to install underground natural gas mains and pipes under public roads and infrequently under an individual homeowner's property. Gas Company supplies all of the mains and pipes used. Gas Company does not charge Contractor for these pipes. Depending on the contract, Contractor will excavate the road, dig down approximately 4 feet and connect additional pipes to Gas Company's existing underground natural gas network. The extent of the work varies from small projects of less than 25 feet in length to large projects where the natural gas pipes are laid for several blocks.

Contractor then refills the 4 foot deep hole with clean fill, lays approximately 10 inches of stone and sand, and applies 2 to 4 inches of asphalt as a final cover. This process restores the road to a condition similar to that prior to the gas pipe installation. Contractor currently purchases the clean fill, sand, stone, and asphalt. Contractor pays sales tax on the purchase of these materials. The applicable governmental entity (town, county, city or state) gets title to most of the road building materials including the fill, sand, stone and asphalt. A private property owner may get title to a portion of the road building materials. For example, Contractor may run pipes 200 feet down a street and then run the pipe 10 feet up an individual's driveway. A portion of the road materials in this case would be installed on the individual's property.

Gas Company retains title to the mains and pipes after their installation. There is no construction contract between either Gas Company or Contractor and any exempt entity or organization or private property owner.

For Phone Company, Contractor is usually engaged to install conduit under public roads and on rare occasions under privately owned property. These conduits are usually 8 inches or 12 inches in diameter and are empty when installed. At a later date, Phone Company uses its own equipment to feed either copper cable, fiber optic cable or other lines through the empty underground conduit. At the time Contractor installs the conduit, Contractor does not know what type of cable will be fed through it.

Contractor uses a similar process as detailed for Gas Company installations to install the conduit used by Phone Company. As with the installations for Gas Company, Contractor excavates, installs the conduit, and restores the road or other real property to a similar condition as prior to the telephone conduit installation.

However, in the case of its contracts with Phone Company, Contractor is required to purchase the conduit that is used in the Phone Company projects from a third party. Phone

Company obtains title to the conduit upon its installation. The applicable governmental entity gets title to all of the road building materials including the fill, sand, stone and asphalt used to restore its property. Private property owners take title to all materials used to restore their property to its original condition after a conduit is installed. Contractor currently pays sales tax on the conduit, fill, sand, stone and asphalt.

Neither Phone Company nor Contractor have a construction contract with any exempt entity or organization or private property owner.

For purposes of this Advisory Opinion, it is presumed that Contractor is making its installations for its customers, Gas Company or Phone Company, on easements in the case where such installations cross private property and on franchises where such installations cross public property.

Applicable law and regulations

Section 1101(b) of the Tax Law provides, in part:

When used in this article for the purposes of the taxes imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and by section eleven hundred ten, the following terms shall mean:

* * *

(4) Retail sale. (i) A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical, component part of tangible personal property, or (B) for use by that person in performing the services subject to tax under paragraphs (1), (2), (3), (5), (7) and (8) of subdivision (c) of section eleven hundred five where the property so sold becomes a physical component part of the property upon which the services are performed or where the property so sold is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax. Notwithstanding the preceding provisions of this subparagraph, a sale of any tangible personal property to a contractor, subcontractor or repairman for use or consumption in erecting structures or buildings, or building on, or otherwise adding to, altering, improving, maintaining, servicing or repairing real property, property or land, as the terms real property, property or land are defined in the real property tax law, is deemed to be a retail sale regardless of whether the tangible personal property is to be resold as such before it is so used or consumed

* * *

(9) Capital improvement. (i) An addition or alteration to real property which:

(A) Substantially adds to the value of the real property, or, appreciably prolongs the useful life of the real property; and

(B) Becomes part of the real property or is permanently affixed to the real property so that removal would cause material damage to the property or article itself; and

(C) Is intended to become a permanent installation.

Section 1105 of the Tax Law provides, in part:

On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax . . . upon:

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

(b) (1) The receipts from every sale, other than sales for resale, of the following: (A) gas, electricity, refrigeration and steam, and gas, electric, refrigeration and steam service of whatever nature; (B) telephony and telegraphy and telephone and telegraph service of whatever nature except interstate and international telephony and telegraphy and telephone and telegraph service . . . (C) a telephone answering service; and (D) a prepaid telephone calling service.

* * *

(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, except:

* * *

(iii) for installing property which, when installed, will constitute an addition or capital improvement to real property, property or land, as the terms real property, property or land are defined in the real property tax law as such term capital improvement is defined in paragraph nine of subdivision (b) of section eleven hundred one of this chapter. . . .

* * *

(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 article

Section 1115(a) of the Tax Law provides, in part:

Receipts from the following shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten:

* * *

(12-a) Tangible personal property for use or consumption directly and predominantly in the receiving, initiating, amplifying, processing, transmitting, retransmitting, switching or monitoring of switching of telecommunications services for sale or internet access services for sale or any combination thereof. Such tangible personal property exempt under this subdivision shall include, but not be limited to, tangible personal property used or consumed to upgrade systems to allow for the receiving, initiating, amplifying, processing, transmitting, retransmitting, switching or monitoring of switching of telecommunications services for sale or internet access services for sale or any combination thereof. As used in this paragraph, the term "telecommunications services" shall have the same meaning as defined in paragraph (g) of subdivision one of section one hundred eighty-six-e of this chapter.

* * *

(15) Tangible personal property sold to a contractor, subcontractor or repairman for use in (i) erecting a structure or building (A) of an organization described in subdivision (a) of section eleven hundred sixteen . . . or (ii) adding to, altering or improving real property, property or land (A) of such an organization . . . as the terms real property, property or land are defined in the real property tax law; provided, however, no exemption shall exist under this paragraph unless such tangible personal property is to become an integral component part of such structure, building or real property.

(16) Tangible personal property sold to a contractor, subcontractor or repairman for use in maintaining, servicing or repairing real property, property or land (i) of an organization described in subdivision (a) of section eleven hundred sixteen . . . as the terms real property, property or land are defined in the real property tax law; provided, however, no exemption shall exist under this paragraph unless such tangible personal

property is to become an integral component part of such structure, building or real property.

(17) Tangible personal property sold by a contractor, subcontractor or repairman to a person other than an organization described in subdivision (a) of section eleven hundred sixteen, for whom he is adding to, or improving real property, property or land by a capital improvement, or for whom he is about to do any of the foregoing, if such tangible personal property is to become an integral component part of such structure, building or real property; provided, however, that if such sale is made pursuant to a contract irrevocably entered into before September first, nineteen hundred sixty-nine, no exemption shall exist under this paragraph.

Section 1116(a) of the Tax Law provides, in part:

Except as otherwise provided in this section, any sale . . . 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. . . .

Section 1119(c) of the Tax Law provides:

A refund or credit equal to the amount of sales or compensating use tax imposed by this article and pursuant to the authority of article twenty-nine, and paid on the sale or use of tangible personal property, shall be allowed the purchaser where such property is later used by the purchaser in performing a service subject to tax under paragraph (1), (2), (3), (5), (7) or (8) of subdivision (c) of section eleven hundred five or under section eleven hundred ten and such property has become a physical component part of the property upon which the service is performed or has been transferred to the purchaser of the service in conjunction with the performance of the service subject to tax or if a contractor, subcontractor or repairman purchases tangible personal property and later makes a retail sale of such tangible personal property, the acquisition of which would not have been a sale at retail to him but for the second to last sentence of subparagraph (i) of paragraph (4) of subdivision (b) of section eleven hundred one. An application for the refund or credit provided for herein must be filed with the commissioner of taxation and finance within the time provided by subdivision (a) of section eleven hundred thirty-nine. Such application shall be in such form as the commissioner may prescribe. Where an application for credit has been filed, the applicant may immediately take such credit on the return which is due coincident with or immediately subsequent to the time that he files his application for credit. However, the taking of the credit on the return shall be deemed to be part of the application for credit. The procedure for granting or denying

such applications for refund or credit and review of such determinations shall be as provided in subdivision (e) of section eleven hundred thirty-nine.

Section 1132 of the Tax Law provides, in part:

(a) (1) Every person required to collect the tax shall collect the tax from the customer when collecting the price, amusement charge or rent to which it applies. If the customer is given any sales slip, invoice, receipt or other statement or memorandum of the price, amusement charge or rent paid or payable, the tax shall be stated, charged and shown separately on the first of such documents given to him. The tax shall be paid to the person required to collect it as trustee for and on account of the state.

* * *

(c)(1) For the purpose of the proper administration of this article and to prevent evasion of the tax hereby imposed, it shall be presumed that all receipts for property or services of any type mentioned in subdivisions (a), (b), (c) and (d) of section eleven hundred five . . . are subject to tax until the contrary is established, and the burden of proving that any receipt . . . is not taxable hereunder shall be upon the person required to collect tax or the customer. Except as provided in subdivision (h) or (k) of this section, unless (i) a vendor, not later than ninety days after delivery of the property or the rendition of the service, shall have taken from the purchaser a resale or exemption certificate in such form as the commissioner may prescribe, signed by the purchaser and setting forth the purchaser's name and address and, except as otherwise provided by regulation of the commissioner, the number of the purchaser's certificate of authority, together with such other information as the commissioner may require, to the effect that the property or service was purchased for resale or for some use by reason of which the sale is exempt from tax under the provisions of section eleven hundred fifteen, and, where such resale or exemption certificate requires the inclusion of the purchaser's certificate of authority number or other identification number required by regulations of the commissioner, that the purchaser's certificate of authority has not been suspended or revoked . . . or (ii) the purchaser, not later than ninety days after delivery of the property or the rendition of the service, furnishes to the vendor: any affidavit, statement or additional evidence, documentary or otherwise, which the commissioner may require demonstrating that the purchaser is an exempt organization described in section eleven hundred sixteen, the sale shall be deemed a taxable sale at retail. . . .

Section 1139(a) of the Tax Law provides, in part:

In the manner provided in this section the tax commission shall refund or credit any tax, penalty or interest erroneously, illegally or unconstitutionally collected or paid if application therefor shall be filed with the tax commission (i) in the case of tax paid by the applicant to a person required to collect tax, within three years after the date when the tax was payable by such person to the tax commission

Section 526.6 of the Sales and Use Tax Regulations provides, in part:

Retail sale. (a) The term *retail sale* or *sale at retail* means the sale of tangible personal property to any person for any purpose, except as specifically excluded.

(b) Special rule--sales specifically included as retail sales.

(1) A sale of any tangible personal property to a contractor, subcontractor or repairman for use or consumption in erecting structures or buildings or adding to, altering, improving, maintaining, servicing or repairing real property, property or land, is deemed to be a retail sale, regardless of whether the tangible personal property is to be resold as such before it is used or consumed. . . .

Section 527.7(b) of the Sales and Use Tax Regulations provides, in part:

Imposition. (1) The tax is imposed on receipts from every sale of the services of maintaining, servicing or repairing real property, whether inside or outside of a building.

(4) The imposition of tax on services performed on real property depends on the end result of such service. If the end result of the services is the repair or maintenance of real property, such services are taxable. If the end result of the same service is a capital improvement to the real property, such services are not taxable.

Section 532.4 of the Sales and Use Tax Regulations provides, in part:

Presumption of taxability. (a) General. (1) It is presumed that all receipts for property or service of any type mentioned in subdivisions (a), (b), (c) and (d) of section 1105 of the Tax Law, all rents for occupancy of the type mentioned in subdivision (e) of said section, and all amusement charges of any type mentioned in subdivision (f) of said section, are subject to tax until the contrary is established.

* * *

(b) Burden of proof. (1) The burden of proving that any receipt . . . is not taxable shall be upon the person required to collect the tax and the customer.

(2) A vendor who in good faith accepts from a purchaser a properly completed exemption certificate or, as authorized by the Department, other documentation evidencing exemption from tax not later than 90 days after delivery of the property or the rendition of the service is relieved of liability for failure to collect the sales tax with respect to that transaction. The timely receipt of the certificate or documentation itself will satisfy the vendor's burden of proving the nontaxability of the transaction and relieve the vendor of responsibility for collecting tax from the customer.

(i) A certificate or other document is "accepted in good faith" when a vendor has no knowledge that the exemption certificate or other document issued by the purchaser is false or is fraudulently presented. If reasonable ordinary due care is exercised, knowledge will not be imputed to the seller required to collect the tax.

* * *

(5) A vendor is not relieved of the burden of proof when it failed to obtain an exemption certificate or accepted an improper certificate, or had knowledge that the exemption certificate issued by the purchaser was false or fraudulently presented.

Section 541.1(b) of the Sales and Use Tax Regulations provides:

The principal distinguishing feature of a sale to a contractor, as compared to a sale to other vendors who purchase tangible personal property for resale, is that the sale of tangible personal property to a contractor for use or consumption in construction is a retail sale and subject to sales and use tax, regardless of whether tangible personal property is to be resold as such or incorporated into real property as a capital improvement or repair. Whenever a contractor uses materials, on which the contractor has paid sales tax, in a repair or maintenance contract (except interior cleaning and maintenance contracts of 30 days or more) subject to the sales tax on services under section 1105(c) of the Tax Law, the contractor may be entitled to a refund or credit of the portion of the tax he paid attributable to the materials transferred to the customer.

Section 541.5 of the Sales and Use Tax Regulations provides, in part:

Contracts with customers other than exempt organizations.

(a) The term *customers* in this classification includes, but is not limited to:

- (1) residential customers; and
- (2) business customers.

(b) Capital improvements contracts.

(1) Purchases. All purchases of tangible personal property (excluding qualifying production machinery and equipment exempt under section 1115(a)(12) of the Tax Law) which are incorporated into and become part of the realty or are used or consumed in performing the contract are subject to tax at the time of purchase by the contractor or any other purchaser. A certificate of capital improvement may not be validly given by any person or accepted by a supplier to exempt the purchase of these materials.

(2) Labor and material charges. All charges by a contractor to the customer for adding to or improving real property by a capital improvement are not subject to tax

provided the customer supplies the contractor with a properly completed certificate of capital improvement.

* * *

(4) Documents; capital improvement contracts.

(i) When a properly completed certificate of capital improvement has been furnished to the contractor, the burden of proving the job or transaction is not taxable and the liability for the tax rests solely upon the customer.

(a) The prime contractor should obtain a certificate of capital improvement from the customer and retain it as part of his records. Copies of such certificate must be furnished to all subcontractors on the job and retained as part of their records.

(b) A certificate of capital improvement may not be issued by a contractor, subcontractor or any other person to a supplier on the purchase of tangible personal property.

(ii) Where a contractor does not receive a capital improvement certificate from a customer, the contract or other records of the transaction will prevail. In such case:

(a) where the contractor does not receive a capital improvement certificate, collects tax on the full invoice price and the job is a capital improvement to real property, the contractor is liable for the tax on the cost of materials incorporated into the job, plus the tax collected from the customer. The customer is entitled to a refund of the tax paid to the contractor; or

(b) where the contractor does not receive a capital improvement certificate, collects no tax on the charges billed to the customer and the job is a capital improvement to real property, the contractor is liable for the tax on the cost of materials incorporated into the job performed.

(iii) If a contract includes the sale of tangible personal property which remains tangible personal property after installation, the contractor must collect the appropriate New York State and local taxes from the customer on the selling price, including any charge for installation, of the tangible personal property unless a properly completed exemption certificate is issued by the customer. The contractor may apply for a credit or refund of taxes he has paid on purchases of the tangible personal property that remain tangible personal property after installation.

Example 1: A contractor sells a building he has constructed and, as a part of the sale agreement, installs free standing water fountains which remain tangible personal property when installed. The contractor's billing to his customer must

separately state all charges for tangible personal property included in the sales agreement. The New York State and applicable local tax rate must be collected on the total charges for the water fountains including any installation charges. In this instance, the contractor may purchase the water fountains tax-free using a contractor exempt purchase certificate. If he pays the tax to his supplier, he is entitled to a refund or credit of the tax paid on the purchase of the water fountains.

Opinion

Contractor is primarily engaged in the business of installing gas mains and pipes used to carry natural gas, and conduit used to house telecommunications cables, and, as an incident to such installations, excavating and replacing sections of roadway and other property. Contractor's two largest customers are a natural gas utility company (Gas Company) and a telecommunications utility company (Phone Company). Contractor does not have contracts with entities exempt from sales tax pursuant to section 1116(a) of the Tax Law for these installations and does not enter into contracts with the owners of the properties upon which it performs services for its customers. Likewise, its customers do not enter into contracts with the owners of the properties upon which Contractor performs services. Contractor is engaged to install the underground natural gas mains and pipes used to carry natural gas and conduit used to house telecommunications cables under public roads and infrequently under an individual homeowner's private property. Gas Company purchases the mains and pipes which Contractor installs, but Contractor purchases the conduit which it installs for Phone Company. In both cases, Contractor purchases the road building materials, including fill, sand, stone and asphalt, it uses. For purposes of this Advisory Opinion, it is presumed that Contractor is making its installations for its customers, Gas Company or Phone Company, on easements in the case where such installations cross private property and on franchises where such installations cross public property.

Petitioner inquires as to Contractor's obligations in collecting sales tax from its customers and as to its liabilities for sales tax when purchasing various materials necessary to complete its contracts with its customers.

Issue 1 - Taxability of charges for installing mains, pipes and conduits by Contractor to its customers

Services performed by construction contractors can generally be placed into one of three categories: *capital improvement, repair or maintenance, or installation of tangible personal property which remains tangible personal property after installation.* The contractor performs a *capital improvement* to real property when all three of the conditions in section 1101(b)(9)(i) of the Tax Law are met. If the contractor performs work which becomes an integral component part of the real property but does not meet the three conditions in section 1101(b)(9) of the Tax Law, a *repair or maintenance* service has been performed. Finally, if the contractor performs an installation which does not become an integral component part of the real property, the

contractor has performed an *installation of tangible personal property which remains tangible personal property after installation.*

Whether or not work performed constitutes a capital improvement to real property must be determined by application of the three requirements provided in section 1101(b)(9)(i) of the Tax Law. Each of these three requirements must be met in order for an addition or alteration to qualify as a capital improvement. Furthermore, the classification of property as real property under the Real Property Tax Law does not determine whether the installation of such property is a capital improvement for sales tax purposes. See *Matter of Merit Oil v State Tax Commn.*, 124 AD2d 326.

The installation of gas mains and pipes used to carry natural gas and conduit used to house telecommunications cables requires that private property owners must grant an easement to the particular utility company whose installation crosses their property. Such utility company must also compensate the property owner for the taking of the easement. This action endows the utility company with certain rights to use the easement. Easements on private property obtained by public utility companies are “continuous and unlimited as to time.” (*Barber v Hudson River Telephone Co.*, 105 App Div 154) Such easements cannot be unilaterally terminated by the owner of the servient estate (the property owner) (*Zunno v Kiernan*, 170 AD2d 795). These easements may be conveyed to the utilities’ assigns or successors for a consideration in an instrument similar to a deed. See 49 NY Jur 2d, Easements §§ 146 - 157. See also *Banach v Home Gas Co.*, 12 AD2d 373. Gas Company retains and Phone Company obtains title to the mains and pipes, and conduit, respectively, installed by Contractor. It appears that each utility company exercises a power of ownership over its easement which is sufficient for it to make improvements which enhance the easement’s value to the utility company. It is reasonable to assume that the utility companies do not intend to remove the mains, pipes or conduits in the foreseeable future. In addition, the owners of the underlying property cannot unilaterally terminate the easements or require the utility company to remove the mains, pipes or conduits.

Therefore, an installation or replacement by Contractor of mains, pipes and conduits on private property pursuant to an easement granted by the property owner to the utility company, as described in this Advisory Opinion, which otherwise appears to meet the three conditions set forth in section 1101(b)(9)(i) of the Tax Law, and in the absence of any disqualifying provisions in the terms of the easement, qualifies as a capital improvement to real property. As a result, Contractor may accept from its customers, Gas Company and Phone Company, a *Certificate of Capital Improvement* (Form ST-124) in lieu of collecting sales tax on its charges for installing the mains, pipes and conduits on private property subject to an easement.

As the end result of such installations is considered a capital improvement to real property, the excavations of the property, including driveways, etc., prior to the installation and the property restoration performed after the installation constitute activities which result in a capital improvement. See *Building Contractors Association, Inc. v Tully*, 87 AD2d 909 [1982]; *Carl A. Morse, Inc.*, Dec St Tx Comm, June 18, 1980, TSB-H-80(144)S. Accordingly,

Contractor will not be required to collect sales tax on its installation services if it is presented with a properly completed *Certificate of Capital Improvement* (ST-124).

Utilities generally receive a franchise which permits them to install mains, pipes and conduit in property owned by New York State or one of its political subdivisions. The franchise bestows rights on the utility which are similar to those granted by an easement. See 60 NY Jur 2d, Franchises §§ 1 - 3; *In re Gillen Place*, 304 NY 215. In the present case, Gas Company's mains and pipes and Phone Company's conduit are installed pursuant to a franchise. The mains, pipes and conduits remain the property of the respective utility after they are installed. It appears that each utility company exercises a power over its franchise which is sufficient for it to make improvements to enhance the franchise's value to the utility company. In addition, New York State or one of its political subdivisions cannot unilaterally terminate the franchise. It is reasonable to assume that the utility companies do not intend to remove the mains, pipes or conduits from the franchise in the foreseeable future.

If a franchise agreement includes a provision indicating that the installation is not intended to be permanent; for example, a provision giving the municipality the right to require the utility to remove the installed property after a fixed period of time, such installation may not qualify as a capital improvement. However, in the absence of any disqualifying provisions in the terms of the franchise agreement, an installation or replacement by Contractor of mains, pipes and conduits on the utility company's franchise, as described in this Advisory Opinion, which otherwise appears to meet the three conditions set forth in section 1101(b)(9)(i) of the Tax Law qualifies as a capital improvement to real property. See *Brooklyn Union Gas Company*, Adv Op St Tx Comm, May 15, 1985, TSB-A-85(7)S. Contractor will not be required to collect sales tax on such installations if it obtains from Gas Company and Phone Company properly completed certificates of capital improvement.

Issue 2 - Purchases of road building materials used on private property

In general, purchases by a contractor of materials which are actually incorporated into and become an integral component part of the real property are subject to sales tax as a retail purchase by such contractor. Such materials are considered to be used or consumed by the contractor in the performance of its contract. See section 541.1(b) of the Sales and Use Tax Regulations. A contractor may purchase materials exempt from tax when the materials become an integral component part of real property owned by an entity or organization exempt from sales tax pursuant to section 1116(a) of the Tax Law. See sections 1115(a)(15) and (16) of the Tax Law.

In the present case, Contractor purchases road building materials including fill, sand, stone, and asphalt, that it uses to restore private property after the installation of mains or pipes for Gas Company or conduits for Phone Company. The property owner takes title to the portion of these road building materials used to restore its property upon completion of the project for Contractor's customers. The purchase by Contractor of road building materials which become

an integral component part of private property is a purchase at retail subject to sales tax. See *Ruston Paving Co.*, Dec St Tx Comm, September 15, 1986, TSB-H-87(222)S.

Issue 3 - Purchases of road building materials used on property owned by governmental entities exempt from sales tax pursuant to section 1116(a) of the Tax Law

Contractor purchases road building materials including fill, sand, stone, and asphalt, that it uses to restore roadways and property of governmental entities exempt from sales tax pursuant to section 1116(a) of the Tax Law, after Contractor installs the mains, pipes or conduits. The exempt governmental entities who own these roadways and property take title to the road building materials upon Contractor's completion of the project for Gas Company and Phone Company.

Sections 1115(a)(15) and (16) of the Tax Law require that, in order to be exempt from sales tax, tangible personal property purchased by a contractor must become an integral component part of real property of an entity exempt from tax pursuant to section 1116(a) of the Tax Law. The contractor's purchases may be exempt even though the exempt governmental entity does not enter into a capital improvement contract with the contractor. In the present case, road building materials purchased by Contractor are installed in and become part of real property owned by an exempt governmental entity and title to the road building materials passes to the exempt entity upon completion of the contract with the respective utility company. Sections 1115(a)(15) and (16) of the Tax Law allow Contractor to make purchases of such road building materials for use exclusively by Contractor to restore the real property of an entity exempt from sales tax pursuant to section 1116(a) of the Tax Law without payment of sales tax to Contractor's suppliers.

When a contractor purchases materials which are exclusively incorporated into real property owned by a governmental entity exempt from tax pursuant to section 1116(a) of the Tax Law, the contractor may issue to its supplier a *Contractor Exempt Purchase Certificate* (Form ST-120.1) indicating that the materials will be so incorporated.

It should be noted that not all roads are owned by governmental entities. Roads owned by private persons are treated as any other private property. See *The Michaels Group, Inc.*, Adv Op Comm T&F, October 23, 1990, TSB-A-90(53)S. If, at the time of purchase, it is impossible for Contractor to distinguish between those road building materials that will be used to restore the property of an exempt entity and of a nonexempt entity, Contractor may not issue a contractor exempt purchase certificate. Contractor may apply for a refund or credit for the tax paid on those materials incorporated into the property of an exempt entity, provided such application is made within 3 years of the date on which the sales or compensating use tax was payable by Contractor's supplier. See section 1139(a) of the Tax Law.

It is possible that Contractor may be required to make its installations on private property owned by an organization exempt from sales tax pursuant to section 1116(a)(4), (5), (6), (7) or (8) of the Tax Law. In this case, Contractor will be eligible to purchase road building materials

for incorporation into the above described projects without payment of sales tax in the same manner that such exempt purchases may be made with regard to such installations on property owned by an exempt governmental entity. See sections 1115(a)(15) and (16) of the Tax Law.

Issue 4 - Contractor purchases of conduit

Contractor purchases conduit material used to build the infrastructure for Phone Company's communication network. The conduit is buried under public roadways and, in some cases, private property. At a later date, Phone Company uses its own equipment to feed either copper cable, or fiber optic or other lines through the empty underground conduit. Phone Company obtains title to the conduit upon completion of the project. It does not transfer title to the conduit to the owner of the underlying property.

Section 1115(a)(12-a) of the Tax Law provides that purchases of tangible personal property for use or consumption directly and predominantly in the receiving, initiating, amplifying, processing, transmitting, retransmitting, switching or monitoring of switching of telecommunications services for sale are exempt from sales and use tax. There is no longer a requirement that the tangible personal property constitute "central office equipment."

The conduit purchased by Contractor is not tangible personal property for use or consumption directly and predominantly in the transmitting of telecommunications services provided by its customer, Phone Company. The conduit is, rather, a structure which houses Phone Company's wires and cables, and, by itself, is not for use or consumption directly and predominantly in the receiving, initiating, amplifying, processing, transmitting, retransmitting, switching or monitoring of switching of telecommunications services for sale as contemplated by section 1115(a)(12-a) of the Tax Law.

Sections 1115(a)(15) and (16) of the Tax Law state that, "no exemption shall exist under this paragraph unless such tangible personal property is to become an integral component part of such structure, building or real property." With respect to Contractor's installations of conduit on property owned by New York State or one of its political subdivisions, such installation is performed pursuant to Phone Company's franchise, and title to the conduit is acquired by and remains with Phone Company. It is not transferred to the owner of the underlying property. The conduit, therefore, does not become an integral component part of the property of the governmental entity. Contractor's purchases of conduit used in this manner are not exempt from sales tax under sections 1115(a)(15) and (16) of the Tax Law but, rather, are subject to sales tax the same as any building material purchased by a contractor, subcontractor or repairman and incorporated into a capital improvement project. Likewise, purchases by Contractor of conduit installed on any private property in the manner described above are subject to sales tax.

Issue 5 - Contractor's acceptance of capital improvement certificate

Contractor should obtain from Gas Company or Phone Company a properly completed *Certificate of Capital Improvement* (Form ST-124) for each contract for the installation of mains,

pipes or conduit that constitutes a capital improvement. If Contractor in good faith accepts a properly completed certificate within 90 days of the date Contractor renders its installation service, Contractor has satisfied its burden of proof that the project was a capital improvement project and that Contractor's charges to Gas Company or Phone Company are not subject to sales tax. See section 1132(c)(1) of the Tax Law and section 532.4 of the Sales and Use Tax Regulations.

Issue 6 - Documentation for project with exempt governmental entity

Petitioner inquires whether Contractor's agreements with its customers constitute sufficient proof that the road building materials described above are used in a project for an exempt governmental entity, or whether additional documentation is required.

In the instant case, no construction contract is in place between either Contractor or its customer and an entity exempt from sales tax pursuant to section 1116(a) of the Tax Law. However, Contractor can substantiate that its purchase of road building material is to become an integral component part of property owned by an entity exempt from sales tax pursuant to section 1116(a) of the Tax Law by relying on a signed document between Contractor and its customer which identifies the project, location and owner of the real property upon which the work is being performed, assuming Contractor's records allow it to tie in a particular purchase of road building materials to the contract with the customer. Contractor should provide its suppliers of road building materials with a properly completed contractor exempt purchase certificate only for those road building materials which will be installed in property owned by an entity exempt from sales tax pursuant to section 1116(a) of the Tax Law. Alternatively, Contractor may pay sales tax on its purchases of road building materials and subsequently apply for a refund or credit for the tax it paid on those road building materials installed in property owned by an entity exempt from sales tax pursuant to section 1116(a) of the Tax Law.

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