

CUNNINGHAM & CUNNINGHAM, LLP

NEW YORK STATE SALES TAX E-MAIL UPDATE

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MAINTAINING, SERVICING AND REPAIRING: Determining the taxability of services that do not result in capital improvements to real property

Regular readers of this update service are familiar with the Department's end result test and its use in determining whether or not services performed upon real property result in a capital improvement or taxable repair or maintenance. In some situations, however, it may not be necessary to distinguish between capital improvements and maintaining, servicing and repairing real property. The services performed may clearly fit within the definition of maintaining, servicing and repairing real property eliminating capital improvement considerations as an issue. Since the end result test is not applicable, what analysis does the Department employ in these cases to determine taxability?

The Department will first look to the definition of the terms *maintaining*, *servicing* and *repair*. The definition incorporates "all activities that relate to keeping real property in a condition of fitness, efficiency, readiness or safety or restoring it such condition." Stated examples include painting, lawn services, garbage removal and snow removal. To further determine taxability, the Department will consider:

- 1) the entirety of the context in which the service is provided as opposed to viewing the service in isolation;
- 2) the primary function of the service; and
- 3) a consideration of the service in its entirety rather than in its component parts.

Recently, the Department's Division of Tax Appeals issued a Determination concerning environmental testing and monitoring services performed upon petroleum stations and terminals. The services were generally intended to determine if petroleum discharges had occurred and the extent of any contamination so that appropriate remediation programs could be instituted. The services included proposing locations for monitoring wells and soil borings, installing monitoring wells, conducting soil borings, collecting groundwater samples and testing samples. Sales tax was not paid to the contractors retained to perform the services and the property owner was audited and assessed. The property owner disagreed that the services were subject to sales tax.

The Department stated that all the testing and monitoring services were performed within the context of a petroleum discharge and cleanup for which the owner was responsible. It found that the primary function of the service was to enable the owner to cleanup or resolve the discharges. It also found that the services were an integral component part of the cleanup process as established by law. As such, and as viewed in their entirety, the services were found to clearly relate to keeping or restoring the real property to a condition of fitness, efficiency, readiness or safety and were subject to sales tax.

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Brian G. Cunningham's book, *Sales and Use Tax and the New York Construction Industry*, published by the New York State Bar Association, has been updated as of October 2011 and makes a great addition to any business library. For more information, go to www.nysba.org/pubs.

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