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Alert

Brownfields Practice Group

Brownfield Tax Credit Update: Environmental Testing and Monitoring Services Held to be Subject to New York Sales and Use Tax

Syracuse, New York

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A New York appellate court affirmed the state tax department's position that environmental testing and monitoring services are subject to sales tax. The dispute involved payments made by Exxon Mobil to contractors between 2000 and 2004 for testing and monitoring on properties affected by petroleum spills.

The Tax Law distinguishes between services related to maintaining, servicing or repairing property, which are taxable, and services adding to or improving such property by a capital improvement, which are exempt. There was no dispute that a purchase of services related to the remediation of spilled petroleum was taxable. Although the testing and monitoring services at issue were allegedly intended to ascertain the condition of the affected property, rather than to directly remediate the petroleum spill, the Court found them to be an "integral part of" the taxable remediation efforts. *Exxon Mobil Corp. v. State of New York Tax Appeals Tribunal*, 2015 WL 919788, 2015 N.Y. Slip Op. 01840 (3d Dep't March 5, 2015)

The line between taxable and nontaxable services is not always clear. An otherwise taxable service performed on a site in close conjunction with a capital improvement might be considered a constituent part of a capital improvement and nontaxable. A portion of a taxable service may also be considered nontaxable because it is an integral part of a capital improvement.

The distinction between taxable and nontaxable remediation services can be very fact-specific. The nature of the project, the purpose for the remediation, and the time between the remediation work and the capital improvement may all be factors when determining whether a particular activity is taxable. In addition, how these services are addressed in governing contracts, work orders, and correspondence may have an impact on whether such services are found to be taxable or nontaxable in a development project.

Bousquet Holstein's Brownfield Practice Group works extensively with investors, developers, consultants, and other stakeholder in connection with New York's Brownfield Cleanup Program. Please do not hesitate to contact us with questions you have regarding these developments and your brownfield projects.

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