

# CUNNINGHAM & CUNNINGHAM, LLP

## NEW YORK STATE SALES TAX E-MAIL UPDATE

*June 2011*

### **STATE TAX APPEALS TRIBUNAL AFFIRMS DETERMINATION THAT THE DEPARTMENT OF TAXATION MISINTERPRETS TEMPORARY FACILITIES REGULATION:**

In the May 2010 edition of our periodic *Sales Tax E-Mail Update*, we reported on an Administrative Law Judge determination that rejected the Tax Department's long standing interpretation of the temporary facilities on construction sites regulation. The regulation states:

Subcontracts to provide temporary facilities at construction sites, which are a necessary prerequisite to the construction of a capital improvement to real property, are considered a part of the capital improvement to real property. Charges for the installation of materials and labor to provide temporary heat, temporary electric service, temporary protective pedestrian walkways, and temporary plumbing by a subcontractor are therefore not subject to tax provided the subcontractor receives a properly completed certificate of capital improvement issued by the customer to the contractor.

The Department's interpretation had been that only temporary heat, temporary electric service, temporary plumbing and temporary protective pedestrian walkways could be treated as capital improvements since they were the only installations specifically listed in the regulation. The Administrative Law Judge rejected this interpretation stating it ignores the general rule contained in the first sentence of the regulation. The Judge also stated that the four items in the regulation are listed only as examples. The Department appealed.

The Tax Appeals Tribunal affirmed the determination agreeing that the examples in the regulation are not to be viewed as an exclusive list. To do so would render the first sentence of the regulation "superfluous." As such, the test for determining whether a contract for temporary facilities can be treated as a capital improvement is 1) is the project a capital improvement, and 2) if yes, is the temporary facility a necessary prerequisite to the construction of the capital improvement. In the underlying case, the temporary facility was the installation of a platform and containment system designed to contain debris and pollutants as part of a complex bridge repainting project. This system was deemed a capital improvement because the project was a capital improvement; the temporary facility was mandated by contract, and the installation was legally necessary for reasons of public health and safety.

This is an important fundamental change in the application of this regulation to temporary facilities on construction sites. It is a change that will benefit contractors and their customers. It will be necessary to re-evaluate temporary facilities contracts as a result of this decision. Whether or not a temporary facility can be treated as a capital improvement will now be decided on a case by case basis subject to this new standard of review.

## **SALES AND USE TAX AND THE NEW YORK CONSTRUCTION INDUSTRY:**

Brian G. Cunningham's book, *Sales and Use Tax and the New York Construction Industry*, published by the New York State Bar Association, makes a great addition to any business library. For more information, go to [www.nysba.org/pubs](http://www.nysba.org/pubs).

## **SALES TAX SEMINARS:**

Is your business complying with New York's sales tax laws and regulations? Are you exposed to liability? Are you paying unnecessary sales taxes? If you are interested in learning more about sales tax as applied to the New York construction and real estate industries, Cunningham & Cunningham, LLP has prepared an instructive seminar course on this topic that can be provided in-house.

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