

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

TSB-A-06(2)S  
Sales Tax  
January 9, 2006

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S041222B

On December 22, 2004, the Department of Taxation and Finance received a Petition for Advisory Opinion from Canine Containment Distributing Company, 5692 Pittsford Palmyra Road, Pittsford, New York, 14534.

The issue raised by Petitioner, Canine Containment Distributing Company, is whether the installation of a pet containment system commonly referred to as an “invisible fence” qualifies as a capital improvement to real property for sales tax purposes.

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

Petitioner sells, installs, repairs and services its brand of pet containment system for its customers who are pet owners. While Petitioner may sell its pet containment system on an uninstalled basis, customers generally contract with Petitioner to provide all equipment, parts, materials and labor necessary to install the pet containment system and to train the pet to the system. The system is designed to keep the customer’s pet on the customer’s property and, depending on the customer’s needs, a similar product may be used to keep the customer’s pet away from certain areas inside the home. The system works by having a transmitter emit a weak radio signal through a perimeter antenna wire which causes a receiver on the pet’s collar to produce a mild shock when the pet moves too close to the perimeter antenna wire. Small flags are placed around the protected area a few feet inside the perimeter antenna wire so the pet can be trained to learn the location of the protected perimeter. The flags may be removed once the pet is trained to the location of the perimeter.

The outdoor system is composed of three primary components: a radio transmitter, a radio receiver collar worn by the pet, and an antenna wire for the protected perimeter. The indoor system does not require the antenna wire. Equipment, parts and materials used in installations include the radio transmitter for either an indoor or outdoor system (or both), the radio receiver collar, a grounding device for lightning protection (optional), a battery back-up in case of electrical failure (optional), batteries to operate the receiver, the antenna wire for the protected perimeter and training flags to mark the protected perimeter.

In typical installations of an outdoor pet containment system, the antenna wire is buried a few inches underground around the perimeter of the containment area. The wire may be placed in an expansion joint in a concrete driveway or sidewalk and be held in place with a suitable caulk. A saw cut across a blacktop or asphalt driveway or sidewalk with the wire caulked in place also provides sufficient installation. The antenna wire need not be buried if positioned where it would not be disturbed by lawn mowing, similar maintenance operations or ordinary activities.

The transmitter is typically mounted on an interior wall in a garage or basement using screws, and is powered by being plugged into an ordinary electrical outlet. The transmitter uses low voltage and plugs in using an adaptor similar to those found on many types of battery chargers, cordless tools and other small, portable appliances that can be operated by batteries or household current. The transmitter may have an optional battery backup, which is installed and powered in a similar manner as the transmitter itself. The transmitter is typically not hard wired into the residential electrical system and may be removed without causing material damage to either the property or the transmitter.

The receiver is merely attached to a collar worn by the pet.

Petitioner or its agent installs the above equipment and materials, including burying the wire and mounting the transmitter, battery backup and lightning protection in the customer's garage or basement. In conjunction with installation of the system, Petitioner instructs the customers how to train pets to the system. For an additional charge, Petitioner will provide more training for the owner and pet at the owner's request. Petitioner separately states the charges for any additional training provided on its invoice to its customer.

Petitioner repairs system malfunctions on the customer's property for a charge and may provide system repairs pursuant to a warranty agreement under which the customer may be charged for service calls. Petitioner's business office may also provide service to equipment, such as the radio receiver mounted on the dog collar, or sell new equipment and parts, such as batteries.

### **Applicable law and regulations**

Section 1101(b)(9)(i) of the Tax Law defines the term *capital improvement* as:

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:

Imposition of sales tax 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.

\* \* \*

(c) The receipts from every sale, except for resale, of the following services:

\* \* \*

(3) Installing tangible personal property . . . or maintaining, servicing or repairing tangible personal property . . . 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 526.8(a) of the Sales and Use Tax Regulations provides, in part:

Definition. The term *tangible personal property* means corporeal personal property of any nature having a material existence and perceptibility to the human senses. Tangible personal property includes, without limitation:

(1) raw materials, such as wood, metal, rubber and minerals;

(2) manufactured items, such as gasoline, oil, chemicals, jewelry, furniture, machinery, clothing, vehicles, appliances, lighting fixtures, building materials;

(3) artistic items, such as sketches, paintings, photographs, moving picture films and recordings;

(4) animals, trees, shrubs, plants and seeds; . . .

Section 527.5(a) 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 installing, maintaining, servicing or repairing tangible personal property, by any means including coin-operated machines, whether or not any tangible personal property is transferred in conjunction with the services.

Section 527.7(a)(1) of the Sales and Use Tax Regulations provides, in part:

*Maintaining, servicing and repairing* are terms which are used to cover all activities that relate to keeping real property in a condition of fitness, efficiency, readiness or safety or restoring it to such condition. Among the services included are services on a building itself such as painting; services to the grounds, such as lawn services, tree removal and spraying; trash and garbage removal and sewerage service and snow removal.

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

(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.

## **Opinion**

Petitioner sells its pet containment system on both an installed and uninstalled basis. Sales by Petitioner of its system on an uninstalled basis are retail sales of tangible personal property subject to sales tax under section 1105(a) of the Tax Law. Such sales include sales of the entire system without installation and sales of replacement parts such as batteries, dog collars, training flags, etc. Charges for repairs, adjustments and battery replacement, either at Petitioner's place of business or on the customer's premises, including charges to the customer for service calls and/or labor under a warranty agreement, are also subject to sales tax under section 1105(c)(3), (5) of the Tax Law.

Petitioner provides instruction to the pet owner enabling the owner to train the pet to the system. In some cases, Petitioner sells additional instruction services separately from its charges for the pet containment systems. The additional instructional services provided by Petitioner are not enumerated in the Tax Law. Therefore, the receipts from the sale of such additional instructional services by Petitioner are not subject to sales tax. See *Little Chefs, Ltd.*, Adv Op Comm T & F, July 25, 2002, TSB-A-02(34)S; *Hodgson, Russ, Andrews, Woods and Goodyear*, Adv Op Comm T&F, April 2, 1992, TSB-A-92(31)S; *Economic Cycle Research Institute, Inc.*, Adv Op Comm T & F, July 23, 1997, TSB-A-97(42)S.

Petitioner inquires as to whether the installation of a complete pet containment system qualifies as a capital improvement to real property for sale tax purposes. In general, to qualify as a capital improvement, an installation must meet all three of the conditions set forth in section 1101(b)(9)(i) of the Tax Law.

The first condition for a capital improvement set forth in section 1101(b)(9)(i)(B) of the Tax Law requires that the pet containment system must substantially add to the value of the real property, or appreciably prolong the useful life of the real property. A pet containment system does not appreciably prolong the useful life of the real property. It is not clear that the pet containment system described in this Opinion substantially adds to the value of the real property.

The second condition for a capital improvement set forth in section 1101(b)(9)(i)(B) of the Tax Law requires that the pet containment system must be installed in such a manner as to become part of the real property or be permanently affixed to the real property so that removal would cause material damage to the property or the system itself. Although most forms of equipment normally require some form of affixation to real property, the test is not merely whether such equipment is affixed to the property. Rather, the test is whether the equipment is affixed to such a degree that it loses its separate identity and becomes part of the real property or that removal would cause material damage to the property or the equipment. Material damage is not considered to exist merely because the value of the property in question is diminished when the equipment or article is removed. See *Peek 'N' Peak Recreation, Inc.*, Adv Op St Tx Comm, July 9, 1987, TSB-A-87(24)S. The primary method of affixing the pet containment system described in this Opinion to the real property is by using screws to attach the transmitter portion of the system to an interior wall, drilling a small hole to allow access for the exterior antenna wire and burying the antenna wire a few inches underground. The system is removed by reversing the installation procedure. The system can be disassembled by removing the screws holding the transmitter to the interior wall, disconnecting the antenna wire from the transmitter and unplugging the transmitter power adaptor from the electrical outlet. The excavation required to bury the antenna wire is minimal and may be accomplished with an ordinary shovel or edger. If the system is removed from the real property, the antenna wire itself may be removed or left behind and replaced at minimal expense. The third component of the system, the receiver attached to a collar worn by the pet, is never affixed to or becomes a part of the real property.

The courts have held that the mere bolting of equipment to real property does not, in and of itself, create the degree of permanence necessary to establish that a particular installation is a capital improvement. See *Matter of Charles R. Wood Enterprises, Inc. v State Tax Commn.*, 67 AD 2d 1042; *Matter of West Mountain Corp. v Miner*, 85 Misc 2d 416. In *Cornwell Energy Management, Inc.*, Adv Op Comm T & F, May 8, 2003, TSB-A-03(22)S, the Tax Department opined that motor controllers that were wired to a motor and bolted to real property, and required only unwiring and unbolting to be removed for service or repair, did not have the degree of permanence necessary to establish a capital improvement. Accordingly, it does not appear that the pet containment system described in this Opinion meets the second condition for a capital improvement set forth in section 1101(b)(9)(i) of the Tax Law.

The third condition for a capital improvement set forth in section 1101(b)(9)(i)(B) of the Tax Law requires that the installation of a pet containment system be intended to be permanent. From the facts presented, it appears that the intention of parties at the time the system is installed is that the system may be permanent. However, section 1101(b)(9)(i)(B) requires that all three of the conditions set forth be met. If the installation of a pet containment system fails to meet one or more of these conditions, such installation cannot qualify as a capital improvement to real property.

Based upon the facts and circumstances described in this Opinion with respect to the pet containment system, it appears the installation of the pet containment system on real property as described above does not qualify as a capital improvement to real property because it is not permanently affixed to the real property such that removal would cause material damage to the property or article itself. Such an installation is, therefore, considered to be an installation of tangible personal property which remains tangible personal property after installation. Accordingly, receipts from the sale of the installation of pet containment systems on real property, including charges for labor and materials, as described above, are subject to sales tax under sections 1105(a) and 1105(c)(3) of the Tax Law.

DATED: January 9, 2006

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