

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-81(63)S
Sales Tax
December 18, 1981

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S810505A

On May 5, 1981, a Petition for Advisory Opinion was received from Industrial Power and Light Corporation, 127 Seneca Street, Buffalo, New York 14210.

The issue raised is whether receipts for "temporary electrical services" are subject to sales tax.

The provision of temporary electrical services consists of the installation of an electrical system, such as the erection of a temporary fuse box or circuit breakers, fed from a power line through a meter. Such temporary systems provide electrical power to a construction project until a permanent system is installed. In the present instance, title to the property constituting the system is transferred by Petitioner to the customer. Petitioner's billing to its customers separately states charges for material, labor, overhead and profit.

Sales tax is imposed on the services of maintaining, servicing or repairing real property (Tax Law section 1105(c)(5)) as distinguished from adding to or improving real property by a capital improvement (Tax Law section 1105(c)(3)). The Tax Law and the Sales and Use Tax Regulations provide as follows:

"A capital improvement is an addition or alteration to real property

- (i) which substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property, and
- (ii) which 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
- (iii) is intended to become a permanent installation.

" Tax Law § 1101(b)(9) and 20 NYCRR 527.7(a)(3).

The term "Retail Sale" is defined in section 1101(b)(4) of the Tax Law to include: "A sale of any tangible personal property to a contractor . . . for use or consumption in erecting structures . . . or . . . improving real property. The Regulations similarly state that "Any contractor who is making a capital improvement must pay a tax on the cost of materials to him, as he is the ultimate consumer of the tangible personal property." 20 NYCRR 527.7(b)(5).

The State Tax Commission has determined that the furnishing of temporary electric service of the nature described by Petitioner is not a maintenance service but rather a necessary prerequisite to the construction of real property and as such becomes part of the capital improvement within the meaning and intent of section 1105(c)(3) of the Tax Law. Tax Law § 1101(b)(9) and 20 NYCRR 527.7(a)(3). Carl A. Morse, Inc. TSB-H 80(144)S.

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Consequently, Petitioner's charge for providing temporary electrical services constitutes receipt from the performance of a capital improvement to real property which is not subject to sales tax. The fact that Petitioner specifically itemizes its charge among the factors which normally go into the computation of any charge for the performance of a capital improvement to real property in no way affects this result. As a contractor who is making a capital improvement, Petitioner must pay a tax on the cost of materials to him which become part of the project, as he is the ultimate consumer of this tangible personal property. 20 NYCRR 527.7(b)(5).

DATED: December 3, 1981

s/LOUIS ETLINGER
Deputy Director
Technical Services Bureau