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

TSB-A-83(36)S
Sales Tax
July 25, 1983

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION PETITION NO. S820428A

On April 28, 1982 a Petition for Advisory Opinion was received from Nelstad Materials Corp., 40 Huntington Place, New Rochelle, New York 10801.

The issue raised herein is whether certain leasehold improvements constitute capital improvements, within the meaning of section 1101(b)(9) of the Tax Law.

Petitioner, the lessee of a ready mix cement producing facility, hired a contractor to furnish and install a complete heating system, including furnace, piping and radiators, and a complete bathroom in the office located on the leased property.

Petitioner also hired a contractor to furnish and install a concrete foundation to serve as a base for the erection of a ready mix concrete plant, as well as a loading platform for the cement plant. A new main water line which provides water for the cement plant was also installed by the contractor.

Section 1101(b)(9) of the Tax Law defines the term capital improvement as: ". . . An addition or alteration to real property which: (1) Substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property; and (ii) 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."

The items at issue substantially add to the value of the real property.

Paragraph 30 of the lease entered into between Petitioner and the landlord provides as follows: "Tenant shall have the right, as his own cost and expense, to make alterations, additions and improvements to the buildings on the demised premises, which additions and improvements made by Tenant shall belong to Landlord . . . . " The words "additions" and "improvements" when used in leases have been given a broad meaning by the courts. See French v New York, 29 Barb 363. Property which might otherwise have been deemed to be a removable trade fixture has been held to be covered by these terms. See Levin v Improved Property Holding Co., 141 A.D. 106. The items installed by Petitioner are additions or improvements as these terms have been construed by the courts. Paragraph 30 of the lease, taken together with a consideration of the items themselves, indicates the intention of the parties that the subject installations are intended to be permanent. These items are attached to the real property in a sufficiently secure manner and are sufficiently adapted to the purposes for which the real property is to be used as to satisfy the common law test for fixtures. The property installed by Petitioner, therefore,' "becomes part of the real property" for purposes of section 1101(b)(9) of the Tax Law. See discussion in Beamon Corporation, State Tax Commission Advisory Opinion, TSB-A-82(32)S.

As noted in the preceding paragraph, the facts here presented indicate an intention that the installations at issue are intended to be permanent, thus satisfying the third of the statutory criteria.

The heating system, bathroom, concrete foundation and water line installed by Petitioner satisfy the requirements of section 1101(b)(9) of the Tax Law and are, therefore, capital improvements. As a result, the amounts paid by Petitioner to contractors for the installation of such property are not subject to sales tax. Tax Law, § 1105(c)(3)(iii).

DATED: June 29, 1983

s/FRANK J. PUCCIA
Director
Technical Services Bureau