

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

TSB-A-85(32)S
Sales Tax
August 21, 1985

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S841114B

On November 14, 1984 a Petition for Advisory Opinion was received from AA Nursery, Inc., 2077 Jericho Tpke., Commack, New York 11725.

The issue raised by Petitioner is whether the sale and installation of coal or wood burning stoves constitute capital improvements to real property which are exempt from sales tax.

Petitioner sells and installs coal and wood burning stoves. The stoves require a chimney for exhausting smoke and unburnt gases. Sometimes a brick chimney is built, but most often a metal insulated chimney pipe is used. The metal chimney stack is either run up directly from the stove through the ceiling and roof or else is run through an adjacent wall and along an outside wall to the roof. In order to install the chimney through the roof, it is necessary to cut floor joists to make room for the insulated chimney and fire stops required by safety codes. Adjustments in the wall studs are also necessary in some chimney installations. Petitioner states that the chimney is permanently secured to the ceiling joists, wall or roof with wall supports, wall bands or roof braces and are held with nuts and bolts.

Mason work of either brick or stone is done behind or around the stove to render the wall fireproof. A concrete base is built below the stove and extends to at least 18 inches around the stove to insure a fireproof base. All chases and holes through the walls, ceiling and roof are sealed off to prevent infiltration of air or moisture.

Section 1105(a) of the Tax Law imposes a sales tax on the receipts from every retail sale of tangible personal property with certain limited exceptions. Section 1105(c)(3) of the Tax Law imposes a sales tax on the receipts from every sale, except for resale, of the service of "[i]nstalling tangible personal property . . . except . . . (iii) for installing property which, when installed, will constitute an addition or capital improvement to real property. . .". The Tax Law defines the term "capital improvement" as an addition or alteration to real property which:

- "(i) 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." Tax Law, 1101(b)(9).

The use of the conjunctive "and" in the Tax Law definition of the term "capital improvement" mandates that the three requirements be met as a unit. If the installation fails to meet any one requirement, it does not qualify for exemption.

A wood or coal burning stove, when installed, retains its identity as tangible personal property and does not become a permanent part of the real property. The stove and its installation are therefore subject to tax pursuant to Tax Law, 1105(a) and 1105(c)(3). M & C Stove World, Inc., Advisory Opinion TSB-A-81-(42)S, (See Publication 862 (2/81), Classification of Improvements and Repairs to Real Property for Sales Tax Purposes, p. 12.)

The installation of a brick chimney, masonry work done behind or around the stove to render the wall fire proof and the concrete base built below the stove have the necessary element of permanence to qualify as a capital improvement in accordance with Tax Law 1101(b)(9). Presumably, there is an intent to make a permanent installation and substantial value is added to the real property. It follows, therefore, that such installations are exempt from tax.

The tax status of the installation of the metal chimney, assuming there is an intent to make a permanent installation, is determined by the mode of installation. If the installation is made in such a way that the metal chimney is permanently attached to the real property so that its removal would cause material damage to the real property or the chimney, the installation is exempt from tax.

The conclusions drawn herein as to what installations constitute a capital improvement are predicated upon the assumption that the installations are made for the owner of the real property or, where installed for a tenant, that there is a lease which provides that title to improvements is to vest in the landlord and that the improvements are to become a part of the premises and remain in the premises. Cf. Beaman Corporation, State Tax Commission Advisory Opinion, TSB-A-82(32)S.

The Sales and Use Tax Regulations provide that "[w]hen tangible personal property, composed of taxable and exempt items is sold as a single unit, the tax shall be collected on the total price." 20 NYCRR 527.1(b). Inasmuch as the sale of the stove is taxable, Petitioner is required to collect and remit tax on the entire charge unless the non-taxable items and the applicable charges therefore are separately stated on the customer's bill.

Where Petitioner performs a capital improvement it must pay sales tax on its purchase of materials, but is not required to collect tax on its separately stated charge to its customers. Tax Law, 1101(b)(4), 1105(c)(3)(iii), 1105(c)(5), 20 NYCRR 527.7(a)(3). In order for Petitioner to be relieved

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of its obligation to collect sales tax where its customer asserts that the installation constitutes a capital improvement, Petitioner must take from its customer a properly completed Certificate of Capital Improvement (Form ST-124). Tax Law, 1132(c); 20 NYCRR 532.4(f).

DATED: July 15, 1985

s/ANDREW F. MARCHESE
Chief of Advisory Opinions

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