

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

TSB-A-85(5)S
Sales Tax
May 15, 1985

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S830217A

On February 17, 1983, a Petition for Advisory Opinion was received from Terco Contracting Corp., 42-20 Astoria Blvd., Long Island City, New York 11103.

Petitioner, a contractor, submitted information detailing five construction projects performed on a customer's building as follows:

1. The construction of a dispatch table, the removal of a wall and the installation of another, the relocation of a door, the installation of a window and the installation of electrical outlets.
2. The installation of a new celotex ceiling in two rooms.
3. The installation of a new 100 amp electrical service complete with breaker panel.
4. The installation of two electrical receptacles.
5. The construction of a new entrance and a new wall and the relocation of a radiator.

A single price was quoted to the customer for each of the five transactions.

The issue raised is whether the work performed by Petitioner for his customer constituted capital improvements to real property and was, therefore, exempt from sales and use tax.

Section 1105(a) of the Tax Law imposes a tax on receipts from every retail sale of tangible personal property. . . . Additions to real property which qualify as capital improvements are exempt from the tax imposed under section 1105(a) of the Tax Law.

Section 1105(c)(3) of the Tax Law imposes a tax on receipts from the sale of "Installing tangible personal property. . . except for installing property which, when installed, will constitute (a). . . capital improvement to real property. . . ."

The Tax Law and the Sales and Use Tax Regulations define the term capital improvement in pertinent part as "as addition or alteration to real property (i) which substantially adds to the value 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); Sales and Use Tax Regulations 20 NYCRR 527.7).

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Items 2, 3, 4 and 5 described above meet each of the requirements of section 1101(b)(9) and therefore constitute capital improvements to real property. As such, they are not subject to the taxes imposed under section 1105(a) and 1105(c)(3) of the Tax Law providing Petitioner's customer presents to Petitioner a properly completed Certificate of Capital Improvement (Form ST-124). However, petitioner is liable for payment of sales tax on all of its purchases of materials incorporated into these projects.

Item 1, as described above, is a mixed transaction. The construction of the dispatch table does not meet the criteria for a capital improvement since it is not affixed to the customer's real property. The other work performed under item 1 meets the criteria for a capital improvement.

When a contract includes elements of both a non-taxable capital improvement and a taxable installation, the contractor should collect sales tax only on the taxable items included in the contract but only if he has separately stated the charges attributable to the taxable items. If a contractor fails to separately state the taxable and non-taxable elements of a transaction, he is required to collect tax on the entire amount of the contract.

DATED: April 18, 1985

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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