

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

TSB-A-86(31)S
Sales Tax
July 28, 1986

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION PETITION NO. S860404A

On April 4, 1986, a Petition for Advisory Opinion was received from Brockport Carpet & Linoleum Center, Inc., Brockport Plaza, Brockport, New York 14420.

The issues raised are (I) whether a retailer, when installing a capital improvement to real property material of a kind it also offers for sale at retail, must collect sales tax on the installation charge, and (II) whether its use tax liability for the installed property must be shown on the bill rendered to the customer.

Petitioner, a retailer in floor covering who also installs the products it sells, submits a sample invoice containing the following information:

Date,	
Customer's Name and Address	
Description:	
50 sq. yds carpet @ 10.00	\$500.00
50 sq. yds pad @ 2.00	100.00
50 sq. yds installation @ 2.75	<u>137.50</u>
	\$737.50
Tax	_____*)
Total	=====*)
*) left blank	

Petitioner asks where on this document should the use tax be added if the charges were for a capital improvement.

ISSUE I.

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

Section 1101(b)(9) of the Tax Law defines "capital improvement" as an addition 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".

The State Tax Commission has determined that the installation of wall-to-wall carpeting over a finished hardwood or tile floor does not meet the criteria of a capital improvement quoted in (ii) and (iii) above, (Matter of Staten Island Savings Bank, Decision of the State Tax Commission, May 11, 1983, TSB-H-83(87)S, Matter of Norman W. Ayers, Decision of the State Tax Commission, Dec. 3, 1982, TSB-H-82(162)S), and therefore is taxable as the service of installing tangible personal property under Tax Law 1105(c)(3), supra. Had the sample invoice been rendered for the performance of such a job, the applicable state and local sales tax should be collected on the entire charge, unless the customer is an exempt organization supplying an exemption document prescribed by the Tax Commission. (See the final paragraph of this Advisory Opinion).

However, when the carpet is laid over a sub-floor (unpainted concrete, plywood, etc.) which is not intended for use without additional covering, the installation constitutes a capital improvement to real property. See S & Y Floor Covering, State Tax Commission Advisory Opinion, TSB-H-81(50)S. Receipts from the performance of a capital improvement to real property by a contractor are not subject to tax. (20 NYCRR 541.1[c]).

However, the Tax Commission has held in the Matter of Waxlife, USA, Decision of the New York State Tax Commission, February 28, STH 77-32; *affd* 67 AD2d 1040, that a capital improvement is not an exempt transaction, inasmuch as the contractor is responsible for the payment of tax on his cost of the materials used in the project, (20 NYCRR 541.13), and this tax may be passed on to the customer as an element in the cost of the job. But, since no tax is collected on the entire charge for the project, the purchaser of the capital improvement receives a tax exemption on the portion of the price which is in excess of material cost, such as installation labor, overhead and mark-up on material.

Moreover, a consumer who buys carpeting from a retailer but employs another contractor to install it over subflooring, must pay tax on the material; however upon the issuance of a Certificate of Capital Improvement (Form ST-124) to the installer, such consumer is not required to pay tax on the labor charges.

ISSUE II.

Pursuant to the Sales and Use Tax Law and Regulations, sales records must provide sufficient detail to determine the taxable status of each sale and the amount of tax due and collected thereon. If any receipt is not taxable, the vendor or customer must furnish proof of the exemption. (Tax Law 1132[c]; 20 NYCRR 533.2[a], [b]).

Petitioner states it would prefer not to show the use tax paid on materials on the bill rendered to the customer since it allows customers to determine Petitioner's cost of the merchandise sold to the customers. Except as required for compliance with the above quoted provisions, the Tax Law and Regulations do not require the breakdown of charges on a sales slip, invoice, receipt or other memorandum of sale. The use tax is an expense the retailer/contractor may choose to absorb (thereby decreasing its profit margin) or pass on to the customer by increasing charges for material or labor. Because, in either instance, the use tax neither represents part of a taxable receipt nor sales tax due from the customer, it need not be stated on the invoice.

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Additionally, Petitioner complains that the Tax Law works to the advantage of carpet retailers who do not install carpeting because, based upon equal profit margins, such retailers are able to advertise carpeting at a price which is lower than the price at which a retailer/installer can advertise. While Petitioner's complaint is undoubtedly true in many cases, the fact remains that this problem is a result of the favorable treatment provided by the Tax Law for capital improvements. Petition states that explanations of this favorable treatment to customers only lead to confusion and misunderstanding. While this has been a longstanding problem for some carpet retailer/installers, it cannot be resolved within the context of an advisory opinion which is merely "a written statement...setting forth the applicability to a specified set of facts of pertinent statutory and regulatory provisions relating to a tax administered by the State Tax Commission." 20 NYCRR 901.1(a). Petitioner's complaint is simply outside the scope of an Advisory Opinion.

Finally, where one of various "exempt organizations" enumerated in Section 1116(a) of the Tax Law is the purchaser of a capital improvement to real property, the retailer/contractor will incur no use tax liability for property incorporated in the capital construction if it has received, no later than 90 days after delivery of the material, a properly completed Exempt Organization Certificate (Form ST-119.1) or a Governmental Purchase Order. (Tax Law 1132[c]; 20 NYCRR 529, 541.3).

DATED: July 28, 1986

s/FRANK J. PUCCIA

Director

Technical Services Bureau

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