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

TSB-A-90 (51)S
Sales Tax
October 23, 1990

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. S900612B

On June 12, 1990 a Petition for Advisory Opinion was received from Allied Steam Corp., Myrtle Avenue, Mahopac Falls, New York 10512.

The issue raised by Petitioner, Allied Steam Corp., is whether the sale and installation of dry cleaning equipment is a capital improvement and whether a contractor may accept a certificate of capital improvement after the original contract which billed sales tax has been presented to the purchaser.

Petitioner's customer is a dry cleaner located in rented space, Petitioner's customer contends that the installation of dry cleaning equipment results in a capital improvement to real property. After the installation was completed, petitioner's customer issued a certificate of capital improvement to him. The equipment is bolted to the floor and piped into the utilities in the building. However all connections can be disconnected.

Section 1101(b)(9)(i) of the Tax Law defines a capital improvement as:

An addition or alteration to real property which:

(A) Substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property; and

(B) 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

(C) Is intended to become a permanent installation.

Section 541.2(g)(1) of the Sales and Use Tax Regulations provides that:

A capital improvement means 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.

(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 criteria for a capital improvement must be met in their entirety. The inability to meet any one of the three conditions will prevent the property in question from qualifying as a capital improvement.

In the instant case the Petitioner's customer is the lessee of the premises on which the dry cleaning equipment is located. Improvements made to leased premises for the purposes of conducting the business for which the realty is leased are presumed not to be permanent and to be made for the sole use and enjoyment of the tenant during the term of the lease, 100 Park Ave., Inc. v. Boyland, 144 NYS2d 88, affd 309 NY 685. Such improvements will be presumed not to be capital improvements unless the lease vests title to the improvements in the lessor upon termination of the lease, Merit Oil of New York v New York State Tax Commission, 124 AD2d 326 or the improvements are so affixed to the realty so that they cannot be removed without substantial damage to them, Flah's of Syracuse v. Tully, 89 AD2d 729. Since Petitioner has failed to show that its customer has met these two latter conditions, it must be presumed that the installation of the dry cleaning equipment is for use in the customer's dry cleaning business and is not a capital improvement.

Consequently, the sale and installation of the dry cleaning equipment is subject to the imposition of sales tax. The purchaser of such equipment would be liable for the use tax on the sale and installation of the equipment if he did not pay the sales tax directly to the seller and the installer of the equipment.

With regard to whether Petitioner may accept a Certificate of Capital Improvement, Section 1132(c) of the Tax Law states, in part:

> (c) For the purpose of the proper administration of this article and to prevent evasion of the tax hereby imposed, it shall be presumed that all receipts for property or services of any type mentioned in subdivisions (a), (b), (c) and (d) of section eleven hundred five,. . . .are subject to tax until the contrary is established, and the burden of proving that any receipt,. . .is not taxable hereunder shall be upon the person required to collect tax or the customer. .[u]nless (1) a vendor, not later than ninety days after delivery of the property or the rendition of the service, shall have taken from the purchaser a certificate in such form as the tax commission may prescribe. . .

Section 541.5(b)(4) of the Sales and Use Tax Regulations explains the effect of 1132(c) of the Tax Law upon the Certificate of Capital Improvement.

> (4) Documents; capital improvement contracts. (i) When a properly completed certificate of capital improvement has been furnished to the contractor, the burden of proving the job or transaction is not taxable and the liability for the tax rests solely upon the customer.
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> (a) The prime contractor should obtain a certificate of capital improvement from the customer and retain it as part of his records. Copies of such certificate must be furnished to all subcontractors on the job and retained as part of their records.
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> (b) A certificate of capital improvement may not be issued by a contractor. subcontractor or any other person to a supplier on the purchase of tangible personal property.

(ii) Where a contractor does not receive a capital improvement certificate from a customer, the contract or other records of the transaction will prevail. In such case:

(a) where the contractor does not receive a capital improvement certificate, collects tax on the full invoice price and the job is a capital improvement to real property, the contractor is liable for the tax on the cost of materials incorporated into the job, plus the tax collected from the customer. The customer is entitled to a refund of the tax paid to the contractor, or

(b) where the contractor does not receive a capital improvement certificate, collects no tax on the charges billed to the customer and the job is a capital improvement to real property, the contractor is liable for the tax on the cost of materials incorporated into the job performed.

(iii) If a contract includes the sale of tangible personal property which remains tangible personal property after installation, the contractor must collect the appropriate New York State and local taxes from the customer on the selling price, including any charge for installation, of the tangible personal property unless a properly completed exemption certificate is issued by the customer. The contractor may apply for a credit or refund of taxes he has paid on purchases of the tangible personal property that remain tangible personal property after installation.

Therefore where Petitioner has accepted in good faith a Certificate of Capital Improvement within 90 days, it is not under a duty to investigate or police its customers and has no duty to debate with its customers as to what constitutes a capital improvement (See: Saf-Tee Plumbing v State Tax Commission, 77 AD2d 1). However, if Petitioner's customers knowingly or fraudulently issue a false exemption certificate, they will be liable for penalties and interest in accordance with Section 1145 of the Tax Law.

DATED: October 23, 1990

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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