

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

TSB-A-94 (43)S
Sales Tax
September 16, 1994

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S940502B

On May 2, 1994, a petition for Advisory Opinion was received from Clestra Hauserman, Inc., 29525 Fountain Parkway, Solon, Ohio 44139.

The issues raised by Petitioner, Clestra Hauserman, Inc., are whether the installation of moveable walls in new or old construction is a capital improvement and whether a Certificate of Capital Improvement may be accepted on the sale of such moveable walls.

Petitioner manufactures and installs floor to ceiling moveable walls. As indicated by Petitioner's sales brochure, the walls are easily moved, and when moved, cause no harm to the building or structure.

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.

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. Allied Steam Corp., Adv Op Comm T & F, October 10, 1990 TSB-A-90(51)S. Petitioner's moveable walls do not become a part of the real property and their installation is not intended to become permanent. Since the installation of Petitioner's moveable walls is not a capital improvement, it makes no difference whether the property in which they are installed is new or old construction.

With regard to whether a Certificate of Capital Improvement may be accepted, 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 Section 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.

(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.

(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 the 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 the purchases of the tangible personal property that remains tangible personal property after installation.

Therefore where Petitioner has accepted in good faith a Certificate of Capital Improvement within 90 days after the completion of the capital improvement, it is not under a duty to investigate or police its customers and has no duty to debate with its customers as to what

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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. Allied Steam Corp., *supra*.

DATED: September 16, 1994

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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