

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

TSB-A-98(23)S
Sales Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S970304A

On March 4, 1997, the Department of Taxation and Finance received a Petition for Advisory Opinion from Hawaiian Pools, Inc., 120 Interstate North Parkway East, Suite 426, Atlanta, GA 30339. Petitioner, Hawaiian Pools, Inc., submitted additional information pertaining to the Petition on March 13, and June 25, 1997.

The issue raised by Petitioner is whether Petitioner is subject to sales or use tax on the cost of materials and supplies, as a contractor, or whether it must collect and remit sales tax on receipts from the sale and installation of its bi-level swimming pools as a retailer.

Petitioner submits the following facts as the basis for this Advisory Opinion.

Petitioner is engaged in the business of selling and installing bi-level swimming pools ranging in size from 15'x4' to 27'x4' round and from 12'x20'x4' to 20'x42'x10'. Generally, each pool is custom designed to specifications dependent upon the size and shape of the purchaser's land.

The pool is made of hot dipped galvanized steel with a resin coating and vinyl liner. The pool is attached to the ground by means of earth, filtration piping, and concrete block footings. In most cases, the deep end of the pool is 2 to 4 feet underground and the ground must be excavated in order to install the pool. After excavation, the pool is attached to concrete block footings and dirt is filled in around the pool to secure it. The pool is connected to a subterranean drain pipe that is generally installed 6 to 9 inches beneath the bottom of the pool. Generally, at the purchaser's option, the pool is surrounded by a wooden deck that is attached to the pool. The posts supporting the deck are buried in the ground on concrete block footings.

Petitioner's swimming pools vary in cost, with the larger pools costing between \$14,000 and \$18,000. Each pool has an estimated useful life of 30 years. Petitioner sells pools on an installed basis, pursuant to lump sum contracts and each pool is given a 30 year guarantee.

Petitioner also provides a "lower price option" plan which allows the purchaser to reduce the cost of labor incurred on the installation of the pool by Petitioner. The "lower price option" plan allows the purchaser to self assemble substantial portions of the pool under the direction and supervision of Petitioner. The purchaser agrees to provide the labor and to assemble the pool in accordance with Petitioner's instructions and onsite supervision. However, Petitioner remains responsible for all aspects of the installation. Additionally, the 30 year guarantee provided to the customer has the same terms as that provided to customers who did not elect the "lower price option" plan.

The purchase and installation of Petitioner's pools are typically financed by Petitioner or by a third party lender and are secured by a mortgage or deed of trust against the purchaser's real estate. The installation of the pool usually requires a home improvement permit to be obtained.

Applicable Law and Regulations

Section 1101(b) of the Tax Law provides in part:

When used in this article for the purposes of the taxes imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and by section eleven hundred ten, the following terms shall mean:

* * *

(4) Retail sale. (i) a sale of tangible personal property to any person for any purpose . . . Notwithstanding the preceding provisions of this subparagraph, a sale of any tangible personal property to a contractor, subcontractor or repairman for use or consumption in erecting structures of buildings, or building on, or otherwise adding to, altering, improving, maintaining, servicing or repairing real property, property or land . . . is deemed to be a retail sale. . ."

* * *

(6) Tangible personal property. Corporeal personal property of any nature

(7) Use. The exercise of any right or power over tangible personal property by the purchaser thereof and includes, but is not limited to, ..., any installations any affixation to real or personal property, or any consumption of such property

* * *

(9) Capital improvement. (i) 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 1105(c)(3) of the Tax Law imposes tax upon receipts from every sale, except for resale, of the following services:

* * *

Installing tangible personal property ... or maintaining, servicing or repairing tangible personal property ... not held for sale in the regular course of business, whether or not the services are performed directly or by means of coin-operated equipment or by any other means, and whether or not any tangible personal property is transferred in conjunction therewith, except:

* * *

(iii) for installing property which, when installed, will constitute an addition or capital improvement to real property, property or land, as the terms real property, property or land are defined in the real property tax law as such term capital improvement is defined in paragraph nine of subdivision (b) of section eleven hundred one of this chapter

Section 1115 of the Tax Law provides in part:

(a) Receipts from the following shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten:

* * *

(17) Tangible personal property sold by a contractor, subcontractor or repairman to a person ... for whom he is adding to, or improving real property, property or land by a capital improvement, ... if such tangible personal property is to become an integral component part of such structure, building or real property; ...

Opinion

In order to be excluded from sales tax, a swimming pool, when installed, must satisfy each of the three statutory conditions of a capital improvement. That is, it must: (1) substantially add to the value of the real property, or appreciably prolong the useful life of the real property; (2) become part of the real property or be permanently affixed to the real property so that removal would cause material damage to the property or article itself; and (3) be intended to become a permanent installation. A determination of whether a particular installation constitutes a capital improvement is generally a factual question not susceptible to determination in an advisory opinion. However, as

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described by Petitioner, it appears that the installations of its bi-level pools constitute capital improvements. Petitioner's charges to its customer for installation of the capital improvements and the materials which become part of the capital improvement are not subject to sales tax. See Sections 1105(c)(3)(iii) and 1115(a)(17) of the Tax Law. Petitioner's purchases of materials and supplies in connection with the installation of the capital improvement are subject to sales tax.

DATED: April 6, 1998

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

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