

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-06(18)S
Sales Tax
June 26, 2006

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S050613A

On June 13, 2005, the Department of Taxation and Finance received a Petition for Advisory Opinion from The Radec Corporation, 135 Gould Street, Rochester, New York, 14610. Petitioner, The Radec Corporation, provided additional information pertaining to the Petition on July 11, 2005.

The issue raised by Petitioner is whether the installation of an emergency home generator constitutes a capital improvement to real property.

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

Petitioner sells and installs emergency home generators that are fueled by natural gas or propane. The generators start automatically in the event of a power failure so there is no interruption of electric service to the property. The generators are 240 volt units that range from 7 to 15 kilowatts output and weigh between 350 and 1400 pounds. They are installed on a gravel pad or bolted to a concrete pad and are permanently attached to either natural gas or propane gas lines by pipes and to the building's electrical system by hard wiring and transfer switches. In order for the generator to operate safely in the event of a power interruption, a transfer switch must be installed between the building's electric meter and circuit breaker panel. The transfer switch is necessary to prevent electrical current from feeding back into the power grid and endangering repair crews who may be working to restore power.

Applicable law and regulations

Section 1101(b)(9)(i) of the Tax Law defines the term *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 1105 of the Tax Law provides, in part:

Imposition of sales tax - - . . . there is hereby imposed and there shall be paid a tax . . . upon:

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

* * *

(c) The receipts from every sale, except for resale, of the following services:

* * *

(3) Installing tangible personal property . . . or maintaining, servicing or repairing tangible personal property . . . 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;

* * *

(5) Maintaining, servicing or repairing real property, property or land, as such terms are defined in the real property tax law, whether the services are performed in or outside of a building, as distinguished from adding to or improving such real property, property or land, by a capital improvement as such term capital improvement is defined in paragraph nine of subdivision (b) of section eleven hundred one of this article

Section 1115(a) of the Tax Law provides, in part:

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 other than an organization described in subdivision (a) of section eleven

hundred sixteen, for whom he is adding to, or improving real property, property or land by a capital improvement, or for whom he is about to do any of the foregoing, if such tangible personal property is to become an integral component part of such structure, building or real property; provided, however, that if such sale is made pursuant to a contract irrevocably entered into before September first, nineteen hundred sixty-nine, no exemption shall exist under this paragraph.

Section 527.7(b) of the Sales and Use Tax Regulations provides, in part:

(1) The tax is imposed on receipts from every sale of the services of maintaining, servicing or repairing real property, whether inside or outside of a building.

* * *

(4) The imposition of tax on services performed on real property depends on the end result of such service. If the end result of the services is the repair or maintenance of real property, such services are taxable. If the end result of the same service is a capital improvement to the real property, such services are not taxable.

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Petitioner sells and installs emergency home generators as backup systems in the event of power failures. The generators are permanently attached to either natural gas or propane gas lines, are hard wired into the building's electrical system, and require the installation of a transfer switch between the building's electric meter and circuit breaker panel to prevent backflow of the electricity from the generator into the power grid. The generators start automatically in the event of a power failure. Petitioner inquires as to whether installations of these generators qualify as capital improvements to real property.

Section 1101(b)(9)(i) of the Tax Law provides that in order to constitute a capital improvement an installation must meet all three of the following conditions:

- 1) The installation must substantially add to the value of the real property, or appreciably prolong the useful life of the real property;
- 2) The installation must 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) The installation must be intended to be a permanent installation.

Section 527.7(b) of the Sales and Use Tax Regulations further provides that the imposition of sales tax on services performed on real property depends on the end result of such service. If the end result of the services is the repair or maintenance of real property, such services are taxable. If the end result of the same service is a capital improvement to the real property, such services are not taxable.

In order to determine whether a particular installation qualifies as a capital improvement to real property, generally the entire installation should be considered rather than the individual components of the installation. For example, when an interior wall is repainted, a taxable maintenance service has occurred. However, if an interior doorway is removed and the resultant opening in the wall is closed, the repainting of that wall will qualify for capital improvement status. See *Sales and Use Tax Classifications of Capital Improvements and Repairs to Real Property*, Publication 862 (4/01).

In order to be a capital improvement, the installation must substantially add to the value of the real property or appreciably prolong the useful life of the real property. In the present case, it may be said that Petitioner's installations of emergency home generators appreciably prolong the useful life of the real property, particularly if a heating system or fire suppression system continues to operate after a power failure. Furthermore, such installations may substantially add to the value of the real property.

The second condition to be considered a capital improvement is Petitioner's emergency home generators must 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. Based on the installation of a transfer switch between the building's circuit breaker panel and electric meter, the connecting pipes from the gas lines to the generator, the concrete or gravel pads, and the hard wiring of the generator into the building's electrical system, the emergency home generators in this case appear to meet this second condition for a capital improvement. See Publication 862, *supra*, which provides that the addition or replacement of add-on panels and additions to wiring systems are considered to be capital improvements for sales tax purposes.

Lastly, Petitioner's installation of the emergency home generators must be intended to be permanent. The nature of the generators described in this Opinion does not lend itself to easy removal. It is unlikely that a property owner would remove such equipment except to replace it. Therefore, the installation of the emergency home generators appears to meet this third condition for a capital improvement.

It should be noted that if Petitioner installs an emergency home generator for a tenant, it is presumed that the installation is not intended to be permanent unless the lease indicates that title to improvements, including the generator, is to vest in the landlord and that the improvements are to become a part of the premises and remain in the premises. See *Beaman Corporation*, Adv Op St Tx Comm, August 19, 1982, TSB-A-82(32)S.

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Accordingly, it appears from the facts in this Opinion that the original installation by Petitioner of an emergency home generator, when taken as a whole, will generally qualify as a capital improvement to real property.

Therefore, if the installation of an emergency home generator is performed for a homeowner and the conditions set forth in section 1101(b)(9)(i) of the Tax Law are met, the entire installation will qualify as a capital improvement to real property. Accordingly, Petitioner will not be required to collect sales tax from its customer on the sale of the generator as installed. See sections 1105(c)(3)(iii) and 1115(a)(17) of the Tax Law. The customer should issue a properly completed *Certificate of Capital Improvement* (Form ST-124) to Petitioner.

DATED: June 26, 2006

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