

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Taxpayer Guidance Division

TSB-A-07(24)S
Sales Tax
August 28, 2007

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S070118B

On January 18, 2007, the Department of Taxation and Finance received a Petition for Advisory Opinion from New Way Equipment, 2027 Avon-Geneseo Road, Avon, New York 14414.

The issue raised by Petitioner, New Way Equipment, is whether the installation of a gas stove as described below qualifies as a capital improvement to real property.

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

Petitioner sells and installs wood, gas, and pellet stoves; zero-clearance fireplaces; and fireplace inserts. The issue in this Opinion is whether a particular installation of a gas stove constitutes a capital improvement. The stove was installed by attaching it to a chimney, an electric line, and a gas line. The stove was not attached to a wall or to ductwork. The installation of the stove in this case required that Petitioner install a chimney, which involved cutting a hole in the roof, and new gas and electric lines to the stove.

Applicable law and regulations

Section 1101(b)(4)(i) of the Tax Law defines the term *retail sale*, in part, as:

A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property, or (B) for use by that person in performing the services subject to tax under paragraphs (1), (2), (3), (5), (7) and (8) of subdivision (c) of section eleven hundred five where the property so sold becomes a physical component part of the property upon which the services are performed or where the property so sold is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax. 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 or buildings, or building on, or otherwise adding to, altering, improving, maintaining, servicing or repairing real property, property or land, as the terms real property, property or land are defined in the real property tax law, is deemed to be a retail sale regardless of whether the tangible personal property is to be resold as such before it is so used or consumed, except that a sale of a new mobile home to a contractor, subcontractor or repairman who, in such capacity, installs such property is not a retail sale. . . .

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:

* * *

(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 541.1(b) of the Sales and Use Tax Regulations provides:

The principal distinguishing feature of a sale to a contractor, as compared to a sale to other vendors who purchase tangible personal property for resale, is that the sale of tangible personal property to a contractor for use or consumption in construction is a retail sale and subject to sales and use tax, regardless of whether tangible personal property is to be resold as such or incorporated into real property as a capital improvement or repair. Whenever a contractor uses materials, on which the contractor has paid sales tax, in a repair or maintenance contract (except interior cleaning and maintenance contracts of 30 days or more) subject to the sales tax on services under section 1105(c) of the Tax Law, the contractor may be entitled to a refund or credit of the portion of the tax he paid attributable to the materials transferred to the customer.

Opinion

Petitioner sells and installs gas stoves by attaching them to a chimney, a gas line, and an electric line. The installation at issue in this case required that Petitioner install a chimney, which involved cutting a hole in the roof, and new gas and electric lines to the stove.

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.

In order to determine whether a particular installation qualifies as a capital improvement to real property, the entire installation must 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 entire project is a capital improvement, including the repainting of the wall. See *Sales and Use Tax Classifications of Capital Improvements and Repairs to Real Property*, Publication 862 (4/01).

Publication 862, *supra*, provides that the following, among others, constitute capital improvements: installation of a new chimney; the original installation of a wood burning stove; the installation of a masonry or prefabricated chimney; additions to a wiring system, for

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example, new circuits; original installation of electrical receptacles and outlets; and additions to piping systems. Accordingly, based on the nature and method of installing Petitioner's gas stove, Petitioner's installation of the stove as described in this Opinion qualifies as a capital improvement. See *Countryside Stove and Chimney of Burnt Hills*, Adv Op Comm T & F, February 8, 2007, TSB-A-07(1)S.

DATED: August 28, 2007

/s/
Jonathan Pessen
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NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.