

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

TSB-A-89(15)S
Sales Tax
June 22, 1989

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S890216A

On February 16, 1989, a Petition for Advisory Opinion was received from Hafner Associates, Inc., 9 South Goodman Street, Rochester, New York 14607.

The issues raised are:

1. Are carpet tiles, which are applied directly to an unfinished floor with self-releasing glue, a capital improvement the first time they are installed in a new building?
2. Is the replacement of the carpet tiles described in issue 1, for renovation purposes, a capital improvement?
3. Is carpet, which is tacked down with pad over an unfinished floor, a capital improvement the first time it is installed in a new building?
4. Is the replacement of the carpet described in issue 3, for renovation purposes, a capital improvement?
5. Is carpet, which is applied directly to an unfinished floor with glue, a capital improvement the first time it is installed in a new building?
6. Is the subsequent replacement of the carpet described in issue 5, for renovation purposes, a capital improvement?
7. Is freestanding shelving, that is bolted to a finished wall for safety, a capital improvement? (The bolts leave sizable holes in the wall when removed. However, this damage could be repaired.)
8. Is the shelving, described in issue 7, which is bolted to an unfinished wall, a capital improvement?
9. Is freestanding shelving that is custom built for a space, but can be moved, a capital improvement if it is bolted to a finished wall for safety?
10. Is the shelving described in issue 9 a capital improvement if it is bolted to an unfinished wall?
11. Is audio visual casework that is affixed to a finished wall a capital improvement even though it could be removed?

12. Is audio visual casework that is affixed to an unfinished wall a capital improvement?
13. Are custom made window blinds that are bolted or screwed to the window casement a capital improvement? (The bolts would leave holes in the casement.)
14. Is drapery that was custom made for a window (size, color, etc.) a capital improvement if the user can leave the rod but remove the drapery?
15. Is drapery that was custom made for a window (size, color, etc.) a capital improvement if the user can remove both the rod and the drapery?
16. Is removable lighting that is affixed to a wall or ceiling a capital improvement? (Removal would leave damage that could be repaired.)
17. In the event of a dispute with a customer over what constitutes a capital improvement, is the seller relieved of any sales tax liability if the customer completes and signs a capital improvement certificate?
18. If the corporation purchases the materials for a capital improvement job from one vendor and pays a different vendor for labor and installation, who is liable for the collection and payment of the sales tax on the materials?
19. Is custom built cabinetry, that is affixed to a finished wall, a capital improvement?
20. Is the cabinetry discussed in issue 19 a capital improvement if it is affixed to a new wall during renovation?

Petitioner performs interior designing and space planning services for clients. Included within Petitioner's services are the specifying of fabrics and finishes, the providing of space layout drawings, plans for non-structural partitions, furniture layouts, lighting plans, built-in cabinetry plans, solutions to acoustical problems, the budgeting of projects, fire code compliance and management of the project.

Section 1105(a) of the Tax Law imposes a tax on the receipts from every sale of tangible personal property. Section 1105(c)(3) imposes tax upon the services of installing tangible personal property, except for installing property which, when installed, will constitute an addition or capital improvement to real property.

Section 1101(b)(9) of the Tax Law and Section 527.7(a)(3) of the Sales and Use Tax Regulations define "capital improvement" as an addition to real property which "(i) substantially adds to the value of the property, or appreciably prolongs the useful life of the real property; and (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 work performed by the contractor must meet all three of the above requirements to be considered a capital improvement.

Section 541.2 of the Sales and Use Tax Regulations states:

* * *

(g) Capital improvement.

(2) A capital improvement does not include:

(i) A contract for the sale and installation of tangible personal property which when installed remains tangible personal property;. . .

The criteria for determining the tax status of charges for the installation of floor covering has been changed effective June 1, 1989. On and after June 1, 1989, floor coverings (carpet, carpet padding, linoleum and vinyl roll flooring, carpet tile, linoleum tile and vinyl tile) installed as the initial finished floor covering in new construction, a new addition to an existing building or structure, or in a total reconstruction of an existing building or structure, constitutes a capital improvement regardless of the method of installation.

Floor covering installed other than as described above does not qualify as a capital improvement. The charge for installation of floor covering which does not qualify as a capital improvement is subject to New York State and local sales tax. Thus floor covering installed other than (1) in new construction, (2) in an addition to existing construction, or (3) in a total reconstruction of an existing building or structure is not a capital improvement, and the installation charge is subject to the sales tax regardless of the manner in which the covering is installed.

The amended rules with respect to floor covering apply to any installations occurring on and after June 1, 1989, unless the contract for such installation was entered into prior to February 1, 1989.

The following applies to carpet, carpet pad and carpet tiles installed prior to June 1, 1989; or installed on or after June 1, 1989 provided the contract for such installation was entered into prior to February 1, 1989:

When carpeting is laid over a sub-floor (unpainted concrete, plywood etc.) which is not intended for use without additional covering, the installation constitutes a capital improvement to real property. See S & Y Floor Covering, Advisory OP State Tax Comm., February 19, 1981, TSB-H-81(50)S.

Accordingly, the original installation of self-gluing carpet tiles, or of wall-to-wall carpet by either being glued or tacked down with pad over an unfinished floor in a new building or structure will constitute a capital improvement. The installation of these same items over an unfinished floor, for renovation purposes, will also be considered as a capital improvement.

The following applies to carpet, carpet pad and carpet tiles installed on or after June 1, 1989 unless the contract for such installation was entered into prior to February 1, 1989:

Self-gluing carpet tiles or wall-to-wall carpet which is glued down or which is tacked down with pad and which is installed as the initial finished floor covering in new construction, a new addition to an existing building or structure, or in a total reconstruction of an existing building or structure, constitutes a capital improvement.

The installation of the carpet tiles or the wall-to-wall carpet (glued down or tacked down with pad) for renovation purposes will be considered a capital improvement only if the installation results from a total reconstruction of an existing building or structure. In those instances where the installation of the replacement carpet is not part of a total reconstruction of an existing building or structure, such installation will not be considered a capital improvement.

The installation of standard sized or custom built free standing shelving by bolting (for safety purposes) such shelving to a new or an unfinished wall will not be considered a capital improvement. Such installation will not result in a permanent affixation whereby the shelving is physically incorporated into the real property nor whereby withdrawal of the bolts, for the purpose of removing the shelving, causes material damage to either the shelving or the wall, as required under Section 1101(b)(9)(ii) of the Tax Law. Whereas the shelving is free standing and is fastened to the wall for safety purposes only, the installation is not intended to be permanent as required under Section 1101(b)(9)(iii) of the Tax Law.

The installation of audio visual casework to a finished or an unfinished wall by a method which will allow removal of such casework will not qualify as a capital improvement. Such method of installation will not result in the audio casework being physically incorporated into the real property nor cause material damage to occur to either the audio visual casework or the wall upon removal of the audio visual casework, as required under Section 1101(b)(9)(ii) of the Tax Law. Moreover, as the method of installation will allow removal of the audio visual casework, it is clear that the installation is not intended to be permanent as required under Section 1101(b)(9)(iii) of the Tax Law.

The installation of custom made window blinds, whereby the blinds are fastened to the window casement by bolts or screws does not constitute a capital improvement as such installation does not fulfill the requirements of Sections 1101(b)(9)(ii) or (iii) of the Tax Law.

The installation of a drapery rod and drapery, whether or not custom made for a particular window, does not qualify as a capital improvement as such installation does not meet the requirements of Sections 1101(b)(9)(ii) or (iii) of the Tax Law.

The installation of removable lighting does not constitute a capital improvement as such installation is not intended to be permanent as required under Section 1101(b)(9)(iii) of the Tax Law.

In those instances where a contractor is given a properly completed form ST-124 Certificate of Capital Improvement by the customer within 90 days after rendering services, the burden of proving the job or transaction was not taxable rests solely on the customer. However, if the contractor has not been given a properly completed Certificate of Capital Improvement within 90 days, the work performed will be deemed to have been a taxable transaction. In such an instance, if the contractor fails to pay the appropriate tax on the full amount of the contract, the contractor will be required to bear the burden of proving the transaction was exempt. It is noted that acceptance of this certificate by a contractor does not relieve the contractor of the liability for payment of sales tax. The contractor must pay sales tax on the purchase of building materials or other tangible personal property incorporated into the real property as a capital improvement.

Section 527.7(b)(5) of the Sales and Use Tax Regulations states:

Any contractor who is making a capital improvement must pay a tax on the cost of materials to him, as he is the ultimate consumer of the tangible personal property.

Accordingly, whenever Petitioner acts as the general or prime contractor on a project and purchases materials for incorporation into such project, Petitioner will be liable for paying sales tax on the cost of such materials. The fact that Petitioner hires a subcontractor to perform the installation of such materials will not relieve Petitioner from being liable for the sales tax due on the purchase of the materials.

The installation of custom built cabinetry, where the cabinets are fastened to a finished wall or a new wall resulting from a renovation, will qualify as a capital improvement provided such installation meets the criteria of Section 1101(b)(9) of the Tax Law.

The pertinent criteria to consider in determining whether the installation constitutes a capital improvement includes the permanency of the affixation of the improvements to the related realty, whether the improvements can be readily removed without damage to them or the realty, and whether the improvements were intended as permanent installations. Matter of Flah's of Syracuse, Inc. vs Tully, (89 AD2d 729).

Accordingly, the installation of the custom built cabinetry will qualify as a capital improvement where such cabinetry is permanently affixed to a finished or newly renovated wall in such a manner that removal would cause material damage to the cabinetry or the wall and it can be shown that such installation is intended to be permanent.

The intention of permanence must be determined based upon the circumstances of the particular installation. For instance, the installation of an improvement in a leasehold where the provisions of the lease require the lessee to remove the improvement upon termination of the lease evidences an intent to not make a permanent installation, notwithstanding the affixation of the installation with a great degree of apparent permanence (RE Western Hills Operating Co., Advisory OP State Tax Comm., July 21, 1986, TSB-A-86(27)S).

It is noted that the installation of the items mentioned above, with the exception of the installations of the carpeting items and custom cabinetry when qualifying as a capital improvement, constitute the installation of tangible personal property which when installed remains tangible personal property.

Accordingly, Petitioner is liable for collecting sales tax from customers based on the total charges for those installations. Petitioner is entitled to a refund or credit of any sales tax paid on the purchase price of such items.

DATED: June 22, 1989

s/FRANK J. PUCCIA
Director
Taxpayer Services Bureau

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