

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

TSB-A-00(5)S
Sales Tax
January 28, 2000

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S990429A

On April 29, 1999, the Department of Taxation and Finance received a Petition for Advisory Opinion from AJE Supply Centre, Inc., 929 Route 25A, Miller Place, New York 11764. Petitioner, AJE Supply Centre, Inc., furnished additional information relating to the Petition by telephone on May 10, 1999.

The issue raised by Petitioner is whether the replacement of a vinyl liner in an in-ground swimming pool and related services associated with such replacement constitute a capital improvement and are, therefore, not subject to New York State and local sales and compensating use taxes.

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

Petitioner is in the business of selling and replacing vinyl in-ground swimming pool liners. The vinyl liner keeps the water from leaking out of the in-ground pool structure. The expected life of a vinyl in-ground pool liner is 20 - 25 years.

When the vinyl liner of an in-ground pool has to be replaced, Petitioner must first pump the water from the swimming pool. Petitioner then removes the old liner from the swimming pool structure. Next, Petitioner retrowels the sand on the bottom of the pool and checks the walls of the pool for stability and corrosion. If needed, Petitioner repairs the walls. Petitioner then installs the new vinyl swimming pool liner and fills the pool with water. When this is completed, Petitioner installs gaskets and faceplates.

Applicable Laws and Regulations

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

(b) 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, 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

* * *

(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)(iii) of the Tax Law provides an exclusion from tax "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(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 527.5(b)(4) of the Sales and Use Tax Regulations provides that tax is not imposed on the charge for installation of tangible personal property which, when installed will be an addition or capital improvement to real property.

Paragraphs (4) and (5) of Section 527.7(b) of the Sales and Use Tax Regulations provide, in part:

(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.

Example 9: The replacement of some shingles or patching of a roof is a repair, but a **new** asphalt shingle roof is a capital improvement.

Example 10: A contractor sells and installs an **above-ground** swimming pool. The pool consists of a vinyl liner supported by an aluminum and wood frame which rests on the ground and a wood and metal deck. The vinyl liner rests on a bed of sand to prevent damage. The deep end (hopper) of the pool is set approximately two feet into the ground. The pool may be dismantled and moved without substantially damaging the real property. The installation of this pool is not a capital improvement, as it may be dismantled and moved without substantial injury to the land, there is no intent that it become a permanent installation and it has not become affixed so that it has become part of the real property. Therefore, the charges for the sale and installation of the pool are subject to the tax. (Emphasis added)

(5) 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.

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Opinion

Petitioner's replacement of vinyl pool liners and the related services associated with such replacement meet the three prong test of Section 1101(b)(9)(i) of the Tax Law in determining whether such liner replacement constitutes a capital improvement. Upon installation a new liner substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property; 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 is intended to become a permanent installation. Therefore, pursuant to Sections 1105(c)(3)(iii) and 1115(a)(17) of the Tax Law, Petitioner's charges for installation of the pool liner and the related services described above, as well as for the liner itself, will not be subject to sales and use taxes.

Petitioner should receive from its customer a Certificate of Capital Improvement (Form ST-124), within 90 days from the date of performing the capital improvement. See Section 1132(c) of the Tax Law and Section 532.4 of the Sales and Use Tax Regulations.

It should be noted that since Petitioner is making a capital improvement when it replaces a vinyl liner as described above, sales or compensating use tax is due on the cost of the liner and related materials used by Petitioner in performing the capital improvement, as it is considered the consumer of the tangible personal property. See Section 1101(b)(4)(i) of the Tax Law and Section 527.7(b)(5) of the Sales and Use Tax Regulations.

DATED: January 28, 2000

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

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