

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

TSB-A-04(5)S
Sales Tax
February 27, 2004

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO.S030513A

On June 2, 2003, the Department of Taxation and Finance received a Petition for Advisory Opinion from John Lombardi, 766 Freedom Plains Road, Poughkeepsie, New York, 12603.

The issue raised by Petitioner, John Lombardi, is whether charges for the installation of a residential security system which is hard wired into the property's electrical system constitute charges for a capital improvement to real property.

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

Petitioner is the owner of a small alarm company and president of the New York Burglar & Fire Alarm Association. Petitioner asks about the application of sales tax to installations of home security systems where some or all of the following circumstances may be true. The system may be:

- sold to and become the property of the homeowner upon installation
- hard wired into the residential electrical system
- sold without the vendor/installer retaining any rights of ownership or rights of removal of the installed property
- sold with or without monitoring (protective) service
- connected to an alarm monitoring service other than the service that installed the system and remain fully functional
- fully functional within the residence although not connected to any alarm monitoring service

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. . . .

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 On and after June first, nineteen hundred seventy-one, 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. . . .

* * *

(8) Protective and detective services, including, but not limited to, all services provided by or through alarm or protective systems of every nature, including, but not limited to, protection against burglary, theft, fire, water damage or any malfunction of industrial processes or any other malfunction of or damage to property or injury to persons, detective agencies, armored car services and guard, patrol and watchman services of every nature other than the performance of such services by a port watchman licensed by the waterfront commission of New York harbor, whether or not tangible personal property is transferred in conjunction therewith.

Section 1115(a)(17) of the Tax Law provides:

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 1119(c) of the Tax Law provides:

(c) A refund or credit equal to the amount of sales or compensating use tax imposed by this article and pursuant to the authority of article twenty-nine, and paid on the sale or use of tangible personal property, shall be allowed the purchaser where such property is later used by the purchaser in performing a service subject to tax under paragraph (1), (2), (3), (5), (7) or (8) of subdivision (c) of section eleven hundred five or under section eleven hundred

ten and such property has become a physical component part of the property upon which the service is performed or has been transferred to the purchaser of the service in conjunction with the performance of the service subject to tax or if a contractor, subcontractor or repairman purchases tangible personal property and later makes a retail sale of such tangible personal property, the acquisition of which would not have been a sale at retail to him but for the second to last sentence of subparagraph (i) of paragraph (4) of subdivision (b) of section eleven hundred one. An application for the refund or credit provided for herein must be filed with the commissioner of taxation and finance within the time provided by subdivision (a) of section eleven hundred thirty-nine. Such application shall be in such form as the commissioner may prescribe. Where an application for credit has been filed, the applicant may immediately take such credit on the return which is due coincident with or immediately subsequent to the time that he files his application for credit. However, the taking of the credit on the return shall be deemed to be part of the application for credit. The procedure for granting or denying such applications for refund or credit and review of such determinations shall be as provided in subdivision (e) of section eleven hundred thirty-nine.

Section 541.2 of the Sales and Use Tax Regulations provides, in part:

Definitions. The words, terms and phrases used in this Part have the following definitions except when the context clearly indicates a different meaning:

* * *

(d) A construction contractor means any person who engages in erecting, constructing, adding to, altering, improving, repairing, servicing, maintaining, demolishing or excavating any building or other structure, property, development, or other improvement on or to real property, property or land.

Section 541.5 of the Sales and Use Tax Regulations provides, in part:

Contracts with customers other than exempt organizations.

* * *

(b) Capital improvements contracts.

(1) Purchases. All purchases of tangible personal property (excluding qualifying production machinery and equipment exempt under section 1115(a)(12) of the Tax Law) which are incorporated into and become part of the realty or are used or consumed in performing the contract are subject to tax at the time of purchase by the contractor or any other purchaser. A certificate of capital improvement may not be validly given by any person or accepted by a supplier to exempt the purchase of these materials.

(2) Labor and material charges. All charges by a contractor to the customer for adding to or improving real property by a capital improvement are not subject to tax provided the customer supplies the contractor with a properly completed certificate of capital improvement.

* * *

(4) Documents; capital improvement contracts.

(i) When a properly completed certificate of capital improvement has been furnished to the contractor, the burden of proving the job or transaction is not taxable and the liability for the tax rests solely upon the customer.

(a) The prime contractor should obtain a certificate of capital improvement from the customer and retain it as part of his records. Copies of such certificate must be furnished to all subcontractors on the job and retained as part of their records.

(b) A certificate of capital improvement may not be issued by a contractor, subcontractor or any other person to a supplier on the purchase of tangible personal property.

* * *

(iii) If a contract includes the sale of tangible personal property which remains tangible personal property after installation, the contractor must collect the appropriate New York State and local taxes from the customer on the selling price, including any charge for installation, of the tangible personal property unless a properly completed exemption certificate is issued by the customer. The contractor may apply for a credit or refund of taxes he has paid on purchases of the tangible personal property that remain tangible personal property after installation.

Example 1: A contractor sells a building he has constructed and, as a part of the sale agreement, installs free standing water fountains which remain tangible personal property when installed. The contractor's billing to his customer must separately state all charges for tangible personal property included in the sales agreement. The New York State and applicable local tax rate must be collected on the total charges for the water fountains including any installation charges. In this instance, the contractor may purchase the water fountains tax-free using a contractor exempt purchase certificate. If he pays the tax to his supplier, he is entitled to a refund or credit of the tax paid on the purchase of the water fountains.

Opinion

Petitioner asks about the application of sales tax to installation of burglar alarm systems in residential property. Sales of such alarm systems on an uninstalled basis are sales of tangible personal property subject to sales tax. See section 1105(a) of the Tax Law.

A burglar or fire alarm company which sells alarm systems on an installed basis may be considered to be a construction contractor when it performs installations on real property. See section 541.2(d) of the Sales and Use Tax Regulations. Charges for the installation of burglar and fire alarm systems can be characterized as 1) a *capital improvement* to real property, 2) an *installation of tangible personal property which remains tangible personal property after installation*, or 3) a charge for *protective services*.

When an alarm company installs for the real property owner an alarm system which meets all three of the conditions set forth in section 1101(b)(9)(i) of the Tax Law, the work is considered to be a capital improvement. Thus, charges for installations which add to the value of the real property, become part of the property or are permanently affixed to the real property so that removal would cause material damage to the property or the article itself, and are intended to be permanent are not subject to sales tax. See sections 1105(c)(3)(iii) and 1115(a)(17) of the Tax Law.

The first condition for a capital improvement set forth in section 1101(b)(9)(i)(A) of the Tax Law requires that an installation must “substantially add to the value of the real property, or appreciably prolong the useful life of the real property.” An alarm system cannot be said to appreciably prolong the useful life of the real property, but it is reasonable to conclude that it may substantially add to the value of the real property. In order to substantially add to the value of the real property, the alarm system must remain functional (at least as a local system) after installation whether or not the property owner subscribes to the alarm service offered by the vendor of the tangible personal property. Where a homeowner has an alarm system installed which does not require connection to an alarm company to be functional, the system may substantially add to the value of the real property and, therefore, the installation of the system would meet the first requirement under section 1101(b)(9)(i) of the Tax Law to qualify as a capital improvement to real property.

The second condition for a capital improvement set forth in section 1101(b)(9)(i)(B) of the Tax Law requires that the alarm system must be installed in such a manner as to 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 alarm system itself. Installations of circuit breaker panels, in wall wiring, additional circuits to electrical systems, main power boxes, and light fixtures are considered to qualify as capital improvements. See *Sales and Use Tax Classifications of Capital Improvements and Repairs to Real Property*, Publication 862 (4/01). The burglar and fire alarms, detectors, switches, sensors and control panels wired and installed in a similar manner as the building’s electrical system, circuit breaker panels and other items listed above, unless a contrary intention is shown, are considered to be permanently affixed to the real property. Where these alarms, detectors,

switches, sensors and control panels are installed so that they become a part of the real property, their installation would meet the second requirement under section 1101(b)(9)(i) of the Tax Law to qualify as a capital improvement to real property.

The third condition for a capital improvement set forth in section 1101(b)(9)(i)(C) of the Tax Law is that the alarm system must be intended to become a permanent installation. In order to meet this condition, the alarm company or installer cannot retain any rights of ownership or rights of removal of the installed property. The alarm system must become the property of the homeowner upon its installation. Where the alarm company retains ownership of the alarm system or a right to remove the alarm system or its components from the homeowner's premises, it has been held that the installation lacks the intention of permanence required to satisfy the third condition under section 1101(b)(9)(i) of the Tax Law and such installation does not qualify as a capital improvement to real property. See *Matter of ADT Co. v. State Tax Commission*, 113 AD2d 140, 142; *Merit Oil of New York, Inc. v. State Tax Commission*, 124 AD2d 326, 328.

Accordingly, where a complete burglar, fire or other security alarm system is installed for the owner of real property, becomes the property of the homeowner upon installation, is sold without the vendor retaining any rights of ownership or rights of removal of the system or any of its components, the system remains fully functional within the residence whether or not the property owner subscribes to the alarm service offered by the vendor of the tangible personal property, and the property is installed so as to be considered permanently affixed to the real property (in the same manner as the building's electrical system), the installation is considered to meet the conditions set forth in section 1101(b)(9)(i) of the Tax Law to qualify as a capital improvement to real property. This is also true for installations performed for the owners of commercial real property.

If an alarm company installs alarm systems which qualify as a capital improvement to real property, the alarm company is considered to be a *construction contractor* and is not required to collect sales tax from its customer. See section 541.2(d) of the Sales and Use Tax Regulations. The alarm company should obtain a properly completed *Certificate of Capital Improvement* (Form ST-124) from its customer. The purchases by the alarm company of parts, alarm system components and other building materials which qualify as capital improvements upon installation are subject to sales tax. The alarm company may not properly issue a resale certificate to purchase such items without the payment of sales tax. The alarm company must also pay sales tax on its tools and equipment used to install the alarms.

Where these conditions are met for installations for tenants of residential or commercial real property, and there is no provision in the lease or rental agreement between the property owner and tenant requiring removal of the system upon termination of the lease or rental agreement, such installations are also considered a capital improvement to real property. See *Matter of Flah's of Syracuse, Inc. v. James H. Tully, Jr. et al*, 89 AD 2d 729.

Where an alarm company performs an installation for the real property owner which does not meet the three conditions set forth in section 1101(b)(9)(i) of the Tax Law for a capital improvement, the alarm company will be considered as *installing tangible personal property which*

retains its identity as tangible personal property after installation. In the *Matter of Charles R. Wood Enterprises, Inc. v. State Tax Commn.*, 67 AD2d 1042, the court determined that certain amusement rides were, even though bolted to the real property, clearly excluded, as movable machinery or equipment, from being capital improvements to real property and were subject to sales tax. See also *Matter of West Mountain Corp. v. Miner*, 85 Misc2d 416. In *Cornwell Energy Management, Inc.*, Adv Op Comm T & F, May 8, 2003, TSB-A-03(22)S, the Tax Department opined that motor controllers that were wired to a motor and bolted to real property, and required only unwiring and unbolting to be removed for service or repair, did not have the degree of permanence necessary to establish a capital improvement. Accordingly, where an installed alarm system can be removed from the real property without material damage to the system or the real property or is not intended to be a permanent installation, the installation is not a capital improvement to the real property and the charge or charges for the alarm system components and their installation are subject to the sales tax pursuant to sections 1105(a) and 1105(c)(3) of the Tax Law.

Likewise, if certain components of the alarm system, such as a video surveillance camera which is installed on a bracket bolted to a wall, can be readily removed from the premises and reused, such installation will not be considered to be permanently affixed to the real property and, therefore, will not be considered a part of the overall capital improvement to real property. See *Matter of Gem Stores, Inc.*, Tax Appeals Tribunal, October 14, 1988, TSB-D-88(30)S.

However, current technology no longer requires the installation of video cameras on brackets bolted to the ceiling or wall. Where the video cameras are installed so as to otherwise qualify as a capital improvement, such installation would be considered to be part of the overall capital improvement. That is, where the cameras are wired and installed in a manner similar to the building's electrical system, such that the installation of the cameras and other components of the alarm system meets the conditions set forth in section 1101(b)(9)(i) of the Tax Law, such installation is also considered part of the overall capital improvement.

Where the alarm company installs an alarm system or a component of an alarm system which remains tangible personal property after installation, and collects the sales tax on the charges for such installation from its customer, the installer may purchase tangible personal property used in such installation and actually transferred to the customer without payment of sales tax. See section 1101(b)(4)(i) of the Tax Law and section 541.5(b)(4)(iii), Example 1 of the Sales and Use Tax Regulations. Where the installer has paid tax on tangible personal property used in such installation, the installer may apply for a refund or credit of the sales tax it paid on the alarm system, components and materials actually transferred to its customer. See section 1119(c) of the Tax Law.

It should be noted that any charges for alarm monitoring services are taxable charges for protective services pursuant to section 1105(c)(8) of the Tax Law. Where the alarm company retains title to the alarm system, reserves the right to remove the alarm system upon termination of its contract with the property owner, or the alarm system becomes useless upon termination of the contract with the alarm company, the installation of the alarm system fails to meet the requirements for a capital improvement. Installations such as these are considered to be part of the charge for

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protective services subject to sales tax. Tangible personal property purchased by an alarm company and supplied to its customers as a component part of its services to its customers is not purchased for resale within the meaning of section 1101(b)(4) of the Tax Law when the alarm company retains ownership of the property. See *Baker Protective Services, Inc. d/b/a Wells Fargo Alarm Services, Inc.*, Dec Tax App Trib, November 1, 2001, TSB-D-01(17)S.

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