

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

TSB-A-06(9)S
Sales Tax
March 8, 2006

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S040727B

On July 27, 2004, the Department of Taxation and Finance received a Petition for Advisory Opinion from Closet Crafters & More Inc., 25 Kraft Avenue, Albany, New York 12205.

The issue raised by Petitioner, Closet Crafters & More Inc., is whether the installation of custom-fitted closet and storage systems, which may include shelving and mirrors, in an existing home or commercial building constitutes a capital improvement.

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

Petitioner is in the business of designing customized built-in closet storage systems for new residential construction, existing residential homes, and commercial construction. All closet storage systems are measured, cut, and made to exact specifications. The closet storage systems become a permanent part of the real property, as they are designed, measured, and made specifically to the measurements of a customer's closet(s) in a particular home or office. Closet storage systems can double or triple the useful storage space in a closet. Upgraded closets installed in a home or office are a typical building upgrade included in a property owner's construction options and are considered to enhance the property's value and appeal.

When Petitioner installs a custom closet storage system, laminated shelving is permanently attached to the real property using a European hang-rail system that is secured to the wall with large three-inch screws on every stud along with a hang rail bracket for each vertical. A secondary installation system is provided with wood cleats, which are secured with screws or heavy-duty wall anchors/mollies. These screws are placed every 16 inches where possible. These closet systems are not designed or installed to be removed and are generally not taken by customers if they move. Removal of the shelving would require reinstalling some type of a storage/shelving unit to restore the home or office to a condition necessary for sale and occupancy.

Mirrors are installed by Petitioner in a similar manner to the closet storage systems and are not designed or installed to be removed and taken with customers should they move. Removal of the mirror would cause damage which would require some type of replacement to restore the home or office to a condition necessary for sale.

Applicable law and regulations

Section 1101(b)(9) of the Tax Law, in part, defines a capital improvement as follows:

(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) of the Tax Law, in part, imposes a tax on the receipts from every sale, except for resale, of the following services:

(3) Installing tangible personal property, excluding a mobile home, or maintaining, servicing or repairing tangible personal property, including a mobile home, not held for sale in the regular course of business, whether or not the services are performed directly or by means of coin-operated equipment or by any other means, and whether or not any tangible personal property is transferred in conjunction therewith, 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:

* * *

(15) Tangible personal property sold to a contractor, subcontractor or repairman for use in (i) erecting a structure or building (A) of an organization described in subdivision (a) of section eleven hundred sixteen . . . or (ii) adding to, altering or improving real property or land (A) of such organization . . . provided, however, no exemption shall exist under this paragraph unless such tangible personal property is to become an integral component part of such structure, building or real property.

* * *

(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:

Imposition. (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.

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.

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

Capital Improvement. (1) A *capital improvement* means an addition or alteration to real property, which:

(i) substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property;

(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.

Example 3: A homeowner hires a general contractor to remove a portion of a masonry wall for the purpose of installing a door and window. The general contractor hires a masonry contractor (subcontractor) to repair the wall. The charge to the contractor by the subcontractor represents a constituent part of the services performed in adding to or improving real property by a capital improvement and therefore is not subject to tax in accordance with section 527.7(b)(4) of this Title.

(2)(i) A capital improvement does not include a contract for the sale and installation of tangible personal property which when installed remains tangible personal property.

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

Capital improvements contracts. (1) Purchases. All purchases of tangible personal property . . . 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.

(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.

(ii) Where a contractor does not receive a capital improvement certificate from a customer, the contract or other records of the transaction will prevail. In such case:

(a) where the contractor does not receive a capital improvement certificate, collects tax on the full invoice price and the job is a capital improvement to real property, the contractor is liable for the tax on the cost of materials incorporated into the job, plus the tax collected from the customer. The customer is entitled to a refund of the tax paid to the contractor; or

(b) where the contractor does not receive a capital improvement certificate, collects no tax on the charges billed to the customer and the job is a capital improvement to real property, the contractor is liable for the tax on the cost of materials incorporated into the job performed.

(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.

Opinion

Petitioner is in the business of permanently installing custom-fitted closet and storage systems, which in addition to shelving may include storage cabinets and mirrors, in new and existing homes and commercial buildings. In order for the installations to be capital improvements, they must meet all three criteria described in section 1101(b)(9) of the Tax Law.

When installed in a new home or commercial building in conjunction with the construction of the home or commercial building, Petitioner's closet storage systems and mirrors, as described, are deemed to be part of the capital improvement project. (See *Home Insulation & Supply Inc.*, Adv Op Comm T & F, May 23, 1996, TSB-A-96(32)S.) Accordingly, the charges for the sale and installation of a closet storage system in a new home or commercial building are not subject to sales tax pursuant to sections 1105(c)(3)(iii) and 1115(a)(17) of the Tax Law.

The fact that property is installed to the realty by bolts, nails and glue does not preclude a determination that an improvement is intended to be permanent. (See *Flah's of Syracuse, Inc. v Tully*, 89AD2d 729). The method of installation of Petitioner's closet storage systems and mirrors in an existing home or commercial building is similar to the installations of mirrors and wall racks determined to qualify as capital improvements in *Flah's of Syracuse, supra*, and the installations of cabinets and mirrors similarly found to qualify as capital improvements in *Matter of Empire Vision Center*, Dec Tax App Trib, Nov 7, 1991, DTA No.805767. Likewise, kitchen cabinets and bathroom vanities which are installed in existing buildings are considered permanent installations adding to the value of the home or commercial building and thus qualify

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as capital improvements to real property. (See *Sales and Use Tax Classifications of Capital Improvements and Repairs to Real Property*, Publication 862 (4/01).)

Since Petitioner's closet storage systems are considered to be permanent installations which add value to the real property, and it appears that material damage to the system components and the real property will be caused if the storage systems are removed, such installations constitute a capital improvement in accordance with section 1101(b)(9) of the Tax Law.

Petitioner is not required to collect tax on the charges for the installation of custom closet storage and shelving units when it accepts in good faith a properly completed *Certificate of Capital Improvement*, Form ST-124, from its customer within 90 days after completion of installation. A certificate is accepted in good faith when Petitioner has no knowledge that it is false. See section 1132(c) of the Tax Law and section 532.4 of the Sales and Use Tax Regulations. As the contractor engaged in the installation of property which becomes a capital improvement, Petitioner is deemed to be the retail purchaser and consumer of all materials incorporated into such installations. See section 541.5(b)(1) of the Sales and Use Tax Regulations. Thus Petitioner owes sales and use tax on its purchases of the materials it installs into its customer's property, except to the extent that the materials are incorporated into realty of, and become the property of, a qualifying exempt organization. See section 1115(a)(15) of the Tax Law.

The conclusions in this Opinion as to what installations constitute a capital improvement are predicated upon the assumption that the installations are made for the owner of the real property or, where installed for a tenant, that there is a lease which provides that title to improvements 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, Aug. 19, 1982, TSB-A-82(32)S.

DATED: March 8, 2006

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