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

TSB-A-07(15)S
Sales Tax
June 21, 2007

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. S060629A

On June 29, 2006, the Department of Taxation and Finance received a Petition for Advisory Opinion from JetBlue Airways Corporation, 19 Old Kings Highway South, Suite 23, Darien, Connecticut 06820. Petitioner, JetBlue Airways Corporation, provided additional information pertaining to the Petition on April 3, 2007, and May 18, 2007.

The issues raised by Petitioner are:

1. Whether the project to renovate Terminal 6 at John F. Kennedy International Airport constitutes a capital improvement to real property for sales tax purposes.

2. Whether the costs incurred by Petitioner, its contractors or subcontractors during the renovation are subject to sales tax.

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

Petitioner is the prime tenant at Terminal 6 at John F. Kennedy International Airport (JFK) and currently operates out of Terminal 6. JFK is owned by the city of New York and is operated by the Port Authority of New York and New Jersey (Port Authority).

One of the conditions of the lease between Petitioner and the Port Authority is that Petitioner will make certain improvements to Terminal 6 that, according to the lease, will become the property of the city of New York upon completion.

In accordance with its lease of Terminal 6, Petitioner requested permission from the Port Authority to reconfigure the baggage-handling system.

The work involves an alteration to Terminal 6 to move the baggage-screening operation performed by the Transportation Security Administration (TSA) from the baggage room to the Departure Building. A 190-ft slope plate carousel is to be installed on the west side of the Departure Building to service 7 Computer Tomography X-Ray (CTX) machines and 11 Explosives Trace Detection (ETD) machines that are used to screen baggage. A new conveyor is to be installed on the far west side to transport the screened bags to the baggage room. The lease between Petitioner and the Port Authority indicates that the baggage-handling system at Terminal 6 is part of the leasehold. Title to all construction work passes to the city of New York when the property is erected, constructed, or installed and becomes part of the premises.

The installation of the baggage-handling system requires the removal of sections of the floor in Terminal 6, along with architectural, mechanical, plumbing, and sprinkler modifications to the terminal building itself. The baggage-handling system (i.e., carousels and conveyors) is permanently bolted and/or welded to the terminal building structure. Extensive electrical work is required during installation to integrate the baggage-handling with the terminal's electrical system. The baggage-handling system as installed is custom designed for the particular location where it is situated. It is so customized that it cannot be removed without causing material damage to both the system and the terminal building.

The CTX machines require special wiring and are hard wired to the building's electrical system. If the machines were to be moved, floor repairs would be required due to the electrical work beneath the floor that supports the CTX machines. Unlike the CTX machines, the ETD machines are moved like appliances and plug into 120-volt electric receptacles.

Each time a CTX machine is relocated, the manufacturer of the machines (a TSA mandated company) must disconnect and reconnect the wiring for the machine and its components. A second TSA mandated company performs the Site Acceptability Test prior to the permitted use of the machine. The Site Acceptability Test consists of testing the machines once they are installed to ensure that they are fully operational and functioning properly. The TSA pays for the services of the TSA mandated companies. Petitioner and its contractors are responsible for the mechanical breakdown and reassembly (unbolting/ bolting) and relocation of the machines, and for alterations to Terminal 6, including wiring and structural modifications, to accommodate the installation of the machines.

Applicable law and regulations

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;

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, property or land (A) of such an organization . . . as the terms real property, property or land are defined in the real property tax law; 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.

(16) Tangible personal property sold to a contractor, subcontractor or repairman for use in maintaining, servicing or repairing real property, property or land (i) of an

organization described in subdivision (a) of section eleven hundred sixteen . . . as the terms real property, property or land are defined in the real property tax law; 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.

Section 527.7(b) of the Sales and Use Tax Regulations provides, in part:

(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.

Opinion

Petitioner will make improvements to Terminal 6 consisting of reconfiguration and installation of a baggage-handling system that, according to Petitioner's lease agreement, will become the property of the city of New York upon completion. Section 1101(b)(9)(i) of the Tax Law provides that an installation must meet all of the following conditions in order to constitute a capital improvement:

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.

Section 1105(c)(3)(iii) of the Tax Law provides that charges for the service of installing tangible personal property that results in a capital improvement to real property are not subject to sales tax. Section 527.7(b) of the Sales and Use Tax Regulations further provides that the imposition of sales 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.

In the present case, the baggage-handling system (i.e., the conveyor and carousel) becomes the property of the city of New York and substantially adds to the value of the real property, thus meeting the first condition for a capital improvement.

The second condition for a capital improvement is that Petitioner's baggage-handling system 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. The system as installed is custom designed for the particular location where it is situated. The installation of wiring for the conveyor and carousel into Terminal 6's electrical system, the alterations to Terminal 6's structure, including modifications to floors to accommodate the baggage-handling system, and the installation of the baggage-handling system appear to meet this second condition for a capital improvement. See *Trans World Airlines, Inc.*, Adv Op Comm T & F, March 26, 1992, TSB-A-92(30)S; and *Sales and Use Tax Classifications of Capital Improvements and Repairs to Real Property*, Publication 862 (4/01), which provides that the addition or replacement of add-on panels and additions to wiring systems, and installation or removal of walls are considered capital improvements for sales tax purposes.

Lastly, Petitioner's installation of the baggage-handling system must be intended to be permanent. The nature of the baggage-handling system described in this Opinion does not lend itself to easy removal. It is unlikely that the lessor would remove such equipment except to replace it. Therefore, the installation of the baggage-handling system appears to meet the third condition for a capital improvement. See *Trans World Airlines, Inc.*, *supra*.

Generally, when an installation is made for a tenant, it is presumed that the installation is not intended to be permanent unless the lease indicates that title to improvements is to vest in the lessor of the real property 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, August 19, 1982, TSB-A-82(32)S. In the present case, Petitioner's lease with the Port Authority specifies that the baggage-handling system and other improvements become the property of the city of New York upon installation.

Since, based on the facts presented in this Opinion, the installation of the baggage-handling system qualifies as a capital improvement to real property amounts charged to Petitioner for such installation (including charges for labor and materials) are not subject to sales tax. See section 1105(c)(3)(iii) of the Tax Law. Petitioner may provide all contractors involved in the installation of the baggage-handling system, including those involved in dismantling and moving certain components of the system that are to be reused, with a properly completed *Certificate of Capital Improvement* (Form ST-124) in lieu of paying the sales tax. Furthermore, since Terminal 6 is the property of an exempt governmental entity, any tangible personal property purchased by Petitioner or its contractors or subcontractors that is actually incorporated into the capital improvement project and becomes an integral component part of Terminal 6 may

be purchased without the payment of sales tax. See section 1115(a)(15) and (16) of the Tax Law; and *Trans World Airlines, Inc.*, *supra*.

With respect to the CTX and ETD machines, Petitioner states that these machines are owned and operated by the TSA. The installation of the CTX machines requires extensive modifications to the building's electrical system and floors. The ETD machines are moved like appliances and plug into 120-volt electric receptacles.

Separately stated charges for disconnecting and relocating equipment are not subject to sales tax. See *Buehler Moving Ltd.*, Adv Op St Tx Comm, February 4, 1982, TSB-A-82(1)C. As stated above, the ETD machines are moved like appliances and simply plugged into 120-volt electric receptacles. Accordingly, separately stated charges for moving the ETD machines from one location to another inside a building so they can be plugged in do not constitute charges for an enumerated service under Article 28 of the Tax Law, and, therefore, such charges are not subject to sales tax.

The CTX machines, on the other hand, require extensive installation efforts, including the addition of special wiring and modifications to the floor and subfloor to accommodate such wiring. These improvements (the special wiring and modifications to the floor and subfloor) become the property of the city of New York upon installation and otherwise meet the conditions set forth in section 1101(b)(9)(i) of the Tax Law, and, therefore, qualify as capital improvements to real property. Separately stated charges for these improvements are not subject to sales tax. See *Price Waterhouse LLP*, Adv Op Comm T & F, September 9, 1998, TSB-A-98(63)S; and *Sales and Use Tax Classifications of Capital Improvements and Repairs to Real Property*, Publication 862, (4/01).

The CTX machines are owned by the TSA subsequent to their installation. The CTX machines, therefore, cannot be said to become a part of the real property or to be permanently affixed to or installed in the real property as required by section 1101(b)(9)(i) of the Tax Law. Accordingly, charges to Petitioner for bolting the CTX machines to the floor and otherwise assembling the machines are subject to sales tax under section 1105(c)(3) of the Tax Law as charges for installation of tangible personal property that remains tangible personal property after installation. Separately stated charges to Petitioner by its contractor for moving the CTX machines within the building are considered to be transportation charges not subject to sales tax. See *Gilbert Displays, Inc.*, Adv Op Comm T & F, June 24, 2005, TSB-A-05(28)S.

Each time a CTX machine is relocated, a TSA mandated company must handle the electrical connections and hookups for the machine. A second TSA mandated company must perform the Site Acceptability Test prior to the permitted use of the machine. The Site Acceptability Test consists of testing the machines once they are installed to ensure that they are fully operational and functioning properly. Since the TSA pays for the services of the TSA

mandated companies, these charges are not included in the charges to Petitioner for the renovation and are not addressed in this Opinion.

DATED: June 21, 2007

/s/
Jonathan Pessen
Tax Regulations Specialist IV
Technical Services Division

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.