

New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-09(7)S
Sales Tax
January 30, 2009

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S080902A

Petitioner asks whether the construction of a custom-engineered steam pipeline designed for the special purpose of delivering steam from Petitioner's energy plant to the customer's property constitutes a capital improvement for purposes of sales and use taxes under Articles 28 and 29 of the Tax Law. We believe that the pipeline constitutes a capital improvement in this situation.

Petitioner submits the following facts: Petitioner operates an energy-from-waste facility that processes 2,250 tons of municipal waste per day, sells steam to nearby companies, and sells electricity to National Grid Company. In 2002, Petitioner entered into a contract to supply steam to an adjacent company (the customer) approximately one mile from Petitioner's plant. Under terms of the contract, Petitioner constructed a custom-built above-ground steam pipeline that delivers the steam under certain temperature and pressure conditions. Petitioner owns the land the pipeline traverses before it reaches the customer's property. The construction of the pipeline cost approximately \$3.3 million and the cost was shared with the customer. The contract had an initial term of seven years and is renewable for additional five-year periods.

According to Petitioner, the pipeline starts inside Petitioner's facility, and travels above-ground on a series of steel stanchions bolted to concrete footings until it reaches the customer's facility. The steel support structure is attached to the foundation embedded in the ground. The sizing of pipe and routing of it is specific to this export steam application. The sections of the pipeline are connected by a seamless groove weld, rather than flanged, to form one continuous unit so that temperature and pressure loss are minimized. The pipeline and steel support structure are attached to the concrete foundation, which is permanently embedded in the ground.

Petitioner engaged an independent engineering firm Sigma Energy Solutions ("Sigma") to answer certain questions related to the design and construction of the pipeline, and whether the pipeline system can be dismantled and used on another project. Sigma states in its report that the pipeline is not designed to be dismantled and used on another project. Furthermore, the report includes a calculation demonstrating that it would not be economically feasible to dismantle the pipeline and reuse it. Doing so would materially damage the pipeline itself, thereby rendering it useless for another project, and the salvage value, if any, would be negligible. Sigma states that the steam pipeline is designed and constructed to remain a permanent installation as an integral part of Petitioner's facility for the life of the property. Sigma Energy Solutions' Report was attached to the Petition.

Tax Law §1105(a) imposes tax on the retail sale of all tangible personal property, unless otherwise expressly exempt. All sales of property or services of a type upon which tax is imposed by Tax Law §1105 are presumed taxable, until the contrary is established. See Tax Law §1132(c)(1). Tax Law §1101(b)(4) defines "retail sale" as "a sale of tangible personal property to any person for any purpose other than . . . for resale" However, "the 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 . . . 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” Id.; see also Sales and Use Tax Regulations §541.1(b).

The service of installing tangible personal property is subject to tax, unless such tangible personal property, when installed, will constitute a capital improvement to property. See Tax Law §1105(c)(3)(iii). Tax Law §1101(b)(9) defines “capital improvement” as:

- (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.

See also Sales and Use Tax Regulations §527.7(a)(3).

The question whether a particular installation constitutes a capital improvement is based on the circumstances of a particular product and its installation. See *Clestra Hauserman, Inc.*, Adv Op Comm T&F, September 16, 1994, TSB-A-94(43)S. Here, the first factor in the definition of “capital improvement” is satisfied, since the pipeline substantially adds to the value of the real property. The facts that the pipeline cost over \$3 million, that the cost was shared by the customer, and that the contract to supply steam to the customer contemplated periodic renewals after the initial seven-year period support the conclusion that this first factor is met. (See *Rochester Gas & Electric Corporation v. New York State Tax Commission*, 128 AD2d 238 (3rd Dept., 1987), *aff’d* 71 NY2d 931 (1988).

Assuming the report from Sigma Energy Solutions is correct, the second factor is also satisfied, because the steel support structure is permanently attached to the foundation. Removal of the pipeline would require cutting away the steel supports and breaking the concrete foundations in which the structures are imbedded. The pipeline system is welded due to unique pressure rating concerns, and dismantling the pipe would require torch cutting. According to the consulting engineer, this would result in irregular rough cuts, producing irregular lengths of pipe that have little salvage value. Removal would cause material damage to the real property and to the capital improvement affixed to it. Such installation satisfies the second factor. See Publication 862, *Sales and Use Tax Classifications of Capital Improvements and Repairs to Real Property*, April 2001.

The fact that the steam line is installed by the property owner on its own property demonstrates that the property owner intended this to be a permanent installation. Thus, we think that the third condition set forth in §1101(b)(9)(i) of the Tax Law is satisfied. (In contrast, additions or alterations installed by a tenant of the property owner that do not become the property of the owner of the premises upon their installation, support a presumption that the installation is not intended to be permanent. See *Empire Vision Center, Inc.*, Dec Tax App Trib, Nov 7, 1991, DTA No.805767.

Accordingly, the sale and installation of the pipeline system qualify as a capital improvement to the real property for purposes of sales and use taxes under Articles 28 and 29 of the Tax Law.

DATED: January 30, 2009

/S/

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