

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S140318B

The Department of Taxation and Finance received a Petition for Advisory Opinion from Petitioner [REDACTED] (“Petitioner”). Petitioner asks whether its façade restoration project for a building (“the Building”) gives rise to sales tax liability under Article 28 of the Tax Law. We conclude that the work being done to the Building constitutes a capital improvement and therefore is not subject to sales tax.

Facts

Petitioner owns a terra-cotta clad building, the façade of which requires extensive restoration. To effect that restoration, Petitioner entered into a contract with a contractor (“the Contractor”) for the restoration of the façades of the Building. Due to the passage of time and penetration of the terra cotta blocks by moisture, the terra cotta blocks, pointing, windows and underlying steel structure have deteriorated. The restoration taking place is to all exterior façades from the second floor to the upper roof, including replacement of 98% of the building’s steel windows with new aluminum windows (the remaining 2% of the windows are fire stair windows, which only require restoration). The total portions of each façade face being restored are: North: 96%; South: 97%; East: 100%; West: 100%. Other aspects of the work being done to the Building include removal and replacement of failing sealant and backing materials near windows and removal and replacement of upper roof coping with new lead-coated copper to match the original. There is no work being performed on the interior of the building; nor is there any work being done on the first floor storefronts and loading dock area façades.

Without this restoration project, the terra cotta blocks would continue to deteriorate, resulting eventually in damage to the steel structure of the building. The new windows and improved insulation being installed as part of this project will add to the building’s energy efficiency.

All of the new components being installed are permanently affixed for the duration of their useful life such that their removal would cause damage to the Building or to those materials. The replaced and/or restored components are anticipated to last 50 years, with the first 10 to 20 of those years protected by a manufacturer and installer guarantee.

The detail of the work being done is as follows:

Terra Cotta. The portions of terra cotta blocks that are beyond repair are being replaced with new terra cotta blocks, which are designed to match the original. Blocks that are severely damaged but do not require replacement are reconstructed and re-glazed. When the damage to the blocks is limited to the surface, those blocks undergo field-glazing, which restores the outer surface of the block. Pointing, which is the removal and replacement of damaged mortar joints,

occurs as needed throughout all façade faces. Finally, all terra cotta blocks and mortar surfaces are being thoroughly cleaned.

Steel Work. The other major aspect of the work involves the resurfacing, restoration and/or replacement of many steel components of the Building, which include segments of window sills, frames, lintels, mullions and column covers. Restoration includes the application of patching compounds, finished to match the original, where limited damage has occurred. Resurfacing includes stripping 20-plus layers of lead-based paint down to raw, original steel and coating the steel with a new 3-coat high-performance system to match the original. Where damage to a steel component, such as a column cover or window lintel, is more than 50%, complete replacement is considered at each location. When replacement is necessary, it requires surgical cutting and complete removal of damaged segments, welding of new steel segments per industry standards to precisely match the original, and coating of all parts for a monolithic finish.

Analysis

Section 1105(c)(5) of the Tax Law imposes sales tax upon the receipts from every sale, except for resale, of the service of “maintaining, servicing or repairing real property, property or land...as distinguished from adding to or improving such real property, property or land, by a capital improvement.” The term “capital improvement” is defined 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 Tax Law § 1101(b)(9)(i). Whether a service to real property is subject to sales tax depends on the “end result” of the 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.” *See* 20 NYCRR § 527.7 (b)(4).

Given the extent of the improvements detailed above and the resulting enhanced energy efficiency of the Building, the project will substantially add value to the Building. The new terra cotta blocks, new steel components of the window frames, and new surface coatings are permanently affixed to the building such that their removal would cause damage to the Building or to those materials. Finally, the alterations to the building are being done on behalf of the building’s owner and are intended to be permanent. Accordingly, the restoration project constitutes a capital improvement. *See Matter of L&L Painting Co.*, Tax Appeals Tribunal, June 2, 2011; *Matter of F.W. Woolworth Co.*, Tax Appeals Tribunal, Dec. 1, 2004; Publication 862, *Sales and Use Tax Classifications of Capital Improvements and Repairs to Real Property* (“[i]nstallation or complete replacement of complete windows” is a capital improvement). It is noted that, even though many of the tasks would be viewed as repairs in isolation, and may even be treated as such for accounting purposes, these activities are part of, and occasioned by, a

major restoration project. Thus, when viewed in their entire context, these activities are part of a capital improvement rather than being individual repairs. *See Matter of F.W. Woolworth Co., supra.*

DATED: February 17, 2016

/S/

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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. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.