



## Advisory Opinion: TSB-A-24(54)S

The Department of Taxation and Finance received a Petition for Advisory Opinion from [ REDACTED ] (Petitioner). Petitioner asks whether its labor is taxable when the customer refuses to provide a capital improvement certificate. We conclude that, if the customer fails or refuses to provide a capital improvement certificate, Petitioner should collect and remit tax on the charges for the installations.

## Facts

Petitioner, a contractor, was hired to renovate a retail store. Petitioner installed new track lighting, new circuits and data cables for checkouts, and other items within a retail store. Petitioner also disconnected replaced equipment and connected new circuits and equipment within the store. Finally, Petitioner made additions to the existing fire alarm system to ensure code compliance. Petitioner asserts ninety percent of the labor performed was new installations. The remainder of the labor was replacement of existing equipment connected to either new or existing circuits. The customer did not provide a capital improvement or other exemption certificates to Petitioner, but instead requested that Petitioner charge sales tax.

## Analysis

Tax Law § 1105(c) imposes sales tax on receipts from every sale, except for resale, of certain enumerated services. Tax Law § 1105(c)(3) imposes sales tax on receipts from the installation of tangible personal property, and Tax Law § 1105(c)(5) imposes tax on sales receipts for “maintaining, servicing or repairing” real property. Such services include all activities related to keeping property in a condition of fitness, efficiency, readiness or safety, or restoring it to such condition. Tax Law § 1105(c)(5); 20 NYCRR 527.7(a)(1), 541.5(d); see TSB-A-15(32)S.

However, Tax Law § 1105(c)(3)(iii) carves out an exception when the property installed constitutes a capital improvement to real property. Tax Law § 1105(c)(3)(iii); 20 NYCRR 541.1(c). A capital improvement is an addition or alteration of real property that (a) substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property; (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; and (c) is intended to be a permanent part of the real property. Tax Law § 1101(b)(9); 20 NYCRR 527.7(a)(3)(i), 541.2(g).

It should be noted that, as a general rule, additions or alterations to real property for or by a tenant with respect to leased premises are presumed to be temporary in nature and do not qualify as capital improvements. Permanence may be contingent on whether the installation premises is leased or owned by the customer. *Matter of Manufacturers and Traders Trust Company*, Tax Appeals Tribunal (September 23, 2004); see *Matter of Flah’s of Syracuse, Inc. v. Tully et al.*, 89 AD2d 729, 730 (3d Dept. 1982). Moreover, the lease terms may dictate whether the installation of tangible personal property is intended to be permanent. *Id.* For example, the lease may require removal of installations upon

termination of the tenancy. Those installations cannot be capital improvements, because they are not intended to be permanent. However, if the lease does not require removal of an otherwise qualified capital improvement installation, the threshold for permanence may be met. TSB-A-09(10)S; TSB-A-11(26)S.

A contractor cannot purchase materials and supplies for resale and must pay sales tax to the supplier on the receipt for those materials and supplies at the time of purchase. In the case of a capital improvement, the customer should sign and provide a properly completed capital improvement certificate (*Form ST-124*) to the contractor. If the contractor accepts the certificate in good faith, the contractor is relieved of the duty to collect sales tax. TSB-A-16(28); TSB-A-15(32)S. The contractor does not collect sales tax for those materials and supplies from the customer. TSB-A-15(32)S; see Publication 862, p. 8.

In the absence of a timely and properly completed exemption certificate, the contractor must collect and remit sales tax for the installed property and the installation service from the customer. If the customer fails to provide an exemption certificate or the project is not a capital improvement, the contractor may claim a credit against its existing sales tax liabilities in certain circumstances. Tax Law § 1119(c); TB-ST-130; TSB-A-15(48)S. The credit represents the tax the contractor paid upon the initial purchase of the materials for a project. To qualify for the credit, the contractor must have paid tax for the materials. *Id.* The credit applies to the contractor's sales tax liability for the period when the work was performed. TB-ST-130.

Here, Petitioner's customer did not provide a capital improvement certificate and instead requested that Petitioner collect sales tax on the installed property and the installation charges. Under these circumstances, Petitioner should collect sales tax on the tangible personal property installed and the installation charges and may take a credit for the sales tax it paid on the purchase of those materials.

DATED: November 12, 2024

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MARY ELLEN LADOUCEUR  
Principal Attorney

**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.