

**New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau**

TSB-A-82(7)S
Sales Tax
January 29, 1982

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S810814A

On August 14, 1981 a Petition for Advisory Opinion was received from Technipaving Corp., 366 Moffitt Boulevard, Islip, New York 11751.

The issue raised is whether the charge for paving over trenches, which were cut and filled by the Long Island Lighting Company in the course of installing new gas lines to its customers, constitutes a capital improvement to real property and is, therefore, exempt from sales tax.

Section 1105(c)(5) of the Tax Law imposes a tax on the receipts from the sale of the service of "(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 chapter"

"Section 1101(b)(9) of the Tax Law, referred to in the foregoing, defines the term "capital improvement" as follows:

- "(9) Capital improvement. 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; and
 - (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."

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

"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." 20 NYCRR 527.7 (b)(4).

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"Any contractor who is making a capital improvement must pay a tax on the cost of materials to him, as he is the ultimate consumer of the tangible personal property." 20 NYCRR 527.7(b)(5).

The paving project performed by Petitioner satisfies the statutory definition of "capital improvement." Accordingly, the charge for such service is not subject to sales tax. Such tax is due, however, on Petitioner's purchases of materials to be used by it in performing the service.

DATED: January 5, 1982

s/LOUIS ETLINGER
Deputy Director
Technical Services Bureau