

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

TSB-A-86(39)S
Sales Tax
October 2, 1986

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S860709A

On July 9, 1986, a Petition for Advisory Opinion was received from Dairy Barn Stores, Inc., 544 Elwood Road, East Northport, New York 11731.

The issue raised is whether the purchase of a freestanding walk-in freezer, installed outdoors on a concrete slab foundation, constitutes a capital improvement to real property for the purpose of taxation under Articles 28 and 29 of the Tax Law.

Petitioner states such fixtures have an estimated useful life of 12 to 15 years. Installation, usually performed by an appliance dealer, requires a building permit and is accomplished by assembling the unit on site from sections, wiring it to the electric supply, and bolting it to a concrete foundation prepared by a construction contractor. These freezers may be installed at any of Petitioner's stores, which may be company owned or located on leased premises.

Petitioner contends that to move such a freezer would substantially impair its usefulness and, moreover, that no such removal is contemplated since the unit is intended to become a permanent fixture and therefore a capital improvement to real property.

The Tax Law (1105[a]) imposes a tax on "[t]he receipts from every retail sale of tangible personal property, except as otherwise provided in this article." Section 1115(a)(17) of the Tax Law exempts from the tax so imposed "[t]angible personal property sold by a contractor . . . to a person . . . for whom he is adding to, or improving real property, property or land by capital improvement, or for whom he is about to do any of the foregoing, if such tangible personal property is to become an integral component part of such structure, building or real property".

Tax Law Section 1105(d)(3)(iii) provides, in part, that tax is due on the sale of the services of installing tangible personal property, except for installing property which, when installed, will constitute an addition or capital improvement to real property, property or land.

The term "capital improvement" is defined in section 1101(b)(9) of the Tax Law 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.

The Sales and Use Tax Regulations explain further:

A capital improvement does not include . . . a contract for the sale and installation of tangible personal property which when installed remains tangible personal property . . . 20 NYCRR 541.2(g)(2)(i).

. . .
If a contract includes the sale of tangible personal property which remains tangible personal property after installation, the contractor must collect the appropriate New York State and local taxes from the customer on the selling price, including any charge for installation . . . 20 NYCRR 541.5(b)(4)(iii).

. . .
Installation charges include but are not limited to:

- (i) the wiring from the electrical panel to the machinery or equipment to make it operational;
- (ii) attaching the machinery and equipment by bolts or other means to a foundation. 20 NYCRR 541.6(d).

. . .
Some items of tangible personal property that retain their identity as tangible personal property after installation are . . . free standing shelves, counters, bars and appliances (refrigerators, stoves, window air conditioning units) . . . 20 NYCRR 541.5(d)(ii).

The State Tax Commission has determined that the construction of a concrete foundation is an addition to real property which constitutes a capital improvement. See Matter of Slattery Associates, Inc., Decision of the State Tax Commission, Aug. 16, 1977, STH 77-65; Multi-View Communication, Inc., State Tax Commission Advisory Opinion, March 26, 1986, TSB-A-86(12)S. Accordingly, pursuant to the above quoted sections of the Tax Law, the contractor's entire charge to the Petitioner for preparing the freezer foundation is not subject to tax. To be assured of the tax exemption, Petitioner should furnish a properly completed Certificate of Capital Improvement (Form ST-124, [4/82]) to the contractor.

Inasmuch as the walk-in freezer is an appliance which will require replacement after 12 to 15 years of use, its affixation to the underlying real property does not demonstrate the intent of the Petitioner to make a permanent installation, nor can it be held that such temporary annexation either enhances the value of the real property or prolongs the useful life of real property. Furthermore, it does not appear that removal of the freezer from its foundation would cause material damage to the real property or the equipment itself. Since all three of the conditions set down in Tax Law 1101(b)(9), supra, must be met before an installation qualifies as a capital improvement, the installation of such walk-in freezers does not qualify as a capital improvement.

TSB-A-86(39)S

Sales Tax

October 2, 1986

Consequently, State sales tax imposed under Article 28 and local sales tax imposed under Article 29 of the Tax Law are due on charges arising from Petitioner's purchase of a walk-in freezer and the labor necessary for its installation.

DATED: October 2, 1986

s/Frank J. Puccia
Director
Technical Services Bureau

NOTE: The opinions expressed in Advisory Opinions
are limited to the facts set forth therein.