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

TSB-A-88 (49)S
Sales Tax
September 28, 1988

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. S880809A

On August 9, 1988, a Petition for Advisory Opinion was received from Larry E. Tyree Co., Inc., 208 Route 109, Farmingdale, New York 11735.

The issue raised is whether the installation of a vapor recovery system pursuant to New York State Law is a capital improvement within the meaning and intent of Section 1101(b)(9) of the Tax Law.

Effective in early 1988, New York State Law mandated that service stations install vapor recovery system: underground piping which returns fumes generated by pumping gasoline back to the underground tanks. This is required by New York State in order for a service station to remain open and conduct business.

Section 1101(b)(9) of the Tax Law defines "capital improvement" as 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 installation in question appears to meet the first two requirements of section 1101(b)(9). The vapor recovery system adds to the value of the real property and makes it suitable for use as a service station. Secondly, because it consists of underground piping, the vapor recovery system becomes permanently affixed to the real property since removal would cause material damage to the property.

Accordingly, the vapor recovery system will qualify as a capital improvement if it also meets the third requirement, viz., it is intended to become a permanent installation.

Whether an installment is intended to be permanent is necessarily a question which must be resolved on a case by case basis depending on the totality of circumstances in each case.

Ordinarily, underground piping installed on property owned by a taxpayer will be deemed to be intended to a permanent by virtue of the nature of the installation. Of course, other circumstances may indicate a contrary result. For example, if state or local laws mandate the removal of a vapor recovery system upon cessation of use, such system cannot have been intended to be permanently installed notwithstanding its installation underground.

Ordinarily, additions or alterations to real property by a tenant of such property will be presumed to be temporary in nature unless a contrary intention can be demonstrated. Technical Services Bureau Memorandum TSB-M-83(17)S provides that:

> A specific lease provision which states that: 1) immediately upon installation, title to such installation vests in the lessor, and 2) the addition or alteration becomes part of and remains with the premises after the termination of the lease, will be recognized as a demonstration of contrary intention (i.e., an intention of permanence). A provision granting the lessor the right to require removal of the improvement will not negate this demonstration of intention of permanence; nor will a provision which states that the improvement becomes the property of the lessor upon expiration of the lease or upon termination of the tenancy.
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> In the absence of a lease provision, other factors such as the nature of the installation, or written agreements other than a lease provision may be considered in determining the intention of the parties with respect to the permanence of the installation. Factors which may indicate that a tenant installation is not intended to be permanent include: 1) a lease provision requiring that the leased premises be restored to their original condition at the termination of the lease; 2) the rental of the installed property from a third party (someone other than the lessor of the premises).

Accordingly, a vapor recovery system may qualify as a capital improvement but only under those circumstances where it is demonstrated that the installation is intended to be permanent.

DATED: September 28, 1988

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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