

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

TSB-A-89 (10)S
Sales Tax
March 28, 1989

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S881102A

On November 2, 1988, a Petition for Advisory Opinion was received from Oscar S. Rothaus, 106 Devon Road, Ithaca, New York 14850.

The issue raised is whether the removal of a boiler asbestos lining is subject to sales tax when such removal is done preliminary to the removal and replacement of a boiler.

Petitioner replaced a boiler type furnace in his home. In doing so, the asbestos coating on the boiler and nearby pipes had to be removed by a specially licensed contractor and disposed of in special land fills. After the removal of the asbestos, Petitioner then hired a plumbing contractor to install a new boiler.

Petitioner was charged sales tax by the asbestos removal contractor but was not charged sales tax by the plumber who installed the boiler.

Section 1105(c)(5) of the Tax Law imposes a sales tax upon receipts from the services of "[m]aintaining, servicing or repairing real property... 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...."

Section 1101 (b)(9) of the Tax Law defines capital improvement as follows:

(9) Capital improvement. (3) "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.

Sales and Use tax regulation section 527.7 (b)(4) provides that:

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

Example 3 of sales and use tax regulation 541.2 (g)(1) provides:

Example 3: A homeowner hires a general contractor to remove a portion of a masonry wall for the purpose of installing a door and window. The general contractor hires a masonry contractor (subcontractor) to repair the wall. The charge to the contractor by the subcontractor represents a constituent part of the services performed in adding to or improving real property by a capital improvement and therefore is not subject to tax in accordance with section 527.7(b)(4) of this Title.

The service of asbestos removal by itself is a service subject to tax under Section 1105(c)(5) of the Tax Law. However, when the service of asbestos removal is performed as a constituent part of a capital improvement, as is true in the instant case, the charge for such removal is not subject to sales and use tax.

To avoid paying tax on a capital improvement, Petitioner should have given the asbestos removal contractor a Certificate of Capital Improvement (Form ST-124). However, since the tax has already been paid, Petitioner may, within three years from the date that the tax was payable, apply to the Department of Taxation and Finance for a refund of the sales tax paid by filing an Application For Credit or Refund of State and Local Sales or Use Tax (Form AU-11).

DATED: March 28, 1989

s/FRANK J. PUCCIA
Director
Technical Services

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