

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

TSB-A-90 (27)S
Sales Tax
May 29, 1990

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S900215A

On February 15, 1990 a Petition for Advisory Opinion was received from Stewarts Ice Cream Co., Inc., Route 9, Saratoga Springs, New York 12866.

The issue raised by Petitioner, Stewarts Ice Cream Co., Inc., is whether the removal of hazardous waste, in conjunction with the installation of new gasoline storage tanks, is a capital improvement to real property.

Petitioner contracts to have old gasoline storage tanks removed from its premises and new ones installed. If the tanks being removed have leaked, Petitioner must also remove the contaminated material from the location. The costs associated with a typical installation involve an expenditure of \$40,000 for new tanks and \$10,000 to \$120,000 for the actual contamination cleanup, repaving, and subsequent monitoring of required test wells. The product removed is not a byproduct of Petitioner's normal business but is, in reality, construction debris. Removal of the tanks, which are underground, causes material damage to the property since Petitioner typically replaces an entire parking lot in a contaminant situation. The installation of the tanks are intended to become a permanent installation.

Section 527.7 of the Sales and Use Tax Regulations provides in part:

- (3) A capital improvement is an addition or alteration to real property:
 - (i) which substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property;
 - (ii) which 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.

Additionally, Section 527.7(b)(4) of the Sales and Use Tax Regulation states that:

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.

If the tanks are installed in accordance with the above general rules, they are considered a capital improvement, provided there is no stipulation by the lessor that the tanks must be removed at the end of the lease or a municipal law or ordinance that requires the removal of the tanks upon

the termination of the business as a service station. If the installation of the tanks are considered to be a capital improvement than the removal of any contaminated material would be considered to be a constituent part of the capital improvement and exempt from sales tax. Building Contractors Association, Inc. v Tully, 87 AD2d 909, 449 NYS 2d 547.

However, the installation of gas tanks which do not meet the qualifications of a capital improvement are, subject to tax as well as any charges for the removal of the hazardous waste in connection with the installation.

DATED: May 29, 1990

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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