

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

TSB-A-92 (61) S  
Sales Tax  
August 14, 1992

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO.S920513B

On May 13, 1992 a Petition for Advisory Opinion was received from Galesi Enterprises, P.O. Box 98, Guilderland Center, New York 12085.

The issue raised by Petitioner, Galesi Enterprises, is whether the replacement of an underground fuel oil tank is a capital improvement and therefore not subject to sales tax.

Petitioner, Galesi Enterprises, entered into a contract for the installation of an underground fuel oil storage tank which is to be used as a backup heat source for an office building owned by Petitioner. The new fuel oil storage tank is located on the premises of the office building and replaces the original fuel oil tank which was installed when the building was constructed in 1971. The tank is installed underground and permanently affixed to the real property in that it is secured to a poured concrete slab, surrounded and covered with earth fill, then covered with asphalt. The replacement will extend the useful life of the property. Petitioner anticipates the useful life of the fuel oil tank to meet or exceed that of the previous one. Petitioner's intent is that the installation of the fuel tank will be 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.

Where a tank is installed in accordance with the above general rules, such installation is considered to be a capital improvement, provided that there is no municipal law or ordinance requiring the specific removal of the tank upon termination of use of the tank.

The municipality in which the tank was installed does not have a local ordinance pertaining to the removal of tanks which are temporarily out of service or abandoned. However, the municipality does rely upon Section 1164.5 of the New York State Division of Housing and Community Renewal Regulations for enforcing proper procedures regarding the safeguarding of tanks which are temporarily out of service or which are abandoned.

Section 1164.5 of said Regulations provides as follows:

1164.5 Abandonment or removal of any class I, II or III liquid storage tank.

(a) Storage tanks rendered temporarily out of service for a period of 30 days to one year shall be made safe by capping the fill line, gage opening, and pump suction and securing against tampering.

(b) Storage tanks not placed back in service within one year must be removed or abandoned in place with proper safeguarding.

(c) All storage tanks abandoned in place shall be made safe by removing flammable or combustible liquids from the tank and connecting lines; disconnecting the suction, inlet, gage and vent lines; filling the tanks completely with an inert, solid material; and capping the remaining piping.

In the instant case, the installation of the tank was a capital improvement. The installation unquestionably satisfied conditions (i) and (ii) of Section 527.7(3) of the Sales and Use Tax Regulations. Because Section 1164.5 of the Division of Housing and Community Renewal Regulations does not absolutely require removal of a tank due to the tank being temporarily out of service or abandoned but offers the option of either leaving the tank in place with the exercising of proper safeguarding or removing the tank, the installation of the tank at issue is considered to meet the intent of permanency required under condition (iii) of Section 527.7(3) of the Sales and Use Tax

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Regulations. Accordingly, the installation of the tank is considered to be a capital improvement and therefore not subject to State or local sales taxes in accordance with Section 527.7(b)(4) of the Sales and Use Tax Regulations.

DATED: August 14, 1992

s/PAUL B. COBURN  
Deputy Director  
Taxpayer Services Division

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