

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-04(18)S
Sales Tax
July 22, 2004

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S031118B

On November 18, 2003, the Department of Taxation and Finance received a Petition for Advisory Opinion from Paul J. Carucci, 9 Scott Drive, New City, NY 10956.

The issue raised by Petitioner, Paul J. Carucci, on behalf of his client (“Client”) is whether charges for services to homes that have suffered fire damage are subject to sales tax.

Petitioner submitted the following facts as the basis for this Advisory Opinion.

Client’s sole activity is to perform mold mitigation to homes that have suffered a fire. This service is performed as part of the repair and reconstruction of the damaged property, and the process involves the removal of damp and musty structures such as walls, ceilings, flooring, etc., and the drying of the underlying structures to mitigate the formation or spreading of mold.

Applicable law and regulations

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

(i) An addition or alteration to real property which:

(A) Substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property; and

(B) 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

(C) Is intended to become a permanent installation.

* * *

(iii) Notwithstanding the provisions of subparagraph (i) of this paragraph: (A) Floor covering, such as carpet, carpet padding, linoleum and vinyl roll flooring, carpet tile, linoleum tile and vinyl tile, installed as the initial finished floor covering in new construction or a new addition to or total reconstruction of existing construction shall constitute an addition or capital improvement to real property, property or land; and

(B) Floor covering, such as carpet, carpet padding, linoleum and vinyl roll flooring, carpet tile, linoleum tile and vinyl tile, installed other than as described in clause (A) of this

subparagraph shall not constitute an addition or capital improvement to real property, property or land.

Section 1105(c) of the Tax Law imposes a tax on the receipts from every sale, except for resale, of the following services:

* * *

(3) Installing tangible personal property, excluding a mobile home, or maintaining, servicing or repairing tangible personal property, including a mobile home, not held for sale in the regular course of business, whether or not the services are performed directly or by means of coin-operated equipment or by any other means, and whether or not any tangible personal property is transferred in conjunction therewith, except:

* * *

(iii) for installing property which, when installed, will constitute an addition or capital improvement to real property, property or land, as the terms real property, property or land are defined in the real property tax law as such term capital improvement is defined in paragraph nine of subdivision (b) of section eleven hundred one of this chapter;...

* * *

(5) Maintaining, servicing or repairing real property, property or land, as such terms are defined in the real property tax law, whether the services are performed in or outside of a building, 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 of this article....

Section 1119(c) of the Tax Law provides, in part:

A refund or credit equal to the amount of sales or compensating use tax imposed by this article and pursuant to the authority of article twenty-nine, and paid on the sale or use of tangible personal property, shall be allowed the purchaser where such property is later used by the purchaser in performing a service subject to tax under paragraph (1), (2), (3), (5), (7) or (8) of subdivision (c) of section eleven hundred five or under section eleven hundred ten and such property has become a physical component part of the property upon which the service is performed or has been transferred to the purchaser of the service in conjunction with the performance of the service subject to tax or if a contractor, subcontractor or repairman purchases tangible personal property and later makes a retail sale of such tangible personal property, the acquisition of which would not have been a sale at retail to him but for the second to last sentence of subparagraph (i) of paragraph (4) of subdivision (b) of section eleven hundred one....

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

(a) Definitions. (1) Maintaining, servicing and repairing are terms which are used to cover all activities that relate to keeping real property in a condition of fitness, efficiency, readiness or safety or restoring it to such condition. Among the services included are services on a building itself such as painting; services to the grounds, such as lawn services, tree removal and spraying; trash and garbage removal and sewerage service and snow removal.

* * *

(3)(i) A capital improvement is an addition or alteration to real property:

(a) which substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property;

(b) 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

(c) is intended to become a permanent installation.

(ii) (a) Floor covering is a capital improvement only when it is installed as the initial finished floor covering in new construction, in a new addition to existing construction or in a total reconstruction of existing construction.

(b) The term floor covering includes carpet, carpet tile, carpet padding, linoleum and vinyl roll floor covering, linoleum tile, vinyl tile and other similar floor coverings. For a detailed discussion and description, see section 541.14 of this Title.

* * *

(b) Imposition. (1) The tax is imposed on receipts from every sale of the services of maintaining, servicing or repairing real property, whether inside or outside of a building.

* * *

(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.

Example 9: The replacement of some shingles or patching of a roof is a repair, but a new asphalt shingle roof is a capital improvement.

Section 541.2(g) of the Sales and Use Tax Regulations provides, in part:

Capital Improvement. (1) A *capital improvement* means 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;

(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.

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.

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

Section 541.5(b)(4) of the Sales and Use Tax Regulations provides, in part:

Documents; capital improvement contracts. (i) When a properly completed certificate of capital improvement has been furnished to the contractor, the burden of proving the job or transaction is not taxable and the liability for the tax rests solely upon the customer.

a) The prime contractor should obtain a certificate of capital improvement from the customer and retain it as part of his records. Copies of such certificate must be furnished to all subcontractors on the job and retained as part of their records.

b) A certificate of capital improvement may not be issued by a contractor, subcontractor or any other person to a supplier on the purchase of tangible personal property.

(ii) Where a contractor does not receive a capital improvement certificate from a customer, the contract or other records of the transaction will prevail. In such case:

a) where the contractor does not receive a capital improvement certificate, collects tax on the full invoice price and the job is a capital improvement to real property, the contractor is liable for the tax on the cost of materials incorporated into the job, plus the tax

collected from the customer. The customer is entitled to a refund of the tax paid to the contractor; or

(b) where the contractor does not receive a capital improvement certificate, collects no tax on the charges billed to the customer and the job is a capital improvement to real property, the contractor is liable for the tax on the cost of materials incorporated into the job performed.

(iii) 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, of the tangible personal property unless a properly completed exemption certificate is issued by the customer. The contractor may apply for a credit or refund of taxes he has paid on purchases of the tangible personal property that remain tangible personal property after installation.

Opinion

Client's sole business activity is mold mitigation. The service is performed only to homes that have suffered water damage as a result of extinguishing a fire and is done as part of the repair and reconstruction of the damaged property. The service involves the removal of damp and musty structures such as walls, ceilings, flooring, etc. and the drying of the underlying structures to mitigate the formation or spreading of mold.

Section 527.7 of the Sales and Use Tax Regulations defines maintaining, servicing or repairing real property as the service of keeping real property in a condition of fitness, efficiency, readiness or safety or restoring it to such condition. The service performed here is required due to water damage sustained as a result of extinguishing a fire. The service of removing the damaged walls, ceilings, and flooring and the drying of the underlying structures is a repair service necessary to keep the real property in a condition of fitness, efficiency, or readiness. Such repair services to real property are subject to sales tax under section 1105(c)(5) of the Tax Law, except as discussed below. Pursuant to section 1119(c) of the Tax Law, Client may apply for a credit or refund of the tax paid on the materials used to complete the taxable repair as an offset against the tax collected from the customer, if such materials become a physical component part of the property upon which the service is performed or are transferred to the purchaser in conjunction with the performance of the service. See *Ronald Webb Builder and Contractor Inc.*, Adv Op Comm T&F, January 24, 2003, TSB-A-03(2)S.

Although Client's services constitute the repair of real property, Client's services might be contracted by a contractor or land owner in conjunction with and as part of an overall capital improvement being performed upon the damaged realty. Under such circumstances, to the extent the service performed by Client becomes part of any capital improvement to the damaged property, then the services would be considered to be part of the capital improvement and not subject to State

TSB-A-04(18)S
Sales Tax
July 22, 2004

or local sales tax. See section 527.7(b)(4) of the Sales and Use Tax Regulations. In such instances, Client, as a subcontractor, should be provided with a copy of the *Certificate of Capital Improvement* (Form ST-124) that was provided to the contractor by its customer. See *Matter of Saf-Tee Plumbing v Tully*, 77 AD2d 1. See also, section 541.14 of the Sale and Use Tax Regulations for special rules for capital improvements as related to repair and installation of flooring and floor coverings.

DATED: July 22, 2004

/s/
Jonathan Pessen
Tax Regulations Specialist IV
Technical Services Division

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