

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Taxpayer Guidance Division

TSB-A-08(37)S
Sales Tax
August 21, 2008

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S080523A

On May 23, 2008, the Department of Taxation and Finance received a Petition for Advisory Opinion from R. M. D. U. Enterprises, Inc., DBA Utech Basement Waterproofing, 3236 Genesee Street, Cheektowaga, New York 14225. Petitioner, R. M. D. U. Enterprises, Inc., DBA Utech Basement Waterproofing, provided additional information relating to the Petition on May 30, 2008.

The issue raised by Petitioner is whether Petitioner's method of waterproofing basement wall cracks constitutes a capital improvement or a taxable repair service to real property for sales tax purposes.

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

Petitioner's waterproofing system is used on leaking poured-concrete basement wall cracks. Petitioner's waterproofing system is designed to permanently prevent water infiltration through cracks in poured-concrete foundation walls by stopping the water at its source.

Petitioner installs its system by temporarily removing a section of the floor adjacent to the wall at the site of the crack. This is intended to expose the drainage system under the basement floor (i.e., drain tile and crushed stone). This section is at least 2 feet wide and 8 to 10 inches out from the wall. A series of at least 5, three-quarter inch diameter access holes are drilled through the wall; the first hole near floor level and the last to be at least 12 to 16 inches below exterior grade (i.e., ground level). The holes are spaced in a staggered manner on either side of the crack. A clay-based material is pumped through the holes in the wall, forcing the material permanently between the foundation and outside soil and effectively filling the crack at the exterior preventing water from leaking through the crack. The clay-based material cannot be removed or altered without excavation at the exterior. The access holes are then filled with a hydraulic cement to prevent the clay-based material from flowing back into the basement and ensuring that the clay-based material remains at the exterior.

A vinyl moisture barrier panel is fitted to the wall over the crack and access holes to below floor level with a urethane adhesive, and riveted to the wall, and is permanently anchored to the wall. The hole cut into the floor is then re-cemented up to the vinyl moisture barrier panel. The job related debris is removed from the job site.

Applicable law and regulations

Section 1101(b)(9)(i) of the Tax Law defines the term *capital improvement* as:

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.

Section 1105 of the Tax Law provides, in part:

Imposition of sales tax. On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax . . . upon:

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

* * *

(c) The receipts from every sale, except for resale, of the following services:

* * *

(3) Installing tangible personal property . . . or maintaining, servicing or repairing tangible personal property . . . 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 527.7(a)(1) of the Sales and Use Tax Regulations provides, in part:

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.

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

(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.

Opinion

Petitioner installs a waterproofing system for cracks in poured-concrete foundation walls that leak water into basements. Essentially, Petitioner fills the crack with a clay-based material and covers the crack with a vinyl moisture barrier panel.

Section 1101(b)(9) of the Tax Law describes a capital improvement as “An addition or alteration to real property” that meets certain conditions. Section 1105(c)(5) of the Tax Law imposes sales tax on the services of maintaining, servicing, or repairing real property. Section 527.7(a)(1) of the Sales and Use Tax Regulations describes the terms *maintaining, servicing and repairing* as terms that 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.

In *Sta Dry Systems Inc.*, Adv Op Comm T & F, July 9, 1996, TSB-A-96(42)S, the petitioner's basement waterproofing system was determined to be a capital improvement. The waterproofing system in that case consisted of an addition to the basement drainage system in the form of a drainage tube installed in the wall and connected to the basement drainage system under the basement floor. *Sales and Use Tax Classifications of Capital Improvements and Repairs to Real Property*, Publication 862 (4/01), provides that additions to piping systems

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constitute capital improvements to real property. In the present case, Petitioner makes no such addition or alteration and merely repairs the crack with a clay-based substance and covers the crack in the wall with a vinyl moisture barrier panel so that it no longer leaks.

Accordingly, Petitioner's method of waterproofing cracks in foundation walls is a repair as contemplated in section 527.7(a)(1) of the Sales and Use Tax Regulations. Receipts from the sale of such repair services are subject to sales tax under section 1105(c)(5) of the Tax Law. See section 527.7(b) of the Sales and Use Tax Regulations.

Note that if Petitioner's basement waterproofing system was installed or incorporated as part of a project that qualifies as a capital improvement to real property (e.g., complete remodeling of a basement room), the entire charge or charges for the service of installing the capital improvement, including the installation of Petitioner's basement waterproofing system, would be excluded from sales tax. See *Saf-Tee Plumbing v State Tax Commission*, 77 AD2d 1 and section 527.7(b)(4) of the Sales and Use Tax Regulations.

DATED: August 21, 2008

/s/
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NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.