

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

TSB-A-85(7)S
Sales Tax
May 15, 1985

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S840702B

On July 10, 1984 a Petition for Advisory Opinion was received from the Brooklyn Union Gas Company, 195 Montague Street, Room 602, Brooklyn, New York 11201.

The issue raised is whether Petitioner's payments for relocation work and related paving work involved in rerouting its underground gas lines are subject to sales tax.

Petitioner distributes natural gas through a network of underground piping in its franchised territory, all of which is located in New York City. This piping is subject to real estate taxes. New York City will, at times, hire private contractors to carry out public works projects on or under city streets. This may include installation of new water and sewer lines and street reconstruction. When a project is awarded to a contractor, New York State law requires that for safety reasons Petitioner be notified. Petitioner's engineers study the city's construction plans and determine the steps required to avoid any direct interference with the planned construction. Relocation of the company's mains and services is mandated where such interference exists.

Relocation entails excavating and laying a new main, disconnecting the interfering length of main and any services branching off from it, and reconnecting the new main to the new or existing services. A paving contractor is then employed to repave the street openings made during the relocation process. The interfering facility is abandoned in place and removed in the course of the city construction.

Section 1105(c)(5) of the Tax Law imposes a tax on the receipts from the following services:

"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 chapter, . . ."

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

- (9) Capital improvement. 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. . . .

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Section 527.7(b)(4) of the Sales and Use Tax Regulations provide as follows:

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

The addition of new gas mains clearly meets each of the conditions set forth in section 1101(b)(9) of the Tax Law. Accordingly, such addition constitutes a capital improvement to real property rather than a repair. Petitioner will not be required to pay sales tax on relocation work if it presents to the contractor a properly completed Certificate of Capital Improvement (Form ST-124).

Additionally, payments for re-paving work also constitute a capital improvement to real property under the "end result" test set forth in 20 NYCRR 527.7(b)(4). Building Contractors Association, Inc. v. Tully, 87 A.D. 2d 909, 449 N.Y.S 547 (1982); Carl A. Morse, Inc., Decision of the State Tax Commission, June 18, 1980, TSB-H-80(144)S. Accordingly, Petitioner will not be required to pay sales tax on such services if it presents to the contractor a property completed Certificate of Capital Improvement.

DATED: April 23, 1985

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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