

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

TSB-A-90(48)S
Sales Tax
October 10, 1990

STATE OF NEW YORK

COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S900612A

On June 12, 1990 a Petition for Advisory Opinion was received from Allied Steam Corp., Myrtle Avenue, Mahopac Falls, New York 10542.

The issue raised by Petitioner, Allied Steam Corp., is whether the sale and installation of dry cleaning equipment consisting of a high pressure steam boiler is a capital improvement exempt from the imposition of sales and use tax.

Petitioner sold a high pressure steam boiler which supplied steam to equipment used to process garments in a dry cleaning operation conducted in rented space. During the cold months of the year, the boiler is left on during the night and the heat emitted by its machinery and piping keeps the building from freezing.

Section 1101(b)(9)(i) of the Tax Law defines a 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 541.2(g)(1) of the Sales and Use Tax Regulations provides that:

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.

The criteria for a capital improvement must be met in their entirety. The inability to meet any one of the three conditions will prevent the property in question from qualifying as a capital improvement.

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In the instant case the Petitioner's customer is the lessee of the premises on which the boiler is located. Improvements made to leased premises for the purposes of conducting the business for which the realty is leased are presumed not to be permanent and to be made for the sole use and enjoyment of the tenant during the term of the lease, 100 Park Ave., Inc. v Boyland, 144 NYS2d 88, affd 309 NY 685. Such improvements will be presumed not to be capital improvements unless the lease vests title to the improvements in the lessor upon termination of the lease, Merit Oil of New York v New York State Tax Commission, 124 AD2d 326 or the improvements are so affixed to the realty so that they cannot be removed without substantial damage to them, Flah's of Syracuse v. Tully, 89 AD2d 729. Since Petitioner has failed to show that its customer has met these two latter conditions, it must be presumed that the installation of the boiler for the primary purpose of generating steam for use in the customer's dry cleaning business is not a capital improvement. Furthermore the fact that the boiler may on occasion secondarily generate energy to heat the building is not sufficient to bring its sale and installation within the definition of a capital improvement as set forth in Section 1101(b)(9)(i) of the Tax Law and Section 541.2(g)(1) of the Sales and Use Tax Regulations.

Consequently, the sale and installation of the boiler is subject to the imposition of sales tax. The purchaser of the boiler would be liable for the use tax on the sale and installation of the boiler only if he did not pay the sales tax directly to the seller and installer of the boiler.

DATED: October 10, 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.