

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

TSB-A-92 (4)S
Sales Tax
January 30, 1992

STATE OF NEW YORK

COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S911008B

On October 8, 1991, a Petition for Advisory Opinion was received from Park Plaza Owners Corp., 61-15 and 61-25 97th Street, Rego Park, New York 11374.

The issue raised by Petitioner, Park Plaza Owners Corp., is whether the removal and disposal of asbestos containing material and the reinstallation of all abated areas with non-asbestos containing material is subject to State and local sales and use taxes.

Petitioner contracted with The Asbestos Management Group, Ltd. for the removal and subsequent disposal of all asbestos containing materials from all basement and garage areas of the buildings located at 61-15 and 61-25 97th Street, Rego Park, NY and the complete reinstallation with materials complying with applicable law of (a) pipes in the basement and garage areas of the aforesaid buildings; and (b) boilers and related components (including breeching) at the location. The Asbestos Management Group, Ltd. hired as subcontractor, the firm of Envirosafe, Inc., for the execution of the work.

Section 1105(c)(5) of the Tax Law imposes a sales tax upon receipts from the services of "[m]aintaining, servicing or repairing real property. . .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. . . ."

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

(9) Capital improvement. (3) "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.

Section 527.7(b)(4) of the Sales and Use Tax Regulation provides that:

(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 "3" of Section 541.2(g)(1) of the Sales and Use Tax Regulation provides:

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.

Moreover, New York State and Local Sales and Use Tax Classifications of Capital Improvements and Repairs to Real Property, Publication 862 (1/90) at pages 6, 8, 9 and 13 provides that the complete insulations of garages, pipes of heating and hot water systems, heating duct systems, and walls constitute capital improvements.

In Oscar S. Rothans, Adv. Op Comm T&F, March 28, 1989, TSB-A-89(10)S the Commissioner advised that the removal of asbestos in connection with the removal and installation of a boiler type furnace was not subject to sales tax since the service of asbestos removal was performed as a constituent part of a capital improvement.

Accordingly, the service of asbestos removal by itself is a service subject to tax under Section 1105(c)(5) of the Tax Law. However, when the service of asbestos removal is performed as a constituent part of a capital improvement, as is true in the instant case where the pipes and boilers are completely reinsulated after the asbestos insulation is removed, the charge for such removal is not subject to sales and use tax in accordance with the provisions of the sections of the law and regulations cited above, Oscar S. Rothans, supra, and Publication 862.

DATED: January 30, 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.