

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

TSB-A-96 (42)S
Sales Tax
July 9, 1996

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S960223A

On February 23, 1996, the Department of Taxation and Finance received a Petition for Advisory Opinion from Sta Dry Systems Inc., 3527 Harlem Road, Cheektowaga, New York 14225.

The issue raised by Petitioner, Sta Dry Systems Inc., is whether a particular method of waterproofing leaking basement wall cracks constitutes a capital improvement or a taxable repair service to real property.

Petitioner presents the following facts.

Petitioner's waterproofing system is used on leaking basement wall cracks. Petitioner is not in the business of repairing, patching or injecting material into cracks. Petitioner's waterproofing system is designed to channel or re-route water that seeps through basement walls into a floor drainage system floor sump pump. Petitioner does not advertise or perform foundation repairs.

Wall leakage is channeled by installing vertical piping and fiberglass drainboard, which extend below the floor, in specified wall areas. Alternatively, in the case of a general overall condition of walls leaking, drainboard alone is installed on the walls to divert water to below the floor. In both cases, either existing drain pipes under the floor may be used for connecting drainage if they are functioning, or Petitioner installs new drainage.

Petitioner's wall drainage system (referred to as a pressure-relief system) is designed to allow the leaking water simply to drain down permanently along the inside surface of the wall. NO attempt is ever made to repair, patch, or inject cracked areas. Petitioner's wall drainage system is only concerned with re-routing water to a floor drainage system.

Background materials submitted by Petitioner describe the procedures for installing the wall drainage system as follows:

STEP 1 - A plastic tent is erected around the work area to prevent debris from entering other basement areas.

STEP 2 - A section of the existing floor adjacent to the wall is temporarily removed. This section is at least 2 feet wide and extends down to the depth of the existing floor drainage system (e.g. drain tile/crushed stone).

STEP 3 - The crack in the wall itself is carefully Veed-Out from grade level to the footer with an electric hammer.

STEP 4 - A flexible half-moon plastic tubing is inserted into the wall following the prepared groove. It extends to below the floor, over the footer, and sets adjacent to the exposed drain tile/ crushed stone.

STEP 5 - Petitioner's exclusive .060 ml high grade Rigid Sealer (fiberglass sheeting) is permanently riveted over the crack (minimum 2 feet wide) and extends below the floor to the footer. This material is guaranteed never to deteriorate or to transmit water, dampness or musty odors.

STEP 6 - The floor opening is then carefully recemented to the wall/rigid sealer.

STEP 7 - The debris in the immediate work area is immediately removed and is swept clean.

In the case of a general overall condition of walls leaking, drainboard alone is installed on the walls to divert water to below the floor and Steps 3 and 4 above would not apply. All other steps in the process are the same. In both cases, the existing drain pipes under the floor may be used for connecting drainage if they are functioning, or Petitioner installs new drainage.

Petitioner's wall drainage system is unconditionally guaranteed for the life of the house (subject to existing drain tile functioning).

Section 1101 of the Tax Law states, in part:

Definitions

(b) When used in this article for purposes of the taxes imposed by subdivisions ... (c) ... of section eleven hundred five and by section eleven hundred ten, the following terms shall mean:

* * *

(4) Retail sale. (i) A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property, or (B) for use by that person in performing the services subject to tax under paragraphs ... (3),(5) ... of subdivision (c) of section eleven hundred five where the property so sold becomes a physical component part of the property upon which the services are performed or where the property so sold is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax. Notwithstanding the preceding provisions of this subparagraph, a sale of any tangible personal property to a contractor, subcontractor or repairman for use or consumption in erecting structures or buildings, or building on, or otherwise adding to, altering, improving, maintaining, servicing or repairing real property, property or land,..., is deemed to be a retail sale regardless of whether the tangible personal property is to be resold as such before it is so used or consumed,

Section 1105(c)(3) of the Tax Law imposes a tax on the receipts from the service of "[i]nstalling tangible personal property ... or maintaining, servicing or repairing tangible personal property."

Section 1105(c)(3)(iii) provides an exception from tax when "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 "

Section 1105(c)(5) of the Tax Law imposes tax upon the receipts from the service of "[m]aintaining, servicing or repairing real property, property or land.., as distinguished from adding to or improving such real property, property or land, by a capital improvement."

Section 1115 of the Tax Law provides in part:

Exemptions from sales and use taxes.--(a) Receipts from the following shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten:

* * *

(17) Tangible personal property sold by a contractor, subcontractor or repairman to a person other than an organization described in subdivision (a) of section eleven hundred sixteen, for whom he is adding to, or improving real property, property or land by a capital improvement, or for whom he is about to do any of the foregoing, if such tangible personal property is to become an integral component part of such structure, building or real property; provided, however, that if such sale is made pursuant to a contract irrevocably entered into before September first, nineteen hundred sixty-nine, no exemption shall exist under this paragraph.

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.

In order to qualify for the exception from sales tax provided by section 1105(c)(3)(iii) of the Tax Law, it must be established that the installation of the property will result in an addition or alteration to real property that meets the requirements of a capital improvement as defined in section 1101(b)(9) of the Tax Law.

Section 1101(b)(9)(i) of the Tax Law defines "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 527.7(b)(4) of the Sales and Use Tax Regulations provides additional guidance when determining whether an activity is taxable:

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 real property, such services are not taxable. (Emphasis added.)

In this case it must be ascertained whether the waterproofing system installed by the Petitioner meets the criteria set forth by the Tax Law and regulations for an affirmative capital improvement determination.

In the Matter of F. W. Woolworth, Det Tax App Trib, December 1, 1994, TSB-D-94(46)S, the Tribunal in affirming the Administrative Law Judge's determination quoted the following language from that determination:

[w]hat sets apart repair activities which involve merely keeping real property in a condition of fitness, efficiency, safety or restoring it to such condition from activities which constitute a capital improvement, is the three-prong test of whether such improvement substantially adds to the value of the real property, becomes part of the real property such that removal would cause material damage, and whether the same is intended to become a permanent installation. The capital improvement criteria include by their very nature the repair and maintenance functions, i.e., a contractor is both repairing the real property and maintaining it while engaged in the process of doing something of a more permanent nature. Whether the individual facets of the work performed by Brisk in this case go beyond the maintenance point and rise to the level of a capital improvement depends upon the framework in which they are viewed, and the result of the application of the three-prong test. As additional guidance we are afforded the "end result" test (Determination, conclusion of law "G").

TSB-A-96 (42)S
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Applying this rationale, Petitioner's waterproofing system as described in this case, does:

1. Substantially add to the value of the real property or appreciably prolong the useful life of the real property, by eliminating the flow of water onto the basement floor and eliminating the cause of mildew and rot to the basement furnishings, walls and ceiling supports;

2. Become part of the real property or is permanently affixed to the real property so that removal would cause material damage to the property. The wall drainage system is permanently attached to the wall, with rivets, and the portion below the floor level cemented tight (when the concrete floor is closed after verification that the floor drainage system is in place and working); and

3. Become a permanent installation. The homeowner is seeking to eliminate permanently the flow of water onto the basement floor through the installation of the wall drainage system. Petitioner guarantees the wall drainage system for the life of the house.

Based upon the above analysis, Petitioner's particular method of waterproofing described above will constitute a capital improvement to real property. Labor and materials furnished to Petitioner's customers will be exempt from sales tax pursuant to Sections 1105(c)(3)(iii) and 1115(a)(17) of the Tax Law. Petitioner should obtain a properly completed Capital Improvement Certificate from its customers to document its exempt sales. Petitioner must pay sales or compensating use tax on its purchase of materials used to perform the capital improvement. See Tax Law, section 1101(b)(4).

DATED: July 9, 1996

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

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