

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

TSB-A-98(91)S
Sales Tax
December 30, 1998

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S980901B

On, September 1, 1998, the Department of Taxation and Finance received a Petition for Advisory Opinion from Maria T. Jones, Esq., Kramer, Levin, Naftalis & Frankel, 919 Third Avenue, New York, New York 10022.

The issue raised by Petitioner, Maria T. Jones, is whether painting and the installation of wall and floor coverings made in conjunction with the remodeling of an entire floor in a hotel constitutes a capital improvement for sales tax purposes.

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

Petitioner's client is the owner of a building in New York City in which it operates a hotel. Petitioner's client has undertaken to reconstruct several floors of the hotel. Reconstruction requires the closure of the entire floor from use by the public. The reconstruction consists of the following.

During the demolition process, the contractor demolishes and removes any walls slated for demolition as determined by the architect and/or designer. Renovations in a few guest rooms include the removal of walls or parts of walls in order to accommodate new building code requirements with regard to accommodations for persons with disabilities. Occasionally, other walls are demolished for reasons consistent with the owner's use of the floor, for example, changes to service areas. Unnecessary demolition of walls is avoided as the walls are made of solid plaster and are difficult and expensive to remove and replace.

Wall and ceiling moldings are removed by the contractor in preparation for installation of new moldings. All existing electrical fixtures, devices and switches and selected outlets are removed for the installation of new devices. New wiring is installed, wherever needed.

All walls are stripped to the bare plaster. The contractor removes wall covering and paint of any type on the existing walls so that the bare surfaces of the plaster are exposed. In order to prepare the walls for new surfaces, all existing finishes and fixtures are stripped leaving an "unfinished canvas." All walls, ceilings, soffits and fascias, including all vertical and horizontal surfaces are then completely covered with a layer of new plaster. This process, the application of plaster via trowels, is called "skimming." After the new plaster is applied, all the surfaces are sanded. The process is time consuming and labor intensive.

In conjunction with the skimming process, all existing metal surfaces (inclusive of but not limited to convector covers, grills in ceilings, doors and frames, etc.) are stripped. The stripping takes the metal "back to bare metal" to allow a smooth application of new finishes. After the sanding of all plaster surfaces and the complete stripping of all metal surfaces, the surfaces are cleaned and prepared for the new finishes.

Paint is applied to all vertical and horizontal surfaces, inclusive of but not limited to moldings, chair rails, trims, doors and frames, convectors, and ceilings, all of which are physically and permanently attached to the building. All wall surfaces slated to receive wall covering receive an application of a special coating followed by the application of the wall covering.

During the demolition process, the contractor removes all existing carpeting, area rugs and carpet padding so that the building concrete floor slab is exposed. Damage to the concrete floor slab is corrected, if necessary. New padding and carpeting is installed on all floors. Ceramic tile or marble is installed if appropriate.

Existing sink and other bathroom fixtures may be removed in preparation for the installation of new fixtures and other bathroom renovations.

The average cost of the building improvements is from \$2 to 3 million per floor, depending on how many guest rooms are on each floor. The cost of the project is capitalized for book purposes and tax purposes.

Applicable Law & Regulations

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

(i) 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.

* * *

(iii) Notwithstanding the provisions of subparagraph (i) of this paragraph: (A) Floor covering, such as carpet, carpet padding, linoleum and vinyl roll flooring, tile, linoleum tile and vinyl tile, installed as the initial finished floor covering in new construction or a new addition to or total reconstruction of existing construction shall constitute an addition or capital improvement to real property, property or land; and

(B) Floor covering, such as carpet, carpet padding, linoleum and vinyl roll flooring, carpet tile, linoleum tile and vinyl tile, installed other than as described in clause (A) of this subparagraph shall not constitute an addition or capital improvement to real property, property or land.

Section 1105(c)(3)(iii) of the Tax Law provides an exclusion from tax "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."

Section 541.14 of the Sales and Use Tax Regulations provides, in part:

Floor Covering. (a)(1) The installation of floor covering is subject to sales tax, regardless of the method of installation or the surface over which the floor covering is installed, unless the installation qualifies for exemption under subdivision (b) of this section.

(2)(i) The term floor covering includes carpet, carpet tile, carpet padding, linoleum and vinyl roll floor covering, linoleum tile, vinyl tile and other similar floor coverings but not area rugs and the like.

(ii) The term floor covering does not include flooring such as wood flooring, ceramic tile, terrazzo, marble, concrete or other similar flooring. Accordingly, the provisions of this section do not apply to the installation of flooring. See section 527.7 of this Title for the rules to determine whether such flooring qualifies as a capital improvement.

(b)(1) The installation of floor covering is exempt from sales tax only if the following criteria are met:

(i) the installation must be of the initial finished floor covering; and

(ii) the installation must be made in:

- (a) the new construction of a building or structure; or
 - (b) the new construction of an addition to an existing building or structure;
- or
- (c) the total reconstruction of an existing building or structure.

(2) For purposes of this subchapter:

(i) "New construction of a building or structure" means the original construction of a building or structure that did not exist before such construction.

(ii) "New construction of an addition to an existing building or structure" means the original construction of a new room, wing or other discrete, substantial unit of a building or structure which enlarges the exterior of the existing building or structure.

(iii) "Total reconstruction of an existing building or structure" means the complete rehabilitation or replacement of most of the major structural elements of an existing building or structure, such as the roof, ceiling trusses, floor joists, walls, support columns, support beams, girders and the foundation.

(3) Floor covering installed as the initial floor covering shall be deemed to be installed in new construction, a new addition or total reconstruction where it is installed within six months of the date of completion of the new construction, new addition or total reconstruction.

(c) Examples.

* * *

Example 5: A floor covering contractor removes wall-to-wall carpet and installs new wall-to-wall carpet padding and carpet as its replacement. The total charge for the installation and sale of the padding and carpet is subject to sales tax, as it is not installed as the initial finished floor covering.

Example 6: A tenant enters into a bare-wall lease to rent the entire third floor of a new office building. The tenant has the right to finish the third floor of the building to suit its needs. When the lease terminates, all improvements made by the tenant will become the property of the owner of the building. As part of finishing the premises, the tenant arranges with a building contractor for the installation of a suspended ceiling, construction of offices, paneling the walls, installation of

complete electrical, plumbing, heating and air-conditioning systems and for the installation of wall-to-wall carpet. The new ceiling, offices, paneling and electrical, plumbing, heating and air-conditioning systems qualify as capital improvements in accordance with section 527.7 of this Title. The new wall-to-wall carpet qualifies as a capital improvement in accordance with subdivision (b) of this section because it is the installation of the initial finished floor covering in new construction.

Example 7: Assume that the tenant in example 6, in the tenth year of the lease, hires a contractor to renovate the premises. The existing ceiling, overhead lighting, wall paneling and carpet are to be replaced. The new ceiling, lighting and paneling qualify as capital improvements in accordance with section 527.7 of this Title. However, the charge by the contractor for the new carpet and its installation is subject to sales tax because the renovation is not new construction, an addition or a total reconstruction.

Opinion

Petitioner's client owns a hotel that it remodels an entire floor at a time. The remodeling entails demolition, stripping walls down to the bare plaster, replacing electrical and bathroom fixtures, skimming, painting, and replacing floor coverings. With the exception of the floor covering, the remodeling constitutes a capital improvement for sales tax purposes. Charges for painting and installation of wall coverings that are performed as part of the remodeling, therefore, are not subject to sales tax. However, the requirements for floor covering to become a capital improvement are statutorily different than other installations. If the installation of floor covering is not part of new construction of a building or structure, an addition to an existing building or structure, or a total reconstruction of an existing building, the installation does not qualify as a capital improvement. See Hodgson, Russ, Andrews, Woods & Goodyear, LLP, Adv Op Comm T&F, TSB-A-97(67)S. Since the remodeling in this case does not result in new construction, an addition or total reconstruction, charges for the installation of floor covering are taxable under Section 1105(c)(3) of the Tax Law. It should be noted that ceramic tile or marble is not floor covering for purposes of Section 1101(b)(9)(iii) of the Tax Law. See Section 541.14(a)(2) of the Sales and Use Tax Regulations. The installation of such floor tile as part of the remodeling described above would be considered part of the capital improvement, and, therefore, not taxable.

DATED: December 30, 1998

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

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