

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-07(1)S
Sales Tax
February 8, 2007

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S040628D

On June 28, 2004, the Department of Taxation and Finance received a Petition for Advisory Opinion from Countryside Stove and Chimney of Burnt Hills, 839 Saratoga Road, Burnt Hills, New York 12027.

The issues raised by Petitioner, Countryside Stove and Chimney of Burnt Hills, are:

1. Whether installations of various wood, pellet, and gas burning heating appliances qualify as capital improvements to real property for New York State and local sales and use tax purposes.
2. Whether the installation of manufactured stone veneers on an interior or exterior wall qualifies as a capital improvement to real property for New York State and local sales and use tax purposes.

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

Petitioner is a retail store selling and installing gas, wood, and pellet burning stoves that are placed on the floor on noncombustible material either purchased or provided by the customer.

The gas stoves can be either directly vented from the stove out the side of the building using a wall thimble and a cap on the outside of the building or vented into the customer's existing chimney by installing a stainless steel flexible liner in the chimney with its own rain cap.

The wood and pellet burning stoves are also vented straight out the back of the stove and through a wall or chimney. Most of the time, Petitioner does not fireproof the wall or fireproof or reinforce the floor when it installs a wood or pellet burning stove; however, Petitioner sells hearth boards on which the stoves can be placed. Petitioner installs stoves according to the wall clearances specified by the stove manufacturer and/or building code. Petitioner may install a chimney as part of a wood or pellet burning stove installation and may also install a liner that is attached to the wood or pellet burning stove with silicon sealer and installed in an existing chimney.

Petitioner also sells and installs zero clearance fireplaces, which are built into the wall of a building, and sells and installs manufactured stone or brick veneers, which are installed on interior or exterior building walls.

Applicable law and regulations

Section 1101(b)(9)(i) of the Tax Law defines the term *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 1105 of the Tax Law provides, in part:

Imposition of sales tax . . . there is hereby imposed and there shall be paid a tax . . . upon:

* * *

(c) The receipts from every sale, except for resale, of the following services:

* * *

(3) Installing tangible personal property . . . or maintaining, servicing or repairing tangible personal property . . . except:

* * *

(iii) 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;

* * *

(5) 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 article

Section 527.7(a) of the Sales and Use Tax Regulations provides, in part:

(1) *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.

Section 527.7(b) of the Sales and Use Tax Regulations provides, in part:

(1) The tax is imposed on receipts from every sale of the services of maintaining, servicing or repairing real property, whether inside or outside of a building.

* * *

(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.

Opinion

Petitioner is a retail store that sells and installs zero clearance fireplaces and gas, wood, and pellet burning stoves. Petitioner inquires as to whether installations of these appliances qualify as capital improvements to real property.

Petitioner installs stoves according to the wall clearances specified by the stove manufacturer and/or building code. Petitioner may install a chimney as part of a stove installation and may also install a liner that is attached to the stove with silicon sealer and installed in an existing chimney. Presumably, installations in an existing chimney generally require modifications to the existing construction. It may be necessary to remove and enclose the fireplace's existing damper; create or enlarge and enclose an opening to connect the stovepipe with the chimney flue; or install a liner in the chimney flue with its own rain cap.

Section 1101(b)(9)(i) of the Tax Law provides that in order to constitute a capital improvement, an installation must meet all three of the following conditions:

- 1) the installation must substantially add to the value of the real property or appreciably prolong the useful life of the real property;
- 2) the installation must become part of the real property or be permanently affixed to the real property so that removal would cause material damage to the property or article itself; and
- 3) the installation must be intended to be a permanent installation.

Section 527.7(b) of the Sales and Use Tax Regulations further provides that the imposition of tax on a service performed on real property depends on the end result of such service. If the end result of the service is the repair or maintenance of real property, the receipt from such service is taxable. If the end result of the same service is a capital improvement to the real property, the receipt from such service is not taxable.

In order to determine whether a particular installation qualifies as a capital improvement to real property, the entire installation must be considered rather than the individual components of the installation. For example, when an interior wall is repainted, a taxable maintenance service has occurred. However, if an interior doorway is removed and the resultant opening in the wall is closed, the repainting of that wall will qualify as a capital improvement. See *Sales and Use Tax Classifications of Capital Improvements and Repairs to Real Property*, Publication 862 (4/01).

Publication 862, *supra*, provides that the following, among others, constitutes a capital improvement: the addition or complete replacement of a flue or liner (metal or foam) in a chimney; the original installation of wood burning stoves (including strengthening floors and fireproofing walls and floors) or the installation of a masonry or prefabricated chimney. Accordingly, given the nature and method of affixation of Petitioner's stoves, it appears that Petitioner's installation of gas, wood, and pellet burning stoves, as described in this Opinion, may qualify as a capital improvement.

Whether or not a particular installation qualifies as a capital improvement to real property can only be determined by examining the facts and circumstances of that particular installation. Such determination is beyond the scope of an Advisory Opinion. However, it is evident from the facts presented in this Opinion that Petitioner's original installation of gas, wood, and pellet burning stoves, when taken as a whole, generally appear to satisfy the three conditions set forth in section 1101(b)(9)(i) of the Tax Law for a capital improvement.

Therefore, where Petitioner's installation of a gas, wood, or pellet burning stove is performed for a property owner and requires holes to be cut in walls, ceilings, or roofs; flues or liners to be installed and attached in chimneys; or the reinforcement of floors or fireproofing of walls, the entire installation qualifies as a capital improvement to real property.

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Zero clearance fireplaces are installed in a wall of a building and require that the wall be opened and the zero clearance fireplace be inserted in the resulting opening. Such an installation clearly meets the conditions set forth in section 1101(b)(9)(i) of the Tax Law for a capital improvement. Accordingly, the installation of a zero clearance fireplace for a property owner will qualify as a capital improvement to real property.

The installation of manufactured stone or brick veneers will generally meet the conditions set forth in section 1101(b)(9)(i) of the Tax Law to qualify as a capital improvement to real property when installed for a property owner. That is, generally such installations substantially add to the value of the real property, are installed so that removal would damage the property and the stone or brick veneer, and are, presumably, intended to be permanent.

Where installations are made for a lessee or tenant of the real property, the installation will not be considered a capital improvement unless the lease provides that the property which was installed becomes the landlord's property. See *Matter of Flah's of Syracuse, Inc. v James H. Tully, Jr. et al*, 89 AD 2d 729; *Beaman Corporation*, Adv Op St Tx Comm, September 6, 1982, TSB-A-82(32)S.

These conclusions represent the current position of the Department. To the extent *M & C Stove World, Inc.*, Adv Op St Tx Comm, October 28, 1981, TSB-A-81(42)S; *AA Nursery, Inc.*, Adv Op St Tx Comm, August 21, 1985, TSB-A-85(32)S, or any other advice from the Department suggests a contrary conclusion, it does not represent current policy.

DATED: February 8, 2007

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