

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

TSB-A-83(21)S
Sales Tax
May 2, 1983

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S820209A

On February 9, 1982, a Petition for Advisory Opinion was received from Pet Crematory Service of America, Inc., 164 Cabot Street, West Babylon, New York 11704.

The issues raised in this Petition are whether purchases of cremation units used exclusively for the cremation of animals, and of fuel consumed exclusively in the cremation of animals, are subject to sales and compensating use tax.

Petitioner is engaged in the business of cremating the bodies of animals. Petitioner's clients include both individual owners of the deceased animals and veterinarians. Petitioner purchased two crematory units for use in its business. The units were installed by the vendor in the building occupied by Petitioner as a tenant. The units are set in poured concrete. They are vented through the walls and ceiling by means of metal and tubular piping. In addition, the units are connected to the oil storage system of the building by means of plumbing connections.

Section 11 of the lease agreement between Petitioner and its lessor provides as follows:

"All improvements made by the Tenant to or upon the demised premises, except said trade fixtures, shall when made, at once be deemed to be attached to the freehold, and become the property of the Landlord, and at the end or other expiration of the term, shall be surrendered to the Landlord in as good order and condition as they were when installed, reasonable wear and damages by the elements excepted."

Section 1105(c)(3) of the Tax Law imposes a tax on the receipts from the service of "installing tangible personal property . . . except . . . (iii) for installing property which, when installed, will constitute an addition or capital improvement to real property . . ." The term "capital improvement" is defined in section 1101(b)(9) of the Tax Law as follows:

- (9) Capital improvement. 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.

This provision was enacted by Chapter 471 of the laws of 1981, effective July 7, 1981. However, such provision represents a legislative enactment of the substance of the Tax Commission's previously promulgated regulation on the subject, located at 20 NYCRR 527.7(a)(3).

As was set forth in Beaman Corporation, State Tax Commission Advisory Opinion, August 19, 1982, TSB-A-82(32)S, absent a lease provision to the contrary, where a tenant installs a removable trade fixture such installation does not constitute a capital improvement because of a failure to satisfy the criterion of intended permanence set forth at Tax Law, § 1101(b)(9)(iii). A trade fixture is an article of personal property which a tenant places upon or annexes to leased real property for the purpose of carrying on his trade or business. 23 N. Y. Jur, Fixtures §29. These are generally considered not to become part of the realty, because not intended as a permanent installation, and to be removable by the tenant, where removal would not cause substantial injury to the real property to which they are attached. People v. Boyland, 144 N.Y.S. 2d 88, aff'd 309 N.Y. 685; Matter of City New York, 192 N.Y. 295; Antonowsky v. State of New York, 14 Misc. 2d 689. In the present matter, the data supplied by Petitioner does not indicate that removal of the incinerators would cause such substantial injury to the underlying freehold as would rebut the law's strong presumption of the intended impermanence of tenant-installed trade fixtures.

The mere fact that the incinerators are set in concrete does not compel such a result (Craine Silo Co., Inc. v. Alden State Bank, 218 A. D. 263; Beaman Corporation, *supra.*), nor does the presence of the venting and plumbing connections (Dow's Music Mart, 205 Misc. 852). In addition, the unique nature of the personalty here annexed, taken together with the relationship of lessor to commercial tenant, particularly militates against a finding of intended permanence. Finally, while the lease between Petitioner and the lessor does provide for the retention by the landlord of improvements made by the tenant, an exception is specifically carved out for trade fixtures. Accordingly, the installation at issue does not constitute a capital improvement by reason of failure to satisfy the requirement set forth at Tax Law, § 1101(b)(9)(iii). This failure of the requirement of permanence also concludes any question of the incinerators' constituting "additions," within the meaning of the statute. Potter v Cromwell, 40 N.Y. 2d 287.

Petitioner's reliance on the resale provisions of the Tax Law is misplaced. Such provisions relate to those instances where property is purchased for resale as such or as a component part of property sold, or for use in performing certain taxable services where the property is transferred to the customer in conjunction with the performance of the service. Here there is no such transfer.

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Finally, Petitioner inquires as to whether tax is due on the purchase of fuel consumed in cremation. Such purchase is subject to tax under section 1105(b) of the Tax Law. The provisions of the Tax Law relating to capital improvements and resale have no bearing on such purchases.

DATED: April 5, 1983

s/FRANK J. PUCCIA
Director
Technical Services Bureau