

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

TSB-A-87(24)S
Sales Tax
July 9, 1987

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S870410A

On April 10, 1987, a Petition for Advisory Opinion was received from Peek 'n Peak Recreation, Inc., Ye Olde Road, Clymer, New York 14724.

The issue raised is whether amounts paid for engineering, design, transportation of materials, labor and other construction costs and material costs for construction of a ski lift for Petitioner's mountain resort are amounts paid for a capital improvement to real property as defined in Section 1101(b)(9) of the Tax Law and excluded from sales tax under section 1105(c)(3)(iii) of the Tax Law.

Petitioner described its ski lift as follows:

In preparation for construction of the ski lift, Petitioner had to demolish and remove its two existing T-Bar ski lifts and do excavation work to make room for the new larger ski lift. The two T-Bar lifts had been in place for approximately twenty years. These lifts were torn down and salvageable parts were traded in as partial payment for a snow-grooming machine. The salvage (trade-in) value allowed Petitioner for these T-Bar parts was \$20,000, or less than three percent of the cost of the new lift. The concrete footings of the old lifts could not be removed. Bulldozers and backhoes were brought in to bury these foundations or push them into lower areas.

Excavation work also had to be done to allow pouring of the concrete foundations for the new lift. Holes were dug for these foundations, which Petitioner estimates to be six to eight feet deep. The digging was done by backhoes and, in especially steep areas, bulldozers were also required for this preparation work. Approximately 60 yards of concrete were poured for the foundation for the two terminals of the new ski lift, the drive terminal and the return terminal, and approximately 84 yards of concrete were required for the foundations for the eight towers comprising the ski lift. The cost of excavation work and concrete for the foundation of the ski lift was \$84,755.

The separate structural and mechanical components of the ski lift include:

- an A-frame drive terminal;
- a fixed return terminal;
- eight steel towers;
- a DC-SCR 100 horsepower prime mover;
- an auxiliary engine;
- forty pulley blocks;
- 196 galvanized steel chairs;
- 8306 feet of wire rope;
- motor room enclosure materials;

operator enclosure;
anchor bolts;
counterweight;
wiring and other electrical materials; and
paint.

These components were brought to Petitioner's parking lot from Utah in twelve semi-trailers.

The terminals and towers range from twenty-five to forty-five feet in height, are made of steel and weigh up to six tons. Special adjustment bolts, each approximately six feet in length and 1-1/4" in diameter and weighing approximately 35 lbs., were deeply imbedded in the concrete bases so that the terminals and steel towers could be mounted in a manner that allowed them to be adjusted to align them. A helicopter was used to transport the terminals and towers to the slope and lower them onto the concrete bases and bolts. Once mounted on the bolts, the towers were aligned to conform to each other.

After excavation of the foundations and erection of the terminals and towers, the ski lift was further assembled by hanging the cable, clamping on the lift chairs, constructing the motor room, aligning the pulley blocks and installing the electrical wiring. The ski lift contains one hundred ninety-six chairs, each of which weighs approximately 200 lbs. The ski lift covers a 1950-foot slope with a vertical lift of 334 feet. It has a capacity to lift 3600 persons per hour. It was designed in accordance with New York State Tramway codes.

The total cost of the ski lift included payment to the contractor to design the ski lift and to supply the labor, materials and equipment to construct the ski lift, including:

- 1) a construction staking survey,
- 2) excavation of foundations,
- 3) all materials for excavation of foundations,
- 4) all concrete, reinforcement and forming materials for foundations,
- 5) the labor to install the tower and terminal foundations, counterweight and other concrete, including anchor bolts and reinforcing,
- 6) the labor to install all towers and terminal steel,
- 7) the assembly of all structural and mechanical chairlift components,
- 8) the installation of all high voltage wiring and low voltage electrical components from tie-in of Petitioner's main disconnect,

- 9) the interconnection of high voltage wiring and low voltage wiring, including communication cables,
- 10) stringing and splicing of the main haul rope,
- 11) applying the final coat of paint,
- 12) aligning the pulley blocks,
- 13) installing the chairs, and
- 14) labor and materials for a load test.

The cost of the equipment and materials and freight for these components represent approximately fifty-seven percent of the total cost paid by Petitioner. Over ten percent (11.5%) of the total cost breakdown represents engineering and design with the remaining approximately 31% of the total cost representing labor costs. In the past, all components of Petitioner's former and remaining ski lifts except for chairs and cables have been included in Petitioner's real property assessment and thus have been subject to real property taxes. The new ski lift, with the exception of the chairs and cables, has also been assessed for real property taxes.

Sales and Use Tax Regulations section 541.2(g)(1) provides as follows:

- (g) Capital improvement. (1) A capital improvement means 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.
 - (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.

The criteria for a capital improvement must be met in their entirety. The inability to meet any one of the three conditions will prevent the property in question for qualifying as a capital improvement.

Ski lifts and most other forms of machinery and equipment normally require some form of affixation to real property. However, the test is not merely whether such machinery and equipment is affixed to real property. Rather, the test is whether the machinery and equipment is affixed to such a degree that it loses its separate identity and becomes part of the real property or to such a degree that removal would cause material damage to the property or to the article. Material damage is not considered to exist merely because the property in question is worth less when it is removed than it was worth when it was installed and in operating condition.

Within the context of the real property tax, it has been determined that ski lifts were removable without material damage where "the towers were attached by long bolts set into poured foundations and the removal process, simply enough, involved no more than its cutting and severance of the bolts to permit the towers to be lowered gently to the ground and trucked to its new site." West Mountain Corporation v. Miner, 85 Misc 2d 416(1976).

Similarly, within the context of the sales tax, it has been held that various amusement park rides which were all bolted into bases, but which could be readily removed without damage to the property, were not improvements to real property. Charles R. Wood Enterprises, Inc. v State Tax Commission, 67 AD 2d 1042(1979).

Based on the above, the mere bolting and welding of equipment to real property does not, in and of itself, create the degree of permanence necessary to establish that a particular installation is a capital improvement. Accordingly, it must be concluded that the installation of the separate structural and mechanical components of Petitioner's ski lift does not qualify as a capital improvement. However, the installation of the ski lift foundations meets each of the criteria for qualification as capital improvements to real property. Accordingly, the charges to Petitioner for excavation of the foundations and materials incorporated into the foundations are exempt from tax. Other charges attributable to the performance of this capital improvement, such as the labor charges for the installation of the foundations, are similarly exempt but only if they are separately stated in the contract.

Additionally, section 1101(b)(3) of the Tax Law defines receipt as:

The amount of the sale price of any property and the charge for any service taxable under this article, valued in money, whether received in money or otherwise, including any amount for which credit is allowed by the vendor to the purchaser, without any deduction for expenses or early payment discounts, but excluding any credit for tangible personal property accepted in part payment and intended for resale and excluding the cost of transportation of tangible personal property sold at retail where such cost is separately stated in the written contract, if any, and on the bill rendered to the purchaser. For special rules governing computation of receipts, see section eleven hundred eleven. (Emphasis supplied)

Based upon the above provision of the Tax Law, if the cost of transportation of materials incorporated into the ski lifts is separately stated, such amount may be deducted when computing the amount subject to tax.

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Engineering and design services are not among those services subject to the sales tax. However, if these services were not purchased separately from the purchase of the ski lift, but as an integral part of the ski lift they are considered a part of the selling price of the tangible personal property and subject to the sales tax.

Section 1105(c)(3) of the Tax Law imposes a tax on the service of installing tangible personal property. Accordingly, the charge for the service of installing the ski lift (other than the foundations), whether or not separately stated, is subject to tax.

DATED: July 9, 1987

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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