

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

TSB-A-87(30)S  
Sales Tax  
August 31, 1987

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S870428A

On April 28, 1987, a Petition for Advisory Opinion was received from Consolidated Edison Company of New York, Inc., 4 Irving Place - Room 208, New York, New York 10003.

The issue raised is whether the sale of installed transformers, network protectors and vaults, which are taxable as real property under the Real Property Tax Law, would be subject to the sales tax imposed under Section 1105(a) of the Tax Law.

Consolidated Edison Company of New York, Inc. (Con Edison) is a public utility corporation engaged in the manufacture, distribution and sale of electricity to customers in the City of New York and in the County of Westchester. As part of its electric distribution system, Con Edison owns and maintains transformers and network protectors.

Transformers convert the electricity maintained in Petitioner's distribution lines (feeders) from high tension voltage to a lower voltage at which service is provided to the customer. Network protectors are switches and similar devices designed to interrupt the flow of electricity to prevent damage to Petitioner's distribution network or to equipment of customers served from the same feeders.

Pursuant to Con Edison's tariff, a customer owning transformation equipment is eligible to be billed for electricity at lower cost high tension rates. A high tension customer receives power at high voltage directly from Con Edison's distribution feeders and is responsible for converting the electricity so received into a lower voltage for its own use. A number of Con Edison's customers intend to convert from low tension to high tension service. Rather than purchase and install new equipment to do so, however, these customers intend to buy Con Edison's existing transformers, network protectors, and vaults.

Transformers and network protectors are either contained in a concrete vault or mounted on a concrete slab or on a pole. The vaults, slabs or poles are situated on the customer's premises or in the public streets adjacent to them.

Petitioner points out that under Real Property Tax Law section 102(17), the right to occupy the public streets with electrical equipment is defined as a "special franchise." Special franchises are defined as real property by Real Property Tax Law section 102(12)(h), and both the value of the right to occupy the public streets as well as the tangible property located therein are assessed and subjected to real property taxes. Similarly, transformers and network protectors located on a customer's premises are defined and taxed as real property under Real Property Tax Law section 102(12)(f).

Petitioner inquires whether, in view of the taxability of the installations at issue under the Real Property Tax Law, their disposal would qualify as the sale of real property under the sales tax law.

Section 1105(a) of the Tax Law imposes a tax on "[t]he receipts from every retail sale of tangible personal property, except as otherwise provided in this article."

The Sales and Use Tax Regulations of the State Tax Commission explain that the term "tangible personal property" does not include real property. 20 NYCRR 526.8(c).

Although the definition of real property, property and land contained in Regulation Section 527.7 generally corresponds to the classifications of the Real Property Tax Law, under the sales tax law the manner and purpose of the affixation of tangible property to realty determines whether the entire completed installation qualifies as capital construction. Thus, the Real Property Tax Law is not controlling on the issue of what constitutes a capital improvement to real property for sales tax purposes. Matter of Robert Roberson v State Tax Commission, 65 AD2d 898.

Pursuant to Section 1101(b)(9) of the Tax Law, a capital improvement is an addition or alteration to real property which meets all three of the following criteria: [It]

- (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.

The construction of concrete foundations (including poles permanently installed therein) and vaults has been determined to be capital improvements to real property. See: Department of Taxation and Finance Publication 862 [2/81], Classification of Improvements and Repairs to Real Property for Sales Tax Purposes, pg. 7; Matter of Slattery Associates, Inc., Decision of the State Tax Commission, Aug. 16, 1977, STH 77-65; 20 NYCRR 528.12[c][3]; Matter of Utica Wilbert Vault Co., Decision of the State Tax Commission, October 7, 1983, TSB-H-84 (40)S.

However, equipment which retains its identity as tangible personal property after affixation to the realty and is removable therefrom without causing material damage to itself or the supporting structures is not considered to become part of a capital improvement. Matter of Wood Enterprises v State Tax Commission, 67 AD2d 1042; Multi-View Communication, State Tax Commission Advisory Opinion, March 26, 1986, TSB-A-86(12)S.

Receipts from the sale of tangible property are presumed to be subject to tax until the contrary is established. The burden of proving exemption is upon the person required to collect tax or the taxpayer.

Accordingly, Petitioner is required to collect and remit sales tax on the receipts from the sale of its transformers, network protectors, and vaults unless it establishes that such property qualifies as a capital improvement under section 1101 (b)(9) of the Tax Law. The taxability of such property for purposes of the Real Property Tax Law is not controlling. Petitioner has not supplied sufficient information to make a determination regarding qualification as capital improvements within the context of this advisory opinion.

Additionally, if Petitioner sells an installation which, pursuant to the foregoing explanation, consists both of real property and of tangible personal property subject to tax, it must itemize the taxable and exempt charges on the invoice rendered and collect the applicable sales tax. If the sales record lacks sufficient detail for determining taxable and exempt charges, the total amount billed will be subject to tax. 20 NYCRR 532.2(b)(2).

DATED: August 31, 1987

s/FRANK J. PUCCIA  
Director  
Technical Services Bureau

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