

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

TSB-A-98(50)S
Sales Tax
July 31, 1998

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S971231B

On December 31, 1997, the Department of Taxation and Finance received a Petition for Advisory Opinion from Whirlwind Music Distributors, Inc., 99 Ling Road, Rochester New York, 14626. Petitioner, Whirlwind Music Distributors, Inc., provided additional information pertaining to the Petition on February 9, 1998.

The issue raised by Petitioner is whether the installation of a new floor as described below is subject to sales tax.

Petitioner submits the following facts as the basis for this advisory opinion.

Petitioner acquired a building for its manufacturing facilities and offices. The building was constructed in 1966. Its last use was as an injection molding shop. It had been vacant for one and one-half years prior to its acquisition by Petitioner. Petitioner planned on using the building in its business of manufacturing electrical components for the music broadcast and entertainment industries. Therefore, the building required major renovations costing over \$350,000 to prepare it for use by Petitioner.

The renovation or reconstruction consisted of stripping, power washing and painting the cement walls. A new roof was installed. A new loading dock was installed along with new plumbing and new electrical wiring. Insulation was added to all walls and masons were hired to plug the cracks. Asbestos tiles and pipe coating had to be removed. The office area was gutted and completely reconstructed. Several new rooms were added and a new floor was installed.

The existing floor had cracks and contained grease and other contaminants. Since it was impractical to remove a concrete floor from an existing building, Petitioner elected to use the existing floor as a foundation for a new solid epoxy floor.

The existing floor was prepared by means of vacuum shot-blasting, scarification and diamond grinding. After completing the preparation, two distinct coats of 100% solids epoxy were applied. These two coats together comprise a new floor.

The new floor is a wall to wall seamless floor (monolithic) which is easily cleaned and fire resistant. It is USDA approved and has a heavy load capacity which is 2 to 4 times greater than concrete.

Applicable Law and Regulations

Section 1101(b) (9) of the Tax Law provides, in part:

Capital improvement. (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, carpet 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 of the Tax Law provides, in part:

Sec. 1105. 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 lands 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 chapter

Section 527.7(b)(4) of the Sales and Use Tax Regulations provides, in part:

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.

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

(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.

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Opinion

The description of the installation, along with the nature and composition of the new solid epoxy floor, indicates that the solid epoxy floor is similar to the flooring described in Section 541.14(a)(2)(ii) of the Sales and Use Tax Regulations. Therefore, the solid epoxy floor constitutes flooring and not floor covering.

The installation of the solid epoxy floor constitutes a capital improvement within the meaning of Section 1101(b)(9) of the Tax Law. Therefore, its installation is not subject to sales tax pursuant to Section 1105(c)(3)(iii) of the Tax Law.

DATED: July 31, 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.