New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-11(24)S
Sales Tax
September 30, 2011

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. S101214B

On December 14, 2010, the Department of Taxation and Finance received a Petition for Advisory Opinion from [redacted]. Petitioner asks whether niche walls, wall fittings, and paneling that are installed during the initial build-out of a store would be classified as capital improvements or furniture and fixtures.

Based on the facts and pictures submitted (Appendix A), we conclude that the niche walls, wall fittings, and paneling are capital improvements and are not subject to sales and use taxes as tangible personal property.

Facts

Petitioner has a retail store located in New York City, at which it sells high fashion men's and women's shoes, accessories, and other related items. Petitioner installed niche walls, wall fittings, and paneling at the initial build-out of the store at this location which it leases from Lessor. Petitioner submitted numerous pictures to show the "wall units," which are described as floor to ceiling in-store display shelving for merchandise. Petitioner asserts that removing the niche walls and paneling would require a new wall to be put up in its place.

Paragraph 3 of the lease between the Petitioner and Lessor states as to alterations that:

> [a]ll fixtures and all paneling, partitions, railings and like installations, installed in the premised at any time, either by the Tenant or by Owner on Tenant's behalf, shall, upon installation, become the property of Owner and shall remain upon and be surrendered with the demised premises unless Owner, by notice to Tenant no later than twenty days prior to the date fixed as the termination of this lease, elects to relinquish Owner's rights thereto and to have them removed by Tenant, in which event, the same shall be removed from the premises by Tenant prior to the expiration of the lease.

Analysis

Section 1105(a) of the Tax Law imposes sales tax on the receipts from the sale of tangible personal property, except as otherwise provided in Article 28 of the Tax Law. Section 1105(c) of the Tax Law excludes the installation of property that when installed would be capital improvements to real property, as defined by paragraph 9 of section 1101(b) of the Tax Law. The term capital improvement is defined in section 1101(b)(9)(i) of the Tax Law as an addition or alteration to real property that (A) substantially adds to the value of the real property, or appreciably

prolongs the useful life of the real property, (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.

As detailed in Matter of Flah's of Syracuse v. Tully, 89 A.D.2d 729 (3d Dep't, 1982), the pertinent criteria to consider in evaluating whether something is a capital improvement as opposed to a trade fixture are the permanency of the affixation of the improvements to the real property, whether the improvements can be readily removed without damage to them or the real property, and whether the improvements are intended as permanent installations. In evaluating the niche walls, wall fittings, and paneling, it appears that the alterations are so permanently affixed to the real property that they could not be removed without substantial damage to the walls upon which these improvements were placed. Petitioner describes the alterations in two ways. The first reference is to niche walls, wall fittings, and paneling. In contrast, Petitioner also refers to the niche walls, wall fittings, and paneling as "wall units," conveying a different image that is more likened to furniture. However, in reviewing the pictures provided by Petitioner, these alterations to the walls appear to be designed in such a way that they are not readily removed from the walls and removal would cause damage to the niche walls, wall units and paneling satisfying the first two criteria.

As to whether the improvements are intended to be permanent, Petitioner's lease with Lessor provides that "fixtures, paneling, partitions, railings and like installations" to the property become the property of the Lessor upon installation. This lease language shows that the niche walls, wall fittings, and paneling are intended to become part of the premises upon installation, so these improvements are intended to be permanent. Even though the lease also provides that right up to twenty days before the expiration of the lease, Lessor can decide the alterations must be removed, TSB-M-83(17)S made clear that "[a] provision granting the lessor the right to require removal of the improvement will not negate this demonstration of intention of permanence."

Accordingly, based on the facts and pictures submitted, the niche walls, wall fittings, and paneling are capital improvements and are not subject to sales tax.

DATED: September 30, 2011

/S/
DEBORAH LIEBMAN
Deputy Counsel

NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.

APPENDIX A