
Opinion of the Tax Commissioner

Date Issued: May 3, 1994

Opinion No: 93-0020

Tax: Sales

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XXXX
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Subject: Real Personal

This request for an opinion of the Tax Commissioner was received on October 15, 1993. It concerns the application of sales tax on work that your company performs for your customers.

FACTUAL BACKGROUND

(1) The taxpayer installs acoustical wall covering for new theater auditoriums throughout the country.

(2) Different techniques are utilized for the construction depending on the areas to be soundproofed and the desires of the customers.

(3) The first technique consists of construction of a patented pleating bracket at the top and bottom of a wall with fabric stretched over the wall surface to create a uniformly pleated drapery system. The predominant materials used in this construction is a mod acrylic and polyester. Sometimes fiberglass is directly attached to the wall surface prior to the installation of the fabric.

(4) In high-traffic areas of the auditoriums, such as the lower wall, wall coverings resembling a thin lightweight carpet are attached directly and permanently to drywall with adhesive.

(5) The taxpayer also installs complete front end packages for its customers, including frame systems, sewn curtains and screens. These systems are motorized and automated and are attached directly to the front wall of the theater.

(6) The taxpayer also installs speaker brackets that are used to attach surround speakers to the wall.

QUESTION FOR WHICH OPINION IS REQUESTED

Whether or not the above stated installations are exempted from sales or use tax as personal property incorporated into realty.

OPINION

The Ohio Revised Code 5739.01(B)(5) excepts from the definition of a sale a transaction where personal property is incorporated into a structure or improvement to and becomes a part of real property. The relevant statutes defining real and personal property are as follows:

R.C. 5701.02(A) defines real property to include land and all buildings, structures, improvements, and fixtures of whatever kind on the land, and all rights and privileges belonging or appertaining thereto.

R.C. 5701.03(A) defines personal property as: every tangible thing that is subject of ownership, including business fixtures. Such business fixtures do not constitute real property as defined in R.C. 5701.02.

R.C. 5701.03(B) further defines a business fixture as: tangible personal property that has become permanently attached or affixed to the land or to a building, structure, or improvement, and that primarily benefits the business conducted by the occupant on the premises and not the realty.

In our present situation, the lightweight carpet wall covering that is permanently affixed to drywall with adhesive does become real property because the covering primarily benefits the building in general rather than the business of the premises. However, pursuant to R.C. 5739.01(B)(5), the sale and installation of carpeting is not considered to be a construction contract. Therefore, these transactions are properly considered sales subject to sales tax.

In regard to projects involving the installation of acrylic and polyester stretched over the wall surface and secured by pleating brackets to create a uniformly pleated drapery system, the motorized curtain screens, and the installation of speaker brackets on walls, these items are not considered to be part of the real property under the terms of R.C. 5701.03(A). Although the above mentioned items may be permanently attached to the realty, they primarily benefit the business conducted by the theaters' owners. Consequently, they are personal property as defined in R.C. 5701.03(B) and, therefore, sales tax should be imposed on these transactions.

The tax consequences stated in this opinion may be subject to change for any of the reasons stated in R.C. 5739.53(C). It is the duty of the taxpayer to be aware of such changes.

Roger W. Tracy
Tax Commissioner