

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

TSB-A-93 (43)S  
Sales Tax  
August 10, 1993

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S930504A

On May 4, 1993 a Petition for Advisory Opinion was received from Park Plaza Owners Corp., 61-15 & 61-25 97th Street, Rego Park, New York 11374.

The issue raised by Petitioner, Park Plaza Owners Corp., is whether restoration work performed on balconies and catwalks of the buildings owned by it will qualify as a capital improvement for sales and use tax purposes.

Petitioner, a cooperative housing corporation, has entered into an agreement with a contractor which involves the comprehensive inspection, testing, cleaning, replacement and restoration of the balconies and catwalks of the buildings located at 61-15 and 61-25 97th Street, Rego Park, New York.

The agreement between Petitioner and the contractor states that the work shall be divided into the following three phases:

- Phase I - Phase I of the Work shall include all mobilization, filing, security, scaffold rigging, materials and labor for inspection and testing of all balconies and hallways, removal of all deteriorated and cracked concrete, cleaning of all balcony and hallway walking surfaces, coating balcony and hallway surfaces, caulking hallway railing post bases, and clean up for Balcony Row Nos. 1, 2, 3, 4, 18, 19, 20 and 30, as indicated in the Drawings, and Catwalk Row Nos. 1, 2, 3, 5 and 6 at the Site, as indicated in the Drawings.

- Phase II - Phase II of the Work shall include all mobilization, filing, security, scaffold rigging, materials and labor for inspection and testing of all balconies, removal of all deteriorated and cracked concrete, cleaning of all balcony walking surfaces, coating balcony surfaces, and clean up for Balcony Row Nos. 5 through 17 at the Site, as indicated in the Drawings.

- Phase III - Phase III of the Work shall include all mobilization, filing, security, scaffold rigging, materials and labor for inspection and testing of all balconies and hallways, removal of all deteriorated and cracked concrete, cleaning of all balcony and hallway walking surfaces, coating balcony and hallway surfaces, caulking hallway railing post bases, and clean up for all Balcony Row Nos. 21 through 29 and Catwalk Row No. 4 at the Site.

The applications for bid proposals distributed by Petitioner state in part as follows:

B. INSPECTION AND TESTING (BASE BID)

The following preparatory work shall be done with respect to each balcony:

1. Contractor shall test by means of a garden hose under full pressure, the condition of existing drains. All clogged or improperly functioning drains shall be reported to the Merritt Engineering Consultants for decision as to repair procedures. Repairs to, or replacement of drains or parts of the plumbing system shall be by change order to the contract.
2. Contractor shall check balcony surfaces for adequate pitch to drain, preferably not less than one-eighth inch per foot (1/8"/ft.). If ponding persists or if unable to check field conditions, Contractor shall advise Merritt Engineering Consultants before proceedings. Any modification to correct pitch to drain shall be by Change Order to Contract.
3. Prior to the start of concrete or coating work, drains shall be protected. Method shall be submitted to Merritt Engineering Consultants for approval.
4. Contractor shall carefully inspect all surfaces of each balcony and hallway for cracks and spalls. Repairs to each surface shall be performed in accordance with the specified procedure stated herein.
5. Contractor shall examine railings for defects and note all defects in railing by location. Contractor shall notify Merritt Engineering Consultants of such defects, and when requested by Owner, Contractor shall furnish a proposal for the work. If accepted by Owner, the work shall be done by Change Order to the Contract. All work shall be done by competent iron workers and all welding by certified welders.
6. Contractor shall sound the concrete slabs with a 2 lb. hammer, on all surfaces of the balcony. Loose and spalled concrete shall be removed to firm base and shall then be cleaned with water under medium pressure and allowed to dry thoroughly. Contractor shall then repair all concrete surfaces in accordance with herein specified procedures.

C. CONCRETE REPAIRS (UNIT PRICES)

1. Preparation of the Work

- a. Prior to the start of the work, carefully examine the existing surface and verify that the work may be completed in strict accordance with the manufacturer's recommendations and/or specifications. If there are any discrepancies or questionable matters do not proceed until resolved. Be sure that loose or disintegrated material which may impair the application of this work has been removed.
  - b. Properly mix material prior to application in accordance with manufacturer's directions.
  - c. Allow sufficient drying time between coats. Do not apply successive coats until the completed coat has thoroughly dried and has been inspected and approved by Merritt Engineering Consultants.
  - d. Do not apply material during adverse weather conditions which would impair the work.
  - e. Deliver manufacturer's materials to the site in original unopened containers clearly indicating manufacturer's name, brand name, and other identifying information.
  - f. Materials shall be stored on pallets, off the ground, in a dry location, to prevent damage or deterioration.
  - g. Flammable materials will not be permitted to be stored within the building premises.
  - h. Submit to Merritt Engineering Consultants copies of manufacturer's specifications, installation instructions data including a sample copy of the standard guarantee, prior to the start of work (see shop drawing procedures).
2. Cracks up to 2" Thick and Minor Spalls up to 2" Deep
- a. Contractor shall chip out all loose and spalled concrete around cracks, and "Vee" out crack minimum width ½-inch.
  - b. Thoroughly clean cracks of all loose material with oil-free compressed air or vacuum.
  - c. Contractor shall apply bonding compound of Injection Grout Sikadur 52, to the surface of the crack followed by a sealer of Polymer Powdered Mortar using SikaTop 123 on vertical and overhead surfaces and Sikatop 122 on horizontal surfaces. The mortar must be applied while the bonding compound is still tacky in accordance with manufacturer's recommendation.
  - d. Spall edges shall be cut a minimum 1/4" deep patched using Sikatop 110 Armatec and then Sikatop 123 on vertical and overhead surfaces and Sikatop

122 on horizontal surfaces. There shall be no feather edging of new material onto existing slab surfaces.

- e. All new repairs to the curbs, and chips to the existing coating caused by testing the curbs, shall be coated with Thorocoat to match the adjacent existing coating.

3. Major Spalls Greater than 2" Deep

- a. Contractor shall remove all loose and broken concrete, and provide a rough, clean, sound concrete surfaces as previously stated. A minimum of 1 1/2 inch deep groove shall be provided at all edges to avoid all feather edging.
- b. 1/4 inch stainless steep pins shall be pre-drilled into the clean, sound concrete surface a maximum of 6" on center and a depth of 2" using a 1/2" DIA. hole. Stainless wire mesh shall then be wrapped between pins. Fill oversized holes with Dikadur 31 Hi-Mod Gel.
- c. After concrete surface has been prepared an application of bonding compound Sikatop 110 Armatec shall be thoroughly brushed onto the surface.
- d. The concrete shall then be restored to its original shape with polymer-powdered mortar of Sikatop 123 on vertical and overhead surfaces and Sikatop 122 on horizontal surfaces. Where areas need reforming, the forms shall be faced by on approved method to prevent bonding of the mortar to the form. Boding agent and mortar, as well as form preparation shall be approved by Merritt Engineering Consultants.

4. Reinforcement

- a. The existing reinforcing bars shall be carefully examined, and all reinforcing covered with disintegrated loose concrete shall be exposed to where the remaining concrete surface is firm and solid. All exposed reinforcing bars or mesh shall then be cleaned of rust and prepared as follows:
- b. Where the exposed reinforcing is less than 1 1/2" from surface the concrete shall be cut around the bar to expose all rust. Ail surfaces shall be brushed clean to remove all rust. The steel and surrounding concrete shall receive two coats of the Sikatop 110 Armatec.
- c. Where required, all deteriorated reinforcing shall be replaced with bars of the same size and spacing. Concrete shall be cut back to sound reinforcing material, and the new reinforcing bar shall be welded to the existing reinforcing material, bar 20 DIA. The resulting bar shall then receive two coats of bonding agent Sikatop 110, Armatec, and the opening sealed per the preceding specifications. Replacement of existing reinforcing will be by Change Order to the contract.

D. CONCRETE PREPARATION AND REPAIR AT RAILINGS/POSTS (UNIT PRICE)

1. Contractor shall remove all loose and spalled concrete from around the railing posts. Removal shall be to firm surface. All debris shall be washed out with clean water under pressure. All such areas shall be allowed to dry thoroughly.
2. The exposed areas of railing posts shall be cleaned carefully. All rust shall be removed. Contractor shall apply two coats of a rust inhibiting primer. The primer shall be compatible with the concrete repairs to be performed. It shall be applied in accordance with manufacturer's recommendations.
3. Exposed steel reinforcement shall be repaired in accordance with Section III.C.4.
4. The repair of cracks and/or spalls associated with post sites shall be as per Section III.C. This shall also include repair of corners where required.
5. Where the railing posts have lost their stability by the spalling/cracking of the concrete surrounding the support, the support area shall be rebuilt as per Section III.C. Additional adjacent areas may have to be removed, even though the area may be sound, if in the opinion of Nerritt Engineering Consultants this shall be necessary to provide structurally sound repair.
6. The openings around the railing post where a depression exists shall be filled with non-shrink grout, as per Section III.C. provided such depression is at least one inch deep. Grout filing shall be within one-half inch (1/2") above the surrounding concrete surface, mounded to slope away from the post in all directions so as to shed water. Where repairs are done around a railing post Contractor shall make sure there is a proper seal around the railing posts by caulking the joint using Tremco Dymeric.
7. All hallway posts shall be caulked at the base with Tremco Dymeric. (This work to be included in the Base Bid.)

E. COATING BALCONY AND HALLWAY FLOOR SURFACES (UNIT PRICE)

1. The balcony and hallway walking surfaces are to be cleaned free of all loose paint, existing coatings, adhesives, and debris, and are to be coated with Sikatop 144. (Base Bid)

Section 1101(b)(9) of the Tax Law defines a capital improvement as follows:

(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.

Section 527.7 of the Sales and Use Tax Regulations states, in part:

Maintaining, servicing or repairing real property. [Tax Law, §1105(c)(5)]

(a) Definitions. (1) Maintaining, servicing and repairing are terms which are used to cover all activities that relate to keeping real property in a condition of fitness, efficiency, readiness or safety or restoring it to such condition. Among the services included are services on a building itself such as painting; services to the grounds, such as lawn services, tree removal and spraying; trash and garbage removal and sewerage service and snow removal.

(2) Real property, property and land are defined as in subdivision 12 of section 102 of the Real Property Tax Law. Among the items considered in this classification are:

(ii) buildings and structures erected upon, under or above land, or affixed thereto;

(3)(i) A capital improvement is an addition or alteration to real property:

(a) which substantially adds to the value of the real property; or appreciably prolongs the useful life of the real property;

(b) which 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.

(b) Imposition. (1) The tax is imposed on receipts from every sale of the services of maintaining, servicing or repairing real property, whether inside or outside of a building.

Example 1: The replacement of broken windows is a repair to real property, which is taxable.

(4) 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.

Example 9: The replacement of some shingles or patching of a roof is a repair, but a new asphalt shingle roof is a capital improvement.

New York State Department of Taxation and Finance Publication 862 (1/90), New York State and Local Sales and Use Tax Classifications of Capital Improvements and Repairs to Real Property, states, in part:

	<u>Repair, Maintenance or Installation of Tangible Personal Property</u>	<u>Capital Improvement</u>
Pg. 4 Brickwork	Fixing cracks Replacing damaged bricks Repointing Sandblasting	Construction of new or complete replacement of brick:  - Chimneys - Exterior Surfaces - Fireplaces - Stairs or Steps - Structures - Walls
	*	*
Pg. 10 Patios	Painting, varnishing or waterproofing existing patios Repair or maintenance of patios Repairing and patching of holes and cracks Replacing sections of concrete patios Replacement of blocks and flagstones	Complete installation or replacement of:  - Blacktop Patios - Concrete patios - Flagstone, Block or Brick Patios - Patio Roofs - Wood Patios Painting, varnishing or waterproofing new patios

Since the work involved in the instant matter as set forth in the agreement between Petitioner and the contractor and in the bid proposal forms, does not call for the construction of new or complete replacement of balconies, catwalks or hallways, but instead calls for the inspection and testing of balconies and hallways, the removal of all deteriorated and cracked concrete, the cleaning of walking surfaces, the patching and coating of balcony and hallway surfaces, etc. the job is not

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considered to be an addition or alteration to real property which meets the conditions stated in Section 1101(b)(9)(i), (A), (B), or (C) of the Tax Law and Section 527.7(a)(3) of the Sales and Use Tax Regulations and, accordingly, is not considered to be a capital improvement. Based on the nature of the restoration work, the job activities relate to keeping the property in a condition of fitness, readiness or safety or restoring it to such condition. Accordingly the restoration work is considered to be the repair or maintenance of real property. Therefore the total charges to Petitioner by the contractor will be subject to New York State and local sales tax. (See Section 527.7(b)(4) of the Sales and Use Tax Regulations. Also, see pgs. 4 and 10 of NYS Department of Taxation and Finance Publication 862, New York State and Local Sales and Use Tax Classifications of Capital Improvements and Repairs to Real Property.)

DATED: August 10, 1993

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