

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

TSB-A-97(13)S  
Sales Tax

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S961010A

On October 10, 1996, the Department of Taxation and Finance received a Petition for Advisory Opinion from W P Owners Corp., c/o Braverman & Associates, P.C., 331 Madison Avenue, New York, New York 10017.

The issue raised by Petitioner, W P Owners Corp., is whether Petitioner must pay sales tax in connection with the garage waterproofing and restoration project to be performed on its property.

Petitioner submits the following facts as the basis for this Advisory Opinion.

Petitioner is about to enter into an agreement with a construction company, which covers a garage restoration and waterproofing project on its premises. Petitioner submitted specifications and drawings outlining the work to be performed. There are nine one-story garage structures on the premises. The work to be performed is to include demolition, steel and concrete replacement in designated areas, installation of a new waterproofing membrane, new asphalt paving, walkway replacement, new hand railings, stucco facing on the garage stairways and other miscellaneous work.

The scope of the work to be performed is:

1. Remove existing asphalt and cold tar pitch waterproof membrane from concrete roof deck surface.
2. Replace or reinforce existing steel in designated areas.
3. Repair or replace concrete roof deck in designated areas.
4. Install new or replacement handrails and drain grates as shown in the drawings for the project.
5. Install new W. R. Grace Bituthene 5000 waterproofing membrane on garage roof deck parking area (except garage #1).
6. Install new asphalt surface on garage roof deck.
7. Install traffic deck coating system and drains on top side of garage #1.
8. Replace concrete walkways on top of garage.
9. Apply synthetic resilient surface to top side of garage #8.

- 10. Pressure inject horizontal cold joint at garage foundation.
- 11. Repair designated garage slabs, walls, curbs stairs.
- 12. Scrape and paint all existing steel in garage.
- 13. Install new or replacement light fixtures at garage entrances to match existing fixtures.
- 14. Re-stripe/re-number interior and exterior parking spaces to match existing spaces.

Except for items 5, 7 and 9, the work described above will be performed on all nine garages.

Section 1105 of the Tax Law imposes sales tax upon:

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

\* \* \*

(c) The receipts from every sale, except for resale, of the following services:

\* \* \*

(3) Installing tangible personal property, excluding a mobile home, or maintaining, servicing or repairing tangible personal property, including a mobile home, not held for sale in the regular course of business, whether or not the services are performed directly or by means of coin-operated equipment or by any other means, and whether or not any tangible personal property is transferred in conjunction therewith, 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, but excluding services rendered by an individual who is not in a regular trade or business offering his services to the public.

Section 1101(b)(9)(i) of the Tax Law provides as follows:

(9) 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.

Section 1115 of the Tax Law provides, in part:

(a) Receipts from the following shall be exempt from tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten:

\* \* \*

(17) Tangible personal property sold by a contractor, subcontractor or repairman to a person other than an organization described in subdivision (a) of section eleven hundred sixteen, for whom he is adding to, or improving real property, property or land by a capital improvement, or for whom he is about to do any of the foregoing, if such tangible personal property is to become an integral component part of such structure, building or real property; provided, however, that if such sale is made pursuant to a contract irrevocably entered into before September first, nineteen hundred sixty-nine, no exemption shall exist under this paragraph.

Section 527.7(b)(4) of the Sales and Use Tax Regulations provides that "[t]he imposition of tax on services performed on real property depends on the end result of such services. 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 541.1(c) of the Sales and Use Tax Regulations provides that "[r]eceipts from the performance of a capital improvement to real property by a contractor are not subject to the sales tax."

In F. W. Woolworth Co., Dec. Tax App Trib, December 1, 1994, TSB-D-94(46)S the Tax Appeals Tribunal in affirming the determination of the Administrative Law Judge for the reasons stated in the determination quoted from the ALJ determination as follows:

What sets apart repair activities which involve merely keeping real property in a condition of fitness, efficiency, safety or restoring it to such condition from activities which constitute a capital improvement, is the three-prong test of whether such improvement substantially adds to the value of the real property, becomes part of the real property such that removal would cause material damage, and whether the same is intended to become a permanent installation. The capital improvement criteria include by their very nature the repair and maintenance functions, i.e., a contractor is both repairing the real property and maintaining it while engaged in the process of doing something of a more permanent nature. Whether the individual facets of the work performed . . . go beyond the maintenance point depends upon the framework in which they are viewed, and the result of the application of the three-prong test. As additional guidance we are afforded the 'end result' test.

The Tribunal further quoted the Administrative Law Judge's determination that:

isolated tasks might very well be deemed repairs and maintenance; however, where such activities are part of a major renovation project, a fact well established by the documents and testimony, the activities must be viewed in their entire context. To conclude otherwise would be losing sight of the permanence of the work done, the increased value to the building and ignoring the extension of the building's useful life.

In this case, Petitioner is entering into an agreement with a construction company for the restoration and waterproofing of nine one-story garage structures on its premises. The work to be performed is to include demolition, steel and concrete replacement in designated areas, installation of a new waterproofing membrane, new asphalt paving, walkway replacement, new hand railings, stucco facing on the garage stairways and other miscellaneous work. Applying the rationale for the decision in F. W. Woolworth Co., supra, to the work to be performed in this case, clearly certain work to be performed in the restoration and waterproofing of the nine one-story garage structures meets the capital improvement criteria. The removal of all existing asphalt and cold tar pitch waterproof membrane from the concrete roof deck surface and installation of new asphalt surface and waterproofing membrane on the garage roof deck, as well as the replacement of concrete walkways, qualify as capital improvements. While some of the work performed may not on its own merits constitute a capital improvement, the end result of all the work to be performed will result in a

capital improvement being made to the real property. Therefore, pursuant to Sections 527.7(b)(4) and 541.1(c) of the Sales and Use Tax Regulations and F. W. Woolworth Co., supra, and based on the facts presented as indicated in this opinion and the specifications and drawings submitted by Petitioner, the project to restore and waterproof the nine one-story garage structures will not be subject to sales tax. Charges by the contractor to Petitioner for labor and materials that become an integral component part of the garage structures are not taxable. Petitioner must timely provide the contractor with a properly completed Certificate of Capital Improvement (ST-124). See Sections 532.4 and 541.5 of the Sales and Use Tax Regulations.

DATED: March 17, 1997

/s/  
John W. Bartlett  
Deputy Director  
Technical Services Bureau

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