

**New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division**

TSB-A-03(10)S
Sales Tax
March 5, 2003

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S020104B

On January 4, 2002, the Department of Taxation and Finance received a Petition for Advisory Opinion from Cardwell Construction Co., Inc., 955 Buffalo Road, Rochester, New York, 14624. Petitioner, Cardwell Construction Co., Inc., provided additional information pertaining to the petition on January 23, 2002.

The issue raised by Petitioner is whether the first-time sealcoating of new pavement qualifies as a capital improvement to real property for sales tax purposes.

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

Petitioner is a general contractor specializing in residential and commercial asphalt paving of driveways and parking lots. Petitioner finishes its asphalt paving projects by “sealcoating” the asphalt pavement with an industrial grade of sealer which differs from products purchased at retail outlets such as hardware stores.

Prior to the initial sealcoating process, the asphalt must be allowed to cure for a minimum period of six months. Since the sealcoating must be done in relatively warm weather, it is performed on a seasonal basis, generally from six to ten months after the asphalt is applied. Petitioner does not bill the customer for the sealcoating at the time the customer is billed for the paving but contacts each of its customers after an appropriate amount of time has elapsed to have the sealcoating done. Petitioner maintains that the paving is not complete until such time that the asphalt has cured for the minimum period (six months) and has received an initial coating of sealer. Petitioner’s one year warranty on the paving job is extended by an additional year where Petitioner or the property owner applies the type of sealer recommended by Petitioner. Where another contractor applies sealer, the warranty is immediately voided.

Applicable Law and Regulations

Section 1101(b)(9)(i) of the Tax Law defines the term capital improvement as:

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 1105 of the Tax Law provides, in part:

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 land 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 article

Section 1115(a) of the Tax Law provides, in part:

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

* * *

(15) Tangible personal property sold to a contractor, subcontractor or repairman for use in (i) erecting a structure or building (A) of an organization described in subdivision (a)

of section eleven hundred sixteen or (B) used predominantly either in the production phase of farming or in a commercial horse boarding operation, or in both, or (ii) adding to, altering or improving real property, property or land (A) of such an organization or (B) used predominantly either in the production phase of farming or in a commercial horse boarding operation, or in both, as the terms real property, property or land are defined in the real property tax law; provided, however, no exemption shall exist under this paragraph unless such tangible personal property is to become an integral component part of such structure, building or real property.

(16) Tangible personal property sold to a contractor, subcontractor or repairman for use in maintaining, servicing or repairing real property, property or land (i) of an organization described in subdivision (a) of section eleven hundred sixteen or (ii) used predominantly either in the production phase of farming or in a commercial horse boarding operation, or in both, as the terms real property, property or land are defined in the real property tax law, provided, however, no exemption shall exist under this paragraph unless such tangible personal property is to become an integral component part of such structure, building or real property.

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

(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.

* * *

(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.

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

(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.

* * *

(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.

* * *

(5) Any contractor who is making a capital improvement must pay a tax on the cost of materials to him, as he is the ultimate consumer of the tangible personal property.

Section 541.3(d) of the Sales and Use Tax Regulations provides, in part:

Contracts with exempt organizations.

(1) Tangible personal property incorporated into real property owned by a governmental entity or by an exempt organization is exempt, whether the contract is on a lump sum, time and material, cost-plus, or other basis.

(2) Purchase for contracts (other than agency contracts).

(i) Tangible personal property sold to a contractor, subcontractor, or repairman for use in erecting, repairing, adding to, or altering a structure or building owned by an exempt organization, described in section 1116(a) of the Tax Law, is exempt when it is to become an integral component part of such structure or building.

* * *

(v) Documents.

(a) If the customer is a governmental entity, copies of signed contracts and government purchase orders are sufficient evidence to establish the exempt status of the job between the governmental entity and the prime contractor. With respect to the documents required between a prime contractor and the subcontractors, a signed document between them which identifies the project, location, and exempt owner, will form the basis for tax exemption of tangible personal property purchased for incorporation into the exempt project. When purchasing such tangible personal property for the exempt project, the contractor or subcontractor will issue a properly completed contractor exempt purchase certificate to the supplier.

(b) If the customer is an exempt organization other than a governmental entity, the prime contractor must obtain an exempt organization certification from his customer and retain it as part of his records. Copies of the certification must also be furnished to all subcontractors on the job. The subcontractors must retain a copy of the certification in their records with a copy of the contract which identifies the project and the location. When purchasing tangible personal property for incorporation into the exempt project, the prime contractor and subcontractor will issue a properly completed contractor exempt purchase certificate to the supplier.

Section 541.5 of the Sales and Use Tax Regulations provides, in part:

Contracts with customers other than exempt organizations.

* * *

(b) Capital improvements contracts.

(1) Purchases. All purchases of tangible personal property (excluding qualifying production machinery and equipment exempt under section 1115(a)(12) of the Tax Law) which are incorporated into and become part of the realty or are used or consumed in performing the contract are subject to tax at the time of purchase by the contractor or any other purchaser. A certificate of capital improvement may not be validly given by any person or accepted by a supplier to exempt the purchase of these materials.

(2) Labor and material charges. All charges by a contractor to the customer for adding to or improving real property by a capital improvement are not subject to tax provided the customer supplies the contractor with a properly completed certificate of capital improvement.

* * *

(4) Documents; capital improvement contracts.

(i) When a properly completed certificate of capital improvement has been furnished to the contractor, the burden of proving the job or transaction is not taxable and the liability for the tax rests solely upon the customer.

(a) The prime contractor should obtain a certificate of capital improvement from the customer and retain it as part of his records. Copies of such certificate must be furnished to all subcontractors on the job and retained as part of their records.

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(b) A certificate of capital improvement may not be issued by a contractor, subcontractor or any other person to a supplier on the purchase of tangible personal property.

Opinion

Petitioner finishes its asphalt paving projects by “sealcoating” the asphalt pavement with an industrial grade of sealer. Prior to the sealcoating process, the asphalt must be allowed to cure for a minimum period of six months. Since the sealcoating must be done in relatively warm weather, it is performed from six to ten months after the asphalt is laid. Petitioner does not bill the customer for the sealcoating at the time the customer is billed for the paving but contacts each of its customers after an appropriate amount of time to advise the customer to have the sealcoating done. Petitioner’s one year warranty on the paving job is extended by an additional year where Petitioner or the property owner applies the type of sealer recommended by Petitioner.

The painting of new structures, buildings or additions constitutes a capital improvement to real property, but the painting of existing structures, or parts thereof, is considered repair and maintenance. See Sullivan Humes Painting, Adv Op Comm T&F, August 31, 1987, TSB-A-87(31)S. The sealcoating of asphalt is similar to painting. Based on the facts in this Advisory Opinion, where Petitioner can substantiate that the particular sealcoating service it has provided relates directly to its installation of asphalt which is known to have been a capital improvement to real property, and the installation of asphalt occurred within the twelve-month period immediately preceding the first application of the sealcoating performed on the asphalt, the initial sealcoating service is considered to be a part of the capital improvement project which included the installation of the asphalt. Accordingly, under such circumstances, Petitioner’s charges for such initial sealcoating service will not be subject to sales tax. See Section 1105(c)(3)(iii), (5) of the Tax Law. Petitioner should receive a properly completed *Certificate of Capital Improvement* (Form ST-124) from its customer. See Section 541.5(b) of the Sales and Use Tax Regulations. Petitioner must have a means of record keeping which associates the invoice for the initial installation of the asphalt and its properly completed *Certificate of Capital Improvement* with the subsequent invoice and associated *Certificate of Capital Improvement* for the sealcoating performed on the new asphalt. See Technical Services Bureau Memorandum entitled Records Required to Be Kept by Sales Tax Vendors, July 15, 1981, TSB-M-81(9)S for information on record keeping requirements.

Petitioner must pay the sales or compensating use tax on its purchases of materials used in capital improvement projects. Materials incorporated into the real property of organizations or entities exempt from sales and compensating use tax under Section 1116(a) of the Tax Law may be purchased by Petitioner exempt from tax. Section 1115(a)(15), (16) of the Tax Law. When purchasing materials actually incorporated as part of the project into the real property of an organization or entity exempt under Section 1116(a) of the Tax Law, the contractor should issue a properly completed *Contractor Exempt Purchase Certificate* (Form ST-120.1) to the supplier to purchase the materials exempt from tax. See Section 1115(a)(15), (16) of the Tax Law and Section 541.3(b) of the Sales and Use Tax Regulations.

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It should be noted that not all installations of new asphalt qualify as capital improvements to real property. For example, asphalt installed on a parking lot or driveway which is only partially resurfaced is a taxable repair to real property and does not qualify as a capital improvement. Any sealcoating performed on such an installation would constitute a taxable repair or maintenance to real property.

DATED: March 5, 2003

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