

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

TSB-A-03(3)S
Sales Tax
January 27, 2003

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S010315A

On March 15, 2001, the Department of Taxation and Finance received a Petition for Advisory Opinion from Centimark Corporation, 12 Grandview Circle, Canonsburg, Pennsylvania. Petitioner, Centimark Corporation, provided additional information pertaining to the Petition by telephone on June 29, 2001.

The issue raised by Petitioner, Centimark Corporation, is whether installations of its various “flooring systems” as described below may constitute capital improvements to real property.

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

Petitioner is a national contractor of roofing and flooring systems and provides sales and service to industrial and commercial customers. Petitioner manufactures its “flooring systems” which consist of various epoxy, urethane, and water-based polymer coatings. The epoxy coatings consist of separate components which, when mixed together at the job site, form a substance distinct from the components. These epoxy coatings, once the components are mixed, have a limited “pot life” ranging from several minutes to several hours depending on the particular product. That is, once the components are combined, the mixture will set if left unused regardless of whether it is stirred, poured or sealed from contact with air.

Epoxy coatings differ from paint and other conventional sealers in that when paint, sealers or other single component coatings are applied, they “dry” in place. That is, when this type of coating is applied, elements of the coating evaporate leaving the dry coating behind. This method of hardening limits the thickness with which such coatings can be applied. Because they need to be in contact with the surrounding air to dry, these coatings will not dry properly if applied in other than a very thin coat. If applied too thickly, the surface of the coat will dry first. As a result, the underlying layer which must adhere to the surface to which it is applied will be sealed from the air and hence unable to dry. Unused portions of these coatings may be stored for many months and still be usable provided they are tightly sealed from contact with air. The volatile components of these coatings may create unpleasant smells, hazardous breathing conditions, fire hazards or other hazards as they evaporate.

Epoxy coatings, on the other hand, require that two or more components be mixed together at the job site. This mixing of different components creates a chemical reaction between the components causing the resultant mixture to harden or “cure.” This hardening or “curing” is not dependent upon contact with air and no evaporation is required. This feature allows epoxy coatings to be applied as relatively thick coatings without the concern that exists with single component coatings (paint, etc.) that they will not properly adhere to the application surface. Epoxy coatings

will cure underwater or in other airless environments. In this sense, epoxy coatings are similar to concrete or asphalt which also harden by chemical reaction and are not dependent on contact with air for curing. This feature also makes it impossible to store unused portions of the epoxy once the components have been combined and their "pot life" is exceeded. In general, epoxies are less likely than single component coatings to release volatile substances during curing. This characteristic reduces the potential fire hazard, as well as health hazard where personnel need access to the area where a coating is being applied.

Petitioner's epoxy coatings, which are advertised to be resistant to abrasion, impact and chemical damage, dust-free, slip-resistant and easy to clean, fall into four main categories.

- The *Centimark Heavy Duty Resurfacing System* consists of a monolithic, 100% epoxy floor topping used to resurface severely worn or damaged concrete floors. The product is applied by Petitioner's employees by power trowel over the entire floor to be resurfaced. It may be topcoated with another of Petitioner's products. It results in a coating approximately .250 inches thick which is claimed to be the equivalent strength of six inches of concrete.
- The *Centimark Self-Leveling System* is a monolithic epoxy resurfacer designed to restore moderately worn or spalled¹ concrete floors. The product is applied by Petitioner's employees by hand troweling over the entire floor to be resurfaced and is designed to flow into low spots in the floor leaving a level, smooth, gloss finish. It may be topcoated with another of Petitioner's products. Its final thickness ranges from .050 to .125 inches.
- The *Centimark High Build System* is an epoxy coating designed to resurface concrete floors which are not so heavily damaged as to warrant the use of the *Heavy Duty Resurfacing System* but still require a new surface. The product is applied by Petitioner's employees by hand troweling over the entire floor to be resurfaced. It may be topcoated with another of Petitioner's products. Its final thickness ranges from .025 to .120 inches.
- The *Centimark Tri-Coat System* is a multi-coat, roller applied epoxy coating system which provides good impact and chemical resistance and an attractive appearance and is meant to be applied over undamaged concrete floors. It may be used as a topcoat with another of Petitioner's products.

Petitioner's remaining single component products are similar to conventional paint or sealing products.

In all cases, the existing floor is prepared by means of vacuum shot-blasting. This process roughens the existing concrete surface to provide better adherence for the initial epoxy primer coat

¹ Spalled concrete floors refers to floors where the masonry surface flakes off leaving a rough and uneven surface.

by blasting the surface of the floor with steel beads (shot). After completing the shot-blast preparation and application of epoxy primer, an additional main coat of epoxy is applied. Depending on the type of coating used, the thickness of the main coat ranges from .025 inches to .250 inches. Generally, these two coats are completed by applying a top coat which serves to protect the floors' coloring from damage caused by ambient ultraviolet light, and, depending on customers' requirements, dissipate static electric charges. The *High Build System* and the *Tri-Coat System* also serve to dissipate static electric charges. The resulting epoxy surfaces cannot be removed without destroying the flooring and damaging the concrete substrate.

Where an installed floor has sustained damage, repair procedures are similar to those conventionally used to repair damaged concrete, asphalt or plaster. The floors take eight to ten hours to cure for traffic and are fully cured in seven days. All floors have a two year warranty.

Applicable Law and Regulations

Section 1101(b)(4)(i) of the Tax Law defines the term retail sale, in part, as:

A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property, or (B) for use by that person in performing the services subject to tax under paragraphs (1), (2), (3), (5), (7) and (8) of subdivision (c) of section eleven hundred five where the property so sold becomes a physical component part of the property upon which the services are performed or where the property so sold is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax. Notwithstanding the preceding provisions of this subparagraph, a sale of any tangible personal property to a contractor, subcontractor or repairman for use or consumption in erecting structures or buildings, or building on, or otherwise adding to, altering, improving, maintaining, servicing or repairing real property, property or land, as the terms real property, property or land are defined in the real property tax law, is deemed to be a retail sale regardless of whether the tangible personal property is to be resold as such before it is so used or consumed, except that a sale of a new mobile home to a contractor, subcontractor or repairman who, in such capacity, installs such property is not a retail sale. . . .

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

(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.

* * *

(iii) Notwithstanding the provisions of subparagraph (i) of this paragraph:

(A) Floor covering, such as carpet, carpet padding, linoleum and vinyl roll flooring, carpet tile, linoleum tile and vinyl tile, installed as the initial finished floor covering in new construction or a new addition to or total reconstruction of existing construction shall constitute an addition or capital improvement to real property, property or land; and

(B) Floor covering, such as carpet, carpet padding, linoleum and vinyl roll flooring, carpet tile, linoleum tile and vinyl tile, installed other than as described in clause (A) of this subparagraph shall not constitute an addition or capital improvement to real property, property or land.

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

(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.

* * *

(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.

(ii) (a) Floor covering is a capital improvement only when it is installed as the initial finished floor covering in new construction, in a new addition to existing construction or in a total reconstruction of existing construction.

(b) The term floor covering includes carpet, carpet tile, carpet padding, linoleum and vinyl roll floor covering, linoleum tile, vinyl tile and other similar floor coverings. For a detailed discussion and description, see section 541.14 of this Title.

* * *

(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.

* * *

(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.

Section 541.14 of the Sales and Use Tax Regulations provides, in part:

Floor Covering. (a)(1) The installation of floor covering is subject to sales tax, regardless of the method of installation or the surface over which the floor covering is installed, unless the installation qualifies for exemption under subdivision (b) of this section.

(2)(i) The term floor covering includes carpet, carpet tile, carpet padding, linoleum and vinyl roll floor covering, linoleum tile, vinyl tile and other similar floor coverings but not area rugs and the like.

(ii) The term floor covering does not include flooring such as wood flooring, ceramic tile, terrazzo, marble, concrete or other similar flooring. Accordingly, the provisions of this section do not apply to the installation of flooring. See section 527.7 of this Title for the rules to determine whether such flooring qualifies as a capital improvement.

Opinion

Whether certain installations of Petitioner's epoxy type flooring systems constitute capital improvements to real property or maintenance service depends on whether the materials used in the flooring systems are distinguishable from floor coverings and ordinary paint or similar coatings.

Flooring materials are distinguishable from floor coverings by their degree of permanence. See Section 1101(b)(9)(iii) of the Tax Law and Section 541.14 of the Sales and Use Tax Regulations. Flooring materials such as concrete, wood, ceramic tile and terrazzo are materials which are more durable and, therefore, more permanent than floor covering materials such as carpeting, linoleum and vinyl tile.

Petitioner's epoxy flooring systems are troweled onto the concrete surface of a floor in a manner similar to the application of terrazzo. The resulting epoxy surface cannot be removed without destroying the flooring and damaging the concrete substrate. The installation of each of Petitioner's epoxy flooring systems results in a new and different surface to the floor which becomes an integral part of the floor. Petitioner's flooring systems are indistinguishable from the epoxy floors described in Whirlwind Music Distributors, Inc., Adv Op Comm T & F July 31, 1998,

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TSB-A-98(50)S. Therefore, Petitioner's epoxy flooring systems constitute flooring and not floor covering for purposes of Article 28 of the Tax Law.

Petitioner's epoxy flooring systems are also distinguishable from ordinary paint or similar coatings. These flooring systems are troweled onto the underlying surface, and result in a thicker coating than ordinary paint. Unlike paint or similar coatings, Petitioner's epoxy flooring systems significantly improve the strength and durability of existing surfaces.

Petitioner's epoxy flooring systems appear to meet the requirements for a capital improvement contained in Section 1101(b)(9)(i) of the Tax Law. First, the installation of Petitioner's epoxy flooring systems substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property. Petitioner's epoxy flooring systems are designed to substantially increase the strength and durability of concrete floors and eliminate cracks and joints. In an industrial or commercial setting where heavy forklift or steel-wheeled dolly traffic would severely damage a concrete floor, the application of Petitioner's epoxy flooring systems would prevent or dramatically reduce such damage. Furthermore, Petitioner's epoxy flooring systems are resistant to chemicals which would quickly damage concrete or painted concrete, and the flooring systems can be made to dissipate static electric charges which is a critical feature in the manufacture of electronic and computer components and in the handling of flammable substances.

Second, Petitioner's epoxy flooring system becomes part of the real property or becomes permanently affixed to the real property so that removal would cause material damage to the property or article itself. Petitioner's epoxy flooring systems are bonded to the underlying concrete floor by an epoxy primer and become an integral part of the floor. Removal would destroy the epoxy coating and damage the underlying concrete.

Third, it appears that Petitioner's epoxy flooring systems are generally intended to become a permanent installation. The epoxy flooring system itself is as permanent an installation as the underlying concrete floor.

Petitioner's epoxy flooring systems, therefore, will constitute a capital improvement when installed as a complete flooring system over an existing floor, as well as when installed as the initial floor in new construction or a new addition to or total reconstruction of existing construction. Petitioner's receipts from charges to a customer for installing a complete flooring system will not be subject to the tax imposed under either Section 1105(c)(3) or 1105(c)(5) of the Tax Law. If, however, Petitioner's epoxy flooring system is only applied to a portion of an existing floor in order to repair damaged areas, such application of the flooring system will generally not be considered a capital improvement. The application of the flooring system in such case will be subject to tax under Section 1105(c).

Petitioner's non-epoxy (single component) floor coatings such as urethane sealers are similar to paint. When these coatings are applied as part of other work which constitutes a capital

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improvement to real property, they are considered to result in a capital improvement. For example, when these coatings are to be used as a primer coat or topcoat with the installation of an epoxy flooring system, or, where they are used to seal a new concrete floor, the application of such coatings will be considered as part of the underlying capital improvement project. However, when these coatings are applied to an existing floor or other surface, or, on a repaired section of flooring, the charge for such application is a charge for maintaining or repairing real property subject to sales tax.

A determination as to whether a given installation of Petitioner's flooring systems constitutes a capital improvement is a question of fact based on the circumstances in each instance and cannot be made in an Advisory Opinion. See George W. Long, Adv Op Comm T& F, July 24, 1992, TSB-A-92(56)S. However, to the extent that an installation satisfies each of the three statutory conditions of a capital improvement, or to the extent that the completion of a capital improvement project cannot be accomplished without the installation of the flooring system, receipts from the sale of such an installation are not subject to sales tax. (See Rochester Gas and Electric v State Tax Commn, 128AD2d 238, affd 71 NY2d 931; Building Contractors Association v Tully, 87 AD2d 909.) Where an installation is found to constitute a capital improvement, Petitioner's purchases of the materials incorporated into the capital improvement are subject to sales or compensating use tax, unless the capital improvement is made to property of an exempt organization. See Sections 1101(b)(4)(i) and 1115(a)(15) and (16) of the Tax Law.

DATED: January 27, 2003

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