

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

TSB-A-84 (33) S
Sales Tax
October 15, 1984

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S830628B

On June 28, 1983 a Petition for Advisory Opinion was received from Horn Waterproofing Corporation, 32-45 Queens Blvd., Long Island City, New York 11101.

The issue raised is whether the waterproofing of buildings by Petitioner constitutes a capital improvement to real property.

Petitioner, a waterproofing contractor, describes its waterproofing process as follows: "Waterproofing consists of cutting out all of the deteriorated mortar from stone and brickwork, then installing new mortar joints; cutting out all of the deteriorated caulking from window perimeters, construction and expansion joints, then replacing same with new caulking; replacing old roofing with new roofing and insulation; . . . rebuilding of loose and dangerous masonry."

Section 1105(c)(5) of the Tax Law imposes a tax on the receipts from every sale, except for resale, of the service of "Maintaining, servicing or repairing real property..... as distinguished from adding to or improving such real property . . . by a capital improvement.

Section 527.7(a)(1) of the Sales and Use Tax Regulations states that "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; . . . lawn services. . ."

Section 1101(b)(9) of the Tax Law defines the term "capital improvement" to mean an addition or alteration to real property" which satisfies three specified criteria. Reading sections 1105(c)(5) and 1101(b)(9) of the Tax Law together leads to the conclusion that an operation performed with respect to real property could fall into, inter alia, one, but not both, of the categories of (1) maintenance, servicing or repair and (2) the creation of an addition or alteration to real property (which may or may not satisfy the criteria for capital improvements). If an activity falls into the first category, thus, an investigation into its status as creating a capital improvement is concluded. Such category, as is indicated by the quoted provision of the Sales and Use Tax Regulations, encompasses not only the replacement of deteriorated or otherwise unsatisfactory parts or portions of unitary functional entities constituting real property, but cosmetic embellishments as well.

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Petitioner's operations with respect to mortar joints, window caulking and masonry falls within the statutory category of "maintaining, servicing or repairing real property" and the receipts therefrom are accordingly subject to tax. The re-covering and insulation of a complete roof constitutes a capital improvement, the receipts from which are not subject to tax, whereas the recovering and insulation of only a portion of a roof falls within the category of "maintaining, servicing or repairing real property," the receipts from which are subject to tax. Tax Law, 5 1101(b)(9), 20 NYCRR 527.7(b)(4).

Petitioner, accordingly, must collect sales tax on all of its described services except where it installs a new roof with insulation which constitutes a capital improvement, as described above. In such instance no tax need be collected where the charge is separately stated and Petitioner takes from its customer a properly completed Certificate of Capital Improvement (Form ST-124).

DATED: January 25, 1984

s/FRANK J. PUCCIA
Director
Technical Services Bureau