STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
L & L PAINTING CO., INC.	:	
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period December 1, 1998 through November 30, 2005.	:	
	:	DECISION DTA Nos. 822266
In the Matter of the Petition	:	and 822227
of	:	
ESTATE OF ALVIN LEVINE	:	
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period September 1, 2003 through November 30, 2005.	:	
	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on March 18, 2010. Petitioners appeared by Hodgson Russ LLP (Timothy P. Noonan, Esq., of counsel). The Division of Taxation appeared by Mark Volk, Esq. (Robert A. Maslyn, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception. Petitioners filed a brief in opposition. The Division of Taxation filed a reply brief. Oral argument, at the Division of Taxation's request, was heard on December 8, 2010, in Troy, New York.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether the installation of a platform to contain debris and pollutants at a job site was a "temporary facility" at a construction site, which was "a necessary prerequisite to the construction of a capital improvement" and therefore not subject to sales tax pursuant to 20 NYCRR 541.8(a).

II. Whether certain other purchases were also not subject to sales tax pursuant to 20 NYCRR 541.8(a).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

On November 13, 2006, following an audit, the Division of Taxation (Division) issued to petitioner, L & L Painting Co., Inc., a Notice of Determination that asserted $1,047,474.98 in additional sales and use tax due, plus interest, for the period December 1, 1998 through November 30, 2005.

Also on November 13, 2006, the Division issued a Notice of Determination to Alvin Levine, which asserted additional sales and use tax due of $286,874.32, plus interest, for the period September 1, 2003 through November 30, 2005. Mr. Levine, who died in 2006, was assessed as a responsible officer of L & L Painting Co., Inc. His status as a responsible officer during the relevant period is not in dispute. Accordingly, unless otherwise indicated, all references to petitioner refer to L & L Painting Co., Inc.

Petitioner, a family-run New York corporation, has been in the commercial painting business for more than 60 years. Petitioner's vice-president, Ross Levine, testified at hearing and explained that petitioner has two lines of business. Its "commercial division" handles the painting of commercial buildings, including hospitals, apartment buildings, schools and hotels. Its "steel bridge division" handles the painting of bridges. Petitioner's bridge painting projects have included the George Washington Bridge, the 59th Street Bridge, the Williamsburg Bridge, the Manhattan Bridge, the Broadway Bridge and the Tappan Zee Bridge. Since the majority of petitioner's bridge projects were performed within New York City, its chief client on such projects has been the New York City Department of Transportation.

In November 2001, the Division commenced a sales and use tax audit of petitioner for the period December 1, 1998 through August 31, 2001. The audit was later expanded to cover tax periods through November 30, 2005. Over the course of the audit period, petitioner reported more than $423 million in sales and accrued use taxes for taxable purchases on its sales tax returns. As a result of the audit, the Division determined that petitioner's taxable sales were correctly reported and that no additional tax was due on petitioner's purchase of capital assets.

With respect to expense purchases, petitioner did not provide sufficient books and records for a detailed review of such purchases for the entire audit period. The Division was provided with complete expense purchase records for the month of March 2001. On audit, petitioner agreed that this month was representative of its expense purchases, and in June 2006, near the close of this unusually protracted audit, petitioner's comptroller signed a test period election agreeing to the use of a test period audit of petitioner's expense purchases.

Upon examination of petitioner's expense purchases in detail for March 2001, the Division determined additional tax due on purchases totaling $205,622.76. An error rate was computed

based on this detailed review and projected over the entire audit period, resulting in a determination of $1,047,474.98 in additional tax due, as indicated in the November 13, 2006 Notice of Determination.

Most of the additional tax due as determined on audit resulted from the Division's conclusion that a $148,843.00 payment from petitioner to Safespan Platform Systems, Inc. (Safespan) during the test period was properly subject to tax. This was a progress payment for the installation of a 40,000 square foot platform as part of a "containment system" in connection with petitioner's contract to paint the Pulaski Bridge, which connects Greenpoint in Brooklyn to Long Island City in Queens, New York. The invoice in respect of this payment is dated March 15, 2001 and describes the work performed as "installation platform."

In addition to the Safespan invoice, petitioner protested the Division's determination of tax due on the following test period purchases: Cow Bay Contracting ($10,000.00), Massaro Electric ($4,550.00), Stan Chem ($262.00), Chester's Towing ($4,317.00) and Bridge Construction Services ($1,000.00).

In its brief, the Division conceded that no additional tax was due on the purchases from Stan Chem, Chester's Towing and Bridge Construction Services.

Petitioner's bridge-coating (or painting) contracts with the New York City Department of Transportation fall into three distinct categories of work, the choice of which depends on the condition of the bridge and its existing paint or coating. The smallest-scale project is a "spot touch-up" job. On a "spot touch-up" job, the bridge is inspected to identify spots where the existing coating has failed and left the structural steel exposed and susceptible to corrosion. Workers then address each trouble spot, using a hand-scraper to scrape off any loose material,

followed by the application of a primer, then an intermediate coating, and finally a topcoat of urethane-based or other paint to match the bridge's existing paint.

The second type of bridge project generally combines a spot touch-up on specific areas, followed by a new topcoat of paint applied over the entire bridge, designed primarily to enhance the aesthetic appearance of the bridge. In this type of "overcoating" project, any areas of failed paint are still addressed through a spot touch-up. But in overcoating, the matching topcoat also is applied over the entire bridge. On portions where the existing topcoat has not failed, the new topcoat is applied directly onto the existing topcoat, without any surface preparation. Industry publications in evidence describe touch-up and overcoating projects as forms of "maintenance painting" that serve as an "alternative to a full removal and replacement of a failed existing paint system." Painting directly over lead paint or the alkyd paints that were used at the time the Pulaski Bridge was erected poses problems relating to the condition of these paints, which become brittle and lose their adhesive abilities with age. Aside from the potential for paint failure from lack of proper surface preparation, repeated overcoating over existing layers can add an unsustainable amount of weight to the bridge.

The third type of bridge contract performed by petitioner, and that specified for the Pulaski Bridge, generally addresses bridges where at least 20 to 25 percent of the bridge's existing paint or protective coating system has failed, leaving the bridge's structural steel particularly susceptible to corrosion. This type of project calls for the complete removal of the bridge's existing coating and its replacement using a new protective coating system. This is accomplished by way of abrasive blasting of the entire steel structure, which removes any rust, dirt, grease, oil, soluble salts, and foreign materials on the structural steel. Once the bridge is blast-cleaned down

to bare steel, the failed coating (typically including layers of ineffective and hazardous lead paint) is replaced with a high-durability three-to-four layer protective coating system.

This type of total removal and replacement is recognized by the painting industry as a more permanent and effective corrosion control solution for steel bridges than either spot touch-up jobs or overcoating jobs. Moreover, multi-layer zinc- and epoxy-based coating systems, such as that utilized on the Pulaski Bridge (discussed below) cannot be applied over existing paint, but rather must be applied onto bare steel whose surface has been prepared to a state as clean or cleaner than it had been in the factory. When properly applied, a multi-layer zinc- and epoxy-based coating system is designed to last at least 20 years, and can last up to 40 years, depending upon the location of the bridge and the weather and traffic conditions surrounding it. Because of the extensive amount of surface preparation involved and a limited painting "season" in a year providing the right temperature conditions, a full removal and recoating project on a large bridge can take as long as five years to complete.

The New York City Comptroller's Office has instituted published financing rules for determining whether a public works project qualifies as a "Capital Project" that must be funded through the issuance of bonds, or a maintenance expense that can be funded through current City funds. Although "painting" is generally considered a "preventative maintenance program" and not eligible for funding as a Capital Project, the Comptroller's Office, in its "Internal Control and Accountability Directive 10: Charges to the Capital Projects Fund," specifically deems bridge painting to be a "betterment" to a "Capital Asset" and therefore an eligible Capital Project "when it involves a treatment process that incorporates extensive surface preparation and application of a protective coating that has a life expectancy of at least 10 years, and the coating is applied to a bridge that has a useful life of at least 10 years and an original or replacement cost of at least $10

million." The City also considers any comprehensive lead-paint abatement projects that "render an otherwise hazardous or potentially hazardous Capital Asset suitable for use or otherwise increase an asset's utility" to be eligible betterments to Capital Assets.

As noted previously, the Pulaski Bridge connects Greenpoint in Brooklyn to Long Island City in Queens. First opened to traffic in 1954, it is a bascule-type drawbridge that carries six lanes of traffic and a pedestrian walkway over Newton Creek, with city streets on either side of the creek. The bridge also sits above a set of Long Island Railroad tracks.

On or about January 19, 2000, petitioner and the New York City Department of Transportation entered into a contract entitled "Protective Coating of the Pulaski Bridge in the Boroughs of Brooklyn and Queens." This nearly 600-page contract called for the complete removal of all lead paint and coatings on the Pulaski Bridge; the installation of a temporary containment system to contain pollutants and debris during the blasting; and finally, the application of a completely new four-layer, zinc- and epoxy-based protective coating system. In addition to the structural steel on the bridge, the contract also required petitioner to address portions of the bridge's structural concrete, including its piers. The contract's concrete specifications called for the application of two types of epoxy coatings to the concrete, following extensive surface preparation (including sandblasting) to ensure proper bonding of the coatings to the concrete.

The total bid for the Pulaski Bridge project came to about $5.4 million, with $3 million of that cost allocated to the actual paint removal, surface preparation work, and the installation of the protective coating system over the bridge's structural steel. An additional $1.5 million of the bid was attributable to the installation of a required temporary "Class 1A" containment system, mandated by the New York City Department of Transportation under the contract, to fully

contain debris and pollutants at the site during the abrasive blasting and removal of the bridge's hazardous lead paint.

The abrasive-blast cleaning required on the Pulaski Bridge was extensive. Petitioner was required to use a dry-abrasive blast (similar to sandblasting, but using larger, sharp-edged particles for maximum cutting effect) to remove all existing paint from the entirety of the bridge, as well as any rust, grease, oil, soluble salts, or other foreign materials that had accumulated on the steel. The contract required petitioner, through the abrasive blasting, to achieve a final surface cleanliness on the structural steel known in the industry as an "SSPC-SP10 Near-White Blast."

"SSPC-SP10 Near-White Blast" (SP-10) is an industry specification developed by the Society for Protective Coatings, a nonprofit association of engineers and others devoted to researching and developing new coatings and application methods to protect industrial steel structures. The primary function of the SP-10 preparation is two-fold: to remove any and all traces of substances from the surface of the steel that can lead to early failure of the protective coating system, and to obtain an optimal surface "profile" or roughness to optimize adhesion of a new coating system. In an SP-10 preparation, the steel is blasted to a point where only five percent of any material other than bare steel is present - mostly in the form of isolated stains. This preparation includes even the removal of "mill scale," a thin layer of oxidation found on steel in its factory state, which has been shown to limit the adhesion of coatings placed over it and to cause premature failure of coatings.

Stephen Pinney, an engineer and consultant with more than 30 years of experience working in the protective coatings field, appeared on behalf of petitioner and was qualified as an expert witness in the field of corrosion control and protective coatings. Among other qualifications

from his long career, Mr. Pinney has held positions with the National Association of Corrosion Engineers and the SSPC itself.

Mr. Pinney testified that the SP-10 preparation is the minimum surface preparation for steel that allows for the use of the zinc-rich primer specified in the Pulaski contract.

Mr. Levine, meanwhile, explained that the combination of surface preparation and the coating system used on the Pulaski Bridge were "categorically different" from anything petitioner would use on a commercial building. Petitioner has never sandblasted, much less been required to perform an SP-10 "near-white blast" on a commercial building. This is primarily because commercial buildings do not require the corrosion-control measures or extremely expensive protective coating systems, such as those using zinc-rich primers, that are required on steel bridges.

According to Mr. Pinney, steel bridges over water in a marine environment like the Pulaski Bridge are particularly prone to corrosion from a combination of moisture in the atmosphere, marine salts, salts used to treat the bridge's roadways in the winter, and normal wear brought on by traffic usage. Exposure to water causes steel to corrode, and salts in the water accelerate corrosion, Mr. Pinney explained. Left unchecked, corrosion can deteriorate portions of a bridge's structural steel where stress is greatest, such as around the bolts and gusset plates that fasten larger steel members of the bridge together. Mr. Pinney noted that corrosion at such points can lead to collapse. Multi-layer protective coating systems such as that employed on the Pulaski Bridge are designed to prevent corrosion and collapse of steel structures.

Mr. Pinney testified at length as to the effectiveness of using a zinc-rich primer within a protective coating system as the leading method of preventing corrosion and prolonging the life of a bridge. Zinc, unlike steel, is extremely resistant to chlorides (i.e., salts). Mr. Pinney

explained that any newly constructed steel bridge today would likely use a coating system built upon a zinc primer.

The Pulaski contract specifications required the use of an organic zinc primer consisting of no less than 80 percent actual zinc. A zinc primer consists of two components that are mixed together at the job site: a pure zinc powder, and a liquid binding agent that allows for the even application of the zinc. As both of petitioner's witnesses explained, the effectiveness of zinc is its ability, when combined with the binding agent and applied to bare, blasted steel, to bond both mechanically and atomically to the steel and to act as an anode, sacrificing itself in preference to the steel. The zinc primer is metal with liquid (the bonding agent) around it, and that liquid ultimately hardens because of the chemical reaction. Extensive abrasive blasting is required for a zinc primer not only to allow a pure bond and electron flow between the zinc and the steel, but also because, as noted previously, blasting increases the surface area of the steel by creating a "profile" or "anchor pattern" of peaks and valleys on the steel surface. This creates an optimum bond and the opportunity for more zinc to bond to the steel, essentially filling in the peaks and valleys with zinc particles.

This surface preparation, and the chemical reaction between zinc and steel, also makes the zinc layer impossible to remove without re-blasting the surface and, inevitably, removing some of the steel itself. Although the zinc primer, like other layers in the Pulaski Bridge coating system, could be applied using sprayers, the Pulaski contract also required a "stripe coat" of the primer to be applied via brushes over sharp-edged areas, including nuts and bolts, to ensure adequate application.

The second layer of the coating system specified in the Pulaski contract was a "high-build" epoxy intermediate coat. This was applied after the application of a "penetrating sealer" over the

zinc, designed to prevent gasses or bubbles from welling up between the primer and epoxy coat. Like the zinc primer, the epoxy intermediate layer consisted of two components mixed at the job site: an epoxy resin and a hardening agent that causes the coating to harden by chemical reaction. While the zinc primer's primary effect is its chemical resistance to chlorides, the epoxy layer functions as a hardened, nonporous, chemically-resistant physical barrier between the steel and the atmosphere. Along with the evaporation of a solvent, the hardening of the epoxy occurs through chemical reaction caused by mixing the two separate components. This is different from a typical waterborne latex paint used on houses, which cures through the water evaporating and leaving a latex film behind. The chief benefits of epoxy as a bridge coating are its toughness, resilience, and adhesion.

The final layer called for in the Pulaski Bridge protective coating system consisted of a topcoat of "acrylic aliphatic urethane." As opposed to the zinc primer and epoxy coating, this urethane layer is applied predominantly for aesthetic purposes. Even though epoxy coatings are available in colors, they react adversely to ultraviolet rays, and exposure to sunlight causes them to "chalk" and lose aesthetic appeal. Thus, the primary purpose of the urethane topcoat on a bridge is to maintain aesthetic appeal.

Both of petitioner's witnesses testified that the purpose of a complete replacement job like that at the Pulaski Bridge is to enhance and protect the structural integrity of the bridge by creating a new chemically and physically resistant barrier to block the deleterious effects of corrosion. According to Mr. Pinney, the primary function of such a steel protective coating system is to ward off corrosion, which can cause structural instability and even collapse of steel structures.

While the substantive work on the Pulaski Bridge involved stripping the bridge down to bare steel and applying a durable new protective coating system, nearly a third of the project's cost related to the installation of the Class 1A containment system. This extensive system was mandated by the New York City Department of Transportation in the contract, within the specifications for lead paint removal. Since the Pulaski project involved dry abrasive blasting, the specifications called specifically for a Class 1A system in order to prevent lead paint, dust, and other debris from falling onto pedestrians, traffic, train tracks, Newton Creek below, or being released into the air. The containment system was also required in order to contain the large amounts of abrasive itself released during the blasting process. Because of this, the Class 1A containment system required a substantial flooring system able to bear at least four times its maximum intended weight without failure. Additionally, all Class 1A systems require vertical screening extending from the flooring to create a fully airtight work area.

Of the five classes of containment systems generally employed on paint-removal projects on steel structures, a Class 1A system has the most stringent requirements for emissions control. Because of the degree of lead paint on New York City bridges and the City's population density, the City would always mandate a Class 1A system on a complete removal project like the Pulaski Bridge, according to Mr. Pinney. Environmental Protection Agency and Occupational Safety and Health Administration standards also dictate the degree of containment necessary for paint removal jobs, as do New York City's own occupational safety and environmental remediation rules and regulations.

Without a temporary containment system meeting all of the contracted-for specifications, petitioner would have been contractually precluded from performing a protective coating project at the Pulaski Bridge.

In order to provide the flooring system necessary for the required Class 1A containment system, petitioner contracted with Safespan on or about February 7, 2000 for the installation and eventual removal of a Safespan "shielding system" at the Pulaski site. The total contract cost to "supply, install, move and remove" this platform system was $650,000.00.

The purpose of the Safespan platform was not to provide petitioner's workers access to the bridge for painting, and petitioner's workers, in fact, did not utilize the platform as a means of access.

As noted previously, in addition to the Safespan payment, petitioner disputed the taxability of certain other test period purchases deemed taxable on audit (***see*** Finding of Fact above). As also noted, the Division has conceded that certain of these purchases were nontaxable (***see*** Finding of Fact above). The following purchases remain in dispute:

a) Cow Bay Contracting. The bill in respect of this $10,000.00 expense describes the work performed as the "Complete removal of temporary lights and re-install existing lights" at the Williamsburg Bridge. Mr. Levine testified that petitioner's work at the Williamsburg Bridge in 2001 was a complete removal of the bridge's protective coatings, abrasive blasting, installation of a Class 1A containment system, and application of a new protective coating system, in a contract with the New York City Department of Transportation, the same category of project as the Pulaski Bridge project.

b) Massaro Electric. Three invoices totaling $4,550.00 were determined taxable on audit. The invoices themselves and the comments in the auditor's workpapers describe the work as the installation and disconnecting of wiring for trailers at the Williamsburg and Broadway Bridges. Mr. Levine testified that, like the Williamsburg Bridge, the Broadway Bridge job also involved the complete blasting, removal, and replacement of that bridge's protective coating system.

No certificate of capital improvement in respect of the Pulaski Bridge contract was provided by petitioner to the Division on audit. After the audit, however, petitioner provided such a certificate dated October 16, 2003.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge determined that the Pulaski Bridge Project was a capital improvement, and that the installation of a platform to contain debris and pollutants was a "temporary facility on a construction site" and a necessary prerequisite to the capital improvement and therefore not subject to sales tax.

In making his decision, the Administrative Law Judge relied on section 1105[c][5] of the Tax Law, which, in imposing a tax on the receipts from certain services including maintaining, servicing or repairing real property, specifically excludes a project that adds to or improves real property by a capital improvement as such is defined by Tax Law § 1101[b][9][i]. Such section defines a capital improvement as an addition or alteration to real property that substantially adds to the value of the real property or appreciably prolongs the useful life of the real property, is permanently affixed to the real property, so that removal would cause material damage, and is intended to become permanent (***see*** Tax Law § 1101[b][9][i][A], [B] and [C]).

The Administrative Law Judge applied an "end result" test to distinguish the Pulaski Bridge Project from maintenance or repair. The Administrative Law Judge determined that the bridge project met the definition of capital improvement as it met the three-part definition under Tax Law § 1101[b][9][i]. The Administrative Law Judge stated, citing ***Matter of Gem Stores*** (Tax Appeals Tribunal, October 14, 1988), that such questions are decided on a case-by-case basis, and determined that the project herein added substantially to both the useful life and the value of the bridge, became permanently affixed to the bridge, and was intended to be permanent.

The Administrative Law Judge noted that the Division did not address the question of whether the Pulaski Bridge Project met the three-part definition of capital improvement, but rather contended that the services were taxable as maintenance because painting is specifically included within the definition of maintaining, servicing and repairing as set forth in the Division's regulations. The Administrative Law Judge stated that this was unfortunate for the Division, "because where, as in the present matter, an activity meets the statutory definition of capital improvement, then the activity must receive capital improvement treatment" (Determination, Conclusion of Law "R") and, having met the three-part definition, it was immaterial that the services included painting. The Administrative Law Judge concluded that petitioner's payment of $148,843.00 to the provider of the installation of the platform was not subject to sales tax, and that the Division's assessment of tax on that payment was improper.

The Administrative Law Judge stated that petitioner failed to show that the other purchases remaining at issue were also entitled to capital improvement treatment, stating that it was not shown that the expenditures therein were "necessary prerequisites" to capital improvement as required under 20 NYCRR 541.8(a).

ARGUMENTS ON EXCEPTION

On exception, the Division argues that the work done on the Pulaski Bridge Project was not a capital improvement but maintenance work, as set forth in Tax Law § 1105(c)(5) and 20 NYCRR 527.7. The Division contends that sections 527.7(a) and 541.2 of the regulations specifically include painting in the definition of the terms maintaining, servicing, or repairing. The Division also cites Tax Services Bureau Memoranda and Publications for the proposition that the painting of existing structures is repair and maintenance.

The Division argues further that where there is an issue of whether services constituted a capital improvement or a repair or maintenance, the regulations (20 NYCRR 527.7[b][4]) apply an end-result test that services will be taxed according to the end result. If the end result of the services is repair or maintenance, then the services are subject to tax. The Division contends that the end result of the work at issue was to keep the property in a condition of fitness, readiness or safety, and was not a reconstruction of the bridge. The Division maintains that there were no structural alterations, only a removal of old paint and the application of a new exterior coating, which restored the bridge to its original value and condition of fitness. The Division asserts that since the end of the service was repair and maintenance of the real property, such service was not a capital improvement.

The Division further argues that the Administrative Law Judge erred in distinguishing the work performed on the Pulaski Bridge Project from other kinds of painting, asserting that "painting is painting." According to the Division, the services and materials provided by petitioner on the Pulaski Bridge Project cannot be differentiated from the meaning of "painting" as used in the statute and regulations.

The Division urges the Tribunal to revisit its decision in ***Matter of Nu-Look Specialists*** (Tax Appeals Tribunal, November 3, 1988), which created a *per se* rule that if the work performed meets the three-part test of Tax Law § 1101(b)(9), the work was in the nature of a capital improvement, even though it includes maintenance or repair service. The Division argues that in ***Nu-Look***, the Tribunal created a "default" finding of capital improvement if the work met the three-part test despite the fact that the regulations were intended to prevent such a default finding and require a review of the activity in light of the statutory distinctions.

The Division also contends, as it did below, that the platform was not a temporary facility nor a "necessary prerequisite" as defined in 20 NYCRR 541.8.

Petitioner disputes the Division's argument that the Tribunal should revisit its decision in ***Matter of Nu-Look*** (***supra***), contending that the Tribunal's analysis was correct. Petitioner argues that when services to real property are performed, their taxability depends on the "end result" of those services, and if the end result of such services performed on real property is a capital improvement, then the services are excluded from tax. Petitioner further contends that the Division's exception is an inappropriate avenue to seek reversal of a prior Tribunal decision.

Petitioner argues that the Administrative Law Judge properly determined that the platform was a temporary facility, which was a necessary prerequisite to the project as defined in 20 NYCRR 541.8. Petitioner states that the Administrative Law Judge correctly dismissed the Division's argument that the examples contained in said regulation were the only facilities of a construction site that could qualify as a temporary facility relying on the rules of statutory and regulatory construction that provide that the meaning and effect should be given to all words of a statute or regulation. Further, petitioner asserts that the facts in the record support the Administrative Law Judge's conclusion that the platform was a necessary prerequisite to the completion of the project.

Petitioner further argues that the Administrative Law Judge properly determined that the work performed on the bridge constituted a capital improvement. Petitioner argues that in regard to the underlying question of whether the project was a capital improvement, the bridge project met the three-part test. It argues that the work done by petitioner added value to the bridge and prolonged its useful life. Petitioner contends that the protective coating system was necessary to fortify the bridge and its structural steel against corrosion, and further, that as found by the

Administrative Law Judge, the highly advanced zinc and epoxy-based four-layer system that replaced the bridge's failing layers of lead paint was designed to protect the bridge for between 20 and 40 years, thus appreciably prolonging its life. Petitioner further contends that the protective-coating system became firmly affixed to the bridge, so that its removal would damage the bridge, asserting that it could not be removed without re-blasting the surface and thereby destroying the coating system. Additionally, petitioner argues that the Administrative Law Judge correctly found that the chemical composition of the protective-coating system, the extensive surface preparation required to install it, and its specific applicability to the bridge's corrosion control needs were indicative that the system installed was intended to be permanent.

No exception was taken to the Administrative Law Judge's determination that other purchases (***see*** Finding of Fact above) were not entitled to capital improvement treatment.

OPINION

Tax Law § 1105(c) provides, in pertinent part, for a tax on:

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

* * *

> (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* . . . (emphasis added).

Tax Law § 1101(b)(9)(i) defines 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.

The regulations adopted by the Division to define capital improvement mirror the statutory language (***see*** 20 NYCRR 527.7[a][3]).

The terms maintaining, servicing and repairing real property, as distinguished from a capital improvement, are defined in the Division's regulations as follows:

> *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 (20 NYCRR 527.7[a][1]).

The regulations adopted by the Division concerning the imposition of tax where services are performed on real property seek to distinguish capital improvements to real property from maintaining, servicing and repairing real property through a so-called end result test:

> 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 (20 NYCRR 527.7[b][4]).

The application of the "end result" test supports the Administrative Law Judge's determination because the explicit purpose of this regulation is to determine whether activities performed on real property result in a capital improvement or a taxable maintenance service by looking at the end result of the activities. Where, as here, the determination based on the facts presented is that the activities meet the statutory definition of a capital improvement, then under the test, the service is a capital improvement. The regulation does not suggest that an activity

whose end result satisfies the definition of a capital improvement could nevertheless be a taxable maintenance or repair service (***see Matter of Nu-Look Specialists***, ***supra***). As we stated previously in ***Nu-Look***, there is nothing in the Tax Law or regulations to indicate that a service that has been found to meet the definition of a capital improvement requires additional proof to remain excluded from tax (***Matter of Nu-Look Specialists, supra***).

The capital improvement provision in Tax Law § 1105[c][5] is not to be viewed as an exception as to which the taxpayer bears the burden of proof, but rather is to be construed under the rule that "[a] statute which levies a tax is to be **construed most** strongly against the government and in favor of the citizen" (***Building Contractors Assn. v. Tully*** 87 AD2d 909 [1982], ***quoting Matter of Grace v. New York State Tax Commn.***, 37 NY2d 193, 196 [1975]). In ***Building Contractors***, the court held that the service at issue was not taxable where its "end result" was a capital improvement (***Building Contractors Assn. v. Tully, supra***). We agree with the Administrative Law Judge's findings that petitioner's activities met the statutory criteria for a capital improvement.

Moreover, we agree with the Administrative Law Judge's determination that the platform was a temporary facility and a necessary prerequisite to the construction of a capital improvement to the real property. 20 NYCRR 541.8(a) provides as follows:

> Subcontracts to provide temporary facilities at construction sites, which are a necessary prerequisite to the construction of a capital improvement to real property, are considered a part of the capital improvement to real property. Charges for installation of materials and the labor to provide temporary heat, temporary electric service, temporary protective pedestrian walkways, and temporary plumbing by a subcontractor are therefore not subject to tax provided the subcontractor receives a copy of the properly completed certificate of capital improvement issued by the customer to the contractor.

In determining whether the platform was a "temporary facility," we reject the Division's argument and find that the examples listed in the second sentence of section 541.8(a) of the regulations are not intended to be exclusive, as such a restrictive reading would render the entire first sentence superfluous. We find, further, that petitioner's payment of $148,843.00 to Safespan for the installation of a platform at the project was not properly subject to sales tax, because under the New York City contracts, by which the work was done on the Pulaski Bridge Project, such installation of temporary facilities was a necessary prerequisite for the construction of the capital improvement. The platform in the Class A1 containment system of which it was a part was required under petitioner's contract, with the New York City Department of Transportation. Furthermore, the containment of pollutants and debris from the work on the bridge was legally necessary for reasons of public health and safety. As legally necessary, it was obviously a necessary prerequisite and thus the cost of the same was exempt from tax.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petitions of L & L Painting Specialists, Inc. and the Estate of Alvin Levine are granted to the extent indicated in conclusion of law "Q" of the Administrative Law Judge's determination; and

4. The Notice of Determination dated November 13, 2006 is cancelled to the extent indicated in paragraph "3," above.

DATED:Troy, New York
June 2, 2011

/s/ James H. Tully, Jr.
James H. Tully, Jr.
President

/s/ Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner