

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
F. W. WOOLWORTH CO. : DETERMINATION
for Revision of a Determination or for Refund : DTA NO. 809878
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period June 1, 1986 :
through May 31, 1989. :

Petitioner, F. W. Woolworth Co., 233 Broadway, New York, New York 10279, filed a petition for revision of a determination or refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1986 through May 31, 1989.

A hearing was held before Catherine M. Bennett, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on October 23, 1992 at 9:15 A.M., with all briefs to be submitted by June 4, 1993. Petitioner appeared by Michael Bray, Esq. and submitted its brief on March 15, 1993. The Division of Taxation, represented by William F. Collins, Esq. (Carroll R. Jenkins, Esq., of counsel), submitted its brief on May 3, 1993. Petitioner's reply brief was filed with the Division of Tax Appeals on June 4, 1993.

ISSUE

I. Whether certain expenditures by petitioner for work performed on the Woolworth Building during the audit period qualified as capital improvements to real property and were therefore exempt from sales and use taxes under the Tax Law.

II. Whether penalties were properly imposed upon petitioner for failure to pay the sales and use tax as assessed.

FINDINGS OF FACT

Post-hearing petitioner submitted a series of proposed findings of fact. It was determined by the Administrative Law Judge that proposed facts nos. 1, 4, 6, 7, 10-13, 15, and 17-35 were

fully supported by the record, and accordingly are reproduced and/or incorporated with others below. Proposed facts nos. 2, 3, 5, 8, 9, 14, and 16 were partially supported by the record, and as such, were accepted to that extent. Additional findings of fact are also set forth below by the Administrative Law Judge.

F. W. Woolworth Co. ("petitioner" or "Woolworth") is a New York corporation conducting a retail merchandising business throughout the United States. Woolworth's headquarters and home office are in the Woolworth Building (the "building") located at 233 Broadway in New York City. The building has been certified as a historic landmark structure.

The tax assessment in question arose subsequent to Woolworth's adoption of a major renovation plan to rehabilitate the building's ornate terra cotta facade, and roofing elements and windows. The restoration program was conducted in conformity with Federal and State guidelines for the restoration of historic landmark structures.

The amount spent by petitioner on the restoration program and charged to the capital account on Woolworth's books under the "Exterior Restoration Account" (Account No. 0175) for the period February 1977 through January 1990 totalled \$25,785,110.65. Included in such amount were expenditures for the audit period totalling \$2,068,254.00. During corresponding years, the assessed value of the Woolworth Building increased from \$12,600,000.00 to \$48,000,000.00 (between 1978 and 1990), and for the audit period (1986 through 1989) the increase in assessed value was from \$26,500,000.00 to \$40,000,000.00.

The expenditures made by petitioner related entirely to invoices from Brisk Waterproofing Co., Inc. ("Brisk"). Both petitioner and Brisk treated these expenditures as capital improvements exempt from New York State's sales and use tax. There were 66 Brisk invoices during the audit period, each consisting of a cover sheet with daily time sheets for the work done during the month preceding the date of the invoice. The time sheets listed the Brisk employees that worked on the job for a particular date and the number of hours that they worked, and contained a summary of the work performed by these employees. There were 20 Brisk invoices characterized as "inspection or L.L. 10 work" which were charged to

Woolworth's Exterior Maintenance and Miscellaneous Repairs Account (Account No. 4690). Local Law 10 is a law enacted by New York City in 1981 requiring building owners to make perpetual inspections of the sides of the building to protect pedestrians. The remaining 46 invoices were characterized by Brisk as "restoration work" and charged by Woolworth to its Exterior Restoration Account (Account No. 0175). The determination of whether the daily work was restoration or inspection (or L.L.10) work was primarily done by Michael Radigan, a 38-year employee of Brisk Waterproofing, a nationwide masonry and waterproofing business, whose testimony was accepted as expert testimony in this matter. Mr. Radigan made his determination in this regard by examining the daily time sheets which summarized the work performed for a particular day as consisting of rigging, handling of transportation of heavy equipment up to a particular work location, removal of terra cotta, mold making, building of a curing room, inspection by an engineer, replacement of steel work, pouring pre-cast concrete stones, curing stones, transporting stones, resetting terra cotta, resetting pre-cast concrete, pointing, caulking, removal of rigging, and removal of debris. He determined that certain tasks constituted "restoration work" rather than "inspection or L.L. 10 work" due to the listing of the crews on the billings because certain people consistently did routine maintenance work, which was included as part of the inspection and L.L. 10 work and other workers, who had more expertise and experience, did reconstruction work. He was further able to discern restoration work from the field reports prepared by Facade Maintenance which were prepared on a weekly basis. These reports contained photographs of the areas to be restored and a description of recommended work that should be done by Brisk. In addition, he distinguished restoration work from the inspection or L.L.10 work due to the location on the building where the work was performed. He was aware that particular sections of the building, due to exposure to wind and water, required major replacement and reconstruction work and also from the presence of large spalls in the glazing of the terra cotta that had penetrated the "biscuit" of the terra cotta discovered during inspection work, that a major failure was indicated. Daily time sheets for work in such locations referred to restoration work. "Spalls" are the spots or blotches on the

terra cotta where there is no glazing and the yellowish, tanish biscuit is exposed.

The term "terra cotta maintenance repair" and "epoxy repair" were used in both the L.L.10 or inspection invoices and in the restoration work invoices, but had two different meanings. When doing L.L.10 work it was a matter of patching small spalls with epoxy. In reconstruction, however, after taking out the stones, repairing the steel, and rebuilding the masonry backup, the repair work involved repointing, finishing and coloring to match the building.

The work done by Brisk for Woolworth was pursuant to a contract between them executed in 1987 entitled "Agreement for Maintenance Services" ("the agreement"). This agreement was for "a five year continuous maintenance program for the building located at 233 Broadway, New York, New York . . . and more particularly the facade and exterior areas of the Building" (Petitioner's Exhibit #5). Under the contract, Brisk agreed to perform services for petitioner which included: 1) inspection of the facade and exterior areas of the building, including all terra cotta surfaces; 2) documentation of all deficiencies in or deterioration of the facade and exterior areas; 3) consultation with Woolworth's architect to establish restoration procedures for all conditions of deterioration; 4) to perform all work necessary to effectuate a comprehensive repair and maintenance program for the facade and exterior areas of the building, including, but not limited to cutting, repointing, caulking, terra cotta repair and replacement; 5) maintaining a complete photographic record of all deficiencies in or deterioration of the facade and exterior areas of the building; 6) bearing the responsibility for rigging and erecting all scaffolding for the program; 7) consulting with petitioner's architect frequently to review the status of the program; 8) assisting petitioner in the determination of whether any emergency stabilization work was necessary; maintain daily work logs of the work performed by Brisk. The fee schedule set forth in the agreement provided the following:

"All sums actually expended by Contractor for materials and expendable supplies shall be billed to Owner at Contractor's cost, including sales tax, plus twenty-five percent (25%) thereof."

Upon audit by the Division, the auditor concluded that all of the expenditures of \$2,068,254.00 charged to Woolworth's Exterior Restoration Account were repairs and

maintenance subject to New York State sales tax. At the hearing, the Division conceded that a part of these expenditures may have constituted capital improvements.

The auditor also identified \$324,122.00 paid to Brisk and charged to Petitioner's "Exterior Maintenance and Miscellaneous Repairs Account" (Account No. 4690). These payments were also treated by Petitioner and Brisk as exempt capital improvements. The auditor classified these expenditures as taxable repairs and maintenance rather than capital improvements.

A Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated March 20, 1990 was issued to petitioner for the period June 1, 1986 through May 31, 1989 asserting additional sales and use tax due with respect to the Exterior Restoration Account in the amount of \$170,630.86 and the Exterior Maintenance and Miscellaneous Repairs Account in the amount of \$26,740.06, for a total amount due of \$197,370.92, plus penalty and interest. A second notice of determination dated March 20, 1990 was issued to petitioner for the same period asserting a 10% omnibus penalty in the amount \$19,737.08.

At the hearing in this matter, the Division noted and agreed to a reduction of the tax asserted in the amount of \$6,280.37 due to a duplication of taxation by the auditor.

Petitioner executed consent extending the period of limitations for the purpose of allowing the sales and use tax asserted as due for the period June 1, 1986 through November 30, 1986 to be determined at any time on or before March 20, 1990.

Petitioner presented the testimony of Richard Lefever, the General Manager of Facade Maintenance Design ("Facade"), whose educational background includes metallurgic engineering and architecture. He provided testimony at the hearing that the parties agreed would be accepted as expert testimony. He holds a certificate of completion from the Restore Program, which was described by him to be an intensive masonry rehabilitation program in New York State. In his current position with Facade, he is responsible for administration and field coordination of exterior restoration services, preparation of condition reports regarding deterioration of the exterior of structures, preparation of drawings for competitive bidding of construction repairs and he is responsible for administration as the work progresses. Mr.

Lefever described the nature of the work performed on the Woolworth Building as "an intensive exterior restoration project taking care of the deterioration to terra cotta facing material on an extremely large terra cotta building" (Transcript p.50-51).

Richard Lefever provided testimony in substantial detail regarding the composition of the building structure. He described the terra cotta substance as a fired clay material which bears similarities to brick, with the primary difference being the fact that terra cotta bears a glazed coating. It is a ceramic material that is fired during the formation of the block. The glaze is applied to the face of the block and is typically approximately one-sixteenth of an inch thick, acting as a very thin veneer that results in the waterproof portion of the terra cotta. The terra cotta material behind the glaze is called the biscuit. The biscuit is the structure of the terra cotta block. The glaze is intended to protect the terra cotta since the biscuit is an absorbent material. The face of the block (to which the glaze is applied) is about an inch and one-half thick. Each block is attached to the building's substructure of masonry or steel with iron hangers. There is a separate piece of iron for each one of the blocks.

Due to phenomena called "creep" and "compressive stress", it is necessary to probe behind the terra cotta panels and to stabilize the building's structural integrity by injecting epoxy into the back-up brick masonry. Creep is the shortening of the building frame over time due to gravity. Since the individual blocks of terra cotta are tied to the structure of the building, stress is built up in a wide variety of areas on the wall. The most effective way to alleviate this stress is to cut soft joints into the mortar between the terra cotta units. Stress is also built up in the back-up brick due to expansion from moisture. Over the course of time, a substantial number of terra cotta blocks have so deteriorated from the loss of the glaze material that water begins seeping into the terra cotta block. When this moisture freezes, it expands in volume by about 8-12% and grinds away at the terra cotta biscuit.

When the mortar between the terra cotta panels gets wet, some of the salt in the mortar mix is put into solution and leached into the terra cotta biscuit where the glaze is missing. When the biscuit dries out due to evaporation from the sun, the salts recrystallize and come out

of solution with an 8-10% volume increase. This salt recrystallization causes additional deterioration of the biscuit. There are certain areas of the building that are more susceptible to compressive stress build up and thermal movements, such as the corners of the building.

Mr. Radigan testified that approximately 80% of the work performed by Brisk is restoration work. Brisk has been involved in work on the Chrysler Building in New York City, the Trans-Am Building in San Francisco, and the White House, among many others. He indicated that the Woolworth Building is especially noted as the first building of its height and design to be totally clayed in terra cotta and that restoration work on a building of the type discussed in this case must follow certain rehabilitation guidelines which are addressed by the Department of Interior of Historic Places in Washington, D.C. Such guidelines require the owner to try and save the terra cotta cladding through reconstruction or duplicating the original features, even if this necessitates removing large sections and replacing them with new pre-cast concrete terra cotta.

The role played by Brisk in the work performed on the Woolworth Building included inspection, complex rigging, "sounding" the terra cotta, removal of defective portions and restructuring of such areas. In some cases there was removal of totally disintegrated pieces, replacement of such pieces with precast concrete and reconstruction of the under structure of the terra cotta. There are other situations where the structural steel showed signs of substantial rust caused by water entering through the terra cotta and held in suspension by the back-up brick, and which consequently needed replacement. Certain other maintenance, referred to as pointing and dressing-up with epoxy, was done to the terra cotta sections that had not yet reached total deterioration. Mr. Radigan estimated that 90 to 95 percent of the dollars charged by Brisk went into replacement and reconstruction activity. During the audit period, \$2,068,254.00 of the total amount billed (\$2,392,376.00), or 86% was charged as a capital expenditure to the restoration work.

Mr. Radigan's testimony addressed the processes of reconstruction and replacement as they were employed in this case. He stated that reconstruction involved removing a substance, and then formulating a program for that area of the building. This analysis would then call for

the reconstruction of the existing fabric or the replacement of the same with a totally new fabric, making sure that all the deficiencies uncovered behind the removal were addressed. Most of the restoration work done during the audit period consisted of reconstructing the biscuit of the terra cotta or replacing terra cotta panels in their entirety. The blocks or panels that required complete replacement were replaced with units fabricated from pre-cast concrete. The reconstruction of deteriorated biscuit was done with a bulky epoxy mixture. The epoxy that was used to replace the waterproof glaze was a thinner, more viscous material. Three to four thousand blocks were completely replaced with individually fabricated pre-cast concrete blocks. The biscuit of an additional two to three thousand blocks were reconstructed with bulky epoxy mixture.

The sections of the building that were addressed during the audit period were three of the four 43rd floor tourelles (or turrets), elevator bulkheads, gables between the 31st and 33rd floors on the north side, balustrades on the 28th floor and window spandrels on the 23rd floor. During his testimony, Mr. Radigan described a tourelle as a dome shaped collection of terra cotta units, in this instance covering vent structures located at the 43rd floor of the building. Balustrades are the vertical posts and horizontal rails which comprise a stairway-type railing along a parapet wall.

Terra cotta units that required replacement would first be measured to determine their shape and dimensions. Then, a mold would be created into which concrete would be poured. After this pre-cast unit was cured, it would be installed on the building with stainless steel anchors. If a terra cotta panel had lost more than a certain percentage of its glaze and the biscuit structure supporting the glaze was sufficiently deteriorated, it was no longer cost effective to reconstruct the panel and it would be subject to replacement.

Mr. Radigan of Brisk additionally provided testimony regarding the complex scaffolding and rigging system that was utilized by Brisk in order to access the work area. He stated that the architectural features of this particular building made it considerably difficult to hang the scaffolding, in part because the decking had to be cut specifically to fit the configuration of the

wall where the work was being done. The scaffolding itself was a semi-permanent catwalk that had to be changed every five feet vertically. He indicated that in some cases, it would take the company weeks to get the scaffolding in place for a month's restoration work.

Mr. Lefever was questioned as to his opinion of whether the restoration work done on the Woolworth building extended its useful life. He responded that the restoration program, including both the epoxy repair work performed on deteriorated material, as well as the replacement work done with pre-cast concrete, served to extend the useful life of the building 20 years (Tr., p. 62-63). Mr. Radigan's opinion was also elicited regarding the same aspect. He testified that the restoration work done during the audit period extended the useful life of the building between 20 and 30 years, and that the useful life of the building would have been dramatically shortened if such work had not been performed (Tr., p. 123).

Petitioner introduced into evidence 16 photographs exhibiting some of the more intricate details of the work performed on the building in issue. A synopsis below indicates the nature of the illustrations and testimony provided with each:

1) Photo #1 showed the general condition of balconies and an example of the stainless steel netting which was wrapped around a hanging pinnacle and secured with steel cables in order to protect a potential problem area until it could be fully addressed.

2) Photo #2 illustrates a tourelle on an elevator bulkhead before and after restoration.

3) Photo #3 is of the north bulkhead before and after restoration. In this photo there was a portion of the building that was being subjected to the process of sounding. A piece of terra cotta had been removed and the body of the building was being examined.

4) Photo #4 shows the condition of brick and terra cotta at the freight elevator bulkheads before construction. The rope in one of the segments of Photo #4 is securing certain terra cotta which is at risk of falling out of the building. The second illustrates a large spall of the glazing of the terra cotta which ultimately needs to be filled in with epoxy to avoid moisture penetration in that area.

5) Photos #5 and #6 illustrate the type of back-up brick that has been affected by freeze

cycles and damaged by the same. Again, epoxy is used, and in this case, injected into the area. A chemical reaction stabilizes the back-up structure and the new terra cotta can then be anchored to that stabilized foundation.

6) The various photos in #7 and #8 give examples of the dismantling that takes place when certain portions of the building lose their structural integrity due to the freeze-thaw cycles and the reconstruction methodology that was implemented.

7) The next photo shows the restoration of three-story gables on the building between the 31st and 33rd floors.

8) The photos comprising #10 show the reconstruction of a tourelle, and contrast the before and after reconstruction.

9) The photos in #11-14 show the various types of conditions that are encountered in the reconstruction activity.

10) Photo #15 contrasts a section of a gable under repair and the completed gable.

11) The final photo is a closer view of a dissection of the terra cotta where the distressed brick is exposed and the structure is being supported by ropes.

SUMMARY OF THE PARTIES' POSITIONS

Petitioner contends that expenditures on the Woolworth building were part of a major restoration program and therefore constituted capital improvements. Petitioner details the tasks which comprised the project as a whole, and discusses how such activities fit into the realm of a capital improvement project. Petitioner urges that the use of the words "repairs" and "maintenance" must be viewed in the context of the project and the need to distinguish certain (Local Law 10) work for the purpose of identifying the completion of such to meet a New York City ordinance. Petitioner further advances the argument that the "end result test" leads one to the same conclusion.

With respect to the issue of penalties, petitioner suggests that the failure to file or pay penalty does not apply to a vendee (petitioner) with respect to taxes due derivatively from a vendor's (in this case, Brisk's) liability for services performed on real property. Additionally, petitioner

maintains that the penalties must be abated since the failure to pay was due to reasonable cause and not willful neglect.

The Division contends that petitioner has failed to show how its documentation supports a finding that the work performed should be deemed qualified capital improvements. In support of its position, the Division discusses various provisions of the contract between Woolworth and Brisk entitled "Agreement for Maintenance Services", as well as its opinion that the invoices likewise do not support such a finding. The Division argues that the repairs and maintenance performed on the real property in this case did not meet the Tax Law criteria in order to constitute capital improvements. The Division places a great deal of importance on the fact that the components of the project undertaken by Brisk were not a complete restoration of the entire exterior, but rather involved work only in certain specific deteriorated sections of the building.

CONCLUSIONS OF LAW

A. Tax Law § 1105(c)(3) imposes a tax on the receipts from the service of installing tangible personal property and maintaining, servicing or repairing tangible personal property, except for installing property which, when installed, will constitute an addition or capital improvement to real property, property or land. In addition, tax is imposed upon on the receipts from the service of maintaining, servicing or repairing real property, property or land as distinguished from adding to or improving such real property by a capital improvement. (Tax Law § 1105[c][5]).

The corresponding regulations provide in pertinent part:

"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]).

B. In order to qualify for the Tax Law § 1105(c)(3)(iii) capital improvement exemption from the sales tax, it must be established that the addition or alteration to the real property in issue:

(i) substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property; and

(ii) 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

(iii) is intended to become a permanent installation (Tax Law § 1101[b][9]).

C. The sales and use tax regulations at 20 NYCRR 527.7(b)(4) render the following additional guidance when determining whether an activity is taxable:

"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." (Emphasis supplied.)

D. The parties in this matter agree on one important point in this case, i.e., the characterizations of the work performed, as either a bookkeeping function or by virtue of the categorizations made in the documentation, do not control or otherwise dictate how the expenditures must be handled with respect to the determination of their capital improvement status and the ultimate issue of whether they should be subject to sales tax. The key determination is whether the facets of the project in substance meet the criteria set forth by the Tax Law and regulations for an affirmative capital improvement determination. Along this same line of reasoning, the testimony revealed that the use of the terms "repairs" and "maintenance" in the Brisk invoices, in the Facade reports and generally by the witnesses, are not in conformity with traditional definitions of these terms such that their use should have determined the outcome of taxation of a particular task. The auditor, as well as the Division's representative, relied in large part on such characterizations to support the Division's position that the nature of the work evidences repairs rather than capital improvements. A reliance on the use of such terms in this unique case of intricate architectural work is not only inconsistent with the Division's stated position that a categorization of the work in a certain manner is not dispositive of the issue, but is also severely flawed.

E. Petitioner has well established by the documents, photos and testimony that the restoration work became part of the Woolworth building or was permanently affixed to the building so that removal would cause material damage to the building, and that such restoration work was intended as a permanent installation. In addition, such evidence, especially the uncontroverted testimony of the experts in this matter, Mr. Radigan and Mr. Lefever, established that the restoration work prolonged the useful life of the Woolworth building. As petitioner points out, 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.

F. In Matter of Nu-Look Specialties (Tax Appeals Tribunal, November 3, 1988) the taxpayer refaced the surface of kitchen cabinets, installed new cabinet doors, hinges, pulls and drawer fronts. In that case, the work performed was held as having met the requirements of a capital improvement. The Division notes that the taxpayer there also satisfied the distinguishing language of the "end result" test, something the Division asserts petitioner fails to do.

The Division attempts to distinguish this case from the decision in Nu-Look by emphasizing the fact that in this case there is "partial, though expensive, restoration of the building's exterior" (emphasis supplied), as contrasted with the capital improvement in Nu-Look where the taxpayer completely refaced the kitchen cabinets, and installed new doors and hardware. The Division suggests by this comparison that the only way in which petitioner's activities would qualify for capital improvement status is if they rose to the level of total restoration of the exterior of this more than 40-story Manhattan structure. Such a requirement would totally undermine the exemption from sales tax for capital improvements, and virtually no major reconstruction project would qualify for such status unless it involved the entire building, which, especially in a case such as this, where the work performed is substantially or entirely exterior, would be

virtually impossible. In addition, there is no support in the statutory framework to conclude that the work performed by Brisk does not qualify as a capital improvement merely because it was not the restoration of the entire facade.

I believe the work performed on the Woolworth building presents an interesting likeness to the projects undertaken in Nu-Look. In Nu-Look, the business operations included removing the exterior surface of kitchen cabinets (doors and face frames) and replacing them with new components which were permanently installed, and substantially improve the value of the real estate. In the case at hand, the facade of the building was the focus of the work performed. During a substantial portion of the work, there was reconstruction of deteriorated terra cotta, or replacement of the same, in addition to other areas where there was complete restructuring of the backup masonry. The deteriorated portions were removed, the structure secured, and the area rebuilt with new pre-cast concrete to which a process was applied for the purpose of matching it to other existing sections of the building. Although the processes used in the two cases are obviously very different, they bear unique similarities that parallel one another in the realm of this analysis.

As to the Division's assertion that the application of the end result test does not reach the same conclusion, the Division is reminded of the reasoning set forth by the Tribunal in Nu-Look on the same issue. There it was stated that:

"If, as here, the determination based on the facts presented is that the activities meet the statutory definition of capital improvement, then, under the 'test' it is a capital improvement. The regulation does not suggest that an activity whose end result satisfied the definition of a capital improvement could nonetheless be a taxable maintenance or repair service."

G. 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 by Brisk in this case go beyond the maintenance point and rise to the level of a capital improvement 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.

H. There are many facets of the work performed in this case that clearly meet the capital improvement criteria, such as the reconstruction of terra cotta, the replacement of terra cotta units, the reconstruction of the masonry substructure, as well as all the steps taken to accomplish the same, from inspection to rigging and erecting the scaffolding. In fact the Division admitted that some of the work could very well constitute capital improvements. Other portions of the work performed are less clearly defined. For example, the epoxy work that was done in order to patch the skin or the glazing of the terra cotta, and was classified as epoxy repair on some invoices, falls into this gray area. A "spall" represents an area where there is no longer any glazing and the biscuit of the terra cotta is exposed. If total deterioration has not occurred, a more viscous epoxy substance is used to secure the area. From the testimony provided by the experts in this case, petitioner has proven that the epoxy used in that situation cures and becomes a part of the real property such that removal would cause material damage. It is intended to become a permanent installation, as is evidenced by the fact that it is not used as a temporary cure, and since it acts to protect the biscuit of the terra cotta as well as other major structural elements (such as those described and illustrated by the photos), petitioner has shown that such work appreciably prolongs the useful life of the real property. This type of epoxy work differs in a significant way from the mere repair of an interior wall such as spackling of drywall. When isolated spackling is done in a case where a portion of drywall is worn or damaged, e.g., punctured, the alteration to the real property may very well become part of the real property and be intended to become permanent. However, it is doubtful whether it substantially adds to the value of the real property or appreciably prolongs the useful life of the

real property. Unlike the case at hand, where further serious deterioration can be avoided, the drywall is repaired for primarily cosmetic reasons and not for the purpose of prolonging the useful life of the wall or the building. It has been held by the Tax Appeals Tribunal that if a determination is made based on the facts presented in a case that the activities meet the statutory definition of capital improvement it is also a capital improvement under the "end result test" (Matter of Nu-Look Specialists, supra). Independently viewing the "end result" of the work performed in this case gives further support to the finding that the work undertaken by Brisk for petitioner was capital improvement in nature.

I. The expert testimony provided by both Mr. Radigan and Mr. Lefever was of a highly specialized nature. It was provided in a clear, concise and undeniably credible manner. Such testimony enhanced and explained the reports prepared by Facade and the invoices provided by Brisk, such that any doubt that the Division voiced as a challenge to terminology or classification that could result in some uncertainty as to how the tasks should be handled for taxation purposes was removed.

J. Since it has been determined that the activities qualified for the capital improvement exemption, the issue of penalties has been deemed moot, and is not herein addressed.

K. The petition of F. W. Woolworth Co. is hereby granted and the notices of deficiency dated March 20, 1990 are cancelled.

DATED: Troy, New York
December 2, 1993

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE