

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Frazer & Jones Co.	:	
Division of The Eastern Co.	:	AFFIDAVIT OF MAILING
	:	
for Redetermination of a Deficiency or Revision	:	
of a Determination or Refund of Sales & Use Tax	:	
under Article 28 & 29 of the Tax Law for the	:	
Period 12/1/77-8/31/80.	:	

State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 16th day of July, 1985, he served the within notice of Decision by certified mail upon Frazer & Jones Co., Division of The Eastern Co., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Frazer & Jones Co.
Division of The Eastern Co.
300 Milton Ave.
Syracuse, NY 13221

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
16th day of July, 1985.

David Parchuck

James A. Hegelund
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

July 16, 1985

Frazer & Jones Co.
Division of The Eastern Co.
300 Milton Ave.
Syracuse, NY 13221

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1138 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Law Bureau - Litigation Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Bruce Donahue
Bond, Schoenck & King
One Lincoln Center
Syracuse, NY 13202
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
FRAZER & JONES CO.,	:	DECISION
Division of The Eastern Co.	:	
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, 1977	:	
through August 31, 1980.	:	

Petitioner, Frazer & Jones Co., Division of The Eastern Co., 300 Milton Avenue, Syracuse, New York 13221, filed a petition 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, 1977 through August 31, 1980 (File No. 37457).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York, on October 18, 1984 at 10:45 A.M., with all briefs to be submitted by December 31, 1984. Petitioner appeared by Bond, Schoeneck & King (Gary Germain, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Anne Murphy, Esq., of counsel).

ISSUE

Whether certain work performed as part of a building renovation constituted taxable repairs to real property or whether such work constituted a capital improvement.

FINDINGS OF FACT

1. Petitioner, Frazer & Jones Co., Division of The Eastern Co., was a manufacturer of mine roof supports, also known as expansion supports, which are used to secure metal shields that support mine ceilings. These expansion

supports are produced by a foundry process that involves the pouring of molten metal into sand molds.

2. On March 15, 1982, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner covering the period December 1, 1977 through August 31, 1980 for taxes due of \$8,309.22, plus interest of \$1,949.43, for a total of \$10,258.65.

3. Petitioner executed consents extending the period of limitation for assessment of sales and use taxes for the period December 1, 1977 through November 30, 1978 to March 20, 1982.

4. An audit of petitioner's books and records disclosed additional sales and use taxes due of \$12,700.71. Petitioner executed a consent to fixing of tax in the amount of \$4,391.49. The disagreed portion of the audit (\$8,309.22) represented taxes determined due on purchases which the Audit Division considered to be repairs and maintenance services to real property.

5. Following a pre-hearing conference held on November 19, 1982, the taxes due were revised to \$3,880.37. The taxes remaining in dispute involve purchases in connection with the renovation of petitioner's Foundry Building #2.

6. In late 1978, petitioner undertook a total renovation of its Foundry Building #2 which had been constructed in 1915. The purpose of this renovation was to convert Foundry #2 into an assembly area to enable petitioner to perform "in house" certain product assembly work which had previously been subcontracted out to local sources. For many years prior to its renovation, Foundry #2 had been used solely as a storage area. The building was unheated, had very limited lighting and electrical service and had a dirt floor.

7. Foundry Building #2 is a single-story building and is 160 feet by 101 feet in size.

The work performed in connection with the renovation was as follows:

a) For site preparation, the removal of pipe and conduit, removal of all steel not structurally supporting anything, removal of all old unit heaters, and removal of all old concrete pads down to eight inches below the dirt floor.

b) The addition of a new complete concrete floor with drain and piping underneath.

c) Construction of an interior wall with a roll-up door to make an alleyway to isolate traffic and sand which would be entering from adjacent buildings.

d) Installation of a building-wide infrared heating system.

e) Installation of all new electrical service and fluorescent and mercury vapor lighting.

f) Sandblasting and painting of the walls and ceiling with special masonry paint.

g) Restoration of columns and beams.

h) Installation of a building-wide sprinkler system.

i) Construction of a supervisor's office in the southwest corner of the foundry.

j) Installation of compressed air, water, and drain lines for equipment which was to be installed at a later date.

8. The total cost of the renovation of Foundry Building #2 was \$209,497.59.

Petitioner capitalized the entire cost for accounting and federal income tax purposes.

The Audit Division determined that \$55,433.79 of the total expenditures were for repairs rather than capital improvements. The following is a list of the purchases which the Audit Division has deemed taxable repairs:

	<u>Date</u>	<u>Description of Work</u>	<u>Amount</u>
(a)	2/15/79	labor, materials and equipment to cover up holes in ceiling; drill holes in ceiling blocks, install furring strips and screw plywood to furring.	\$ 1,845.00
(b)	2/15/79	labor, materials and equipment to sandblast and paint Foundry #2 (1 prime coat and 1 finish coat).	\$ 2,243.00 part payment
(c)	2/15/79	labor, materials and equipment to sandblast and paint Foundry #2 (1 prime coat and 1 finish coat).	\$10,000.00
(d)	2/15/79	labor, materials and equipment to repair columns in Foundry #2 as follows: (1) reface upper section above steel; (2) wrap base with $\frac{1}{4}$ " steel plate with corners to be 3" x 3" angle iron; and (3) steel to be primed and painted.	\$ 2,500.00 partial payment
(e)	2/15/79	labor, materials and equipment to repair beams in Foundry #2 as follows: (1) chip away concrete; (2) drill and lag to anchor mesh; (3) install 4-6 layers; and (4) rub to finish product.	\$ 2,100.00 partial payment
(f)	3/6/79	labor, materials and equipment to repair and patch East Wall of Foundry #2 as follows: (1) plug holes and (2) brick up columns.	\$ 1,835.00
(g)	3/20/79	see (d)	\$ 2,000.00 2nd payment
(h)	3/20/79	see (e)	\$ 2,444.00 balance due
(i)	4/25/79	see (b)	\$ 1,122.00 balance due
(j)	4/25/79	see (c)	\$ 5,000.00 balance due
(k)	5/16/79	see (d)	\$ 365.00 balance due
(l)	6/5/79	frames and beams	\$ 1,383.75
(m)	7/23/79	uprights	\$ 695.00

(n)	7/30/79	beams	\$ 200.00
(o)	8/9/79	materials	\$ 1,401.04
(p)	12/28/79	labor, materials and equipment for the following work: (1) remove and replace flashing; (2) reface concrete columns; (3) repair roof section; and (4) repair windows and frames.	\$20,500.00

All of the foregoing work was performed by Pine Vista Contractors.

Petitioner took the position that the work was performed in conjunction with the entire renovation project which was a capital improvement to real property and the end result of the project controls its taxability.

9. Petitioner conceded that tax was due on material purchases "(1)", "(m)", "(n)" and "(o)" and has remitted a check for \$407.33 in payment thereof (\$257.59 - tax and \$149.74 - interest).

CONCLUSIONS OF LAW

A. That section 1105(c)(3) of the Tax Law 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. Paragraph (5) of subdivision (c) of the same section imposes a tax 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.

B. That section 1101(b)(9) of the Tax Law defines "capital improvement" as:

"An addition or alteration to real property which:

(i) Substantially adds to the value of the real property, or appreciably prolongs the useful life of 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."

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 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)]; Matter of Building Contractors Association, Inc. v. Tully, 87 A.D.2d 909.

C. That the renovation of Foundry Building #2, when viewed as a whole, constituted a capital improvement to real property in accordance with section 1101(b)(9) of the Tax Law. Therefore, the services performed by the contractor in the course of the renovation of Foundry Building #2 were not taxable. (Matter of Nepco Terminal Corp., State Tax Commission, July 1, 1983).

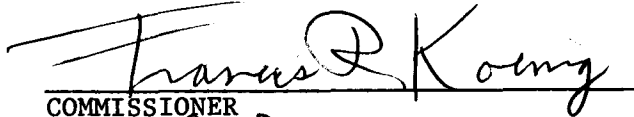
D. That the petition of Frazer & Jones Co., Division of The Eastern Co. is granted and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued March 15, 1982 is cancelled.

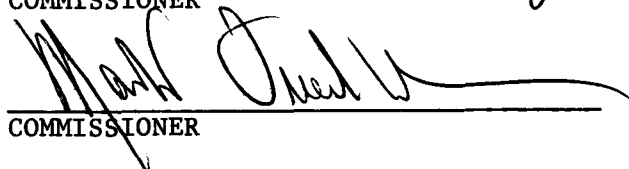
DATED: Albany, New York

STATE TAX COMMISSION

JUL 16 1985


PRESIDENT


COMMISSIONER


COMMISSIONER

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RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1984-446-014

PS Form 3800, Feb. 1982

Sent to <i>Fragel & Jones Co.</i>	
Street and No. <i>Champion of the Easters Co</i>	
P.O., State and ZIP Code <i>Box Miller Ok</i>	
Postage <i>Postage 7413221</i>	
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return receipt showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

P 095 690 920

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1984-446-014

PS Form 3800, Feb. 1982

Sent to <i>Bruce Conelue</i>	
Street and No. <i>San Schornick King</i>	
P.O., State and ZIP Code <i>Old American Center</i>	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return receipt showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	