STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ADIRONDACK BANK	:	DECISION DTA NO. 825101
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 October 18, 2007 through December 22, 2009.	:	

Petitioner, Adirondack Bank, filed an exception to the determination of the Administrative Law Judge issued on August 7, 2014. Petitioner appeared by Peter E. Iorio, Esq. The Division of Taxation appeared by Amanda Hiller, Esq. (Lori P. Antolick, Esq., of counsel).

Petitioner filed a letter brief in support of the exception. The Division of Taxation filed a letter brief in opposition. Petitioner did not file a reply brief. Neither party requested oral argument. The six-month period for the issuance of this decision began on December 2, 2015, the due date for petitioner's reply brief.

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

ISSUES

I. Whether the Division of Taxation properly denied petitioner's claim for refund of sales and use taxes paid on the purchase and installation of a security system, a pump for an HVAC system, and blacktop on the basis that such purchases and installation did not constitute capital improvements.

II. Whether the Division of Taxation properly denied petitioner's claim for refund of sales and use taxes paid on the purchase of purported internet access services.

III. Whether the Division of Taxation properly denied petitioner's claim for refund of sales and use taxes paid on purported promotional materials.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except for finding of fact 2, which we have modified to more fully reflect the record. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

1. Petitioner, Adirondack Bank, is a full-service banking corporation with its main office in Utica, New York, and branch offices throughout New York State.

2. Between December 10, 2007 and November 2, 2009, Sentinel Security & Communication, Inc., of New Hartford, New York (Sentinel), installed various security items at several of petitioner's branches. According to invoices provided on audit, Sentinel installed a "new system," "prewire and equipment" and "security/fire/cctv" at the Ilion branch. In addition, a reader was replaced at the Lake Placid branch. Outdoor and dome cameras were installed at the Little Falls, Mohawk, Utica, and Boonville branches. The invoices list the type of item installed, but do not provide any further description of the work performed. They do not indicate whether interior wiring was required. They also list the following charges for the service and materials provided:

Date of Service	Branch	Charge
November 2, 2009	Boonville	$750.00
October 6, 2008	Ilion	$15,000.00
October 28, 2008	Ilion	$12,500.00

March 30, 2009	Little Falls, Mohawk, Utica	$2,350.00
December 10, 2007	Lake Placid	$590.00

A total of $2,715.25 in sales tax was paid for these installations.

3. On February 19 and 20, 2009, J. Hogan Refrigeration & Mechanical, Inc., of Peru, New York (J. Hogan), replaced a pump on a condenser at petitioner's Saranac Lake branch. The invoice for this transaction identifies the purchase and installation of a "B & E Pump #90," among other parts. Again, the invoice does not provide any description of the work performed other than the type of item installed. Petitioner did not present any other evidence with regard to installation of this item. The invoice lists a taxable subtotal of $4,299.06, and sales tax of $343.93 was paid by petitioner for this work.

4. On July 9, 2008, Nathaniel Weigand Builders (Weigand) performed construction services at the Rome branch of petitioner. The receipt for this transaction identifies the project as "rework curb area in drive thru." It also has entries reading "entrance remove and replace blacktop - rework whole area" and "drive thru corner - remove curb, repair handrail, blacktop." There is no further description on the receipt of the work performed. The receipt indicates that the cost of service and materials provided was $5,671.00. Sales tax of $496.21 was paid by petitioner for this work.

5. Petitioner received data line services from Verizon during the 26-month period in issue. The record contains only four partial billing statements from Verizon, those dated October 4, 2007, October 7, 2007, December 16, 2007, and January 16, 2008 (Verizon Bills). Each of the Verizon Bills is missing at least one page. Additionally, on the first page of each of the Verizon Bills is a handwritten entry identifying the bill as "data line charges" for various branches. It is unclear as to who wrote these entries. Each of the Verizon Bills covers a one-month period.

There are numerous charges on the Verizon Bills, including entries for frame relay circuits. It is unclear what some of the other entries signify. The total amount of taxes listed as paid on the Verizon Bills was $1,525.45. Petitioner also submitted a self-prepared summary list of all taxes claimed to have been paid to Verizon for data line charges during the period for which a refund is sought. That summary totaled $16,225.16.

6. Petitioner placed into the record the affidavit of Robert Bruzgulis, its Vice-President, Director of Information Services. Mr. Bruzgulis avers that he has personal knowledge of the facts relating to taxes paid by petitioner on the Verizon Bills. He states that none of the data lines from Verizon included Voice Over Internet Protocol (VOIP). Instead, he points out, petitioner uses a traditional Modular Integrated Communications Systems (MICS) telephone system. Mr. Bruzgulis adds that all of the internet access services from Verizon were solely for the transmission of data, and that each of the circuits he reviewed were used for point-to-point data communication among petitioner's branches.

7. In addition, petitioner placed into the record a series of e-mails dated December 22, 2011, between Christina Halikiopoulos, an account manager with Verizon Business, and Melynda Perry of State Tax Refund Service, petitioner's representative. In the first e-mail between the two, Ms. Perry sought clarification that the data circuits purchased by petitioner were strictly for transmitting data and did not include voice or video transmission. Also, Ms. Perry sought an explanation as to why the data lines were taxed and whether they should continue to be taxed. In a responsive e-mail, Ms. Halikiopoulos stated that "I cannot tell you what the customer uses the circuit for. Only that it is a data circuit. Verizon does not monitor the traffic or type of traffic over the circuit." As for Ms. Perry's second question, Ms. Halikiopoulos could not provide an answer. Attached to the aforementioned e-mails was another

undated e-mail from Ms. Halikiopoulos to Ms. Perry identifying accounts numbered "315S290811953258," "315S260023," and "000743698190" as data circuits.

8. Between September 30, 2008 and November 30, 2009, petitioner purchased, on a monthly basis, various items such as labels, debit cards, and envelopes from a company named Fiserv.[1] The invoices provided on audit name the items purchased, but contain no further description of them. There are no photographs, examples, or other identification of the items in the record. Moreover, the Fiserv receipts include charges for "PIN POSTAGE," "MAIL LISTING," and "CARD PRODUCTION SET UP," none of which are further explained in the record. Sales tax of $3,696.89 was paid by petitioner for the items purchased from Fiserv.

9. On October 15, 2008 and October 8, 2009, petitioner received software support services from SRS Systems Inc. (SRS) of Syracuse, New York. The amount of sales tax paid on these services remaining at issue at the time the petition was filed was $90.56.

10. On October 15, 2010, petitioner filed an application for credit or refund with the Division of Taxation (Division) seeking a refund of sales and use taxes paid during the period from October 25, 2007 through December 22, 2009 in the amount of $99,970.91. Petitioner claimed a refund for taxes paid on four groups of transactions that it maintained were exempt:

a. the installation of security systems by Sentinel, the pump for an HVAC system by J. Hogan, and blacktop at various branches by Weigand, all of which petitioner maintained constitute capital improvements;

b. the provision of internet access service by Verizon to various branches;

c. the purchase of computer software support; and

[1] The invoices in the record evidence that at some point during the period at issue, Fiserv became known as Personix.

d. the purchase of promotional materials from Fiserv.

11. On February 24, 2011, after a field audit, the Division granted petitioner a refund in the amount of $5,535.40, but denied the remaining $94,435.51 of petitioner's refund claim. The denial letter stated, in pertinent part, as follows:

> The denied portion comes from jobs you believe to be Capital Improvement [sic] projects but didn't meet the three qualifications to qualify as a capital improvement. The rest of the deined [sic] portion is from taxable telecommunication services, canned software, and purchases that don't qualify as promotional materials.
>
> * * *
>
> The net refund amount comes from projects that qualify as capital improvements, exempt services, and printed promotional materials.

12. On April 20, 2012, the Bureau of Conciliation and Mediation Services (BCMS) issued a conciliation order recomputing the Division's refund denial and granting a refund to petitioner in the amount of $30,174.55. The conciliation order does not identify any particular item that served as the basis for the refund.

13. Petitioner filed a petition on July 5, 2012, in which it reduced the amount of its remaining refund claim to $22,233.23.[2] A schedule listing the components of that claim was placed into the record. It breaks down the remaining refund claim as follows:

Contractor	Items(s) Purchased	Sales Tax Paid
J. Hogan	B&E Pump	$343.93
Weigand	Blacktop	$496.21
Sentinel	Security System	$1,380.48
Verizon	Internet Access	$16,225.16
SRS	Computer Software Support	$90.56
Fiserv	Promotional Materials	$3,696.89
TOTAL		$22,233.23

[2] The parties placed into evidence an amended petition dated January 3, 2013, in which the amount of tax contested was increased to $52,407.80. Subsequently, petitioner informed the Division of Tax Appeals by letter of January 15, 2013 that it was withdrawing the amended petition. This letter was not introduced by the parties as part of their submission, but is part of the file of the Division of Tax Appeals and, therefore, is included in the record by official notice pursuant to State Administrative Procedure Act § 306 (4). Further, petitioner, in its brief, confirms that it is only seeking a refund in the amount of $22,233.23. As a result, the latter figure is the amount at issue here.

14. Petitioner did not place into the record any affidavits or other testimony regarding the security system, B & E pump, blacktop, or materials purchased from Fiserv.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge reviewed the relevant statutes regarding capital improvements and case law regarding proof of such claims. The Administrative Law Judge concluded that petitioner failed to offer sufficient evidence to prove its claims, emphasizing the lack of any testimony, affidavits, photographs or descriptions of the claimed capital improvements.

The Administrative Law Judge next addressed petitioner's claim that it improperly paid sales tax on internet access services. The Administrative Law Judge noted that, although petitioner claimed a refund of tax assertedly paid on such services over a 26-month period, it submitted invoices to substantiate its claim for only four months of that period and even those invoices were incomplete. He noted further that the bills that were submitted contain many entries for which there is no explanation in the record. He found the affidavit of Mr. Bruzgulis lacking in its failure to offer any such explanation. The Administrative Law Judge thus found that petitioner failed to establish entitlement to this component of the subject refund claim.

Finally, the Administrative Law Judge reviewed petitioner's claim for a refund of sales tax paid on promotional materials. The Administrative Law Judge determined that petitioner failed to prove that the items in question met the statutory definition of promotional materials, noting that the invoices submitted lacked a detailed description; no samples or photographs of the items were submitted; and no affidavit was submitted on this issue. The Administrative Law Judge also noted that petitioner offered no evidence to show that the items in question were delivered to customers or prospective customers without charge and shipped to such customers by common

carrier or like delivery service, another component of the exemption. The Administrative Law Judge thus found against petitioner on this issue, as well.

The Administrative Law Judge granted a portion of petitioner's refund claim ($90.56) that was conceded by the Division in its brief below.

ARGUMENTS ON EXCEPTION

Petitioner raises no new arguments on exception. It continues to argue that the evidence presented is sufficient to establish entitlement to the claimed refunds. The Division continues to argue that petitioner's proof falls short.

OPINION

We affirm the determination of the Administrative Law Judge.

Addressing first petitioner's security system purchases, Tax Law § 1105 (c) (3) imposes sales tax on the receipts from every sale, except for resale, of the service of installing tangible personal property, except for installing property which, when installed, will constitute a capital improvement to real property. The term "capital improvement" is defined in Tax Law § 1101 (b) (9) (i) as follows:

> "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."

Charges for maintaining, servicing or repairing real property, as distinguished from adding to or improving real property by a capital improvement, are taxable (Tax Law § 1105 [c] [5]).

Whether an installation of tangible personal property or a service to real property

constitutes a capital improvement "must be decided on a case-by-case basis" (***Matter of Gem Stores, Inc.***, Tax Appeals Tribunal, October 14, 1988). A taxpayer bears the burden to show that each element of the statutory test has been met in order to establish entitlement to capital improvement treatment (***see Matter of A. Colarusso and Son, Inc.***, Tax Appeals Tribunal, June 23, 2011). Specific facts are very important in determining whether a claimed capital improvement meets each element of the statutory test (***see Matter of MacLeod***, Tax Appeals Tribunal, July 3, 2008, ***confirmed sub nom MacLeod v Megna***, 75 AD3d 928 [2010]).

As the Administrative Law Judge correctly noted, in determining whether an addition or alteration substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property, this Tribunal's analysis has frequently focused on the cost of the improvements. If substantial, we have deemed the improvements to have satisfied this criterion (***see e.g.***, ***Matter of Dairy Barn Stores, Inc.*** (Tax Appeals Tribunal, October 5, 1989) [costs for freezers in excess of $10,000.00 substantially added to the value of petitioner's retail properties]; ***Matter of Gem Stores, Inc.*** [installation and purchase expense in excess of several thousand dollars (approximately $21,000.00) for electronic surveillance equipment substantially added to the value of petitioner's buildings]).

Applying this standard to the present matter, we agree with the Administrative Law Judge that, except for security system project at the Ilion branch (cost approximately $27,000.00), and given the lack of other evidence in the record on this criterion, none of the remaining security system purchases was of the nature or expense to substantially add to the value of petitioner's properties.

With regard to the second and third criteria, we agree with the Administrative Law Judge's conclusion that petitioner failed to show that any of the security system purchases were

permanently affixed such that removal would cause material damage to either petitioner's property or the purchased item itself or that the installation of such items was intended to be permanent (***see*** Tax Law § 1101 [b] [9] [i] [B], [C]). In reaching this conclusion, we note, as did the Administrative Law Judge, the lack of any testimony, affidavit, photograph or description beyond the terse information contained on the invoices regarding the nature of the security system installations at issue. We agree with the Administrative Law Judge that the evidence herein is insufficient to show that any of the security system installations were wired into the realty or that any system involved in-wall wiring or cables (***cf.,*** New York State Department of Taxation and Finance Publication 862, Sales and Use Tax Classifications of Capital Improvements and Repairs to Real Property [in-wall installations of electrical wiring and communications cables in connection with the installation of security systems considered a capital improvement]). We also note, as did the Administrative Law Judge, that a manufacturer's printout in the record describing various security system keypads and readers is of little probative value, as petitioner offered no evidence indicating which, if any, of the many readers listed on the printout was installed at petitioner's Lake Placid branch.

We also agree with the Administrative Law Judge's finding that the B & E pump installation fails to qualify for capital improvement treatment under the three prong test in § 1101 (b) (9) (i). Specifically, the pump's cost and the lack of any other evidence regarding its installation compels the conclusion that this purchase did not substantially add to the value of the realty. As to the issues of permanent affixation, we agree with the Administrative Law Judge's finding that "the record is devoid of evidence describing the installation of the B & E pump and the effect, if any, of its removal."

We also agree with the Administrative Law Judge's conclusion that petitioner's blacktop purchase failed to qualify as a capital improvement. We specifically concur in his finding that "the sparse evidence suggests that project was a repair to certain sections and not a complete repaving of the driveway." We note that such evidence consists only of the invoice and that petitioner submitted no photographs, testimony, affidavits or other descriptions of its blacktop purchase.

Turning next to petitioner's claim that it erroneously paid sales tax to Verizon for internet access service, Tax Law § 1115 (v) provides:

> "[r]eceipts from the sale of Internet access service, including start-up charges, and the use of such service, shall be exempt from the taxes imposed under this article. For purposes of this subdivision, the term 'Internet access service' shall mean the service of providing connection to the Internet, but only where such service entails the routing of Internet traffic by means of accepted Internet protocols. The provision of communication or navigation software, an e-mail address, e-mail software, news headlines, space for a website and website services, or other such services, in conjunction with the provision of such connection to the Internet, where such services are merely incidental to the provision of such connection, shall be considered to be part of the provision of Internet access service."

Petitioner has the burden to prove entitlement to the exemption (***see Matter of Lake Grove Entertainment, LLC v Megna***, 81 AD3d 1191 [2011]).

We agree with the Administrative Law Judge's conclusion that petitioner has failed to meet its burden. We specifically agree with his finding that petitioner substantiated only $1,525.45 of its claim of $16,225.16 in sales tax paid on purported internet access service charges. We further agree with his conclusion that the four months of Verizon bills in evidence (out of a 26-month period) were incomplete and contained unexplained entries, and that such shortcomings were not overcome by Mr. Bruzgulis's affidavit.

Finally, we note our agreement with the Administrative Law Judge's conclusion that petitioner failed to prove that its purchases from Fiserv were promotional materials exempt from sales tax pursuant to Tax Law § 1115 (n) (4). Under that provision, to qualify for this exemption, petitioner was required to prove, inter alia, that the items purchased were promotional materials within the meaning of Tax Law § 1101 (b) (12); that such items were provided to customers or prospective customers without charge; and that they were shipped to such customers by common carrier or like delivery service.

We agree with the Administrative Law Judge that petitioner failed to prove that the items in question, which included labels, debit cards and envelopes, qualified as promotional materials under the statutory definition. Significantly, petitioner offered no examples or photographs of the items in question or even an affidavit describing such items (***cf. Matter of United Parcel Serv., Inc. v Tax Appeals Trib. of State of N.Y.***, 98 AD3d 796 [2012], ***lv denied*** 20 NY3d 860 [2013][where taxpayer was entitled to the exemption after introducing as evidence numerous examples of the relevant items]). Petitioner also offered no evidence to show that the items were provided without charge or how they were delivered to customers.

Accordingly, it is ORDERED, ADJUDGED AND DECREED, that:

1. The exception of Adirondack Bank is denied;

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

3. The Division of Taxation's February 24, 2011 partial denial of petitioner's refund claim, as modified by the conciliation order dated April 20, 2012, and as further modified by conclusion of law K of the determination, is sustained; and

4. The petition of Adirondack Bank is granted to the extent indicated in conclusion of law K of the determination, but is denied in all other respects.

DATED: Albany, New York
May 28, 2015

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

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

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