STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
HOWARD JOHNSON 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 September 1, 1978 through November 30, 1981.	:	
	:	DECISION
In the Matter of the Petition	:	
of	:	
MARRIOTT FAMILY RESTAURANTS, INC. AS SUCCESSOR IN INTEREST TO HOWARD JOHNSON, 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 September 1, 1981 through November 30, 1985.	:	
	:	

Petitioner, Marriott Family Restaurants, Inc., formerly known as Howard Johnson Co., filed an exception to the determination of the Administrative Law Judge issued on September 21, 1989 with respect to the petitions of petitioner Howard Johnson Co., One Monarch Drive, North Quincy, Massachusetts 02269 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, 1978 through November 30, 1981 (File No. 800927) and petitioner Marriott Family Restaurants, Inc., as successor in interest to Howard Johnson Co., One Marriott Drive, Washington, DC 20058 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, 1981 through November 30, 1985 (File No. 803275). Petitioner appeared by Breed, Abbott & Morgan (Edward H. Hein, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Carroll R. Jenkins, Esq., of counsel).

Both parties submitted briefs. Oral argument was heard at the request of petitioner on January 31, 1990.

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

ISSUES

I. Whether the Division of Taxation properly determined that the installation of walk-in freezers, parking lot poles and lights, and the Howard Johnson rooftop cupola were not capital improvements, but purchases of tangible personal property subject to sales tax.

II. Whether the Division of Taxation properly disallowed 76% of petitioner's claimed manufacturing exemption under Tax Law §§ 1115(c) and 1105-B and 100% of petitioner's claimed manufacturing exemption under Tax Law § 1115(a)(12) for its Queens Village plant operations because 76% of the food manufactured at such plant was used by petitioner in its own restaurant operations.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for certain modifications. Such facts and modifications are stated below.

We modify the findings of the Administrative Law Judge as follows:

> Pursuant to 20 NYCRR 3000.7, the parties hereto, by their respective representatives, executed a stipulation of facts in these matters. The facts contained in the stipulation of facts concerning the petition of Howard Johnson Co. have been incorporated into the findings of fact below.[1]

---

[1] The original pargraph in the Administrative Law Judge's findings of fact read as follows:

> "Pursuant to 20 NYCRR 3000.7, the parties hereto, by their respective representatives, executed a stipulation of facts in these matters. The stipulation of facts concerning the matter of the petition of Howard Johnson Co. with regard to the period September 1, 1978 through November 30, 1981 is set forth below."

Petitioner, Howard Johnson Co., at all relevant times, was engaged in business in the State of New York and in other states in the United States, inter alia, operating restaurants/motor lodges, selling food, tangible personal property and services subject to sales tax.

For the period at issue, petitioner operated a plant located at Queens Village, New York.

At the Queens Village plant, a wide variety of food products were produced from raw materials received in basic form and then frozen or canned.

The products were shipped from the plant either directly to petitioner's distribution centers outside New York State or, in the case of canned products, to a warehouse in Jamaica, New York from which they were shipped to the distribution centers. Twenty-four percent of the products were shipped from the distribution centers in fulfillment of sales by petitioner to restaurants operated by licensees and other wholesale food account customers, and the remaining 76% was shipped from the distribution centers to restaurants owned or operated by petitioner both within and without New York State where it was served to paying customers in such restaurants.

The products had a different identity from their ingredients and were tangible personal property.

All of the liquid nitrogen consumed at the Queens Village plant was used solely in its manufacturing activities, while 93% of the utilities used at the plant were for manufacturing purposes.

No restaurant or other retail facility owned or operated by petitioner was located at or adjacent to the Queens Village plant, petitioner's warehouse in Jamaica, or any distribution center.

Petitioner made expenditures at its restaurants and motor lodges at various locations in New York State for the conversion of outside parking lights to high sodium vapor lamps, and

---

This paragraph has been modified to indicate that the findings of fact are not an exact copy of the stipulation submitted by the parties.

for the installation of walk-in freezers and the Howard Johnson cupola on rooftops of its facilities.

On or about 1983, the Division of Taxation conducted an audit of petitioner's sales and use tax liability for the period September 1, 1978 through November 30, 1981.

The Division for this period determined tax due as follows:

Sales Tax	
Unsubstantiated exempt sales	$ 2,380.32
Use Tax	
Recurring purchases (not including the Queens Village plant)	71,528.06
Capital expenditures (all locations except the Queens Village plant)	48,324.51

QUEENS VILLAGE PLANT AUDIT

Petitioner claimed a tax refund of $74,057.77 for 93% of the utilities used in manufacturing at the Queens Village plant. Of this amount, 24% was allowed as a refund (based on 24% of the Queens Village plant's food which was manufactured for sale).

($17,699.81)

Use Tax	
Recurring purchases	55,792.45
Liquid nitrogen used in manufacture	14,948.86
Manufacturing supplies (hot dog casings)	16,601.76
Capital expenditures 34,802.10	
Credit for tax overpaid on capital	(6,085.31)
Total additional tax due for period:	$220,592.94

As a result of the audit, petitioner was assessed for sales and use taxes due of $185,634.03 for the period September 1, 1978 to February 28, 1981, via notice of determination No. 831125001A, and assessed for sales and use tax due of $34,958.91 for the period March 1, 1981 to November 30, 1981 via notice of determination No. 831125002A.

Of the deficiencies in tax stated in the above notices, $104,985.33 plus interest was paid on or about February 17, 1984, leaving in dispute a balance of $115,607.61 in tax. In addition, a timely claim for refund of $74,057.77 was allowed only to the extent of $17,699.81 leaving in dispute a balance of $56,357.96 in tax. The total of $115,607.60, the portion of the deficiency

remaining in dispute, and $56,357.96, the portion of the refund claim still in dispute, is $171,965.56. Of this total amount, $132,197.31 is attributable to Issue II, set forth above.

We modify the findings of the Administrative Law Judge as follows:

> The facts contained in the stipulation of facts concerning the petition of Marriott Family Restaurants, Inc. as successor in interest to Howard Johnson Co. for the period September 1, 1981 through November 30, 1985 has been incorporated into the findings of fact below.[2]

Petitioner, Marriott Family Restaurants, Inc., at all relevant times, was engaged in business in the State of New York operating restaurants/motor lodges, selling food, tangible personal property and services subject to sales taxes.

Up until October 1983, petitioner operated a plant located at Queens Village, New York. Of the food products manufactured at the plant, 24% was sold by petitioner and the remaining 76% was shipped to restaurants owned or operated by petitioner.

The Division of Taxation conducted an audit of petitioner's sales and use tax liability for the period September 1, 1981 to November 30, 1985 and determined that petitioner owed additional use tax of $435,474.55, plus interest.

On or about February 13, 1986, the Division issued to the petitioner a notice of determination No. S860214003A for the period September 1, 1981 through November 30, 1985 setting forth use taxes due, plus interest, a portion of which has been paid.

On June 30, 1986, petitioner was issued two statements of proposed audit adjustments: the first statement was for tax due of $317,240.21, plus interest, which was agreed to and paid by petitioner; the second statement was for tax due of $118,234.34, plus interest, and the subject of this proceeding.

---

[2] The original paragraph in the Administrative Law Judge's findings of fact read as follows:

> "The portion of the stipulation of facts concerning the petition of Marriott Family Restaurants, Inc. as successor in interest to Howard Johnson Co. for the period September 1, 1981 through November 30, 1985 is set forth below."

This paragraph has been modified to indicate that the findings of fact are not an exact copy of the stipulation submitted by the parties.

The $118,234.34 in dispute, constitutes the New York State Tax (4-1/4%) imposed on the disallowed manufacturing exemption for fuel, utilities, supplies (disposable hot-dog casings), and equipment purchased for use at petitioner's Queens Village plant.

The Administrative Law Judge made the following additional findings of fact.

According to the audit report for the period September 1, 1981 through November 30, 1985, petitioner Howard Johnson Co. was a wholly-owned subsidiary of Imperial, Ltd. Such parent corporation spun off the Ground Round Restaurant Division of the Howard Johnson Co. to form a new separate division of Imperial, Ltd. The parent corporation then sold Howard Johnson Co., in a stock transfer, to Marriott Corp. Marriott Corp., in turn, sold the Howard Johnson Company's motor lodge operation and reorganized Howard Johnson Co. as Marriott Family Restaurants, Inc.

The field audit report concerning the assessment for the period September 1, 1978 through February 28, 1981 notes that the vendor stated that it was nearly impossible to trace the food processed at the Queens Village plant to individual restaurants. Because Howard Johnson Co. owned and operated 76% of all the Howard Johnson restaurants, Ground Round and Red Coaches, while the remainder were operated by licensees, it was decided that only 24% of the food processed was for sale, and 76% was for self-use.

We modify additional finding of fact "21" to read as follows:

> The amount of $132,197.31 represents sales tax imposed on Howard Johnson Co.'s purchases of fuel, liquid nitrogen, hot dog casings and certain unspecified expenditures for the Queens Village plant. Further, since the parties stipulated that the total amount that remains in dispute is $171,965.56 and that the amount of $132,197.31 is attributable to Issue II, set forth above, the difference of $39,768.25 is therefore attributable to the disallowance by the Division of Taxation of capital improvement exemptions for petitioner's installation of parking lot lights, Howard Johnson cupolas, and walk-in freezers at various restaurants operated by it.[3]

---

[3] Finding of fact "21" of the Administrative Law Judge's determination has been modified by deleting the last three sentences of that finding which originally read as follows:

A lease dated June 27, 1961, between Howard D. Johnson Co., a predecessor entity to petitioner, Howard Johnson Co., as lessee and Motor Lodge Properties, Inc., as lessor for the lease of land on Route 7 in Colonie, New York, for the purpose of constructing a Howard Johnson restaurant provides that:

> "[U]pon the termination or expiration of the lease for whatsoever cause, the Lessee shall have the privilege and right at its own expense of removing its movable business fixtures, movable office furniture, machinery, equipment, signs, insignia and other indicia of the lessee's tenancy or use including the right to remove the orange colored roof and cupola when the same has been erected on the building on the demised premises."

A lease dated March 8, 1976, between petitioner, Howard Johnson Co. as lessee, and Capital Plaza at Latham Associates as lessor, for the lease of land situated on Route 9 in Colonie, New York similarly provides that petitioner may upon the termination or expiration of the lease for whatsoever cause remove the roof tile and cupola when the same has been erected on the building on the demised premises. The audit papers include two other leases and one lease assignment to petitioner. Of these, none specifically refer to the petitioner's right to remove the Howard Johnson cupola although one gives petitioner the right to remove the "roof tile" upon the termination of the lease.

The field audit report concerning the assessment for the period, September 1, 1981 through November 30, 1985, notes that the vendor Marriott Family Restaurant, Inc., agreed to additional tax due of $317,240.21 but disagreed with $118,234.34 tax due pending the resolution of the prior audit protest of Howard Johnson Co. concerning the assessment for the earlier period. This disagreed tax was the result of the Division's not allowing in full petitioner's claim of manufacturing exemption for its Queens Village plant.

OPINION

> "The record on submission, however, is inadequate to allocate this amount among these various items. Further, the record on submission provides no factual details concerning any of these installations. There is no evidence concerning the number, location, procedures for installation, or lifetime of these items."

The original finding of the Administrative Law Judge has been modified at petitioner's request to remove those statements which are ultimate conclusions based upon an analysis of the adequacy of the factual record.

In the determination below, the Administrative Law Judge determined that the Division had properly rejected petitioner's position that the installation of the walk-in freezers, parking lot poles and lights, and the Howard Johnson rooftop cupola constituted capital improvements. The Administrative Law Judge found that the submitted record lacked sufficient evidence to support petitioner's contention that the installations at issue constituted capital improvements. As to petitioner's claim of entitlement to certain manufacturing exemptions, the Administrative Law Judge found that only 24% of the products produced at petitioner's plant was produced "for sale" and the remaining 76% was produced for petitioner's use in its own restaurants. Accordingly, the Administrative Law Judge disallowed 76% of petitioner's claimed manufacturing exemptions under Tax Law §§ 1115(c) and 1105-B and 100% of petitioner's claimed manufacturing exemption under Tax Law § 1115(a)(12).

On exception, petitioner challenges the conclusion that it failed to present sufficient factual details to support its claim that the installation of the freezers, parking lot lights and poles, and the rooftop cupola qualified as capital improvements. Petitioner further asserts that the Administrative Law Judge applied an erroneous analysis of the law in reaching the conclusion that petitioner's installations did not constitute capital improvements. Turning to the manufacturing exemptions, petitioner argues that the requirement of production of tangible personal property "for sale" was met with respect to that portion of the products shipped to petitioner's own restaurants because those products were ultimately sold to customers in the restaurants. Accordingly, petitioner contends that its use of the products in its own restaurants constituted a sale and was improperly characterized by the Administrative Law Judge as "self-use". Lastly, petitioner asserts that the Administrative Law Judge erred in characterizing the food products at the time of sale as restaurant food, a category distinct from tangible personal property.

In response, the Division asserts that petitioner failed to present sufficient facts to support the claim that the installations at issue constituted capital improvements. As to the manufacturing exemption, the Division argues that since only 24% of the food manufactured at

petitioner's plant was sold, petitioner does not meet the requirement that the machinery and equipment be used "predominantly" in the manufacture of tangible personal property for sale. The Division further argues that petitioner has failed to demonstrate its entitlement to the subject exemptions with regard to the products transferred to petitioner's own restaurants because upon delivery of the food products to those restaurants and their preparation for sale to customers, the food products took on a new taxable identity, i.e., restaurant food. Accordingly, the Division asserts that petitioner is not entitled to the subject exemptions because petitioner has failed to demonstrate that it was manufacturing the food products "for sale" and because the food, once prepared and sold in the restaurants, was no longer tangible personal property.

We affirm the determination of the Administrative Law Judge.

We turn first to the issue of whether the installation of the freezers, parking lot poles and lights, and the rooftop cupola were properly found to be subject to sales tax. Tax Law § 1105(c)(3) imposes sales tax on the service of installing tangible personal property not held for sale in the regular course of business. An exclusion from the imposition of that tax is provided by Tax Law § 1105(c)(3)(iii) for an installation "which, when installed, will constitute an addition or capital improvement to real property, property or land". In order to qualify for the exclusion from sales tax for capital improvements pursuant to Tax Law § 1105(c)(3)(iii), the taxpayer must demonstrate that its improvements meet the definition of that term as provided in Tax Law § 1101(b)(9) (see, Merit Oil of New York v. State Tax Commn., 124 AD2d 326, 508 NYS2d 107). That section 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 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]).

We agree with the finding below that the factual record is insufficient to show that any of the installations at issue here constitute capital improvements within the meaning of Tax Law § 1101(b)(9). As to the freezers, petitioner has simply failed to provide any factual details setting forth the value, relative size or weight, the method of installation or any other pertinent information to support the claim that the freezers qualify as a capital improvement (cf., Dairy Barn Stores, Tax Appeals Tribunal, October 5, 1989 [where detailed evidence regarding physical characteristics of a freezer such as its dimensions, weight, construction, manner of affixation, ability to be disassembled and moved resulted in the conclusion that the installation was a capital improvement under Tax Law § 1101(b)(9)]). Similarly, the record is devoid of any factual details concerning the construction, size, method of affixation or other relevant details regarding the parking lot poles and lights. In view of this inadequate factual record, we conclude that petitioner has simply failed to demonstrate that the freezers or the parking lot poles and lights meet the statutory definition of a capital improvement as set forth in Tax Law § 1101(b)(9).

The factual record also fails to support petitioner's claim that the rooftop cupola installed on the leased premises constitutes a capital improvement.[4] Petitioner failed to offer any evidence

---

[4]To illustrate this point, we note that the only information contained in the record relevant to the question of whether the installations constituted capital improvements is contained in paragraph 17 of the stipulation as follows:

> "17. The Audit Division maintains Petitioner's improvements to its properties were not capitol [sic] improvements because:
>
> "a) The parking lot lights consisted of metal poles attached to a concrete base by bolts. These poles and lights could easily be removed without damage to the property. Accordingly they were not permanent installations and not capital improvements.
>
> "b) Cupolas. Under the terms of Petitioners leases, petitioner retained the right to remove the cupolas at the end of the leases. They were therefore not permanent installations to real property, but remained tangible personal property, and not capitol [sic] improvements.
>
> "c) Walk in freezers. The freezers in question were delivered to Petitioner's facilities in sections and installed in sections. Since they could be dismantled and removed in the same manner, without significant damage to the property, they are neither permanent installations or capitol [sic] improvements."

Petitioner has merely stipulated as to the Division's position regarding the installations and has not provided any

that would serve to rebut the presumption that tenant installed improvements are not made with the intent to enhance the permanent value of the property (see, Matter of Flah's of Syracuse v. Tully, 89 AD2d 729, 453 NYS2d 855). Moreover, two of the leases in the record afford petitioner the specific right to remove the cupolas upon termination of the lease. Where the right to remove installed property has been specifically reserved in a lease, a finding of permanency is unlikely (Matter of Glenville Cablesystems Corp. v. State Tax Commn., 142 AD2d 851, 531 NYS2d 137, Merit Oil of New York v. State Tax Commn., supra, 508 NYS2d 107, 109; Matter of ADT Co. v. State Tax Commn., 113 AD2d 140, 142, 495 NYS2d 274, 276, appeal dismissed 67 NY2d 917, 501 NYS2d 1026). In the absence of any evidence to the contrary, we must agree with the conclusion below that petitioner has clearly failed to establish that the cupola qualifies as a capital improvement.

In reliance on Matter of Metromedia, Inc. v. Tax Commn. of the City of New York (60 NY2d 85, 468 NYS2d 457), petitioner argues that the Administrative Law Judge used an erroneous standard in rejecting the claim that the subject installations constituted capital improvements. We do not agree. In Metromedia, the Court of Appeals considered whether for purposes of the Real Property Tax Law certain outdoor advertising display signs constituted real property and were therefore subject to tax. Because the detailed evidentiary record in that case indicated that the signs were permanently affixed to the railroad superstructure, were devoted to a common use of the railroad superstructure, i.e, advertising, and were intended by the parties to be permanent, the Court concluded that the signs at issue constituted taxable real property (Matter of Metromedia v. Tax Commn. of the City of New York, supra, at 468 NYS2d 457, 459). That case is easily distinguishable from the case at hand because, as the above discussion indicates, petitioner has not provided any factual evidence that would support its claim that the installations at issue were part of or permanently affixed to the real property, were intended to be permanent or added to the value or prolonged the useful life of the real property. With respect

---

relevant facts necessary to resolve the question of whether the subject installations constitute capital improvements.

to what would have been the proper standard to evaluate the installations had petitioner established their nature, it is well settled that the classification of property as real property under the Real Property Tax Law is not dispositive of whether the property is a capital improvement for sales tax purposes (see, Merit Oil of New York v. State Tax Commn., supra; Dairy Barn Stores, supra). Accordingly, we agree with the conclusion reached below that Metromedia does not mandate a contrary result here.

We now turn to petitioner's claim of entitlement to certain exemptions under Tax Law §§ 1115(c), 1115(a)(12) and 1105-B(a). Under Tax Law § 1115(c), utilities used or consumed "directly and exclusively in the production of tangible personal property for sale by manufacturing" are exempt from the imposition of sales and use tax (emphasis added). Tax Law § 1105-B(a) provides, in pertinent part, that sales tax imposed on the retail sale of "parts with a useful life of one year or less, tools and supplies for use or consumption directly and predominantly in the production of tangible personal property . . . for sale by manufacturing . . . shall be paid at the rate of two percent for the period commencing September 1, 1980 and ending February 28, 1981 and such retail sales shall be exempt from such tax on and after March 1, 1981" (emphasis added). Tax Law § 1115(a)(12) provides, in pertinent part, that receipts from the sale of "[m]achinery or equipment for use or consumption directly and predominantly in the production of tangible personal property . . . for sale, by manufacturing" are exempt from sales and use tax (emphasis added). "Predominantly", as used in Tax Law § 1115(a)(12), means that the machinery or equipment is used more than 50% in the production of tangible personal property for sale (see, 20 NYCRR 528.13[c][4]). As emphasized, the foregoing sections require that the utilities, tools and supplies, and machinery or equipment at issue be used or consumed in the production of tangible personal property for sale.

Petitioner's arguments on exception regarding its entitlement to the exemptions at issue all flow from the primary assertion that the production of that portion of the food products which were transferred to petitioner's own restaurants constitutes "the production of tangible personal property for sale" within the meaning of the three exemptions at issue because those products

were ultimately sold to customers in petitioner's restaurants. While conceding that transfer of 76% of the food products to its own facilities is an intra-corporate transfer and does not constitute a sale for tax purposes, petitioner maintains that the eventual sale of the food products to restaurant patrons satisfies the "for sale" requirement in the exemptions at issue. On that point, petitioner further challenges the finding by the Administrative Law Judge who in reliance on Matter of Burger King v. State Tax Commn. (51 NY2d 614, 435 NYS2d 689), found that at the time the food products were sold by petitioner to customers at the restaurants they were sold as "restaurant food", a category distinct from tangible personal property. Petitioner takes the position that at the time of sale in the restaurants the food products were sold as tangible personal property and thus fall squarely within the language of the exemptions at issue. Consequently, the crux of the matter is whether the sale of the food products in the restaurants is a sale of tangible personal property for the purposes of the exemptions at issue.

We begin our analysis by observing that while the food products were located at petitioner's manufacturing and distribution centers, the products were tangible personal property within the meaning of Tax Law §§ 1115(a)(12), 1115(c) and 1105-B(a). If the food products had been sold to a third party as tangible personal property, petitioner would have been entitled to the claimed manufacturing exemptions. Indeed, the Division allowed and the Administrative Law Judge sustained 24% of the claimed manufacturing exemptions on that basis. The remaining 76% of the food products, however, was transferred to petitioner's own restaurants and then prepared and served to paying customers. Petitioner asserts that the sale of the food products to its restaurant patrons satisfies the "for sale" requirement of the exemptions at issue.

We agree with petitioner's initial point that the sale to its patrons in the restaurants of the food products qualifies as a sale within the meaning of Tax Law § 1101(b)(5). We are not, however, persuaded by petitioner's further contention that at the time of sale the food products were sold as tangible personal property within the meaning of the exemptions at issue.

The Division argues that at the time of retail sale to the customers at petitioner's restaurants the food products were sold not as tangible personal property but as restaurant food.

We agree. To conclude that the food products, after processing and service in the restaurants, continue to be tangible personal property rather than restaurant food not only contradicts the decision of the Court of Appeals in Burger King but would render meaningless the statutory scheme of Article 28 of the Tax Law which imposes a sales tax on six separate types of transactions, including a tax on the receipts from the retail sale of tangible personal property (Tax Law § 1105[a]) and a separate tax on the sale of restaurant food and drink (Tax Law § 1105[d]). The existence of § 1105(d), which imposes a sales tax on the receipts of "every sale . . . of food and drink of any nature or of food alone, when sold in or by restaurants", led the Court in Burger King to conclude that restaurant food was in a category distinct from tangible personal property for purposes of the sales tax. The Court reasoned that if restaurant food was merely tangible personal property it would be subject to tax under Tax Law § 1105(a) which imposes a tax on the sale of tangible personal property, thus rendering § 1105(d) unnecessary. Employing the "familiar and salutary canon of construction that courts, in construing apparently conflicting statutory provisions, must try to harmonize them" (quoting McKinney's Cons. Laws of NY, Book 1, Statutes, §§ 98, 141), the Court gave credence to the distinction drawn by the former State Tax Commission between restaurant food and tangible personal property. The Court noted that the preparation and service of food products in a restaurant "was more than the mere receipt of an edible or a potable" and could reasonably be viewed as a hybrid transaction involving the combination of the delivery of both food and service rather than as the sale of tangible personal property (Matter of Burger King v. State Tax Commn., supra, 435 NYS2d 689, 691-692). Based on the distinction between restaurant food and tangible personal property, the Court held that equipment used to process food and drink sold by a fast food chain did not qualify for the manufacturing exemption because the production efforts were geared to the processing and delivery of restaurant food, a category distinct from tangible personal property. Accordingly, we find the distinction articulated in Burger King applicable to the present situation as well and hold that the sale of restaurant food is not the sale of tangible personal property for purposes of the exemptions at issue here.

We find additional support for this conclusion in Matter of Midland Asphalt Corp. v. Chu (136 AD2d 851, 523 NYS2d 697). There the court held that purchases of electricity and equipment used to produce asphalt were not exempt under Tax Law § 1115(a)(12) and (c) because the taxpayer was primarily in the business of contracting its services of installing the asphalt rather than the business of selling the material separately from the services it provided (see also, Matter of Southern Tier Iron Works v. Tully, 66 AD2d 921, 410 NYS2d 711, 713 [denial of manufacturing exemption sustained where taxpayer's business involved a service component which was not merely incidental to the manufacture of the tangible personal property]; Matter of Spancrete Northeast, Tax Appeals Tribunal, March 8, 1990 [exemptions denied where taxpayer provided service installation of over 90% of the tangible personal property]; Matter of Willets Point Contracting Corp., Tax Appeals Tribunal, September 14, 1989 [exemption denied where 96% of taxpayer's business was in connection with its paving services]). The rule which we glean from these cases is that in order for machinery, equipment or fuel to qualify for the applicable exemptions, the taxpayer must produce tangible personal property, for sale, subject to tax as the sale of tangible personal property pursuant to § 1105(a) of the Tax Law. Thus, in Midland, the exemption was denied because the tangible personal property, i.e., the asphalt, was sold as part of a service subject to tax under § 1105(c) of the Tax Law. Similarly, in Burger King, the manufacturing exemption was denied because the tangible personal property was sold as restaurant food subject to tax under § 1105(d) of the Tax Law.

In the case before us, the facts establish that 76% of the frozen or canned food products, produced at the Queens Village plant, was shipped from petitioner's distribution centers to restaurants operated by petitioner where it was served to paying customers. As such, the sale of the food products in the restaurants presumptively falls within the statutory classification of "restaurant food" under Tax Law § 1105(d)(i) at the point of sale (see, Matter of Burger King v. State Tax Commn., supra). Petitioner has failed to demonstrate that the food products were not sold as restaurant food subject to tax under Tax Law § 1105(d). Accordingly, we find that petitioner has not demonstrated its entitlement to the exemptions at issue here because at the

time of sale the food products were sold as restaurant food and thus were not subject to tax as tangible personal property under Tax Law § 1105(a).

Petitioner argues that we are precluded from characterizing the food products at the time of sale as restaurant food because the stipulation entered into by the parties provides that "the products were tangible personal property". While we agree that at the time of manufacture and while the products were located at the distribution centers, the food products constituted tangible personal property as that term is defined in Tax Law § 1101(b)(6), we must however reject the argument that this characterization likewise controls the status of the food products once delivered to the restaurants and prepared and served to the restaurant patrons. In our view, it is reasonable to infer from the language of the stipulation that the characterization of the food products as tangible personal property applies only to the food products at the time of manufacture and distribution. To conclude otherwise would, as discussed above, violate the decision of the Court of Appeals in Burger King and would be inconsistent with the statutory scheme of Article 28 of the Tax Law. Accordingly, we are not persuaded by petitioner's contention on this point.

We are not persuaded by petitioner's further attempt to distinguish Burger King on the grounds that it dealt with a taxpayer's entitlement to the manufacturing exemption on equipment used on the restaurant premises whereas in petitioner's situation, the machinery and equipment at issue are located in a wholly separate food manufacturing plant. We recognize that in the situation presented before us petitioner is not attempting to claim the exemptions on the machinery or equipment used in its restaurant to prepare the food for consumption by its patrons. Instead, because the event of sale occurred at the restaurant premises when the food products were presumptively being sold as restaurant food, petitioner is attempting to bootstrap the manufacturing stage where the food, if sold from that location, would correctly be taxable as tangible personal property under Tax Law § 1105(a), to the point of retail sale in petitioner's restaurants where the food was being sold as restaurant food under Tax Law § 1105(d). Thus it is clear that application of the distinction drawn in Burger King causes petitioner's argument to

fail at a very basic level because at the time of sale the food products were subject to tax as restaurant food rather than as tangible personal property, and therefore not within the language of the subject exemptions.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner Marriott Family Restaurants Inc. formerly known as Howard Johnson Co., is in all respects denied;

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

3. The petitions of Howard Johnson Co. and Marriott Family Restaurants, Inc. as successor in interest to Howard Johnson Co. are denied; and

4. The notices of determination and demand for payment of sales and use taxes due dated November 21, 1983 and February 13, 1986 are sustained, except to the extent indicated in conclusion of law "K" and findings of fact "12" and "23" of the Administrative Law Judge's determination.

DATED: Troy, New York
July 19, 1990

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner