STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
DAIRY BARN STORES, INC.	:	DECISION
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 June 1, 1983 through August 31, 1986.	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge, issued on December 8, 1988, with respect to a petition filed by Dairy Barn Stores, Inc., 544 Elwood Road, East Northport, New York 11731, for revision of a determination or for refund of sales and use taxes under Article 28 and 29 of the Tax Law for the period June 1, 1983 through August 31, 1986 (File No. 804197). Petitioner appeared by Lapatin, Lewis, Green & Kaplan, P.C. (Benjamin Lewis, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Irwin Levy, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception. Petitioner filed a responding brief to the exception. Oral argument, at the petitioner's request, was heard on May 24, 1989.

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

ISSUE

Whether the installations of freezers by the owner of the underlying realty in question, whereby the units are constructed upon separately erected concrete foundations and cannot be moved without causing significant damage to their insulating capabilities, constitute capital improvements to real property within the meaning of Tax Law § 1101(b)(9), so as to be excluded from the sales tax due on the receipts from the installation of tangible personal property under Tax Law § 1105(c)(3).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and such facts are stated below. We also find additional facts as noted.

Petitioner, Dairy Barn Stores, Inc., is the owner of approximately 60 small convenience stores located in Nassau and Suffolk counties. Each store sells ice cream, eggs and various grocery products. Located adjacent to each of the convenience stores is a free-standing outside freezer box.

We also find as a fact that petitioner is the owner of the underlying real properties connected with the stores.

The freezer in issue in this case is 8.6 feet in height and 10 by 12 feet in its horizontal dimensions. It is shipped in about 20 prefabricated pieces on a flat bed truck. It is made of galvanized steel and urethane insulation and contains freezing and condenser units. Once constructed, the freezer is set on a four-inch concrete foundation slab set in the ground. While the freezer apparently may be bolted to the slab, the one in issue here merely rests on the slab with no attachment. The freezer has a "mast" for the connection of electrical service. It is guaranteed for 10 years and has an expected life of approximately 20 years. The freezers' costs range from $10,000.00 to $12,000.00.

We also find as a fact that each freezer weighed approximately 3,000 pounds.

To be moved, the freezer would have to be cut apart and pieced together again. However, it would not retain its insulating capability and would be useless as a freezer.

Building permits are required for the installation of the freezers in the Town of Huntington and Village of Lindenhurst, Suffolk County. Site plans for construction of these freezers have been required for properties located in the Town of Islip, Suffolk County, and the Villages of New Hyde Park and Port Washington, Nassau County.

A Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued to petitioner on November 24, 1986 for the period June 1, 1983 through August 31,

1986 in the amount of $6,065.26, plus interest of $571.30, for a total amount due of $6,636.56. The tax due was based on the cost of the purchase and installation of the freezer unit. A consent extending the period of limitation for the period June 1, 1983 through August 31, 1984 to December 20, 1986 had been signed on August 14, 1986.

OPINION

The Administrative Law Judge determined that the purchase and installation of the freezer units in question constituted capital improvements and thus were excluded from sales tax as provided by Tax Law §§ 1105(c)(3) and 1115(a)(17).

On exception the Division argues that the free-standing refrigerators do not become part of the real property, are not permanently affixed to the real property, and do not appear to be permanently installed. The Division concludes that these units failed to satisfy the statutory criteria for a capital improvement. The Division also argues that the Administrative Law Judge erred in relying on the definition of real property contained in the Real Property Tax Law.

Petitioner, in response, claims that the freezers were intended to be permanently installed and would be substantially damaged upon removal. Thus, petitioner asserts that these units are capital improvements not subject to sales tax under Tax Law §§ 1105(c)(3) and 1101(b)(9).

We affirm the determination of the Administrative Law Judge.

Tax Law § 1105(c)(3) imposes a sales tax on the installation of tangible personal property not held for sale in the regular course of business. Tax Law § 1105(c)(3)(iii) provides, in pertinent part, an exception to this general rule:

> "(iii) for installing property which, when installed, will constitute an addition or capital improvement to real property, property or land, as the terms real property, property or land are defined in the real property tax law . . . ."

Tax Law § 1101(b)(9) 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."

We first address whether the freezers substantially added to the value of the real properties. With purchase costs in excess of ten thousand dollars, petitioner's freezers did substantially add to the value of each of petitioner's retail properties. Hence, petitioner has met the first condition for a finding that its units are capital improvements.

We turn next to the questions of whether petitioner's freezers became part of the realty or their removal would materially damage the real property or units themselves and whether the units were intended to be permanently installed (Tax Law § 1101[b][9][ii] and [iii]). While we agree with the Division of Taxation that the classification of property as real property under the Real Property Tax Law does not determine whether the property is a capital improvement for sales tax purposes (Matter of Merit Oil v. State Tax Commn., 124 AD2d 326, 508 NYS2d 107), we find that our analysis of the second and third elements of a capital improvement is aided by referring to the common law definition of real property fixture which has elements substantially similar to those of a capital improvement. A fixture "is based upon the united application of three requisites: (1) actual annexation to the real property or something appurtenant thereto; (2) application to the use or purpose to which that part of the realty with which it is connected is appropriated; and (3) the intention of the party making the annexation to make a permanent accession to the freehold" (Marine Midland Trust Co. v. Ahern, 16 NYS2d 656, 659 citing Potter v. Cromwell, 40 NY 287; 59 NY Jur2d 608). In the above definition, "actual annexation" is akin to Tax Law § 1101(b)(9)(ii), i.e., "becomes a part of the real property or is permanently affixed to the real property" and "intention . . . to make a permanent accession" is substantially the same as Tax Law § 1101(b)(9)(iii), i.e., "is intended to become a permanent installation."

Since "the intention of the party making the annexation has long been the controlling test in determining the character of personalty as a fixture," (59 NY Jur2d 614), we turn initially to

petitioner's intention of making the freezers permanent installations (Tax Law § 1101[b][9][iii]). The controlling intent is not petitioner's secret or subjective intention at the time the units were acquired, but rather the intention the law objectively will deduce from all the circumstances at the time the property is annexed to the realty to see whether it may fairly be found that the purposes of the annexation was to make the unit a permanent part of the freehold (Voorhees v. McGinnis, 48 NY 278; Marine Midland Trust Co. v. Ahern, 16 NYS2d 656, 659). Factors to be considered in deciding whether the annexation was intended to be permanent include: the nature of the article annexed, the mode of annexation, the relation to the property of the person making the attachment, and the applicability and application of the unit to the use to which the property is being put (Capri Marina & Pool Club v. County of Nassau, 84 Misc 2d 1096, 379 NYS2d 341, 345 citing Marine Midland Trust Co. v. Ahern, 16 NYS2d 656, 660; see, Gould v. Springer, 206 NY 641; Potter v. Cromwell, supra).

Applying these principles to the instant case, it is clear that the freezers were intended to be permanent installations. First, the nature of the article itself as well as the method of its installation suggest permanency. Measuring 8.6 by 10 by 12 feet and weighing over 3,000 pounds, we are persuaded that they are too ponderous and cumbersome to be moved about at will. Second, it should be pointed out that the on-site construction of a foundational support for these units requires constructing a 4-inch concrete slab set in the ground. The record also indicates that in order to move the freezers, one would have to cut them apart and piece them back together again. This, however, would damage their insulating capability and render them useless.

Third, the freezers were purchased by and installed at the request of the owner of the underlying store properties. While this factor alone may not be conclusive of petitioner's intention to make the installations permanent, it nevertheless holds considerable sway. "An owner is much more likely to intend permanency than one in possession of premises temporarily, as for example a tenant." (Marine Midland Trust Co. v. Ahern, 16 NYS2d 656, 660; Van Buren v. Gallo, 157 Misc. 289, 283 NYS 453.)

Fourth, petitioner presented convincing proof that the freezers were both adapted and essential to the use to which the building on the property was applied. Petitioner owned and operated a chain of convenience stores that sells milk, ice-cream, eggs, frozen meat, and other groceries. The freezer boxes were necessary to keep these products cool and at an even temperature. In the absence of any evidence to the contrary, we can fairly assume that the business was intended to be permanent. The unit was purchased and installed in connection with the business, and there is little to suggest that its use was to be only temporary. We conclude, therefore, from all these factors that the freezer units were installed with a view towards permanency.

We turn now to the question of whether petitioner's freezers became part of the real property or were permanently affixed to the realty so that removal would cause material damage to the realty or units themselves (Tax Law § 1101[b][9][ii]). While the freezers in question were not bolted to their concrete bases, it has been stated that "[a] thing may be as firmly affixed to the land by gravitation as by clamps or cement (Snedeker v. Warring, 12 NY 170, 175). Plainly, by virtue of its weight, the unit is rendered immovable for all practical purposes. In addition, as we discussed earlier, any attempts to move the freezers would make the units functionally useless. Thus, we conclude that the freezers became part of the real property or were permanently affixed to the retail properties and that petitioner has met all the conditions for a finding that its units are capital improvements.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Dairy Barn Stores, Inc. is granted; and

4. The notice of determination issued on November 24, 1986 is cancelled.

DATED: Troy, New York
October 5, 1989

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

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

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