STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
EMPIRE VISION CENTER, INCORPORATED	:	DECISION DTA No. 805767
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, 1982 through February 28, 1986.	:	

Petitioner Empire Vision Center, Incorporated, 2921 Erie Boulevard, Syracuse, New York 13224 and the Division of Taxation filed exceptions to the determination of the Administrative Law Judge issued on August 23, 1990 with respect to petitioner's 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 June 1, 1982 through February 28, 1986. Petitioner appeared by Scolaro, Schulman, Cohen, Lawler & Burstein, P.C. (Alan S. Burstein, Esq. and Bruce M. Poushter, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (James Della Porta, Esq., of counsel).

Both parties filed briefs on exception. Oral argument, at the request of both parties, was heard on May 16, 1991.

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

ISSUES

I. Whether the purchase of a computer by petitioner was exempt from the imposition of sales and use tax because the computer was used or consumed directly and predominantly in the production for sale of tangible personal property.

II. Whether the expenses incurred by petitioner for the installation of various items constituted capital improvements to real property, thereby exempting said expenses from the imposition of sales tax.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "4" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

During the period in issue, petitioner, Empire Vision Center, was a corporation whose activity consisted of providing eye examinations, eyeglasses and contact lenses. The corporation had its primary place of business in Syracuse, New York. Mr. Lionel Gilels was petitioner's president.

As the result of a field audit, the Division of Taxation ("Division") concluded that petitioner's purchases of various items for eight of its offices were subject to sales and use tax.[1] The Division also found that petitioner's purchase of a Wang computer was not exempt from sales and use tax on the premise that the computer was not used in the manufacturing process.

Petitioner paid the sales and use tax sought by the Division and, in August 1986, it filed a claim for a refund. On or about May 12, 1987, the Division advised petitioner that its claim for a refund of tax was denied on the basis of the conclusions drawn from the prior field audit. This proceeding ensued.

THE WANG COMPUTER

We modify finding of fact "4" of the Administrative Law Judge's determination to read as follows:

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[1] The eight locations are Syracuse, Albany, Latham, Fulton, Fairmont, Watertown, Geneva and Vestal.

> Generally, each of petitioner's offices prepared eyeglasses for its customers while they waited. Each customer would present a prescription from an eye doctor to petitioner's employees. The prescription contained certain measurements of the customer's eyes critical to the production of lenses designed to correct the customer's sight to the greatest extent possible. In addition to the prescription, the customer would have to choose the frame, the tint of the lens, if any, and the material for the lens, i.e., glass or plastic. Using the information in the prescription and the choices made by the customer, machine operators in each of petitioner's offices would operate machines which would grind the lenses according to the prescription, apply the appropriate tint, and otherwise produce the eyeglasses. There was a certain group of people for which eyeglasses could not be made in petitioner's offices. In order to serve this group of people, the relevant data from the prescription was transmitted to a central manufacturing center in Syracuse. There, data entry operators manually entered into the Wang computer all the relevant data. The computer made necessary calculations and produced a printout which described the production method for the lenses, i.e., lens material, lens type, the lens size, the curvatures and the settings necessary to eventually produce the eyeglasses. This information was then used by machine operators to operate machines to grind the lenses to make the eyeglasses. The computer was not physically linked to the equipment which did the grinding of the lens.[2]

The Wang computer was used exclusively to make eyeglasses and petitioner was not be able to make certain types of eyeglasses without the computer. Prior to the use of this system, petitioner sent out to have lenses manufactured.

Petitioner maintains a second computer system, manufactured by IBM, which was used for billing and accounting activities. The IBM computer was also used to maintain records such as laboratory productivity. The only access the Wang computer had to petitioner's records was for the purpose of inquiring whether certain lens blanks were in stock.

CAPITAL IMPROVEMENTS

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[2] Findings of Fact "4" of the Administrative Law Judge's determination read as follows:

> "Generally, each of petitioner's offices prepared eyeglasses for its clients while they waited. However, there was a certain group of people for which this could not be done. In order to serve this group of people, data for the prescription was transmitted to a central manufacturing center in Syracuse. Thereafter, machine operators manually entered into a Wang computer information such as the prescription, type of frame and lens and certain measurements taken by the technician. In response, the machine operators obtained a computer printout which described the settings for the machinery to grind the lens including the numbers to set the dials of the lens grinding machine, the tool to use, and the amount of time the machine should be operating. It also told the operator the size of lens to start with in order to complete the job. The computer was not physically linked to the equipment which ground the lens."

We have modified this finding of fact to more accurately reflect the record.

The sales tax audit referred to above led the Division to conclude that sales and use taxes were due on the amounts represented by 36 invoices. At the time of the hearing, petitioner was able to locate 33 of the 36 invoices. Information pertaining to each of the invoices is set forth as Appendix A.

The parties agreed at the hearing that the items designated as C, D, E, O, S, X, Y, DD, EE and FF in Appendix A were capital improvements.

When it performed its audit of petitioner's invoices, the Division declined to give petitioner credit for sales tax paid of $911.28.

The item described as Hexam Gardens Constr. in Appendix A is part of the expense of $103,000.00 which petitioner incurred for the renovation of its office in Latham, New York. Prior to petitioner's acquisition of the building, it had been used to sell fast food. Thereafter, the building was left empty for a period of time.

In order to renovate the Latham office, a demolition team removed all of the old cooking equipment and grease traps so that all that was left was a "ripped up" floor, exterior walls and some interior walls. The old electrical wiring and plumbing was also removed. Thereafter, the contractor built new walls, installed a completely new electrical and plumbing service and completely refinished the floor. Furthermore, the contractor worked on the exterior of the building by installing sheets of stone.

Petitioner also found that once the electrical wiring was reinstalled, some of the parking lot light poles did not work. Consequently, some light poles were rewired and bulbs were replaced to make them operational.

Petitioner discovered that the wooden roof had leaked over a period of time resulting in rotting of the support beams and roof. Consequently, some of the wood was replaced and the roof was patched to prevent additional leaking.

The contractor also renovated the heating and air conditioning system. This consisted of removing all existing duct work and installing new ducts. In addition, a new heating and air conditioning unit was installed.

Petitioner's occupancy of its Latham office was pursuant to a lease, executed on January 1, 1984 between Mr. Gilels, as landlord, and petitioner, as tenant. The term of the lease expired on December 31, 1988. The eleventh paragraph of the lease provided as follows:

> "ELEVENTH--All improvements made by the Tenant to or upon the demised premises, shall when made at once be deemed to be attached to the freehold, and become the property of the Landlord, and at the end or other expiration of the term, shall be surrendered to the Landlord in as good order and condition as they were when installed, reasonable wear and damages by the elements excepted."

Invoice T in Appendix A is for track lighting at petitioner's Schenectady location. This item consisted of a 12-foot metal strip that was attached to the ceiling. Lights were then affixed to the metal strip so that they could be moved along the tracks. The track lighting was connected to the electrical wiring in the building. If the tracks were removed, there would be holes in the ceiling tiles where the installer fed the electrical wires. There would also be holes in the ceiling cross grid in those locations where the track lighting was removed. Lastly, the ceiling tiles underneath the tracks would probably be a different color from those which were exposed.

In September 1980, petitioner entered into an agreement to lease premises for use as a vision center for its Schenectady office from Hexam Gardens Construction Company, Inc. The lease was for a term of five years with an option to renew for an additional five years. The second paragraph of the lease contemplated petitioner installing such fixtures as were necessary or appropriate to prepare the leased premises for the opening of business. The thirty-second paragraph concerned surrender of the leased premises and provided as follows:

> "Upon the expiration of the term of this lease, Tenant shall surrender the Demised Premises to Landlord in as good order and condition as existed on the Commencement Date, except for reasonable wear and tear, damage by fire or other casualty, and failure of Landlord to make repairs as provided in this lease."

As indicated on Appendix A, petitioner was unable to locate three invoices which were the subject of the initial sales tax audit. The first invoice for $2,500.00 was for a builder who constructed walls. Petitioner conceded the taxability of the second invoice which was for $70.00. The third missing invoice in the amount of $1,593.00 was for a "Lens Display."

At the hearing, the parties stipulated that the findings applicable to the Watertown retail location regarding the method of installation would be applicable to the remaining retail locations. The parties further stipulated that the corporate headquarters would be considered separately.

All of the items in issue were put together by carpenters and cabinetmakers. Since each location had a different space configuration, each item was designed and custom built for the space it was to occupy. Petitioner has never been able to remove an item without damaging it or the property around it. Furthermore, when petitioner has changed locations, it has never used the same cabinet twice.

If any of the items in issue were removed from its location, there would not be any market to sell the item.

When petitioner negotiates a lease, part of petitioner's bargaining position is that the improvements will enhance the site and that the improvements could be used in a professional office after the lease is over.

WATERTOWN OFFICE

On April 8, 1985, petitioner entered into a lease agreement with Juster Associates for the rental of particular premises at the Nichols Plaza Shopping Center in Watertown, New York. The lease had a term of ten years commencing March 1, 1985. The fourteenth paragraph of the lease was denominated interior alterations and provided as follows:

> "FOURTEEN--Tenant may, at its expense, make such alterations and improvements to the Demised Premises and Install Interior partitions as it may require, provided that the written approval of the Landlord be first obtained and that such improvements and alterations are done in a workmanlike manner in keeping with all building codes and regulations and in no way harm the structure of the Demised Premises, provided that at the expiration of this Lease or any extension thereof, Tenant, if requested to do so by Landlord, at its expense, shall restore the within Demised Premises to its original condition and repair any

damage to the premises resulting from the installation or removal of such partitions, fixtures, or equipment as may have been installed by Tenant. Tenant to submit plans and specifications to Landlord for approval prior to proceeding with work.

The Landlord reserves the right, before approving any such changes, additions, or alterations, to require the Tenant to furnish it a good and sufficient bond, conditioned that it will save Landlord harmless from the payment of any claims, either by way of damages or liens. All of such changes, additions, or alterations shall be made solely at the expense of the Tenant; and the Tenant agrees to protect, indemnify and save harmless the Landlord on account of any injury to third persons or property, by reason of any such changes, additions, or alterations, and to protect, indemnify and save harmless Landlord from the payment of any claim of any kind or character on account of bills for labor or material in connection therewith."

The twenty-fifth paragraph of the lease was entitled removal of fixtures and it provided:

"TWENTY-FIVE.--If after default in payment of rent or violation of any other provision of this Lease, or upon expiration of this Lease, the Tenant moves out or is dispossessed and fails to remove any trade fixtures, signs or other property prior to such said default, removal, expiration of Lease, or prior to the issuance of final order or execution of warrant, then and in that event, the said fixtures, signs and property shall be deemed abandoned by Tenant and shall become the property of the Landlord, or Landlord may notify Tenant to remove same at Tenant's own cost and expense, and upon the failure of Tenant so to do, Landlord may, in addition to any other remedies available to it, remove said trade fixtures, signs or other property as the duly authorized agent of Tenant, and store the same in the name and at the expense of Tenant or those claiming through or under it under any usual or proper form of warehouse receipt, whether or not authorizing the sale of same for nonpayment of storage charges, without in any way being liable for trespass, conversion or negligence by reason of the acts of Landlord or anyone claiming under it or by reason of the negligence of any person in caring for same while in storage and Tenant will pay to Landlord upon demand any and all expenses and charges incurred upon such removal and storage, irrespective of the length of time of storage.

Landlord shall have a lien as security for the payment of the rent and other charges hereby reserved upon all goods and chattels which are or may be placed in and upon the said premises during the term hereby created; and that such lien may be enforced, on the nonpayment of the rent hereby reserved or other default of Tenant hereunder, by the seizure and sale of the said goods and chattels pursuant to a distress warrant issued by the Landlord."

The invoice for the Watertown office, which was involved in the stipulation described above, is set forth as Appendix B. These items will be described seriatum:

(A) Frame storage unit.

This is a unit containing 5 drawers which is used for storage. In order to install a frame storage unit, it is placed on the floor, leveled, screwed to a backing and placed against the wall.

The unit is then screwed to the wall so that it will not fall over when holding certain heavy equipment. Many of the units are also glued to the wall. The units, which add to the value of the real estate, are made for a specific location and their removal would cause damage to the unit and to the walls. If one attempted to remove the unit, there would be many screw holes. Moreover, because of the use of glue, there would be a tendency for the back to rip off.

(B) Countertop and upper ledge.

The countertop sits on top of the frame storage unit and is affixed by screws and, in many cases, glue to the frame storage unit. The countertop covers the frame storage unit, provides a work surface and supports the frame bars and mirror units that are on top of it.

The upper ledge is the uppermost portion of the unit which stores frames. It is permanently affixed to the wall by being glued and screwed and cannot be removed without damage to either the surrounding area or the ledge.

(C) Display counter mirror units.

These are countertop mirror units that are laid on the display counter and affixed to the wall below the upper ledge and between the frame displays. They are affixed by being screwed to the countertop and the upper ledge. Petitioner averred that the mirror can not be removed without damage to it. The mirror unit, as well as the upper ledge and countertop, was intended by petitioner to be permanent.

(D) Display counter mirror with door.

This item is a door with an attached mirror which permits an individual to pass glasses needing work from the sales area to the laboratory. The opening is about four feet high and two feet wide. The door is affixed by hinges and is intended by petitioner to be permanent.

(E) Tote Display Frames

At the hearing petitioner's representative conceded that a tote display frame was not a capital improvement.

(F) Slatwall.

The slatwall is a piece of wood with horizontal slats in it which permit display hooks to be affixed. This, in turn, enables petitioner to hang either plastic or metal displays. The slatwall is intended by petitioner to be permanent and is screwed and glued to the wall behind it. Petitioner averred that it cannot be removed without damaging either the slatwall or the wall behind it. The slatwall is not a freestanding item.

(G) Four-seat and six-seat dispensing counters.

These are tables with Formica countertops. The only difference between the four-seat and six-seat units is the amount of room available for seating along the counter. Generally, the wood portion of the structure is screwed to bolts extending from raised concrete slabs. The top of the table is screwed to the base. The dispensing counter was intended by petitioner to be a permanent installation. If removal were attempted, screws would break and the Formica edge would chip.

(H) Dispensing mirrors.

These are mirrors on the dispensing counter which are screwed to the counter. The mirrors could be removed without damaging them. However, there would be screw holes in the counter. The mirrors were intended by petitioner to be a permanent installation.

(I) Vertical file units.

These are units used to store patient records. They are made of wood and are approximately 84 inches high, 4 feet wide and 10 inches deep. The units are either screwed to a wall or freestanding in the middle of a room. In the latter instance they would be screwed together side by side and back-to-back. Removal of the vertical file units would cause unspecified damage to the floors and walls.

(J) Low seating walls.

A low seating wall is a wall which is approximately the height of the back of a chair and utilized to set off a line of chairs and create a walkway. Generally, the wall is screwed to a piece of wood which is shot to the floor with a nail gun. The wall was built by carpenters and

cabinetmakers and intended by petitioner to be permanently attached. It could not be removed without damage to it or the surrounding area.

(K) End tables.

At the hearing, petitioner conceded that the end tables were subject to tax.

(L) Vertical coat rack.

This is a freestanding unit with a shelf to put hats on. The unit contains a bar upon which one may place clothes hangers. The coat rack was not permanently affixed to the real estate. It was screwed to the wall and could be removed without damage to it or the wall. However, it was intended to be a permanent installation. The item was designed for this location and not usable anywhere else.

(M) Accessory glass tube display.

At the hearing, petitioner withdrew its claim that accessory glass tube displays were exempt from tax.

(N) Reception counter and column enclosure.

As the name indicates, this is petitioner's reception counter. At certain points along the counter, there are columns which extend from the floor to the ceiling. The columns were attached to the ceiling and the floor and provide support to the ceiling. The reception counter weighs approximately 500 to 600 pounds and was assembled by cabinetmakers and custom finishing people in the office. It was screwed and glued to material surrounding the column. The reception desk was intended by petitioner to be a permanent installation and could not be removed without damage to the columns or the floor. If one attempted to disassemble it, it would be destroyed. Since the unit gets part of its support from the columns, it can not stand on its own.

(O) Reception back counter.

This is a work counter with an attached file unit that is located behind the reception counter. The reception back counter, which was intended by petitioner to be a permanent fixture, was screwed and glued to the wall. It could not be removed without damaging the unit.

If one attempted to remove the unit, there would be screw holes and material ripped from the walls.

(P) Blue painted accent trim and Empire Vision sign.

These charges were for the lettering on the Empire Vision sign. The letters were cut out, nailed and glued to the wall at the Empire Vision Center in Watertown and Schenectady. The letters are made out of wood and are approximately 12 to 18 inches high. The lettering was intended by petitioner to be a permanent fixture and could not be removed without damaging the trim or the sign.

(Q) File room counter with brackets.

This is a small counter built into the file room for personnel to utilize. It may hold a telephone, calculator, copy machine or files. Brackets are placed underneath the counter to give it support. The counter is screwed to the wall and usually has glue behind it. It was intended to be a permanent fixture and could not be removed without damage to it or the wall.

(R) Shelf and hardware.

At the hearing, petitioner withdrew its claim that the shelf and hardware were exempt from tax.

(S) Contact lens base and upper cabinet.

These units are similar in appearance to kitchen cabinets. The cabinets are screwed and glued to the walls and the bottom part is both screwed and glued to the walls and has plumbing running into the floor. The units contain a drainage pipe and piping for cold water. One portion of the unit is similar to a kitchen counter insofar as it has a built-in sink with plumbing. The unit was intended to be permanent and, according to petitioner, could not be removed without damaging it or the surrounding structure.

(T) Angle corner cabinet.

This is a cabinet built specifically for the Watertown location. A specific type of cabinet was needed because of the walls in the Watertown office. The unit is affixed in a manner similar to a contact lens base and was intended to be a permanent fixture.

(U) Contact lens display.

The contact lens display is a unit which holds bottles of soft contact lenses. In the Watertown and possibly one other location, the units could be removed without damaging them or the wall. The units in the other locations were screwed and glued directly to the wall and then removal would cause damage to the units and the wall. All of the units were intended by petitioner to be permanent fixtures.

(V) Pre-screen cabinet and counter.

This unit consists of a rectangular cabinet. The cabinet also serves as a support for one side of a counter. The cabinet is screwed to the wall. Electrical wiring runs from the wall through the cabinet to equipment which sits on the cabinet. If the cabinet were not screwed to the wall it would fall over because the counter holds several hundred pounds. Petitioner intended this item to be a permanent fixture. Its removal would leave holes in the unit and the wall.

(W) Vanity.

This is a unit which contains a built-in sink and faucet with plumbing for hot and cold water. The unit is screwed to the floor and screwed and glued to the wall. It cannot be removed without damaging it or the surrounding area. The vanity was intended by petitioner to be permanent.

(X) Desk and shelf unit.

This is a desk with shelves that is used by physicians at Empire Vision. The shelves are screwed and glued to the wall and provide the desk with support. The desk was intended by petitioner to be a permanent unit and its removal would damage it and leave holes in the surrounding wall.

(Y) Countertop and backsplash.

The countertop is a flat working surface with a built-in faucet and sink. The backsplash is a two and one-half to three-inch piece of wood that sits above the counter. Both parts are screwed and glued to the wall. The units were intended by petitioner to be permanent fixtures

and could not be removed without damaging them or the wall. Specifically, the backsplash would be broken off, vinyl would be ripped off the wall and there would be numerous screw holes.

(Z) Shelf and hardwood.

At the hearing, petitioner withdrew its claim that the purchase of this item was exempt from tax.

(AA) Kitchenette unit.

This is a unit designed for this location which contains a counter and upper cabinets similar to those which one would see in a kitchen or lunchroom. The counter is equipped with a sink and faucet. The upper cabinet is screwed to the wall. Its removal would leave screw holes. The base counter and backsplash is screwed and glued to the wall. If it were removed the backsplash would be broken off the countertop, vinyl would be ripped off the wall, and there would be many screw holes.

(BB) Designer displays.

This is cabinetry which petitioner utilizes to display higher priced merchandise. The lower portion of the display contains cabinets for storage. It had a wood finish and was equipped with internal lighting. In the Watertown office, a large portion of the display was screwed to a front wall. There are wires that run between different portions of the cabinetry to provide power to the lighting. If the unit were removed, there would be an unfinished side of the display line because it was only finished on one side. Moreover, a portion of the display would have a tendency to fall over because of the weight distribution.

Part of the items making up the designer display are 14 white frame bars without backs at $105.00 each and 4 white frame bars with prism backs at $115.00 each. The frame bars are assembled by carpenters and carpenter's assistants. Between 6 and 8 of the white frame bars without backs and all of the white frame bars with prism backs are removable. The remaining part of the designer display was screwed to the wall and intended to be a permanent

improvement. According to petitioner, it could not be removed without destroying the item itself or the wall behind it.

(CC) Petitioner had carpeting installed at its Watertown location. The carpeting was glued to the floor and was intended to be a permanent installation. It could not be removed without destroying the carpet.

(DD) Petitioner was charged $738.92 for materials from the firm of L&B Products. This charge was for stools that are used at petitioner's dispensing counters. The stools were affixed to a bolt and the bolt was embedded into concrete. The bolt could not be removed but the stool could be removed from the bolt. The stool was intended by petitioner to be a permanent installation but a part of the stool could be removed without destroying the stool or the base.

(EE) Petitioner was charged for labor, travel time and vehicle mileage by Garfield Construction Corporation for the installation of the items described above.

(FF) Petitioner was charged $1,930.00 by T.A. Holmes for plastic frame bars which are part of the frame display line. Although the frame bars were intended by petitioner to be a permanent installation, they could be removed without destroying the surrounding cabinetry. Their removal would leave holes in the wall.

SYRACUSE OFFICE

On April 15, 1983, Mr. Gilels, as the lessor, and petitioner, as the lessee, entered into a lease for premises in Syracuse which had a term of 20 years and 105 days. Petitioner used the leased premises as its corporate headquarters. The sixth paragraph of the lease was entitled "USE, SIGNS AND ALTERATIONS" and provided as follows:

> "The Lessee shall not use the Premises for any other purpose than as above stated, nor erect or display any signs on the Premises, nor make any alterations or improvements upon them without the prior written consent of the Lessor, nor make or permit any defacement, injury, or waste, in, to, or about the Premises. Lessee agrees that any changes, additions, or improvements made by the Lessee shall at the Lessor's sole option remain in and become a part of the Premises at the expiration of the Lease or any renewal thereof. At Lessor's option, Lessee may be required to restore the Premises to their original condition and remove therefrom any additions, improvements, or alterations made thereto."

The invoice for the Syracuse office, which is involved in the stipulation described above, is set forth as Appendix C. These items will also be discussed in the order presented:

(A) Dispensing table and dispensing table base.

This item is similar to the previously described dispensing counter at the Watertown location. The item is screwed together, nailed and placed on the floor so it is not moveable. The tables add to the value of the real estate and were intended to be permanent. The dispensing table could be removed from the base without damage. However, the dispensing table would tip over if it were not secured to the base.

On one occasion petitioner attempted to take a dispensing table apart. The effort was unsuccessful because screws broke so the pieces could not be taken apart. Also, portions of the Formica edges chipped.

The base is a raised part of the floor which supports the dispensing table. The base is screwed to a piece of wood which is shot to the floor with a nail gun. On at lease one occasion, petitioner attempted to remove the wood. The result was that the wood splintered into many pieces.

(B) Display counter and upper ledge.

The display counter is a countertop which sits on top of a frame drawer unit. The upper ledge is a band which goes on top of the frame bars and appears to frame the display mirror. This item was intended by petitioner to be permanent and was screwed and glued to the walls. The countertop is screwed from the inside to the frame drawer units. These items add to the value of the real estate. If someone attempted to remove the countertop there would be Formica chips and broken screws.

(C) Display counter mirror unit.

The display counter mirror unit is a mirror which is located directly above the display counter and below the upper ledge. In order to construct the display counter mirror unit, a triangular shaped piece of wood weighing approximately 60 to 80 pounds is screwed to the countertop and walls. A person attaching the unit may also use glue depending upon whether

there were studs behind the unit. The mirrors are then attached to the wood with glue. The mirror unit was intended by petitioner to be a permanent improvement. It would fall over if it was not affixed as described above.

(D) Display counter mirror door unit.

This unit is also a mirror located between the display counter and the upper ledge. One side of this unit is set on a piano hinge allowing one to swing the mirror open so that one may pass an object between the sales area and the manufacturing laboratory which is behind the wall. The piano hinge has 18 to 20 screws on either side spaced approximately every 2 inches running the entire length of the door.

Both the display counter mirror unit and the display counter mirror door unit are part of the entire cabinetry at this location. The items were intended by petitioner to be a permanent improvement. Petitioner maintains that the item could not be removed without damaging the surrounding item.

(E) Slatwall and trims.

A slatwall is a piece of wood that has horizontal slats allowing one to easily affix or remove plastic or metal displays. The trims are white frames that go around the displays on both sides of the slatwall. The trims affix back-lit displays, called totes, to a wall over a light fixture. The slatwall is permanently installed by being screwed and glued to the wall. However, the trims around the totes are removable so that one can replace bulbs behind the back-lit display.

(F) Catalogue unit.

This is a built-in storage unit with shelves upon which books or other items may be placed. It is built into the cabinet top and is screwed to the countertop, frame drawer units and wall. It is glued in place as well. The catalogue unit was intended by petitioner to be a permanent improvement and adds to the value of the real estate. The unit is permanently affixed and could not be removed without destroying the surrounding unit or damaging the walls.

(G) Accessory display.

This item resembles a picture frame except that it is approximately 8 to 10 inches deep. The unit, which is screwed to the wall behind the reception counter, contains adjustable shelves which allow for the display of items such as contact lens solution or eyeglass cleaner. This unit was intended by petitioner to be a permanent improvement and added to the value of the real estate. The display could be removed without damage to it. However, removal of the display would leave holes in the wall.

(H) Reception counter.

The reception counter is approximately 5 feet high and 12 feet long. It is assembled by carpenters and cabinetmakers on the site from 6 to 8 heavy pieces which are put into position, leveled and then screwed and glued together. The completed unit weighs approximately 600 or 700 pounds and is free standing. The reception counter adds to the value of the real estate and was intended by petitioner to be a permanent improvement.

(I) Chair wall.

This is a solid wall approximately 20 to 30 feet long, 4 feet high and 4 inches wide which is used to separate various areas of the vision center. It forms a barrier against which one may place chairs and delineates an aisle for the flow of pedestrian traffic. The chair wall is screwed to a piece of wood which is shot to the floor with a nail gun. If it were unsecured, it would have a tendency to fall over because of its unwieldy shape and size. The wall is built by carpenters and cabinetmakers and was intended by petitioner to be a permanent installation. It cannot be removed without destroying the wall or the area around the wall.

(J) End tables.

At the hearing, petitioner withdraw its claim for a refund of this item.

(K) Lab counter and shelving.

The lab counter is a counter which is approximately 40 to 44 inches from the floor. It is used to hold petitioner's equipment. One portion of the counter has a built-in sink with hot and cold running water. The lab counter adds to the value of the real estate. The counter is

supported by cross pieces going down to the floor. The cross pieces are screwed and glued to the wall. It could not be removed without destroying the item or the surrounding wall and floor. The shelving could be removed without suffering damage. However, the walls would be damaged.

(L) End panels, toekick and trim for existing frame drawer bases.

This is a new finished panel for the right and left end of the frame drawer cabinets which were on some of the counters. These items are screwed and glued to the frame drawer from inside the cabinet so that the end panel will have a finished side.

(M) Outside birch corners.

This is trim placed on the corner of a wall so that people passing this corner will not damage the sheet rock or the vinyl paper. The birch corner is nailed and glued to the wall and could not be removed without damaging the wallpaper, the wall or the birch corner. The birch corner was intended by petitioner to be a permanent installation and adds to the value of the real estate.

(N) Lounge room coat closet.

At the hearing, petitioner withdrew its claim that item was a capital improvement.

(O) Drawers for computer station.

Initially, when petitioner had its computer modules built, it forgot to include drawers for pencils, paper clips, staplers and similar items. Therefore, petitioner ordered drawers which were attached by cabinetmakers with screws to the underside of the working surface of the computer module. Thus, the drawer becomes part of the computer station which, in turn, is screwed to the wall. The drawers are intended to add to the value of the real estate and be permanently affixed. The drawers could be removed without destroying the computer station. However, they were specifically designed for use with the computer station. The computer station would probably fall over, if it were free standing.

(P) Desks.

At the hearing, petitioner withdrew its claim for a refund on its purchase of desks.

(Q) Credenza and bookshelves.

A credenza is a cabinet which resembles a kitchen counter cabinet with both doors and drawers for storage of files and other miscellaneous items. The bookshelves are shelves which have been attached to the wall to hold books, displays and other items. Both the bookshelves and credenza are screwed and glued to the walls. These items were put together by cabinetmakers on the site and were intended by petitioner to be permanent. The credenza adds to the value of the real estate and could not be removed without destroying the surrounding real property or the credenza.

(R) Conference storage base.

This item is very similar to the credenza except that it was made for the conference room and was therefore given a different name. The unit is permanently affixed to the wall and was intended by petitioner to be permanent. It adds to the value of the real estate and could not be removed without destroying the item or the surrounding area.

(S) Storage-wardrobe.

This is a built-in closet which is designed for hanging apparel on a rod in the interior of the unit. Some storage space is available above the unit. The unit is screwed to the walls and glued to adjoining cabinets. The unit was intended by petitioner to be permanent and could not be removed without destroying the item itself or the surrounding area.

(T) Coffee-storage

This is a unit which is similar to a kitchen counter. The countertop has a built-in sink. There are cabinets with doors located above and below the countertop. The unit is screwed to the walls, was intended by petitioner to be permanent and, according to petitioner, cannot be removed without destroying the item or the surrounding walls and floor.

(U) Reception.

This is the reception counter at petitioner's corporate office. The unit, which is not freestanding, is screwed to the wall. It was intended to be a permanent installation and adds to

the value of the real estate. If the unit were removed, it would leave screw holes in the wall and expose wiring for electrical outlets and telephones.

(V) Corner table.

At the hearing, petitioner withdrew its claim that the expense incurred for the corner table was exempt from tax.

(W) Vanity counter.

This is a bathroom vanity that is used to hold bathroom sinks. It was intended by petitioner to be permanent and was affixed to the wall. Its removal would ruin the item itself as well as the wall and the tile around the item. The vanity added to the value of the real estate.

(X) Computer stations.

These are carrel-like workstations which are utilized by people performing data entry. The units are affixed to the wall by screws in order to support the weight of both the countertop and the dividers between the workstations. The computer stations were intended by petitioner to be a permanent improvement. It added to the value of the real estate. Their removal would leave screw holes in the wall.

(Y) Petitioner incurred labor expense of $2,559.00 for loading and delivery of the items previously referred to at the Syracuse office.

(Z) Petitioner incurred an expense of $62.00 for vehicle mileage for the delivery of materials to the Syracuse office.

(AA) Petitioner was charged $206.03 for supplies from the firm of L&B Products. The expense is for stools which were placed in front of the dispensing desk. As noted earlier, part of the stool could be removed and part of the stool was embedded in concrete.

(BB) Petitioner was charged $990.60 for supplies from the firm of Gamrod-Harman. This expense was for Levolor blinds for windows at this particular location. The blinds were custom manufactured and custom color selected to match the decor of this particular office. Their removal would leave some damage to the aluminum mullions on the window frame. The blinds were intended by petitioner to be a permanent installation and add to the value of the real estate.

(CC) Petitioner was charged $121.98 for material from the firm of Purcell's. This expense was for Lexan corners which are used to protect wall corners and vinyl wall covering from people bumping into corners. The plastic corners are screwed and taped to the walls. Their removal would damage the plastic corners, walls or vinyl.

(DD) Petitioner was charged $822.00 for supplies from the firm of Decor Designs. This expense was for vertical cloth blinds which were custom ordered, custom measured and custom color selected to match the decor of the facility. The blinds could be removed without damage. However, their removal would leave holes in the mullions. The blinds added to the value of the real estate.

(EE) The expense of adding improvements to the Syracuse Office included the following:

"7% NYS Tax	149.84
15% Overhead and Profit	321.09
Freight	25.68"

On January 1, 1977, Mr. Jack J. Rose, as landlord, and petitioner, as tenant, entered into a lease for office space in Albany, New York. The parties agreed that the lease would expire on December 31, 1986. Petitioner utilized this office space as its Albany retail location. The eleventh paragraph of the lease provided as follows:

> "ELEVENTH -- All improvements made by the Tenant to or upon the demised premises, shall when made at once be deemed to be attached to the freehold, and become the property of the Landlord, and at the end or other expiration of the term, shall be surrendered to the Landlord in as good order and condition as they were when installed, reasonable wear and damages by the elements expected."

During the period in issue, petitioner was the lessee of premises in Fulton, New York. The record does not disclose whether petitioner had an agreement with respect to improvements and additions at these premises.

Petitioner leased office premises in Fairmont, New York from a firm known as Franklin Furniture. The lease commenced October 1, 1982. The parties agreed that the lease would continue for a period of six years with an option to renew for an additional term of three years. The fifth paragraph of the letter of intent to sublease provided:

"It is agreed that sub-lessee shall make at its own costs and expense such alterations in the subleased space necessary to conduct a retail vision center and it is agreed that sub-lessee shall be able, again at its own costs and expense, to add to the existing road and building signs, such signs as are commensurate in size and character as shall properly advertise the retail vision center to be operated by sub-lessee."

During the period in issue, petitioner maintained an office in Geneva, New York pursuant to a lease with Pyramid Centers of Empire State Company. The original lease commenced on January 30, 1978 and continued throughout the period in issue pursuant to a renewal option. The relevant portion of Article 9 of this lease provided as follows:

"9.01 -- Installation by Tenant

All fixtures installed by Tenant shall be new or completely reconditioned. Tenant shall not make or cause to be made any alterations, additions or improvements or install or cause to be installed any trade fixtures, exterior sign, floor covering, interior or exterior lighting, plumbing fixtures, shades or awnings, or make any changes to the store front without first obtaining Landlord's written approval and consent which consent shall not be unreasonably withheld. Tenant shall present to Landlord plans and specifications for such work at the time approval is sought.

9.02 -- Removal and Restoration by Tenant

All alterations, decorations and additions made by Tenant, or made by Landlord on Tenant's behalf by agreement under this Lease, the cost of which is borne by Tenant, shall remain the property of the Tenant for the term of the Lease. Such alterations, decorations and additions shall not be removed from the Premises prior to the end of the term hereof without prior consent in writing from Landlord. Upon expiration of the term of this Lease and upon Tenant's vacating the Premises, all such alterations, decorations and additions shall become the property of Landlord or Tenant shall remove all such alterations, decorations, and additions if Landlord so directs. Tenant shall repair or cause to be repaired any damage to the Premises caused by such removal and shall leave the Premises broom clean and in good order, repair and condition, reasonable wear and tear and damage by fire or other unavoidable casualty excepted. Tenant shall surrender all keys for the Premises to Landlord and shall inform Landlord of all combinations on locks, safes and vaults, if any, in the Premises. Any personal property of Tenant not removed as hereinabove provided within five (5) days following the termination of this Lease shall, at Landlord's option, become the property of Landlord."

On March 25, 1986, petitioner entered into a five-year lease for premises in Vestal, New York. The paragraph of the lease which concerned alterations provided as follows:

"Except for business furnishings, displays and fixtures, Tenant shall not make any alterations to the interior or exterior of the premises without the prior approval of the Landlord; said approval not to be unreasonably withheld. In the event that Tenant makes any structural changes either to the interior or to the exterior of the premises, said structural changes shall, at the expiration of this

> Lease Agreement, become a part of the premises and belong to the Landlord. Any alteration made by Tenant which is attached to the premises such that it cannot be removed without material injury to the premises shall, at Landlord's option, become part of the premises at the expiration of this Agreement ('Agreement' including any option terms); however, any alteration made by Tenant which may be removed without material injury to the premises shall remain the property of the Tenant."

The lease also contained a paragraph entitled surrender of premises which provided as follows:

> "On the last day of said term or sooner termination of the estate granted, the Tenant shall peaceably surrender the premises to the Landlord, its successors and assigns, in as good a state and condition as reasonable use thereof will permit; and if said premises be not surrendered at the end of the term, the Tenant will save the Landlord harmless from and against all damage which the Landlord shall suffer by reason thereof and will indemnify the Landlord therefor. At the termination of this Agreement, the building construction therein and all permanent fixtures, alterations and additions shall belong to and be the property of the Landlord provided, however, that Tenant shall be permitted to remove the Tenant's sign and the Tenant's business displays, non-permanent [sic] fixtures, furnishings and furniture."

OPINION

We deal first with the capital improvement issue and the pivotal element of whether petitioner intended the improvements to be permanent. The Administrative Law Judge examined each of the invoices in question in light of the three-pronged test for a capital improvement in Tax Law § 1101(b)(9), i.e., whether the improvement substantially adds to the value of the real property or appreciably prolongs the useful life of the real property; whether it becomes part of the real property so that removal would cause material damage to the property or the article itself; and whether it is intended to become a permanent installation.

The Administrative Law Judge determined that the improvements at the Latham office represented by the Hexam Gardens invoice were capital improvements. The Administrative Law Judge relied on petitioner's lease to establish the fact that the improvements were intended to be permanent. Based on Matter of Flah's of Syracuse v. Tully (89 AD2d 729, 453 NYS2d 855) he rejected the Division's assertion that the improvements could not be capital improvements because the lease did not expressly mention that trade fixtures became the property of the landlord.

The Administrative Law Judge determined that the track lighting at the Schenectady store was not a capital improvement because petitioner failed to prove it was installed in such a way that removal would cause material damage to itself or to the property. He further determined that the lease for the Schenectady office did not establish that the addition was intended to be permanent.

The Administrative Law Judge determined that petitioner failed to establish that the two missing invoices met the criteria for capital improvements.

With regard to the Watertown office, the Administrative Law Judge determined that petitioner established that certain items were affixed in such a manner that their removal would cause material damage to the property or to the item itself.[3] He determined that other items failed to meet this test[4]. The Administrative Law Judge concluded, however, that none of the improvements were intended to be permanent because the lease provided that petitioner could be required to restore the premises to their original condition by removal of the improvements.

With regard to the Syracuse office, the Administrative Law Judge determined that certain items[5] met the second criterion and that other items did not meet this criterion.[6] As with the Watertown office, he determined that none of the improvements were intended to be permanent

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[3]The items are set forth seriatum in the findings of fact and in appendix B as follows: frame storage unit, countertop and upper ledge, slatwall, four-seat and six-seat dispensing counters, low seating walls, reception counter and column enclosure, reception back counter, blue painted accent trim and Empire Vision sign, file room counter with brackets, contact lens base and upper cabinet, angle corner cabinet, vanity, desk and shelf unit, countertop and backsplash, kitchenette unit and carpeting.

[4]The items are set forth seriatum in the findings of fact and in appendix B as follows: display counter mirror units, display counter mirror with door, dispensing mirrors, vertical file units, end tables, vertical coat rack, contact lens display, pre-screen cabinet and counter, designer displays, stools used at dispensing counters and plastic frame bars.

[5]The items are set forth seriatum in the findings of fact and in appendix C as follows: dispensing table and dispensing table base, display counter and upper ledge, display counter mirror unit, slatwall and trims, catalogue unit, reception counter, chair wall, lab counter and shelving, end panels, toekick and trim for existing frame drawer bases, outside birch corners, credenza and bookshelves, conference storage base, storage-wardrobe, vanity counter and Lexan corners.

[6]The items are set forth seriatum in the findings of fact and in appendix C as follows: display counter mirror door unit, accessory display, drawers for computer station, desks, coffee-storage, reception, computer stations, stools used at dispensing desk, Levolor blinds and vertical cloth blinds.

because under the lease petitioner could be required to restore the premises to their original condition by removal of the improvements.

With regard to the Albany, Latham and Vestal offices of petitioner, the Administrative Law Judge determined that all of the improvements were capital improvements. The Administrative Law Judge determined that the remaining lease, i.e., Geneva, did not show the requisite intent that the improvements were intended to be permanent.

The Division excepts to the Administrative Law Judge's conclusion that all the improvements at the Albany, Latham and Vestal locations were capital improvements. The Division asserts that the leases for these locations differentiate between structural changes and those alterations which may be removed without material damage to the premises. The Division asserts that improvements in this latter category are trade fixtures and that they are clearly not capital improvements.

Petitioner takes exception to the conclusions of the Administrative Law Judge that the leases for the Watertown, Syracuse and Geneva locations did not establish a clear intent that the additions were intended to be permanent. Petitioner asserts the leases provide that, at the landlord's option, the improvements become vested in the landlord. Petitioner acknowledges that where a tenant reserves the right to remove the installed property, a finding of permanency is unlikely. "But where the landlord has the option of keeping the improvements, the landlord constructively owns the improvements. *** A lease provision that requires removal of an improvement if requested by the landlord presumes that the landlord owns the improvement. It is clear that the Tenant has reserved no rights in the improvements" (Petitioner's brief, p. 3).

We modify the determination of the Administrative Law Judge.

Tax Law § 1105(c)(5) excludes from the application of sales tax "adding to or improving . . . real property or land, by a capital improvement as such term . . . is defined in paragraph nine of subdivision (b) of section eleven hundred one of this chapter . . . ."

The term "capital improvement" is defined as:

"[a]n 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" (Tax Law § 1101[b][9][i]).

Petitioner's intent must be deduced from all the facts and circumstances at the time the improvement was installed (see, Voorhees v. McGinnis, 48 NY 278; Marine Midland Trust Co. of Binghamton v. Ahern, 16 NYS2d 656).

Installations made for the purposes of conducting the business of one who is not the owner of the real property, e.g., a tenant, licensee or franchisee, are presumed not to be permanent, but made for the sole use and enjoyment of the person who owns the business and not for the purpose of the landlord's estate (see, e.g., Matter of Flah's of Syracuse v. Tully, supra).

Moreover, when a lessee or licensee of property reserves the right to remove the installed property, "a finding of permanency is unlikely" (Matter of Glenville Cablesystems Corp. v. State Tax Commn., 142 AD2d 851, 531 NYS2d 137, 138, citing Matter of Merit Oil of New York v. New York State Tax Commn., 124 AD2d 326, 508 NYS2d 107). Where the licensee has actually obligated itself to remove the improvement upon demand, the evidence is even stronger "of intention that the improvement be other than permanent" (Matter of Manhattan Cable Tel. v. New York State Tax Commn., 137 AD2d 925, 524 NYS2d 889, lv denied 72 NY2d 808, 534 NYS2d 666).

In Manhattan, the franchise agreement between the city and the cable company provided the City of New York with the option to purchase the system or to require the cable company to remove it from the special franchise at the expiration of the franchise agreement. The court focused on the latter aspect of the franchise agreement where the cable company obligated itself to remove the improvement and indicated that this was "even stronger evidence of an intent that the improvement was not permanent." The court apparently found the provision which gave the

city ownership of the system if it so opted, less persuasive as an indication of an intent of permanency.

We find no reason not to follow the court's approach in Manhattan and conclude that with regard to the Watertown lease, paragraphs 14 and 25, the Syracuse lease, paragraph 6, paragraph 9.02 of the Geneva lease, and paragraph 32 of the Schenectady lease, petitioner, as tenant, has obligated itself to remove the improvements if the landlord lessor so requires or to return the premises to the landlord in good order and condition at the termination of the lease. Accordingly, the requisite intention of permanence is lacking.

With regard to the Vestal office, we are cognizant, as the Division points out in its brief, that the lease differentiates between "all permanent fixtures, alterations and additions . . . and non-permanent fixtures, furnishings and furniture" and establishes "removal without material injury to the premises" as the criterion for determining what remains the property of the tenant and what remains the property of the landlord. However, the Division offers no argument or evidence to support its disagreement with the Administrative Law Judge that removal of the challenged improvements would cause damage to the item and/or premises. We would note that affixing by bolts and glue does not in and of itself imply non-permanence, as the Division seems to imply.[7] Accordingly, we find no reason to alter the determination of the Administrative Law Judge that removal of certain improvements results in material damage to such improvements or to the real property to which affixed.

With regard to the Albany and Latham offices, the Division asserts that some of the improvements were suitable only for petitioner's purposes and were only trade fixtures which are presumed not to be permanent (Division's brief, p. 15). The Division refers to items such as the Empire Vision sign, slat walls, reception counters and dispensing tables, items which the Administrative Law Judge determined were affixed in such a way that their removal would cause material damage to the item or to the real property to which affixed. With the exception

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[7]In ***Flah's,*** the facts as determined by the former State Tax Commission were that the improvements were affixed to the realty by bolts, nails and glue (State Tax Commn. TSB-H-81[9]S). These facts did not deter the court from determining that the improvements were intended to be permanent (***Matter of Flah's of Syracuse v. Tully,*** supra).

of the Empire Vision sign, our review of the record indicates no evidence or testimony to alter the Administrative Law Judge's determination that these improvements met the criteria for a capital improvement. With regard to the sign, we cannot agree with the Administrative Law Judge that it was intended to be permanent. Clearly, it had no use other than for identifying petitioner's business. As such, it could not be viewed as a permanent improvement to the leased premises.

We deal next with whether petitioner's computer (the Wang Computer) qualifies for the production exemption (Tax Law § 1115[a][12]; 20 NYCRR 528.13[b]).

The Administrative Law Judge, relying on Matter of T.V. Data (Tax Appeals Tribunal, March 2, 1989), determined that petitioner's computer was engaged in production, had an active causal relationship in the production of the product to be sold, i.e., eyeglasses, within the meaning of the Commissioner's regulations (20 NYCRR 528.13[c][1][ii]) and, thus, it qualified for the production exemption in Tax Law § 1115(a)(12).

In so concluding, the Administrative Law Judge rejected the Division's assertion that the computer here was different from the computer in T.V. Data because here there was no "physical linkage" between the computer and the other equipment used in the production of the eyeglasses. The Administrative Law Judge found that there was no statutory or other basis for the Division's position that "physical linkage" was a necessary prerequisite for the computer to qualify as equipment or machinery used "directly" in the production of eyeglasses.

The Division excepts to the Administrative Law Judge's conclusion that the Wang computer qualified for the production exemption in section 1115(a)(12). The Division reiterates its argument at hearing that the Wang computer was not "physically linked" to the other equipment used by petitioner in the production of eyeglasses and was not "directly" involved in the production process as required by the statute and the Commissioner's regulations. The Division asserts that the computer was used in the administration phase of petitioner's business operations, not in the production phase.

We reverse the determination of the Administrative Law Judge and agree with the assertion by the Division that the computer was used in the administration phase of petitioner's business operations and not in the production phase.

Tax Law § 1115(a)(12) exempts from sales and use tax receipts from: "Machinery or equipment for use directly and predominantly in the production of tangible personal property . . . by manufacturing, processing, generating . . . ."

The Commissioner's regulations amplify the statutory language to define production and distinguish it from administration or distribution (20 NYCRR 528.13[b][1]). Production "includes the production line of the plant starting with the handling and storage of raw materials at the plant site and continuing through the last step of production where the product is finished and packaged for sale" (20 NYCRR 528.13[b][1][ii]). Administration, on the other hand, "includes activities such as . . . general office work . . . purchasing, maintenance . . . and clerical work in production such as preparation of work, production and time records" (20 NYCRR 528.13[b][1][i]). Distribution "includes all operations subsequent to production, such as storing . . . and shipping finished products" (20 NYCRR 528.13[b][1][iii]).

The regulations provide that the "exemption applies only to machinery and equipment used directly and predominantly in the production phase. Machinery and equipment partly used in the administration and distribution phases does not qualify for the exemption, unless it is used directly and predominantly in the production phase" (20 NYCRR 528.13[b][2]). "Usage in activities collateral to the actual production process is not deemed to be used directly in production" (20 NYCRR 528.13[c][2]).

While the point of demarcation between what is administration and what is production is gossamer in nature, we conclude that the computer's function, while necessary for production to eventually occur, is not one which is engaged in the production process within the statute's meaning (see, Matter of St. Joe Resources Co. v. State Tax Commn., 132 AD2d 98, 522 NYS2d 252, 256, Yesawich, J. dissenting, revd on dissenting opn below, 72 NY2d 943, 533 NYS2d 51 [in which the court embraced the principles underlying the Division's regulations distinguishing

transportation from production and determined that certain transportation equipment, while necessary to ultimate production, did not amount to use directly in production]).

The facts here show that, generally, each of petitioner's offices prepared eyeglasses for its clients while they waited. However, there was a certain group of people for which this could not be done. In order to serve this group of people, data from the eyeglass prescription was transmitted from the particular office to a central manufacturing center in Syracuse. There, data entry operators manually entered into the Wang computer the relevant information. The Wang computer produced a printout of relevant information which described the production method for the lenses, i.e., lens material, lens type, lens size, the curvatures and the settings necessary for the machinery to produce the eyeglasses. The actual production of the eyeglasses involved the grinding of the lenses which was done by another set of machines operated by machine operators with the information produced by the Wang computer. Clearly, the information on the printout was used by the machine operators in making the lenses. However, it seems equally clear that the role of the computer ended prior to the start of the production process, i.e., with the printout which it furnished to the machine operators, and did not extend into the grinding process by which the lenses were produced.

We find the Administrative Law Judge's reliance on T.V. Data misplaced. The facts in T.V. Data are distinguishable from those presented here. The computer at issue in T.V. Data was one of five interconnected computers which formed a network that produced the commands to drive the typesetting equipment. The typesetting equipment and the computers were connected to each other and functioned as a unit, although the computer at issue was connected to the typesetting equipment through another computer. The function performed by the computer at issue had a direct and active causal relationship to the production process as its function was to create the camera ready copy and to direct the typesetting equipment in its production of the finished product (the TV listings). Here, there is a gap between the principal function of the Wang computer, i.e., to perform calculations and to produce instructions for the

production of the eyeglasses, and the actual production of the eyeglasses. No such gap existed in T.V. Data.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Empire Vision Center, Incorporated is denied;

2. The exception of the Division of Taxation is granted to the extent that the Empire Vision signs at the Albany and Latham stores do not qualify as capital improvements and that the Wang computer does not qualify for the production exemption, and in all other respects, the exception is denied;

3. The determination of the Administrative Law Judge is modified to the extent indicated in paragraph "2" above, but is otherwise sustained; and

4. The petition of Empire Vision Center, Incorporated is granted to the extent indicated in paragraph "3" above, but in all other respects is denied.

DATED: Troy, New York
November 7, 1991

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

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

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

APPENDIX A

Analysis of Invoice for Empire Vision Center, Inc.

Sales Tax Audit

November 1, 1982 through December 28, 1986

Document Identifier	Vendor's Name	Amount Being Assessed On	Description
A	Garfield Construction	$ 2,362.25	Partial bill for Latham Office
B	Garfield Construction	32,891.55	Partial bill for Camillus Office
C	Garfield Construction	13,929.37	Latham office same bill as A - $2,362.25 being assessed twice
D	Garfield Construction	7,642.50	Bill for work at Geneva Rochester and other stores
E	Garfield Construction	2,313.75	Bill for labor on Camillus installation
F	Garfield Construction	10,763.76	Bill for Albany reconstruction
G	Garfield Construction	20,607.00	Bill Syr. Corporate offices and retail sales
H	Garfield Construction	1,301.75	Bill repair work 8 offices
I	Garfield Construction	442.47	Work at Albany store-extra
J	Garfield Construction	618.00	Labor only on bill of $765.58 for Recept. counter
K	Garfield Construction	4,958.73	Bill Schenectady remodeling
L	Garfield Construction	4,462.55	Portion of bill for Geneva remodeling excluding repairs made
M	Garfield Construction	516.75	Portion of bill for labor included in total of $2,888.95
N	Garfield Construction	31,650.00	Progress payment on Syr. West store
O	Mark O. Scott	600.00	Total for $2,700-not able to determine work done
P	Hexam Gardens Constr.	12,712.50	Portion of total bill of $103,000 for Latham store
Q	Garfield Construction	1,294.48	Same as bill L - balance of bill for other items
R	Garfield Construction	714.31	Bill for protection of air cond. and misc. material & labor
S	Chip Mabie Builders	4,300.00	Construction Schenectady office
T	Wade Lupe	536.70	Track lighting-part of renovation of Schenectady
U	Garfield Construction	813.57	Bill Fairmount-levelor installation
V	Garfield Construction	17,586.56	Bill Schenectady store
W	Chip Mabie Builders	406.27	Remodeling labor & material
X	Chip Mabie Builders	1,735.31	Remodeling labor & material
Y	Chip Mabie Builders	2,259.00	Remodeling labor & material
Z	Garfield Construction	427.00	Silk Screening
AA	Garfield Construction	2,994.92	Design work & items for all

locations

Appendix A (cont'd)

BB	Garfield Construction	63,392.59	Partial bill for Watertown and Schenectady, NY
CC	Garfield Construction	288.00	Vanity top Syracuse-East
DD	Chip Mabie Builders	225.00	Remodeling labor & material
EE	FW Strac Construction	2,422.00	Temporary wiring for laboratory Erie Blvd.
FF	Garfield Construction	244.00	Mat for Watertown
GG	J J Rose, DDS PC	5,663.70	Remodeling work at Albany office paid by landlord, ½ payable by Empire

Invoices not found

Amount	Period	
$2,500.00	8/31/84	FW Strac Construction
70.00	11/30/84	
1,593.00	2/28/86	Lens Display

APPENDIX B

"November 22, 1985

Empire Vision Center
2921 Erie Blvd. E.
Syracuse, N.Y. 13224

Attn: Robert Perlmuter

Re: Empire Vision Center
Watertown, N.Y.

INVOICE #S2061-2

FIXTURING:

DISPLAY LINE:

Frame/storage units (12) @ $315.00		$3,780.00	
Counter top & upper ledge (60)1f @ $22.00		1,320.00	
Display counter mirror units (4) @ $65.00		260.00	
Display counter mirror w/dr (1) @ $150.00		150.00	
Tote Display frames (6) @ $7.50		45.00	
Slatwall (10)1f @ $15.00	150.00		
4-seat dispensing counters (2) @ $550.00		1,100.00	
6-seat dispensing counters (1) @ $655.00		655.00	
Dispensing mirror (6) @ $30.00		180.00	
Dispensing mirror (2) @ $48.00		96.00	
Dispensing mirror (1) @ $65.00		65.00	
			$7,801.00

WAITING/RECEPTION/FILE:

Vertical file units (16) @ $155.00		$2,480.00	
Low seating walls (16)lf @ $35.00		560.00	
End tables (2) @ $95.00	190.00		
Verticle [sic] coat racks (2) @ $130.00		260.00	
Accessory glass cube display (1) @ $675.00		675.00	
Reception counter & column enclosure (1) @ $2750.00	2,750.00		
Reception back counter (8)lf @ $30.00		240.00	
Blue painted accent trim 2" (16)lf @ $3.05		50.00	
Empire Vision sign (1) set @ $390.00		390.00	
File rm counter & brackets (8)lf @ $22.00		176.00	
Shelf/hardware (8)lf @ $8.75		70.00	
			$7,841.00

Appendix B (cont'd)

CONTACT LENS RM/SCREEN:

C/L base & upper cab. (1) @ $720.00	$ 720.00	
Angle corner cab. (1) @ $380.00	380.00	
Contact lens display (12) @ $95.00	1,140.00	
Pre-screen cabinet & counter (1) @ $345.00	345.00	
		$2,585.00

EXAM ROOMS:

Vanities (3) @ $145.00	$ 435.00	
Desk & shelf unit (1) @ $415.00	415.00	
		$ 850.00

LAB:

Counter top & backsplash (44)lf @ $22.00	$ 968.00	
Shelving & hardware (48)lf @ $8.75	420.00	
		$1,388.00

LUNCH ROOM:

Kitchenette unit (1) @ $685.00	$ 685.00
DESIGNER DISPLAY - COMPLETE:	$4,000.00

LAYOUT/LOADING/DELIVERY/INSTALLATION:

LABOR:

(49) regular hours @ $19.50	$ 955.50	
(7) overtime hours @ $24.50	171.50	
(55½) regular hours @ $12.50	693.50	
(13½) overtime hours @ $17.50	263.25	
		$2,057.00

EXPENSES:

TRAVEL TIME:

(6) hours @ $9.00	$ 54.00

COMPANY VEHICLE MILAGE:

Volvo - (2) trips @ 145 mi. ea. @ $.50	$ 145.00	
Van - (3) trips @ 145 mi ea. @ $.35	152.25	
		$ 351.25

Appendix B (cont'd)

MATERIALS:

T. A. Holmes		$1,930.00	
L & B Products		738.92	
Lerman Carpet Corp.	878.94		
Masland Carpet		3,150.72	
		6,698.58	
7% NYS Tax		468.90	
15% Overhead & Profit		1,004.79	
Freight charges for above	385.29		
			$ 8,557.56

TOTAL AMOUNT DUE THIS INVOICE: $36,115.81

THANK YOU."

APPENDIX C

"December 14, 1983

Empire Vision Center
2921 Erie Blvd. East
Syracuse, New York 13224

Re: Empire Vision Corporate office
2921 Erie Blvd. East
Syracuse, New York

INVOICE #S850-2

Architectural Fee		$ N/C
Blueprinting costs	10.06	
15% retainer held on Inv.S850-1		935.66
Remaining fixture items:		
- credit (4) lens/frame cabinets @ $300	$(1,200.00)	
- credit (2) dispensing mirror units @ $28	(56.00)	
- dispensing table (4) @ $525	2,100.00	
- dispensing table bases (4) @ $55	220.00	
- display counter & upper ledge 58' @ $20	1,160.00	
- display counter mirror units (6) @ $60	360.00	
- display counter mirror door unit (1) @ $145	145.00	
- slatwall & trims (¾ sheet) N/C		
- catalogue unit (1) @ $202205.00		
- accessory display (1) @ $175	175.00	
- reception counter (1) @ $1275	1,275.00	
- chair walls (3) @ $175 525.00		
- end tables (14) @ $90 1,260.00		
- lab counters & shelving 51' @ $24	1,224.00	
- end panels, toekick & trim for existing frame drawer bases 125.00		
- (2) outside birch corners 25.00		
- (1) lounge room coat closet	175.00	
- (6) drawers for computer stations @ $40	240.00	
		7,958.00

Appendix C (cont'd)

Furniture for corporate offices

- Item #1 (2) desks @ $535		$ 1,070.00	
- Item #2 credenza/bookshelves		1,440.00	
- Item #3 credenza/bookshelves		1,260.00	
- Item #4 conference storage base		840.00	
- Item #5 storage/wardrobe		1,975.00	
- Item #6 coffee/storage	530.00		
- Item #7 reception	1,485.00		
- Item #8 corner table	185.00		
- Item #9 vanity counters	265.00		
- Item #10 computer stations		1,200.00	
			$10,250.00

Loading/delivery/supervision

- Field labor:			
87 hrs @ $19.50		1,696.50	
69 hrs @ 12.50		862.50	
			2,559.00

Vehicle milage for deliveries	62.00

Suppliers:

- L & B Products		206.03	
- Gamrod-Harman		990.60	
- Purcell's (Lexan corners)	121.98		
- Decor Designs		822.00	
		2,140.61	
- 7% NYS Tax		149.84	
- 15% Overhead & Profit	321.09		
- Freight		25.68	
			2,637.22

TOTAL AMOUNT DUE THIS INVOICE:	$24,411.94

THANK YOU."