STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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| In the Matter of the Petition<br>of<br>**N.A.E., INC., GENERAL PARTNER, ET AL. D/B/A NASSAU SPORTS**<br>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, 1985 through May 31, 1988. | : | |
| In the Matter of the Petition<br>of<br>**ROBIN PICKETT, PARTNER OF NASSAU SPORTS**<br>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, 1985 through May 31, 1988. | : | DECISION<br>DTA NOS. 810045, 810046, 810210 |
| In the Matter of the Petition<br>of<br>**NASSAU SPORTS, N.A.E., INC., ET AL. PARTNERS**<br>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, 1985 through May 31, 1988. | : | |

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on November 18, 1993 with respect to the petitions of N.A.E., Inc., General Partner, et al. d/b/a Nassau Sports and Nassau Sports, N.A.E., Inc., et al. partners, Nassau Coliseum, Uniondale, New York 11553 and Robin Pickett, partner of Nassau Sports, 1768

South Ocean Boulevard, Palm Beach, Florida 33480. Petitioners appeared by Rivkin, Radler and Kremer (David Steckler, Esq., of counsel). The Division ofTaxation appeared by William F. Collins, Esq. (Robert J. Jarvis and James Della Porta, Esqs., of counsel).

The Division of Taxation filed a brief on exception. Petitioners filed a brief in opposition. The Division of Taxation filed a letter in lieu of a reply brief. Oral argument was heard on September 22, 1994, which date began the six-month period for the issuance of this decision.

Commissioner Dugan delivered the decision of the Tax Appeals Tribunal. Commissioner Koenig concurs.

***ISSUES***

I. Whether the Division of Tax Appeals has subject matter jurisdiction over the petition of "Nassau Sports, N.A.E., Inc. et al. Partners."

II. Whether petitioner Robin Pickett is a person responsible for collection and payment of sales and use taxes on behalf of Nassau Sports.

III. Whether the renovation of an electronic scoreboard was exempt from the sales tax imposed on the installation, repair and maintenance of tangible personal property by Tax Law § 1105(c)(3) because the scoreboard was the property of Nassau County or, alternatively, because the renovation involved the installation of tangible personal property which became a capital improvement to real property after installation.

IV. Whether work performed by J.H. Electric Corporation constituted a capital improvement to real property or the installation of tangible personal property.

V. Whether petitioners are liable for payment of tax imposed by Tax Law § 1105(f)(1) on certain admission charges to a place of amusement.

## *FINDINGS OF FACT*

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Nassau Sports ("Sports") is a New York limited partnership formed in 1972. It is the sole owner of the New York Islanders, a National Hockey League hockey team. Petitioner N.A.E., Inc., is Sports' only general partner, and petitioner Robin Pickett is Sports' only limited partner.

The County of Nassau, a municipal corporation, owns the Nassau Veterans Memorial Coliseum (the "Coliseum") which is used for the conduct of sporting and entertainment events. Sports has leased the Coliseum from Nassau County since 1972. The Coliseum is also leased to other entities for the conduct of various sporting events and performances.

The Division of Taxation ("Division") conducted a sales tax field audit of Sports which resulted in the issuance of three notices of determination and demands for payment of sales and use taxes due, each dated September 20, 1989. Each notice assessed sales and use taxes in the amount of $168,034.45 for the period June 1, 1985 through May 31, 1988 plus penalty and interest. Notice number S890920001N ("001") was issued to "Nassau Sports NAE et al., partners", Federal identification number 112254417. Notice number S890920002N ("002") was issued to "NAE Inc., as general partner et al, d/b/a Nassau Sports", Federal identification number 112254417. Notice number S890920003N ("003") was issued to "Robin Pickett, as partner Nassau Sports." Notice numbers 002 and 003 contain the following statement:

> "You are liable individually and as partner of Nassau Sports under Sections 1131(1) and 1133 of the Tax Law for the following taxes determined to be due in accordance with section 1138(a) of the Tax Law."

Two requests for a conciliation conference were filed in connection with these assessments. One was filed for N.A.E. Inc. as general partner d/b/a Nassau Sports d/b/a New York Islanders Hockey Team, and one was filed for Robin Pickett as partner in Nassau Sports. A request was not filed in connection with notice number 001.

The Division placed in evidence two copies of United States Postal Service form 3811, a certified mail receipt, or green card as it is commonly called. One of the forms shows that an

article of mail addressed to "Nassau Sports NAE et al, partners" at the Nassau Coliseum was delivered on October 3, 1989 and received by a K. Johnson. The second form shows that an article of mail addressed to NAE Inc, as general partner et al, at the Nassau Coliseum, was received by "Pat Arign" (the date of receipt is not shown). In an affidavit signed by Lance Elder who was employed by Spectacor Management Group ("Spectacor") as the Assistant General Manager of Nassau Coliseum, "K. Johnson" is identified as a receptionist for Spectacor, a corporation with its offices in the Coliseum. Spectacor and Sports are not related companies. According to the affidavit of William M. Skehan, the general counsel of Nassau Sports, assessment number 001 was never received by any agent or employee of Nassau Sports which first became aware of the assessment when a warrant was filed in 1991. A copy of notice 001 was attached to the petition of Nassau Sports, N.A.E. et al. partners.

During the course of the field audit, Sports executed a consent to extend the period of limitation for assessment of sales and use taxes. The consent form identifies the vendor as "NAE Inc., as general partner et al., D/B/A Nassau Sports."

The Division issued two conciliation orders, dated July 19, 1991, which reduced the amount of tax asserted to $135,725.51. Before the hearing commenced, the parties agreed that only three audit issues remain in dispute. These issues, and the amount of tax asserted with regard to each issue, are as follows: (1) whether Sports was required to pay sales tax on the amounts it paid for the upgrading of a scoreboard for the Coliseum ($41,250.00); (2) whether Sports was required to pay sales tax on amounts it paid to J. H. Electrical Corporation for services associated with the installation of television sets within the Coliseum ($9,064.59); and (3) whether Sports was required to pay sales tax on the value of seats used by the hockey team's owner, Sports' employees, and team medical personnel ($36,000.00). The parties refer to this as the "complimentary seats" issue.

## *THE SCOREBOARD*

A scoreboard (hereinafter the "Scoreboard") was installed in the Coliseum in 1972 when the Coliseum was first built. In photographs, the Scoreboard looks like a huge television set with screens on four sides, suspended from the ceiling of the Coliseum. In actuality, the Scoreboard was enormous. It was described by one witness as a small house, approximately 26 to 28 feet wide. The roof of the Coliseum had to be reinforced with steel girders to bear the weight of the Scoreboard which was approximately 22,000 to 24,000 pounds. The Scoreboard was attached to the roof by cables and a winching system which allowed it to be raised and lowered to accommodate other events where it would not be needed. Cables and electric wires ran from the Scoreboard through the Coliseum to a control room where the Scoreboard was operated. The component parts of the Scoreboard were delivered on several trucks and assembled inside the Coliseum.

The Scoreboard was installed and owned by the County of Nassau. During the audit period, the Coliseum was operated by Facility Management of New York ("Facility"), as assignee of the County of Nassau (Facility was later replaced by Spectacor). A lease agreement was entered into by Sports, Nassau County and Facility for a 30-year period commencing on September 28, 1985. This lease agreement amended and extended an earlier lease agreement between Sports and the County of Nassau which was entered into in 1979. The 1985 lease agreement contains the following provisions:

> "1.1. The words and terms defined in this Article shall for all purposes of this Agreement, and any agreements supplemental hereto, whether used in the singular or the plural, have the following respective meanings:
>
> * * *
>
> "'Coliseum' shall mean the land and structure known as the Nassau Veterans Memorial Coliseum located at Mitchell Field, Uniondale, New York, including the underground 60,000 square foot exhibition hall, all spaces and areas, enclosed or unenclosed, within or under said structure; together with all improvements, fixtures, machinery, equipment, ticket booths and other installations owned by County and used in connection with the operation of the Coliseum, and all permanent improvements, additions, alterations, fixtures, equipment and installations constructed, provided or added thereto at any time by County, Sports or any other Entity; together with the Coliseum Parking Lots.

* * *

"'Scoreboard' shall mean the Stewart-Warner Scoreboard presently suspended from the ceiling of the Sports Arena, containing advertising space and a clock with an integrated lighting system for goals and remaining playing time, and any replacements thereof.

* * *

"9.3 all alterations, decorations, installations additional or improvements made by either party upon the Demised Premises, including without limitation, all lighting, ceiling, paneling, decorations, partitions and railings, shall, unless County or its Assignee elects otherwise . . . become the property of County and shall remain upon, and be surrendered with, said premises, as a part thereof, at the the end of the term or renewal term as the case may be, provided, however, that this provision shall not apply to items which are not fixtures but are personalty and readily removable without damage to the Demised Premises.

* * *

"13.1 In addition to making available to Sports the use and occupancy of the Demised Premises as set forth herein, County or its Assignee shall furnish to and, where applicable, operate for Sports during the periods of time set forth in 4.2 the following equipment and systems:

* * *

"(iii) Scoreboard, to be maintained and operated as provided in Articles XX."

Pursuant to the lease agreement, Nassau County agreed to operate the Scoreboard and maintain it in good condition (¶¶ 14.1, 14.2, 20.2[A]) and to install and replace as necessary all structural supports to support and suspend the existing Scoreboard (¶ 20.2[A][ii]). The Scoreboard is defined in Article XX as follows:

"all structural supports, cables, wires, pipes, conduits, related facilities, computers, equipment and other elements which are necessary to suspend the Scoreboard from the ceiling of the Sports Arena and which are necessary for the operation thereof, irrespective of the nature or classification of said supports, cables, wires, pipes, conduits, related facilities, computers, equipment and elements as fixtures, personal property or real property.

The original Scoreboard was upgraded in 1985 in conjunction with a larger renovation of the Coliseum undertaken by Sports. Scoreboards, gameboards and related equipment were purchased by Sports from White Way Sign Company which also acted as the contractor for installation of the new equipment. In a letter to White Way dated July 3, 1985, the contract between Sports and White Way was outlined. Included in the contract were certain items which

the parties agree were subject to tax as the installation of tangible personal property, such as out-of-town gameboards. The only portions of the contract in issue here relate to the upgrading of the actual Scoreboard.[1] Among the services and items purchased from White Way were the following:

> "3. Remodeling of existing four-sided Scoreboard changing existing scoring section and adding a four-sided 120 existing scoring section and adding a four-sided 120 lamp by 128 lamp four-color matrix per drawing #52066R.
>
> * * *
>
> "7. White Way shall supply all labor, material, equipment, and transportation necessary to construct and install the equipment, it being the intent that all equipment shall be complete and operative as of September 20, 1985.
>
> "8. White Way will pay all costs to provide and install primary wire, electrical feeders, switches, circuits, control cables and conduits. White Way will use the services of the electrical contractor presently working on the luxury suites being built as its electrical contractor for this work. Should the charge for this work be less than $30,000, White Way will give the Islanders a credit for the savings.
>
> "The established value for all equipment, installation and all services mentioned above shall be $498,000.00 plus any applicable taxes."

Purchase invoices from White Way Sign Company for charges associated with the renovation of the Scoreboard total $500,000.00. On audit, the Division determined that these receipts were subject to sales tax as the purchase of fixed assets and the installation and repair of tangible personal property.

The upgrading or renovation of the Scoreboard required it to be completely gutted. All of the electronic components were removed so that nothing was left but the frame of the board itself. These components were replaced by White Way.

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[1]The Division placed in evidence a letter from White Way to the New York Islanders listing the equipment to be installed at the Coliseum. The Division was uncertain of how or when it gained possession of the letter or the significance of the letter to the issues raised here. It was received in evidence pursuant to SAPA § 306(2) which allows an agency to place in evidence all records and documents in its possession. The letter lists a number of items related to the Scoreboard, such as a computer control system, which on their face appear not to be capital improvements. Since the Division failed to lay any foundation for the letter or to make any arguments based on its contents, no weight was given to it as evidence that the upgrade of the Scoreboard included items subject to tax under Tax Law § 1105(c)(3).

In 1990, Sports replaced the 1985 Scoreboard with a state-of- the-art video scoreboard. In order to remove the 1985 Scoreboard from the Coliseum, the entire mechanism had to be dismantled. The individual responsible for its removal and the installation of the new scoreboard described the removal of the old Scoreboard. It was hung from the rafters of the Coliseum, held by a cable which was attached to a winch system which was affixed to the roof supports in the center of the building. To remove the Scoreboard, it was lowered to the floor, taken off its cables and cut up with torches, saws and other equipment. The Scoreboard was reduced to scrap by this process. The entire process took a crew of 10 to 15 approximately a day and a half to complete. The roof of the Coliseum building required some repair and reinforcement as part of the removal of the old Scoreboard and installation of the new Scoreboard.

The individual who removed the 1972 Scoreboard and installed the new scoreboard in 1990 was asked whether removal was possible without totally destroying the old Scoreboard. He testified as follows:

> "I think if you had all the time in the world and highly skilled technicians, surgeons, I might say, yes, it would be possible but highly improbable.
>
> * * *
>
> "Because each nut and bolt would have to be disassembled, each cable would have to be broken away or taken away, each piece would have to be pulled out fragilely, marked and put aside, wrapped so that it could be reassembled. It could be done but it would be a very slow, tedious process. Highly unlikely." (Tr., December 14, 1992, pp. 52-53.)

In a letter to Facility's general manager dated January 19, 1990, the County of Nassau gave its permission for the replacement of the 1985 Scoreboard with the new scoreboard. In that letter, the County stated that the new scoreboard "shall be the sole property of the County of Nassau."

***ELECTRICAL WORK AND INSTALLATION OF TELEVISION SETS***

As indicated in the letter to White Way Sign Company, in 1985 Sports was engaged in a major renovation of the luxury boxes and Sports' offices located in the Coliseum. The electrical subcontractor working on this project was J. H. Electric Corporation ("J.H."). Apparently, as the renovation proceeded Sports decided additional work was required. Rather than making continual changes to the existing construction contract, Sports separately contracted with J.H. to perform additional electrical work. A statement provided to Sports by J.H., dated December 11, 1985, lists the work which Sports hired J.H. to perform and the amount of each job as follows:

| | |
|---|---|
| Floor Box | $ 250.00 |
| Cablevision Box (9) | 1,750.00 |
| Pickett's Office | 1,250.00 |
| 41 TV's | 65,424.00 |
| 45 TV Hook-ups | 20,000.00 |
| Extra #3 | 5,181.00 |
| Extra #4 | 400.00 |
| Extra #5 | 7,331.00 |
| Extra #6 | 1,760.00 |
| Total | $103,346.00 |

A second statement, almost identical to the first and dated February 12, 1986, shows that two additional items were added to the contract, "Extra #7" which is described as "Hook up Computer Electric" and the installation of park heaters. These additional items brought the contract price to $112,886.00. The Division's worksheets show that after the BCMS conference it determined tax due on purchases from J.H. in the amount of $110,720.00 based on four J.H. invoices. The parties agree that the amount of tax now claimed to be due on these purchases is $9,064.59 which would indicate purchases in the amount of $109,873.81, based on a tax rate of 8¼ percent. These minor discrepancies were not explained by the parties.

In a sworn affidavit, Mr. Herrick, who is the president of J.H., explained the nature of the work performed by his company for Sports. He states:

> "2. During the period August 1985 to December 1985, my company performed the following work:
>
> "Installation of outlets, receptacles, switches, add-on panels, and other in-wall electrical wiring work in connection with the upgrade of electrical wiring which was necessitated by the installation of electrical appliances (such as televisions).

* * *

> "4. The attached December 11, 1985 sworn statement contains a notation for August 29, 1985 relating to "41 TV's." This notation and the notation below it for 45 TV's both relate to that portion of the scope of work that concerned the installation of television sets at various locations throughout the Coliseum, and further, that each such installation required the running of in-wall wires as well as the upgrading and/or original installation of circuits, switches, sockets, receptacles, outlets, etc. No part of the attached . . . statement relates to the sale of television sets, as my company is not in the business of and does not engage in the sale of televisions."

Petitioners offered a number of work orders, invoices, worksheets and other documents which also evidence the nature of the work performed by J.H. They show that the actual installation of the television sets, as opposed to the electrical work, was done by others. A statement entitled "Additional Work Authorization," dated September 20, 1985, contains the notation "Pentagon to Install Brackets," apparently referring to the brackets needed to install the television sets. A similar statement, dated October 3, 1985, shows the additional work to be performed by J.H. as "Supply and install 24 TV coaxial homeruns. Hook up 45 TV's." Excluded from the price quoted for this work were the following items: all TV equipment, the delivery and mounting of the TV's, cable material and equipment, supervision of the cable television company, and a one-half inch cable feed. A second worksheet dated August 27, 1985, describes work to be performed by J.H. and work to be performed by others. The work to be performed by others included: "scoffling and access doors," steel required to support televisions, opening the ceilings for the televisions and cabinet and finish work.

According to the auditor's testimony, the J.H. contract indicated that some of the services performed were for the installation of property which became a capital improvement and some of the services were not. As an example of an installation not qualifying as a capital improvement, he mentioned the installation of an apparatus to bolt the television sets so they could not be stolen. The auditor testified that the entire contract amount was deemed subject to sales tax because the contract was not detailed enough to enable the Division to determine what elements of the contract were taxable and which were not.

***COMPLIMENTARY SEATING***

The information provided regarding the Division's determination of tax due on the price of certain tickets is sketchy. The audit report contains the following explanation of the Division's assessment in this area:

> "Taxpayer withholds a certain number of tickets per game for complimentary seating, on which use tax is due. Since the actual number of seats withheld were [sic] not provided (even though requested numerous times), this was estimated based on the prior audit. The actual ticket prices were available. Use tax due on complimentary seating is $42,086.03."

A worksheet prepared by the Division in connection with the conciliation conference in BCMS shows the Division's revised calculation of tax due on complimentary seating. The Division determined that Sports withheld tickets on 165 seats per game. Of the total, 34 seats were found to be seats in the luxury boxes at ticket prices of $25.00 to $30.00; 60 tickets were reserved for the hockey players at a price of $21.00 to $27.00 per seat; and 71 tickets were reserved for employees at a price of $16.00 to $20.00 per seat. The Division estimated use tax due on these seats of $36,084.35.

According to the testimony of Mr. Selletti, Sports' comptroller, the Division's determination of the number of ticket seats distributed per game was a close approximation of the actual number. Petitioners provided no evidence of their own of the exact number of tickets Sports distributed, although Mr. Selletti testified that the total number of complimentary tickets distributed per game was approximately 260 to 270. Petitioners provided a description of the complimentary seats provided by Sports to its employees, owners and players.

Under the terms of its collective bargaining agreement with the hockey players, Sports was required to provide each player with two free tickets to each game. According to the testimony of Mr. Selletti, approximately 50 tickets were distributed to the players per game. The players were allowed to pick up their tickets in a Sports' office a few days before the game.

Sports distributed 50 to 60 tickets to employees who were required to be present at each game. Some of these employees were medical and ambulance staff who were on standby in

case of injury. Others were office personnel who were required to attend all games as part of their duties. For instance, they observed other employees to ensure that proper policies and procedures were being followed. They also performed a public relations function, mingling with and talking to the fans. They were present to resolve problems with security, lost tickets or any other situations which might arise. The Coliseum management required every person present at a game to sit in a seat. As a consequence, each employee who was required to attend a game was given a ticket for a seat. Mr. Selletti stated that the seats given to employees were in areas with restricted views and were sold to the public only if a game was otherwise sold out. Approximately 48 seats were reserved for employees whether a game was a sellout or not.

There were 20 tickets per game available to the team owner in the owner's box. The tickets were reserved for the owner's exclusive use whether he used them or not.

A box called the manager's perch had 14 seats in it. It was described as an unfinished luxury box used by the team manager and his staff to observe the hockey team's performance. Entry to the manager's perch was described by Mr. Selletti.

> "They would have to walk down the end of the hall where the regular suites end and there is a fire door and they would have to go through some piping and down a flight of cement steps and come up on the other side in an area that's not finished off, a basement-type atmosphere, and come up through a separate door and go into this one little section." (Tr., November 16, 1992, p. 79.)

The manager was given tickets for the 14 seats in this box. These seats were never for sale to the general public. The box itself was part of the seating plan for the hockey games but not for other Coliseum events.

## ***OPINION***

Nassau County owns the Coliseum and leases it for the conduct of sporting events and performances. Petitioners own the New York Islanders, a National Hockey League team, and have leased the Coliseum from the County since 1972. The only issue on this exception is whether the $500,000.00 upgrading of the Scoreboard in the Coliseum, paid for by petitioners, is exempt from sales tax as a capital improvement to the Coliseum. The Administrative Law

Judge concluded it was a capital improvement. The Division asserts it was not a capital improvement.

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. An exception to this general rule is provided for the installation of property which, when installed, constitutes an addition or capital improvement to real property, property or land, as those terms are defined in the Real Property Tax Law (Tax Law § 1105[c][3][iii]).

A capital improvement is an addition or alteration to real property which:

> "(A) Substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property; and
> "(B) Becomes part of the real property or is permanently affixed to the real property so that removal would cause material damage to the property or article itself; and
>
> "(C) Is intended to become a permanent installation" (Tax Law § 1101[b][9][i]).

The Administrative Law Judge determined that "[s]ince all three conditions of Tax Law section 1101(b)(9) have been met, the 1972 Scoreboard must be deemed to be a capital improvement to real property" (Determination, conclusion of law "C").

Specifically, the Administrative Law Judge determined that:

> "[t]here is no question that the Scoreboard substantially added to the value of the Coliseum building. Although the cost of the original Scoreboard is not in the record, the cost of the 1985 upgrade was approximately $500,000.00. Moreover, the lease agreement establishes that both Nassau County and Sports saw the Scoreboard as adding substantial value to the Coliseum" (Determination, conclusion of law "C").

The Administrative Law Judge next concluded that:

> "[t]he size and nature of the Scoreboard suggest that its installation was intended to be permanent. It was described as being about 26 to 28 feet wide and weighing about 22,000 pounds. It was delivered to the Coliseum in pieces and assembled inside the building. Once installed it could only be removed from the building by dismantling it. When the 1972 Scoreboard was replaced, it was totally demolished. Although, as the Division suggests, it conceivably could have been dismantled in a way that would allow it to be reassembled in a different place, the cost of doing so was prohibitive . . . Where the only practicable way of removing a fixture is by demolishing the fixture itself and damaging the roof of the building to which it is attached, the second condition of Tax Law § 1101(b)(9)(ii) has been met . . . . Other evidence also establishes

> that, upon installation, the Scoreboard was intended to be a permanent fixture. As the lease agreement makes clear, the Scoreboard was the property of Nassau County. Although Sports bore the cost of upgrading the 1972 Scoreboard and replacing it in 1990, both Scoreboards remained the property of Nassau County. Ownership of the Scoreboard by Nassau County is an additional factor suggesting that the Scoreboard was intended to be a permanent installation, since '[a]n owner is much more likely to intend permanency than one in possession of premises temporarily, as for example a tenant' [cite omitted]" (Determination, conclusion of law "C").

Having determined that the 1972 installation of the Scoreboard was a capital improvement, the Administrative Law Judge next addressed whether the 1985 upgrade and renovation of the Scoreboard was a capital improvement. She concluded that it was a capital improvement.

"In order to upgrade the Scoreboard, it was necessary to completely gut it. No usable parts remained except the steel frame" (Determination, conclusion of law "C"). The Administrative Law Judge concluded that "it cannot be doubted" that the new "insides" to the Scoreboard added to its value, that they could not be removed without causing material damage and that they were intended to be permanent when they were installed. Further, the Administrative Law Judge concluded:

> "[a]gain, the Scoreboard was owned by Nassau County. This fact, plus the very nature of the installation, indicates that permanency was intended. Thus, by definition the property installed in the Scoreboard in 1985 became a part of the real property (see, Matter of Rochester Gas and Elec. v. Tax Commn., 128 AD2d 238, 516 NYS2d 341, affd 71 NY2d 931, 528 NYS2d 810 [where the installation of superheater units to boilers was found to constitute a capital improvement inasmuch as they were permanently affixed to the boilers and their removal would result in damage to the superheaters])" (Determination, conclusion of law "C".

Citing to the Division's regulations for illustrative purposes, the Administrative Law Judge rejected the Division's assertion that the removal of the 1972 Scoreboard in 1990 was proof that it was not a capital improvement stating that "it must be remembered that almost any capital improvement, including walls, ceilings and roofs, can be removed" (Determination, conclusion of law "C").

On exception, the Division asserts that:

> "[p]etitioners have not provided any evidence that the value of the Coliseum as a whole increased at all after the scoreboard was upgraded, let alone substantially increased.
>
> "(b) There is similarly insufficient evidence to support the ALJ's statement that the 1985 upgrading of the scoreboard was 'of a highly complex nature.' It may have been relatively costly and time consuming, but there is no evidence that it was particularly complex" (Division's Rider to Notice of Exception, p. 2).

The Division also:

> "strongly disagrees that the size and nature of the scoreboard is determinative of whether installation of the 1985 upgrades thereto were intended to be permanent, or, for that matter, whether the scoreboard itself was permanently installed. Regardless of the size of this item, the facts remain that the scoreboard was not permanently affixed to the realty, and that separation of the scoreboard from the winch system did not cause material damage to either the building or the scoreboard. In this regard, the scoreboard here is distinguishable from the freezers in the Dairy Barn [Tax Appeals Tribunal, October 5, 1989] case cited by the ALJ. In that case, the weight and configuration of the items themselves secured them to the real property; they could not be moved without cutting them up. Here, the scoreboard could be moved up and down by means of the cable system, and it could be readily detached from the roof by simply disconnecting the suspension cables and electrical connections.
>
> "(d) Moreover, there is certainly no persuasive evidence in this record that removal of the upgrades would cause material damage to the scoreboard or to the upgraded components. Furthermore, petitioners' witnesses conceded that the upgraded scoreboard could have been dismantled without destroying it. The dismantling method utilized was chosen because of time constraints, not because it was the only way to disassemble the scoreboard, or because other methods were cost prohibitive. For all of these reasons, the ALJ is in error in stating that the record herein shows that removal of the electronic components installed in 1972 caused those components to be damaged to the extent of being reduced to scrap" (Division's Rider to Notice of Exception, p. 2).

The point of the Division's assertion that the 1985 upgrade of the Scoreboard was not a capital improvement is that it was something else, i.e., a repair.

We cannot agree.

We affirm the determination of the Administrative Law Judge for the reasons stated in her determination.

We deal next with the issue of whether the upgrade and renovation of the Scoreboard were exempt under section 1115(a)(15) of the Tax Law.

The Administrative Law Judge determined that the upgrade and renovation of the Scoreboard were exempt from sales tax under Tax Law §§ 1116(a)(1) and 1115(a)(15) since the County owned the Coliseum, the Scoreboard was installed on behalf of the County and it became an integral part of the structure.[2] Specifically, the Administrative Law Judge concluded:

> "[a]ccording to the Division's own interpretation of section 1115(a)(15), materials purchased by a tenant, its contractors, subcontractors or repairmen and used in adding to, altering, improving, maintaining, servicing or repairing real property owned by an entity exempt from tax under Tax Law § 1116(a)(1) and which become integral component parts of the real property owned by such an entity are exempt from sales and compensating use tax (see, Citibank, N.A., Advisory Op., Commr. of Taxation and Fin. [TSB-A-88(9)S]; 450 Lexington Venture, Advisory Op., Commr. of Taxation and Fin. [TSB-A-89-(8.1)S]). Petitioners argue that the upgrades became an "integral component part" of the Scoreboard. Since the upgrades have been found to constitute capital improvements, they must also be deemed to be integral component parts of the Scoreboard. Thus, the services performed and materials purchased by Sports in connection with upgrading the Scoreboard were exempt from taxation" (Determination, conclusion of law "C").

On exception, the Division asserts that "since the purchases at issue were not made by the County of Nassau, and since Nassau Sports does not qualify as a contractor, the ALJ's citation to the exemption provided by Tax Law §§ 1116(a)(1) and 1115(a)(15) is inapposite" (Division's Rider to Notice of Exception, p. 3).

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[2]Tax Law § 1116(a)(1) provides, as pertinent:

> "(a) Except as otherwise provided in this section, any sale or amusement charge by or to any of the following or any use or occupancy by any of the following shall not be subject to the sales and compensating use taxes imposed under this article:
>
> "(1) The state of New York . . . or political subdivisions . . ." (emphasis added).

Tax Law § 1115(a)(15) provides:

> "Tangible personal property sold to a contractor, subcontractor or repairman for use in erecting a structure or building of an organization described in subdivision (a) of section eleven hundred sixteen, or adding to, altering or improving real property, property or land of such an organization, as the terms real property, property or land are defined in the real property tax law; provided, however, no exemption shall exist under this paragraph unless such tangible personal property is to become an integral component part of such structure, building or real property" (emphasis added).

We fail to see the relevance of the Division's assertion that Nassau County did not make the purchases or that Sports was not a contractor. The key considerations under Tax Law § 1115(a)(15) are whether the upgrading of the Scoreboard became an "integral component part" of the Coliseum (which, as a capital improvement, it did), whether Nassau County is a section 1116(a)(1) organization (which it is) and whether the County owns the Scoreboard (which it does). Under these circumstances, we agree with the Administrative Law Judge for the reasons stated in her determination that the upgrading was also exempt under section 1115(a)(15).[3]

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 Nassau Sports, N.A.E., Inc., et al. Partners is granted to the extent indicated in conclusions of law "A," "C" and "E" of the Administrative Law Judge's determination, but such petition is otherwise denied;

4. The petitions of N.A.E., Inc., General Partner, et al. d/b/a Nassau Sports and Robin Pickett, Partner of Nassau Sports are granted to the extent indicated in conclusions of law "C" and "E" of the Administrative Law Judge's determination, but such petitions are otherwise denied; and

[3]We note that the Division reached the same conclusion under similar circumstances in Advisory Opinion (TSB-A-92[30]S, March 26, 1992). The relevant facts there were that the petitioner, TWA, purchased and installed a customized baggage/conveyor/handling/and sorting system in its terminal building at JFK Airport. The system substantially added to the value of the terminal building, was permanently bolted and/or welded to the terminal building structure, was intended to remain a permanent installation and could not be removed without causing material damage to both the system and the terminal building. The building was leased from the Port Authority of New York, an organization described in Tax Law § 1116(a)(1). The lease provided that title to the baggage conveyor system vested with the Authority upon completion of its installation. The Advisory Opinion concluded that "pursuant to Section 1115(a)(15) of the Tax Law the purchase and installation of the baggage conveyor system by [TWA] is not subject to sales and use taxes."

5. The Division of Taxation is directed to modify the notices of determination issued on September 20, 1989 in accordance with paragraphs "3" and "4" above, but such notices are otherwise sustained.

DATED: Troy, New York
March 16, 1995

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

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