STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ELEGANT AFFAIRS, INC.	:	
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, 1999 through February 28, 2002.	:	DECISION DTA Nos. 820599, 820600 AND 820601
In the Matter of the Petition	:	
of	:	
ANDREA CORREALE	:	
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 December 1, 2000 through February 28, 2002.	:	
In the Matter of the Petition	:	
of	:	
SCOTT SCHNEIDER	:	
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 December 1, 2000 through February 28, 2002.	:	

Petitioners, Elegant Affairs, Inc., Andrea Correale, and Scott Schneider, filed an exception to the determination of the Administrative Law Judge issued on February 8, 2007. Petitioners appeared by Moritt Hock Hamroff & Horowitz, LLP (Steven Horowitz, Esq. and Lee J.

Mendelson, Esq, of counsel). The Division of Taxation appeared by Daniel Smirlock, Esq. (Michael Hall, of counsel).

Petitioners filed a brief in support of their exception and the Division of Taxation filed a brief in opposition. Petitioners filed a reply brief. Oral argument, at petitioners' request, was held on September 17, 2007 in New York, New York.

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

ISSUES

I. Whether the Division of Taxation ("Division") properly assessed sales and use taxes upon the purchases and rentals of certain equipment and supplies by Elegant Affairs, Inc. ("Elegant Affairs") which were subsequently provided to its customers.

II. Whether the Division properly assessed sales and use taxes upon Elegant Affairs' purchases and installations of certain improvements to its business premises.

III. Whether penalties assessed by the Division upon petitioners should be abated.

FINDINGS OF FACT

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

Elegant Affairs is an off-premises caterer which, in addition to selling food and beverages and preparing the food and beverages sold, also rents party equipment and other party paraphernalia.

While the case was assigned to the auditor in February 2002, the actual audit did not commence until May 2002. On May 2, 2002, the auditor made an unannounced visit to Elegant Affairs' business premises at 110 Glen Cove Avenue, Glen Cove, New York. Therefore, she did

not see the kitchen or the areas where Elegant Affairs stored the items that it rented to its customers. In addition, the auditor did not see or ask to see customer proposals or customer contracts.

Prior to having been assigned this audit, the auditor had performed audits on approximately four caterers. None of these audits involved an off-premises caterer.

On May 7, 2002, the auditor mailed an appointment letter to Elegant Affairs in which, among other things, she requested that records be produced for audit. The records requested included: sales tax returns and worksheets, canceled checks, Federal income tax returns, New York State corporation tax returns, a general ledger, a general journal and closing entries, sales invoices, exemption documents, chart of accounts, fixed asset purchase invoices, expense purchase invoices, merchandise purchase invoices, bank statements and deposit slips, cash receipts journal and cash disbursement journal. While the audit was postponed on a number of occasions at the request of petitioners or their representative, the records requested by the auditor were eventually produced with the exception of a few expense invoices, fixed asset invoices and bank statements.

Sales records were deemed adequate for the audit period. Gross sales per books were reconciled to sales and Federal tax returns. Bank deposits were transcribed and found to be in substantial agreement with books and records. Therefore, gross sales were accepted as reported. On March 4, 2003, petitioners' representative and the auditor executed a Test Period Audit Method Election whereby it was agreed that a test period audit method would be utilized in the audit of sales and recurring expense purchases. The test period selected was September 1, 2000 through November 30, 2000 and September 1, 2001 through November 30, 2001. The audit report stated that two test periods were utilized because in or about January 2001, Elegant Affairs

changed its accounting system.[1] Prior to the change, Elegant Affairs reported all of its sales in a general sales account. After the change in accounting methods, Elegant Affairs became very specific in how it was reporting its income, which included breaking out income derived from specific rental items.

A review of the taxable sales resulted in additional taxable sales of $17,288.71 with sales tax due thereon in the amount of $1,469.54. This assessment resulted from the disallowance of some claimed nontaxable sales and from some jurisdiction (tax rate) errors and from tax not having been charged on credit card handling fees.

A detailed review of asset acquisitions determined that fixed assets totaling $73,825.76 had been purchased without payment of tax, resulting in additional tax due of $6,275.19. Fixed assets included rental catering equipment, office equipment, furniture and fixtures. Rental catering equipment consisted of tables, chairs, kitchen supplies, party props, tents, dance floors, glassware, trays and tablecloths. Some of this portion of the assessment resulted from tax not having been paid to out-of-state suppliers. For some of the asset acquisitions, Elegant Affairs claimed that they were installed as capital improvements at its business premises. These items included a walk-in freezer, flooring and a surveillance monitoring system. Petitioners' representative disputed portions of this assessment on the basis that Elegant Affairs was renting this equipment to its customers.

A review of expense purchase records was performed (expense records were deemed to be adequate by the auditor) utilizing the test period method (the sales tax quarter September 1 through November 30, 2001 was used). Additional taxable expense purchases of $461,455.29

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[1] While the Field Audit Report states that the change in accounting method occurred in or about January 2001, the auditor, in the course of her testimony at the hearing, indicated that Elegant Affairs changed its accounting system in or about April 2000.

were found by the auditor with tax due thereon of $39,223.70. While a few errors resulted from incorrect tax rates having been charged by suppliers, most of the assessment was attributable to tax not having been paid by Elegant Affairs which, instead, provided resale certificates to its suppliers.

The auditor identified each invoice for which sales tax was not charged. She computed an error rate by taking the additional tax found to be due and dividing it by the base amount of purchases for the test period. The error rate was then multiplied by the total purchases in the account for the entire audit period to determine the tax due for that account.

During the audit, the auditor found in Elegant Affairs' records, a memorandum dated December 1, 1998 from one of its vendors, P.J. McBride, Inc., which indicated that this vendor would not accept resale certificates on equipment purchased and rented by Elegant Affairs because the vendor did not consider these purchases and rentals to be for resale. P.J. McBride, Inc. provided Elegant Affairs with a copy of a State Tax Commission decision, ***Matter of The Food Gallery, Inc.*** (State Tax Commission, June 17, 1986) which set forth a caterer's obligation to pay tax on its purchases and rentals. Elegant Affairs thereafter paid sales tax on future purchases and rentals from P.J. McBride, Inc., but took credit on its sales tax returns for the tax paid.

As a result of the auditor's findings, the Division, on February 6, 2004, issued a Notice of Determination to Elegant Affairs assessing additional sales and use taxes in the amount of $46,968.43, plus penalty and interest, for a total amount due of $82,767.26 for the period June 1, 1999 through February 28, 2002.

On March 1, 2004, the Division issued notices of determination to Scott Schneider and Andrea Correale, each of which assessed additional sales and use taxes in the amount of

$24,075.76, plus penalty and interest, for a total amount due of $40,377.26 for the period December 1, 2000 through February 28, 2002. The notices of determination advised Mr. Schneider and Ms. Correale that they were being assessed as officers or responsible persons of Elegant Affairs. Neither of these petitioners contests the Division's determination that each was an officer or responsible person of Elegant Affairs during the period at issue herein.

At a conciliation conference held by the Division's Bureau of Conciliation and Mediation Services, documentation was provided by petitioners to show that tax had been paid on an item of equipment (a "Hartford Cooler") and that two other fixed assets ("Ringside Concrete" and "Viking Ironworks") were capital improvements. Accordingly, a Conciliation Order (CMS No. 202909) was issued which reduced the assessment against Elegant Affairs from $46,968.43 to $45,018.87, plus penalty and interest computed at the applicable rate. Conciliation orders (CMS No. 202911 and 202910) were also issued to petitioners Scott Schneider and Andrea Correale, respectively, which reduced the assessments against each of these petitioners from $24,075.76 to $22,296.20, plus penalty and interest computed at the applicable rate.

Penalties were assessed by the auditor because Elegant Affairs had been notified by means of the memorandum from P.J. McBride, Inc. (***see***, Finding of Fact above) as to its obligation to pay sales tax on equipment purchased or rented. However, Elegant Affairs continued to claim credits for tax paid on such purchases and rentals of equipment.

Laura Wootton is employed by Elegant Affairs as an event planner and salesperson who sells catered parties to Elegant Affairs' customers. After the initial meeting with the customer, she develops a proposal or a contract which, in addition to the food and beverages to be provided by Elegant Affairs, also includes a detailed list of all rental items recommended for the particular event such as china, glassware, flatware and linens. Ms. Wootton does not make the

determination whether items obtained by Elegant Affairs (either by purchase or rental) are for resale and whether sales tax is properly due upon Elegant Affairs' purchase or rental of these items; such a determination is made by Elegant Affairs' operations department. Under each category of rental items, the proposal or contract is further itemized as to the number of pieces to be provided by Elegant Affairs. Prior to signing the contract, the customer may choose to provide such items himself or may choose to obtain the items from another rental company. It is the customer's choice as to whether or not to rent the items from Elegant Affairs.

For some of the parties sold by Ms. Wootton, customers have chosen to have Elegant Affairs provide food and beverages without any rental equipment. Food provided by Elegant Affairs is served on its trays, platters, bowls, etc., and decorative props such as ice buckets, wine buckets and cake trays are also provided by Elegant Affairs. These serving pieces are not detailed on the proposals provided to the customer; a flat fee is charged for this equipment. Ms. Wootton indicated that rental items are anything that the customer uses, such as tables, chairs, linens, plates and silverware and the customer is charged a rental fee according to the number of pieces used. The rental items are not rented to the customer on a per person basis but on a per piece basis. The customer is not charged an additional amount if items such as plates, glasses or cups are broken. No one instructs the customer or his guests or invitees as to how the rental items are to be used. This is true whether Elegant Affairs owns the equipment or has to obtain it from another vendor.

Since Elegant Affairs owns no party tents, if a customer requests a tent, Elegant Affairs obtains one from a vendor such as Elite Party Rental who will erect the tent a day or two before the party. P.J. McBride, Inc. is another vendor from whom Elegant Affairs rents tents, draping and flooring. In these instances, Elegant Affairs charges the customer for the rental and charges

sales tax to the customer. In one instance, P.J. McBride, Inc. charged Elegant Affairs the sum of $38,000.00 for the rental of a tent for a party for a customer; Elegant Affairs then charged the customer $55,442.30 which included Elegant Affairs' profit.

On an invoice dated September 2, 2001 included in Elegant Affairs' petition, the customers were charged $.65 each for glasses referred to as "Citation Stems" and "High Balls" and $.95 each for glasses denoted as "Champagne Flutes," "Martini Glasses," "Water Glasses," "White Wine Glasses" and "Red Wine Glasses." At this particular event, a total of 2,275 glasses were provided to the customers at a total charge of $2,038.75 for the glasses alone.

China and glassware (along with certain other items) are removed unwashed from the customer's premises right after the party. Some of the items such as tables and chairs rented by Elegant Affairs to its customers are, on occasion, left for a day or two after the party, often at the customer's request.

Benedetta Kliger is a long-time customer who has contracted with Elegant Affairs to handle 25 to 30 parties. While most of the parties included charges for rental equipment, an invoice for a party occurring on December 2, 2000 charged for food only; there were no rentals included. For one of her parties (December 14, 2000), Ms. Kliger rented a tent and chairs from a company known as Parties To Go, which billed Ms. Kliger directly. For other parties, Ms. Kliger rented these and other items from Elegant Affairs.

Until May 23, 2005, Scott Schneider was a 50% shareholder of Elegant Affairs. Prior to his affiliation with Elegant Affairs, Mr. Schneider, a graduate of the Culinary Institute of America, was a freelance chef and an off-premises caterer in New York City. He then started his own business and later became employed by Elegant Affairs. Originally, he prepared all of the

food for Elegant Affairs and later became an owner along with Andrea Correale. Ms. Correale started Elegant Affairs but initially subcontracted food preparation to Mr. Schneider's company.

Mr. Schneider's duties with Elegant Affairs included cooking, running parties, payroll, insurance issues and buying equipment; he was involved in all aspects of the business with the exception of dealing with customers.

When conducting a party at a customer's home or business premises, Elegant Affairs often must bring equipment and make a kitchen in the customer's garage or in a tent. This equipment is not considered by Elegant Affairs to be rentable catering equipment since the customer or his guests do not use any of it. Among the equipment owned by Elegant Affairs which it uses in the performance of its catering services and which it does not rent to its customers are portable kitchen, cooking and food preparation equipment, serving pieces, catering props and decorative items. When such equipment is purchased by Elegant Affairs, sales tax is paid upon purchase.

A kitchen fee is charged and Elegant Affairs brings what is deemed necessary for the particular needs of the customer. An equipment fee is charged by Elegant Affairs for these items, which include serving pieces such as trays, bowls, etc. Elegant Affairs owns these items and uses them over and over at various functions. While an equipment fee is charged to the customer for the food preparation equipment and serving pieces, these items are not delineated on the invoice provided to the customer.

Elegant Affairs was not always in the rental business. In 2000 and in years prior thereto, the business was located in a much smaller facility, i.e., a 1,000-square foot facility in Locust Valley, New York. At that time, Elegant Affairs owned plates and flatware, which it rented out to its customers. Petitioner Scott Schneider indicated that since the rental of these items was the most profitable part of the business, he and petitioner Andrea Correale decided to move Elegant

Affairs into a larger space in order to further the rental aspect of the business. In order to operate a rental business, it was necessary to employ additional staff to load and unload rental equipment such as tables, chairs and bars. Larger trucks were necessary to transport the equipment. Special equipment such as that necessary to polish silverware had to be purchased.

When Elegant Affairs purchases rentable catering equipment, it does not pay sales tax on it because, in the opinion of petitioners, it is intended for resale to its customers. In some instances, when a vendor, on its invoice to Elegant Affairs, charged sales tax on equipment that Elegant Affairs deemed to be rentable catering equipment, Elegant Affairs would cross out the sales tax on the invoice and pay only the actual selling price of the equipment and not the total price (including tax) set forth on the invoice. An example of this practice is evidenced by an invoice from Bar Boy Products to Elegant Affairs, dated September 6, 2000, by which Elegant Affairs purchased 24 cases of glassware. The selling price for the glassware was $1,365.12, plus sales tax of $116.04, for a total invoiced price of $1,481.16. Elegant Affairs crossed out the $116.04 and paid only $1,365.12 and noted on the invoice that a tax exempt certificate was on file.

Scott Schneider indicated that approximately 28% to 30% of Elegant Affairs' business came from the rental of equipment owned by Elegant Affairs and approximately 15% to 18% from the rental of other equipment. Therefore, over 40% of Elegant Affairs' total business is from the rental of equipment to its customers. The balance of its business is from catering (food, beverages and staff).

At about the time that Elegant Affairs moved to its new, larger location at 110 Glen Cove Avenue, Glen Cove, New York in or about 2000, changes were made to its general ledger to include rentals as well as food, beverages and staff.

Elegant Affairs' business premises consist of an approximately 6,000-square foot facility in the main building. On the first floor, approximately 1,500 square feet are devoted to offices, a display area (china, napkins, etc.), and tasting area. Behind this area is a warehouse of approximately 1,500 square feet where linens, plates, china and other equipment is stored. Downstairs is a 3,000-square foot state-of-the-art kitchen with refrigerators and freezers. Behind the main building is a 1,000-square foot food shed and two metal containers where large rental items such as tables, chairs, ovens and hot boxes are stored.

At the time that Elegant Affairs moved to its new location, major changes had to be made at the facility since it previously was a plumbing warehouse. New walls, offices, heating and cooling system, sprinklers, electrical system, tile floors in the basement, floor drains, pumps and grease traps were added at a cost of approximately $20,000.00. The premises at 110 Glen Cove Avenue are rented by Elegant Affairs from an affiliated corporation.[2]

There are several items purchased by Elegant Affairs that it contends were capital improvements and upon which it asserts sales tax was improperly assessed by the auditor. These items are as follows:

a. An invoice from American Restaurant Equipment dated June 2, 1999 in the amount of $5,065.00 for a walk-in freezer. It must be noted that on the auditor's schedule entitled "Listing of Invoices with Tax Change by Audit Area Subtotaled By" (hereinafter "Listing of Invoices"), a six-page document that is part of the workpapers and schedules prepared by the auditor, an invoice in the amount of $5,000.00, dated November 15, 2000, was assessed

[2] Along with its Reply Brief before the Administrative Law Judge, petitioners submitted a copy of the lease agreement. Since petitioners did not seek additional time, at the conclusion of the hearing, to submit the lease (time was provided to petitioners to submit evidence regarding a walk-in freezer only; however, no additional evidence was submitted) its provisions shall not be considered as evidence in the record. The fact that Elegant Affairs leased the premises from an affiliated corporation was derived from the testimony of petitioner Scott Schneider.

tax by the auditor (Record No. 224). Her comments regarding this invoice stated that the information had been taken from the building improvement worksheet and that no invoice was presented to support a fixed asset acquisition. Petitioner Scott Schneider indicated that a concrete slab was poured on which the freezer was installed.

b. Petitioners presented a series of invoices from Daltile Corporation issued in February and March 2001, which petitioner Scott Schneider stated were for the tile for a new floor in the basement at Elegant Affairs' premises. Tax was charged on each of these invoices. Petitioner Scott Schneider indicated that the tile floor was installed by Edward Gomez. In the auditor's Listing of Invoices, there are three invoices (February 14, 2001, June 1, 1999 and March 19, 2001) totaling $7,000.00. Petitioner Scott Schneider explained that these sums were paid by Elegant Affairs to Mr. Gomez for the installation of 3,000 square feet of graded tile with two floor drains in the kitchen of Elegant Affairs' premises.

c. Petitioners presented an invoice from Home Theatre High-Tech Audio, dated May 14, 2001, in the amount of $7,795.00, $6,195.00 of which was for equipment and $1,600.00 of which was for "installation of sound and video." On the first line of the invoice was a charge of $1,000.00 for "prewire and labor." Petitioner Scott Schneider explained that this invoice was for a surveillance monitoring system that was installed in the building to prevent theft, as well as for a sound system built into the walls of the premises for tastings and customer-related uses. The 27-inch TV monitor was mounted onto the wall and speakers were cut into the ceiling and mounted. In addition, a volume control was mounted in the wall to adjust the volume of the speakers. On the auditor's Listing of Invoices (Record No. 160), the auditor indicated that the taxable amount of this

invoice was $6,795.00. Her comments were that only the wiring is a capital improvement in the installation of a security system; other materials and equipment are taxable.

Petitioners presented other invoices from various vendors for which they contend that they are entitled to a credit for sales tax paid. These include:

a. An invoice dated March 17, 1999 from Bar Boy Products in the amount of $5,300.00, plus sales tax of $450.00, for a total of $5,740.00.[3] The invoice indicates that an Amex (American Express) payment of $1,000.00 was paid with a balance due thereon in the amount of $4,740.00. Petitioner Scott Schneider explained that the invoice was for a banquet box for seated events used by Elegant Affairs to keep plated meals at an acceptable temperature. The auditor's Listing of Invoices (Record No. 192) indicated that tax was assessed on this $1,000.00 down payment. The explanation stated that no invoice was presented for fixed asset acquisition;

b. Petitioners indicate that the auditor's Listing of Invoices (Record No. 196) includes an assessment of sales tax on a $4,500.00 invoice dated November 21, 2000 from Cement Work. Petitioners contend that an invoice from Ringside Concrete shows that the charges were for delivery of cement used for a capital improvement. An invoice from Ringside Concrete Corp., dated January 29, 2001, was an exhibit attached to petitioners' petitions;

c. Petitioners indicate that the auditor's Listing of Invoices (Record No. 183) assessed tax in the amount of $170.00 on the sale of a hot dog truck in the amount of $2,000.00. Petitioners contend that this was the sale of a vehicle and, therefore, tax is paid by the purchaser at the time of registration. No documentation or testimony was presented to support petitioners' position;

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[3] Apparently, the total of the invoice should have been $5,750.00.

d. Petitioners state that the auditor's Listing of Invoices (Record No. 223) indicates that tax was assessed in the amount of $463.25 on an invoice dated November 14, 2000 in the amount of $5,450.00, which the auditor indicates was not an invoice for a fixed asset acquisition. As an exhibit to their petitions, petitioners attached an invoice in the amount of $5,450.00 which indicates that "2 steam kettle and Swiss braiser and sink" were purchased. Petitioners maintain that these items are permanent pieces of kitchen equipment that are permanently installed and are, therefore, capital improvements not subject to tax; and

e. Petitioners presented a series of eight invoices from A-1 Tablecloth Company for tablecloths purchased by Elegant Affairs that were subsequently rented to customers and, accordingly, for which petitioners claim a credit for sales tax paid thereon.

Andrea Correale is the president of Elegant Affairs. She has a bachelor's degree in hotel restaurant administration from New York Tech. Prior to graduating, she started a company called Rent-a-Waitress, which supplied waitresses to people who were having parties in their homes. Often, these people had hired a caterer that did not supply wait staff. In addition to homeowners, Ms. Correale solicited business from caterers who did not employ wait staff. By the time she graduated from college, she had a customer base of approximately 500 "very wealthy North Shore customers in Long Island." Later, she decided to start an off-premises catering business, but since she had no real culinary background, she partnered with Scott Schneider, a graduate of the Culinary Institute of America.

Approximately a year after starting the business with her former partner, Scott Schneider, Ms. Correale and Mr. Schneider realized, after reviewing the year-end numbers of the business, that they had spent a large amount of money with rental companies. At that point, Ms. Correale

decided that Elegant Affairs should do some of the rentals itself. The company then applied for and obtained a business loan and used the proceeds to purchase "some of the basic rentals," such as tables, chairs, china, flatware, etc., and began renting them to its customers. Because Elegant Affairs did not own everything needed by its customers for their parties, other rental companies were still utilized.

Ms. Correale described Elegant Affairs as an off-premises catering company whose main business is supplying food for parties. However, she stated that "we also have a rental division."

Ms. Correale indicated that some customers, after receiving a proposal from Elegant Affairs, choose to handle certain aspects of the party themselves, which may include renting items from other rental companies.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge rejected Petitioners' assertion that certain classes of equipment (*e.g.,* portable ovens, glassware racks, serving bowls, and trays) which it purchased for its business should be treated as used by petitioners in providing a catering service while other classes of equipment (*e.g.,* tents, portable dance floors, china, flatware, glasses, and linens) should instead be treated as rented to its customers for their use. Accordingly, all of the equipment in question was governed by the following rule in the Division's regulations: "Taxable tangible personal property or services used or consumed by a caterer in performing catering services are not purchased for resale as such and are subject to tax" (20 NYCRR 527.8[f][2][i]).

The Administrative Law Judge also reviewed the circumstances surrounding petitioners' acquisition and installation of a freezer, tile and floor drains, flooring, sound and video equipment, a security system, steam kettles, a braiser, and a sink and concluded that none of

these constituted capital improvements as defined in Tax Law § 1101(b)(9)(i) which would be exempt from sales tax.

Finally, it was determined that penalties under Tax Law § 1145(a)(1) were properly imposed because petitioners failed to demonstrate that its failure to pay tax was due to reasonable cause and not due to willful neglect. The Administrative Law Judge noted in this regard that one of petitioners' vendors refused to accept petitioners' resale certificates and had furnished petitioners with a copy of a State Tax Commission decision discussing a caterer's obligation to pay tax on its purchases.

ARGUMENTS ON EXCEPTION

On exception, petitioners argue, as they did below, that the Administrative Law Judge erred in not finding that the provisions of 20 NYCRR 527.8(f)(1) and (2) are invalid because they do not fall within the intention of the statute. Further, petitioners argued that the regulations above are patently unfair and unconstitutional in that they arbitrarily and capriciously distinguish between rentals that are deemed to be resales and rentals of materials by off-premises caterers for specific party events of customers that are not deemed to be resales. Petitioners also argued that the improvements to its premises (pouring concrete for the walk-in freezer and installing mud floor and tiles) were capital improvements within the meaning of Tax Law § 1101(b)(9)(i). Lastly, petitioners argued that the penalties assessed should be abated.

The Division argues that petitioners' purchase of tangible personal property in conjunction with the catering service was not excluded from the definition of "retail sale" in Tax Law § 1101(b)(4) because (A) it is not a "sale . . . for resale, as such" since petitioner's use of the property was not a sale or rental for purposes of the sales tax and (B) the property was not used by petitioners in performing services subject to tax under section 1105(c) since catering is subject

to tax under section 1105(d). Further, petitioners have failed to establish that they are victims of double taxation. The Division asserts that the payment of sales tax on rentals and purchases does not result in inequitable competition between equipment rental companies and caterers which rent equipment. The Division points out that petitioners have failed to establish that the regulations are inconsistent within the intent of the statute, arbitrary and capricious, patently unfair or unconstitutional. The Division argued that sales and use taxes upon some of the purchases and installations of tangible personal property at its leased premises were proper because they were not capital improvements. Finally, the Division argued that the penalties imposed by the Division should be sustained, as reasonable cause to abate the penalties does not exist.

OPINION

A "retail sale" is defined in general terms as "the sale of tangible personal property to any person for any purpose" (Tax Law § 1101[b][4][i]). There are two exclusions from this definition. The first exclusion is the purchase of tangible personal property "for resale as such" or as a physical component part of tangible personal property (Tax Law 1101[b][4][i][A]). Petitioners assert that this exclusion applies in reliance on ***Matter of Levine v. State Tax Commn.***, 144 AD2d 209 (3d Dept 1988), in which the court reversed the State Tax Commission and held that purchases of floral arrangements by a caterer from a florist were exempt from tax as purchases for resale. The court rejected the Division's argument that the flowers were part of a service performed by the caterer since the caterer's only role was to make arrangements with the florist and to place the flowers on the tables. Moreover, the flowers became the property of the ultimate customer to deal with as it pleased as soon as the flowers were delivered.

In the present case, petitioners unload its equipment from a truck in preparation for a wedding, set it up, and when the event is over, load it on the truck and takes it away for future use. Arbitrarily designating some of this equipment as subject to a separate rental transaction does not alter the true nature of the transaction–namely that the equipment is used by petitioners in performing catering services subject to tax under section 1105(d). Unbundling the caterer's bill to show that part of the amount charged is based on the number of chairs and tables and champagne glasses used does not make that part of the transaction a "rental" for tax purposes even if the taxpayer labels it as such. Although petitioners claim to have had a "rental division," there is no basis in the record for concluding that petitioners were in a separate business of renting equipment except as an integral component of catering services.

We conclude that petitioners' reliance on the ***Levine*** case is misplaced. The floral arrangements purchased by the caterer, from the florist, were delivered by the caterer to the customer in an unaltered state at which point they became the unqualified property of the customer. Our decisions in ***Matter of Ricky Eisen*** (Tax Appeals Tribunal, July 5, 2001) and ***Matter of D-M Restaurant Corp.*** (Tax Appeals Tribunal, April 18, 1991) similarly distinguish ***Levine***.

The second exclusion to the definition of retail sale is the purchase of tangible personal property for use in performing specified taxable services where the property becomes a part of the property upon which the taxable service is performed or where the property is "later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax" (Tax Law § 1101[b][4][i][B]). The referenced taxable services are those in Tax Law § 1105(c)(1): information services, (2) printing, (3) installation of tangible personal property, (5) maintaining, servicing, or repairing real property, (7) interior decorating and

designing services, and (8) protective and detective services. Petitioners are not engaged in any of the services described in section 1105(c); instead its catering services are subject to tax under section 1105(d). Accordingly, it does not come within the exclusion.

We next address petitioners assertion that the imposition of tax herein results in double taxation. In ***Matter of Delta Sonic Car Wash Sys.*** (Tax Appeals Tribunal, November 14, 1991), we held that a car wash did not qualify for an exemption under Tax Law § 1115(a)(12) even though the machinery and equipment used was necessary to provide a service subject to sales tax. While petitioners must pay taxes on its purchases of the rental equipment necessary to allow it to provide their catering service, the tax on the rental equipment is imposed on petitioners' customers, not petitioners, and is for the service purchased, not the equipment. The same result was reached in ***Matter of Helmsley Enters. v. Tax Appeals Tribunal***, 187 AD2d 64 (1996), ***lv denied*** 81 NY2d 710 (1993) in which the court stated as follows:

> The foregoing discussion also disposes of petitioner's alternative argument that denial of the purchase-for-resale exclusion to petitioner's acquisition of guestroom furniture, furnishings and consumables would result in an unlawful multiple sales taxation on the same items of personal property because the cost of these items is an element of petitioner's room charges to guests. The same multiple taxation would exist in any case where personal property is furnished as an incident to the provision of services, or as an amenity for the comfort of patrons of hotels, restaurants and the like . . . . Acceptance of the argument that this kind of multiple taxation is sufficient to establish eligibility for the sales tax exclusion at issue would have "potentially limitless application" . . . and must, therefore, be rejected (187 AD2d at 69-70).

We are not persuaded by petitioners' next argument that pouring concrete for the walk-in freezer and installing mud floor and tiles should not have been taxed because they constitute capital improvements. To qualify as a "capital improvement," as defined in section 1101(b)(9) of the Tax Law, an asset must be:

> "[a]n addition or alteration to real property which: (i) substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property; and (ii) becomes part of the real property or is permanently affixed to the real property so that removal would cause material damage to the property or article itself; and (iii) is intended to become a permanent installation."

We hold that petitioners' walk-in freezer is not a capital improvement and, thus, is not exempt from sales tax because petitioners failed to sustain the burden of proving each of the three prongs of the test (***see***, 20 NYCRR 3000.10[d][4]).

Petitioners have failed to prove that the installation was intended to be permanent. Elegant Affairs was the lessee of the premises. Improvements made to leased premises for the purposes of conducting the business for which the realty is leased are presumed not to be permanent and to be made for the sole use and enjoyment of the tenant during the term of the lease (***see, Matter of Empire Vision Ctr.***, Tax Appeals Tribunal, November 7, 1991). The terms of a lease agreement would weigh heavily in determining whether the installations were intended to be permanent, but petitioners' lease is not part of the record before us. We find that petitioners have to overcome the presumption that the improvement in question was not intended to be permanent (***Matter of Airport Indust. Park,*** Tax Appeals Tribunal, April 11, 1991). There is no evidence to show that the freezer was intended to be a permanent installation, that removal would cause material damage to the property, or that it added value to the property.

We affirm the Administrative Law Judge's finding that two of the three invoices for the mud floor and tiles did qualify for the capital improvement exemption, but that the third was for a time period nearly two years prior and, thus, did not qualify.

Finally, penalties were imposed pursuant to Tax Law § 1145(a)(1), which authorizes the imposition of penalties for failure to pay any tax imposed under Articles 28 and 29 of the Tax Law, and for failure to report and pay sales tax in an amount in excess of 25% of the amount

required to be shown on the return. We agree with the Administrative Law Judge that penalties were properly imposed because Elegant Affairs and its shareholders had knowledge that their use of resale certificates was contrary to the Division's position regarding the use of equipment by caterers. As the Division pointed out, petitioners' failure to pay sales tax under these circumstances was not reasonable (***see, Matter of Auerbach v. State Tax Commn.***, 142 AD2d 390 [1988]; ***Matter of LT & B Realty Corp. v. State Tax Commn.***, 141 AD2d 185 [1988]; ***Matter of Franklin Mint Corp. v. Tully***, 94 AD2d 877 [1983], affd 61 NY2d 980 [1984]). Petitioners have not shown reasonable cause for penalty abatement and, therefore, the penalty is sustained.

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

1. The exception of Elegant Affairs, Inc., Andrea Correale and Scott Schneider is denied;

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

3. The petitions of Elegant Affairs, Inc., Andrea Correale and Scott Schneider are granted to the extent indicated in conclusion of law "H" of the determination of the Administrative Law Judge, but are otherwise denied; and

4. The Notices of Determination dated February 6, 2004 and March 1, 2004, as modified (A) by the Conciliation Order of the Bureau of Conciliation and Mediation Services and (B) in accordance with paragraph "3" above, are sustained.

DATED:Troy, New York
March 13, 2008

/s/ Charles H. Nesbitt
Charles H. Nesbitt
President

/s/ Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/ Robert J. McDermott
Robert J. McDermott
Commissioner