

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition :  
of :  
**AMUSEMENTS OF WNY, INC.** : DECISION  
 : DTA NO. 822534  
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 March 1, 1999 through May 31, 1999. :

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The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on August 4, 2010. The Division of Taxation appeared by Mark Volk, Esq. (Michael B. Infantino, Esq., of counsel). Petitioner appeared by Lemery Greisler LLC (Robert J. May, Jr., Esq., of counsel).<sup>1</sup>

The Division of Taxation filed a letter brief in lieu of a formal brief in support of its exception. Petitioner filed a brief in opposition. The Division of Taxation filed a letter brief in lieu of a formal reply brief. Oral argument, at the Division of Taxation's request, was heard on February 16, 2011 in Troy, New York.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision. Commissioner Tully took no part in the consideration of this matter.

***ISSUE***

Whether the Division of Taxation properly denied petitioner's claim for refund of sales and use taxes paid on the purchase and installation of a roller coaster on the basis that such

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<sup>1</sup> Petitioner waived a hearing before the Division of Tax Appeals and submitted this matter for determination based on documents and briefs.

purchase and installation did not constitute a capital improvement.

***FINDINGS OF FACT***

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

Petitioner, Amusements of WNY, Inc., operates an amusement park located at 2400 Grand Island Boulevard, Grand Island, New York. The premises on which the amusement park is located is wholly owned by the corporation.

In August 1998, Glynn Geotechnical Engineering prepared a foundation design for a proposed roller coaster to be built on the premises. Petitioner eventually entered into a contract with Custom Coasters International to design, engineer and construct a roller coaster on its premises, known as the "Silver Comet." The contract allocates specific costs for design and engineering, rental cranes and forklifts, freight, labor to build the coaster, footings, a station building, housing, electrical subcontractors, a safety system, mechanics and the structure for the coaster. The Silver Comet was completed on or about April 30, 1999, and has been located on the premises since that date. The overall footprint of the Silver Comet is approximately 1.8 acres. The length of its wooden track is approximately 3,000 feet, while its highest point is 95 feet.

The Silver Comet is a wooden roller coaster, meaning that it has a flat steel strip overlaid upon a wooden track. In addition to the wooden track, wood is used for the cross pieces, known as ledgers, which support the track. The plans of the Silver Comet indicate that its foundation includes concrete slabs and piers to attach the steel support structure of the roller coaster to the ground. The steel structure supports the roller coaster. The station building, or station house,

where passengers wait in line and board the roller coaster's cars, is a steel structure that is permanently affixed to the property and is connected to the roller coaster.

Mr. Frank C. Hardwick is a professional engineer with a Bachelor of Science Degree in Industrial Engineering. Mr Hardwick has experience with the construction and installation of wooden roller coasters, including being the engineer of record for the installation of "The Comet" at the Great Escape Amusement Park in Lake George, New York (the Great Escape). Mr. Hardwick's responsibility on the Comet included performing layout work and controlling the field work. He was also the engineer of record for five other roller coaster projects at the Great Escape Amusement Park. As part of his preparation and research for the submission of an affidavit in this matter, Mr. Hardwick reviewed photographs of the Silver Comet while in construction, photographs of the finished Silver Comet and the engineering site plans for the foundation of the Silver Comet prepared by an engineer of Glynn Geotechnical Engineering.

The former owner of the Great Escape purchased the Comet from a defunct amusement park, Crystal Beach in Ontario, Canada, with the intent of rebuilding the Comet at the Great Escape. The only original materials used in the reconstruction of the Comet were the steel support structure and the steel roof trusses of the station house. None of the wood from the Comet's Crystal Beach facility was used in its reinstatement, which required the construction of all new wooden ledgers and wooden track. Many of the bolts necessary to reconstruct the coaster's support structure had been destroyed when it was dismantled. As all of the bolts and hardware from the Comet had been discarded, all new bolts and hardware were used in the reconstruction of the Comet. Additional parts that needed to be replaced on the reconstructed coaster included the motor, computer controls, sensors and cars. Furthermore, the installation at the Great Escape required foundations to be surveyed, engineered and built at the site.

Everything other than the steel support structure and the steel roof trusses at the station was new construction when the coaster was reconstructed.

As previously noted, Mr. Hardwick reviewed the photographs of the Silver Comet at various stages of its construction and had reviewed the foundation plans prepared by Glynn Geotechnical Engineers. The Silver Comet's wooden track is constructed using ring nails, while bolts attach the wooden parts to the steel frame. When the ring nails and bolts are removed, the removal tears the fiber of the wood, rendering it unusable. Any new construction would require new, straight planks from the start to be properly shaped during the construction process. Dismantling of the roller coaster would need to be done with care so that the steel is not bent or distorted. Additionally, a plan to remove and reassemble the Silver Comet would require that each piece of steel be individually numbered and stored appropriately so that it could be rebuilt in the exact position as originally intended. The removal of the Silver Comet would also result in damage to the station house. Mr. Hardwick concluded that dismantling of the Silver Comet would cause the wood from the track and ledgers to be unsuitable for use in the reconstruction; would cause material damage to the wooden track and ledgers; and that the only salvageable part of the coaster would be the steel framing.

Petitioner was audited by the Division of Taxation (Division) for the period March 1, 1999 through November 30, 2003. As part of the audit, the concrete footings, station house and electrical and labor costs associated with the installation of the roller coaster that may cause material damage to the property if removed were allowed as capital improvements. The amount allowed of \$646,500.00 was subtracted from the roller coaster's total cost of \$1,998,052.00, leaving \$1,351,552.00 subject to the imposition of sales tax. Petitioner paid the sales tax due as

a result of the audit, including the remaining amount due on the purchase of the roller coaster.

The amount of sales tax paid on the purchase of the roller coaster was \$108,124.16.

On September 26, 2007, petitioner filed an Application for Credit or Refund of Sales and Use Tax in the amount of \$164,840.00 on its purchase of the roller coaster. The application stated the original cost of the roller coaster to be \$1,998,052.00.

On December 12, 2007, the Division issued a letter to petitioner denying the refund claim in full. The denial letter stated, in part, as follows:

**The refund claim is being denied in full.** The actual tax paid on the roller coaster was \$108,124.16 and this claim is denied due to the fact that the roller coaster is considered tangible personal property under Tax Law section 1101(b)(6). The difference of \$56,715.84 is the portion greater than tax actually paid on audit and therefore, this portion of the refund claim i[s] invalid.

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

That Administrative Law Judge began his analysis by citing Tax Law § 1105(c)(3), which imposes sales tax on the receipts from every sale, except for resale, of the service of installing tangible personal property, except for installing property which, when installed, will constitute a capital improvement to real property. The Administrative Law Judge noted that the term “capital improvement” is defined in Tax Law § 1101(b)(9)(i) as:

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.

Therefore, the Administrative Law Judge observed that each improvement must be considered with respect to the established criteria.

Addressing the first requirement, the Administrative Law Judge found that because the purchase and installation costs of the roller coaster approached \$2,000,000.00, the subject roller coaster substantially added to the value of the real property.

Next, the Administrative Law Judge addressed whether the addition or alteration is intended to become a permanent installation (Tax Law § 1101[b][9][i][C]). The Administrative Law Judge noted that since the intention of the party making the annexation has long been the controlling test in determining the character of personalty as a fixture (59 NY Jur 2d, Fixtures § 7), it is necessary to determine petitioner's intention of making the roller coaster a permanent installation (*see* Tax Law § 1101[b][9][i][C]).

The Administrative Law Judge noted that to see whether the annexation was intended to be a permanent part of the freehold, the controlling intent is not petitioner's secret or subjective intention, but rather the intention the law objectively will deduce from all the circumstances at the time the property is annexed to the realty (*see Voorhees v. McGinnis*, 48 NY 278 [1872]). Factors to be considered in deciding such intent include the nature of the article annexed, the mode of annexation, the relation to the property of the person making the attachment, and the applicability and application of the unit to the use to which the property is being put.

Applying these principles to the facts here, the Administrative Law Judge determined that the roller coaster was intended to be permanent. The Administrative Law Judge found that the nature of the article itself, as well as the method of its installation, suggest permanency, noting that the overall footprint of the roller coaster is approximately 1.8 acres. The length of its wooden track is 3,000 feet, while its highest point is 95 feet and it could not be readily moved.

In addition, the Administrative Law Judge noted that the foundation of the roller coaster includes concrete slabs and piers to attach the steel structure to the ground. The station house, where passengers board the roller coaster's cars, is a steel structure, permanently affixed to the real property and is connected to the roller coaster. The wooden track of the coaster is constructed using ring nails, while bolts attach the wooden parts to the steel frame. The Administrative Law Judge further noted that removal of the ring nails and bolts would tear the fiber of the wood, rendering it unusable. Any new construction of the roller coaster at a different location would require new concrete footings, wood supports, wood track and station house. The Administrative Law Judge noted that any plan to remove and reassemble the Silver Comet would require that each piece of steel be individually numbered and stored appropriately to insure that it be rebuilt in the exact position as originally intended.

In further considering whether the roller coaster was intended to be a permanent installation, the Administrative Law Judge noted that the roller coaster was purchased by and installed at the request of the owner of the amusement park. While this factor alone may not be conclusive of petitioner's intention to make the coaster permanent, the Administrative Law Judge found that it may, nevertheless, hold considerable sway, observing that an owner is more likely to intend permanency than, for example, a tenant (*cf. Marine Midland Trust Co. v. Ahern*, 16 NYS2d 656 [1939]; *Matter of Dairy Barn Stores*, Tax Appeals Tribunal, October 5, 1989). Therefore, the Administrative Law Judge found, based upon all of the above factors, that the roller coaster was installed with an intent that it be permanent.

Addressing the criterion that the addition or alteration "[b]ecomes part of the real property or is permanently affixed to the real property so that removal would cause material damage to the property or the article itself" (Tax Law § 1101[b][9][i][B]), the Administrative Law Judge noted

that if an item is so attached that its removal would cause substantial damage to the item or the real property, this requirement is met (*see e.g. Matter of Flah's of Syracuse v. Tully*, 89 AD2d 729 [1982] [improvements that were bolted, nailed and glued to the real property were permanently affixed thereto]). The Administrative Law Judge observed, however, that the claim of damage must be supported (*Matter of Gem Stores*, Tax Appeals Tribunal, October 14, 1988).

The Administrative Law Judge rejected the Division's argument that because the steel super-structure of the roller coaster can be moved and reassembled, it did not become part of the real property. The Administrative Law Judge opined that the Division's claim conflicted with its own Sales and Use Tax Classifications of Capital Improvements and Repairs to Real Property. The Administrative Law Judge observed that Publication 862 classifies many items as capital improvements even though they can be dismantled and reassembled at another location, e.g., kitchen cabinets, appliances, doors, plumbing and fences. Here, the Administrative Law Judge noted that petitioner established that portions of the coaster are permanently affixed to the real property, and the Division agrees. In addition, the Administrative Law Judge found that petitioner also established that portions of the roller coaster, specifically the wooden track, wooden ledgers and station house, if removed, would cause material damage to the article itself. Although the steel structure could be used in creating another roller coaster, it is useless without those portions of the coaster that the Division has conceded are capital improvements. The Administrative Law Judge further found that petitioner established that removal of the roller coaster would result in material damage to the improvement or to the land itself by rendering the concrete footings, wooden track, wooden supports, the station house and the connecting hardware damaged or unusable in a reconstruction of the coaster. Accordingly, the Administrative Law Judge found that under such facts, the steel structure has no function absent



the wooden parts and concrete footings, and concluded that the coaster became part of the real property or was permanently affixed to the realty such that removal would cause material damage to the realty or article itself. Therefore, the Administrative Law Judge determined that petitioner established that the installation of the roller coaster constituted a capital improvement.

### ***ARGUMENTS ON EXCEPTION***

On exception, the Division argues as it did below that petitioner has failed to show an intent that the Silver Comet be a permanent installation, since it could be unbolted from its cement footings and re-erected elsewhere. Further, the Division urges that this could all be done without material damage to the real property or to the Silver Comet itself. The Division acknowledges that the concrete footings, the station house, and the electrical and labor costs associated with their installation constituted capital improvements to real property because they substantially added to the value of the real property, became part of the real property or were permanently affixed to the realty so that removal would cause material damage to the property or improvements themselves, and were intended to become a permanent installation. However, the Division asserts that since the steel superstructure can be unbolted, moved and reassembled elsewhere, petitioner has failed to establish that it ever became part of the real property or was so permanently affixed that its removal would cause material damage to the real property or the article itself.

Petitioner disagrees and urges that we affirm the determination of the Administrative Law Judge.

### ***OPINION***

Based upon the facts presented in the record, we affirm the determination of the Administrative Law Judge. The Administrative Law Judge thoroughly reviewed the facts of this

case and properly applied the criteria established in Tax Law § 1101(b)(9)(i) to the facts set forth herein. We reject the Division's arguments that petitioner failed to show that the Silver Comet was intended to be a permanent installation, and that it could be unbolted from its cement footings and re-erected elsewhere without material damage to the real property or the Silver Comet itself. The evidence establishes that removing the bolts and nails that attach the steel frame at the coaster to the wooden track, would render the wooden portion unusable. As the Administrative Law Judge noted, the steel structure is useless without those portions of the coaster that the Division has conceded are capital improvements. As such, there can be little doubt that material damage to the roller coaster, as a whole, would result (*see e.g. Rochester Gas and Elec. Corp. v. State Tax Commn.*, 128 AD2d 238 [1987], *affd* 71 NY2d 931 [1988]; *Matter of Dairy Barn Stores, supra*). We find that the Administrative Law Judge has fully and correctly addressed each of the arguments presented and we can find no basis on exception to modify the determination in any respect.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The Division of Taxation's exception is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Amusements of WNY, Inc., is granted to the extent indicated in conclusion of law "F" of the of the Administrative Law Judge's determination, but is otherwise denied; and

4. The Division of Taxation is directed to refund to petitioner the disputed amount of \$108,124.16, plus applicable interest; and the remaining portion of the Division of Taxation's refund denial relating to the claim in excess of the actual amount paid, is sustained.

DATED: Troy, New York  
May 26, 2011

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

/s/ Charles H. Nesbitt  
Charles H. Nesbitt  
Commissioner