STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
GEM STORES, INC.	:	DETERMINATION
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 September 1, 1982 through May 31, 1984.	:	

Petitioner, Gem Stores, Inc., 1916 McDonald Avenue, Brooklyn, New York 11223, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1982 through May 31, 1984 (File No. 802661).

A hearing was held before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on September 17, 1987 at 9:15 A.M., with additional evidence to be submitted by November 1, 1987. Petitioner appeared by Charles H. Meisels, C.P.A. The Audit Division appeared by William F. Collins, Esq. (Michael J. Glannon, Esq., of counsel).

ISSUES

I. Whether fees paid by petitioner for the rental and/or purchase and the installation of electronic surveillance equipment used in theft prevention constituted a capital improvement to real property, thereby exempting said fees from the imposition of sales tax.

II. Whether petitioner's purchase of sensitized stickers which, when affixed to store merchandise and carried from the store on stolen merchandise, triggered the electronic surveillance equipment, was a purchase for resale thereby exempting fees paid thereon from the imposition of sales tax. III. Whether interest and penalties assessed against petitioner should be reduced or abated.

FINDINGS OF FACT

1. On September 30, 1985, the Audit Division issued to Gem Stores, Inc. (hereinafter

"petitioner") a Notice and Demand for Payment of Sales and Use Taxes Due in the amount of $6,952.88, plus penalty and interest, for a total amount due of $10,403.01 for the period September 1, 1982 through May 31, 1984.[1]

2. The aforesaid notice resulted from an audit of Checkpoint Systems, Inc., a company that sold, leased, installed and repaired electronic surveillance equipment used in theft prevention. During the period at issue, petitioner leased such equipment for one of its stores, purchased the equipment for other stores and also purchased sensitized stickers used in conjunction with the equipment, utilizing resale certificates in making the payments for these stickers.

3. A portion of the assessment related to a payment in the amount of $2,162.00 for a maintenance contract for the electronic surveillance equipment in petitioner's McDonald Avenue, Brooklyn location. Tax was assessed on this transaction in the amount of $178.37, plus penalty and interest. At the hearing held herein, petitioner's representative conceded liability for the tax assessed, but did not concede liability for the penalty and interest assessed in conjunction therewith.

4. Petitioner sells general merchandise of the five and dime variety, with an emphasis on housewares, health and beauty aids, candy and tobacco and cosmetics. At issue herein is the equipment leased and/or purchased for seven locations throughout the New York City metropolitan area. The electronic surveillance equipment is installed into the floor of the store and wired through its electrical system. The stickers are affixed to the store merchandise and, if not desensitized by having a second sticker placed over the top by a store employee, will trigger the sounding of the electronic device when the merchandise is removed from the store. The cost of the stickers is added to the cost of the merchandise in determining the selling price of the merchandise. Removal of the sticker (rather than placing a second sticker on top) would cause substantial damage to the package due to the strength of the adhesive.

5. Petitioner's representative stated that one or two of the stores which are the subject of this proceeding are owned by petitioner, but offered no substantiation in furtherance of this statement. Leases for two of the stores were produced, i.e., 163-24 Jamaica Avenue, Queens and 5408 Myrtle Avenue, Ridgewood. Each of the standard form store leases contains the following provisions with respect to alterations made to the premises by the tenant (petitioner):

> "All fixtures and all paneling, partitions, railings and like installations, installed in the premises at any time, either by Tenant or by Owner in Tenant's behalf, shall, upon installation, become the property of Owner and shall remain upon and be surrendered with the demised premises unless Owner, by notice to Tenant no later than twenty days prior to the date fixed as the termination of this lease, elects to relinquish Owner's rights thereto and to have them removed by Tenant, in which event, the same shall be removed from the premises by Tenant prior to the expiration of the lease, at Tenant's expense. Nothing in this article shall be construed to give

---

[1]It should be noted that a Notice of Determination and Demand for Payment of Sales and Use Taxes Due rather than a Notice and Demand for Payment of Sales and Use Taxes Due should have been issued to petitioner by the Audit Division. However, petitioner was not prejudiced by the issuance of the incorrect document inasmuch as said petitioner timely protested the assessment by filing a petition for an administrative hearing and was granted such hearing at which time all substantive issues raised by petitioner were addressed by the Administrative Law Judge in the determination herein.

Owner title to or to prevent Tenant's removal of trade fixtures, moveable office furniture and equipment, but upon removal of any such from the premises or upon removal of other installations as may be required by Owner, Tenant shall immediately and at its expense, repair and restore the premises to the condition existing prior to installation and repair any damage to the demised premises or the building due to such removal. All property permitted or required to be removed by Tenant at the end of the term remaining in the premises after Tenant's removal shall be deemed abandoned and may, at the election of Owner, either be retained as Owner's property or may be removed from the premises by Owner at Tenant's expense."

SUMMARY OF PETITIONER'S POSITION

6. At the hearing held herein, petitioner contended as follows:

a. that the electronic surveillance devices were installed into the floor of the store with the intention that they should remain permanently affixed thereto. Removal of the equipment would necessitate ripping it out of the floor which would cause serious damage to the floor and would require a major overhaul of the system to render it operational again. Petitioner has not removed the devices from any of its store locations nor does it intend to do so. Petitioner, therefore, maintains that fees paid for the rental (with an option to purchase) and/or purchase and installation of the device were for a capital improvement to real property;

b. that the stickers are similar to packaging materials transferred to the customer as part of the sale. Petitioner maintains that the cost of the stickers was passed on to the customer and that they were beneficial to the customer in that their use lowered the theft rate thereby lowering the selling price and that, as a result thereof, the stickers were purchased for resale; and

c. that interest and penalty should be reduced or abated because the failure to pay sales tax was based not upon willful neglect but rather upon petitioner's interpretation of ambiguous statutes and regulations.

CONCLUSIONS OF LAW

A. That the term "capital improvement" is defined by section 1101(b)(9) of the Tax Law

as follows:

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

B. That there exists in law a presumption that tenant-installed fixtures and improvements are not made with an intention to enhance the permanent or lasting value of the property and thus do not qualify as capital improvements pursuant to Tax Law § 1101(b)(9) (100 Park Ave., Inc. v. Boyland, 144 NYS2d 88, mod on other grounds, 284 AD 1033, revd on other grounds, 309 NY 685; see Tifft v. Horton, 53 NY 377). However, the facts may serve to rebut such presumption (Matter of Flah's of Syracuse, Inc. v. Tully, 89 AD2d 729).

C. That petitioner has not met its burden of proving that any of the premises where its stores were located were owned by petitioner and it must, therefore, be presumed that the premises whereon the electronic surveillance equipment was installed were rented.

D. That the language in the standard form store leases which provides that all fixtures, paneling, partitions, railings and like installations, except trade fixtures and moveable office furniture and equipment, shall become the property of the owner and remain with the premises unless the owner elects to relinquish his rights and have them removed by the tenant, is not determinative of whether the installation of the electronic surveillance equipment was intended to become permanent. No evidence was presented by petitioner, beyond mere assertions thereto, that such equipment is permanently affixed to the real property and that removal would cause material damage to the property. Petitioner has, therefore, failed to sustain its burden of proving that this equipment meets each of the elements of the definition of "capital improvement" as set

forth in section 1109(b)(9) of the Tax Law.

E. That section 1115(a)(19) of the Tax Law provides an exemption from sales for:

> "Cartons, containers, and wrapping and packaging materials and supplies, and components thereof for use and consumption by a vendor in packaging or packing tangible personal property for sale, and actually transferred by the vendor to the purchaser."

F. That "gummed labels" are included within the definition of "packaging materials" as the term is defined in 20 NYCRR 528.20(b)(1). However, it is clear that the stickers which were affixed to petitioner's merchandise were not a critical element of the product sold but were affixed by the vendor merely to lower the rate of theft. Petitioner's merchandise could certainly be purchased without the stickers being affixed. While a lower theft rate may well result in a benefit to the customer, i.e., a lower selling price, that, alone, does not render the stickers "critical" elements of the product sold. Moreover, petitioner's argument that the purchase price of stickers was included in setting the price of its merchandise is not persuasive, since there are many other factors taken into account in setting selling prices which do not become a part of the product being sold merely because their cost is a factor in setting the selling price (Celestial Food of Massapequa Corporation v. State Tax Commn., 63 NY2d 1020).

G. That there is no statutory authority in the Tax Law for the abatement of interest imposed upon an assessment.

H. That section 1145(a)(1)(i) of Article 28 of the Tax Law requires the imposition of a penalty (at the rate specified therein) for failure to file a return or to pay over any tax under such Article in a timely manner. Tax Law section 1145(a)(1)(iii) further provides as follows:

> "If the tax commission determines that such failure or delay was due to reasonable cause and not due to willful neglect, it shall remit all of such penalty and that portion of such interest that exceeds the interest that would be payable if such interest were computed at the rate set by the tax commission pursuant to section eleven hundred forty-two. The tax commission shall promulgate rules and regulations as to what constitutes reasonable cause."

I. That petitioner's contention that certain statutes or regulations are ambiguous and that its interpretation of such statutes and regulations resulted in a determination that the transactions at issue herein were not subject to tax is not reasonable cause for failure to pay sales tax. Petitioner's interpretations were not "reasonable" and assessment of penalties must, therefore, be sustained.

J. That the petition of Gem Stores, Inc. is denied and the Notice and Demand for Payment of Sales and Use Taxes Due issued September 30, 1985 is hereby sustained.

DATED: Albany, New York
December 3, 1987

_____
ADMINISTRATIVE LAW JUDGE