STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **TUXEDO JUNCTION, 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 September 1, 2000 through August 31, 2003.	SMALL CLAIMS DETERMINATION DTA NO. 820604

Petitioner, Tuxedo Junction, Inc., 120 Earhart Drive, Williamsville, New York 14221, 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, 2000 through August 31, 2003.

A small claims hearing was held before James Hoefer, Presiding Officer, at the offices of the Division of Tax Appeals, 77 Broadway, Buffalo, New York 14203, on June 12, 2006 at 1:30 P.M. Petitioner appeared by Hodgson Russ LLP (Paul R. Comeau and Jack R. Trachtenberg, Esqs., of counsel). The Division of Taxation appeared by Mark F. Volk, Esq. (Dawn Lynn Culhane and Claudia J. Sydoriak).

The final brief in this matter was due by December 29, 2006, and it is this date that commences the three-month period for the issuance of this small claims determination.

ISSUES

I. Whether exhibits attached to petitioner's post-hearing brief should be received in evidence.

II. Whether petitioner's purchases of dry cleaning solvents and sizing chemicals are excluded from sales tax as purchases for resale.

III. Whether petitioner's purchases of dry cleaning machines and pressing machines were exempt from sales and use taxes on the basis that the machines constituted capital improvements to real property or, alternatively, were exempt manufacturing or waste control equipment.

IV. Whether the Division of Taxation should be prohibited from assessing additional sales and use taxes on petitioner's purchases of the solvents, chemicals and machinery in question on the basis that prior audits and correspondence from Division of Taxation personnel treated similar or identical purchases as not taxable and that to now hold these items as taxable would be arbitrary, capricious and inequitable.

V. Whether the Division of Tax Appeals has jurisdiction over petitioner's claim for refund or, alternatively, for an offset against any taxes found due, where the claim for refund or offset was made for the first time at the small claims hearing held herein.

FINDINGS OF FACT

With its initial brief**,** petitioner, Tuxedo Junction, Inc., submitted 52 proposed Findings of Fact and said proposed Findings of Fact have been substantially adopted herein. To the extent that all or part of any proposed Finding of Fact has not been included in this determination, it was rejected as irrelevant, not supported by the record or conclusory in nature. To the extent that any proposed Finding of Fact has been modified, it was done so to more accurately reflect the record.

Background

1. Petitioner, a New York corporation, is engaged in the business of manufacturing, renting and selling various items of formal wear, including tuxedo jackets and pants, shirts,

vests, cummerbunds, ties and related accessories (e.g., shoes, cuff links, etc.). Approximately 90% of petitioner's revenue comes from the rental of formal wear.

2. Petitioner's sole shareholder is Barry Snyder. Petitioner is headquartered, and its primary operating facilities are located, at 120 Earhart Drive, Williamsville, New York 14221 ("120 Earhart").

3. Petitioner purchases raw materials to be used in the manufacturing of the tuxedo jackets and trousers that it rents and sells. The raw material purchases include fabric, lining, pocketing, trouser adjusters, waistbands, shoulder pads, buttons, zippers, and labels. Tuxedo shirts and accessories are purchased, fully manufactured and on an as-needed basis, from various vendors.

4. Petitioner subcontracts with third parties throughout the world to manufacture the raw materials it purchases into tuxedo jackets and trousers. The garments are made to petitioner's specifications using uniform patterns that are supplied to the subcontractor by petitioner. Petitioner oversees and directs the manufacturing process and conducts site visits of the manufacturing facilities to ensure quality control. Roughly 90% of the tuxedo jackets and trousers that petitioner rented and sold during the audit period were manufactured in this manner.

5. Petitioner receives the various tuxedo garments, including those that are manufactured through subcontractors, at 120 Earhart. The garments, which are typically packed in large containers, are not suited for rental or sale upon arrival. They must first be cleaned, rinsed, pressed and treated with sizing chemicals. These chemicals give the garments "body and life" and help them to withstand extensive use and multiple dry cleanings. Occasionally, the garments are also in need of repair. Virtually all of these repairs are performed by in-house tailors and seamstresses. Once the garments are ready for rental and sale, they are segregated and stocked

by style and size in their respective department (i.e., the coat, trouser, shirt, accessory, or shoe departments).

6. When a customer order is received, petitioner assembles the garments and accessories selected by the customer into complete tuxedo packages. Petitioner does this using an assembly line process. Five copies of the customer's order are printed and one copy is sent to each of petitioner's five departments. Each department then pulls from stock (in a size as close as possible to that specified) the selected garment or accessory. The garment is then moved through the warehouse until it gets to the "matching area." At the matching area, the various parts of the customer's order are matched, put through a final inspection and bagged for delivery.

7. Most of the outfits also require some degree of individualized tailoring before they are ready for use by the customer. The vast majority of these alterations (with the exception of last-minute "emergency" alterations) are also performed in-house at 120 Earhart before being shipped to the customer.

8. Petitioner ships the complete tuxedo package, via its own fleet of trucks or common carrier, to the customer at one of its 92 stores, which are located throughout the United States in Arkansas, California, Colorado, Florida, Kansas, Mississippi, New Mexico, New York, Ohio, Oklahoma, Pennsylvania, Tennessee and Texas. Thirty-three of these stores are owned by petitioner. The others are "independent" stores with whom petitioner has licensing agreements. In addition, petitioner has over 300 wholesale accounts with wedding-related retail merchants. Due to petitioner's large inventory of shirts, coats, trousers, shoes, ties and accessories, customers have more than 11 million color and style combinations to choose from.

9. When rented tuxedos are returned to petitioner, they are disassembled, dry-cleaned, pressed, sorted and restocked for future use. Many of these garments require special attention to return them to merchantable quality. For example, the seamstresses and tailors sometimes return

altered garments to their original "off-the-rack" dimensions. Moreover, the garments withstand considerable wear and tear. Buttons must be reattached, ripped seams must be mended and reinforced, and zippers must be realigned. Often this process requires that a tailor add new fabric to the undamaged portion of the garment.

10. Petitioner collects and remits sales tax on all tuxedo garments that it rents and sells to its retail customers.

The Dry Cleaning Solvents

11. One of the most important aspects of the tuxedo's preparation for sale or rental, as well as its rehabilitation after use, is its dry cleaning. Dry cleaning removes any odors and stains that may be trapped in the garment's fibers and sanitizes the garment for the next customer.

12. During the audit period, petitioner made recurring purchases of dry cleaning solvents and "sizing" chemicals for use in dry cleaning and preparing the tuxedo garments for rental and sale.

13. The dry cleaning solvent most frequently purchased by petitioner was tetrachloroethylene, also referred to as "PERC." Petitioner also purchased certain petroleum-based (instead of ethylene based) solvents. The dry cleaning solvents were used to clean and refresh the garments prior to subsequent sale, rental or rerental.

14. The sizing chemicals were used in the dry cleaning process to give the garments "body and life" so as to ensure a proper fit and new look. The sizing chemicals help the garments withstand use and repeated dry cleanings. The testing criteria used by petitioner in its manufacturing process are intended to produce a garment that can, when treated with the sizing chemicals, withstand up to 50 washings.

15. The dry cleaning solvents and sizing chemicals are stored in drums located near petitioner's dry cleaning machines. A computer program used by petitioner ensures that the appropriate amounts of the solvents and chemicals are injected into the machines, at the right time during the dry cleaning process.

16. The dry cleaning solvents and sizing chemicals are not completely consumed in the manufacturing and dry cleaning process. Trace amounts remain embedded in each garment that is rented or sold by petitioner.

17. The dry cleaning solvents and sizing chemicals (especially the PERC) are regulated by the New York State Department of Environmental Conservation (the "DEC"). Among other things the DEC regulations limit the amount of solvent and chemical that is permitted to remain in the garments. The regulations also set air quality standards that limit the amount of PERC that may be released into the air.

The Dry Cleaning and Pressing Machines

18. During the audit period, petitioner made several purchases with respect to machines that were used to dry-clean, press and prepare the various tuxedo garments for rental and sale. In particular, petitioner expended: (a) $19,825.00 for a carbon absorber retrofitted to five of its Union L-80 dry cleaning machines; (b) $2,350.00 in installation charges for a new Union HL-790 dry cleaning machine; and (c) $26,000.00 for four Sankosha Pants Topper machines, which are used to press and pleat tuxedo trousers.

The Carbon Absorber Retrofits

19. The five Union L-80 dry cleaning machines that were retrofitted to the carbon absorber are each approximately 6 feet tall, 9 feet wide and 5 feet deep. Steam pipes, water lines, air lines running from compressors, and injection systems (for the dry cleaning solvents

and sizing chemicals) are attached to the L-80 machines. Some of the piping runs along the roof, while other piping runs through the wall to the boiler room, through the roof to a cooling tower, and into trenches dug in the floor. When fully assembled, with all of the requisite piping, the L-80 machines stand over 20 feet high.

20. The carbon absorber was purchased by petitioner from EBZ, Inc., on an installed basis and was purchased in February 2001. The carbon absorber was retrofitted to the L-80 machines to make them compliant with "Generation IV" dry cleaning regulations. The L-80 machines, which use PERC, had been purchased by petitioner around 1984 and were compliant with only "Generation III" dry-cleaning regulations prior to the installation of the carbon absorber. Fittings were attached to the L-80 machines to accept pipes which brought the dry cleaning fumes to be filtered by the carbon absorber, thus producing a less polluted vented by-product.

The Union HL-790 Installation Charge

21. The $2,350.00 installation charge relates to a Union HL-790 dry cleaning machine that petitioner purchased on an uninstalled basis from Union Drycleaning Products, USA in March 2001. The HL-790 machine was installed by USA Clean, LLC in April 2001.

22. Petitioner paid $54,000.00 for the Union HL-790 machine, as well as $1,105.54 in freight charges to have the machine delivered to 120 Earhart. On March 30, 2001, petitioner reported and remitted $28,189.00 in use tax with its filing of Form ST-890, New York State and Local Sales and Use Tax Return for Part-Quarterly Filers. Of the $28,189.00 of the use tax paid by petitioner, $4,408.44 represented use tax due on the purchase price and freight charges for the Union HL-790 machine ($55,105.54 x 8% tax rate).

23. The Union HL-790 machine is larger than petitioner's L-80 dry cleaning machines. Its dimensions are approximately 8 feet tall (20 feet tall when attached to all the required piping and utility lines), 9 feet wide and 6 feet deep. It weighs approximately 6,000 to 7,000 pounds empty, and roughly 10,000 pounds when filled with solvents and chemicals.

24. The Union HL-790 machine is attached to the same through-the-wall, through-the-roof and through-the-floor utility and supply lines (i.e., air and water lines, steam pipes injection system, etc.) that run to the L-80 machines. Because it is a Generation IV machine, the Union HL-790 is not retrofitted to the carbon absorber.

25. The Union HL-790 machine is lag bolted to a 12-inch thick concrete pad to prevent vibration, which could damage the machine and crack the flooring. Some of the lag bolts were cemented in the concrete padding and protruded up from the flooring into the machine's base, and also down into the floor. Other lag bolts protruded up from the flooring and were installed, using special cement, in holes that were drilled into the concrete.

26. The Union HL-790 machine is not easily movable. All of the piping and utility supply lines would have to be detached, and due to its size and weight, heavy machinery would be needed to transport the machine to a different location (or even to a different area of petitioner's facility). Reinstallation of the machine would be complex, as new trenches would have to be dug and new piping and utility supply lines run to the machine through the floor, roof and walls.

The Sankosha Pants Topper Machines

27. Petitioner purchased the four Sankosha pants toppers from USA Clean, LLC on an installed basis. One machine was shipped in November 2001 and three more machines were shipped in January 2002. The purchase price for each machine, including installation, was

$6,500.00. The pants toppers are used to steam press and pleat the tuxedo trousers after they have been dry-cleaned.

28. Each pants topper is similar in dimension to a hot water heater, i.e., approximately 3 feet long, 3 feet wide and 5½ feet high. The pants toppers are lag-bolted to the floor and are attached to the steam and hydraulic (compressed air) piping discussed above.

Installation of Equipment at 120 Earhart

29. All of the dry cleaning and pressing machines in question were affixed to the real property located at 120 Earhart.

30. Mr. Snyder constructed 120 Earhart in 1984 to serve as the headquarters for petitioner. He obtained financing for the project through the Amherst Industrial Development Agency (the "AIDA").

31. Prior to July 30, 2001, Mr. Snyder was the sole lessee of 120 Earhart under a lease with the AIDA. Under the AIDA lease, the AIDA held title to 120 Earhart, as well as any contents that were purchased with AIDA funds or incorporated into the property, including leasehold improvements and replacements for AIDA financed equipment. As lessee, Mr. Snyder sublet 120 Earhart to petitioner, subject to the terms of the AIDA lease.

32. The leases that were in effect between petitioner and Mr. Snyder prior to September 1, 2001 state that "[a]ll leasehold improvements, excluding trade fixtures, but including exterior signs shall become the property of the Landlord and be surrendered with the Premises upon the termination of the lease."

33. When the AIDA lease ended in July 2001, Mr. Snyder became the sole owner of 120 Earhart. At that time, he transferred 120 Earhart to Lindrew Properties LLC (the "LLC"), which

still owns the premises. Lindrew Properties is owned by Mr. Snyder and his family. Mr. Snyder is the sole managing member of the LLC.

34. Effective September 1, 2001, petitioner leased 120 Earhart from the LLC. The leases between petitioner and the LLC, including those in effect during the audit period, state that "[a]ll leasehold improvements, excluding trade fixtures, but including exterior signs shall be the property of Landlord and be surrendered with the Premises upon the termination of this lease." This is the same language that was contained in the leases in effect prior to September 1, 2001.

35. Mr. Snyder constructed 120 Earhart as a "purpose-built" facility that was designed specifically to house petitioner's manufacturing, processing, assembly and dry cleaning operations. In particular, 120 Earhart was designed and constructed in anticipation of the fact that the facility would have to house the type of equipment that is at issue in this case. This included the construction of purpose-built concrete pads for the dry cleaning and pressing machines to be lag bolted onto, as well as the digging of specifically placed trenches to hold the necessary electrical, gas, steam, water and air supply lines. Consequently, when the machines purchased by petitioner during the audit period were installed, it was not necessary to make any modifications to the 120 Earhart facility.

36. Mr. Snyder and petitioner intend to use 120 Earhart as petitioner's headquarters and operational facilities as long as petitioner is in business. Moreover, Mr. Snyder and petitioner have always intended to keep 120 Earhart and its improvements (including the machines in question) together. There is, and never has been, any intent to remove these items from the premises.

37. It would make little economic sense to move much of petitioner's equipment, especially the older L-80 Generation III dry cleaning machines, as they would cost more to move

than replace. Similarly, as time goes by, technology and environmental regulations continue to charge. Therefore, it also becomes less economically feasible to move the Union HL-790 dry cleaning machine. Petitioner does not intend (or expect) to move the HL-790 at any time in the future.

Prior Audit Treatment

38. The Division has conducted three prior sales and use tax audits of petitioner since 1989. These prior audits covered the periods March 1, 1986 through February 28, 1989, March 1, 1989 through February 28, 1992 and November 1, 1992 through August 32, 1995 (hereinafter referred to as the 1986-1989, 1989-1992 and 1992-1995 audits, respectively). Each of these prior audits was conducted by the Division's Buffalo District Office. The Buffalo District Office also conducted the audit at issue here.

39. Two of the issues that arose during the 1986-1989 audit were (a) the taxability of dry cleaning solvents and sizing chemical, similar to those at issue in this case, that were purchased by petitioner for use in dry-cleaning tuxedo garments for rental or sale; and (b) whether store fronts, sprinkler systems, heating, ventilation, air conditioning and similar items that were installed on petitioner's leased premises qualified as capital improvements.

40. At a Bureau of Conciliation and Mediation Services ("BCMS") conference that was held following the 1986-1989 audit, petitioner reached an agreement with the Division's auditor regarding the taxability of these items. Chemicals that were purchased to dry-clean tuxedo garments for sale or rental were determined to be exempt purchases for resale. The store fronts, sprinklers and other installations were deemed to be nontaxable capital improvements.

41. On March 8, 1991, petitioner's administrative assistant, Claudia Syracuse, wrote to BCMS Conferee Bruce Rauch regarding the agreement reached between petitioner and the

Division (the "Rauch Letter"). The Rauch Letter states "This letter also serves as confirmation to the tax treatment as follows. . . ." The Rauch Letter goes on to explain the nontaxability of the dry cleaning chemicals (used to clean garments for sale or rental) and capital improvements, and in the final paragraph states "If you agree that this letter summarizes the resolution of this audit, please sign and return one copy in the self-addressed, stamped envelope, confirming both receipt of the enclosed payment and confirmation of the basis for the adjustments." Conferee Rauch signed the letter on March 15, 1991.

42. At petitioner's June 12, 2006 small claims hearing, Ms. Syracuse testified that she understood the letter as providing guidance to petitioner on how to treat its purchases of dry cleaning chemicals and installed equipment, for sales and use tax purposes, on a going forward basis. Calvin R. Cleveland, president of Tuxedo Junction, Inc., similarly attested to his belief that the taxability of these items had been "favorably and finally resolved."

43. Since the prior 1986-1989, 1989-1992 and 1992-1995 audits and prior to the current audit, petitioner never received any contrary instruction from the Division regarding the tax treatment of either the dry cleaning chemicals or equipment installed in petitioner's leased premises.

44. In fact, when these issues again arose in the 1989-1992 and 1992-1995 follow-up audits, the Division followed the determinations set forth in the Rauch Letter.

45. In the years that followed the 1986-1989, 1989-1992 and 1992-1995 audits, petitioner's business model remained essentially the same. Petitioner continued to use similar dry cleaning solvents and chemicals, and subsequent real property leases contained identical language indicating that improvements made to the land by petitioner were the property of the landlord and would remain with the land.

46. Since the 1986-1989 audit, petitioner has relied upon the Rauch Letter and has collected and paid sales and use taxes as agreed upon by petitioner and the Division in that audit. As a result, petitioner continued to purchase dry cleaning solvents and chemicals tax free and continued to treat permanent improvements to its leased properties as nontaxable capital improvements.

47. Since petitioner relied on the Rauch Letter it did not have the option of either accruing the tax or changing its business practices to avoid the imposition of the tax.

The Current Audit

48. The only issues contested during the current audit again focus on the tax status of dry cleaning solvents and sizing chemicals, as well as the designation of various fixed asset purchases as capital improvements. With respect to these issues, the Division has refused to apply the conclusions of the prior audits and has disregarded the Rauch Letter.

49. The Division maintains that petitioner's purchases of dry cleaning solvents and sizing chemicals did not qualify for the resale exclusion because petitioner was not a manufacturer and did not intend for the solvents and chemicals to remain with the tuxedo garments that it sold and rented.

50. With respect to the fixed assets, the Division concluded that since they were installations to real property that was leased by petitioner's business, they were presumed to be installations of nonpermanent trade fixtures. The Division's representatives also asserted that the dry cleaning and pressing machines were not, in fact, permanently affixed to the real property because their removal would not cause material damage to the property or machines themselves and that the fixed assets did not materially add to the value of the property.

51. Following the audit, the Division, on January 23, 2004, issued a Notice of Determination to petitioner asserting that $9,522.68 of additional sales tax was due, plus interest. Of the total tax asserted due, $5,668.68 represents the tax asserted due on dry cleaning solvents and sizing chemicals and $3,854.00 was tax purportedly due on fixed asset acquisitions.

52. The invoice submitted in evidence for petitioner's purchase of the one Sankosha pants topper shipped in November 2001 is a photocopy of poor quality. The invoice indicates that "30 day trail [sic] starting install day. In event Tuxedo chooses not to keep, Tuxedo is responsi [sic] to pay frt [freight] back to fcty [factory]. If Tuxedo keeps [unreadable] payment in full to USA-Clean at end of 30 day trail [sic]." The invoice for the three Sankosha pants toppers shipped in January 2002 contains no language to suggest that these three machines were purchased on a trial basis.

CONCLUSIONS OF LAW

A. Addressing first the Division's objection to the exhibits attached to petitioner's post-hearing brief, it is noted that at the conclusion of the small claims hearing held herein the record was specifically held open for petitioner to submit certain documents with its initial brief. The documents which were appended to petitioner's initial brief are consistent in nature with the documents which petitioner expressed a desire to submit post-hearing. Accordingly, the documents attached to petitioner's initial brief are accepted in evidence and have been considered in the rendering of my determination.

B. Turning next to the taxable status of the dry cleaning solvents and sizing chemicals, it is noted that Tax Law § 1105(a) imposes a sales tax on "every retail sale of tangible personal property. . . ." As relevant to this proceeding, "retail sale" is defined in Tax Law § 1101(b)(4)(i) as "[A] sale of tangible personal property to any person for any purpose, other than (A) for resale

as such or as a physical component part of tangible personal property. . . ." The Commissioner's regulation at 20 NYCRR 526.6(c) further defines the resale exclusion as follows:

> (c) Resale exclusion. (1) Where a person, in the course of his business operations, purchases tangible personal property or services which he intends to sell . . . as a component part of other property or services, the property . . . which he has purchased will be considered as purchased for resale. . . .
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> (5) The purchase by a vendor of an item of tangible personal property which is sold by him as a physical component part of tangible personal property to a customer is a purchase for resale and therefore is not subject to tax.

C. In the instant matter, there is no dispute that a small portion of the dry cleaning solvents and sizing chemicals remain with the garment after each cleaning. The Division asserts that the solvents were not a component part of the garments, only an unintended result of the dry cleaning. The Division maintains that the solvents used to clean the garments, which it considers a finished product, were consumable supplies which did not become a component part of the product. In its brief, the Division argues that the cases and regulation relied on by petitioner "refers to chemicals used to create a *finished* product, not chemicals used for regular laundering." The Division posits that petitioner is clearly not predominantly engaged in manufacturing as that term is defined in the Tax Law or regulations.

Petitioner argues that it is a manufacturer, and, even if it is determined that it is not a manufacturer, it is nonetheless entitled to the Tax Law §1101(b)(4)(i)(A) component part resale exclusion with respect to its purchase of dry cleaning solvents and sizing chemicals. Petitioner takes the position that the clear language of Tax Law §1101(b)(4)(i)(A) does not require the purchasing taxpayer to be a manufacturer in order to be eligible for the component part resale exclusion contained therein.

D. In my view, petitioner's purchases of the dry cleaning solvents and sizing chemicals at issue herein are eligible for the component part resale exclusion contained in Tax Law §1101(b)(4)(i)(A). The cited statue does not contain any language to support, or even suggest, that the Legislature intended this exclusion to apply only to manufacturers. In ***Finch, Pruyn & Co., Inc. v. State Tax Commn. (***69 AD2d 192, 419 NYS2d 232), the Court concluded that as long as some detectable amount of chemicals remained with the finished product, the chemicals qualified for the component part resale exclusion and that to hold otherwise "would disrupt the plain legislative intent not to exact a use tax from the purchase of items that retain a physical identity *in products offered for resale* " (emphasis added). The Court did not state products manufactured for resale, but instead used the phrase "products offered for resale," and I suspect it used such broad language so that its decision would conform to the broad language of the statute.

E. Purchases of tangible personal property are not subject to sales tax where the property, when installed, constitutes a capital improvement (Tax Law §1105[3][c][iii]). 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.

F. Petitioner has the burden of proof to show that the carbon absorber retrofit of the five Union L-80 dry cleaning machines, the Union HL-790 machine and the four Sankosha pants topper machines each met all three prongs of the test set forth in Tax Law § 1101(b)(9)(i).

Petitioner has failed to carry its burden with respect to each piece of machinery in question. I cannot find on this record that there is sufficient evidence to prove that the machines at issue substantially added value to the real property or appreciably prolonged the real property's useful life. Furthermore, the evidence does not support that the machines were permanently affixed to the real property in such a manner that removal would cause material damage to the real property or the machines. In fact, the first Sankosha pants topper was installed on a trial basis, and petitioner, if not satisfied with its performance, could return the machine. This scenario does not support that the machine was permanently affixed to the real property, and I agree with the Division that the other machines were not affixed to the realty in such a manner as to be considered permanent. With respect to whether the machines were intended to be permanent installations, I view these machines as trade fixtures, which under the terms of petitioner's various leases, were not treated as leasehold improvements which became the property of the landlord. (***See, Matter of Supermarket General Corp. Pathmark Stores,*** Tax Appeals Tribunal, November 9, 2006.)

G. Petitioner's alternative arguments that the machinery in question was exempt from sales tax as either manufacturing equipment (Tax Law § 1115[a][12]), or, in the case of the carbon absorber retrofit, as waste control equipment (20 NYCRR 528.13[d]) are rejected. Only the first dry cleaning of a garment after it is received from petitioner's subcontractors can conceivably be considered part of the manufacturing process. The remaining 49 dry cleanings of the garment clearly cannot be considered the production of tangible personal property as contemplated in Tax Law § 1115 (a)(12) (***see, Matter of Delta Sonic Car Wash Systems, Inc. v. State Tax Commn.,*** 142 AD2d 828**,** 530 NYS2d 341). With respect to petitioner's claim that the carbon absorber retrofit qualifies as exempt waste control equipment, it must be noted that

20 NYCRR 528.13(d)(ii) requires that more than 50% of the waste treated must result from the production process. As noted previously, petitioner's operations that could conceivably be considered as a production process are, at best, only 2% of its overall operations. Accordingly, the carbon absorber retrofit does not qualify as waste control equipment.

H. Petitioner has also asserted that any machinery purchased and installed prior to the expiration of the AIDA lease on July 30, 2001 should be treated as exempt purchases by or on behalf of the AIDA, an exempt organization. The record herein contains insufficient evidence to support that petitioner purchased any of the machinery at issue as an agent for the AIDA, that it was subject to the AIDA's control and that the AIDA authorized petitioner to act as its agent. Absent such an agency relationship, petitioner's purchases were not exempt from taxation pursuant to Tax Law § 1116(a)(1).

I. Petitioner also asserts that the Division should be prohibited from retroactively imposing tax on the items at issue in a manner inconsistent with the tax treatment accorded these items in the prior audits. Petitioner asserts that the prior tax treatment was confirmed by the Rauch Letter and that it is arbitrary, capricious and inequitable for the Division to change its position on these items in the current audit.

Initially, it is noted that conciliation orders are not considered precedent and cannot be given any force or effect in subsequent proceedings (Tax Law § 170.3-a[f]; 20 NYCRR 4000.5[c][5]). While it appears that the 1986-1989 audit was settled by BCMS via a consent without the need for the issuance of a Conciliation Order, I can see no reason to treat resolution by consent any different from resolution by Conciliation Order. Since the Conciliation Order is not binding, except for the periods or years in dispute, and has no force or effect in subsequent proceedings, it follows that the Legislature intended that a resolution by consent, which would

occur before the issuance of a Conciliation Order, would likewise have no force or effect in subsequent proceedings.

Petitioner's assertion that it relied on the Rauch Letter to its detriment and is thus entitled to have the assessment canceled due to said reliance is without merit. First, the Rauch Letter, as relevant to the issues in dispute in this proceeding, simply states, via a handwritten notation, that the taxable status of chemicals and certain capital improvements in the 1986-1989 audit was resolved between petitioner's representative and the Division's auditor. A taxpayer can, through a request for an advisory opinion, obtain a binding written opinion from the Division on which it is entitled to rely. The handwritten notation of Conferee Rauch, upon which petitioner relies, falls far short of and cannot be elevated to the status of a binding advisory opinion. Second, it is not reasonable for petitioner to rely on the handwritten notation of Conferee Rauch or the results of any prior audit for guidance as to whether the machines currently in dispute constituted nontaxable capital improvements. The determination as to what constitutes a capital improvement is dependent upon many different factors which can, and will, vary greatly with each improvement. Absent identical machinery being installed in an identical manner under identical leases, it cannot be found that it was reasonable for petitioner to rely on the results of the prior audits for guidance as to whether the machinery at issue in this proceeding constituted capital improvements.

Petitioner also believes that, given the circumstances herein, it is fair and equitable (Tax Law § 2012) to cancel the assessment. I do not agree. Petitioner, as the result of this determination, is being held liable for sales tax due on its acquisition and installation of various pieces of machinery which it considered as exempt. This is not a situation where petitioner failed to collect tax from a customer under unusual circumstances and is now being held liable

for the tax owed by the customer. The tax which remains due herein is petitioner's liability on its taxable purchases. As noted previously, it was not reasonable for petitioner to rely on the prior audits or the Rauch Letter for guidance as to what constituted a capital improvement. Under the facts of this case, I do not find the principles of fairness and equity applicable to this proceeding.

J. Finally, the issue concerning whether the Division of Tax Appeals has jurisdiction over petitioner's claim for refund or offset with respect to the Union HL-790 dry cleaning machine is rendered moot since this determination holds that the cost of the machine and its installation are both subject to tax. Since petitioner is not entitled to any refund or offset, there is no need to address whether the Division of Tax Appeals has jurisdiction over the claim for refund or offset.

K. The petition of Tuxedo Junction, Inc. is granted to the extent indicated in Conclusion of Law "D"; the Division of Taxation is directed to modify the Notice of Determination dated January 23, 2004 consistent with this determination, and, except as so granted, the petition is in all other respects denied.

DATED: Troy, New York
March 29, 2007

/s/ James Hoefer
PRESIDING OFFICER