

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition :

of :

F. & Z. FOODS, INC. :

DECISION :

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 11,  
1972. :

---

Petitioner, F. & Z. Foods, Inc., 924 Arsenal Street, Watertown, New York 13601, 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 December 11, 1972 (File No. 01619).

On June 14, 1984, petitioner waived its right to a hearing and requested that a decision be rendered based on the entire record contained in its file, including briefs to be submitted by August 27, 1984. After due consideration, the State Tax Commission hereby renders the following decision.

ISSUE

Whether equipment purchased by petitioner and installed in leased premises constituted capital improvements exempt from sales and use tax.

FINDINGS OF FACT

1. Petitioner herein, F. & Z. Foods, Inc., obtained, sometime during the 1970 calendar year, a license to operate a McDonald's fast food restaurant ("the restaurant") located at 924 Arsenal Street, Watertown, New York. Petitioner was lessee of the restaurant premises.

2. On October 19, 1970, petitioner entered into an agreement with Illinois Range Company for the purchase of certain restaurant equipment to be used in

the restaurant. By invoice dated December 11, 1970, Illinois Range Company billed the principals of F. & Z. Foods, Inc. the sum of \$41,196.00 for various equipment and \$4,991.00 for installation and delivery, for a total of \$46,187.00. Said invoice also billed New York State sales tax of \$2,771.22 ( $\$46,187.00 \times .06$ ). The total due shown on said invoice of \$48,958.22 ( $\$46,187.00 + \$2,771.22$ ) was reduced by a deposit of \$15,000.00 which had been made on or about October 19, 1970, leaving a balance due of \$33,958.22. By check dated March 18, 1971, petitioner made payment to Illinois Range Company of the \$33,958.22 balance due.

3. On December 11, 1972, petitioner submitted an Application for Credit or Refund of State and Local Sales or Use Tax claiming a refund of \$1,431.49<sup>1</sup> on the grounds that a portion of the aforementioned equipment purchased from Illinois Range Company became a part of the building when installed and, as such, was exempt from sales and use tax as a capital improvement. Attached to the application for refund was a photocopy of the Illinois Range Company invoice dated December 11, 1970, wherein petitioner marked the following items as exempt capital improvements:

<u>Item</u>	<u>Amount</u>
a) Multimixer Stand	\$ 575.00
b) Center Island Unit - Complete	4,946.00
c) K-Way System with Water Chiller & Stand	4,230.00
d) Sandwich Preparation Unit	2,365.00
e) Uniflow Walk-In, Reach-In Refrigerator	3,630.00
f) 3-Compartment Sink	844.00
g) Trim (Channel)	55.00
h) Undercounter Shelving	1,000.00
i) Menu Board with Glass	630.00
j) Bally Freezer	3,782.00
k) Delivery & Installation	4,991.00
Total	<u>\$27,048.00</u>

---

<sup>1</sup> In the computation of the refund of \$1,431.49 petitioner used an incorrect tax rate. The proper tax rate for the period at issue was six percent and petitioner has therefore understated its claim for refund by \$191.39.

4. Pursuant to a letter dated March 2, 1973, the Audit Division advised petitioner that its claim for refund was denied in full. Petitioner timely filed a petition with the State Tax Commission for a redetermination of the refund denial.

5. Petitioner's lease agreement for the restaurant premises was not included as part of the record. However, petitioner's representative asserted, pursuant to a letter dated July 27, 1984, that the terms of the lease were "substantially identical" to the lease described in the Matter of the Petition of J.F. Townhouse, Inc.<sup>2</sup> (decided this date).

6. The record is devoid of any credible evidence as to the manner in which the items in question were affixed to the leased realty. Also, there is no evidence in the record to show that the items in question, if removed, would cause substantial damage to said items or to the realty.

#### CONCLUSIONS OF LAW

A. That petitioner has failed to show that the items in question were affixed to the leased realty with any degree of permanency or that the items in question, if removed, would be substantially damaged or would cause damage to the realty. Additionally, it would appear that the lease agreement for the rental of the McDonald's restaurant would reveal that title to the items in question remained with petitioner and were therefore not intended to be permanent installations. Flah's of Syracuse, Inc. v. Tully, 89 A.D. 2d 729.

---

<sup>2</sup> Petitioner herein, F. & Z. Foods, Inc., and J. F. Townhouse, Inc. have common principals and were both involved in the operation of McDonald's restaurants. Both corporations were represented by the same attorney and identical issues were presented to the State Tax Commission for its consideration.

B. That the various items in question did not, when installed in the leased realty, constitute capital improvements within the meaning and intent of sections 1101(b)(9) and 1105(c)(3)(iii) of the Tax Law.

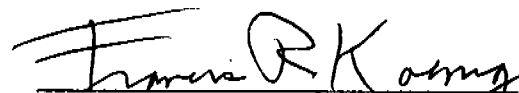
C. That the petition of F. & Z. Foods, Inc. for refund is denied in its entirety and the notice of refund denial dated March 2, 1973 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

FEB 06 1985

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER