

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

J. F. TOWNHOUSE, 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 November 11, 1971.

Petitioner, J. F. Townhouse, Inc., 247 Genesee Street, Utica, New York 13501, 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 November 11, 1971 (File No. 01622).

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 of the record, 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. On November 12, 1971, petitioner herein, J. F. Townhouse, Inc., obtained, through assignment from James D. Fotos and Irene A. Fotos, a license to operate a McDonald's fast food restaurant located at 247 Genesee Street, Utica, New York and a 20 year lease for said restaurant. James D. Fotos and Irene A. Fotos had acquired the license from McDonald's System, Inc. and the lease from Franchise Realty Interstate Corporation.

2. On September 16, 1971, Mr. Fotos, owner of 100 percent of the stock of petitioner herein, had entered into an agreement with Illinois Range Company for the purchase of certain restaurant equipment to be used in the McDonald's restaurant located at 247 Genesee Street, Utica, New York. By invoice dated November 30, 1971, Illinois Range Company billed Mr. and Mrs. Fotos \$41,760.00 for various equipment and \$5,134.00 for installation and delivery, for a total of \$46,894.00. Said invoice also billed New York State sales tax of \$1,875.76 ( $\$46,894.00 \times .04$ ). The total due shown on said invoice of \$48,769.76 ( $\$46,894.00 + \$1,875.76$ ) was reduced by a deposit of \$15,000.00 which had been made on or about September 16, 1971, leaving a balance due of \$33,769.76. By check dated January 13, 1972, petitioner made payment to Illinois Range Company of the \$33,769.76 balance due.

3. On December 12, 1972, petitioner submitted an Application for Credit or Refund of State and Local Sales or Use Tax claiming a refund of \$1,021.11 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 November 30, 1971, wherein petitioner marked the following items as exempt capital improvements:

<u>ITEM</u>	<u>AMOUNT</u>
a) Multimixer Stand-Complete	\$ 629.00
b) Center Island - Complete	5,098.00
c) Multiplex Twin "1200" Disp. Sys.	4,263.00
d) Syrup Rail, w/Step, Freestanding	458.00
e) Vollrath Walk-In Refrig.	3,866.00
f) 3 Compartment Sink w/ Drainboard	840.00
g) Undercounter Shelving	1,000.00
h) Menu Board (Florida Plastics)	294.00
i) Bally Freezer	3,945.00
j) Installation & Delivery	5,134.00
Total	<u>\$25,527.00</u>

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 McDonald's restaurant located at 247 Genesee Street, Utica, New York provided, pursuant to Article II, Section 5, that:

"Lessee agrees to purchase, install and maintain all at his own expense the sign, including the arches, and the trade fixtures and equipment in accordance with the plans, specifications and layout of McDonald's System, Inc., or any of its subsidiaries."

Said lease also provided, pursuant to Article III, Section 5, that:

"By this lease, Lessor does not acquire any right, title or interest in or to any property of Lessee except such rights as are specifically stated in the Lease."

6. The record is devoid of any 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. Furthermore, the inference is warranted that petitioner did not intend the items in question to be permanent installations since, pursuant to the lease agreement, title to said items remained with petitioner and did not pass to the lessor. Flah's of Syracuse, Inc. v. Tully, 89 A.D.2d 729.


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 J. F. Townhouse, 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