STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of MERIT OIL OF NEW YORK 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 9, 1979 through November 30, 1980.	DECISION

Petitioner, Merit Oil of New York, Attn: Leonard Gilmar, 44 West Lancaster Avenue, Ardmore, Pennsylvania 19003, 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 March 9, 1979 through November 30, 1980 (File No. 38556).

A formal hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Office Campus, Albany, New York, on June 29, 1984 at 9:00 A.M., with all briefs to be filed by November 7, 1984. Petitioner appeared by Wolf, Block, Schorr & Solis-Cohen, Esqs. (William P. Thorn, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Paul A. Lefebvre, Esq., of counsel).

ISSUES

I. Whether certain improvements made by petitioner in the construction of gasoline service stations on leased land constitute capital improvements to real property.

II. Whether certain maintenance charges for service stations which were paid for by another corporation related to petitioner and then charged back to petitioner at cost were properly subject to tax.

FINDINGS OF FACT

1. On May 4, 1982, following a field audit, the Audit Division issued to petitioner, Merit Oil of New York ("Merit"), a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the sales tax quarterly periods ended May 31, 1979 through November 30, 1981 in the amount of $266,542.33, plus interest. This assessment consists of two separate items, as follows: a) tax in the amount of $263,081.59 assessed on the cost of improvements made by petitioner on leased properties (as more fully described hereinafter); b) tax in the amount of $3,460.74 assessed on certain monthly repair and maintenance charges.

2. Merit operates gasoline service stations in New York State, owning approximately one-half of the stations it operates and leasing the remainder. It is Merit's practice to build completely new facilities for its station operations when it acquires, either by purchase or lease, a new property. Where there are existing station facilities, they are demolished and new facilities are erected except, in some cases, where an existing building may be left standing for storage purposes. The portion of the instant assessment pertaining to the improvements is based only on the cost of improvements made by Merit on leased properties, with no tax assessed on the cost of the same types of improvements made to properties owned by Merit.

3. There are 29 leased service stations in question in this proceeding. The type of improvements at issue include gasoline tanks buried underground, fuel piping systems from the tanks to the gasoline pumps, canopies over the fuel pumping area, cashiers' booths for the service station attendant located under the canopy area, concrete parking areas over the underground gasoline

tanks and around the pumps, asphalt paving over the entire property except for the described concrete paved areas, storage buildings and pylon signs.

4. The assessment herein stems from the Audit Division's review of six specific stations, all leased, upon which the noted type of improvements were made by Merit. This use of six stations as a test group, with projections of the tax due therefrom as the method of auditing Merit's total station construction activities, was agreed to by Merit at the commencement of the audit.

5. Construction specifications and installation methods pertaining to the various types of improvements in dispute are as follows:

A) STORAGE AND DISPENSING SYSTEM:

The system consists of underground storage tanks, dispensers, underground submersible pumps and related underground piping.

- Installation and Specifications:

Storage tank holes measuring 39' long x 28' wide x 9' deep are dug. The bottom of the excavation is filled with concrete to a depth of 12" to support and provide a level surface for the five 4,000 gallon steel or fiberglass storage tanks. The tanks, measuring 5'4" diameter x 24' long, are lowered into the excavation and positioned 2' apart, and are filled to full capacity to preclude moving or floating due to rainfall. All piping connections, running about 3' below finish grade level, are completed at this stage of the installation, including 4" fill lines, 2" vent lines and submersible pump units with 2" product discharge piping to each gasoline pump. The gasoline pumps are firmly secured to the pumping island with lag bolts, and the complete system is tested for tightness. The excavation is filled with concrete to a level

even with the top of each tank. The area above the tanks is backfilled with sand to a depth of 8" below finished grade, and is compacted. The perimeter of the tank area is formed out with 2" x 8" edging boards to provide a form for the concrete mat over the tanks. All manholes for gauge and fill lines are set. A 24" x 24" street box is set over the submersible pump. Reinforcing steel road mesh is set in place, and concrete is poured 8" thick and finished. The concrete strength is 3,500 psi certified. Product identification markers are installed at the appropriate fill openings.

B) CASHIER BOOTH:

The booth is 8' x 14', weighs 8,000 pounds, and consists of prefinished interior metal walls and ceiling, exterior brick veneer over metal wall, and includes steel cross members in the floor welded to and supporting the walls. The booth configuration includes three rooms; a cashier's area, a rest room, and a storage/utility room. It is centrally heated and air conditioned.

- Installation and Specifications:

The booth is placed on a concrete footing poured to a depth of approximately 4' below finish grade. Electrical service, individual conduits, sanitary sewer and water service are stubbed in. A 4" thick concrete floor is poured inside the booth over the steel cross members which completely secures the floor supports and walls to the foundation. The exterior of the booth is then encased in a 4" concrete platform. The tile floor and rest room fixtures are installed and the electrical connections are completed.

C) STATION CANOPY:

The canopy, covering the gasoline pumping and cashiers' booth area, is 36' x 78' (standard size) and weighs approximately 39,314 pounds. It consists of structural steel framework and beams, galvanized metal decking and gutters, and .080 gauge (5/64") aluminum fascia.

- Installation and Specifications:

Concrete canopy footings are poured to a depth of 5' to 8' below finish grade. The 8" round x 19' long canopy poles are set in place on the concrete footings, and the pockets in which the canopy poles are resting are filled with concrete. The steel main support trusses of the canopy structure are bolted to the poles and all other structural members are positioned and bolted into place. The upper deck of the canopy is attached to the top rail of the structural truss using ¼" diameter bolts and self-tapping and sealing structural screws. The lower deck is fastened to the bottom rail of the structural truss in the same fashion as the upper deck.[1] The fascia panels are secured to the top deck of the canopy with a 2¼" x 1½" continuous aluminum angle, which is attached with metal screws. This angle is installed around the entire perimeter of the canopy. The fascia panels have a bend at the top, which allows them to overlap and hang on the aluminum

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1 The double deck canopy has two advantages over the single deck canopy. First, it provides support for the fascia and signs. This could be accomplished with bracing; however, by incorporating the top deck, the advantage of a weather proof enclosure for the signs and lighting fixtures is gained. Second, the interior of the canopy structure provides an area where servicing of the signs can be accomplished free from inclement weather conditions.

angle. The bottom of the fascia panels have a bend, which is secured to the bottom deck of the canopy with metal screws. Each fascia panel or sign is approximately 4' wide and 5'6" high and is fastened at the bottom with two screws. The panels are secured to one another with two screws at each side, thereby providing a uniform sign. The sign consists of a fascia panel, which has been cut out with a metal saw to produce the desired copy; e.g. "MERIT", "MERIT SERV & SAVE", price panel, logo M, etc. Plexiglass is applied directly behind the cut-out with an adhesive sealant. This plexiglass produces the desired color to the sign copy. The illumination for the sign is produced from a fluorescent light box fixture which is attached to the canopy supports with metal screws directly behind the copy of the fascia panels. Complete canopy installation time is approximately three days with a three member crew.

D) STATION PAVING:

- Concrete Paving (Gasoline Islands and Mats)

The pump-area island is constructed by laying in place, setting and leveling stainless steel forms which are purchased to the exact size required. The gasoline piping and electrical conduits for the dispensers are securely fastened to a steel pumpbox set within the island. Concrete is poured for the island and steel bumper posts are imbedded in the concrete to protect the pumps from damage by vehicles. The concrete is treated with a black colored dye and troweled to a smooth finish. Concrete mats are utilized at the islands in place of asphalt paving because concrete

is impervious to spilled gasoline. The mat is made up of 6" thick poured concrete reinforced with steel.

- Asphalt Paving:

Final grades are established and all areas other than those paved with concrete are graded accordingly. A 4" stone base is put down and rolled, followed by a 1½" asphalt binder course. After the binder course sets and hardens, a 1½" finish course of asphalt is laid down and rolled. All edges and seams are sealed with liquid asphalt.

E) PYLON SIGNS:

- Installation and Specifications:

A 5½' deep concrete footing is poured, and (4) 1½" diameter x 5' long steel anchor bolts are embedded in the concrete footing. The sign support column, varying in length from 20' to 32', depending on visibility requirements and/or code restrictions, is rasied into position and bolted to the concrete footing. The 4' x 6'" x 10", 2,500 pound sign is attached at the top of the column.

F) ACCESSORY BUILDINGS:

The accessory buildings are of masonry construction, with steel roof decking, and are used to store items such as antifreeze, oil, etc.

6. To remove the canopies, the decking would have to be unscrewed, the steel support trusses unbolted, and all would be labeled and crated. The columns would have to be either cut or burned off at grade level. Merit has never removed a canopy, nor has it ever removed an underground tank. Although it is possible to remove and later re-use canopy decking and underground tanks, Merit asserts that the cost of doing either is uneconomical.

7. The only items previously described which Merit has ever removed from a station are the gasoline pumps and the pylon signs. To remove any of the other described items (except the canopy decking, pumps and signs), it would be necessary to use a jackhammer to break up the surface area and concrete. Furthermore, in the case of the booths, the steel supporting cross members would have to be cut off, which in conjunction with using the jackhammer to remove the four inch concrete flooring would damage the booth to the extent that it would not be practical to reuse it.

8. The leases pertaining to the 29 locations at issue are all for lengthy terms and many contain renewal provisions. The lease terms vary in length from ten years with two five year renewals at the option of the lessee, to twenty-five years with a ten year renewal at the option of the lessee. The median lease is for a period of twenty years with two five year renewals at the option of the lessee. Sixteen of the leases are twenty year leases, of which fifteen have two five year renewals at the option of the lessee. Four of the leases have fifteen year terms, with three of those giving the lessee the right to extend the lease for three additional five year periods.

9. The improvements to the stations made by Merit vary in cost from about $60,000.00 to about $200,000.00.

10. When Merit started leasing station sites, most of the leases were custom leases tailored to each property. However, after a period of time, a standard lease was developed, although some provisions were changed in almost all of the leases as a result of negotiations between the parties. The standard form of lease provided that Merit, as the lessee, had the right to remove all buildings and other improvements that may have been erected on the property by Merit. Some of the original leases provided that improvements made by the

lessee (Merit) became the property of the lessor either upon completion or upon termination of the lease. Merit has never enforced the right to remove the improvements, with the exception of personal property such as oil dispensers or display units and some signs and gas pumps. The removal provision was put in the leases originally to aid Merit in renegotiating a new lease at the end of a given leasehold period, through the ability to stress diminution in value of the premises if Merit exercised the right to remove improvements. Merit later entered into a number of agreements of reformation to change the provision with respect to certain enumerated improvements so that they became the property of the landlord upon the expiration of the lease. Each of these agreements of reformation were entered into subsequent to the period at issue. A more complete listing of the removal clause aspect of the leases is attached to this decision as Appendix "A".

11. The lengthy duration of the various leases allows Merit to be in the premises a sufficiently long period of time to recover the costs involved with constructing the stations.

12. The tax assessed on the station conversions was computed by determining the portion of Merit's total construction conversion costs deemed taxable and assessing tax thereon. The taxable portion of such total costs was arrived at by comparing taxable costs to total conversion costs for each of six converted stations, specifically the Fort Hamilton, Nostrand, Remsen, Tee, Bell and Bushwick stations (as agreed between the parties at the time of commencement of the audit), and applying the resulting percentage to total conversion costs of all stations. The determinations of the taxable percentages per station are shown as follows:

Station	Total Conversion Cost	Taxable Portion	Percentage
Fort Hamilton	$ 116,841.00	$ 67,867.00	58.1
Nostrand	98,979.00	60,217.00	60.8
Remsen	111,725.00	61,822.00	53.3
Tee	245,647.00	168,845.00	68.7
Bell	285,456.00	208,510.00	73.0
Bushwick	266,675.00	197,317.00	74.0
Totals	$1,125,323.00	$764,578.00	67.9

13. Petitioner submitted one invoice for conversion work performed at the Bell station upon which tax of $1,037.68 was paid. Since the auditor included the entire amount of this invoice as conversion costs subject to tax, petitioner asserts that the amount of tax therein should be removed in determining the percentage projection, and also asserts that petitioner is entitled to a $1,037.68 credit against any deficiency assessed since the tax was in fact paid.

14. The portion of the assessment which pertains to repair and maintenance charges is based on expenses for such services performed at petitioner's stations by outside parties and paid for by Merit Oil Corporation, a Delaware corporation, as the central payment unit for petitioner and its sister corporations. After payments are made by Merit Oil Corporation, charges for such payments are billed back to petitioner at cost as an intercompany allocation. These expenses were not paid directly by Merit to the third parties who supplied materials and/or labor, but were Merit's allocated share of such costs paid by Merit Oil Corporation and charged to Merit per the allocation. Neither specific services and expenses therefor, nor the method of allocation was detailed by Merit. Petitioner asserts that such allocated expenses were not retail sales subject to tax but were allocations solely for the purpose of determining the profit and loss of each corporation.

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."

This provision, enacted by Chapter 471 of the Laws of 1981 (effective July 7, 1981), represents a legislative enactment of the substance of the Commission's previously promulgated regulation on the subject, located at 20 NYCRR 527.7(a)(3).

B. That petitioner's assertion that the Real Property Tax Law is controlling on the issue of what constitutes a capital improvement for sales tax purposes is misplaced. Rather, it is the criteria set forth in Tax Law section 1101(b)(9) which defines a capital improvement (Matter of Broadway Mobile Home Sales Corp. v. State Tax Comm., 67 A.D.2d 1029; Matter of Roberson v. State Tax Comm., 65 A.D.2d 898).

C. That imposition of tax by the Audit Division was based upon the presumption that the items installed by petitioner, as a tenant, were not intended to become permanent installations. In this regard, the Audit Division specifically points to the fact that pumps and signs have been removed by petitioner, together with the terms of the station leases regarding ownership of items upon lease expiration.

D. 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 section 1101(b)(9). (People ex rel. 100 Park Ave., Inc. v. Boyland, 144 N.Y.S.2d 88, mod. on other grounds, 284 A.D. 1033, rev'd on other grounds, 309 N.Y. 685; see Tifft et al. v. Horton et al., 53 N.Y. 377). However, the facts may serve to rebut such presumption (Matter of Flah's of Syracuse, Inc. v. Tully, 89 A.D.2d 729).

E. That several of petitioner's station leases were reformed whereby certain specific items were enumerated as becoming the property of the landlord upon lease expiration. The reformed leases are petitioner's Exhibits "3" and "18 through 31", and the items specified therein are the canopies, booths, heating and air conditioning systems, overhead fire suppression systems, paving and underground storage tanks including, by implication, underground piping attendant thereto. A number of other leases, specifically petitioner's Exhibits "4 through 9" and "15", "16" and "17", provide that "improvements" or "building" or "buildings and improvements" become the property of the landlord upon lease expiration. Specifically excluded, however, in petitioner's Exhibit "8" were underground tanks and piping. The balance of the leases indicate that ownership of improvements and/or trade fixtures, equipment, etc. is to remain with petitioner at lease expiration unless, in some instances, the landlord elects to purchase the same.

F. That in reforming the leases, petitioner enumerated certain items as becoming the property of the landlord, as noted in Conclusion "E". Such items were thus presumably specifically contemplated by petitioner to be permanent "improvements", and the term "improvements" as appearing in other leases (with the specific exception of underground tanks and piping as excluded per Exhibit "8") shall pertain solely to such specified items.

G. That by abandoning ownership of the enumerated improvements and buildings as per either the original or reformed lease terms, petitioner has evidenced its intention to make permanent installations of such items. Accordingly, such improvements and buildings (with the exception of underground tanks and piping per Exhibit "8") meet the criteria set forth in Tax Law Section 1101(b)(9) and constitute capital improvements. However, by contrast, in the absence of such ceding of ownership, it is presumed that petitioner did not intend to make permanent installations. Accordingly, except with respect to the specific improvements and buildings previously noted, petitioner has failed to meet the third enumerated criterion of section 1101(b)(9), and thus such items do not constitute capital improvements. In recomputing the instant deficiency, petitioner is to be allowed credit with respect to the amount of tax erroneously included from the specific invoice noted in Finding of Fact "13.

H. That section 1105(c) of the Tax Law imposes a tax on "(t)he receipts from every sale...of the following services:

> (3) Installing tangible personal property...or maintaining, servicing or repairing tangible personal property,...".

That the bookkeeping entries recorded on petitioner's books and records reflecting petitioner's allocated share of the expenses for maintenance services performed at its various locations, as described, effectuated a "sale of services" between petitioner and its parent within the meaning and intent of Tax Law sections 1101(b)(5) and 1105(c)(3) (Matter of 107 Delaware Associates v. State Tax Commission, ___ N.Y.2d ___, rev'ing 99 A.D.2d 29).

I. That the petition of Merit Oil of New York is granted to the extent indicated in Conclusion of Law "G", but is in all other respects denied and the

Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated May 4, 1982, as recomputed and reduced in accordance herewith, is sustained.

DATED: Albany, New York

JUL 10 1985

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER

APPENDIX A

DISPOSITION OF PROPERTY INSTALLED BY TENANT

Petitioner's Exhibit No.	Station Name	Paragraph in Lease	Summary of Provision
3	Bell	1,	Reformation Canopy, booth, heating and air conditioning systems, overhead fire suppression system, paving and underground storage tanks shall become property of landlord upon the expiration of the lease.
4	Bushwick	5	Improvements become property of landlord upon expiration of lease.
5	Copiague	Art. IX, XV B, XXVI	All improvements are property of landlord, equipment belongs to tenant.
6	Flushing	7	Buildings and improvements become property of landlord upon expiration of lease; tenant may remove or abandon other property.
7	Astoria	7, 45	Buildings and improvements become property of landlord upon expiration of lease; tenant may remove or abandon other property.
8	Cypress	7	Improvements, plumbing, heating and lighting fixtures and all driveways become property of landlord upon termination of lease; tenant may remove pumps, tanks, containers, piping, appliances and service station equipment.
9	89th St.	7	Buildings become property of landlord upon termination of lease; tenant has option to remove other fixtures and equipment.
10	Houston	7, 32, 47	Landlord has right to purchase all buildings, improvements and fixtures, equipment, signs, canopies, attachments and apparatus.

Petitioner's Exhibit No.	Station Name	Paragraph in Lease	Summary of Provision
11	Nostrand	28	Landlord has right to purchase all buildings, improvements and fixtures, equipment, signs, canopies, attachments and apparatus.
12	Patchogue	7	Landlord has right to purchase all buildings, improvements and fixtures, equipment, signs, canopies, attachments and apparatus.
13	Remsen	9	Improvements belong to tenant and landlord may require tenant to remove at expiration of lease. Underground tanks have to be made unusable and safe.
14	Stanley	7	Tenant may remove buildings and equipment.
15	Conduit	7	Buildings and improvements belong to landlord; tenant may remove trade fixtures, equipment, attachments and apparatus.
16	Crossbay	Art. 7	Buildings and improvements belong to landlord; tenant may remove trade fixtures, equipment, attachments and apparatus.
17	Tee	Art. 49, K, W	Buildings and improvements belong to landlord; tenant may remove trade fixtures, equipment, attachments and apparatus.
18-31	All other properties at issue	1, Reformation	Canopy, booth, heating and air conditioning systems, overhead fire suppression system, paving and underground storage tanks shall become property of landlord upon the expiration of the lease.