STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

MCDONALD'S-ALPS MANAGEMENT, 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 September 1, 1979 through August 31, 1982.

Petitioner, McDonald's-Alps Management, Inc., 2A Byram Brook Place, Armonk, New York 10504, 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, 1979 through August 31, 1982 (File No. 68578).

A hearing was commenced before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on December 3, 1986 at 11:00 A.M., at which time petitioner stated its desire to have the matter decided by the Commission based upon the entire contents of the Audit Division's file, together with additional documents and briefs to be submitted by April 6, 1987. After due consideration, the Tax Commission renders the following decision.

ISSUE

Whether petitioner's addition of a "drive-thru" window to its leased business premises constituted a capital improvement not subject to tax.

FINDINGS OF FACT

1. McDonald's-Alps Management, Inc. operated a McDonald's restaurant on premises leased from the McDonald's corporation.

2. During the period in question, petitioner altered its restaurant by adding a "drive-thru" window, so that patrons could drive up to the window to purchase various items for takeout, without having to park their car and walk into the restaurant.

3. The alteration required breaking out through one of the restaurant's brick walls, constructing two brick walls perpendicular to the existing broken-out wall at the points of the break, constructing a brick wall with a service window parallel to the prior-existing wall, and then "roofing over" the added structure.

4. Upon audit, the Audit Division concluded that the above leasehold improvement did not qualify as a capital improvement pursuant to Tax Law section 1101(b)(9).

5. On March 18, 1983, the Audit Division issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period September 1, 1979 through February 28, 1982 in the amount of $3,386.05, plus interest. This notice represents the tax calculated as due in connection with the above leasehold improvement.

6. Petitioner maintains that the improvement constructed constitutes a capital improvement not properly subject to tax. Petitioner notes the manner of construction and the materials used therein as proof of the permanent nature of the addition. Further, petitioner submitted an August 14, 1980 letter from McDonald's to petitioner setting forth explicitly, inter alia, the agreement that any improvements to the property, including the one in question, "shall become a permanent part of the premises and will not be removed by [petitioner] without the consent of [McDonald's]."

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 imposition of tax by the Audit Division was based upon the presumption that the improvement installed by petitioner, as a tenant, was not intended to become a permanent installation, and that title thereto did not pass to the owner of the premises upon construction or upon conclusion of petitioner's lease.

C. 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* NYS2d 88, mod on other grounds, *284* App Div *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).*

D. That given the nature of the improvement constructed and the materials used therein, it **is** clear that said improvement adds to the value of the real property and that any attempt to remove the improvement would result in reduction of the improvement to scrap. Further, as the August *14, 1980* letter agreement establishes, petitioner did not gain, hold or reserve any right to remove the improvement constructed at any time after its construction. Accordingly, petitioner has sustained its burden of proving that the improvement in question meets the criteria of being a capital improvement and thus was not properly subject to tax.

E. That the petition *of* McDonald's-Alps Management, Inc. is hereby granted and the Notice of Determination dated March 18, 1983 is cancelled.

DATED: Albany, New York

JUN 0 9 1987

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER