

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Flah's of Syracuse, Inc. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Sales & Use Tax :
under Article 28 & 29 of the Tax Law
for the Period 6/1/73 - 11/30/75. :

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 28th day of November, 1980, he served the within notice of Determination by mail upon Flah's of Syracuse, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

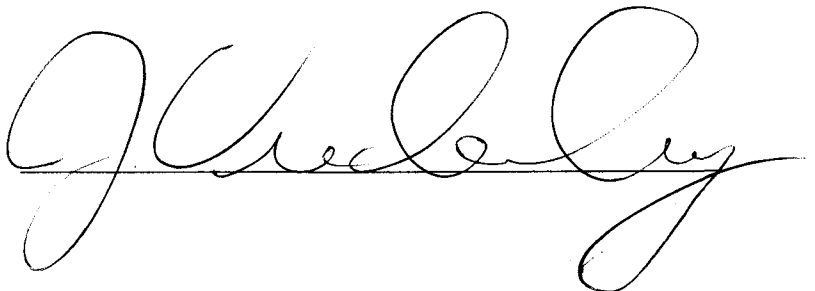
Flah's of Syracuse, Inc.
878 Albany-Shaker Rd.
Latham, NY 12110

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
28th day of November, 1980.

Rebecca A. Bank



STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Flah's of Syracuse, Inc. :

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for Redetermination of a Deficiency or a Revision :
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Sales & Use Tax :
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State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 28th day of November, 1980, he served the within notice of Determination by mail upon Richard H. Weiner the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

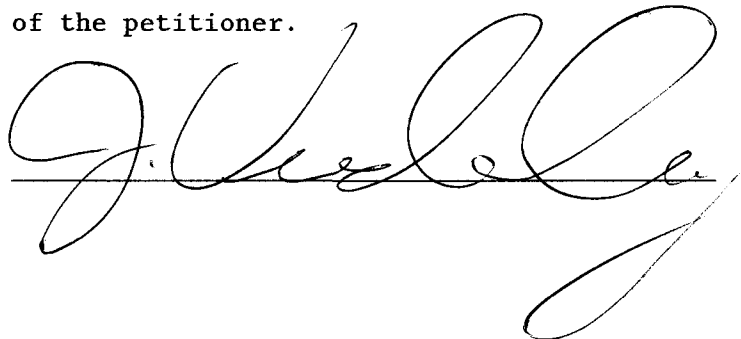
Mr. Richard H. Weiner
Nolan & Heller
60 State St.
Albany, NY 12207

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
28th day of November, 1980.

Richard A. Bank



STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

November 28, 1980

Flah's of Syracuse, Inc.
878 Albany-Shaker Rd.
Latham, NY 12110

Gentlemen:

Please take notice of the Determination of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1138 & 1243 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Richard H. Weiner
Nolan & Heller
60 State St.
Albany, NY 12207
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application	:	
of	:	
FLAH'S of SYRACUSE, INC.	:	DETERMINATION
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 June 1, 1973 through	:	
November 30, 1975.	:	

Applicant, Flah's of Syracuse, Inc., 878 Albany-Shaker Road, Latham, New York 12110, filed an application 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 June 1, 1973 through November 30, 1975 (File No. 16658).

A formal hearing was held before Michael Alexander, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Campus, Albany, New York, on October 31, 1978 at 9:00 A.M. Applicant appeared by Nolan & Heller (Richard H. Weiner, Esq., of counsel). The Audit Division appeared by Peter Crotty, Esq. (Barry M. Bresler, Esq., of counsel).

ISSUE

Whether additions to and modifications of applicant's stores are capital improvements and, therefore, exempt from sales and use tax.

FINDINGS OF FACT

1. Applicant, Flah's of Syracuse, Inc., is a retailer of clothing and related accessories which operated from a number of retail locations, three of which are involved herein. One of said stores was located in Baldwinsville, New York; another in Utica, New York; and the third in DeWitt, New York.

2. On September 17, 1976, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against applicant. The tax asserted was \$28,519.91, plus penalty and interest of \$12,063.03, for a total of \$40,582.94.

3. At the hearing, the Audit Division conceded that an error had been made in the audit. The auditor had counted an invoice for work done in applicant's Utica store twice. The invoice was in the amount of \$41,420.00.

4. In each of said stores, applicant had similar work performed. The work consisted of the erection of perimeter walls, the installation of display units, soffits, fixtures, decor, and floor covering. Lastly, applicant placed movable trade fixtures in the stores.

5. The perimeter walls were erected to separate the retail sales areas from the non-sales areas, and to serve as a base for decorations and display units. Where the walls were straight, they consisted of sheetrock which was fastened to metal or wood studs. Where curved walls were needed, the perimeter wall was made from plywood units that were manufactured outside the store. Each plywood unit, when received at the store, was attached to the subfloor and to each other. The units could not be removed without substantial damage to them.

6. Once the perimeter wall was completed, retail display units were trucked in and installed. They were bolted to each other and to the wall. Once bolted together, holes were drilled and electrical wiring for lighting was installed. Then a "leatherette-type" wall covering was applied to both the walls and the retail display units to provide a uniform, integrated appearance. The retail display units could not be removed without causing material damage to said units and without destroying the wall covering.

7. Next, custom-fit soffits were installed to shield the glare of the lights illuminating the installed display units. Various metal display fixtures were also installed. These custom-made metal display fixtures were bolted to both the floor and the perimeter wall. Then, carpeting and the remaining decor (wood trim, mirrors, etc.) were installed (nailed, glued or otherwise permanently attached). None of these items could be removed without doing material harm to them, and since they were of a custom design, once removed they would be of little value.

8. Finally, applicant placed movable trade fixtures and furniture in the stores. These were display units which were readily movable without doing material damage to them or the building. They were neither attached nor affixed permanently into place. Some of the display units were brought to these three stores from storage or from facilities that applicant was closing; other display units were received from wholesalers who provided them free of charge when applicant ordered a specified minimum amount of merchandise; and still other display units were purchased by applicant. Applicant purchased \$10,700.00 of movable trade fixtures for the Baldwinsville store, \$15,780.00 of movable trade fixtures for the DeWitt store, and \$11,433.50 of movable trade fixtures and furniture for the Utica store.

9. The leases which applicant had entered into for these stores provided that title to improvements (as described in Findings of Fact "5", "6" and "7" above) was to immediately vest in the landlord, and that the improvements were to become a part of the premises and remain in the premises. The leases further provided that movable trade fixtures (discussed in Finding of Fact "8") remained the property of the lessee.

10. Applicant did not pay sales or use tax of \$189.22 on taxable recurring purchases or general expenses of \$2,879.74.

11. That applicant cooperated with the Audit Division despite its dire financial straights, which circumstances eventually resulted in applicant operating under Chapter Eleven of the Bankruptcy Act.

CONCLUSIONS OF LAW

A. That the additions to and modifications of applicant's stores (described in Findings of Fact "5", "6" and "7") were not capital improvements exempt from tax but rather were purchases of tangible personal property and services subject to tax under sections 1105(a) and (c) respectively of the Tax Law.

B. That applicant failed to sustain the burden of proof required to show that the improvements substantially added to the value of the real property or appreciable prolonged the useful life of the real property; or that the improvements were intended to become a permanent installation (20 NYCRR 527.7(a)(3)(i) and (iii)).

C. That the applicable rule of law is that:

"Unless a contrary intention is expressed, the law will presume that where installations are made for the purpose of conducting the business for which premises are leased, such installations are not permanent annexations to the freehold, but are made for the sole use and enjoyment of the tenant during the term of his lease, and not for the purpose of enhancing the value of the landlord's estate."
100 Park Avenue v. Boyland, 144 N.Y.S.2d 88, aff'd. 309 N.Y. 685.

D. That the movable trade fixtures and furniture (described in Finding of Fact "8") are tangible personal property subject to tax under section 1105(a) of the Tax Law.

E. That penalty and interest above the minimum statutory rate are hereby cancelled.

F. That the application of Flah's of Syracuse, Inc. is granted to the extent indicated in Finding of Fact "3" and Conclusion of Law "E" above; that the Audit Division is hereby directed to modify the Notice of Determination


and Demand for Payment of Sales and Use Taxes Due issued on September 17, 1976; and that, except as so granted, the application is in all other respects denied.

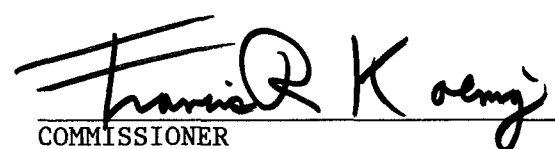
DATED: Albany, New York

NOV 28 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER