

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Raised Computer Floors, Inc. :  
for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Sales & Use Tax :  
under Article 28 & 29 of the Tax Law for the :  
Period 12/1/75-5/31/79. :  
\_\_\_\_\_ :

AFFIDAVIT OF MAILING

State of New York }

ss.:

County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 6th day of January, 1983, he served the within notice of Decision by certified mail upon Raised Computer Floors, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Raised Computer Floors, Inc.  
6 Sullivan St.  
Westwood, NJ 07675

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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  
6th day of January, 1984.

David Parchuck

James P. Haggard  
pursuant to Tax Law section 174

Authorized to administer oaths

STATE TAX COMMISSION

In the Matter of the Petition  
of  
Raised Computer Floors, Inc.

for Redetermination of a Deficiency or Revision  
of a Determination or Refund of Sales & Use Tax  
under Article 28 & 29 of the Tax Law for the  
Period 12/1/75-5/31/79.

AFFIDAVIT OF MAILING

State of New York }  
County of Albany } ss.:

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 6th day of January, 1983, he served the within notice of Decision by certified mail upon Gerard W. Cunningham, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Gerard W. Cunningham  
Cunningham & Lee  
40 Gold St.  
New York, NY 10038

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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  
6th day of January, 1984.

David Paruch

Carrie Robinson  
pursuant to Tax Law section 174

Authorized to administer oaths

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

January 6, 1984

Raised Computer Floors, Inc.  
6 Sullivan St.  
Westwood, NJ 07675

Gentlemen:

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

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1138 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law 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  
Law Bureau - Litigation Unit  
Building #9, State Campus  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Gerard W. Cunningham  
Cunningham & Lee  
40 Gold St.  
New York, NY 10038  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
RAISED COMPUTER FLOORS, 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 1, 1975	:	
through May 31, 1979.	:	

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Petitioner, Raised Computer Floors, Inc., 6 Sullivan Street, Westwood, New Jersey 07675, 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 1, 1975 through May 31, 1979 (File No. 30615).

A formal hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 20, 1983 at 9:15 A.M. Petitioner appeared by Gerald W. Cunningham, Esq. The Audit Division appeared by John P. Dugan, Esq. (Lawrence Newman, Esq., of counsel).

ISSUES

I. Whether the installation of raised or access flooring results in a capital improvement to real property or whether such flooring remains tangible personal property after its installation.

II. Whether the Audit Division properly used a "test period" as a basis for determining a portion of petitioner's tax liability.

III. Whether a capital improvement certificate issued by a customer relieved petitioner of its liability for failure to collect tax.

FINDINGS OF FACT

1. Petitioner, Raised Computer Floors, Inc., was a contractor primarily engaged in the installation of raised or access flooring. Petitioner also performed repair and demolition services to existing raised floors.

2. On April 18, 1980, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner covering the period December 1, 1975 through May 31, 1979 for taxes due of \$32,439.42, plus interest of \$6,241.64 for a total of \$38,681.06.

3. Petitioner executed consents extending the period of limitation for assessment of sales and use taxes for the period at issue to June 20, 1980.

4. Raised flooring is typically installed as follows: adjustable steel pedestals are glued to the existing floor, sub-floor or structural concrete with industrial adhesive (pedestals are sometimes-bolted). Removable 24" x 24" panels rest directly on the pedestal or are placed in a rigid grid assembly attached to the pedestal.

The purpose of a raised floor is to provide an under-floor cavity to accommodate electrical conduit, air delivery ducts, mechanical service lines and air plenum. These floors are commonly installed in computer facilities. However, they are also found in banks, telephone and communication centers, hospitals and laboratories.

5. Petitioner treated the above installations as capital improvements to real property and paid use tax on the materials used in the performance of such installations.

On audit, the Audit Division took the position that raised flooring was personal property and the sale and installation thereof was subject to tax.

It therefore disallowed the nontaxable capital improvement sales reported by petitioner and determined additional taxable sales of \$573,385.89. Since all sales were deemed taxable, petitioner was given credit for material purchases of \$147,671.00 on which use tax was paid. Sales tax of \$32,439.42 was assessed on the balance of \$425,714.89.

6. The additional taxable sales determined on audit consisted of:

(a) disallowed capital improvements (12/1/75 through 11/31/77)	\$ 55,833.05
(b) repair sales (no tax collected)	2,077.96
(c) disallowed capital improvements (12/1/77 through 5/31/79 48.55%)	198,315.00
(d) sales to Donn Access Floors, Inc.	317,159.88
	<u>\$573,385.89</u>
<u>Less:</u> purchases subject to use tax	<u>147,671.00</u>
	<u>\$425,714.89</u>

The disallowed capital improvements in (c) above were estimated based on the Audit Division's test of sales invoices for the period September 1, 1978 through November 30, 1978. The actual capital improvements disallowed for the test period were \$57,931.00. Use tax was paid on purchases of \$38,715.00 leaving net additional taxable sales of \$19,216.00.

Petitioner conceded that tax was due on the repair sales in (b).

7. Donn Access Floors, Inc. was a manufacturer of raised flooring systems located in Forest Hill, Maryland. Arnott-Bennis, Inc., was a general contractor hired by Citibank to complete certain work at 111 Wall Street, New York, N.Y. Arnott-Bennis, Inc. subcontracted with Donn to supply the flooring materials. Donn subcontracted with petitioner to perform the installation of the flooring.

The sales referred to in Finding of Fact "6(d)" are the installation charges for the raised flooring at the Citibank building.

Citibank issued capital improvement certificates to Arnott-Bennis, Inc. for the work at 111 Wall Street. Petitioner was provided with copies of said certificates.

8. The Audit Division conceded that the taxable installation charges to Donn erroneously included a voided invoice for \$12,024.17 and charges of \$29,389.00 for work performed outside New York State.

9. The average cost to install raised flooring was \$10.00 per square foot.

10. Demolition or removal of raised flooring commonly occurred when a tenant relocated.

The removal of the pedestals damaged the sub-floor to the extent that the holes that were left would have to be patched before a different floor covering could be installed. The pedestals that were removed were sold as scrap rather than reused because the cost of a new pedestal was approximately \$2.00.

11. Petitioner maintained sufficient books and records from which the exact amount of installations performed for the period December 1, 1977 through May 31, 1979 could have been determined.

#### CONCLUSIONS OF LAW

A. That receipts from the sale of services performed in making capital improvements are excluded from the imposition of sales tax under section 1105(c)(3) of the Tax Law; receipts from the sale of tangible personal property used in making capital improvements are exempt from tax under section 1115(a)(17) of the Tax Law (Saf-Tee Plumbing Corp. v. Tully, 77 A.D.2d 1).

B. That section 1101(b)(9) of the Tax Law and 20 NYCRR 527.7(a)(3) define capital improvements as:

"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."

The foregoing criteria has been used by the courts in determining the taxability of installations similar to those at issue herein (see Matter of Consolidated Edison Co. of N.Y. v. City of N.Y., 44 NY2d 536; Matter of Wood Enterprises v. State Tax Commission, 67 A.D.2d 1042; Matter of Flah's of Syracuse v. Tully, 89 A.D.2d 729).

C. That raised flooring installed in the manner described in Finding of Fact "4" neither becomes part of the reality nor is permanently affixed to the real property; raised flooring is not designed to be a permanent installation as evidenced by its moveable nature, method of affixation and the fact that it can easily be removed and installed elsewhere without causing substantial damage. Accordingly, such installations do not constitute capital improvements within the meaning and intent of sections 1101(b)(9) and 1105(c)(3) of the Tax Law.

D. That the raised flooring installed by petitioner retained its identity as tangible personal property after its installation and therefore receipts from the sale and installation are subject to the tax imposed pursuant to sections 1105(a) and (c) of the Tax Law.

E. That since the Audit Division could have determined petitioner's actual liability on the installation of raised flooring for the period December 1, 1977 through May 31, 1979, its use of a "test period" was unauthorized (Matter of



Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44). Accordingly, the additional taxable sales determined for the period December 1, 1977 through May 31, 1979 of \$198,315.00 (Finding of Fact "6(c)") shall be reduced to \$57,931.00, the actual amount found for the test period.


F. That petitioner was furnished with and accepted in good faith certificates of capital improvement issued by Citibank and therefore, is relieved of any tax liability with respect to the installations set forth in Finding of Fact "6(d)" (Saf-Tee Plumbing Corp. v. Tully, 77 A.D.2d 1).

G. That the petition of Raised Computer Floors, Inc. is granted to the extent indicated in Conclusion of Law "E" and "F"; that the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued April 18, 1980; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

JAN 06 1984

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

P 470 315 044  
**RECEIPT FOR CERTIFIED MAIL**

NO INSURANCE COVERAGE PROVIDED—  
 NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Gerard W. Cunningham</i>	
Street and No. <i>410 Gold St</i>	
P.O., State and ZIP Code <i>NY NY 10038</i>	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return Receipt Showing to whom, Date, and Address of Delivery	
<b>TOTAL Postage and Fees</b>	<b>\$</b>
Postmark or Date	

PS Form 3800, Feb. 1982

P 470 315 043  
**RECEIPT FOR CERTIFIED MAIL**

NO INSURANCE COVERAGE PROVIDED—  
 NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Russian Computer Store Inc</i>	
Street and No. <i>6 Sullivan St</i>	
P.O., State and ZIP Code <i>Westwood NY 07675</i>	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return Receipt Showing to whom, Date, and Address of Delivery	
<b>TOTAL Postage and Fees</b>	<b>\$</b>
Postmark or Date	

PS Form 3800, Feb. 1982