STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of Gulf Oil Corp.	:
	AFFIDAVIT OF MAILING
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 6/1/74-5/31/77 & 9/1/77-8/31/80.	:

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 7th day of November, 1985, he served the within notice of Decision by certified mail upon Gulf Oil Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Gulf Oil Corp.
ATTN: David J. Wilkinson
P.O. Box 2227, Tax Dept.
Houston, TX 77252

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
7th day of November, 1985.

David Parchuck

Authorized to administer oaths
pursuant to Tax Law section 174

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

November 7, 1985

Gulf Oil Corp.
ATTN: David J. Wilkinson
P.O. Box 2227, Tax Dept.
Houston, TX 77252

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: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions of GULF OIL CORPORATION for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Periods June 1, 1974 through May 31, 1977 and September 1, 1977 through August 31, 1980.	DECISION

Petitioner, Gulf Oil Corporation, Attn: David J. Wilkinson, Tax Department, P.O. Box 2227, Houston, Texas 77252, filed petitions for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods June 1, 1974 through May 31, 1977 and September 1, 1977 through August 31, 1980 (File Nos. 25523 and 39665).

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 October 29, 1984 at 10:45 A.M., with all briefs to be filed by February 28, 1985. Petitioner appeared by David J. Wilkinson, Senior Tax Analyst. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUES

I. Whether use tax is due on the installation of kiosks and canopies at petitioner's gasoline stations.

II. Whether the Audit Division properly used test period and projection audit techniques in determining use tax due on recurring purchases.

III. Whether penalty and interest in excess of statutory minimum amounts should be reduced or abated.

FINDINGS OF FACT

1. On September 11, 1978, the Audit Division issued to petitioner, Gulf Oil Corporation ("Gulf"), a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period June 1, 1974 through May 31, 1977 in the amount of $89,420.46, plus penalty and interest. Gulf had previously executed a validated consent allowing assessment for the noted period to be made on or before September 20, 1978.

2. Prior to the hearing, the parties resolved a number of the items at issue in the above-noted assessment, thereby reducing the amount at issue (exclusive of penalty and interest) to $28,351.06, the breakdown of which is hereinafter more fully described.

3. On August 11, 1982, the Audit Division issued to Gulf a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period September 1, 1977 through August 31, 1980 in the amount of $37,058.69, plus interest, with no penalties being asserted. Gulf had previously executed a validated consent allowing assessment for the noted period to be made on or before August 20, 1982.

4. Prior to the hearing, the parties resolved certain of the items at issue in the above-noted assessment, thereby reducing the amount at issue (exclusive of interest) to $16,181.59, as hereinafter more specifically detailed.

5. Gulf is engaged in the production, distribution and sale of petroleum products. The items remaining at issue herein consist of the following two categories:

> a) use tax in the amount of $11,741.92 assessed on recurring expenses for the period 6/1/74 through 5/31/77. A detailed audit of invoices for two months, June 1975 and January 1977, revealed taxable purchases in the amount of $10,801.00 upon which tax was not paid which, when compared to gross sales for such sample months ($64,052,669.00)

yielded an error rate of .0169 percent. This error rate was then applied to reported gross sales for the entire audit period ($1,051,652,422.00) to arrive at audited additional taxable purchases of $177,641.00 and tax due in the amount of $11,741.92.

b) Use tax due on kiosks (booths) and overhead canopies installed at certain of Gulf's gasoline stations located in New York State, in the respective amounts of $13,233.41 for the period 6/1/74 through 5/31/77[1] and $16,181.89 for the period 9/1/77 through 8/31/80.

6. The kiosks or booths are prefabricated buildings with floors, walls, roofs, windows, doors, plumbing, lighting and heating which are cemented into place on cement foundations at the various station locations. They are constructed of brick, cement and steel, are approximately 8 feet by 18 feet in size and serve as the cashier/attendant's booth at each location. The canopies consist of steel roof decking which is bolted (as opposed to welded) together and bolted to upright steel columns which are embedded in concrete in the ground. Although lacking in further specificity, it is Gulf's assertion that the kiosks and canopies would be substantially damaged and rendered unusable if removed.

7. Gulf owns some of the station locations at which the canopies and kiosks at issue were installed, and leases the balance of such locations. All of the leased locations involve long-term leases, each of which has a renewal or extension option. Distinction between leased locations and owned (deeded) locations is set forth by the following chart:

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1 The amount due for the period 6/1/74 through 5/31/77 was initially stated to be $16,609.14. However, at the commencement of the hearing, Gulf produced evidence that two invoices, in the amounts of $1,020.88 and $2,355.85, respectively, represented double billings. The Audit Division conceded this point and accordingly reduced the amount at issue from $16,609.14 to $13,233.41.

Exhibit Number	Station Location	Lease/Ownership
4-A	New Hartford, N.Y.	information not provided
4-B	Syracuse, N.Y.	ownership
4-C	5501 Broadway, N.Y.C.	lease
4-D	E. 23rd St., N.Y.C.	lease
4-E	Cicero, N.Y.	ownership
4-F	Delmar, N.Y.	*ownership (Tremarco)
4-G	Valley Stream, N.Y.	lease
4-H	North Massapequa, N.Y.	lease
4-I	Schenectady, N.Y.	ownership
4-J	Tonawanda, N.Y.	information not provided
5-A	Southhampton, N.Y.	lease
5-B	1260 Hicksville Rd., Massapequa, N.Y.	lease
5-C	900 Broadway, Massapequa, N.Y.	lease
5-D	North Massapequa, N.Y.	lease
5-E	Monroe, N.Y.	ownership
5-F	Great Neck, N.Y.	ownership
5-G	Hamburg, N.Y.	information not provided
5-H	Ithaca, N.Y.	ownership
5-I	Southport, N.Y.	*ownership (Tremarco)
5-J	Middleton, N.Y.	ownership (Tremarco)
5-K	Maspeth, N.Y.	*ownership
5-L	Staten Island, N.Y.	lease
5-M	Plainview, N.Y.	ownership
5-N	Tuxedo Park, N.Y.	ownership
5-O	Bronx, N.Y.	ownership

* These locations are owned by Gulf as the result of the August 20, 1973 merger of Gulf and Tremarco Corporation.

8. Gulf has never removed a canopy or a kiosk from any of its station locations, either during the tenure of a lease or at the expiration of a lease.

9. The canopies and kiosks are included in calculating the real property tax assessments by the various localities where the stations are situated.

10. It is undisputed that Gulf maintained complete and accurate books and records, and that such books and records were made available for audit. There is no assertion made nor any evidence that Gulf consented to a test period and projection therefrom to determine tax due on recurring expenses. No evidence was presented by Gulf to refute the amount of taxable purchases on which tax was not paid as determined by the two month detailed audit of such purchases ($10,801.00; see Finding of Fact "5-a").

11. Gulf asserts that the canopies and kiosks are capital improvements and that tax was improperly assessed thereon. Gulf also maintains the projection of tax due on recurring expenses was improper. Finally, Gulf notes that penalty was imposed only for the earlier of the two periods at issue (6/1/74 through 5/31/77) and, based on its past exemplary filing and payment record and the nature of the items at issue, seeks abatement of the penalty imposed for such period and reduction of interest to the statutory minimum amount.

CONCLUSIONS OF LAW

A. That inasmuch as Gulf maintained and made available for audit complete and adequate books and records, the Audit Division's resort to test period and projection audit techniques without Gulf's consent was unwarranted [Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44 (1978)]. Therefore, tax assessed as due on recurring expenses for the period 6/1/74 through 5/31/77 is reduced to the amount of tax found due but unpaid on such expenses for the sample months of June 1975 and January 1977 (see Findings of Fact "5-a" and "10").

B. 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).

C. 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).

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 given the nature of the kiosks and canopies and the manner in which they are affixed to the real property the issue presented turns upon whether such items were installed with the intention that they were to be permanent affixations to the realty.

F. That in those instances where Gulf owns the real property on which its stations are situated (see Finding of Fact "7"), the kiosks and canopies are clearly intended to be permanent additions to such real property and thus meet the criteria of capital improvements under Tax Law section 1101(b)(9).

With respect to the leased stations, the terms of the leases provide, in general, that the buildings and improvements are to remain with the lessor at lease expiration, but that "trade fixtures" may be removed by Gulf. The terms of the leases give no indication of whether canopies and kiosks constitute

trade fixtures removeable by Gulf, or rather constitute items the ownership of which has been ceded to the leasors as permanent additions to their properties. Under the facts presented, it has not been shown that canopies and kiosks installed at Gulf's leased station locations meet the third enumerated criterion of Tax Law section 1101(b)(9). Accordingly, canopies and kiosks installed at such locations do not qualify as capital improvements (see Matter of Merit Oil of New York, State Tax Comm., July 10, 1985).

G. That the penalty asserted for the period June 1, 1974 through May 31, 1977 is cancelled, and interest for such period is reduced to the minimum statutory amount.

H. That the petition of Gulf Oil Corporation for the period June 1, 1974 through May 31, 1977 is granted to the extent indicated in Conclusions of Law "A", "F", and "G" and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated September 11, 1978, as reduced and recomputed in accordance herewith is sustained. The petition of Gulf Oil Corporation for the period September 1 1977 through August 31, 1980 is granted to the extent indicated in Conclusion of Law "F" and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated August 11, 1982, as reduced and recomputed in accordance herewith, is sustained.

DATED: Albany, New York
NOV 07 1985

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER

P 153 387 653

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to Gulf Air Corp	
Street and No. Att. David J. Dickerson	
P.O., State and ZIP Code P O Box 2227 Tax Dept. Houston TX 77252	
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	
TOTAL Postage and Fees	$
Postmark or Date	

PS Form 3800, Feb. 1982

★ U.S.G.P.O. 1984-446-014