

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**NW SIGN INDUSTRIES, INC.** : DETERMINATION  
 : DTA NO. 825245  
 :  
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, 2006 through February 28, 2010. :  
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Petitioner, NW Sign Industries, Inc., 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 June 1, 2006 through February 28, 2010.

A hearing was held before Donna M. Gardiner, Administrative Law Judge, in New York, New York, on March 4, 2014 at 11:00 A.M., with all briefs to be submitted by July 21, 2014, which date began the six-month period for the issuance of this determination. Petitioner appeared by Cordua, Pastore & Associates, LLC (Vincent M. Pastore, CPA). The Division of Taxation appeared by Amanda Hiller, Esq. (Michael J. Hall).

***ISSUE***

Whether certain work performed by petitioner constituted capital improvements such that the transactions are excluded from sales tax pursuant to Tax Law § 1105(c)(3).

***FINDINGS OF FACT***

1. Petitioner, NW Sign Industries, Inc., a Delaware corporation, operated a sign manufacturing and installation business located in Moorestown, New Jersey. Petitioner performed work within New York State.

2. On or about April 28, 2009, the Division of Taxation (Division) commenced an audit of petitioner. On June 11, 2009, the Division's auditor mailed an appointment letter to petitioner requesting copies of its books and records.

3. In response to the appointment letter, petitioner's then representative met with the Division and provided sales tax returns, Excel spreadsheets used in preparing the returns and also information on a CD regarding sales invoices, assets, general ledger, corporation tax returns, cash receipts journals, corporate book, general journals, purchases information and resale certificates. The auditor was unable to reconcile the information contained on the spreadsheet with the sales tax returns.

4. The Division's review on audit covered sales, assets and recurring expenses. The Division concluded that no additional tax was due on capital assets or on expense purchases.

5. The auditor stated that although the records produced were adequate to perform her audit, she was missing certain information such as invoices, contracts, quotes and exemption certificates. The auditor assessed additional sales tax due on claimed capital improvement jobs that were missing properly completed exemption certificates. The auditor testified that the exemption certificates at issue were not valid because the forms were missing an identification number, were untimely filed and that the forms did not adequately describe the work being done by petitioner that would qualify the sales as nontaxable, capital improvements.

6. On November 22, 2010, a Notice of Determination, Notice L-035030280, was issued to petitioner for additional sales tax due in the amount of \$292,219.78 plus interest. No penalty was assessed. This tax due amount consisted of \$288,995.11 in additional sales tax on unsubstantiated nontaxable sales and \$3,224.67, which appeared to be collected as tax by

petitioner, yet not remitted to the state. Petitioner was then credited for use tax previously paid on purchases in the amount of \$17,149.03.

7. Petitioner timely filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS). On June 29, 2012, a conciliation order was issued that reduced the amount of sales tax due to \$120,233.19<sup>1</sup> and that is the amount at issue herein.

8. The certificates of capital improvement, forms ST-124, that are at issue in this case are from petitioner's customer, Commerce Bank. These forms ST-124 are in evidence. These forms do not contain a certificate of authority number for Commerce Bank.

9. Petitioner did not offer any testimony at the hearing.

#### ***CONCLUSIONS OF LAW***

A. This case devolves to whether the forms ST-124 are sufficient enough to demonstrate that the sales made by petitioner to its customer were in the nature of capital improvements. Tax Law § 1105(c)(3) provides for a tax on receipts from every sale, except for resale, for the installation of tangible personal property, with the following exception:

“(iii) for installing property which, when installed, will constitute an addition or capital improvement to real property, property or land, as the terms real property, property or land are defined in the real property tax law as such term capital improvement is defined in paragraph nine of subdivision (b) of section eleven hundred one of this chapter.”

Tax Law § 1101(b)(9)(i) defines capital improvement as an addition or alteration to real property which:

“(A) Substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property; and

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<sup>1</sup> This reduction was based upon an adjustment that was made due to an overlapping audit period with one of petitioner's customers.

(B) 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

(C) Is intended to become a permanent installation.”

The regulations adopted by the Division to define capital improvement mirror the statutory language (*see* 20 NYCRR 527.7[a][3]).

B. Exhibit 1 contains all of the forms ST-124 that have been rejected by the Division. As noted in the findings of fact, these forms are all lacking the certificate of authority identification number. Moreover, there is a question regarding the timely receipt of these forms. The auditor testified that she did not see the forms until after the audit period.

The failure to timely provide a certificate of capital improvement is not determinative of capital improvement status (*see Matter of L & L Painting Co.*, Tax Appeals Tribunal, June 2, 2011). What must be determined is whether the work performed by petitioner qualified as a capital improvement under the three-prong test set forth in Tax Law § 1101(b)(9)(I). Petitioner has failed to show that the work qualified as capital improvements.

As noted by the auditor, the forms ST-124 merely state that the work performed was “FABRICATION & INSTALLATION OF SIGNAGE.” Attached to the forms are separate invoices. However, the invoices add little information as to whether the work qualified as capital improvements. Some invoices state fabrication, installation, travel time and permits while other invoices provide even less information. The auditor requested contracts, which were not provided. In the absence of any detailed description regarding the work performed, the Division properly rejected the forms ST-124 since, on their face, they fail to demonstrate that the work performed by petitioner was nontaxable capital improvements.

C. The petition of NW Sign Industries, Inc., is denied and the Notice of Determination dated November 22, 2010, as modified by the conciliation order, is sustained.

DATED: Albany, New York  
January 15, 2015

/s/ Donna M. Gardiner  
ADMINISTRATIVE LAW JUDGE