New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-84(11)S
Sales Tax
March 23, 1984

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION PETITION NO. S820429A

On April 29, 1982 a Petition for Advisory Opinion was received from Bayshore Catering Corp., 25 Shames Drive, Westbury, New York 11590.

The issues raised are:

1. Whether purchases of floral centerpieces by a caterer for its customers are subject to sales tax.

2. Whether certain leasehold improvements made by Petitioner, a tenant, are exempt from sales tax as capital improvements.

Issue #1

In some instances where Petitioner contracts with a customer to cater an affair, Petitioner will purchase floral centerpieces for use in decorating the hall. Petitioner states that when it provides the standard floral centerpieces, the centerpieces become the property of the customer, are not for Petitioner's re-use at another affair and that the centerpieces are taken by the customer or his guests at the end of the affair. When billing the customer, Petitioner shows the charge for the centerpieces as an itemized charge in the same manner as other items listed. Petitioner collects sales tax from the customer on its various charges.

Section 1105(a) of the Tax Law imposes a tax on the receipts from retail sales of tangible personal property. The term "retail sale" is defined, in section 1101(b)(4) of the Tax Law, as: "(i) A sale of tangible personal property to any person for any purpose, other than (A) for resale as such . . . or, (B) for use by that person in performing the services subject to tax under paragraphs (1), (2), (3) and (5) of subdivision (c) of section eleven hundred five "(Emphasis added.)

Section 1105(d) of the Tax Law imposes a tax upon: "The receipts from every sale of food and drink of any nature, when sold . . . by caterers, including in the amount of such receipts any cover, minimum, entertainment or other charge made to . . . customers" (Emphasis added.) This is the tax applicable to Petitioner's receipts from its customers.

When Petitioner caters an affair the standard floral centerpieces supplied by Petitioner are given their first use as part of Petitioner's catering service. The fact that Petitioner does not re-use the centerpieces, and that the customer or guests take the flowers at the end of the affair, does not create a resale to the customer prior to use by Petitioner. A purchase which is not "for any purpose . . . other than . . . resale" is one made solely for resale, and not for use by the first purchaser prior to transfer to a subsequent party. Matter of Jacks v. Joseph, 282 A.D. 622. Such test is not met

herein. Accordingly, Petitioner's purchases of the standard floral centerpieces are subject to state and local sales tax.

It is to be noted that Section 526.5(e) of the Sales and Use Tax Regulations provides, in part, that: "All expenses incurred by a vendor in making a sale, regardless of their taxable status and regardless of whether they are billed to a customer are not deductible from the receipts." Accordingly, Petitioner must collect sales tax on its charges to its customers for the standard floral centerpieces irrespective of the fact that the cost of the centerpieces is a taxable purchase to Petitioner.

Issue #2

Petitioner leases an entire building for use as a catering establishment. The first floor of the building consists primarily of an entranceway, cocktail and smorgasbord room, main ballroom and kitchen, while the basement level contains a bride's dressing room, chapel and storage area. Petitioner has installed disco lights in the main ballroom. Such installation required the installation of new wiring which runs inside the ceiling and walls. In addition, in order to permit the installation of the disco lights it was necessary to replace the existing ceiling with a new one. The new ceiling consists of ceiling tiles nailed to wooden ceiling beams. In addition to the foregoing, Petitioner installed a new marble floor in the chapel, cemented with concrete to the existing concrete basement foundation and grouted with cement. Petitioner inquires as to whether the installations here described constitute capital improvements.

Section 1101(b)(9) of the Tax Law defines the term "capital improvement" 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."

As to the marble floor and new ceiling, these installations clearly satisfy the first criterion set forth in the statutory provision, in that they substantially add to the value of the real property. In addition, they satisfy the second criterion, in that they are permanently affixed to the real property so that removal would cause material damage to the real property or the installation itself. Thus, Petitioner has indicated that removal of the floor would leave the marble in broken or chipped condition, unfit for future use. Similarly, removal of the ceiling would obviously cause material damage to the real property in that it would leave it bereft of one of its vital architectural features.

The remaining issue is whether each of the two installations is "intended to become a permanent installation." Were Petitioner the owner of the premises, a finding of intended permanence would flow from the confluence of three factors: the mode of annexation, the relationship to the real property of the party making the addition and the apparent purpose for which the annexation is made. Beaman Corporation, State Tax Commission Advisory Opinion, TSB-A-82(32)S. In the present instance, however, the relationship of Petitioner to the building is that of lessee, which tends to suggest an intended impermanence. As it has been stated,

> Unless a contrary intention is expressed, the Law will presume that where installations are made for the purpose of conducting the business for which the 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 (Matter of 100 Park Ave. v. Boyland, 144 N.Y.S. 2d 88, 93, aff'd 309 N.Y. 685)

Such an expression of a "contrary intention" may find embodiment in a lease provision. Thus, in Flah's of Syracuse, 89 AD 2d 729 (1982), wherein a tenant's installation of certain trade fixtures was held to constitute a capital improvement, the presumption of impermanence was negatived by the existence of explicit provisions included in the applicable leases to the effect that "title to improvements . . . was to immediately vest in the landlord, and that the improvements were to become a part of the premises and remain in the premises." In the present case there is extant just such a lease provision, establishing the requisite intent, which provides as follows:

> ELEVENTH.--All improvements made by the Tenant to or upon the demised premises, except said trade fixtures, shall when made, at once be deemed to be attached to the freehold, and become the property of the Landlord, and at the end or other expiration of the term, shall be surrendered to the Landlord in as good order and condition as they were when installed, reasonable wear and damages by the elements excepted.

It follows that the two installations in question do constitute capital improvements, within the meaning and intent of section 1101(b)(9) of the Tax Law.

A different conclusion is reached, however, with respect to the disco lights. These are trade fixtures, and as such are excluded from the terms of Convenant Eleventh of the lease. Excelsior Brewing Co. v. Smith, 125 A.D. 668, aff'd 198 N.Y. 519; Webber v. Franklin Brewing Co., 123 A.D. 465, aff'd 198 NY 509.If this were not enough, a rider to the lease contains a provision entitled "Addendum to Article Eleventh," which provides as follows:

> Trade fixtures, ¢ (sic) equipment and any other detachable fixtures placed in or upon or attached to any part of the demised premises by the tenant shall be at all times the property of the tenant. Such trade or other fixtures or equipment of the tenant, if detachable from the realty by removal of screws, bolts, nails or the severing of any wires or other means by which said trade or other fixtures have been affixed to the walls, floors or ceiling may be removed or taken away by the tenant at the expiration or other termination of the demised term, providing such termination is in accordance with provisions of the lease herein. Tenant shall at his own cost and expense, however, repair all damage to the demised premises caused

> by the installation or removal of its trade or other fixtures in default of which such repairs may be made by Landlord at tenant's expense. Tenant shall, at the expiration or termination of the lease, at tenant's sole cost and expense, remove all its machinery and equipment, and in the event of tenant's failure to do so, the Landlord shall be reimbursed for cost of such removal.

It thus appears clear from the provision of the lease itself that the disco lights were not installed with the statutorily requisite intention of permanence and, accordingly, do not constitute capital improvement within the meaning of section 1101(b)(9) of the Tax Law.

DATED: March 6, 1984

s/FRANK J. PUCCIA
Director
Technical Services Bureau