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

TSB-A-82(32)S
Sales Tax
September 6, 1982

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION PETITION NO. S810721A

On July 21, 1981, a Petition for Advisory Opinion was received from Beaman Corporation, 800 West Smith St., P. O. Box 21687, Greensboro, North Carolina 27420.

The issue raised is whether certain canopies and kiosks installed by Petitioner constitute capital improvements for purposes of the sales tax imposed under Article 28 of the Tax Law.

Petitioner is a contractor primarily engaged in constructing service stations for oil companies. Canopies and kiosks are two of the structures included in these service stations. Canopies are roof-like structures overhanging the service areas of the stations. They are up to thirty feet wide and ninety feet long. Kiosks serve as the offices for service station cashiers, rest rooms and storage facilities. Both types of structures are sunk in concrete footings. To remove these structures, jackhammers must be used to break up the concrete in which the structures are imbedded.

The term "capital improvement" is defined in section 1101(b)(9) of the Tax Law as follows:

> (9) 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 was enacted by Chapter 471 of the Laws of 1981, effective July 7, 1981. However, such provision represents a legislative enactment of the substance of the Tax Commission's previously promulgated regulation on the subject, located at 20 NYCRR 527.7(a)(3).

In the present instance, the structures in question substantially add to the value of the real property to which they are affixed, thus satisfying the first of the three enumerated criteria.

In those cases where improvements of the type here under discussion are made by the owner of the underlying real property, it is clear that the second statutory requirement is also satisfied, in that the kiosk or canopy in question "becomes part of the real property." This conclusion derives from an application of the common law's tripartite test for determining when personalty has been so connected with real property as to come to partake of the nature of the latter. This test was early set forth in Potter v. Cromwell, 40 N.Y. 287, as follows:

> ". . .the true criterion of a fixture is the united application of three requisites: First. Actual annexation to the realty, or something appurtenant thereto. Second. Application to the use or purpose to which that part of the realty with which it is connected is appropriated. Third. The intention of the party making the annexation, to make a permanent accession to the freehold." Id., at 297.

It is clear in the instant matter that the kiosks and canopies are actually annexed to the underlying real property, that they are dedicated to the use to which such real property is being put (viz., use as a service station) and a finding of intended permanence arises from 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. Finally, implicit in this finding to the effect that the annexed kiosks and canopies constitute fixtures, and thus part of the real property, is the finding that they are intended to constitute permanent installations, thus satisfying the third criterion set forth in Tax Law, § 1101(b)(9).

As indicated above, where an owner of real property makes an improvement to such real property of the type here described, such installation is presumably a permanent one. However, where the installation is made by a tenant, a different presumption arises. This difference is well described in a leading case in the law of fixtures, Tifft et al v. Horton et al, 53 NY 377:

> The law makes a presumption in the case of any one making such annexation, and it is different as the interest of the person in the land is different, that is, whether it is temporary or permanent. The law presumes that because the interest of a tenant in the land is temporary, that he affixes for himself, with a view to his own enjoyment during his term, and not to enhance the value of the estate; hence, it permits annexations made by him to be detached during his term, if done without injury to the freehold, and in agreement with known usages. The law presumes that because the interest of the vendor of real estate, who is the owner of it, has been permanent, that he has made annexations, for himself to be sure, but with a view to a lasting enjoyment of his estate, and for its continued enhancement in value. Id., at 382.

The presumptive removability of tenant-installed fixtures is particularly strong with regard to trade fixtures. See in this regard Matter of City of New York, 192 N.Y. 295; 100 Park Avenue v. Boyland, 144 NYS 2d 88, aff'd 309 NY 685. Trade fixtures may be defined as articles of personal property which a tenant places upon or annexes to leased property for the purpose of carrying on his trade or

business. 23 NY Jur., Fixtures § 29. These are generally considered not to become part of the realty, because not intended as a permanent installation, and removable by the tenant, where such removal would not cause substantial injury to the real property to which they are attached. People v. Boyland, supra, at 93; Antonowsky v. State of New York, 14 Misc. 2d 689. Accordingly, the installation of such removable trade fixtures would not constitute the rendering of a capital improvement because of the failure in such cases to satisfy the requirement of intended permanence.

The structures here under consideration, where installed by a tenant of real property, will generally constitute trade fixtures of the type just described. This finding is supported by a consideration of a number of judicial decisions relating to trade fixtures. In Marnall Steel Products, Inc. v. Bernard, 147 Misc. 314, aff'd 241 AD 616, the court held to be a removable trade fixture a greasing pit installed at a service station. This greasing pit consisted of a metal container placed in an excavation some 16' x 20' x 5' at the bottom of which was an additional excavation containing a metal tank resting on concrete blocks laid upon the ground. In Crater's Wharf v. Valvoline Oil Co., 204 App. Div. 840, the court reached a similar conclusion with respect to the following structures, among others' a building used as a garage and shed, with stone foundation and concrete floor; a shed built upon a stone foundation containing a concrete structure enclosing a gasoline tank; and a gasoline storage pit and kerosene storage pit, containing tanks enclosed in stone walls. As the court put it, "The premises in question, at the time of the letting, consisted of a rough, unoccupied lot, with no building thereon, except a bulkhead. The buildings and structures removed were all erected for the purposes of the defendant's business, and not for the benefit of the landlord. The removal left the premises in substantially the same condition as at the time of the original letting and the presumptions are in favor of the tenant." Finally, in Bernheimer v. Adams, 70 App. Div. 114, aff'd 175 NY 472, the court held to be removable as a trade fixture an awning made of corrugated iron five or six feet in width and extending some seventy-five feet along the side of a brick building, connected in such a manner that removal would cause some small damage to certain bricks in the wall, and possibly requiring the replacement of these bricks. Cf., Matter of Mr. & Mrs. Joseph B. Jarentowitz, State Tax Commission, June 18, 1982, TSB-H-82(49)S.

Presumptions, of course, may be entirely done away with by the facts. Tifft, supra, at 383. Thus, in Flah's of Syracuse, ____ AD 2d ____(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." See Matter of Flah's of Syracuse, Inc., State Tax Commission, November 28, 1980, TSB-H-81(9)S. Cf., Office Alarm v. Tax Comm., 58 AD 2d 162.

Accordingly, where Petitioner installs the kiosks and canopies in question for the owner of the real property upon which they are placed, the installation presumably constitutes a capital improvement. Where Petitioner makes such an installation for a tenant of real property, the installation would presumably not constitute a capital improvement. Where Petitioner performs a

capital improvement it must pay sales tax on its purchase of materials, but is not required to collect tax on its charge to its customer. Tax Law, §§ 1101(b)(4), 1105(c)(3)(iii), 1105(c)(5); 20 NYCRR 527.7(a)(3). Where the Petitioner's installation of tangible personal property does not constitute the performance of a capital improvement, Petitioner's charges to its customers, both for any tangible personal property sold and for the service of installation, are subject to tax. Tax Law, §§ 1105(a), 1105(c)(3). In such instance Petitioner need not pay tax on the tangible personal property purchased by it for resale to its customer, upon presentation to its vendor of a properly completed Contractor Exempt Purchase Certificate (Form ST-120.1). Finally, it is to be noted that in order for Petitioner to be relieved of its obligation to collect sales tax where its customer asserts that the installation in question constitutes a capital improvement, Petitioner must take from its customer a properly completed Certificate of Capital Improvement (Form ST-124). Tax Law, § 1132(c); 20 NYCRR 532.4(f).

DATED: August 19, 1982

s/LOUIS ETLINGER
Deputy Director
Technical Services Bureau