STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition of **GEM STORES, INC.** 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 September 1, 1982 through May 31, 1984.	DECISION DTA NO. 802661

Petitioner, Gem Stores, Inc., 1916 McDonald Avenue, Brooklyn, New York 11223, filed an exception to the determination of the Administrative Law Judge issued on December 3, 1987 with respect to its 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 September 1, 1982 through May 31, 1984 (File No. 802661). Petitioner appeared by Charles H. Meisels, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (Michael J. Glannon, Esq., of counsel).

The petitioner did not file a brief on exception. The Division of Taxation filed a brief in opposition to the exception. Oral argument was heard at the request of the petitioner on April 14, 1988.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether fees paid by petitioner for the rental, purchase and installation of electronic surveillance equipment used in theft prevention constituted a capital improvement to real property, thereby exempting said fees from the imposition of sales tax.

II. Whether petitioner's purchase of sensitized stickers used to deter and detect shoplifters when used in conjunction with electronic surveillance equipment was a purchase for resale thereby exempting their cost from sales tax.

III. Whether the interest and penalty charges levied against ***petitioner should be reduced or abated.***

FINDINGS OF FACT

We find the facts as stated in the determination of the Administrative Law Judge and such facts are incorporated herein by reference. To summarize these facts, petitioner sells general household, health, candy and tobacco merchandise from seven leased locations throughout the New York City metropolitan area. To deter and detect shoplifting in each of its stores, petitioner purchased three units of electronic surveillance equipment and leased four others. This equipment is installed into the store's floor and connects to the realty's electrical system. Sensitized stickers are affixed to store merchandise and trigger the electronic equipment to sound an alarm when merchandise is removed from the store without the salesclerk having first affixed a second sticker on the original to desensitize it at the point of sale. Any attempt to simply remove the sensitized sticker at the point of sale would cause substantial damage to the merchandise owing to the bonding strength of the sticker's adhesive. The cost of these stickers is passed on to the customer by sufficiently raising the gross sales price to account for the additional expense.

On September 30, 1985, the Division of Taxation issued to petitioner a Notice and Demand for Payment of Sales and Use Taxes Due in the amount of $6,952.88, plus penalty and interest, for a total amount due of $10,403.01. This notice resulted from a field audit of a supplier of theft prevention equipment from whom petitioner leased and purchased equipment and stickers during the period at issue, September 1, 1982 through May 31, 1984. A portion of the assessment related to a payment of $2,162.00 for the contracted maintenance of petitioner's McDonald Avenue surveillance equipment. Petitioner conceded the assessed tax of $178.37 on this contract at the initial hearing but continues to protest the liability for interest and penalties.

Petitioner's representative alleged without certainty or specificity that one or two of the subject stores are owned by petitioner. However, no direct evidence has been submitted to substantiate this statement. Leases for two of the stores were produced, i.e., the 163-24 Jamaica Avenue, Queens, 10-year lease commencing September 7, 1977, and the 5408 Myrtle Avenue, Ridgewood, 3-year lease starting April 7, 1986. Only the Jamaica Avenue lease pertains to the period at issue and petitioner has given no indication that the Ridgewood lease is the same as a prior lease applicable at some or all times from September 1982 through May 1984. Nonetheless, both leases petitioner submitted are of a standard form and contain the following provisions concerning petitioner's alteration of the lease premises:

> "All fixtures (emphasis added) and all paneling, partitions, railings and like installations, installed in the premises at any time, either by Tenant or by Owner on Tenant's behalf, shall, upon installation, become the property of Owner and shall remain upon and be surrendered with the demised premises unless Owner . . . . Nothing in this article shall be construed to give Owner title to or to prevent Tenant's removal of trade fixtures, (emphasis added) moveable office furniture and equipment, ... All property permitted or required to be removed by Tenant at the end of the term remaining in the premises after Tenant's removal shall be deemed abandoned (emphasis added) and may, at the election of Owner, either be retained as Owner's property or may be removed from the premises by Owner at Tenant's expense."

Petitioner made no allegations and offered no evidence indicating that the outstanding five leases were other than comparable standard form leases containing identical trade fixture clauses as provided above.

OPINION

The Administrative Law Judge determined: (1) electronic surveillance equipment in seven of petitioner's leased retail outlets falls without the capital improvement exception to the sales tax, (2) the sensitized stickers used in conjunction with this equipment to deter and detect shoplifting are a non-critical packaging material and are subject to sales tax, and (3) petitioner's unreasonable interpretation of certain statutes and regulations compelled imposition of penalties.

Petitioner asserts: (1) the electronic surveillance equipment is a capital improvement exempt from sales tax, (2) the sensitized labels are a packaging material not subject to sales tax, and (3) the Division of Taxation is estopped from assessing penalties when a lack of clarity in the applicable sales tax laws of this case is admitted by the Division. The Division asserts that the determination of the Administrative Law Judge correctly resolves all issues in this case.

First, petitioner contends that the installation of the surveillance equipment was a capital improvement. The installation and maintenance of tangible personal property not held for sale in the regular course of business are services generally subject to the imposition of sales tax (Tax Law { 1105[c][3]). Tangible personal property which, when installed, constitutes an addition or capital improvement to real property form an exception to this general rule (Tax Law { 1105[c][3][iii]). "Capital improvement" is defined as:

> "An addition or alteration to real property which:
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> (i) Substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property;
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> (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
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> (iii) Is intended to become a permanent installation." (Tax Law { 1101[b][9]; see also, 20 NYCRR 527.7[3].)

Based on the purchase and installation costs for petitioner's three purchased units, as detailed in the auditor's "Schedule of Audited Use Tax Due" (Department's Exhibit C), petitioner has met the first element for a finding that its surveillance equipment is a capital improvement. With an installation and purchase expense in excess of several thousand dollars,[1] petitioner's electronic surveillance equipment would substantially add to the value of each of petitioner's leased buildings.

However, petitioner failed to prove that the units satisfied the second and third elements of a capital improvement in that the units became part of the realty or that their removal would materially damage the real property or units themselves and that the units were intended to be

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[1] $7590, $7392, $5685

permanently installed.[2] Our analysis of whether the petitioner satisfied these two elements is assisted by turning to the common law definition of fixture which has elements substantially similar to the second and third elements of a capital improvement.

A fixture "is based upon the united application of three requisites: (1) actual annexation to the real property or something appurtenant thereto; (2) application to the use or purpose to which that part of the realty with which it is connected is appropriated; and (3) the intention of the party making the annexation to make a permanent accession to the freehold" (Marine Midland Trust Co. v. Ahern, 16 NYS2d 656, citing Potter v. Cromwell, 40 NY 287, 289; 59 NY Jur 2d 608). In the above definition, "actual annexation" is akin to Tax Law {1101(b)(9)(ii) and "intention . . . to make a permanent accession" is substantially the same as Tax Law section 1101(b)(9)(iii).

Because the intent of the party making the annexation has long been the controlling test in determining the character of personalty as a fixture (59 NY Jur 2d 614) and since "the definite tendency in modern times is to accord less significance to the manner of annexation and more to the intention of the person making it," (Marine Midland Trust Co. v. Ahern, supra, at 659), our analysis is initially directed to petitioner's intention of permanency (Tax Law {1101[b][9][iii]). The controlling intent is not petitioner's subjective intent when installing the units, but rather the intention the law objectively will deduce from all the circumstances at the time the property is annexed to the realty to test whether, everything considered, it may fairly be found that the purpose of the annexation was to make the chattel a permanent part of the freehold (Voorhees v. McGinnis, 48 NY 278, 286, Marine Midland Trust Co. v. Ahern, supra, at 659). Factors to weigh in deciding whether the annexation was intended to be permanent include: the nature of the article annexed, the mode of annexation, the relation to the property of the person making the attachment, and the

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[2]Tax Law section 1132(c) states in part, " . . . it shall be presumed that all receipts for property or services of any type mentioned in subdivisions (a), (b), (c) and (d) of section eleven hundred five, . . . are subject to tax until the contrary is established and the burden of proving that any receipt, . . . or rent is not taxable hereunder shall be upon the person required to collect tax or the customer." The Tax Appeals Tribunal Rules include section 3000.10(d)(4) which adds, "The burden of proof shall be upon the petitioner except as otherwise provided by law.

applicability and application of the chattel to the use to which the property is being put (Capri Marina & Pool Club v. County of Nassau, 84 Misc 2d 1096, 1099, citing Marine Midland Trust Co. v. Ahern, supra, at 660; see, Gould v. Springer, 206 NY 641; Potter v. Cromwell, supra, at 287).

Analyzing these factors against the record we note that the allegation of petitioner's representative that "this equipment is a sophisticated surveillance or detective device which is installed into the ground on the floor and wired through the electrical system throughout the store" (transcript, pgs. 16, 17) leaves unanswered the type of floor material(s) into which the units were affixed (wooden subflooring, decorative wooden flooring, concrete, stone, etc.), the means of affixation (glue, bolts, poured concrete, etc.), the purpose for affixation itself (necessity when in use, stability, avoidance of the equipment being shoplifted), its mass, (height, width, weight, etc.) its center of gravity, (whether it could stand freely without modification, tipped easily, etc.) and its rate of physical and economic depreciation (whether its useful life was within the leased periods for the equipment and/or the realty into which it was placed).

Initially, we note that the fact that articles are attached to the floor or wall "merely for the purpose of stability does not render them fixtures. To change the character of a chattel to one of a fixture requires more than nailing or bolting it to the floor or to a wall or ceiling. This is normally a precaution against damage of the chattel itself and for the safety of individuals and not an intention to surrender ownership thereof." (Gottfried v. State of New York, 23 Misc 2d 733, 761, mod on other grounds 14 AD2d 612, affd 11 NY2d 1084.)

Petitioner failed to prove that such units are customarily affixed to realty as fixtures, that they are not adapted to freestanding use, nor, whether each was affixed here for reasons other than its stability. The applicable leases for four of the units were not introduced into evidence and therefore it cannot be determined if the duration of the equipment's leasehold exceeded its physical or economically useful life. Their absence prevents application of the rule, otherwise beneficial to petitioner, that the permanency of a fixture does not mean perpetual, "it being sufficient that it was contemplated that the article remain where fastened until worn out or superseded by another article more suitable to the purpose." (Troncillito v. Farm Family Mutual Insurance Company, 89 Misc 2d

844, 846, affd [3d Dept] 63 AD 2d 1042, affd 47 NY2d 736.) Finally, petitioner failed to prove that it owned the realty housing any of its stores and, as a tenant, shoulders the added burden to overcome the presumption against a finding of permanency for tenant improvements (100 Park Avenue, Inc. v. Boyland, 144 NYS2d 88, 93; Tift v. Horton, 53 NY 377, 382).[3]

The fact that some of the systems were purchased and not leased does not overcome the petitioner's failure to substantiate its allegations at the hearing concerning the factors used to find an intention of permanency cited in Capri Marina & Pool Club v. County of Nassau, supra.

Likewise, petitioner's allegation that removal of each unit would "destroy the floor into which it is anchored" (transcript, p. 17) is entirely unsupported. Also unsupported is its statement that a unit, upon removal, "becomes useless until there is a major overhaul of the system" (transcript p. 17).

We conclude that petitioner has not proved (1) that any of the units were intended to be permanent installations, (2) that they became part of the realty, or (3) that their removal would result in injury to the realty or themselves and therefore they were not capital improvements.

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[3] "Where petitioner reserves the right to remove the installed property, a finding of permanency is unlikely." (Matter of ADT Co. v. State Tax Commn., 113 AD2d 140, 142; Merit of New York, Inc. v. State Tax Commn., 124 AD2d 326, 328; Glenville Cable Systems v. State Tax Commn., No. 1988 WL 74718, slip op. at 2 [N.Y.A.D. 3rd Dept].) Even assuming arguendo that the surveillance equipment and/or the realty would be substantially damaged upon any unit's removal, plaintiff bears the burden to demonstrate that each lease contains language transferring title over to the owner upon installation in order to more closely satisfy the permanency requirement for a capital improvement (Flah's of Syracuse, Inc. v. Tully, 89 AD2d 729, 730).

In Flah's, petitioner was a clothing retailer which had improved its leased premises by constructing perimeter walls and bolting and otherwise permanently affixing lighting, mirrors, and wall racks to the realty so that the improvements could not be removed without substantial harm to them. Importantly, the leases in Flah's stipulated that title to these improvements vested immediately in petitioner's landlords immediately upon their installation and were to become part of and permanently remain in the premises. The finding that title was transferred to the landlord did not compel the court a fortiori, to find for petitioner. Instead, the court identified that the lack of removability satisfied the second element of a capital improvement (Tax Law section 1101[b][9][ii]) while the lease provision for transfer of title over these improvements was separately required to establish the intent that they were to be permanent.

Instead they were "tenant personalty" subject to the applicable sales tax determined in the Division's field audit.

The next issue is whether the purchase of the sensitized stickers used by the petitioner to trigger an electronic alarm when an item is being shoplifted from one of petitioner's stores is subject to sales tax. The Division of Taxation seeks to impose a tax on these stickers as tangible personal property sold to petitioner as the ultimate purchaser at retail and not otherwise excepted or exempted from sales tax (Tax Law section 1105[a]). Petitioner has excepted to the determination on the basis that the labels were not subject to sales tax when purchased from its wholesale supplier. It argues that these purchases were for resale which Tax Law section 1101(b)(4)(i)(A) excepts from sales tax. Alternatively, petitioner argues the stickers were packaging materials exempted from sales tax by Tax Law section 1115(a)(19).

Unless otherwise provided by statute, a sales tax is imposed on the receipts from every "retail sale" of "tangible personal property" (Tax Law section 1105[a]). "Tangible personal property" is corporeal personal property of any nature not including certain exceptions not applicable herein (Tax Law section 1101[b][6]). Petitioner's labels are clearly tangible personal property. "The term 'retail sale' means the sale of tangible personal property to any person for any purpose, except as specifically excluded." (20 NYCRR 526.6[a].) One exclusion is found "where a person, in the course of his business operations, purchases tangible property or services which he intends to sell, either in the form in which purchased, or as a component part of other property or services." (20 NYCRR 526.6[c].)

The threshold question is whether the stickers, when affixed to store merchandise to deter and detect shoplifting, were purchased by petitioner from its supplier "for resale as such, in the form in which purchased, or as a physical component part of tangible personal property." (Tax Law section 1101[b][4][i][A]; 20 NYCRR 526.6[c].) The applicable test to find a purchase for resale, as such, is whether the items, when purchased at wholesale, "form a critical element of the product sold (at retail), consumers ultimately paying sales tax on these items as part of their . . . purchases." (Celestial Food of Massapequa Corporation v. State Tax Commn., 63 NY2d 1020 citing Matter of

Burger King v. State Tax Commn., 51 NY2d 614, 623.) Otherwise "a pyramiding of taxes would distort the original legislative intent and is to be avoided." (Burger King, supra, at 623.)

Petitioner's sensitized stickers were not a critical element[4] of the merchandise sold since, "only when, as in Burger King, such items were necessary to contain (emphasis added) the product for delivery can they be considered a critical element of the product sold." (Celestial Food, supra, at 1022.) These stickers were not containers. Instead they were part of the general overhead petitioner chose in order to profitably carry on its business, notwithstanding their physical attachment to a portion of the merchandise[5].

Petitioner's argument that the stickers, in lowering retail sales prices, provided customers with a hybrid service/merchandise product within the meaning of "service" as used in Burger King is without merit. In a competitive marketplace, the "service" of lowering overhead and passing at least some of the savings onto the customer is as necessary for the retailer's survival as it is for the customer's continued patronage. Fast-food outlets, on the other hand, presumably have to increase

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[4]To understand Burger King, note that the inquiry whether an item becomes a critical element of the product sold depends upon whether a critical quality useful to the final customer survives the sale at wholesale making him the "purchaser at retail". (20 NYCRR 526.3.) Central to the so-called "container cases" (see fn. #5, infra) heavily relied upon in Burger King was the finding that those earlier containers remained "tangible personal property." (Matter of Colgate-Palmolive-Peet Co. v. Joseph, 308 NY 333, 339.) Because they were resold as containers (emphasis in original) and because they were not consumed by becoming inseparable from their contents, the sugar and molasses packers who first purchased them could do so without paying a sales tax on that initial purchase. The only seeming difference between the holdings in the "container cases" and that in Burger King is that whereas the former did not hold the fact that the containers were resold "purely (as) an incident to the sale of the contents" against the taxpayer, (American Molasses, at 273) Burger King requires that they be far more than incidental to the sale, but instead form "a critical element of the final product sold." (Burger King, at 622.)

[5]Of course, when an item is physically attached to another, a disputed item's chances of avoiding sales tax as "a physical component part of tangible personal property," (Tax Law section 1101[b][4][i][A]) would seem to increase. However, this later inquiry is entirely distinct from that which would find a resale exclusion under section 1101(b)(4)(i)(A). Truth of this point is evidenced by the analysis, apart from the separate discussion pertaining to a possible resale exclusion, that delved into whether restaurant food is "tangible personal property" to which fast-food wrappers would be excluded from sales tax as physical component parts." (Burger King, at 614, 621.)

their net retail prices to quickly serve clean, ready-to-eat food which is edible on or off the premises. The wrappers and containers at issue in Burger King were essential to these "vaunted services." (Burger King, supra, at 621.) The contrast between petitioner's case and Burger King is the difference between services which, as general overhead in petitioner's case, indirectly benefit the customer and those from which the customer is the intended and primary beneficiary, as in Burger King.

Inasmuch as petitioner admits to the tenacious manner in which the labels stuck to its merchandise, and given the reliance upon the so-called "container cases"[6] in Burger King, petitioner's assertion that its stickers can be equated to fast food cups and wrappers additionally falls victim to the independent "inseparably connected" caveat noted therein.[7] Neither does the fact that petitioner included the price of the stickers in determining the gross sales price make them part of the item sold. (Celestial Food, supra, at 1022.)

Having determined that petitioner did not purchase the stickers "for resale as such," (Tax Law section 1101[b][4][i][A]) petitioner can nonetheless still avoid the assessed sales tax if these labels were found to be a "physical component part of tangible personal property."[8] The initial question,

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[6]Matter of American Molasses Co. v. McGoldrick, 281 NY 269, 273; Matter of Colgate-Palmolive-Peet Co. v. Joseph, 308 NY 333, 338; Matter of Dairylea Co-op. v. State Tax Commn., 41 AD2d 312, 316, mot for lv to app den 33 NY2d 513.

[7]As the Burger King court took care to note, " . . . in the present case, as in the cited ones, the containers and their contents at no time become 'inseparably connected'." (Burger King at 622.) The shipping cartons at issue in the "container cases" were determined to be resold as containers and therefore not subject to tax when purchased at wholesale, provided that they were not inseparable with their contents. (Matter of Colgate-Palmolive-Peet Co. v. Joseph, 308 NY 333, 338; American Molasses Co. v. McGoldrick, 281 NY 269, 273.) When made inseparable, such as with petitioner's stickers in the instant case, the containers would then be consumed. (American Molasses Co., at 273.) This consumption, even though made by a retailer or even a wholesaler, triggers a sales tax on his "purchase at retail" (20 NYCRR 526.3) unless, though consumed, the disputed item remains "a physical component part of tangible personal property." (Tax Law { 1101[b][4][i][A].)

[8]We cannot look to the "critical element" test to resolve this "physical component" issue since the restaurant food involved in Burger King was held not to be "tangible personal property" to which the food wrappers would otherwise have been a "physical component part" for the purpose of Tax Law section 1101(b)(4)(i)(A). (Burger King at 622.) If petitioner's stickers fell

"What is a component?" is raised within the issue whether these stickers are "physical component parts" within the intended meaning of that phrase.

The legislative history provides no explanation for this term. (Bill Jacket, 1965, ch. 93.) The word "component" is defined as "serving, or helping to constitute, constituent." (Webster's New Collegiate Dictionary 270 [9th ed 1987].) "Constituent" in turn is defined as, "that which constitutes as a part, or an essential part; a component; an element." (Webster's New Collegiate Dictionary 281 [9th ed 1987].) Clearly implicit in these definitions is that components and constituents held for retail sale are, from the customer's perspective, more than unrelated or unwanted physical appendages. To petitioner's customers, the stickers were perhaps tolerated as annoyances necessary to prevent escalating prices from the cost of shoplifting, but in no light can they be viewed as being related to the customers' purposes in buying petitioner's merchandise.

Finally, sales tax can only be assessed here if the stickers fall without the separate exemption for packaging materials (Tax Law { 1115[a][19]). Tax Law section 1115(a)(19) was enacted, in part, to exempt the sales and use tax on packaging and packaging materials and, in so doing, overturn Colgate-Palmolive Peet Co. v. Joseph (308 NY 333). (Bill Jacket, 1975, ch 581, pgs. 10, 11.) This decision held that cartons and other packaging material are taxable when sold to a vendor who, before selling the product, removes the products from the carton and vice versa. This determination resulted in a "container tax" not only for which the audit and collection costs

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within the exemption for packaging materials, they would be exempt from sales tax regardless of whether or not they constituted a critical element of the final product sold. After all, the critical element test is only applicable to Tax Law section 1101(b)(4)(i)(A), and then has only been applied to the resale portion of that statutory part, but not to the phrase "physical component parts" included therein.

In Finch, Pruyn & Co. v. Tully (69 AD2d 192, 196) the court held, "While only small amounts (of chemicals absorbed by the liquid cellulose 'slurry' to rid it of unwanted lignins used in the process of manufacturing fine and high grade papers) remain in the finished product, the degree of consumption was not made a statutory factor and the ordinary meaning of a "component" (as used in Tax Law { 1101[b][4][i][A]) is certainly broad enough to include detectable materials contained in a finished whole." On the other hand, petitioner's stickers are not "in" its merchandise to become "components" as that term was meant in Finch, Pruyn.

approached the net tax revenue, but also for which the excessive cost of compliance was being borne by the consumer through higher retail prices.

A plain reading of the statute is consistent with its legislative history. "Packing materials" are included within the statute's exemption only to the extent that vendors use them for "packaging" and "packing." (Tax Law { 1115[a][10].) These terms, in turn, deal with enclosing, covering, enveloping and tightly protecting things, (Webster's New Collegiate Dictionary 845 [9th ed 1987]) but not with simply adhering something like a sticker to a portion of them.

"Gummed labels" used for packaging purposes are presumably within the intended meaning of "packaging materials." Examples of these would be adhesive address labels and warning stickers like "FRAGILE - HANDLE WITH CARE." Thus, the Administrative Law Judge's determination that petitioner's adhesive sensitized labels are included within the term "packaging materials" as defined in 20 NYCRR 528.20(b)(1) is a literal reading of the regulation which fits neither a plain reading nor the legislative history of the statute it defines. However, having determined that the stickers are not "packaging material," and with petitioner now having exhausted all its other possible exemptions from sales tax for them, the prior correct conclusion remains that these stickers are subject to sales tax as a retail sale not otherwise exempted from tax.

The final issue is whether the penalties imposed against the petitioner should be waived. The failure to properly pay any tax to the tax commission subjects the taxpayer to penalties and additional interest, but a finding of reasonable cause and not willful neglect cancels these charges (Tax Law { 1145[a][1][i]&[ii]). The absence of willful neglect alone is not sufficient grounds . . . for cancelling penalties and interest (20 NYCRR 536.5[a][3]). Also, the taxpayer must have acted in good faith (20 NYCRR 536.5[d][1]).

Petitioner argues, without specificity, that its interpretation of "the law" is not readily explained or clearly defined in "the regulations," i.e., that all statutes and regulations presumably applicable herein were drafted ambiguously. This ambiguity is the cause which petitioner, in effect, claims "would appear to a person of ordinary prudence and intelligence as reasonable" for its non-payment (20 NYCRR 536.5[c][5]).

The most important factor to be considered in determining whether reasonable cause and good faith exist is the extent of the taxpayer's efforts to ascertain the proper tax liability (20 NYCRR 536.5[d][2]). This analysis, in turn, may include:

> "(i) an honest misunderstanding of fact or law that is reasonable in light of the experience, knowledge, and education of the taxpayer;
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> * * *
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> "(iii) the reliance by the taxpayer on any written information, professional advice or other facts, ..."

With seven locations throughout the New York metropolitan area, petitioner, a corporation, constantly faces the interpretation of laws and regulations in conducting its substantial volume of business. It must therefore be held to have the experience and knowledge expected of such a sizable corporation.

As to the surveillance equipment, because the particular issue of whether improvements to realty constitute capital improvements must be decided on a case-by-case basis, this area of law would seem to be ripe for petitioner to make an "honest misunderstanding(s) of fact or law." However, petitioner has not shown any effort beyond its own summary conclusions to ascertain the correct tax liability for the surveillance units. The record is vacant as to any expert advice petitioner sought and thereafter relied upon in not submitting the appropriate sales tax. No conversations or correspondence between petitioner and the Department of Taxation and Finance were cited as having reasonably misled petitioner. Petitioner gave no indication that it attempted to acquire and read the Department's publication, "Classifications of Improvements and Repairs to Real Property for Sales Tax Purposes" (Publication 862 [2/81]) to more soundly weigh its determinations. Finally and importantly, petitioner's lack of submitted evidence as to the attachment of the surveillance units prevents us from determining that petitioner's misunderstanding was "reasonable," wholly apart from the standard expected of it "in light of its experience, etc." Without having presented so little as a mere photograph or having called even a single witness to testify on petitioner's behalf concerning the manner in which the units were affixed, we cannot now allow petitioner to benefit from its inability to adequately present its case.

As to the stickers, it is noteworthy to add that the period at issue, September 1, 1982 - May 31, 1984, fell entirely before the Court of Appeals November 20, 1984 resolution of Celestial Food. However, petitioner cannot rely on its misinterpretation of Burger King prior to the clarification made in Celestial Food since it did not prove that it relied upon the Burger King decision.

For these reasons, we affirm the Administrative Law Judge's determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the petitioner, Gem Stores, Inc., is denied;

2. The determination of the Administrative Law Judge is affirmed; and

3. The petition of Gem Stores, Inc. is denied and the notice and demand issued on September 30, 1985 is sustained.

Dated: Albany, New York
October 14, 1988

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner