STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
EMPIRE VISION CENTER, INCORPORATED	:	DETERMINATION
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, 1982 through February 28, 1986.	:	

Petitioner, Empire Vision Center, Incorporated, 2921 Erie Boulevard, Syracuse, New York 13224, 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, 1982 through February 28, 1986 (File No. 805767).

A hearing was commenced before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, W.A. Harriman State Office Building Campus, Albany, New York on February 1, 1989 at 1:15 P.M., continued at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on April 27, 1989 at 1:45 P.M. and concluded at the offices of the Division of Tax Appeals, 333 East Washington Street, Syracuse, New York on May 24, 1989 at 1:15 P.M., with all briefs to be filed by October 30, 1989. Petitioner appeared by Scolaro, Schulman, Cohen, Lawler & Burstein, P.C. (Alan S. Burstein, Esq. and Bruce M. Poushter, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (James Della Porta, Esq., of counsel).

ISSUES

I. Whether the purchase of a computer by petitioner was exempt from the imposition of sales and use tax because the computer was used orconsumed directly and predominantly in the production for sale of tangible personal property.

II. Whether the expenses incurred by petitioner for the installation of various items constituted capital improvements to real property, thereby exempting said expenses from the

imposition of sales tax.

FINDINGS OF FACT

During the period in issue, petitioner, Empire Vision Center, was a corporation whose activity consisted of providing eye examinations, eyeglasses and contact lenses. The corporation had its primary place of business in Syracuse, New York. Mr. Lionel Gilels was petitioner's president.

As the result of a field audit, the Division of Taxation ("Division") concluded that petitioner's purchases of various items for eight of its offices were subject to sales and use tax.[1] The Division also found that petitioner's purchase of a Wang computer was not exempt from sales and use tax on the premise that the computer was not used in the manufacturing process.

Petitioner paid the sales and use tax sought by the Division and, in August 1986, it filed a claim for a refund. On or about May 12, 1987, the Division advised petitioner that its claim for a refund of tax was denied on the basis of the conclusions drawn from the prior field audit. This proceeding ensued.

The Wang Computer

Generally, each of petitioner's offices prepared eyeglasses for its clients while they waited. However, there was a certain group of people for which this could not be done. In order to serve this group of people, data for the prescription was transmitted to a central manufacturing center in Syracuse. Thereafter, machine operators manually entered into a Wang computer information such as the prescription, type of frame and lens and certain measurements taken by the technician. In response, the machine operators obtained a computer printout which described the settings for the machinery to grind the lens including the numbers to set the dials of the lens grinding machine, the tool to use, and the amount of time the machine should be operating. It also told the operator the size of lens to start with in order to complete the job.

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[1]The eight locations are Syracuse, Albany, Latham, Fulton, Fairmont, Watertown, Geneva and Vestal.

The computer was not physically linked to the equipment which ground the lens.

The Wang computer was used exclusively to make eyeglasses and petitioner was not be able to make certain types of eyeglasses without the computer. Prior to the use of this system, petitioner sent out to have lenses manufactured.

Petitioner maintains a second computer system, manufactured by IBM, which was used for billing and accounting activities. The IBM computer was also used to maintain records such as laboratory productivity. The only access the Wang computer had to petitioner's records was for the purpose of inquiring whether certain lens blanks were in stock.

Capital Improvements

The sales tax audit referred to above led the Division to conclude that sales and use taxes were due on the amounts represented by 36 invoices. At the time of the hearing, petitioner was able to locate 33 of the 36 invoices. Information pertaining to each of the invoices is set forth as Appendix A.

The parties agreed at the hearing that the items designated as C, D, E, O, S, X, Y, DD, EE and FF in Appendix A were capital improvements.

When it performed its audit of petitioner's invoices, the Division declined to give petitioner credit for sales tax paid of $911.28.

The item described as Hexam Gardens Constr. in Appendix A is part of the expense of $103,000.00 which petitioner incurred for the renovation of its office in Latham, New York. Prior to petitioner's acquisition of the building, it had been used to sell fast food. Thereafter, the building was left empty for a period of time.

In order to renovate the Latham office, a demolition team removed all of the old cooking equipment and grease traps so that all that was left was a "ripped up" floor, exterior walls and some interior walls. The old electrical wiring and plumbing was also removed. Thereafter, the contractor built new walls, installed a completely new electrical and plumbing service and completely refinished the floor. Furthermore, the contractor worked on the exterior of the building by installing sheets of stone.

Petitioner also found that once the electrical wiring was reinstalled, some of the parking lot light poles did not work. Consequently, some light poles were rewired and bulbs were replaced to make them operational.

Petitioner discovered that the wooden roof had leaked over a period of time resulting in rotting of the support beams and roof. Consequently, some of the wood was replaced and the roof was patched to prevent additional leaking.

The contractor also renovated the heating and air conditioning system. This consisted of removing all existing duct work and installing new ducts. In addition, a new heating and air conditioning unit was installed.

Petitioner's occupancy of its Latham office was pursuant to a lease, executed on January 1, 1984 between Mr. Gilels, as landlord, and petitioner, as tenant. The term of the lease expired on December 31, 1988. The eleventh paragraph of the lease provided as follows:

> "ELEVENTH--All improvements made by the Tenant to or upon the demised premises, 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."

Invoice T in Appendix A is for track lighting at petitioner's Schenectady location. This item consisted of a 12-foot metal strip that was attached to the ceiling. Lights were then affixed to the metal strip so that they could be moved along the tracks. The track lighting was connected to the electrical wiring in the building. If the tracks were removed, there would be holes in the ceiling tiles where the installer fed the electrical wires. There would also be holes in the ceiling cross grid in those locations where the track lighting was removed. Lastly, the ceiling tiles underneath the tracks would probably be a different color from those which were exposed.

In September 1980, petitioner entered into an agreement to lease premises for use as a vision center for its Schenectady office from Hexam Gardens Construction Company, Inc. The lease was for a term of five years with an option to renew for an additional five years. The second paragraph of the lease contemplated petitioner installing such fixtures as were necessary

or appropriate to prepare the leased premises for the opening of business. The thirty-second paragraph concerned surrender of the leased premises and provided as follows:

> "Upon the expiration of the term of this lease, Tenant shall surrender the Demised Premises to Landlord in as good order and condition as existed on the Commencement Date, except for reasonable wear and tear, damage by fire or other casualty, and failure of Landlord to make repairs as provided in this lease."

As indicated on Appendix A, petitioner was unable to locate three invoices which were the subject of the initial sales tax audit. The first invoice for $2,500.00 was for a builder who constructed walls. Petitioner conceded the taxability of the second invoice which was for $70.00. The third missing invoice in the amount of $1,593.00 was for a "Lens Display".

At the hearing, the parties stipulated that the findings applicable to the Watertown retail location regarding the method of installation would be applicable to the remaining retail locations. The parties further stipulated that the corporate headquarters would be considered separately.

All of the items in issue were put together by carpenters and cabinetmakers. Since each location had a different space configuration, each item was designed and custom built for the space it was to occupy. Petitioner has never been able to remove an item without damaging it or the property around it. Furthermore, when petitioner has changed locations, it has never used the same cabinet twice.

If any of the items in issue were removed from its location, there would not be any market to sell the item.

When petitioner negotiates a lease, part of petitioner's bargaining position is that the improvements will enhance the site and that the improvements could be used in a professional office after the lease is over.

Watertown Office

On April 8, 1985, petitioner entered into a lease agreement with Juster Associates for the rental of particular premises at the Nichols Plaza Shopping Center in Watertown, New York. The lease had a term of ten years commencing March 1, 1985. The fourteenth paragraph of the lease was denominated interior alterations and provided as follows:

"FOURTEEN--Tenant may, at its expense, make such alterations and improvements to the Demised Premises and Install Interior partitions as it may require, provided that the written approval of the Landlord be first obtained and that such improvements and alterations are done in a workmanlike manner in keeping with all building codes and regulations and in no way harm the structure of the Demised Premises, provided that at the expiration of this Lease or any extension thereof, Tenant, if requested to do so by Landlord, at its expense, shall restore the within Demised Premises to its original condition and repair any damage to the premises resulting from the installation or removal of such partitions, fixtures, or equipment as may have been installed by Tenant. Tenant to submit plans and specifications to Landlord for approval prior to proceeding with work.

The Landlord reserves the right, before approving any such changes, additions, or alterations, to require the Tenant to furnish it a good and sufficient bond, conditioned that it will save Landlord harmless from the payment of any claims, either by way of damages or liens. All of such changes, additions, or alterations shall be made solely at the expense of the Tenant; and the Tenant agrees to protect, indemnify and save harmless the Landlord on account of any injury to third persons or property, by reason of any such changes, additions, or alterations, and to protect, indemnify and save harmless Landlord from the payment of any claim of any kind or character on account of bills for labor or material in connection therewith."

The twenty-fifth paragraph of the lease was entitled removal of fixtures and it provided:

"TWENTY-FIVE.--If after default in payment of rent or violation of any other provision of this Lease, or upon expiration of this Lease, the Tenant moves out or is dispossessed and fails to remove any trade fixtures, signs or other property prior to such said default, removal, expiration of Lease, or prior to the issuance of final order or execution of warrant, then and in that event, the said fixtures, signs and property shall be deemed abandoned by Tenant and shall become the property of the Landlord, or Landlord may notify Tenant to remove same at Tenant's own cost and expense, and upon the failure of Tenant so to do, Landlord may, in addition to any other remedies available to it, remove said trade fixtures, signs or other property as the duly authorized agent of Tenant, and store the same in the name and at the expense of Tenant or those claiming through or under it under any usual or proper form of warehouse receipt, whether or not authorizing the sale of same for nonpayment of storage charges, without in any way being liable for trespass, conversion or negligence by reason of the acts of Landlord or anyone claiming under it or by reason of the negligence of any person in caring for same while in storage and Tenant will pay to Landlord upon demand any and all expenses and charges incurred upon such removal and storage, irrespective of the length of time of storage.

Landlord shall have a lien as security for the payment of the rent and other charges hereby reserved upon all goods and chattels which are or may be placed in and upon the said premises during the term hereby created; and that such lien may be enforced, on the nonpayment of the rent hereby reserved or other default of Tenant hereunder, by the seizure and sale of the said goods and chattels pursuant to a distress warrant issued by the Landlord."

The invoice for the Watertown office, which was involved in the stipulation described in Finding of Fact "17", is set forth as Appendix B. These items will be described seriatum:

(A) Frame storage unit.

This is a unit containing 5 drawers which is used for storage. In order to install a frame storage unit, it is placed on the floor, leveled, screwed to a backing and placed against the wall. The unit is then screwed to the wall so that it will not fall over when holding certain heavy equipment. Many of the units are also glued to the wall. The units, which add to the value of the real estate, are made for a specific location and their removal would cause damage to the unit and to the walls. If one attempted to remove the unit, there would be many screw holes. Moreover, because of the use of glue, there would be a tendency for the back to rip off.

(B) Countertop and upper ledge.

The countertop sits on top of the frame storage unit and is affixed by screws and, in many cases, glue to the frame storage unit. The countertop covers the frame storage unit, provides a work surface and supports the frame bars and mirror units that are on top of it.

The upper ledge is the uppermost portion of the unit which stores frames. It is permanently affixed to the wall by being glued and screwed and cannot be removed without damage to either the surrounding area or the ledge.

(C) Display counter mirror units.

These are countertop mirror units that are laid on the display counter and affixed to the wall below the upper ledge and between the frame displays. They are affixed by being screwed to the countertop and the upper ledge. Petitioner averred that the mirror can not be removed without damage to it. The mirror unit, as well as the upper ledge and countertop, was intended by petitioner to be permanent.

(D) Display counter mirror with door.

This item is a door with an attached mirror which permits an individual to pass glasses needing work from the sales area to the laboratory. The opening is about four feet high and two feet wide. The door is affixed by hinges and is intended by petitioner to be permanent.

(E) Tote Display Frames

At the hearing petitioner's representative conceded that a tote display frame was not a

capital improvement.

(F) Slatwall.

The slatwall is a piece of wood with horizontal slats in it which permit display hooks to be affixed. This, in turn, enables petitioner to hang either plastic or metal displays. The slatwall is intended by petitioner to be permanent and is screwed and glued to the wall behind it. Petitioner averred that it cannot be removed without damaging either the slatwall or the wall behind it. The slatwall is not a freestanding item.

(G) Four-seat and six-seat dispensing counters.

These are tables with Formica countertops. The only difference between the four-seat and six-seat units is the amount of room available for seating along the counter. Generally, the wood portion of the structure is screwed to bolts extending from raised concrete slabs. The top of the table is screwed to the base. The dispensing counter was intended by petitioner to be a permanent installation. If removal were attempted, screws would break and the Formica edge would chip.

(H) Dispensing mirrors.

These are mirrors on the dispensing counter which are screwed to the counter. The mirrors could be removed without damaging them. However, there would be screw holes in the counter. The mirrors were intended by petitioner to be a permanent installation.

(I) Vertical file units.

These are units used to store patient records. They are made of wood and are approximately 84 inches high, 4 feet wide and 10 inches deep. The units are either screwed to a wall or freestanding in the middle of a room. In the latter instance they would be screwed together side by side and back-to-back. Removal of the vertical file units would cause unspecified damage to the floors and walls.

(J) Low seating walls.

A low seating wall is a wall which is approximately the height of the back of a chair and utilized to set off a line of chairs and create a walkway. Generally, the wall is screwed to a

piece of wood which is shot to the floor with a nail gun. The wall was built by carpenters and cabinetmakers and intended by petitioner to be permanently attached. It could not be removed without damage to it or the surrounding area.

(K) End tables.

At the hearing, petitioner conceded that the end tables were subject to tax.

(L) Vertical coat rack.

This is a freestanding unit with a shelf to put hats on. The unit contains a bar upon which one may place clothes hangers. The coat rack was not permanently affixed to the real estate. It was screwed to the wall and could be removed without damage to it or the wall. However, it was intended to be a permanent installation. The item was designed for this location and not usable anywhere else.

(M) Accessory glass tube display.

At the hearing, petitioner withdrew its claim that accessory glass tube displays were exempt from tax.

(N) Reception counter and column enclosure.

As the name indicates, this is petitioner's reception counter. At certain points along the counter, there are columns which extend from the floor to the ceiling. The columns were attached to the ceiling and the floor and provide support to the ceiling. The reception counter weighs approximately 500 to 600 pounds and was assembled by cabinetmakers and custom finishing people in the office. It was screwed and glued to material surrounding the column. The reception desk was intended by petitioner to be a permanent installation and could not be removed without damage to the columns or the floor. If one attempted to disassemble it, it would be destroyed. Since the unit gets part of its support from the columns, it can not stand on its own.

(O) Reception back counter.

This is a work counter with an attached file unit that is located behind the reception counter. The reception back counter, which was intended by petitioner to be a permanent

fixture, was screwed and glued to the wall. It could not be removed without damaging the unit. If one attempted to remove the unit, there would be screw holes and material ripped from the walls.

(P) Blue painted accent trim and Empire Vision sign.

These charges were for the lettering on the Empire Vision sign. The letters were cut out, nailed and glued to the wall at the Empire Vision Center in Watertown and Schenectady. The letters are made out of wood and are approximately 12 to 18 inches high. The lettering was intended by petitioner to be a permanent fixture and could not be removed without damaging the trim or the sign.

(Q) File room counter with brackets.

This is a small counter built into the file room for personnel to utilize. It may hold a telephone, calculator, copy machine or files. Brackets are placed underneath the counter to give it support. The counter is screwed to the wall and usually has glue behind it. It was intended to be a permanent fixture and could not be removed without damage to it or the wall.

(R) Shelf and hardware.

At the hearing, petitioner withdrew its claim that the shelf and hardware were exempt from tax.

(S) Contact lens base and upper cabinet.

These units are similar in appearance to kitchen cabinets. The cabinets are screwed and glued to the walls and the bottom part is both screwed and glued to the walls and has plumbing running into the floor. The units contain a drainage pipe and piping for cold water. One portion of the unit is similar to a kitchen counter insofar as it has a built-in sink with plumbing. The unit was intended to be permanent and, according to petitioner, could not be removed without damaging it or the surrounding structure.

(T) Angle corner cabinet.

This is a cabinet built specifically for the Watertown location. A specific type of cabinet was needed because of the walls in the Watertown office. The unit is affixed in a manner

similar to a contact lens base and was intended to be a permanent fixture.

(U) Contact lens display.

The contact lens display is a unit which holds bottles of soft contact lenses. In the Watertown and possibly one other location, the units could be removed without damaging them or the wall. The units in the other locations were screwed and glued directly to the wall and then removal would cause damage to the units and the wall. All of the units were intended by petitioner to be permanent fixtures.

(V) Pre-screen cabinet and counter.

This unit consists of a rectangular cabinet. The cabinet also serves as a support for one side of a counter. The cabinet is screwed to the wall. Electrical wiring runs from the wall through the cabinet to equipment which sits on the cabinet. If the cabinet were not screwed to the wall it would fall over because the counter holds several hundred pounds. Petitioner intended this item to be a permanent fixture. Its removal would leave holes in the unit and the wall.

(W) Vanity.

This is a unit which contains a built-in sink and faucet with plumbing for hot and cold water. The unit is screwed to the floor and screwed and glued to the wall. It cannot be removed without damaging it or the surrounding area. The vanity was intended by petitioner to be permanent.

(X) Desk and shelf unit.

This is a desk with shelves that is used by physicians at Empire Vision. The shelves are screwed and glued to the wall and provide the desk with support. The desk was intended by petitioner to be a permanent unit and its removal would damage it and leave holes in the surrounding wall.

(Y) Countertop and backsplash.

The countertop is a flat working surface with a built-in faucet and sink. The backsplash is a two and one-half to three-inch piece of wood that sits above the counter. Both parts are

screwed and glued to the wall. The units were intended by petitioner to be permanent fixtures and could not be removed without damaging them or the wall. Specifically, the backsplash would be broken off, vinyl would be ripped off the wall and there would be numerous screw holes.

(Z) Shelf and hardwood.

At the hearing, petitioner withdrew its claim that the purchase of this item was exempt from tax.

(AA) Kitchenette unit.

This is a unit designed for this location which contains a counter and upper cabinets similar to those which one would see in a kitchen or lunchroom. The counter is equipped with a sink and faucet. The upper cabinet is screwed to the wall. Its removal would leave screw holes. The base counter and backsplash is screwed and glued to the wall. If it were removed the backsplash would be broken off the countertop, vinyl would be ripped off the wall, and there would be many screw holes.

(BB) Designer displays.

This is cabinetry which petitioner utilizes to display higher priced merchandise. The lower portion of the display contains cabinets for storage. It had a wood finish and was equipped with internal lighting. In the Watertown office, a large portion of the display was screwed to a front wall. There are wires that run between different portions of the cabinetry to provide power to the lighting. If the unit were removed, there would be an unfinished side of the display line because it was only finished on one side. Moreover, a portion of the display would have a tendency to fall over because of the weight distribution.

Part of the items making up the designer display are 14 white frame bars without backs at $105.00 each and 4 white frame bars with prism backs at $115.00 each. The frame bars are assembled by carpenters and carpenter's assistants. Between 6 and 8 of the white frame bars without backs and all of the white frame bars with prism backs are removable. The remaining part of the designer display was screwed to the wall and intended to be a permanent

improvement. According to petitioner, it could not be removed without destroying the item itself or the wall behind it.

(CC) Petitioner had carpeting installed at its Watertown location. The carpeting was glued to the floor and was intended to be a permanent installation. It could not be removed without destroying the carpet.

(DD) Petitioner was charged $738.92 for materials from the firm of L&B Products. This charge was for stools that are used at petitioner's dispensing counters. The stools were affixed to a bolt and the bolt was embedded into concrete. The bolt could not be removed but the stool could be removed from the bolt. The stool was intended by petitioner to be a permanent installation but a part of the stool could be removed without destroying the stool or the base.

(EE) Petitioner was charged for labor, travel time and vehicle mileage by Garfield Construction Corporation for the installation of the items described above.

(FF) Petitioner was charged $1,930.00 by T.A. Holmes for plastic frame bars which are part of the frame display line. Although the frame bars were intended by petitioner to be a permanent installation, they could be removed without destroying the surrounding cabinetry. Their removal would leave holes in the wall.

Syracuse Office

On April 15, 1983, Mr. Gilels, as the lessor, and petitioner, as the lessee, entered into a lease for premises in Syracuse which had a term of 20 years and 105 days. Petitioner used the leased premises as its corporate headquarters. The sixth paragraph of the lease was entitled "USE, SIGNS AND ALTERATIONS" and provided as follows:

> "The Lessee shall not use the Premises for any other purpose than as above stated, nor erect or display any signs on the Premises, nor make any alterations or improvements upon them without the prior written consent of the Lessor, nor make or permit any defacement, injury, or waste, in, to, or about the Premises. Lessee agrees that any changes, additions, or improvements made by the Lessee shall at the Lessor's sole option remain in and become a part of the Premises at the expiration of the Lease or any renewal thereof. At Lessor's option, Lessee may be required to restore the Premises to their original condition and remove therefrom any additions, improvements, or alterations made thereto."

The invoice for the Syracuse office, which is involved in the stipulation described in

Finding of Fact "17", is set forth as Appendix C. These items will also be discussed in the order presented:

(A) Dispensing table and dispensing table base.

This item is similar to the previously described dispensing counter at the Watertown location. The item is screwed together, nailed and placed on the floor so it is not moveable. The tables add to the value of the real estate and were intended to be permanent. The dispensing table could be removed from the base without damage. However, the dispensing table would tip over if it were not secured to the base.

On one occasion petitioner attempted to take a dispensing table apart. The effort was unsuccessful because screws broke so the pieces could not be taken apart. Also, portions of the Formica edges chipped.

The base is a raised part of the floor which supports the dispensing table. The base is screwed to a piece of wood which is shot to the floor with a nail gun. On at lease one occasion, petitioner attempted to remove the wood. The result was that the wood splintered into many pieces.

(B) Display counter and upper ledge.

The display counter is a countertop which sits on top of a frame drawer unit. The upper ledge is a band which goes on top of the frame bars and appears to frame the display mirror. This item was intended by petitioner to be permanent and was screwed and glued to the walls. The countertop is screwed from the inside to the frame drawer units. These items add to the value of the real estate. If someone attempted to remove the countertop there would be Formica chips and broken screws.

(C) Display counter mirror unit.

The display counter mirror unit is a mirror which is located directly above the display counter and below the upper ledge. In order to construct the display counter mirror unit, a triangular shaped piece of wood weighing approximately 60 to 80 pounds is screwed to the countertop and walls. A person attaching the unit may also use glue depending upon whether

there were studs behind the unit. The mirrors are then attached to the wood with glue. The mirror unit was intended by petitioner to be a permanent improvement. It would fall over if it was not affixed as described above.

(D) Display counter mirror door unit.

This unit is also a mirror located between the display counter and the upper ledge. One side of this unit is set on a piano hinge allowing one to swing the mirror open so that one may pass an object between the sales area and the manufacturing laboratory which is behind the wall. The piano hinge has 18 to 20 screws on either side spaced approximately every 2 inches running the entire length of the door.

Both the display counter mirror unit and the display counter mirror door unit are part of the entire cabinetry at this location. The items were intended by petitioner to be a permanent improvement. Petitioner maintains that the item could not be removed without damaging the surrounding item.

(E) Slatwall and trims.

A slatwall is a piece of wood that has horizontal slats allowing one to easily affix or remove plastic or metal displays. The trims are white frames that go around the displays on both sides of the slatwall. The trims affix back-lit displays, called totes, to a wall over a light fixture. The slatwall is permanently installed by being screwed and glued to the wall. However, the trims around the totes are removable so that one can replace bulbs behind the back-lit display.

(F) Catalogue unit.

This is a built-in storage unit with shelves upon which books or other items may be placed. It is built into the cabinet top and is screwed to the countertop, frame drawer units and wall. It is glued in place as well. The catalogue unit was intended by petitioner to be a permanent improvement and adds to the value of the real estate. The unit is permanently affixed and could not be removed without destroying the surrounding unit or damaging the walls.

(G) Accessory display.

This item resembles a picture frame except that it is approximately 8 to 10 inches deep. The unit, which is screwed to the wall behind the reception counter, contains adjustable shelves which allow for the display of items such as contact lens solution or eyeglass cleaner. This unit was intended by petitioner to be a permanent improvement and added to the value of the real estate. The display could be removed without damage to it. However, removal of the display would leave holes in the wall.

(H) Reception counter.

The reception counter is approximately 5 feet high and 12 feet long. It is assembled by carpenters and cabinetmakers on the site from 6 to 8 heavy pieces which are put into position, leveled and then screwed and glued together. The completed unit weighs approximately 600 or 700 pounds and is free standing. The reception counter adds to the value of the real estate and was intended by petitioner to be a permanent improvement.

(I) Chair wall.

This is a solid wall approximately 20 to 30 feet long, 4 feet high and 4 inches wide which is used to separate various areas of the vision center. It forms a barrier against which one may place chairs and delineates an aisle for the flow of pedestrian traffic. The chair wall is screwed to a piece of wood which is shot to the floor with a nail gun. If it were unsecured, it would have a tendency to fall over because of its unwieldy shape and size. The wall is built by carpenters and cabinetmakers and was intended by petitioner to be a permanent installation. It cannot be removed without destroying the wall or the area around the wall.

(J) End tables.

At the hearing, petitioner withdraw its claim for a refund of this item.

(K) Lab counter and shelving.

The lab counter is a counter which is approximately 40 to 44 inches from the floor. It is used to hold petitioner's equipment. One portion of the counter has a built-in sink with hot and cold running water. The lab counter adds to the value of the real estate. The counter is

supported by cross pieces going down to the floor. The cross pieces are screwed and glued to the wall. It could not be removed without destroying the item or the surrounding wall and floor. The shelving could be removed without suffering damage. However, the walls would be damaged.

(L) End panels, toekick and trim for existing frame drawer bases.

This is a new finished panel for the right and left end of the frame drawer cabinets which were on some of the counters. These items are screwed and glued to the frame drawer from inside the cabinet so that the end panel will have a finished side.

(M) Outside birch corners.

This is trim placed on the corner of a wall so that people passing this corner will not damage the sheet rock or the vinyl paper. The birch corner is nailed and glued to the wall and could not be removed without damaging the wallpaper, the wall or the birch corner. The birch corner was intended by petitioner to be a permanent installation and adds to the value of the real estate.

(N) Lounge room coat closet.

At the hearing, petitioner withdrew its claim that item was a capital improvement.

(O) Drawers for computer station.

Initially, when petitioner had its computer modules built, it forgot to include drawers for pencils, paper clips, staplers and similar items. Therefore, petitioner ordered drawers which were attached by cabinetmakers with screws to the underside of the working surface of the computer module. Thus, the drawer becomes part of the computer station which, in turn, is screwed to the wall. The drawers are intended to add to the value of the real estate and be permanently affixed. The drawers could be removed without destroying the computer station. However, they were specifically designed for use with the computer station. The computer station would probably fall over, if it were free standing.

(P) Desks.

At the hearing, petitioner withdrew its claim for a refund on its purchase of desks.

(Q) Credenza and bookshelves.

A credenza is a cabinet which resembles a kitchen counter cabinet with both doors and drawers for storage of files and other miscellaneous items. The bookshelves are shelves which have been attached to the wall to hold books, displays and other items. Both the bookshelves and credenza are screwed and glued to the walls. These items were put together by cabinetmakers on the site and were intended by petitioner to be permanent. The credenza adds to the value of the real estate and could not be removed without destroying the surrounding real property or the credenza.

(R) Conference storage base.

This item is very similar to the credenza except that it was made for the conference room and was therefore given a different name. The unit is permanently affixed to the wall and was intended by petitioner to be permanent. It adds to the value of the real estate and could not be removed without destroying the item or the surrounding area.

(S) Storage-wardrobe.

This is a built-in closet which is designed for hanging apparel on a rod in the interior of the unit. Some storage space is available above the unit. The unit is screwed to the walls and glued to adjoining cabinets. The unit was intended by petitioner to be permanent and could not be removed without destroying the item itself or the surrounding area.

(T) Coffee-storage

This is a unit which is similar to a kitchen counter. The countertop has a built-in sink. There are cabinets with doors located above and below the countertop. The unit is screwed to the walls, was intended by petitioner to be permanent and, according to petitioner, cannot be removed without destroying the item or the surrounding walls and floor.

(U) Reception.

This is the reception counter at petitioner's corporate office. The unit, which is not freestanding, is screwed to the wall. It was intended to be a permanent installation and adds to the value of the real estate. If the unit were removed, it would leave screw holes in the wall and

expose wiring for electrical outlets and telephones.

(V) Corner table.

At the hearing, petitioner withdrew its claim that the expense incurred for the corner table was exempt from tax.

(W) Vanity counter.

This is a bathroom vanity that is used to hold bathroom sinks. It was intended by petitioner to be permanent and was affixed to the wall. Its removal would ruin the item itself as well as the wall and the tile around the item. The vanity added to the value of the real estate.

(X) Computer stations.

These are carrel-like workstations which are utilized by people performing data entry. The units are affixed to the wall by screws in order to support the weight of both the countertop and the dividers between the workstations. The computer stations were intended by petitioner to be a permanent improvement. It added to the value of the real estate. Their removal would leave screw holes in the wall.

(Y) Petitioner incurred labor expense of $2,559.00 for loading and delivery of the items previously referred to at the Syracuse office.

(Z) Petitioner incurred an expense of $62.00 for vehicle mileage for the delivery of materials to the Syracuse office.

(AA) Petitioner was charged $206.03 for supplies from the firm of L&B Products. The expense is for stools which were placed in front of the dispensing desk. As noted earlier, part of the stool could be removed and part of the stool was embedded in concrete.

(BB) Petitioner was charged $990.60 for supplies from the firm of Gamrod-Harman. This expense was for Levolor blinds for windows at this particular location. The blinds were custom manufactured and custom color selected to match the decor of this particular office. Their removal would leave some damage to the aluminum mullions on the window frame. The blinds were intended by petitioner to be a permanent installation and add to the value of the real estate.

(CC) Petitioner was charged $121.98 for material from the firm of Purcell's. This expense

was for Lexan corners which are used to protect wall corners and vinyl wall covering from people bumping into corners. The plastic corners are screwed and taped to the walls. Their removal would damage the plastic corners, walls or vinyl.

(DD) Petitioner was charged $822.00 for supplies from the firm of Decor Designs. This expense was for vertical cloth blinds which were custom ordered, custom measured and custom color selected to match the decor of the facility. The blinds could be removed without damage. However, their removal would leave holes in the mullions. The blinds added to the value of the real estate.

(EE) The expense of adding improvements to the Syracuse Office included the following:

"7% NYS Tax	149.84
15% Overhead and Profit	321.09
Freight	25.68"

On January 1, 1977, Mr. Jack J. Rose, as landlord, and petitioner, as tenant, entered into a lease for office space in Albany, New York. The parties agreed that the lease would expire on December 31, 1986. Petitioner utilized this office space as its Albany retail location. The eleventh paragraph of the lease provided as follows:

> "ELEVENTH -- All improvements made by the Tenant to or upon the demised premises, 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 expected."

During the period in issue, petitioner was the lessee of premises in Fulton, New York. The record does not disclose whether petitioner had an agreement with respect to improvements and additions at these premises.

Petitioner leased office premises in Fairmont, New York from a firm known as Franklin Furniture. The lease commenced October 1, 1982. The parties agreed that the lease would continue for a period of six years with an option to renew for an additional term of three years. The fifth paragraph of the letter of intent to sublease provided:

> "It is agreed that sub-lessee shall make at its own costs and expense such alterations in the subleased space necessary to conduct a retail vision center and it is agreed that sub-lessee shall be able, again at its own costs and expense, to add to

the existing road and building signs, such signs as are commensurate in size and character as shall properly advertise the retail vision center to be operated by sub-lessee."

During the period in issue, petitioner maintained an office in Geneva, New York pursuant to a lease with Pyramid Centers of Empire State Company. The original lease commenced on January 30, 1978 and continued throughout the period in issue pursuant to a renewal option. The relevant portion of Article 9 of this lease provided as follows:

"9.01 -- Installation by Tenant

All fixtures installed by Tenant shall be new or completely reconditioned. Tenant shall not make or cause to be made any alterations, additions or improvements or install or cause to be installed any trade fixtures, exterior sign, floor covering, interior or exterior lighting, plumbing fixtures, shades or awnings, or make any changes to the store front without first obtaining Landlord's written approval and consent which consent shall not be unreasonably withheld. Tenant shall present to Landlord plans and specifications for such work at the time approval is sought.

9.02 -- Removal and Restoration by Tenant

All alterations, decorations and additions made by Tenant, or made by Landlord on Tenant's behalf by agreement under this Lease, the cost of which is borne by Tenant, shall remain the property of the Tenant for the term of the Lease. Such alterations, decorations and additions shall not be removed from the Premises prior to the end of the term hereof without prior consent in writing from Landlord. Upon expiration of the term of this Lease and upon Tenant's vacating the Premises, all such alterations, decorations and additions shall become the property of Landlord or Tenant shall remove all such alterations, decorations, and additions if Landlord so directs. Tenant shall repair or cause to be repaired any damage to the Premises caused by such removal and shall leave the Premises broom clean and in good order, repair and condition, reasonable wear and tear and damage by fire or other unavoidable casualty excepted. Tenant shall surrender all keys for the Premises to Landlord and shall inform Landlord of all combinations on locks, safes and vaults, if any, in the Premises. Any personal property of Tenant not removed as hereinabove provided within five (5) days following the termination of this Lease shall, at Landlord's option, become the property of Landlord."

On March 25, 1986, petitioner entered into a five-year lease for premises in Vestal, New York. The paragraph of the lease which concerned alterations provided as follows:

"Except for business furnishings, displays and fixtures, Tenant shall not make any alterations to the interior or exterior of the premises without the prior approval of the Landlord; said approval not to be unreasonably withheld. In the event that Tenant makes any structural changes either to the interior or to the exterior of the premises, said structural changes shall, at the expiration of this Lease Agreement, become a part of the premises and belong to the Landlord. Any alteration made by Tenant which is attached to the premises such that it cannot be removed without material injury to the premises shall, at Landlord's option, become

part of the premises at the expiration of this Agreement ('Agreement' including any option terms); however, any alteration made by Tenant which may be removed without material injury to the premises shall remain the property of the Tenant."

The lease also contained a paragraph entitled surrender of premises which provided as follows:

"On the last day of said term or sooner termination of the estate granted, the Tenant shall peaceably surrender the premises to the Landlord, its successors and assigns, in as good a state and condition as reasonable use thereof will permit; and if said premises be not surrendered at the end of the term, the Tenant will save the Landlord harmless from and against all damage which the Landlord shall suffer by reason thereof and will indemnify the Landlord therefor. At the termination of this Agreement, the building construction therein and all permanent fixtures, alterations and additions shall belong to and be the property of the Landlord provided, however, that Tenant shall be permitted to remove the Tenant's sign and the Tenant's business displays, non-permanent [sic] fixtures, furnishings and furniture."

CONCLUSIONS OF LAW

A. Tax Law § 1115(a)(12) provides that the purchase of machinery and equipment with a useful life of at least one year that is used or consumed directly and predominantly in the production of tangible personal property is exempt from sales and use tax.

In this instance, the Division has cited a series of cases for the proposition that the computer in issue is not exempt from sales and use tax because it was not used directly in the production of tangible personal property. However, a detailed analysis of each of these cases would be unproductive since "the determination of whether the use is taxable largely depends upon the peculiarities of the taxpayer's operations and, therefore, each case has to be individually assessed on its own fact pattern..." (Matter of Rochester Independent Packer, Inc. v. Heckelman, 83 Misc 2d 1064, 374 NYS2d 991, 993 citing Matter of Niagara Mohawk Power Corp. v. Wanamaker, 286 AD 446, 144 NYS2d 458, affd 2 NY2d 746, 157 NYS2d 792).

The regulations of the Commissioner of Taxation are explicit that in order to be exempt from sales and use tax the machinery and equipment must be "used or consumed directly and predominantly in the production for sale of tangible personal property" (20 NYCRR 528.13[a][1][i]). The regulation further provides that in order for machinery or equipment to be considered as used "directly" in production, it must:

"(i) act upon or effect a change in material to form the product to be sold,

or

(ii) have an active causal relationship in the production of the product to be sold, or

(iii) be used in the handling, storage, or conveyance of materials or the product to be sold, or

(iv) be used to place the product to be sold in the package in which it will enter the stream of commerce." (20 NYCRR 528.13[c][1].)

It is concluded that petitioner's computer has an active causal relationship in the production of the product to be sold within the meaning of 20 NYCRR 528.13(c)(1)(ii). Support for this conclusion may be found in Matter of T.V. Data, Inc. (Tax Appeals Tribunal, March 2, 1989).

In T.V. Data the Administrative Law Judge determined that a certain computer used to create camera-ready copy by performing an editing function did not qualify for the exemption provided for in Tax Law § 1115(a)(12) because it did not effect a change in the materials which became the final product and because it did not direct the operations of the typesetters by a direct connection. On appeal, the Tax Appeals Tribunal disagreed with the conclusion of the Administrative Law Judge and stated as follows:

> "[W]e find that the System C computer does have an active causal relationship in the production of the product to be sold within the meaning of 20 NYCRR 528.13(c)(1)(ii). It was one of five interconnected computers which formed the network that produced the commands to drive the typesetting equipment. The fact that the System C computer itself was not directly connected to the typesetting equipment does not negate its role in the production of the camera-ready copy. The merging, justifying and updating of data done by the System C is a direct, necessary and integral part of the production of camera-ready copy. Without the processes provided by the System C the overall production process of the camera-ready copy would be incomplete. We find that it does have an active causal relationship in the production process as it updates, merges and justifies the information to make the camera-ready copy possible."

Similar reasoning should prevail here. The information processed by petitioner's computer was a direct, necessary and integral part of the production of eyeglasses. Without the processes provided by petitioner's computer, it would not have been able to produce the eyeglasses. Therefore, petitioner's computer has an active causal relationship in the production process as it provides the information which makes the production of the lenses possible.

In reaching the foregoing conclusion, it is recognized that the Division has sought to distinguish T.V. Data on the basis that in this matter there is no physical linkage between the computer and the production equipment. However, this distinction does not require that a different conclusion be drawn. Neither Tax Law § 1115(a)(12) nor the regulations require a physical linkage between the production equipment in order for there to be an exemption from sales and use tax. Therefore, it is concluded that the distinction urged by the Division does not require that petitioner be denied the exemption which is provided for in Tax Law § 1115(a)(12).

B. Tax Law § 1105(c)(3) imposes sales tax on the installation of tangible personal property not held for sale in the regular course of business. An exception to this rule is set forth in Tax Law § 1105(c)(3) which exempts from the imposition of sales tax the installation of tangible personal property which, when installed, constitutes a capital improvement to real property. The term capital improvement is defined by Tax Law § 1101(b)(9) 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."

C. Generally, with the exception of the Latham office, the briefs of the parties address the general criteria for capital improvements. It is the Division's position: that the lease must provide that the lessor will obtain title to the improvement upon installation; that the lease must refer to trade fixtures; that the articles attached to the floor and walls for stability are not capital improvements; that very few of the items would be materially damaged if removed; and that the limited use of the items shows that they are not capital improvements. It is petitioner's position: that the leases contain evidence of permanence regardless of whether they say that title to the improvement vests in the landlord; that the lease does not have to mention trade fixtures and that the items in issue were alterations and additions within the meaning of the lease provisions; that the attachment of some items was not just for the purpose of stability; that the items in

issue were permanently affixed by glue, screws and sometimes nails; that most of the items in issue could be adopted for the use of a subsequent retail or office tenant; and that the annexation is intended to be permanent within the meaning of Matter of Dairy Barn Stores, Inc. (Tax Appeals Tribunal, October 5, 1989).

D. It has been observed that the question of whether an improvement to realty constitutes a capital improvement "must be decided on a case-by-case basis" (Matter of Gem Stores, Inc., Tax Appeals Tribunal, October 14, 1988). Therefore, it is necessary to consider each improvement with respect to the established criteria.

E. As noted, the first requirement is that the addition or alteration add to the value of the real property or prolong the useful life of the real property. In examining whether this criterion has been satisfied, the Tax Appeals Tribunal has examined the purchase and installation expenses incurred (see, e.g., Matter of Dairy Barn Stores, Inc., supra; Matter of Gem Stores, Inc., supra).

F. The second criterion is that the addition or alteration "[b]ecomes a part of the real property or is permanently affixed to the real property so that removal would cause material damage to the property or to the article itself" (Tax Law § 1101[b][9][ii]). If an item is so attached that its removal would cause substantial damage to the item, a finding of permanency is warranted (see, e.g., Matter of Flah's of Syracuse, Inc. v. Tully, 89 AD2d 729, 453 NYS2d 855). However, the claim of damage must be supported (Matter of Gem Stores, Inc., supra).

G. The third criterion is that the improvement "[i]s intended to become a permanent installation" (Tax Law § 1101[b][9][iii]). Recently, when discussing this requirement, the Tax Appeals Tribunal in Matter of Dairy Barn Stores, Inc. (supra) stated as follows:

> "The controlling intent is not petitioner's secret or subjective intention at the time the units were acquired, but rather the intention the law objectively will deduce from all the circumstances at the time the property is annexed to the realty to see whether it may fairly be found that the purposes of the annexation was to make the unit a permanent part of the freehold (Voorhees v. McGinnis, 48 NY 278; Marine Midland Trust Co. v. Ahern, 16 NYS2d 656, 659). Factors to be considered 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 applicability and application of the unit to the use to which the property is being put (Capri Marina & Pool Club v. County of

> Nassau, 84 Misc 2d 1096, 379 NYS2d 341, 345 citing Marine Midland Trust Co. v. Ahern, 16 NYS2d 656, 660; see, Gould v. Springer, 206 NY 641; Potter v. Cromwell, supra)."

When the addition or improvement is made to leased premises, additional considerations apply. In 100 Park Avenue v. Boyland (144 NYS2d 88, mod 284 App Div 1033, 136 NYS2d 367, revd 309 NY 685) the Court set forth the applicable rule as follows:

> "Unless a contrary intention is expressed, the law will presume that where installations are made for the purpose of conducting the business for which 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 (citation omitted)."

A contrary intention may be found in a lease provision that title to the improvements vests in the landlord immediately upon their installation and that they become a permanent annexation to the freehold (Matter of Flah's of Syracuse, Inc., supra). A contrary intention may also be found when the improvements pass to the landlord at the end of the lease (see, Matter of Merit Oil of New York v. New York State Tax Commn., supra). On the other hand, where the taxpayer reserves the right to remove the addition, it is unlikely that the addition will be considered permanent (Matter of Merit Oil of New York v. New York State Tax Commn., supra; Matter of ADT Co. v. New York State Tax Commn., 113 AD2d 140, 142, appeal dismissed 67 NY2d 917, 495 NYS2d 274). This latter rule will prevail despite evidence that petitioner did not remove the vast majority of its improvements from its leased premises, that removal of the improvements would be a significant undertaking, or that the right to remove additions was reserved to increase bargaining power with the taxpayer's landlords (Matter of Merit Oil of New York v. New York State Tax Commn., supra). In this regard, it is noted that petitioner's reference to Matter of Dairy Barn Stores, Inc. (supra) is misplaced inasmuch as, unlike the situation here, the improvements were not made to leased premises in that case.

H. With respect to the invoice from Hexam Gardens Constr., it is concluded that each of the criteria set forth in Tax Law § 1101(b)(9) was satisfied. Specifically, in view of the expense incurred, the improvements added to the value of the real property. Secondly, the nature of the construction was such that it is clear that the items became part of the real property and that

their removal would damage them and the adjoining property. Lastly, the terms of petitioner's lease for its Latham office establish that the improvements were intended to be permanent (see, Matter of Flah's of Syracuse, Inc. v. Tully, supra).

In reaching the foregoing conclusion, it is recognized that the Division has argued that the terms of the lease must expressly mention that trade fixtures become the property of the landlord. This argument must be rejected. The lease for the Latham office appears to be very similar to the lease in the Flah's case where the Court found the additions to be capital improvements. Therefore, accepting the Division's argument would be contrary to the holding in Flah's.

I. Petitioner has not established that the track lighting was installed in such a way that it would cause material damage to itself or to the property (Tax Law § 1101[b][9][ii]). In addition, the lease for the Schenectady office does not establish a clear intention that the addition was intended to be a permanent addition (Matter of Flah's of Syracuse, Inc. v. Tully, supra). Rather, the terms of the lease indicate that petitioner was expected to remove the additions at the conclusion of the lease. Therefore, petitioner has not shown, as required, that this improvement was intended to be permanent (Tax Law § 1101[b][a][iii]).

J. Petitioner has not established that two missing invoices which remain in issue (Finding of Fact "16") are capital improvements. It is not possible to ascertain from the record whether either of the items became part of the real property or how the items were affixed to the real property. The record also does not disclose that the additions were intended to become permanent.

K. Watertown Office.

(1) The Division has not argued that any of the additions fail to meet the requirement that the additions add to the value of the real estate (Tax Law § 1101[b][9][i]). Moreover, in view of the expenses incurred, it is concluded that each of the items in issue at the Watertown office substantially add to the value of the real property (Matter of Gem Stores, Inc., supra).

(2) On the basis of the facts set forth herein, petitioner has established that the

following items are affixed in a manner such that their removal would cause material damage to the property or to the item itself (Tax Law § 1101[b][9][ii]): 21A, B, F, G, J, N, O, P, Q, S, T, W, X, Y, AA and CC. In reaching this conclusion, particular significance has been given to those items which were affixed through the use of glue. Petitioner has established that those items affixed by glue could not be removed without damage to the item itself or the surrounding property. The following items do not satisfy this criterion because there is either no damage or one cannot ascertain the nature or amount of the damage: 21C, D, H, I, K, L, U, V, BB, DD and FF. In reaching this conclusion, it is noted that the fact that holes would be left in a wall where an item was located is not material damage within the meaning of Tax Law § 1101(b)(9)(ii) (see, Matter of Susquehanna Sheet Metal Erection, State Tax Commn., December 5, 1986).

(3) The lease for the Watertown office does not contain the clear intention that the improvements are to be permanent annexations to the freehold which has been required by the case law (Matter of Merit Oil of New York v. New York State Tax Commn., supra; Matter of Flah's of Syracuse, Inc. v. Tully, supra). This is evident from the fact that the lease obviously contemplates petitioner removing its improvements. The additions do not become the property of the landlord unless abandoned by the tenant. However, even in the latter event, the landlord has the option of requiring petitioner to remove the additions. In this regard, it is noted that petitioner's subjective declarations of intent are not controlling (Matter of Gem Stores, Inc., supra). Therefore, petitioner has failed to satisfy the criteria of Tax Law § 1101(b)(9)(iii) with respect to each of the purchases for the Watertown office.

L. Syracuse office.

(1) As was the case with the Watertown office, the Division has not argued that any of the additions fail to meet the requirement that the additions add to the value of the real estate (Tax Law § 1101[b][9][i]). Furthermore, in view of the expenses incurred, it is concluded that each of the items in issue at the Syracuse office substantially add to the value of the real property (Matter of Gem Stores, Inc., supra).

(2) On the basis of the facts set forth herein, petitioner has established that the

following items are affixed in a manner such that their removal would cause material damage to the property or to the item itself (Tax Law § 1101[b][9][ii]): 23A, B, C, E, F, H, I, K, L, M, Q, R, S, W and CC. As was the case with the Watertown office, petitioner has shown that those items affixed by glue were affixed in such a way that the criterion of Tax Law § 1101(b)(9)(ii) was satisfied. The following items do not satisfy this criterion because there is either no material damage or one cannot ascertain the nature or amount of the damage: 23D, G, O, P, T, U, X, AA, BB and DD. As previously stated, the fact that removal would leave holes in the walls where an item was located is not material damage within the meaning of Tax Law § 1101(b)(9)(ii) (Matter of Susquehanna Sheet Metal Erection, supra).

(3) The lease for the Syracuse office does not contain the clear intention that the improvements are to be permanent annexations to the freehold which has been required by the case law (Matter of Merit Oil of New York v. New York State Tax Commn., supra; Matter of Flah's of Syracuse, Inc. v. Tully, supra). The fact that the landlord has the option of requiring petitioner to remove the additions precludes finding such an interest. In addition, as previously stated, petitioner's subjective declarations of intent are not controlling (Matter of Gem Stores, Inc., supra). Therefore, petitioner has failed to satisfy the criterion of Tax Law § 1101(b)(9)(iii) with respect to each of the purchases for the Syracuse office.

M. The leases for the retail locations in Albany, Latham and Vestal show a clear intention that those items which were permanently affixed in such a manner that their removal would cause material damage to the property or the item itself (see, Conclusions of Law "K[2]" and "L[2]") were intended to be permanent annexations to the freehold (Matter of Flah's of Syracuse, Inc. v. Tully, supra). Therefore, such items in the Albany, Vestal and Latham locations are found to be capital improvements. The remaining leases do not show the requisite intent that the improvements were to be permanent annexations to the freehold.

N. Petitioner is entitled to be given a credit or refund for the tax paid on the cost of installing those items found to be capital improvements. This may be calculated by multiplying the tax paid by a ratio of the value of the capital improvements to the value of all of the

improvements in a particular invoice.

O. Petitioner is entitled to a refund on those items conceded by the Division at the hearing (Finding of Fact "8").

P. Petitioner is entitled to be given credit for the sales tax it paid in accordance with Finding of Fact "9".

Q. The petition of Empire Vision Center, Incorporated is granted to the extent of Conclusions of Law "A", "H", "M", "N", "O" and "P" and is, in all other respects, denied.

DATED: Troy, New York

_____

ADMINISTRATIVE LAW JUDGE

APPENDIX A

Analysis of Invoice for Empire Vision Center, Inc.
Sales Tax Audit
November 1, 1982 through December 28, 1986

Document Identifier	Vendor's Name	Amount Being Assessed On	Description
A	Garfield Construction	$ 2,362.25	Partial bill for Latham Office
B	Garfield Construction	32,891.55	Partial bill for Camillus Office
C	Garfield Construction	13,929.37	Latham office same bill as A - $2,362.25 being assessed twice
D	Garfield Construction	7,642.50	Bill for work at Geneva Rochester and other stores
E	Garfield Construction	2,313.75	Bill for labor on Camillus installation
F	Garfield Construction	10,763.76	Bill for Albany reconstruction
G	Garfield Construction	20,607.00	Bill Syr. Corporate offices and retail sales
H	Garfield Construction	1,301.75	Bill repair work 8 offices
I	Garfield Construction	442.47	Work at Albany store-extra
J	Garfield Construction	618.00	Labor only on bill of $765.58 for Recept. counter
K	Garfield Construction	4,958.73	Bill Schenectady remodeling
L	Garfield Construction	4,462.55	Portion of bill for Geneva remodeling excluding repairs made
M	Garfield Construction	516.75	Portion of bill for labor included in total of $2,888.95
N	Garfield Construction	31,650.00	Progress payment on Syr. West store
O	Mark O. Scott	600.00	Total for $2,700-not able to determine work done
P	Hexam Gardens Constr.	12,712.50	Portion of total bill of $103,000 for Latham store
Q	Garfield Construction	1,294.48	Same as bill L - balance of bill for other items
R	Garfield Construction	714.31	Bill for protection of air cond. and misc. material & labor
S	Chip Mabie Builders	4,300.00	Construction Schenectady office
T	Wade Lupe	536.70	Track lighting-part of renovation of Schenectady
U	Garfield Construction	813.57	Bill Fairmount-levelor installation
V	Garfield Construction	17,586.56	Bill Schenectady store
W	Chip Mabie Builders	406.27	Remodeling labor & material
X	Chip Mabie Builders	1,735.31	Remodeling labor & material
Y	Chip Mabie Builders	2,259.00	Remodeling labor & material
Z	Garfield Construction	427.00	Silk Screening
AA	Garfield Construction	2,994.92	Design work & items for all locations

Appendix A (cont'd)

BB	Garfield Construction	63,392.59	Partial bill for Watertown and Schenectady, NY
CC	Garfield Construction	288.00	Vanity top Syracuse-East
DD	Chip Mabie Builders	225.00	Remodeling labor & material
EE	FW Strac Construction	2,422.00	Temporary wiring for laboratory Erie Blvd.
FF	Garfield Construction	244.00	Mat for Watertown
GG	J J Rose, DDS PC	5,663.70	Remodeling work at Albany office paid by landlord, ½ payable by Empire

Invoices not found

Amount	Period	
$2,500.00	8/31/84	FW Strac Construction
70.00	11/30/84	
1,593.00	2/28/86	Lens Display

APPENDIX B

"November 22, 1985

Empire Vision Center
2921 Erie Blvd. E.
Syracuse, N.Y. 13224

Attn: Robert Perlmuter

Re: Empire Vision Center
Watertown, N.Y.

INVOICE #S2061-2

FIXTURING:

DISPLAY LINE:

Frame/storage units (12) @ $315.00		$3,780.00	
Counter top & upper ledge (60)1f @ $22.00		1,320.00	
Display counter mirror units (4) @ $65.00		260.00	
Display counter mirror w/dr (1) @ $150.00		150.00	
Tote Display frames (6) @ $7.50		45.00	
Slatwall (10)1f @ $15.00	150.00		
4-seat dispensing counters (2) @ $550.00		1,100.00	
6-seat dispensing counters (1) @ $655.00		655.00	
Dispensing mirror (6) @ $30.00		180.00	
Dispensing mirror (2) @ $48.00		96.00	
Dispensing mirror (1) @ $65.00		65.00	
			$7,801.00

WAITING/RECEPTION/FILE:

Vertical file units (16) @ $155.00		$2,480.00	
Low seating walls (16)lf @ $35.00		560.00	
End tables (2) @ $95.00	190.00		
Verticle [sic] coat racks (2) @ $130.00		260.00	
Accessory glass cube display (1) @ $675.00		675.00	
Reception counter & column enclosure (1) @ $2750.00	2,750.00		
Reception back counter (8)lf @ $30.00		240.00	
Blue painted accent trim 2" (16)lf @ $3.05		50.00	
Empire Vision sign (1) set @ $390.00		390.00	
File rm counter & brackets (8)lf @ $22.00		176.00	
Shelf/hardware (8)lf @ $8.75		70.00	
			$7,841.00

Appendix B (cont'd)

CONTACT LENS RM/SCREEN:

C/L base & upper cab. (1) @ $720.00	$ 720.00	
Angle corner cab. (1) @ $380.00	380.00	
Contact lens display (12) @ $95.00	1,140.00	
Pre-screen cabinet & counter (1) @ $345.00	345.00	
		$2,585.00

EXAM ROOMS:

Vanities (3) @ $145.00	$ 435.00	
Desk & shelf unit (1) @ $415.00	415.00	
		$ 850.00

LAB:

Counter top & backsplash (44)lf @ $22.00	$ 968.00	
Shelving & hardware (48)lf @ $8.75	420.00	
		$1,388.00

LUNCH ROOM:

Kitchenette unit (1) @ $685.00	$ 685.00
DESIGNER DISPLAY - COMPLETE:	$4,000.00

LAYOUT/LOADING/DELIVERY/INSTALLATION:

LABOR:

(49) regular hours @ $19.50	$ 955.50	
(7) overtime hours @ $24.50	171.50	
(55½) regular hours @ $12.50	693.50	
(13½) overtime hours @ $17.50	263.25	
		$2,057.00

EXPENSES:

TRAVEL TIME:

(6) hours @ $9.00	$ 54.00

COMPANY VEHICLE MILAGE:

Volvo - (2) trips @ 145 mi. ea. @ $.50	$ 145.00	
Van - (3) trips @ 145 mi ea. @ $.35	152.25	
		$ 351.25

Appendix B (cont'd)

MATERIALS:

T. A. Holmes		$1,930.00	
L & B Products		738.92	
Lerman Carpet Corp.	878.94		
Masland Carpet		3,150.72	
		6,698.58	
7% NYS Tax		468.90	
15% Overhead & Profit		1,004.79	
Freight charges for above	385.29		
			~~$ 8,557.56~~

TOTAL AMOUNT DUE THIS INVOICE: $36,115.81

THANK YOU."

APPENDIX C

"December 14, 1983

Empire Vision Center
2921 Erie Blvd. East
Syracuse, New York 13224

Re: Empire Vision Corporate office
2921 Erie Blvd. East
Syracuse, New York

INVOICE #S850-2

Architectural Fee		$ N/C
Blueprinting costs	10.06	
15% retainer held on Inv.S850-1		935.66
Remaining fixture items:		
- credit (4) lens/frame cabinets @ $300	$(1,200.00)	
- credit (2) dispensing mirror units @ $28	(56.00)	
- dispensing table (4) @ $525	2,100.00	
- dispensing table bases (4) @ $55	220.00	
- display counter & upper ledge 58' @ $20	1,160.00	
- display counter mirror units (6) @ $60	360.00	
- display counter mirror door unit (1) @ $145	145.00	
- slatwall & trims (¾ sheet) N/C		
- catalogue unit (1) @ $202205.00		
- accessory display (1) @ $175	175.00	
- reception counter (1) @ $1275	1,275.00	
- chair walls (3) @ $175 525.00		
- end tables (14) @ $90 1,260.00		
- lab counters & shelving 51' @ $24	1,224.00	
- end panels, toekick & trim for existing frame drawer bases 125.00		
- (2) outside birch corners 25.00		
- (1) lounge room coat closet	175.00	
- (6) drawers for computer stations @ $40	240.00	
		7,958.00

Appendix C (cont'd)

Furniture for corporate offices			
- Item #1 (2) desks @ $535		$ 1,070.00	
- Item #2 credenza/bookshelves		1,440.00	
- Item #3 credenza/bookshelves		1,260.00	
- Item #4 conference storage base		840.00	
- Item #5 storage/wardrobe		1,975.00	
- Item #6 coffee/storage	530.00		
- Item #7 reception	1,485.00		
- Item #8 corner table	185.00		
- Item #9 vanity counters	265.00		
- Item #10 computer stations		1,200.00	
			$10,250.00
Loading/delivery/supervision			
- Field labor:			
87 hrs @ $19.50		1,696.50	
69 hrs @ 12.50		862.50	
			2,559.00
Vehicle milage for deliveries			62.00
Suppliers:			
- L & B Products		206.03	
- Gamrod-Harman		990.60	
- Purcell's (Lexan corners)	121.98		
- Decor Designs		822.00	
		2,140.61	
- 7% NYS Tax		149.84	
- 15% Overhead & Profit	321.09		
- Freight		25.68	
			2,637.22
TOTAL AMOUNT DUE THIS INVOICE:			$24,411.94

THANK YOU."