STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **HUDSON RIVER CLUB, LP**	:	DETERMINATION DTA NO. 817778
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 November 30, 1993 through April 22, 1999.	:	

Petitioner, Hudson River Club, LP, 90 West Street, New York, New York 10006, 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 November 30, 1993 through April 22, 1999.

A hearing was commenced before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on January 25, 2001 at 10:30 A.M., and was continued to conclusion before the same Administrative Law Judge at the same location on March 8, 2001, with all briefs to be submitted by August 10, 2001, which date commenced the six-month period for issuance of this determination (Tax Law § 2010[3]). Petitioner appeared by Cunningham and Cunningham, LLP. (Gerard W. Cunningham, Esq., of counsel). The Division of Taxation appeared by Barbara G. Billet, Esq. (James Della Porta, Esq., of counsel).

ISSUES

I. Whether petitioner has established its entitlement to a refund of sales tax paid on any of its purchases from 15 different vendors, including its landlord, on the basis that:

(i) it made such purchases from or for an exempt organization (Battery Park City Authority), or from its landlord acting as the agent of such exempt organization, or in its own right as the agent of such exempt organization; or

(ii) such purchases consisted of tangible personal property sold to a contractor for use in erecting a structure or building of an exempt organization, per Tax Law § 1115(a)(15), or adding to, altering or improving, or maintaining, servicing or repairing the real property of an exempt organization, per Tax Law § 1115(a)(16); or

(iii) such purchases constituted capital improvements.

II. Whether a refund for any portions of the period encompassed within petitioner's application for refund is barred by operation of the statute of limitations.

III. Whether the dollar amount of petitioner's refund, if any, or the specific transactions subject to review, are limited by petitioner's failure to respond to a Request for Admissions.

FINDINGS OF FACT

1. During the period in issue, petitioner, Hudson River Club, LP, owned and operated two restaurants, known as the Hudson River Club and Edward Moran's Bar and Grill, located at 4 World Financial Center in lower Manhattan at Battery Park City, New York. The building in which petitioner's restaurants were located was owned by Battery Park City Authority ("BPCA"), acting through BPC Development Corporation, a subsidiary of the New York State Urban Development Corporation. BPCA leased the property to Olympia and York ("O & Y"), which developed and constructed the infrastructure and buildings, and in turn leased portions of such constructed space to various occupants, including petitioner.

2. Petitioner occupied and used the portions of the building in which the two restaurants were operated pursuant to a written lease between itself and O & Y. In 1996, O & Y was replaced as landlord by Brookfield Properties. Petitioner's lease for the premises is voluminous, itself running some 71 pages in length and thereafter including an even greater number of pages

of schedules and exhibits incorporated into the lease by reference. A number of provisions from petitioner's lease are set forth hereinafter.

3. Article 4, section 4.01(A) and (B) and Article 34, section 34.01 (B) and (FF) of petitioner's lease with O & Y define "Rent" to consist of "Minimum Rent" plus "Additional Rent." "Minimum Rent" is calculated based on a dollar amount (which escalates over the years of the lease term) multiplied by the number of square feet of net rentable area. "Additional Rent" was defined to consist of:

> all other sums of money as shall become due from and be payable by Tenant hereunder, whether or not the same be designated as such (*for default in the payment of which Landlord shall have the same remedies as for a default in the payment of Minimum Rent*). (Emphasis added.)

4. Article 34, sections 34.01(E) and (SSS) provide the following definitions:

> E. "Building Equipment" shall mean all machinery, apparatus, equipment, personal property, fixtures and systems of every kind and nature whatsoever now or hereafter *incorporated in, attached to or used or usable in connection with the operation or maintenance of the Building and/or Retail Area*, including all electrical, heating, mechanical, sanitary, sprinkler, ventilating, air cooling, air conditioning, incinerating, elevator and escalator systems, apparatus and equipment; chutes, ducts, pipes, tanks, fittings, conduits and wiring; partitions, doors, cabinets, hardware; floor, wall and ceiling coverings of any public areas; lobby decoration; communications equipment and any and all renewals and replacements of any thereof; but excluding, however, (i) Tenant's Property, (ii) property of any other tenant (which such tenant has the right to remove pursuant to the terms of its lease), (iii) property of contractors servicing the Premises or the Building, (iv) property of the Port Authority or PATH . . . . (Emphasis added.)
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> SSS. "Tenant's Property" shall mean all fixtures, trade fixtures, stock-in-trade, furniture, fittings, partitions, signs and other property (i) installed or purchased at the sole expense of Tenant, (ii) with respect to which Tenant has not been granted any credit or allowance by Landlord, (iii) which are removable without material damage to the Premises, (iv) which are not replacements of any property of Landlord, whether any such replacement is made at Tenant's expense or otherwise and (v) which are not mechanical and kitchen equipment which is *attached to* the Premises. (Emphasis added.)

5. Article 13, section 13.01(A) provides as follows:

> Landlord, at Tenant's sole cost and expense, shall cause (i) the exterior of the windows and storefronts, glass, plate glass and doors (including, in each case, the frames therefor) of the Premises to be cleaned at such times and in a manner consistent with the quality and clientele of the Building, (ii) the Premises to be exterminated with such frequency and in such manner as to prevent the existence of vermin or other infestation, (iii) Tenant's garbage and other refuse to be removed, at such times and from such place as Landlord shall designate, by Landlord's designated cartage service and (iv) where kitchen exhaust is required, the kitchen exhaust duct serving the Premises to be cleaned in the manner and with the frequency determined by the Landlord. Bills for such aforementioned services shall be rendered by Landlord as necessary (but not more frequently than once a month) and Tenant shall pay to Landlord, as *Additional Rent*, the amount of such bill. Notwithstanding the foregoing, Landlord, at its sole option, may elect to have all or any portion of the aforementioned services performed by Tenant. Tenant, at its sole cost and expense, shall otherwise keep the Premises clean and in a neat, orderly, safe and sanitary condition; provided, however, that Landlord, at its option, shall have the right to select the contractors to be used by Tenant for the performance of the same, at the times and in the manner prescribed by Landlord, and Tenant agrees to use such contractors and to adhere to such regulations to the exclusion of all other contractors, devices, equipment or services. (Emphasis added.)

6. Article 9, sections 9.06, 9.07 and 9.09 provide as follows:

> Section 9.06 All fixtures, equipment, betterments, improvements and appurtenances *attached to, or built into*, the Premises at the commencement of or during the Lease Term ("Fixtures"), whether or not by or at the expense of Tenant, shall be and shall remain a part of the Premises, shall be deemed to become the property of Landlord (subject to the terms of any Superior Lease) and shall not be removed by Tenant, except as provided in Section 9.07. Further, any personal property in the Premises on the Commencement Date, *unless installed and paid for by Tenant*, shall be and shall remain Landlord's property and shall not be removed by Tenant. (Emphasis added.)
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> Section 9.07 All Tenant's Property (as defined in Article 34) shall be and shall remain the property of Tenant and may be removed by Tenant at any time during the Lease Term; provided, however, that if any Tenant's Property shall be removed, Tenant shall repair, in accordance with the provisions of Article 10, or pay the cost of repairing, any damage to the Premises or to the Building resulting from the installation and/or removal thereof, and provided, further, that Tenant provides evidence satisfactory to Landlord that it is substituting therefor new Tenant's Property at least equal

in quality, value and function to that being removed. Any equipment or other property for which Landlord shall have granted any allowance or credit to Tenant shall not be deemed to have been installed by or for the account of Tenant without expense to Landlord, shall not be considered Tenant's property and shall be deemed the property of Landlord.

Section 9.09 Tenant covenants and agrees that all construction agreements shall include the following provision: "[contractor] [subcontractor] [materialman] hereby agrees that immediately upon the purchase by [contractor] [subcontractor] [materialman] of any *building material to be incorporated into the Premises*, or of any building materials to be incorporated in improvements made thereto, such materials shall become the sole property of Battery Park City Authority ("BPCA"), a public benefit corporation, notwithstanding that such materials have not been incorporated in, or made a part of, such Premises at the time of such purchase; and [contractor] [subcontractor] [materialman] shall look solely to [Tenant] [contractor] [subcontractor] for payment in connection with the purchase of any such materials, it being expressly understood that neither Landlord, . . . nor BPCA shall be liable in any manner for payment or otherwise to [contractor] [subcontractor] [materialman] in connection with the purchase of any such materials and neither Landlord, . . . nor BPCA shall have any obligation to pay any compensation to [contractor] [subcontractor] [materialman] by reason of such materials becoming the sole property of BPCA . . . . (Emphasis added.)

7. Article 10, section 10.01 provides, in relevant part, as follows:

> Tenant shall, at its sole cost and expense, keep and maintain the Premises and each and every part thereof in good repair, order and condition and make all *non-structural repairs* thereto *not affecting the base Building systems*. Tenant shall promptly notify Landlord of all structural and non-structural repairs affecting the base Building systems required to be made to the Premises and *if the necessity for any of such repairs shall have been occasioned by any action, omission to act or negligence of Tenant or Tenant's agents, employees or contractors*, then Landlord, at Tenant's sole cost and expense, shall make or cause to be made all such structural and non-structural repairs to the Premises and Tenant, upon demand by Landlord, shall pay to Landlord, as Additional Rent, an amount equal to Landlord's cost thereof . . . . (Emphasis added.)

8. Article 4, section 4.10(C), pertaining to petitioner's share of an extensive and broadly inclusive list of general operating expenses for the Landlord's premises, provides, in relevant part, as follows:

> The term "Operating Expenses" shall mean the aggregate of all costs and expenses (*and taxes thereon, if any*) paid or incurred by Landlord or on behalf of Landlord with respect to the operation, cleaning, repair, safety, management, security and maintenance of the Parcel Retail Areas and with respect to any services or facilities provided the tenants thereof. . . . (Emphasis added.)

9. Article 7, section 7.03 provides, in relevant part, that petitioner (as Tenant) shall :

> P. keep the ventilating hoods over ranges and cooking equipment and duct work to the main vertical risers clean, in a manner and under conditions reasonably satisfactory to Landlord, keep all plumbing in the Premises and sanitary systems and installations serving the Premises in a good state of repair and operating condition to the points they connect with the main vertical risers and stacks of the Building, bag and remove all rubbish and other debris from the Premises daily during hours and through areas designated by Landlord to the Building's designated disposal area under conditions approved by Landlord;
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> Q. install all necessary and proper grease traps or other apparatus and keep the same clean and maintained in good order and repair for the purpose of preventing any stoppage or interference with the general plumbing or sewerage system of the Building of which the Premises form a part emanating from the Premises. Tenant will, at is sole cost and expense, promptly remove and/or repair any stoppage or interference with said general plumbing or sewerage system due to the carelessness, neglect, improper conduct, acts of omission or commission, or other cause of Tenant, its agents, licensees, invitees, or employees or otherwise, originating from the Premises;
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> * * *
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> S. shall maintain a fire suppression system similar to Ansul in good working condition throughout the term of this Lease, and shall install and maintain such equipment and such service contracts as may be required at any time to maintain the lowest insurance premiums available for the uses conducted in the Premises. . . .

10. There is no claim that O & Y, or its successor Brookfield Properties, or petitioner are tax exempt entities in their own right. In the same manner, there is no dispute that BPCA is an entity entitled to tax exemption per Tax Law § 1116(a)(1).

11. On April 27, 1999, the Division of Taxation ("Division") received from petitioner an application for refund of sales tax paid by petitioner for the period "11/30/93 through present." This claim, seeking a refund in the amount of $75,000.00, is dated April 22, 1999. As a result, the term "present," as used to specify the end date of the refund period in petitioner's claim, is presumed to mean through such April 22, 1999 date. The basis for petitioner's claim is set forth on its refund application as follows:

> Claimant applies for a full refund, with interest, of all sales and use tax improperly collected from and paid by claimant on services rendered and materials supplied in connection with its business operations in a tax exempt property.
>
> The rael [sic] property occupied by claimant is owned by a tax exempt organization pursuant to Tax Law section 1116(a)(1).
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> Claimant's application is based upon the following:
>
> 1. Services and materials purchased in connection with capital improvement work;
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> 2. Services and materials purchased in connection with the repair, improvement, alteration rebuilding and care of real property owned by a tax exempt organization;
>
> 3. Services and materials incorporated into or used upon the real property of a tax exempt organization which upon incorporation into the real property became the property of the tax exempt organization.

The cover letter accompanying petitioner's application stated that "[s]ince the supporting documentation for this application is voluminous, we will supply it at a time and place that is most convenient to you."

12. On June 8, 1999, the Division made a request for worksheets and exemption certificates pertaining to the foregoing refund claim. On September 7, 1999, the Division's desk audit unit received a responding cover letter from petitioner's representative dated September 1,

1999 together with an attached "schedule of the items making up the refund claim for sales tax overpaid." The attached five-page schedule ("the September 1, 1999 schedule") was presented in columnar format and carried headings labeled "date," "vendor," "amount," "tax pd." and "description." All of the dates were month, day and year specific, with the exception of 4 entries which listed only a year, and 15 entries for which no date was listed. The schedule lists ten different vendors to whom amounts were paid by petitioner based on invoices issued by such vendors. The final column provides a cryptic "description" of the purpose for each of the amounts expended. Petitioner's submission of the schedule did not include the submission of any of the invoices upon which the schedule was premised, or of any worksheets or exemption certificates as requested.

13. While petitioner's application sought a refund of $75,000.00, the tax claimed as paid per the September 1, 1999 schedule totaled only $14,763.76, as follows:

VENDOR	AMOUNT OF TAX
O & Y	$ 6,337.61
Otis Elevator	1,420.55
International Service Systems ("ISS")	3,539.80
T.McCaffrey-Electrical	968.18
MacFelder, Inc.	248.20
Dee's Associated, Inc.	335.53
Kitchen Works	1,300.12
Farrugia Plumbing	185.03
Sentinal Fire Control, Inc.	59.14
ABC Awning	369.60
TOTAL	$14,763.76

14. By letters dated January 5, 2000 and February 15, 2000, the Division's auditor requested that petitioner provide a revised schedule "listing only the expenditures made for materials incorporated into the real property of the exempt organization and invoices for each of such expenditures." The January 5, 2000 letter (a copy of which was included with the February 15, 2000 letter) outlined the Division's position that exemption under Tax Law § 1115(a)(15) and (16) pertained to materials used in constructing, improving, maintaining, servicing or repairing real property of an exempt organization to the extent that such materials become an integral component part of the structure, building or real property of such an organization, but not to purchases of maintenance and repair services performed on real property of an exempt organization.

15. Petitioner did not respond to either of the foregoing letters and, by a letter dated March 27, 2000, the Division advised petitioner that its claim for refund was denied in full. In turn, petitioner challenged the denial of its claim by filing a petition with the Division of Tax Appeals. This petition specified the amount of refund claimed as $75,000.00 and provided as follows:

> The Commissioner erred in denying the Petitioner's application for a sales tax refund which was based on the fact that Petitioner's purchasers [sic] were of capital improvement services and materials; services and materials purchased in connection with the repair, improvement, alteration, rebuilding and care of real property owned by a tax exempt entity; services and materials incorporated into or used upon real property of a tax exempt entity which upon incorporation into the real property, became the property of the tax exempt entity.

16. The Division filed an answer to the petition. At the same time, the Division filed a Demand for a Bill of Particulars ("Demand") and also filed a Request for Admissions ("Request"). The Division's Request sought admission of the following three facts:

a) the total dollar value of petitioner's refund claim [representing the aggregate of the amounts in the "Tax Pd" column of petitioner's September 1, 1999 schedule (see Finding of Fact "13")] is $14,763.76;

b) the total dollar value of petitioner's refund claim [as set forth in the application for refund and in the petition] is $75,000.00;

c) the total dollar value of petitioner's refund claim is overstated, both in the application for refund and in the petition, by $60,236.24.

17. It is undisputed that petitioner did not respond to the Demand by filing a Bill of Particulars, or to the Request by either admitting, denying or denying sufficient knowledge to admit or deny with respect to the three facts for which admission was sought. It is also undisputed that the Division did not move at any point to compel compliance or seek sanctions for petitioner's failure to comply with regard to the Demand. In accordance with 20 NYCRR 3000.6(b)(3), the Division was not required to move to compel compliance or seek sanctions with respect to its Request.

18. At the hearing in this matter, petitioner introduced into evidence several groups of invoices showing sales tax paid on its purchases from some 15 different vendors. These invoices form the basis of petitioner's claim for a refund in the amount of $60,494.14 (as totaled from such invoices), as follows:[1]

INVOICE NUMBER	SUPPLIER NAME	TAX AMOUNT
8	Olympia and York	$ 6,339.10
9	WPF Retail Co., LP	33,912.79
10	Otis Elevator	1,420.23

[1] There are 22 Exhibits (Exhibits "8" through "29") each of which is comprised of an invoice or a group of invoices. However, there are only 15 vendors from whom petitioner made purchases. The difference between the number of exhibits and the number of vendors results because certain vendors' invoices (e.g., Otis Elevator) are grouped into two separate exhibits.

11	Otis Elevator	1,767.44
12	Action Glass Co., Inc.	499.93
13	International Service Systems	3,566.93
14	International Service Systems	442.68
15	Sentinel Fire Control, Inc.	59.14
16	Multiplex Electrical Services	478.50
17	ABC Awning Co. Inc.	369.60
18	Kitchen Works	1,300.12
19	Kitcheneering, Inc.	612.56
20	Farrugia Plumbing & Heating	185.63
21	Mac Felder, Inc.	248.20
22	Mac Felder, Inc.	1,057.43
23	T. McCaffrey & T. McGover	968.18
24	T. McCaffrey & T. McGover	33.00
25	Dee's Associated, Inc.	335.53
26	Dee's Associated, Inc.	4,542.06
27	Donnelly Mechanical Corp.	541.67
28	Scientific Fire Prevention	1,615.42
29	Sentinal Fire Control, Inc.	198.00
TOTAL	----------	**60,494.14**[2]

19. At hearing, petitioner presented the testimony of Peter Rooney, a certified public accountant who served as petitioner's accountant during the period in issue. Mr. Rooney's role

[2] Comparing the invoices submitted at hearing to petitioner's September 1, 1999 schedule reveals that invoices for five vendors who were not listed on the September 1, 1999 schedule were included in the evidence submitted at hearing. Those five vendors are: WFP Retail Co., LP; Action Glass Co., Inc.; Multiplex Electrical Services; Kitcheneering, Inc.; and Donnelly Mechanical Corp. Furthermore, invoices for certain transactions which were not listed on petitioner's September 1, 1999 schedule were submitted at hearing for some vendors, resulting in an increase to the amount of tax for such vendors over that shown on the September 1, 1999 schedule.

with petitioner was to serve as its in-house accounting department. In this role, Mr. Rooney received and processed all of petitioner's invoices (bills) for payment, including writing (cutting) the payment checks for all such bills and thereafter filing the invoices. Upon receipt of an invoice, Mr. Rooney would match that invoice to the related work order, check to make sure that the invoice had not already been paid, and verify that the last-past bill to that vendor had been paid. Mr. Rooney explained that such careful tracking was important in light of petitioner's business cycle. That is, petitioner typically was busy and had a better cash flow in the summer months as opposed to the much slower winter months. As a result, winter invoices were sometimes not paid promptly but rather were held until the summer cash flow increase at which time petitioner "caught up." Petitioner's landlord was aware of this business cycle and apparently accepted petitioner's method of operating and payment. However, given the time period differences, Mr. Rooney took pains to accurately track petitioner's bills and the payments thereof.

20. The largest dollar component of petitioner's claim involves tax shown on invoices petitioner received from its landlord, found in Exhibit "8" pertaining to O & Y ($6,339.10) and in Exhibit "9" pertaining to WFP Retail Co., LP ($33,912.79), respectively.[3] The type of work involved may be generally described as cleaning and maintenance services which were required to be performed on an ongoing basis per petitioner's lease. The charges were nearly always billed on a "time and materials basis," although on occasion a charge would be made on an estimated basis.

21. Review of the invoices submitted as Exhibits "8" and "9", and of the description column of petitioner's September 1, 1999 schedule, reveals that much of the work involved

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[3] WFP Retail Co., LP appears to have been a subsidiary of petitioner's landlord.

regularly scheduled recurring items such as "fan coil maintenance," "fan system cleaning," "coil unit repairs," "Class E maintenance" (described generally as fire alarm system maintenance), "trench coil maintenance," "checking air conditioning units," and the like. In addition, certain invoices, as well as petitioner's September 1, 1999 schedule, indicate that the charges were for "labor," including "engineering services," "responding to fire alarms" and "re-setting the systems," "tracing leaks," "assisting fire department," "checking for noise," "sprinkler systems work," "responding to a flood call," and "coordinating work." A few of the invoices reflect mixed charges for both labor and materials, including replacing a water meter and panel, removal of planters and dirt, new electrical installation (described more specifically as "syrup leak down to P-5 level from Ed Moran's soda machine"), and installing new fan coil motors. In addition to the foregoing types of charges, the invoices from Exhibit "9" include billings for electricity. These billings show, as provided for in petitioner's lease at Article 11, section 11.01(A), that the electricity charges were based on meter readings, and that they included the imposition of sales tax.

22. Petitioner's Hudson River Club restaurant was located on the second floor of the building, and there was an elevator from the ground floor to the second floor which provided access to and served only petitioner's premises. Exhibits "10" and "11" consist of monthly invoices for maintenance of this elevator pursuant to a maintenance service contract between petitioner and Otis Elevator Company. Each of the invoices in Exhibits "10" and "11", save for one, lists the monthly service period, the contract amount, the sales tax amount, and the resulting total amount, with no charges for any materials therein.[4] Exhibit "11" also includes copies of

[4] The elevator maintenance contract amount is subject to periodic adjustment pursuant to the contract terms. Exhibits "10" and "11" include the periodic notices from Otis to petitioner explaining the calculation of the upcoming contract dollar amount change. In turn, the invoices subsequent to such notices reflect such contract

checks drawn on petitioner's account at Citibank in payment of the invoices included in Exhibit "11".

The one different invoice, found at page 42 of Exhibit "11", is identified as invoice number GD25220001 dated March 24, 1998 . This invoice includes the description "furnish and install the Otis Handsoff phone," at a cost of $950.00, plus tax of $78.38, for a total of $1,028.38. The invoice does not further break down or differentiate the total charge between materials (presumably the phone) and installation labor. Exhibit "11" includes a photocopy of a Citibank check in payment of this total invoice amount. Petitioner's September 1, 1999 schedule describes all of the Otis Elevator charges as "monthly service charge."

23. The remaining exhibits offered in support of petitioner's claim involve groups of invoices for purchases from some 12 different vendors (other than petitioner's landlord), as follows:[5]

(i) Exhibit "12"–Action Glass Co, Inc.: Petitioner provided nine invoices for purchases from Action Glass Co., Inc. totaling $6,505.81, including sales tax of $499.93. According to Mr. Rooney, Action Glass replaced broken glass panes, primarily in the doors at petitioner's Edward Moran Bar premises. Each of the invoices describes the bill to be for the "installation" of glass. None of the invoices specify or differentiate labor costs from material costs in the total charge listed thereon. Each invoice is accompanied by a photocopy of a Citibank payment check for the total amount shown on the invoice, including tax.

(ii) Exhibits "13" and "14"–International Service Systems: Petitioner provided numerous invoices for purchases from International Service System, Inc. ("ISS") showing tax in the

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amount changes.

[5] As described, some vendors' invoices are included in two separate exhibits.

aggregate amount of $4,009.61 on purchases of exterior window cleaning and pest exterminating services. Extermination service charges and window cleaning services are listed separately (as line items) on the invoices, although tax is imposed on the total invoice charge for both extermination and window cleaning services.[6] Petitioner seeks a refund of the tax paid on the regular recurring window cleaning services, the cost of which was generally less than $100.00 per month for Edward Moran's Bar and Grill and approximately $300.00 per month for Hudson River Club, upon the assertion that the same was required under the lease and was performed in order to maintain the landlord's property in a condition of good repair and safety. Petitioner's September 1,1999 schedule describes all of the ISS charges as "window cleaning." The invoices in Exhibit "14" are accompanied by photocopies of Citibank payment checks in the amounts of the invoices, including tax shown thereon.

(iii) Exhibits "15" and "29"–Sentinel Fire Control, Inc.: Petitioner provided a total of four invoices (three in Exhibit "15" and one in Exhibit "29") for charges from Sentinel Fire Control, Inc. totaling $3,374.61, which included sales tax charged in the aggregate amount of $257.14. The charges were described in petitioner's September 1, 1999 schedule as "installed new piping" and in testimony as maintaining the fire suppression system in petitioner's range hoods and maintaining the fire sprinklers. The invoices in Exhibit "15" use the terms "installed," "supplied and installed," "extended piping and detection to protect fryers, changed defective nozzles as needed." None of the invoices separately states, identifies or differentiates materials charges from labor or installation charges. The one invoice constituting Exhibit "29" states "supplied

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[6] Petitioner conceded that pest extermination charges, all of which appear on Exhibit "13" invoices, were properly subject to sales tax as an ongoing operating expense of petitioner's business. In fact, Article 13, § 13.01(A) of petitioner's lease requires, *inter alia*, the performance of pest extermination services on an ongoing basis. Based on petitioner's concession alone, tax in the amount of $2,622.92 on the ISS charges for such extermination services is not subject to refund, and thus petitioner's refund claim amount must be reduced in any event by such $2,622.92 amount.

and installed R102 cylinder and assembly to existing fire system," and includes a copy of a Citibank check in payment of the full invoice amount including tax. This invoice carries a handwritten notation "capitol [sic]–new ansul system." The charge shown is in the amount of $2,400.00 plus tax of $198.00 for a total amount of $2,598.00.

(iv) Exhibit "16"–Multiplex Electrical Services: Petitioner introduced two invoices, together with copies of Citibank payment checks for the full amount of each of such invoices including tax, for charges from Multiplex Electrical Services in the aggregate amount of $6,278.50 plus tax in the amount of $478.50. These invoices and amounts were not included as part of petitioner's September 1, 1999 schedule. The charges were described in testimony as the electrical work for the build out of the Market Bar. The Market Bar, in turn, was described as space formerly leased by petitioner for storage use, which was converted into a small bar area intended to serve primarily commodity traders. The terms and provisions in petitioner's lease for the Market Bar, dated September 23, 1997, are nearly identical to the terms and provisions in petitioner's lease with O & Y. The invoices in Exhibit "16" describe the work performed only as "additions and modifications," include no description of any materials involved, and make no distinction between materials charges versus labor charges.

(v) Exhibit "17"–A.B.C. Awning Co., Inc.: Petitioner submitted an invoice dated July 1, 1993 from A.B.C. Awning Co., Inc., showing a charge in the aggregate amount of $4,849.60, including tax in the amount of $360.60. The invoice carries the description "Complete Canopy with Underliner," breaks the charge into a deposit amount of $2,240.00 and a balance due of $2,609.60, and includes an attached Chase Manhattan bank check in payment of the deposit amount. Petitioner's September 1, 1999 schedule carries the description "installed new canopy." Mr. Rooney described this item as a canvas canopy at the entrance to the Hudson River Club,

which included "hard-wired" lighting underneath and a sign at the end of the canopy (apparently embroidered into the canvas) identifying the Hudson River Club. The canvas canopy was supported by a metal framework, which was bolted to the building at one end, with brass poles holding up the frame and canopy at the far end. The invoice makes no distinction between materials charges (i.e., the cost of the canopy, supporting frame and any attachment or wiring hardware) versus labor or installation charges.

(vi) Exhibit "18"–Kitchen Works: Petitioner submitted two invoices from Kitchen Works for charges totaling $17,059.12, including tax in the amount of $1,300.12. Petitioner's September 1, 1999 schedule describes these as charges as "installed new grill" and "installed new ovens." In testimony these invoices were described as charges for the purchase, delivery and installation of grills, fryers and ranges. The ranges were further described as heavy stoves which were bolted to the floor and connected to a gas supply pipe. The electric fryers were described as hard-wired to an electrical box as opposed to being plug-in units.

Invoice number 27237, dated May 19, 1995, carries the description "removed old grill, delivered and installed new grill," at a total cost of $4,231.50 including tax of $322.50. The invoice does not separately state or distinguish between the costs for the new grill versus removal charges for the old grill, or delivery or installation charges for the new grill.

Invoice number 59, dated February 9, 1996, for a total amount of $12,827.62 including tax in the amount of $977.62, reflects the following information:

Description of Work	Amount
2) Garland Salamander IR 1,500.00	$3,000.00
1) " Heavy Duty Six Burner with Conv. Oven	3,450.00
1) " " " " " Reg Oven	3,200.00
2) Pitco Fryers with 5 Year Tank Warranty 1,100.00	2,200.00

All prices include installation and removal of old including piping.

Total Material	$11,850.00
Tax	977.62
Pay this amount	$12,877.62

(vii) Exhibit "19"–Kitcheneering, Inc.: Petitioner submitted four invoices for charges from Kitcheneering, Inc. in the aggregate amount of $7,997.92, including tax in the aggregate amount of $612.56. These invoices were not included in petitioner's September 1, 1999 schedule. In testimony, the charges were described as being for the purchase and installation of a new stove and new fryers, and for the temporary relocation of an existing fryer from one restaurant to the other for use pending delivery and installation of a new fryer, after which the relocated fryer was to be returned to its original location. The invoices provide the following information as to costs and descriptions:

> Invoice No. 1109--Invoice amount (incl. tax) $3,72.15-- one restaurant series 6-Burner range w/ convection oven base; natural gas; w/ single overshelf.
>
> Invoice No. 1083–Invoice amount (incl. tax) $460.06--Switch fryers. Job to be done at night. Job includes disconnect and remove (2) existing Garland fryers from main cookline at Hudson River Club. Also, disconnect and temporarily install into HRC (1) Pitco fryer from Edward Moran's. At the time of installation of (2) new Jade fryers, will reinstall Pitco fryer to Edward Moran's. Includes all necessary pipings, fittings and materials.
>
> Invoice No. 1096–Invoice amount (incl. tax) $3,875.35–two Pitco 14S fryer with stainless steel tank, s/s exterior, 2-baskets. 10 yr warranty on tank. Job to be done at night. Job includes removal of old equipment, delivery, assembly, and installation of new equipment. Test for correct operation of all new units.
>
> Invoice No. 1153–Invoice amount (incl. tax)–$3,348.17–One Jade 40 lb. Fryer, stainless steel tank, one Jade 18" tubular double overshelf, one Garland 17" backguard flue riser. Job to be done at night. Job includes removal of old equipment, delivery, assembly, and installation of new equipment. Test for correct operation of all new units.

The invoices do not separately state or distinguish between the costs for the new items versus the costs for disconnection, relocation or removal of old units, or the delivery and installation of the new units. Invoice number 1083 appears to involve only switching the location of a fryer with no indication that any new items were purchased.

(viii) Exhibit "20"–Farrugia Plumbing and Heating: Petitioner submitted three invoices from Farrugia Plumbing and Heating for charges totaling $2,435.63, including tax in the aggregate amount of $185.63. Petitioner's September 1, 1999 schedule describes these charges as "installed new pipes," "relocated sprinkler heads" and "installed new sink." In testimony, the charges were described as plumbing maintenance involving drain pipes, a wash basin and an ice machine. The invoices, which are dated but not otherwise numbered, provide the following descriptive language:

> February 23, 1994–Replaced the copper 1" drain pipe on A Bar sink with 1½" cast iron pipe. Connected 2 sinks into one line. Drilled a hole thru [sic] the brass plate on the floor drain in order to insure water goes into floor drain and not on the floor as before.
>
> One mechanic 4 hrs. regular time @ $90.00.....$360.00
> Material.....100.00
> Subtotal.....$460.00
> Tax.....37.95
> Total.....$497.95
>
> March 30, 1994–Disconnected 2 sprinkler heads around the ice maker in machine. Relocated the 2 sprinkler heads after ice maker was installed. Rebuilt faucet Bar C. Reinstalled sink that fell off of the wall in HRC. Also rebuilt faucet
>
> One mechanic 8 hours regular time @ $90.00...$720.00
> Material.....150.00
> Subtotal.....$870.00
> Tax.....71.78
> Total.....$941.78
>
> September 8, 1994–Provided and installed wash basin in mens room west.

Price as agreed.....$920.00
Tax.....75.90
Total.....$995.90

The "material" in the first two invoices is not further identified, and there is no breakdown between the cost of the wash basin and any related (or included) installation charge in the third invoice.

(ix) Exhibits "21" and "22"–MacFelder, Inc.: Petitioner submitted 20 invoices for charges by MacFelder, Inc. in the aggregate amount of $17,143.27 including tax in the aggregate amount of $1,305.63. The six invoices in Exhibit "21" are included in petitioner's September 1, 1999 schedule and describe the charges as "plumbing installation." The 14 invoices in Exhibit "22" were not included in petitioner's September 1, 1999 schedule.

Each of the six invoices in Exhibit "21" includes a description of the work performed, lists the materials involved, and thereafter separately states the charges for materials and for labor, subtotals the same, calculates sales tax thereon, and arrives at a resulting total amount due. Review of the six invoices in Exhibit "21" reveals that the nature of the work involved maintenance and repairs to existing plumbing systems, including locating and repairing or replacing leaking, damaged or defective piping, valves, gauges, faucets, toilets, etc., in kitchens and bathrooms and testing such systems upon repair or replacement. The materials charges were in each case substantially less than the labor charges as follows:

INVOICE NO.	MATERIAL	LABOR	TAX	TOTAL CHARGE
3193	$ 43.00	$ 212.00	$ 21.00	$ 277.00
3683	15.00	170.00	15.00	201.00
4082	19.00	216.00	19.00	255.00
4081	118.00	170.00	23.00	312.00
4936	322.00	1,265.00	131.00	1,718.00
6232	29.20	437.50	38.50	505.20
Total	$546.20	$2,470.50	$247.50	$3,264.20

The 14 invoices in Exhibit "22" reflect the same types of maintenance and repair work as above, including clearing plugged drains and waste pipes. A representative invoice, number 00931/17551 dated May 17, 1999 and marked as page 15 of Exhibit "22", provides the following information:

DATE	DESCRIPTION OF WORK PERFORMED
5/13/99	Repaired leak at 3 compartment sink. Disconnected & removed defective Franklyn waste & replaced with new. Repaired 2 other Franklyn waste, removed Franklyn wastes & furnished & installed new gaskets. Repaired leak at fish prep hand sink. Removed defective section of waste & replaced with new.

MATERIAL

1 - 3½" Franklyn waste complete
2 - 3½ Franklyn waste gaskets
1 - 1½ NH clamps
1 - 1½ galv. nipple
1 - 1½ flgd waste bend

Material	$111.20
Labor	$429.75
Total	$540.95
Tax	$ 44.62
Total	$585.57

A second representative invoice numbered 12928 and dated April 29, 1997, describes work

performed at Moran's Bar & Grill as follows:

LADIES' ROOM:

Repaired basin faucet. Reseat, rewashered and repacked same. Repaired leak at waste line. Replaced leaky section with new. Cleared stoppage of basin waste. Cleaned same electrically and tested.

MATERIAL:

1 - 1½" X 1½" slip nut and washer

1 - 1¼" x 1¼" chrome plated trap
1 - 1½" chrome plated tubular box escutcheon
1 - 1¼" x 12" chrome plated T tailpiece
1 - 1¼" chrome plated grid strainer
2 - Kohler stems
2 - 1¼" x 4" toggle bolts

Material	$161.42
Labor	$671.25
Tax	$ 68.69
Total	$901.36

Five of the invoices in Exhibit "22" include charges for labor only, with no charges for materials.

(x) Exhibits "23" and "24"–T. McCaffrey & T. McGovern: Petitioner submitted 12 invoices from T. McCaffrey & T. McGovern for charges totaling $12,852.08 including tax in the amount of $1,001.18. The 11 invoices comprising Exhibit "23" are included on petitioner's September 1, 1999 schedule and are described as being for "electrical installation." The one invoice in Exhibit "24" was not included in petitioner's September 1 1999 schedule. The charges in these invoices were described in testimony as being incurred for routine general electrical work, including troubleshooting electrical problems, repairing or replacing broken or defective electrical items and wiring, and installing circuits, switches, lights, receptacles, and the like. A representative invoice, marked as page 3 of Exhibit "23" and dated December 27, 1994, shows a billing to petitioner for the following work:

> Installed wiring for 3 20 amp lines in bar area.
> Supplied and installed one 1000 watt dimmer for low voltage lighting.
> Installed one line for window lighting.
> Rewire one food warmer.
> Replaced burned out wires for receptacles.
> Repair short circuit in receptacle in office.

Each of the invoices sets forth its charges as "Labor and material," and does not separate labor costs from material costs. Tax is imposed on the entire charge shown on each invoice. Included with the invoice in Exhibit "24" is a copy of a Citibank check in payment of the entire amount of such invoice, including the tax shown thereon.

(xi) Exhibits "25" and "26"–Dee's Associated, Inc.: Petitioner submitted 5 invoices as Exhibit "25" and 134 invoices as Exhibit "26" for charges from Dee's Associated, Inc. In testimony, these charges were described as being for various items and services involving refrigeration. Tax in the aggregate amount of $335.53 was shown on the invoices in Exhibit "25", while tax in the aggregate amount of $4,542.06 was shown on the invoices in Exhibit "26".

The invoices from Exhibit "25" were included in petitioner's September 1, 1999 schedule and reflect the descriptions "labor - refrigeration inspection," "replaced condensing unit," "installed floor," and "installed and piped new freezer."

The invoices from Exhibit "26" were not included in petitioner's September 1, 1999 schedule. Review of the invoices reveals that the work primarily involved ongoing troubleshooting, repair and maintenance of various pieces of refrigeration equipment, including refrigerators, ice makers, freezers, coolers and the like. Some invoices indicated charges for labor only, while others indicated charges for both labor and materials. In some cases, the invoice description section indicates "picked up and installed" and "supplied and installed" various component parts of existing refrigeration equipment, including fan motors, fan blades, compressors, driers, evaporators, gaskets, door hinges, and the like. Many of the invoices indicate that, as part of the same work, Dee's personnel evacuated and recovered freon from the units and thereafter recharged the units (with freon). While the portion of the charge for materials is, in general, stated separately from the charges for labor, the invoices do not

distinguish between component parts of the equipment and items such as freon. In addition, several invoices involve troubleshooting followed by a repair which included chemical cleaning of a unit or a line. These invoices indicate a charge for materials and a charge for labor. The materials are not specified in particular, but presumably are the cleaning chemicals used. Representative invoices describe the type of work provided as follows:

Exhibit "25" - June 16, 1994 - Invoice No. 57583:

> Recovered freon as per EPA Mandate. Replaced condensing unit. Changed drier. Pulled vacuum [sic]. Charged and checked operation.

Exhibit "26" - January 28, 1998 - Invoice No. 66337:

> Checked unit. Found compressor inefficient and condenser clogged with grease. Recovered freon as per EPA Mandate. Picked up and installed new condensing unit. Changed drier and site glass. Evacuated, leak checked and charged system.

Exhibit "26" - July 21, 1999 - Invoice No. 10468:

> Checked unit. Found bin stat snapped and chute assembly off bin. Replaced bin stat and mounted chute assembly. Checked operation.

Exhibit "26" - August 23, 1999 - Invoice No. 10694:

> Checked unit. Found system low on freon. Leak checked unit, found no leak, recharged and checked operation.

A few invoices pertained to the supply and installation of larger dollar items including a walk-in beer box (refrigerator or cooler), a Perlite beer system (presumably a keg beer dispensing system), an ice machine, and an undercounter freezer. The specifics concerning the method of installation of these items, including their method of affixation to the premises, were not further developed or detailed in the record. Finally, Invoice No. 56865 from Exhibit "25", dated January 28, 1994, provides as follows:

WALK IN BOXES

Customer complained water leaking from seams. Found dripping coming from other a/c duct work, chill water lines, or thru floor. *Must get building to repair.* (Emphasis supplied.)

(xii) Exhibit "27"–Donnelly Mechanical Corp.: Petitioner provided nine invoices for charges from Donnelly Mechanical Corp. totaling $7,107.35, including tax in the amount of $541.67. Donnelly Mechanical was hired to provide maintenance of ceiling air conditioning units which operated to provide additional cooling to those areas where the main air conditioning system was not sufficient. Four of the invoices reflect charges for labor only, although the description portion of the invoices recommends, in some instances, the replacement of a worn part of one of the units. The remaining five invoices reflect separate charges for materials and labor. In each instance, the material charge is far lower than the labor charge. The descriptions of the work performed are similar in nature and scope. Representative invoices describe the work performed as follows:

Exhibit "27" - October 31, 1997 - Invoice No. S25177:

Responded to a call to check noisy unit and cooling problems. Checked unit above min bar area and found defective belt. Installed new belt and check operation of unit. Checked units serving main office and found two chilled water fans not running. Reset one fan and recommend replacing other fan. Also found two supply diffusers on ceiling not supplying air. Recommend performing a pm on entire ac system. Also checked first floor units and found both stats in off position. Reset and left units running.

1 belt $10.56

Material $10.56
Labor $380.00

Exhibit "27" - August 4, 1997 - Invoice No. S23717:

Responded to a call for water leaking from ceiling. Checked and found condensation leaking from chilled water piping Recommend pipe is insulated with new insulation. Left unit running.

Duct wrap and tape $123.32

Material $123.32
Labor $576.00

The largest dollar invoice was Invoice No. S25008 dated October 18, 1997, which provides as follows: "As per Mr. Eric Friedman, arrived to perform major maintenance on a/c inspection. Replaced all filters and belts." Materials on this invoice totaled $445.62 and are identified as "filters, belts and filter media." The labor charge on this invoice totaled $2,908.00.

(xiii) Exhibit "28"–Scientific Fire Prevention Co.: Petitioner provided 23 invoices from Scientific Fire Prevention Co. for charges totaling $21,189.88, including tax in the amount of $1,615.42. Mr. Rooney noted that Scientific was hired to perform maintenance of the grease exhaust fan systems over the cooking surfaces. Each of the invoices carries the identical description of the work performed, to wit, "grease exhaust system maint.," with one exception where the description reads "emergency to check blower." The charges, all of which include the imposition of tax, are in the recurring amounts of $460.06, for work at Edward Moran's Bar and Grill, and $1,455.96, for work at Hudson River Club. The one exception involved a charge of $113.66 for the emergency check at Edward Moran's Bar and Grill. None of the invoices indicates any charges for materials. Copies of Citibank checks in payment of the invoices reveal that the full amount of each invoice, including tax charged thereon, was paid.[7]

SUMMARY OF THE PARTIES POSITIONS

24. Petitioner takes the position that all of the expenses in question, including services billed under maintenance service contracts (e.g., elevator maintenance, window washing,

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[7] At hearing, petitioner voluntarily withdrew one invoice from those initially offered as part of Exhibit "28", specifically an invoice dated October 22, 1997 showing tax in the amount of $84.55, on the basis that petitioner's witnesses could offer no information concerning the nature of the work involved or the charge for such work. Such invoice and tax amount is not included in the total tax amount shown for Scientific Fire Prevention in Finding of Fact "20".

exhaust fan and duct cleaning, etc.) as well as repairs including materials used in connection therewith and purchases of items of tangible personal property, were incurred in order to keep the premises in a good and safe condition. Petitioner maintains that it was required, under the terms of its lease, to incur all such charges. Petitioner asserts that the items purchased became petitioner's landlord's property, or cared for, maintained or restored such property, and thus claims the charges for such purchases should be exempt by virtue of the landlord's relationship with the owner of the premises, BPCA, a tax exempt entity. In short, petitioner argues that the tax exempt status of BPCA under Tax Law § 1116(a)(1) carries down to petitioner's landlord, and through to petitioner with regard to any tangible personal property and any services purchased in connection with maintenance or repair of the premises. In addition, petitioner claims that the lease required the purchase of certain services and related materials from its landlord, and characterized the charges therefor to be "additional rent." Hence, petitioner argues that such charges, as payments of rent, are not properly subject to tax in any event.

25. In the alternative, petitioner maintains that its purchases were exempt from the imposition of sales tax under Tax Law § 1115(a)(15) and (16), in that such purchases consisted of tangible personal property used in adding to, altering or improving, or maintaining, servicing or repairing the real property of an exempt organization (i.e., BPCA). Petitioner further claims that some of its purchases consisted of capital improvements which were exempt from tax pursuant to Tax Law § 1101(b)(9).

26. Petitioner also argues that its method of pursuing its refund claim, and its failure to respond to certain filings made by the Division, including specifically the Request for Admissions, should not serve to limit the dollar amount of its refund. In this regard, petitioner argues that it should receive the full amount of refund attributable to any taxes that it improperly

paid, and maintains that any prejudice to the Division in its ability to respond to the refund claim was cured by the continuation of the hearing to a second date, with the interim period between hearing dates affording the Division a full opportunity to review petitioner's evidentiary submission in substantiation of its claim.

27. Petitioner did not respond directly to the statute of limitations issues raised by the Division (***see***, Finding of Fact "30"). However, by comparing the dollar amounts of tax sought for refund from some of the vendors in the "Summary of Tax Paid" (attached to petitioner's brief) with the amount of tax initially sought for refund in petitioner's September 1, 1999 schedule and with the invoices submitted at hearing, it appears that petitioner at least tacitly concedes that transactions dated after April 22, 1999 (the date of its refund application) are not properly at issue. No such concession is apparent upon review of such schedule or invoices with regard to transactions occurring before September 1, 1993, or during the gap period spanning September 1, 1995 through February 28, 1996 (or for the month of March 1996 with respect to any vendors who may have filed on a part-quarterly [monthly] basis).

28. The Division, in contrast, maintains that petitioner's purchases were not exempt from sales tax under any of the theories advanced by petitioner. First, the Division asserts that exemption under Tax Law § 1116(a)(1) is not available because nothing in the record establishes that petitioner, or its landlord, were either exempt entities themselves or were agents who made the purchases in question on behalf of an exempt entity (BPCA). The Division also asserts that none of the charges paid by petitioner to its landlord (O & Y or its subsidiary WFP Retail Co., LP) represented nontaxable "additional", "ancillary" or "incidental rent" paid, notwithstanding such denomination in petitioner's lease. Rather, the Division points out that such charges were provided on a "fee for service" basis with petitioner paying for the economic value of such

services. Moreover, the Division contends that even if petitioner's landlord was an exempt entity (or the agent of an exempt agency) such charges would be taxable nonetheless as charges for services ordinarily sold by private persons per Tax Law § 1116(a)(1). In this respect, the Division points out that such charges represented ongoing operational expenses for such items as utilities, and protective, storage, cleaning, maintenance and repair services.

29. The Division also maintains that petitioner's purchases of various services were not exempt from sales tax under Tax Law § 1115(a)(15) or (16) because such section only exempts the purchase of tangible personal property that becomes an integral component part of real property, but does not exempt the purchase of services. On this score, the Division points out that many of the charges in question clearly represent services in their entirety as opposed to purchases of tangible personal property. Further, the Division points out that the testimony and other evidence is not sufficiently detailed to establish that any tangible personal property in fact became an integral component part of the realty, questioning petitioner's proof on the permanency of the affixation of any tangible property. The Division also notes that the vast majority of the invoices do not separately state or identify tangible personal property purchases as opposed to charges for services, including installation or other labor charges. The Division points out that under such circumstances the entire invoice charge is subject to tax. Finally, the Division maintains that petitioner has simply failed to establish, by sufficiently detailed evidence, that any of its purchases were for installation of capital improvements. In this regard, as well as with respect to the overall issue of tangible personal property purchased, the Division questions the issue of ownership, both under the terms of the lease ("tenant's property" versus landlord or BPCA property) and in terms of the statutory requirement that the property must become an integral component part of the realty. The Division notes that petitioner admitted to

carrying certain items, none of which were specifically identified, on its books of account and depreciating the same for income tax purposes.

30. The Division also raises a number of procedural grounds, and asserts that petitioner's refund claim must in any event be limited in scope and dollar amount based thereon. First, the Division asserts that any transactions occurring before September 1, 1993, between September 1, 1995 and February 28, 1996 (and during the additional month of March 1996 with respect to any vendors who filed sales tax returns on a part-quarterly [i.e., monthly] basis), and after April 22, 1999, are barred as untimely by operation of the statute of limitations.[8] In addition, the Division points out that petitioners did not submit any proof in substantiation of its claim for refund until hearing, notwithstanding repeated requests for such information. In this regard, the Division points out that petitioner did not submit any information to the Division's desk auditor despite letters requesting the same, did not respond to the Demand, the Request, and a subpoena (served shortly prior to the continued hearing date), and did not file a hearing memorandum in this case. The Division notes specifically that petitioner's failure to respond to the Request resulted in the deemed admission of the facts presented therein. In turn, these admitted facts leave petitioner's refund claim overstated by some $60,236.24, and limited to the $14,763.76, the amount of tax shown on petitioner's September 1, 1999 schedule at most. The Division also posits that the vendors and transactions subject to refund consideration should, on the same basis, be limited to those identified on petitioner's September 1, 1999 schedule. The Division argues that

[8] In connection with the statute of limitations claim, the record establishes that the Division conducted an audit of petitioner's business for the period September 1, 1993 through August 31, 1996, and that as part of this audit petitioner executed consent documents allowing the Division to assess tax for the period September 1, 1993 through August 31, 1995 at any time on or before December 20, 1998.

petitioner's pattern of conduct militates against ignoring or setting aside the consequences of its failure to respond to the Request.

31. Finally, the Division asserts that petitioner's pattern of ignoring process, including most notably its failure to comply with the Division's subpoena, supports drawing negative inferences with regard to any lapses in petitioner's proof. Specifically, the Division refers to any issues of proof concerning whether petitioner has established that tax as shown on the invoices submitted at hearing was in fact paid to all of the vendors as claimed, and with respect to any questions concerning the nature and details of the various purchases at issue.

CONCLUSIONS OF LAW

A. Treated first is the question of whether any portions of petitioner's refund claim are barred by operation of the statute of limitations. Petitioner files its sales tax returns on a quarterly basis. The quarterly periods span June 1 through August 31, September 1 through November 30, December 1 through February 28 (or 29th) and March 1 through May 31, with the requisite sales tax returns being due on the 20th day of the month following the close of the particular quarterly period (Tax Law § 1136[b]). In the case at hand, petitioner's refund application seeks a refund for the period encompassing "11/30/93 through present." November 30, 1993 is the end of one of the four sales tax quarterly periods, to wit, the period spanning September 1, 1993 through November 30, 1993. Hence the beginning period for petitioner's claim would be September 1, 1993, the beginning date for that quarterly period. In turn, it is clear that any transactions occurring prior to such date are barred from consideration not only pursuant to the statute of limitations (Tax Law § 1139[a]), but on the simple basis that they are not encompassed within the period identified in petitioner's application for which refund is sought.

B. Tax Law § 1139(a) provides that a refund of sales tax "paid by the applicant to a person required to collect tax" must be filed "within three years after the tax was payable by the person to the [Commissioner]." Under this general rule, petitioner's application would be timely with respect to any transactions occurring within the three years of sales tax quarterly periods preceding April 22, 1999, to wit, back to March 1, 1996.[9] As a result, it would appear at first glance that any part of the refund claim period which falls within the quarterly periods prior to March 1, 1996 (i.e., periods from September 1, 1993 through February 28, 1996) would be time barred. However, it is undisputed that the Division conducted a sales tax audit of petitioner's business for the period September 1, 1993 through August 31, 1996 ("the audit period"). During the conduct of this audit petitioner executed consent documents pursuant to which the Division was entitled to assess tax for the period September 1, 1993 through August 31, 1995 (the "consented period") at any time on or before December 20, 1998. In turn, Tax Law § 1147(c) extends, by six months, the time within which a refund application may be filed with respect to a consented period (here September 1, 1993 through August 31, 1995). Six months after the December 20, 1998 extended date for the consented period runs until June 20, 1999. Petitioner's refund application, dated April 22, 1999, clearly falls within this extended refund claim period, and thus petitioner's refund claim is timely with respect to the "consented period" September 1, 1993 through August 31, 1995.

As noted previously, the general three-year statute of limitations on refund claims left petitioner's application, dated April 22, 1999, timely in any event from such date back to March 1, 1996. Unfortunately, there exists a period of time, specifically the two quarterly periods

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[9] Three years back from April 22, 1999 dates to April 22, 1996. The sales tax quarterly period encompassing such date spans March 1, 1996 through May 31, 1996.

spanning September 1, 1995 through February 28, 1996 ("the gap period"), which is both *after* the August 31, 1995 end of the consented period and *prior to* the three-year general limitations cut off date of March 1, 1996. There is no claim or evidence that any consent documents were executed with respect to the balance of the audit period, i.e., from September 1, 1995 through August 31, 1996, within which time frame the gap period falls. As a result, this gap period is time barred under Tax Law § 1139(a), and any transactions occurring within such period are barred from consideration for refund.

C. In addition to the foregoing, petitioner's refund claim is dated April 22, 1999, and seeks refund of tax paid "through present." It can only logically be concluded that "present" means the date of the application, to wit, April 22, 1999, since (at that point in time) any later date would have been considered "future." The Division of Tax Appeals has jurisdiction to review refund claims filed with and denied by the Division of Taxation. Denial of a refund claim occurs either by explicit denial, as in this case by the Division's March 27, 2000 denial letter, or by "deemed denial," where six months from the date of the claim passes without denial or grant of refund by the Division (***see*** Tax Law § 1139[b]). It is evident that the Division cannot be said to have had an opportunity to review and act upon transactions the dates of which are subsequent to the filing date of a refund application (i.e., "future" transactions). Such being the case, there would be no action (i.e., explicit or deemed refund claim denial) by the Division subject to review in the Division of Tax Appeals. Hence any transactions occurring on dates after April 22, 1999 are barred from consideration in this matter.[10]

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[10] In addition to the gap period discussed in Conclusion of Law "B" above, the Division also argues that the month of March 1996 could be barred, at least with respect to any of petitioner's vendors who filed sales tax returns on a part-quarterly (i.e., monthly) basis. As noted, Tax Law § 1139(a) provides that a refund claim for tax paid by the applicant to a "person required to collect tax" must be filed within three years after the tax was "payable by such person to the Commissioner." Monthly filers are required to file their returns for each month by the 20th day of the following month (Tax Law § 1136[b]). Under this scenario, a refund claim dated April 22, 1999 would

D. In summary of the foregoing, petitioner's application for refund for the period November 30, 1993 through present is subject to limitation by statute as follows:

> i) transactions occurring between September 1, 1993 and August 31, 1995, and transactions occurring between March 1, 1996 and April 22, 1999, fall within the period of limitations and such periods and transactions are considered timely for statute of limitations purposes.
>
> ii) Transactions occurring prior to September 1, 1993, transactions occurring during the "gap period" of September 1, 1995 through February 28, 1996, and transactions occurring after April 22, 1999 are beyond the period of limitations for claiming a refund and may not be considered in any event.

The Division has identified, and review of the record confirms that, 7 transactions involving tax in the aggregate amount of $496.66 occurred on dates prior to September 1, 1993, 38 transactions involving tax in the aggregate amount of $4,048.86 occurred on dates subsequent to April 22, 1999, and 29 transactions involving tax in the aggregate amount of $2,568.05 occurred on dates during the September 1, 1995 through February 28, 1996 gap period. Furthermore, the dates with regard to some 19 transactions between petitioner and O & Y, involving tax in the

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not be timely for monthly filers for the month of March 1996, since such refund claim would not have been filed within three years after the April 20, 1996 due date for such filer's March 1996 return. Such a result is consistent with the reasoning in ***Matter of Mast*** (Tax Appeals Tribunal, July 23, 1993), which held that a part-quarterly return is a return for purposes of commencing the statute of limitations within which the Division may assess tax (***see, Matter of Klein***, Tax Appeals Tribunal, January 25, 1996; Tax Law § 1147[b]). The difficulty in this case, however, centers on determining which, if any, of petitioner's vendors were part-quarterly filers. The Division alleged that O & Y, Otis Elevator, and "possibly International Service Systems" were such filers. However, the only evidence supporting this assertion is the desk auditor's testimony that he checked the Division's computerized sales tax master file and learned that O & Y and Otis Elevator were monthly filers, and that he was unable to ascertain the filing status of I.S.S. While not casting any specific doubt on the credibility of the auditor's testimony, the Division's position must be balanced against the absence of any printout from the sales tax master file or other documentary evidence establishing the filing status of any of these vendors. Such information is clearly within the possession of the Division and would presumably be easily obtainable (in comparison to the ability of the petitioner to obtain such evidence). Accordingly, it must be concluded that the evidence in the record does not sufficiently establish or warrant concluding that O & Y, Otis Elevator, I.S.S. or any of the other vendors were in fact monthly filers such that a refund based on any transactions occurring in the month of March 1996 should be barred by operation of the statute of limitations. Review of the evidence reveals that there were only four March 1996 transactions which could have been subject to bar in any event, to wit, a March 20, 1996 transaction with Otis Elevator involving tax of $49.53, a March 24, 1996 transaction with O & Y involving tax of $162.78, and two March 1, 1996 transactions with I.S.S. involving tax of $6.27 and $25.76, respectively.

aggregate amount of $1,656.01, are either missing (i.e., no date is provided) or are nonspecific as to date (i.e., only a year is specified), and thus it is not possible to determine or conclude that these transactions fall within the period of limitations. Hence, such 19 transactions are barred from consideration herein. All of the barred transactions are identified in Appendix "A" attached hereto.

E. The maximum possible dollar amount of petitioners's refund claim based on the invoices submitted at hearing (and assuming no limitation based on the Request for Admissions) would be $60,494.14 (***see*** Finding of Fact "18"). In view of the foregoing conclusions, under which certain invoices are barred from consideration per the statute of limitations, there must be (at a minimum) an $8,769.38 reduction in the amount of tax which could be available for refund consideration. The remaining amount potentially available for refund must be further reduced by the $2,622,92 amount of tax imposed on charges for extermination services (***see*** Footnote "6"), which petitioner conceded were a part of the taxable operating expenses of its restaurants. The maximum amount of tax remaining in issue is thus $49,101.84, calculated as follows:

Total tax on all invoices submitted		$60,494.14
less: pre-09/01/93 invoices	$ 496.66	
post-04/22/99 invoices	4,048.66	
gap period invoices	2,568.05	
undated invoices	1,656.01	
		($ 8,769.38)
Subtotal		$51,724.76
less: tax on extermination services		($ 2,622.92)
Total tax remaining at issue		$49,101.84

F. As to the merits of petitioner's refund application the Division maintains, at the outset, that it was severely limited in its ability to "audit" petitioner's claim prior to hearing. The Division specifically notes that petitioner's conduct and method of proceeding essentially precluded the Division from obtaining, among other things, canceled checks, ledgers, journals or

other proof to verify that tax as shown on all of the invoices submitted at hearing had indeed been paid. In essence, this argument is one which questions petitioner's substantiation in general. The Division asserts that petitioner's failure to have submitted any substantiation prior to hearing, and its failure to comply with the Division's subpoena, entitles the Division to the benefit of a negative inference with respect to any questionable areas of substantiation of payment or of qualification for exemption from tax on any of the invoices. Petitioner counters with the assertion that the Division was not harmed in its ability to "audit" the refund claim since the Division requested and was granted a continuance of the hearing, during which time the Division was able to review or "audit" petitioner's submission of documents in support of its claim. Petitioner maintains that in end result, it should receive any refund to which it has established entitlement via documents and testimony, notwithstanding its choice not to provide any substantiation prior to hearing or its admitted failure to respond to the various requests for information, including the subpoena.

G. It is true that petitioner did not provide the Division with the documents requested by subpoena, and that the record does not, for example, include a copy of a canceled check in proof of payment, including tax, for each invoice submitted. In the ordinary course of events, including the review or "audit" of a refund claim, the Division is clearly entitled to challenge whether tax was paid and review documents to establish the same to its satisfaction. In this case, as noted above, petitioner's conduct clearly was a hindrance to the Division in pursuing such proof. It is also clear that the impact of petitioner's conduct necessitated the conduct of an audit as part of the hearing process. A hearing is not the optimal setting in which to conduct an audit. Rather, an audit, including review of a refund claim, should occur at earlier stages. Conduct of such an invoice by invoice review in the less formal setting of an audit as opposed to a hearing

accommodates and encourages a frank and open give and take between the parties. This ordinarily leads to resolution on some issues or transactions or, at the least, helps to identify and crystalize the issues and items in dispute which may then be presented for resolution by formal hearing. Petitioner's manner of proceeding in this case did not allow for such steps to occur. On this score, the Tribunal has observed as follows:

> Petitioner's failure to produce documentation concerning the transactions at issue during the audit is unfortunate since that was the appropriate time for adequate consideration by both parties of the documents and the nature of the transactions they represent. The formal nature of the hearing before the Administrative Law Judge operates against such discussion and analysis. While such documents can be reviewed post-hearing by the Administrative Law Judge, again the bilateral review and consideration that can occur during audit is absent. (***Matter of Jenkins-Covington***, Tax Appeals Tribunal, August 25, 1988, ***confirmed on other grounds*** 195 AD2d 625, 600 NYS2d 281, ***lv denied*** 82 NY2d 664, 610 NYS2d 151.)

H. The Tribunal has determined that a taxpayer may introduce at hearing documents which it failed to produce in the course of an audit (***Matter of Jenkins-Covington, supra.; see, Matter of Airport Industrial Park***, Tax Appeals Tribunal, April 11, 1991). Consequently, petitioner was properly permitted to present its documents for the first time at this late stage, despite earlier requests for production by the Division which petitioner apparently ignored. At the same time, it is clearly acceptable for the Division, now faced with a great number of invoices, to vigorously contest petitioner's claims. By choosing its course of conduct, and purposefully avoiding a review of its substantiation petitioner, at the least, should not expect to receive the "benefit of the doubt" on questionable items. Rather, any failures in its proof should properly be viewed negatively and weigh heavily against petitioner (***see, Matter of Donahue***, Tax Appeals Tribunal, December 8, 1994). However, it must also be noted that the Division's

subpoena was served only six days prior to the March 8, 2001 continued hearing date. Moreover, upon placing its evidence supporting its claim in the record (and notwithstanding that its choice of how to proceed in this case cannot be said to have encouraged the full and timely exchange of information), petitioner is nonetheless clearly entitled to have such evidence reviewed and fairly evaluated (***Matter of Airport Industrial Park, supra.; Matter of Jenkins-Covington, supra.***)

I. In this case, petitioner's evidence concerning payment of tax is twofold. First, petitioner's accountant, Peter Rooney, appeared and testified that he functioned as petitioner's accounting department, receiving all bills, reviewing and verifying that such bills were valid, accurate and had not been previously paid, processing the bills for payment, making payment, and filing such paid bills. He testified that all bills which included tax were paid in full, including the tax amount. He also alluded in such testimony to the fact that any monies owed to petitioner's landlord (***see,*** Exhibits "8" and "9") were denominated "Additional Rent" under the lease which, if in arrears, could be enforced for collection in the same manner as "Minimum Rent" under petitioner's lease. This testimony by Mr. Rooney, a CPA, concerning matters directly within his area of activity and responsibility for petitioner, was clear and credible and is accepted.[11]

In addition to Mr. Rooney's testimony, many of the invoices submitted by petitioner for many of the vendors other than petitioner's landlord, were accompanied by photocopies of payment checks. In each instance, the amount of the check was for the full amount of the

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[11] Mr. Rooney's testimony in this specific area (accounting for and paying petitioner's bills) may be contrasted with his testimony concerning the actual work performed by the various vendors. While it is evident that he had a basic understanding of the nature and types of work performed, his testimony concerning this latter area of work specifics, including issues of purpose, permanency, methods of affixation of items, and the like, was far more general and conclusory than was his testimony concerning receipt and payment of bills.

invoice, including the amount of tax shown thereon.[12] It is true that each and every invoice in the record is not accompanied by a copy of a check in payment thereof, including the amount of tax shown thereon and that, in a few instances, there are copies of payment checks for some, though not all, invoices. It could be argued, via the Division's negative inference position, that any invoice for which the record does not include direct documentary proof of payment should be eliminated. However, the balance of the proof militates against this result and overcomes the impact of any negative inference. First, as explained above, petitioner's witness provided credible testimony concerning payment of the invoices. In addition, for those vendors whose invoices are not accompanied by payment checks, there is nonetheless an ongoing and repeating regular pattern of work being performed for petitioner. It is unlikely that vendors would continue to perform work for petitioner (or for any party) in the face of any pattern of chronic failure to pay for such work. Coupling this factor with the presence of the checks in full payment of many invoices, including tax, and with Mr. Rooney's testimony, supports the conclusion that the tax shown on the invoices submitted in evidence was in fact paid.

J. Turning, finally, to the main substantive merits of petitioner's application for refund, Tax Law § 1101(b)(4)(i) defines a "retail sale", in relevant part, as follows:

> a sale of any tangible personal property to a contractor, subcontractor or repairman for use or consumption in erecting structures or buildings, or building on, or otherwise adding to, altering, improving, maintaining, servicing or repairing real property, property or land . . . regardless of whether the tangible personal property is to be resold as such before it is so used or consumed . . . .

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[12] The invoices comprising Exhibits "9", "11", "12", "14", "16","17", "19", "22", "24", and "26" through "28", are accompanied by copies of checks in payment thereof. The invoices comprising Exhibit "15", while not accompanied by checks, each bear a dated "paid" stamp on their faces.

K. Tax Law § 1105(a), in relevant part, provides for the imposition of sales tax upon the "receipts from every retail sale of tangible personal property, except as otherwise provided in [Article 28]." Tax Law § 1105(c) also imposes sales tax upon the receipts from every sale, except for resale, of the services of:

> (3) Installing tangible personal property . . . or maintaining, servicing or repairing tangible personal property . . . not held for sale in the regular course of business, whether or not the services are performed directly . . . or by any other means, and whether or not any tangible personal property is transferred in conjunction therewith, except:
>
> * * *
>
> (iii) for installing property which, when installed, will constitute an addition or capital improvement to real property, property or land, as the terms real property, property or land are defined in the real property tax law as such term capital improvement is defined in paragraph nine of subdivision (b) of section eleven hundred one of this chapter . . . .

Tax Law § 1105(c) imposes sales tax upon the receipts from every sale of the services of:

> (5) Maintaining, servicing or repairing real property, property or land, as such terms are defined in the real property tax law, whether the services are performed in or outside of a building, as distinguished from adding to or improving such real property, property or land, by a capital improvement as such term . . . is defined in paragraph nine of subdivision (b) of section eleven hundred one of this article . . . .

L. Tax Law § 1116(a) provides, in relevant part, as follows:

> any sale . . . by or to any of the following or any use . . .by any of the following shall not be subject to the sales and compensating use taxes imposed under this article:
>
> (1) The State of New York, or any of its agencies, instrumentalities, public corporations . . . or political subdivisions where it is the purchaser, user or consumer, *or where it is a vendor of services or property of a kind not ordinarily sold by private persons* . . . . (Emphasis added.)

M. Petitioner's primary contention focuses on BPCA's right to make all of its purchases of goods and services free from the imposition of sales and use taxes, and the alleged impact of

this right on petitioner. As a starting point, there is no dispute that the owner of the premises, BPCA, leased its premises to petitioner's landlord, O & Y. O & Y was required to construct certain nonresidential buildings, structures and improvements, including the premises in question at Four World Trade Center, and to operate, maintain and repair such buildings, structures and improvements, keeping the same in good and safe condition. The Division admits that BPCA is entitled to the exemption from sales and use taxes provided at Tax Law § 1116(a)(1) "where it is the purchaser, user or consumer, or where it is a vendor of services or property of a kind not ordinarily sold by private persons." Petitioner points out that the lease between O & Y and BPCA provides that title to all materials that are incorporated into the building is to vest in BPCA upon the purchase of such materials and, further, that O & Y was required to include a provision of similar effect in all contracts and leases it entered into in connection with construction of the building and in connection with any subsequent improvements made to the building. Petitioner's lease between itself and O & Y, (which carried through to Brookfield Properties as O & Y's successor-in-interest), included such a similar provision at Article 9, section 9.09. Petitioner posits that O & Y enjoyed tax exemption on all of its purchases in connection with the premises as an agent of BPCA, an organization exempt under Tax Law § 1116(a)(1), and goes on to maintain that this exemption carries down to petitioner with regard to any such purchases.

N. Title or ownership of the building and of all "Building Equipment" therein, as defined, clearly resided in BPCA (***see***, Findings of Fact "4" and "6"). At the same time, the record is less than crystal clear on the question of which particular purchases, represented by the invoices in evidence and including purchases of tangible personal property, would constitute tenant's property, as defined, or purchases of repair and maintenance services with respect

thereto.[13] In addition to this lack of clarity is the fact that none of the invoices introduced by petitioner at the hearing indicates that petitioner's landlord (O & Y or WFC Retail Co., LP), or petitioner, acted as the agent of BPCA in purchasing any of the goods and services at issue. Neither do any of the canceled checks introduced by petitioner at the hearing indicate that any payment was made on behalf of BPCA. The Division raises no dispute that purchases made by a contractor pursuant to a disclosed agency relationship with an exempt organization would be exempt from the imposition of sales tax, it being the case that the exemption provided by Tax Law § 1116(a)(1) would flow through to the contractor purchasing goods and services as the agent of the exempt organization (***see, Matter of The Pioneer Group***, Tax Appeals Tribunal, February 8, 19990; ***Matter of West Valley Nuclear Services Co., Inc.***, Tax Appeals Tribunal, November 13, 1998, ***confirmed*** 264 AD2d 101, 706 NYS2d 259, ***lv denied*** 95 NY2d 760, 714 NYS2d 710). However, the evidence in this case is clear that neither petitioner's landlord (or its successor in interest) nor petitioner were exempt organizations in their own right, nor were they the agents of an exempt organization. In fact, there is no language in any of the documents that created an agency relationship between petitioner and its landlord or BPCA. Since the purchases in issue were not made by the exempt organization or by an agent acting on its behalf, such purchases are not exempt pursuant to Tax Law § 1116(a)(1). Nor, upon review of the evidence, can it be concluded that any of the services provided by petitioner's landlord (***see,*** Exhibits "8" and "9") were "of a kind not ordinarily sold by private persons" (Tax Law § 1116[a][1]). Accordingly, the charges for utilities, and for protective, storage, cleaning and

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[13] At least one invoice (Exhibit "25", Invoice No. 56865, at Finding of Fact "23[xi]") rendered in response to petitioner's complaint of a leak in a "walk in box" and reflecting the advice "must get building [i.e., landlord] to repair," points out this lack of clarity between landlord (or BPCA) items or systems and tenant's property or systems. In the same vein, petitioner's indication that it depreciated certain of the items in issue is at best inconsistent with the claim that its landlord (and ultimately BPCA) owned all items purchased.

maintenance services to real property provided by petitioner's landlord, as reflected in the invoice billings included in Exhibits "8" and "9", were not exempt from tax under such section but rather were clearly taxable per Tax Law § 1105(c)(3) or (5).[14]

O. Petitioner relies on ***Wegmans's Food Markets v. Department of Taxation & Finance of the State of New York*** (126 Misc 2d 144, ***affd*** 115 AD2d 962, ***lv denied*** 67 NY2d 606 ["***Wegmans I***"]). In ***Wegmans I***, the issues were whether an Industrial Development Agency ("IDA") was exempt from sales tax on personal property used in a project financed by industrial development bonds, and whether Wegmans, a retail merchant who occupied the project premises, was also exempt from State sales tax on purchases, which were made with the occupant's own funds, of personal property used in the project. The Court held in favor of the taxpayer, stating that, under General Municipal Law § 874, all property of the IDA is exempt from tax. The Court emphasized the fact the IDA owned the personal property and that the property was an integral part of the project financed by the IDA and occupied by Wegmans.

P. Petitioner's reliance on ***Wegmans I*** fails to recognize the impact of ***Wegmans Food Markets v. The Department of Taxation and Finance of the State of New York***, Sup Ct, Monroe County, January 10, 1992, Galloway, J.["***Wegmans II***"]. ***Wegmans II*** addressed the issue of whether the same tax exemption available for personal property described in ***Wegmans I*** applied to operational expenses incurred by the retail merchant in its day-to-day operation of supermarkets which had been constructed and equipped under agreements made with IDA's. The types of expenses identified included "utilities, refuse removal, outside and inside maintenance, lease payments, rentals, purchased maintenance, cleaning supplies and

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[14] Electricity charges were metered and the invoices for electricity included sales tax, as provided under the terms of the lease at Article 11, section 11.01(A).

miscellaneous items" (***Id.***). In concluding that such operational expenses were not entitled to exemption, the Court stated as follows:

> Although some of the numerous expenses listed by plaintiff in their [sic] complaint may be exempt (such as expenses necessary to preserve or repair project property), not all of the claimed expenses would be exempt. Many of these expenses bear no relationship to the purchase, repair or replacement of project property *per se* but instead represent costs of supermarket business operations. For example, a very large part of the claimed utilities expenses represents purchases of non-tangible electrical power used in operating food-freezing equipment to preserve and display food for sale to customers. Although such utility service runs through power conduits located on IDA properties, the ongoing utility costs incurred are not for the conduits but for the power, and therefore do not sufficiently relate to the authorized functions of the IDAs with respect to such property.
>
> Because all the expenses involved in this action do not have the same relationship to the IDA's ownership of the project and authorized functions under the financing scheme, the expenses must be individually examined to determine what, if any, relationship each bears to the authorized and lawful functions of an IDA, particularly the "maintenance" function. The exemption shall be applicable only to those expenses properly within such function and authority. In this regard, it should be noted that *tax-exempt maintenance would be that needed to maintain the structural integrity of the structures constructed or rehabilitated to house the various supermarkets, or to repair equipment used as part of the project.*
>
> The use of utilities and washing windows and other such operating expenses have nothing to do with the underlying financing scheme and should not be tax-exempt under the law. If one business is able to operate indefinitely without paying taxes on its operating expenses simply because at one time its structures were financed with IDBs, that business would have an apparently unintended, open-ended economic advantage over competitors, thereby flying in the face of the fundamental purpose of the law–i.e., the development of economically sound commerce. . . . (***Id;*** emphasis added; ***see also, Fagliarone, Grimaldi & Assoc. v. Tax Appeals Tribunal***, 167 AD2d 767, 563 NYS2d 324).

In the case at hand, many of the expenses at issue (e.g., window cleaning, exhaust duct cleaning, etc.) in fact clearly fall within the lease definition of "operational expenses" per Article 4, section 4.10(C), and within the ambit of ongoing cleaning and maintenance expenses to be

incurred by petitioner under the terms of the lease (***see, e.g.,*** Article 13, section 13.01[A]; Article 10, section 10.01; Article 7, section 7.03[P], [Q], [S]). Such operational expenses are simply not entitled to exemption. Moreover, petitioner's position, distilled to its essence, is that every item purchased and every service performed is exempt because all were purchased for or performed upon the property of the landlord and, ultimately BPCA, an exempt organization. However, as noted, there is a lack of clarity between what is tenant's property and what is landlord's (or BPCA's) property (i.e., "project property"). This lack of clarity prevents a clear conclusion as to which invoice purchases, if any, represented expenses to repair and maintain the "structural integrity of the structures . . . or to repair equipment used as part of the project" (***id***).

Q. Petitioner's next argument relies upon the general proposition that "rent" paid for premises is not subject to sales tax. Petitioner argues that since payments made to its landlord (O & Y [Exhibit "8"] and WFP Retail Co., LP [Exhibit "9"]) were denominated payments of "Additional Rent," in accordance with the terms of Article 4, section 4.01 (A) and (B) and Article 34, section 34.01 (B) and (FFF) of its lease, such payments should not be taxable in any event. While many expenses are denominated "Additional Rent" under the lease terms, it appears clear that such denomination was for the primary purpose of conferring and guaranteeing that the remedies available in the event of petitioner's default in payment of such expenses would be the same as for overdue rent. Such denomination does not, however, render taxable items nontaxable especially where, as here, they are provided on a fee-for-service basis and represent the actual cost for the economic benefit of the services rendered (***see, Greene & Kellog, Inc. v. Chu***, 134 AD2d 755, 521 NYS2d 571; ***cf, Empire State Bldg. Co. v. New York State Dept of Taxation and Finance***, 150 Misc 2d 747, 570 NYS2d 419, ***affd*** 185 AD2d 201, 586 NYS2d 597, ***lv granted in part, dismissed in part*** 81 NY2d 810, 595 NYS2d 389, ***affd*** 81

NY2d 1002, 599 NYS2d 536). Petitioner's "additional rent" claim, based on the words of the lease, simply overlooks both the reality of the nature of the items for which payments were made as well as the apparent purpose for denominating such amounts as additional rent. (***Id.***) That is, despite their characterization or denomination as rent, the payments were in fact made for purchases properly subject to tax under Tax Law § 1105(c)(3) or (5).

R. Tax Law § 1115(a) provides, in relevant part, as follows:

> Receipts from the following shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten:
>
> * * *
>
> (15) Tangible personal property sold to a contractor, subcontractor or repairman for use in erecting a structure or building of an organization described in subdivision (a) of section eleven hundred sixteen, or adding to, altering or improving real property, property or land of such an organization, as the terms real property, property or land are defined in the real property tax law; provided, however, no exemption shall exist under this paragraph unless such tangible personal property is to become an integral component part of such structure, building or real property.
>
> (16) Tangible personal property sold to a contractor, subcontractor or repairman for use in maintaining, servicing or repairing real property, property or land of an organization described in subdivision (a) of section eleven hundred sixteen, as the terms real property, property or land are defined in the real property tax law; provided, however, no exemption shall exist under this paragraph unless such tangible personal property is to become an integral component part of such structure, building or real property.

S. As an alternative to its "agent of an exempt organization," "exempt organization ownership" and "additional rent" arguments, petitioner also pursues its claim based upon Tax Law § 1115(a) and its exemption for *tangible personal property* used in "erecting" or "adding to,

altering or improving" real property (under subdivision "15"), or used in "maintaining, servicing or repairing real property" (under subdivision "16") of an exempt organization, where such tangible personal property becomes "an integral component part of [the real property]." As a starting point, neither subdivision "15" nor "16" provides exemption from tax with respect to the provision of "services." Moreover, these provisions do not exempt from tax the purchase of supplies (i.e., tangible personal property) used or consumed in performing services which clearly relate to a taxpayer's own business operations. Many of the invoices provided in this case reflect the provision of maintenance services involving either no tangible personal property, or in many instances tangible personal property, such as cleaners and other chemicals, which were used or consumed in the course of providing the maintenance services.

T. Tax Law § 1105(c)(5) imposes sales tax upon the receipts from every sale of the service of maintaining, servicing or repairing real property . . . ." Similarly, Tax Law § 1105(c)(3) imposes sales tax upon the receipts from every sale of the service of "[m]aintaining, servicing or repairing tangible personal property . . . not held for sale in the regular course of business . . . ." (***See also,*** 20 NYCRR 527.7[a][1].) Petitioner properly paid sales tax on the services in question under the relevant statutory and regulatory language detailed herein. The cleaning and maintenance services were taxable as the servicing of real property under Tax Law § 1105(c)(5) since they clearly "relate to keeping real property in a condition of fitness . . . " (20 NYCRR 527.7[a][1]). This result is consistent with ***Matter of SSOV '81 LTD*** (Tax Appeals Tribunal, January 19, 1995), in which the Tribunal stated:

> In order to determine a service's taxability, the analysis employed by the New York courts and the Tax Appeals Tribunal focuses on the service *in its entirety*, as opposed to reviewing the service by components . . . . (Emphasis added.)

In sum, petitioner's reliance on Tax Law § 1115(a)(15) and (16) is misplaced because it ignores the primary function of the services purchased and the clear taxability of such services under Tax Law § 1105(c)(3) or (5). The specific statutory language justifying the imposition of sales tax on such services must prevail. The provisions relied upon by petitioner simply do not exempt from tax the purchase of *services* or of *supplies used in performing such services*, which clearly related to petitioner's normal operation of its restaurants. On this basis those invoices which clearly reflect the provision of services with either no materials charges or relatively minimal materials charges, such as Exhibits "10" and "11" for elevator maintenance service, Exhibits "13" and "14" for window cleaning (and the previously conceded pest extermination services), Exhibit "27" for air conditioning maintenance, and Exhibit "28" for grease exhaust system maintenance simply do not qualify for tax exemption.

Petitioner's claim also fails since the invoices fail, in nearly every instance, to separate out the identity and costs of the materials used in the particular maintenance or repair service. It is well settled that if a single invoice charge includes taxable and nontaxable components, the entire charge is subject to tax (***see, LaCascade v. State Tax Commission***, 91 AD2d 84, 458 NYS2d 80).[15]

U. Petitioner's claim also fails since the record does not establish that any materials became integral component parts of the realty as required under Tax Law § 1115(a), as opposed

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[15] The invoices do indicate some instances which might conceivably be considered the purchase of tangible personal property used in maintaining, servicing or repairing real property which became an integral component part of the realty, such as the March 24, 1998 Otis Elevator invoice regarding installation of the "Handsoff" phone (***see***, Finding of Fact "22"). However, this invoice makes no distinction between the material (phone) cost and installation cost. This same failure to distinguish between labor costs and material costs exists with respect to the invoices in Exhibit "12" (Action Glass Co. Inc.), Exhibits "15" and "29" (Sentinental Fire Control, Inc.), Exhibit "16" (Multiplex Electrical Services), Exhibit "18" (Kitchen Works), Exhibit "19" (Kitcheneering, Inc.), Exhibits "23" and "24" (T. McCaffrey & T. McGovern) and Exhibits "25" and "26" (Dee's Associated). Consequently, it is concluded that petitioner properly paid sales tax on the purchases at issue under either Tax Law § 1105(c)(3) or (5).

to being merely items used in the performance of a service (***see, Matter of N.A.E., Inc.***, Tax Appeals Tribunal, March 16, 1995). On this score, there was neither specific testimony, nor even any affidavits from an engineer or from any of petitioner's contractors, describing the manner of affixation or installation of any items. In the same manner, there is little evidence concerning the method and likely result of removal of any items, including any damage to the item or to the structure that might occur upon removal (***Matter of Gem Stores***, Tax Appeals Tribunal, October 14, 1988; ***Matter of Raised Computer Floors v. Chu***, 116 AD2d 958, 498 NYS2d 288, ***lv denied*** 68 NY2d 606, 506 NYS2d 1031). Essentially, the evidence on the nature of affixation of the tangible personal property amounted to self-serving claims in general descriptive narrative provided by petitioner's accountant, with very minimal detail. Such generalized and conclusory statements, although in some instances intuitively appealing, do not constitute sufficient proof, and the lack of detail in this respect weighs heavily against petitioner (***see***, Conclusion of Law "G"). In short, the testimony by petitioner's accountant, credibly given but lacking in detail, is not sufficient to prove that any of the invoice charges were for tangible personal property which became an integral part of the realty of an exempt organization.

V. Petitioner also claims that some of the purchases at issue should have been exempt on the basis that they constituted capital improvements. As noted, Tax Law § 1101(b)(9)(iii) defines a "capital improvement" as follows:

> Capital improvement. An addition or alteration to real property which:
>
> (i) Substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property; and
>
> (ii) Becomes part of the real property or is permanently affixed to the real property so that removal would cause material damage to the property or article itself; and

(iii) Is intended to become a permanent installation.

W. The three separately numbered requirements are joined by the conjunctive "and," thus mandating that each be met in order for an addition or alteration to qualify as a capital improvement (***see, Matter of Howard Johnson Co.***, Tax Appeals Tribunal, July 19, 1990, ***confirmed*** 174 AD2d 805, 570 NYS2d 741, ***lv denied*** 78 NY2d 863, 578 NYS2d 877). Petitioner has not established that its purchases of any goods (tangible personal property) met these requirements. Review of the invoices reveals that a few purchases, such as the beer box, undercounter freezer, stoves and fryers, and the like, were of such a nature that they might constitute capital improvements. In fact, the Division's auditor admitted as much as a possibility.[16] However, the record falls short of establishing the requisite three criteria. In this regard, there is little specific descriptive testimony as to the items themselves, or the method or permanency of their affixation to the premises, or of the nature or extent of any damage to the property or the item likely to occur upon removal. The very general testimony in this regard described certain items such as those noted as being large, bolted to the floor, and connected to gas pipes or wired to a box as opposed to being plugged in. However, there is little evidence establishing that removal of any of the items would result in material damage to the property or to the article itself. Fryers were apparently easily moved from restaurant to restaurant (***see***, Finding of Fact "23[vii]" referring to invoice number 1083), and stoves were removed and replaced. Petitioner's witness also stated that certain items were carried on petitioner's books and were depreciated for income tax purposes. Such items were not specified, but presumably would include stoves, fryers and similar items. While this treatment is consistent with a claim

[16] It should be noted that some items which might arguably be viewed as capital improvements are barred herein by the statute of limitations (e.g., Exhibit "17" ABC Awning [Finding of Fact "23(v)"]; Exhibit "18" Kitchen Works [Finding of Fact "23(vi)"]; ***see*** Appendix "A").

that such items were capital improvements, there remains the fact that petitioner offered no documentary proof of such depreciation treatment (e.g., tax returns and depreciation schedules). Further, it is at least noteworthy that such claim and treatment is entirely contrary to petitioner's earlier argument for exemption based on ownership vesting in BPCA. Finally, review of the invoices clearly leads to the overriding conclusion that the aim as well as the end result of most of the services provided entailed maintenance rather than the installation of capital improvements. In fact, many of the claimed expenses are repetitive in timing and amount of cost, and clearly show the provision of an ongoing service in the nature of periodic maintenance. Such charges simply do not qualify as capital improvements (20 NYCRR 527[b][4]). In sum, petitioner has not clearly established that any of the items shown on any of the invoices met the necessary criteria and were, in fact, capital improvements.

X. Having rejected petitioner's application for refund on the basis of substantive law as well as, in part, by impact of the statute of limitations, largely moots the impact of the Division's request for limitation of the dollar amount of petitioner's claim, in any event, based on the facts deemed admitted via petitioner's failure to respond to the Request for Admissions (***see***, Findings of Fact "16" and "17"). Facts sought for admission in such a Request which are not denied (either by direct admission thereof or, as here, by nonresponse) are deemed admitted pursuant to 20 NYCRR 3000.6(b)(2). In this case, the facts deemed admitted result in a conclusion that while petitioner's refund application and subsequent petition sought a refund of $75,000.00 in tax, its September 1, 1999 schedule listed only $14,763.76 in tax, thus (as admitted) leaving the refund claim overstated by $60,247.00 and limiting the allowable dollar amount of refund to $14,763.76 at most.

Y. The essential question concerning the Division's request for limitation is whether petitioner has established some basis upon which it should be allowed to withdraw the facts deemed admitted. The Tribunal's regulation at 20 NYCRR 3000.6(b)(3) provides, in part, as follows:

> The administrative law judge designated by the tribunal may, at any time, allow a party to amend or withdraw any admission on such terms as may be just. Any admission shall be subject to all pertinent objections to admissibility which may be interposed at the hearing.

The Division maintains that petitioner has established no excuse for its failure to have responded to the Request for Admissions, that petitioner has shown a pattern of ignoring process, and that limitation based on deemed admission is appropriate in this case. Petitioner allegedly justified its choice not to provide the invoices underlying the transactions or any other information to the Division's desk auditor and instead requested that the refund claim be denied and moved forward for hearing, on its belief (based on prior audit experiences) that an audit would not be competently conducted, that the Division's auditors might not fully understand the basis for the claim, and in any event would not agree to such claim. Whatever the plausibility of this position may be, it does little to explain or justify petitioner's apparent pattern of disregarding numerous items including the Demand for a Bill of Particulars, the filing of a Hearing Memorandum, the subpoena and, in particular, the Request for Admissions. These matters all occurred *after* the denial of the refund claim and during the stages immediately prior to, and in the case of the subpoena, during the pendency of the hearing process. It is true that the Division made no move to compel compliance with its Demand or its subpoena. However, it is not claimed nor can it be said that the Division's inaction either encouraged petitioners's pattern of disregard or in some manner excuses the same. Petitioner only points out that the Division's

request for a continuance of the hearing was granted, thus curing any prejudice. Countenancing such an excuse only results in the conclusion that the regulatory provision concerning requests for admissions (as well as the other provisions in the Tribunal's Rules and Regulations) may be ignored with impunity. Petitioner could have avoided the consequences of the deemed admissions by simply responding with a denial of the third requested admission, to wit, that its refund claim was not limited to the amount of $14,763.76 and was not overstated by $60, 236,24. It did not do so. Having established no reasonable basis to warrant allowing withdrawal of the facts deemed admitted, such facts (as well as the consequences flowing therefrom) are accepted.

Z. The petition of Hudson River Club, LP is hereby denied and the Division's March 27, 2000 denial of petitioner's April 22, 1999 refund claim is sustained.

DATED: Troy, New York
February 7, 2002

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE

APPENDIX A[17]

Exhibit No.	Date	Vendor	Tax Amount
		–Pre-09/01/93 Transactions–	
17	07/01/93	ABC Awning	$ 369.60
8	08/14/93	Olympia & York	73.92
8	08/16/93	"	18.48
8	08/18/93	"	4.62
8	08/18/93	"	12.71
8	08/18/93	"	12.71
8	08/28/93	"	4.62
		Total	$ 496.66
		–Post–04/22/99 Transactions–	
9	04/28/99	WFP Retail Co. LP	$ 909.27
9	04/29/99	"	426.74
9	04/29/99	"	148.70
28	04/30/99	Scientific Fire Prev. Co.	35.06
28	04/30/99	"	110.96
26	05/14/99	Dee's Associated	6.19
26	05/14/99	"	9.90
26	05/14/99	"	27.64
26	05/14/99	"	13.20
22	05/17/99	MacFelder, Inc.	44.62
9	05/20/99	WFP Retail Co., LP	987.16
11	05/20/99	Otis Elevator	52.22
19	05/20/99	Kitcheneering, Inc.	40.18
12	06/10/99	Action Glass Co., Inc.	23.51
11	06/21/99	Otis Elevator	52.22
9	06/21/99	WFP Retail Co., LP	252.74
26	06/25/99	Dee's Associated	9.90
12	07/14/99	Action Glass Co., Inc.	47.03
19	07/15/99	Kitcheneering, Inc.	282.15
12	07/16/99	Action Glass Co., Inc.	47.03
26	07/21/99	Dee's Associated	24.71

[17] All of the pre-September 1, 1994 transactions, the gap transactions, and the transactions without specific dates appear on petitioner's September 1, 1999 schedule. Hence, the $14,763.76 amount of refund claimed per such schedule, and deemed admitted as the amount of petitioner's refund claim pursuant to the Request for Admissions, would be reduced by the tax total of such time barred transactions ($4,720.72), resulting in a maximum available refund of $10,043.04 in any event (the remaining tax on transactions not barred by the statute of limitations as determined herein).

26	07/27/99	"	6.60
26	07/27/99	"	13.20
26	07/30/99	"	25.58
28	07/30/99	Scientific Fire Prev. Co.	110.96
28	07/30/99	"	35.06
26	08/10/99	Dee's Associated	22.89
26	08/13/99	"	7.43
26	08/13/99	"	42.03
26	08/13/99	"	10.52
26	08/23/99	"	20.52
26	09/03/99	"	12.38
26	09/03/99	"	34.24
26	09/03/99	"	11.34
26	09/13/99	"	12.38
26	09/13/99	"	9.90
28	10/29/99	Scientific Fire Prev. Co.	35.06
28	10/29/99	"	110.96
		Total	$ 4,048.66

–Gap (09/01/95 - 02/28/96) Transactions–

13	09/01/95	Internat. Service Systems	$ 23.85
13	09/01/95	"	5.80
23	09/10/95	T. McCaffrey Electrical	70.13
10	09/20/95	Otis Elevator	47.64
13	10/01/95	Internat. Service Systems	5.80
13	10/01/95	"	23.85
8	10/05/95	Olympia & York	17.32
10	10/20/95	Otis Elevator	49.53
21	10/24/95	MacFelder, Inc.	131.00
8	10/25/95	Olympia & York	120.08
8	10/25/95	"	120.08
13	11/01/95	Internat. Service Systems	5.80
13	11/01/95	"	23.85
23	11/09/95	T. McCaffrey Electrical	66.00
10	11/20/95	Otis Elevator	49.53
13	12/15/95	Internat. Service Systems	5.80
10	12/20/95	Otis Elevator	49.53
13	01/01/96	Internat. Service Systems	6.27
13	01/01/96	"	25.96
10	01/20/96	Otis Elevator	49.53
8	01/25/96	Olympia & York	244.05
8	01/26/96	"	122.10
8	01/29/96	"	122.10
13	02/01/96	Internat. Service Systems	25.76

13	02/01/96	"	6.27
8	02/05/96	Olympia & York	17.57
18	02/09/96	Kitchen Works	977.62
10	02/20/96	Otis Elevator	49.53
8	02/24/96	Olympia & York	105.90
	Total		$ 2,568.05

–Transactions Without Specific Dates–

8	-----	Olympia & York	$ 190.96
8	-----	"	149.54
8	-----	"	172.93
8	-----	"	5.20
8	-----	"	324.44
8	-----	"	54.86
8	-----	"	4.95
8	-----	"	39.60
8	-----	"	148.50
8	-----	"	142.43
8	-----	"	128.70
8	-----	"	52.22
8	-----	"	4.79
8	-----	"	56.49
8	-----	"	38.28
8	-----	"	103.85
8	-----	"	28.71
8	-----	"	4.79
8	-----	"	4.79
	Total		$ 1,656.01