STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
AMUSEMENTS OF WNY, INC.	:	DETERMINATION DTA NO. 822534
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 March 1, 1999 through May 31, 1999.	:	

Petitioner, Amusements of WNY, Inc., 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 March 1, 1999 through May 31, 1999.

On April 23, 2009 and April 27, 2009, respectively, the Division of Taxation, appearing by Daniel Smirlock, Esq. (Michael B. Infantino, Esq., of counsel), and petitioner, appearing by Lemery Greisler LLC (Robert J. May, Jr., Esq., of counsel), waived a hearing and submitted this matter for determination based on documents and briefs to be submitted by February 12, 2010, which date commenced the six-month period for issuance of this determination (Tax Law § 2010[3]). After due consideration of the documents and arguments submitted, Thomas C. Sacca, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation properly denied petitioner's claim for refund of sales and use taxes paid on the purchase and installation of a roller coaster on the basis that such purchase and installation did not constitute a capital improvement.

FINDINGS OF FACT

1. Petitioner, Amusements of WNY, Inc., operates an amusement park located at 2400 Grand Island Boulevard, Grand Island, New York. The premises on which the amusement park is located is wholly owned by the corporation.

2. In August 1998, Glynn Geotechnical Engineering prepared a foundation design for a proposed roller coaster to be built on the premises. Petitioner eventually entered into a contract with Custom Coasters International to design, engineer and construct a roller coaster on its premises, known as the "Silver Comet." The contract allocates specific costs for design and engineering, rental cranes and forklifts, freight, labor to build the coaster, footings, a station building, housing, electrical subcontractors, a safety system, mechanics and the structure for the coaster. The Silver Comet was completed on or about April 30, 1999, and has been located on the premises since that date. The overall footprint of the Silver Comet is approximately 1.8 acres. The length of its wooden track is approximately 3,000 feet, while its highest point is 95 feet.

3. The Silver Comet is a wooden roller coaster, meaning it has a flat steel strip overlaid upon a wooden track. In addition to the wooden track, wood is used for the cross pieces, known as ledgers, which support the track. The plans of the Silver Comet indicate that its foundation includes concrete slabs and piers to attach the steel support structure of the roller coaster to the ground. The steel structure supports the roller coaster. The station building, or station house, where passengers wait in line and board the roller coaster's cars, is a steel structure which is permanently affixed to the property and is connected to the roller coaster.

4. Mr. Frank C. Hardick is a professional engineer with a Bachelor of Science Degree in Industrial Engineering. Mr Hardwick has experience with the construction and installation of

wooden roller coasters, including being the engineer of record for the installation of "The Comet" at the Great Escape Amusement Park in Lake George, New York. Mr. Hardwick's responsibility on the Comet included performing layout work and controlling the field work. He was also the engineer of record for five other roller coaster projects at the Great Escape Amusement Park. As part of his preparation and research for the submission of an affidavit in this matter, Mr. Hardwick reviewed photographs of the Silver Comet while in construction, photographs of the finished Silver Comet and the engineering site plans for the foundation of the Silver Comet prepared by an engineer of Glynn Geotechnical Engineering.

5. The former owner of the Great Escape purchased the Comet from a defunct amusement park, Crystal Beach in Ontario, Canada, with the intent of rebuilding the Comet at the Great Escape in Lake George, New York. The only original materials used in the reconstruction of the Comet were the steel support structure and the steel roof trusses of the station house. None of the wood from the Comet's Crystal Beach facility was used in its reinstallation, which required the construction of all new wooden ledgers and wooden track. Many of the bolts necessary to reconstruct the coaster's support structure had been destroyed when it was dismantled. As all of the bolts and hardware from the Comet had been discarded, all new bolts and hardware were used in the reconstruction of the Comet. Additional parts needed to be replaced on the reconstructed coaster included the motor, computer controls, sensors and cars. Furthermore, the installation at the Great Escape required foundations to be surveyed, engineered and built at the site. Everything other than the steel support structure and the steel roof trusses at the station was new construction when the coaster was reconstructed.

6. As previously noted, Mr. Hardwick reviewed the photographs of the Silver Comet at various stages of its construction and had reviewed the foundation plans prepared by Glynn

Geotechnical Engineers. The Silver Comet's wooden track is constructed using ring nails, while bolts attach the wooden parts to the steel frame. When the ring nails and bolts are removed, the removal tears the fiber of the wood, rendering it unusable. Any new construction would require new, straight planks from the start to be properly shaped during the construction process. Dismantling of the roller coaster would need to be done with care so that the steel is not bent or distorted. Additionally, a plan to remove and reassemble the Silver Comet would require that each piece of steel be individually numbered and stored appropriately so that it could be rebuilt in the exact position as originally intended. The removal of the Silver Comet would also result in damage to the station house. Mr. Hardwick concluded that dismantling of the Silver Comet would cause the wood from the track and ledgers to be unsuitable for use in the reconstruction; would cause material damage to the wooden track and ledgers; and that the only salvageable part of the coaster would be the steel framing.

7. Petitioner was audited by the Division of Taxation (Division) for the period March 1, 1999 through November 30, 2003. As part of the audit, the concrete footings, station house and electrical and labor costs associated with the installation of the roller coaster that may cause material damage to the property if removed were allowed as capital improvements. The amount allowed of $646,500.00 was subtracted from the roller coaster's total cost of $1,998,052.00, leaving $1,351,552.00 subject to the imposition of sales tax. Petitioner paid the sales tax due as a result of the audit, including the remaining amount due on the purchase of the roller coaster. The amount of sales tax paid on the purchase of the roller coaster was $108,124.16.

8. On September 26, 2007, petitioner filed an Application for Credit or Refund of Sales and Use Tax in the amount of $164,840.00 on its purchase of the roller coaster. The application stated the original cost of the roller coaster to be $1,998,052.00.

9. On December 12, 2007, the Division issued a letter to petitioner denying the refund claim in full. The denial letter stated, in part, as follows:

> **The refund claim is being denied in full.** The actual tax paid on the roller coaster was $108,124.16 and this claim is denied due to the fact that the roller coaster is considered tangible personal property under Tax Law section 1101(b)(6). The difference of $56,715.84 is the portion greater than tax actually paid on audit and therefore, this portion of the refund claim i[s] invalid.

CONCLUSIONS OF LAW

A. Tax Law § 1105(c)(3) imposes sales tax on the receipts from every sale, except for resale, of the service of installing tangible personal property, except for installing property which, when installed, will constitute a capital improvement to real property. The term "capital improvement" is defined in Tax Law § 1101(b)(9)(i) as:

> An addition or alteration to real property which:
>
> (A) Substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property; and
>
> (B) 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
>
> (C) Is intended to become a permanent installation.

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

B. As noted, the first requirement is that the addition or alteration add to the value of the real property or prolong the useful life of the real property. In examining whether this criterion has been satisfied, the Tax Appeals Tribunal has examined the purchase and installation

expenses incurred and has indicated that if the purchase and installation costs were substantial, i.e., in excess of several thousand dollars, the equipment substantially added to the value of the property (***see Matter of Emery Air Freight Corp.***, Tax Appeals Tribunal, October 17, 1991; ***Matter of Dairy Barn Stores, Inc.***, Tax Appeals Tribunal, October 5, 1989; ***Matter of Gem Stores, Inc.***). Accordingly, as the purchase and installation costs of the roller coaster approached $2,000,000.00, it is determined that such coaster substantially added to the value of the real property.

C. A second criterion to be met in order for an addition or alteration to be considered a capital improvement is that the improvement "[i]s intended to become a permanent installation" (Tax Law § 1101[b][9][iii]). As the Division has correctly pointed out in its brief, the classification of property as real property under the Real Property Tax Law does not determine whether the property is a capital improvement for sales tax purposes (***Matter of Merit Oil v. State Tax Commn.***, 124 AD2d 326, 508 NYS2d 107 [1986]). However, the Tax Appeals Tribunal has indicated in ***Matter of Dairy Barn, Inc.*** that an analysis of the second and third elements of a capital improvement is aided by referring to the common law definition of real property fixture, which has elements substantially similar to those of a capital improvement. A fixture "is based upon the united application of three requisites: (1) actual annexation to the real property or something appurtenant thereto; (2) application to the use or purpose to which that part of the realty with which it is connected is appropriated; and (3) the intention of the party making the annexation to make a permanent accession to the freehold" (***Marine Midland Trust Co. v. Ahern***, 16 NYS2d 656, 659 [1939] citing ***Potter v. Cromwell***, 40 NY 287[1869]; 59 NY Jur 2d, Fixtures § 2). In the above definition, "actual annexation" is akin to Tax Law § 1101(b)(9)(ii), i.e., "becomes a part of the real property or is permanently affixed to the real

property" and "intention . . . to make a permanent accession" is substantially the same as Tax Law § 1101(b)(9)(iii), i.e., "is intended to become a permanent installation."

D. Since "the intention of the party making the annexation has long been the controlling test in determining the character of personalty as a fixture" (59 NY Jur 2d, Fixtures § 7), it is necessary to determine petitioner's intention of making the roller coaster a permanent installation (Tax Law § 1101[b][9][iii]). The controlling intent is not petitioner's secret or subjective intention at the time the units were acquired, but rather the intention the law objectively will deduce from all the circumstances at the time the property is annexed to the realty to see whether it may fairly be found that the purposes of the annexation was to make the unit a permanent part of the freehold (***Voorhees v. McGinnis***, 48 NY 278 [1872]; ***Marine Midland Trust Co. v. Ahern***). Factors to be considered in deciding whether the annexation was intended to be permanent include: the nature of the article annexed, the mode of annexation, the relation to the property of the person making the attachment, and the applicability and application of the unit to the use to which the property is being put (***Capri Marina & Pool Club v. County of Nassau***, 84 Misc 2d 1096, 379 NYS2d 341, 345 [1976] citing ***Marine Midland Trust Co. v. Ahern***; ***see Potter v. Cromwell***).

E. Applying these principles to the present case, it is determined that the roller coaster was intended to be permanent. The nature of the article itself as well as the method of its installation suggest permanency. The overall footprint of the roller coaster is approximately 1.8 acres. The length of its wooden track is 3,000 feet, while its highest point is 95 feet. Clearly this is not an article that can be moved about at will. In addition, the foundation of the roller coaster includes concrete slabs and piers to attach the steel structure to the ground. The station house, where passengers wait in line and board the roller coaster's cars, is a steel structure which is

permanently affixed to the real property and is connected to the roller coaster. The wooden track of the coaster is constructed using ring nails, while bolts attach the wooden parts to the steel frame. Removal of the ring nails and bolts would tear the fiber of the wood, rendering it unusable. Any new construction would require new concrete footings, wood supports, wood track and station house. The plan to remove and reassemble the Silver Comet would require that each piece of steel be individually numbered and stored appropriately to insure that it be rebuilt in the exact position as originally intended.

The roller coaster was purchased by and installed at the request of the owner of the amusement park. While this factor alone may not be conclusive of petitioner's intention to make the coaster permanent, it nevertheless holds considerable sway. "An owner is much more likely to intend permanency than one in possession of premises temporarily, as for example a tenant." (***Marine Midland Trust Co. v. Ahern***; ***Matter of Dairy Barn, Inc.***) Therefore, based upon all the factors discussed, it is concluded that the roller coaster was installed with a view towards permanency.

F. The final criterion is that the addition or alteration "[b]ecomes a part of the real property or is permanently affixed to the real property so that removal would cause material damage to the property or to the article itself" (Tax Law § 1101[b][9][ii]). If an item is so attached that its removal would cause substantial damage to the item or the real property, the second requirement is met (***see e.g. Matter of Flah's of Syracuse, Inc. v. Tully***, 89 AD2d 729, 453 NYS2d 855 [1982] [improvements which were bolted, nailed and glued to the real property were permanently affixed thereto]). However, the claim of damage must be supported (***Matter of Gem Stores, Inc***).

The Division has conceded that the concrete footings, station house, electrical and labor costs associated with the installation of the coaster constitute capital improvements to real property because they substantially added to the value of the real property, became part of the real property or were permanently affixed to the real property so that removal would cause material damage to the property or article itself, and were intended to become a permanent installation. It is the Division's position that because the steel structure of the roller coaster can be moved and reassembled, it does not become part of the real property or is so permanently affixed to the real property so that removal would cause material damage to real property or the article itself. Such position appears to conflict with the Division's own Sales and Use Tax Classifications of Capital Improvements and Repairs to Real Property, Publication 862, which classifies many items as capital improvements that can be dismantled and reassembled at another location, such as kitchen cabinets, appliances, doors, plumbing and fences. For example, the posts of a fence may be permanently installed, but the sections of the fence can be removed from the posts and reinstalled on other posts. However, the Division does not distinguish between the posts and sections of a fence. Here, petitioner has established, and the Division agrees, that portions of the coaster are permanently affixed to the real property, and petitioner has also established that portions of the roller coaster, specifically the wooden track, wooden ledgers and station house, if removed, would cause material damage to the article itself. Although the steel structure could be used in creating another roller coaster, it is useless without those portions of the coaster that the Division has conceded are capital improvements. Under such circumstances, the steel structure has no function absent the wooden parts and concrete footings, and it is concluded that the coaster became part of the real property or was permanently affixed to the realty such that removal would cause material damage to the realty or article itself. Therefore, it

is concluded that petitioner has established that the roller coaster meets all the conditions for a finding that its installation constituted a capital improvement (***Matter of Dairy Barn, Inc.***).

G. The factual circumstances in the cases relied upon by the Division in support of its position are distinguishable from the facts presented in the present matter. The Court in ***Matter of Charles R. Wood Enterprises, Inc. v. State Tax Commission*** (67 AD2d 1042, 413 NYS2d 765 [1979]), held that amusement rides that were merely bolted to bases and could be easily removed without damage to the property could not be considered capital improvements. In the present matter, petitioner has established that removal of the roller coaster would render the concrete footings, wooden track, wooden supports, the station house and the connecting hardware damaged or unusable in a reconstruction of the coaster.

In ***Matter of West Mountain Corp. v. Miner*** (85 Misc 2d 416, 381 NYS2d 606 [1976]), it was determined that ski lifts, which were regularly uninstalled and sold on the used market, could not be considered permanent. Here, it has not be established that roller coasters are regularly removed and sold as used property, and in fact, as the Division has conceded, removal would result in only the steel support structure being reusable.

The decision of the Tax Appeals Tribunal in ***Matter of Emery Air Freight Corporation*** (October 17, 1991), which concluded that the conveyor system at issue was not exempt from the imposition of sales tax as a capital improvement, was based on the provisions of the lease agreement, which indicated that the conveyor systems were intended to be used by the taxpayer and removed at the end of the lease. Relevant to the issue herein, however, was the Tribunal's conclusion that the material handling systems were permanently affixed to the real property so that removal caused material damage to both the building and the handling systems themselves. This conclusion was based upon the fact that the conveyor system was welded and bolted into

place, requiring the use of acetylene torches and carbide saws to totally remove it, and that such removal would damage both the article itself and the real property to which it was attached. The present factual situation is similar to that existing in the ***Emery*** case, as to the damage caused by removal of the article at issue.

H. The petition of Amusements of WNY, Inc., is granted to the extent indicated in Conclusion of Law F and Finding of Fact 7. The Division of Taxation is directed to refund to petitioner the amount of $108,124.16, plus applicable interest. In all other respects the petition is denied, and that portion of the Division of Taxation's refund denial relating to the claim in excess of the actual amount paid is sustained.

DATED: Troy, New York
August 4, 2010

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE