STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
A-Z PARKING SERVICES, INC. AND ALBERT ZARATZ, AS OFFICER	:	DECISION DTA No. 810145
for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period December 1, 1988 through August 31, 1990.	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on September 16, 1993 with respect to the petition of A-Z Parking Services, Inc. and Albert Zaratz, as officer, 10822 Queens Boulevard, Suite 222, Forest Hills, New York 11375. Petitioners appeared by James J. Mahon, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Robert J. Jarvis, Esq., of counsel).

The Division of Taxation filed a brief on exception. Petitioners filed a brief in opposition. The Division of Taxation filed a reply brief. Oral argument, at the Division of Taxation's request, was heard on April 20, 1994, which date began the six-month period for the issuance of this decision.

Commissioner Dugan delivered the decision of the Tax Appeals Tribunal. Commissioner Koenig concurs.

ISSUE

Whether payments received for the removal of "immobilization boots" affixed to cars, illegally parked on private property, were subject to sales tax as receipts from the taxable sale of services under Tax Law § 1105.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and make additional findings of fact. The Administrative Law Judge's findings of fact and the additional findings of fact are set forth below.

Albert Zaratz described his business, A-Z Parking Services, Inc. (hereinafter "A-Z Parking Services") as "a parking immobilization enforcement company". According to Mr. Zaratz, 75 to 80% of the revenues of A-Z Parking Services were from its booting of cars illegally parked along the seven miles of roadway located in Forest Hills Gardens, a private community located in the Borough of Queens in New York City. Frederick LawOlmsted, the famous American landscape architect, contributed to the design of Forest Hills Gardens, and apparently in the 1920's, 900 homes were developed on its 175 acres. Pursuant to an agreement dated February 14, 1989, Forest Hills Gardens Corporation contracted with A-Z Parking Services for "immobilizing and/or arranging the removal of unauthorized parked vehicles."

The Division of Taxation (hereinafter "Division") issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated August 23, 1991 against A-Z Parking Services asserting total tax due of $92,679.62, plus interest, for the period December 1, 1988 through August 31, 1990. The parties stipulated that A-Z Parking Services had no revenues subject to tax during the period ended February 28, 1989 and, if the amounts received by A-Z Parking Services for its "activities" are determined to be taxable, then the tax due of $92,679.62 on receipts of $1,123,389.00 would be allocated by sales tax quarters as follows (which would result in a reduction of interest due):

Period Ending	Tax Amount
2/28/89	-0-
5/31/89	$18,371.26
8/31/89	18,371.27
11/30/89	18,371.27
2/28/90	12,521.94
5/31/90	12,521.94
8/31/90	12,521.94
Total	$92,679.62

A Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated August 23, 1991 was also issued against Albert Zaratz, as officer, asserting total tax due of $92,679.62, plus interest. Mr. Zaratz has not denied that he was a person responsible for the collection of sales tax on behalf of A-Z Parking Services, if it is determined that sales tax should have been collected on receipts from the parking immobilization activities of the corporate taxpayer.

The parties agree that this matter involves the resolution of a legal issue, and that there does not appear to be any dispute concerning the nature of the operations of A-Z Parking Services. Facts concerning such operations were set forth in a petition for an advisory opinion and were summarized in the advisory opinion,[1] dated May 17, 1991 (which was adverse to petitioners), as follows:

> "Petitioner is engaged by owners of various private streets and various commercial establishments[2] to operate a program designed for the purpose of enforcing the property owner's prohibition against unauthorized parking of motor vehicles upon the private property of such owners. Prominent signs inform the public that parking by unauthorized vehicles is prohibited and that offenders are subject to having their vehicles immobilized and/or towed away. Petitioner sends around on the private streets a 'booting' team which, when it discovers an unauthorized parked vehicle, applies an immobilization device called a 'boot' to one or two tires of the vehicle, attaches a sticker to the windshield warning that any movement of the vehicle while the boot is attached could damage the vehicle, photographs the vehicle for purposes of defending damage claims and notifies the central office of the immobilization. After a reasonable period of time, if the car owner or operator has not redeemed the vehicle, a licensed towing company is called to remove [sic] from the private streets and hold it until redeemed (the charge for which encompasses not only the Petitioner's charge but also the towing fee of the towing company). If prior to the removal by the towing company the vehicle's owner or

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[1] This advisory opinion has been issued by the Division as TSB-A-91(42)S (1991 WL 122298 [N.Y. Dept. of Tax. & Fin.]).

[2] The Division introduced into evidence, as its Exhibit "H," photocopies of agreements between the corporate petitioner and various establishments for "services in the form of immobilizing motor vehicles which have been illegally or improperly parked." These establishments included fast food restaurants such as Roy Rogers, McDonald's, White Castle and Burger King, and condominium or apartment complexes such as Trump Village.

> operator comes to the Petitioner's office to redeem the vehicle, the 'booting' team will go to the vehicle and remove the 'boot'.
>
> "Petitioner employs between 10 and 25 full and part-time drivers to perform the 'booting' operation. Petitioner maintains, in the near vicinity of one of the private communities it serves, an office that is open and manned at all times when vehicles are 'booted' so that the vehicle owner or operator can pay the redemption charge to secure the release of vehicle from the immobilizing device. In the case of other locations, the vehicles [sic] owner or operator can telephone the office and a 'booting' team will be dispatched to the location to collect the redemption charge and release the vehicle.
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> "Petitioner regularly sends its personnel around to check on the security of 'boots' that have been installed on unauthorized vehicles. This is solely because of the numerous instances where the vehicle operator has endeavored to remove the 'boot' by various means including hacksaws, bolt cutters, crow bars and acetylene torches."

Mr. Zaratz testified that his company "used every kind of boot manufactured in the world." It appears that in the early 1970's a prior booting program at Forest Hills Gardens failed because the boots then available were of such poor quality and design so as to be easily destroyed or removed. The boots used by petitioner were 28 pounds of steel apiece and were described by Mr. Zaratz as follows:

> "[Y]ou have a dish that goes over the hubcap . . . and on the other end you have a hook that hooks into the wheel and you can tighten this dish into the hubcap and create a vise effect on the wheel of the vehicle. And the boot has two pins in it and you apply a lock to the boot."

The pins would cause a flat tire if the car was moved. According to Mr. Zaratz it took about a minute to put a boot on a car and roughly 30 seconds to remove it.

Mr. Zaratz candidly testified that his business was "a dirty business, a tough business." Although the concept of booting a car was an attempt "to create a less severe punishment" because the immobilized car was not towed miles away, it spawned much controversy, anger and resistance. Hundreds of small claims actions were commenced against A-Z Parking Services, and certain residents of Forest Hills Gardens, who had their own cars booted for illegal parking, were furious and threatening. Furthermore, booting was so effective in countering illegal parking that, in the beginning of its program for Forest Hills Gardens,

petitioners were booting 200 cars per week, but a year and one-half later only 200 cars per month. Mr. Zaratz testified:

> "What would happen, for instance, we would have a contract with a McDonald's franchise. After two or three weeks, nobody would park there anymore . . . ."

In response to the large number of small claims actions brought against A-Z Parking Services, the corporate petitioner and Forest Hills Gardens Corporation commenced an action in New York State Supreme Court for an order declaring that they had the right (1) "to immobilize unauthorized parked vehicles through the application of a boot, and (2) that a redemption fee of $105 to remove the boot is a legal, valid and currently reasonable charge." Justice Edwin J. Kassoff in Forest Hills Gardens Corporation v. Baroth (147 Misc 2d 404, 555 NYS2d 1000, 1003) determined that petitioners' booting program for Forest Hills Gardens "falls well within the self-help ambit of 'rigorous use of traditional common law remedies' [citation to Forest Hills Gardens Corporation v. Kowler, 80 AD2d 630, 436 NYS2d 92, affd 55 NY2d 768, 447 NYS2d 246]." By an order dated June 15, 1990, Justice Kassoff approved a settlement of the litigation which provided that "[e]ach allowed claimant[3] will be entitled to Five Dollars ($5.00) from the Settlement Fund" and $12,500.00 to the attorneys representing the "class comprised of . . . all individuals who have had their vehicles immobilized by boot . . . prior to April 1, 1990 . . . ."

We also find the following additional facts:

> Petitioners introduced into the record the original agreement dated February 14, 1989 between petitioners and Forest Hills Gardens Corporation (FHGC). The agreement provides that petitioners shall act on behalf of the FHGC "as the Parking Enforcement Agency" for arranging the removal or immobilization of unauthorized parked vehicles; that petitioners will collect from the "redeemer" of the vehicle a fee of $95.00 for each vehicle booted; that petitioners will remit weekly to FHGC, 40 percent of the gross revenues from fees actually collected for booting vehicles; and that FHGC reserves the right to require petitioners to release any vehicle that has been immobilized without charging a fee. The agreement was amended on March 31, 1989 to provide that petitioners would remit "$15.00 (fifteen dollars) per boot installed and redeemed" to FHGC rather than 40 percent of the gross revenues.

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[3]An allowed claimant is an individual who can prove payment of "$95.00 to [A-Z Parking Services or Forest Hills Gardens Corp.] for redemption of their vehicles."

The Division introduced 17 other agreements between petitioners and various clients who owned, operated and maintained private parking premises pursuant to which petitioners agreed to provide parking enforcement services, i.e., booting, similar to that described in the above agreement between petitioners and FHGC. Notwithstanding petitioners' testimony to the contrary, these agreements appear to differ from the FHGC agreement in two ways: 1) petitioners were not agents or employees of their clients but independent contractors, and 2) petitioners did not remit any of the money collected to their clients.

OPINION

Tax Law § 1105(c)(3) imposes sales tax on:

> "(c) The receipts from every sale, except for resale, of the following services:
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> * * *
>
> "(3) Installing tangible personal property, excluding a mobile home, or maintaining, servicing or repairing tangible personal property, including a mobile home, not held for sale in the regular course of business" (Tax Law § 1105[c][3]).

The Administrative Law Judge determined that:

> "Tax Law § 1105(c)(3) does not support the imposition of sales tax on the activities of A-Z Parking Services. Only a forced and contorted reading of this provision would lead to the conclusion that payments made by owners of illegally parked cars to remove booting devices applied to their cars by petitioners have been made for installing, maintaining, servicing or repairing tangible personal property.
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> "Furthermore, it also requires a forced and contorted reading of Tax Law § 1101(b)(5), which defines the terms 'sale, selling or purchase' and of Tax Law § 1101(b)(2) which defines 'purchaser' to conclude that owners of the illegally parked cars are purchasers of services from A-Z Parking Services. In sum, a natural reading of Tax Law § 1105(c)(3) in the context of these definitional provisions supports petitioners' position: the fees collected from the owners of the illegally parked cars were not for the installation, servicing or repairing of tangible personal property" (Determination, conclusion of law "C").

The Administrative Law Judge explicitly rejected the Division's analogy to towing, stating that:

> "[t]he Division's analogy to towing services, which have been 'traditionally treated as taxable,' lacks merit. Towing services are clearly not taxable under Tax Law § 1105(c)(3) as the installation, servicing or repairing of tangible personal property. Rather, they apparently are taxable under Tax Law § 1105(c)(4) as an activity related to the storage of tangible personal property:

> "'[t]he operation of an auto pound constitutes the operation of a place of business engaged in the storing of motor vehicles, and all charges made in the course of conducting the services -- including charges for towing, certified notification letters and Department of Motor Vehicle searches -- are taxable [citation to an advisory opinion omitted]' (3 NY Tax Service § 52.164, Storage) (emphasis added)" (Determination, conclusion of law "D").

On exception, the Division asserts that:

> "[t]he issue stated by the Administrative Law Judge (ALJ) is unnecessarily limited to the removal of the boots in question, rather than including both installation and removal. As such, the ALJ's statement is narrower than the issue as actually raised and addressed by the parties. A more accurate definition of the issue for determination herein is whether the payments received by [petitioner] are for services subject to sales tax under New York's Tax Law" (Rider to Notice of Exception, p. 1).

The Division also objects to the Administrative Law Judge's quoting from the advisory opinion as the primary findings of fact in this case.

> "No attempt is made to ascertain the veracity of the same. Hence, the facts stated in an advisory opinion are hypothetical in nature. Such 'facts' are not supported by any evidentiary findings, and are not a substitute for the facts which can be adduced from the documentary and testimonial evidence presented at the hearing held herein. At that hearing petitioners had more than ample opportunity to establish the facts relevant to their case, and indeed did so. Accordingly, all findings of fact for this case should be based upon the evidence of record" (Rider to Notice of Exception, p. 1).

The Division excepts to conclusion of law "B" of the Administrative Law Judge's determination stating that:

> "[t]he Division does not agree that there is any ambiguity in the statutory language set forth in Tax Law § 1105(c)(3)" (Rider to Notice of Exception, p. 1).

Finally, the Division asserts that the Administrative Law Judge erred in concluding that:

> "only a 'forced and contorted' reading of Tax Law § 1105(c)(3) would lead to the conclusion that the payments at issue are for installing, servicing, or repairing tangible personal property, and that it requires a 'forced and contorted' reading of Tax Law §§ 1101(b)(5) and 1101(b)(2) to conclude that the owners of the vehicles in question purchase services from A-Z" (Rider to Notice of Exception, p. 1).

The Division requests that we make the following conclusions:

> "1. The words of a tax statute must be given their plain meaning whenever possible.

"2. There is no ambiguity whatsoever in the portion of the language of Tax Law § 1105(c)(3) which is applicable to petitioners' activities. Rather, the statute is clear and simple in its instruction to impose tax on all services of installing, maintaining, servicing, or repairing tangible personal property.

"3. In accordance with the plain and ordinary meaning of the subject statutory language, A-Z is installing tangible personal property (the boot) when the booting device is applied to a parked vehicle. With the boot thus attached to the vehicle's tire, tangible personal property is set up and put into place for use, within the meaning of 20 NYCRR §527.5(a)(2).

"4. Removal of the boot has the effect of restoring a vehicle to a condition of operability. As such, this activity clearly constitutes maintaining, servicing or repairing tangible personal property (the vehicle). Because removal of the boot prevents the boot itself from being damaged, thereby keeping the booting device in a condition of fitness, readiness or safety, removal also constitutes maintaining or servicing the boot (other tangible personal property).

"5. It is also clear that there is a purchaser for each of these two services performed by A-Z. The landowners purchase the service of installing the boot, as part of their contracts with A-Z. Additionally, to the extent that an implied contract exists when a vehicle is illegally parked on private land, the vehicle's driver also can be viewed as a purchaser of the installation service. Certainly, the driver purchases the service of removing the boot, directly from A-Z.

"6. Since A-Z charged one fee for all of its services, without any allocation of its fee to the separate activities of installing and removing the boot, the entire amount of the charge is taxable if either one of these two services is subject to tax.

"7. The Audit Division therefore properly determined that the petitioner corporation's receipts are all subject to tax, and the Notices of Determination issued to petitioners must be sustained in full" (Rider to Notice of Exception, pp.2-3).

Petitioners' position on exception is the same as that expressed by the Administrative Law Judge in his determination:

"[p]etitioners argue that it is 'ludicrous' to suggest that the fees collected by petitioners were properly subject to sales tax as the installation or servicing or repair of tangible personal property:

> "'[i]llegally parked car owners are paying a common-law fine to the owners of private property to redeem their property. They enter into no contract with petitioners and no services are performed for them. They do not pay to have their car booted. They do not pay to have the boot removed. Instead, they pay to get their cars back. Any contrary interpretation wars with common sense [and] would require a contorted interpretation of the statute.'

> "According to the petition, '[a] reading of the whole of Tax Law § 1105(c) shows the basic intention to reach transactions between a customer and a seller of services and goods'" (Determination, finding of fact "8").

We affirm the determination of the Administrative Law Judge.

Initially, we deal with the Division's assertion on exception that the Administrative Law Judge erred in quoting facts from the advisory opinion issued to petitioners by the Division as the relevant facts in this case. We cannot agree. The agreement between petitioners and Forest Hills Garden Corporation (Petitioners' Exhibit "2"), the 17 agreements between petitioners and various clients (Division's Exhibit "H"), the audit report (Division's Exhibit "E"), as well as the testimony at hearing, support the description of petitioners' business activity as summarized in the advisory opinion.

We deal next with the overarching question in this case, i.e., "whether the activities of [petitioners] are subject to sales tax under New York's Tax Law" (Stipulation, ¶ 1). Stated in terms related to petitioners' business activities, the issue is whether the payment of the redemption fee by the owner of an illegally parked vehicle, to petitioners, for the removal of the boot, is a transaction within the purview of the Tax Law.

We conclude it is not.

The booting program is the result of the "rigorous use of traditional common law remedies" by petitioners' clients to prevent illegal parking of vehicles on their privately owned parking premises (see, Fieldston Property Owners' Assoc. v. City of New York, 16 NY2d 267, 266 NYS2d 97; Forest Hills Gardens Corp. v. Kowler, 80 AD2d 630, 436 NYS2d 92, affd 55 NY2d 768, 447 NYS2d 246; Forest Hills Gardens Corp. v. Baroth, supra). An integral aspect of this common law remedy is the enforcement of the regulations through the imposition of the redemption fee which is the sanction for violation of the parking regulations. We find no authority cited by the Division which brings such sanction within the purview of the statute as the installation or servicing of tangible personal property.

Moreover, we agree with the Administrative Law Judge that "[o]nly a forced and contorted reading of [section 1105(c)(3)] would lead to the conclusion" that the payments for

removal of the boot are "for installing, maintaining, servicing or repairing tangible personal property" as asserted by the Division (Determination, conclusion of law "C").

For example, in requested conclusion "5," the Division asserts that: "[i]t is also clear that there is a purchaser for each of these two services performed by [petitioners]. The landowners purchase the service of installing the boot, as part of their contracts with [petitioners]" (Division's Rider to Notice of Exception, p. 3). The meaning of this assertion escapes us. While we agree that the landowners are purchasing a service from petitioners, it is not the receipts from the sale of such service which are at issue here. Rather, it is the redemption fee paid by the owner of the vehicle.

In the third sentence of requested conclusion "5," the Division asserts that "to the extent that an implied contract exists when a vehicle is illegally parked on private land, the vehicle's driver also can be viewed as a purchaser of the installation service" (Division's Rider to Notice of Exception, p. 3). The gist of this assertion is that the owner of a vehicle enters into an implied contract with petitioners to purchase the installation of the boot if the vehicle is found to be illegally parked. We find no legal basis to support this thesis.

We also agree with the Administrative Law Judge's rejection of the Division's analogy of petitioners' services to towing services. We find Advisory Opinion TSB-A-91(48)S instructive on this point. The City of Rochester had contracted with Central Auto to operate an auto pound for the City. Central Auto was directed to tow vehicles to the auto pound to be stored until redeemed by the owners or sold at auction. Vehicle owners had to pay a single charge to the City before their vehicles would be released from the pound. The charge included $55.00 for towing the vehicle, storage of $8.00 to $8.50 per day, $2.00 for a certified notification letter and $6.00 for a Department of Motor Vehicles search.

The City asked if:

> "the services of towing, storage, mailing of certified notification letters to [vehicle] owners and Department of Motor Vehicles searches performed by [the City of Rochester], or its contracted representative [Central Auto], in the removal of vehicles from city streets for violations of the

> Rochester City Code, the Motor Vehicle Law or accidents or pursuant to arrests are subject to the imposition of sales tax" (TSB-A-91[48]S).

The Division determined that the operation of an auto pound constitutes the operation of a place of business engaged in the providing of storage of motor vehicles pursuant to Tax Law § 1105(c)(6)[4] and, relying on Matter of Freidus v. Leary (38 AD2d 919, 329 NYS2d 897, affd 32 NY2d 869, 346 NYS2d 531),[5] the Division concluded that the charge was subject to sales tax. In the instant case, petitioners did not operate an auto pound or otherwise store or park vehicles.[6]

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is denied;

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

3. The petition of A-Z Parking Services, Inc. and Albert Zaratz, as officer is granted; and

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[4]Tax Law § 1105(c)(6) imposes sales tax on, among other things, "storing of motor vehicles by persons operating a garage . . . or other place of business engaged in . . . storing motor vehicles."

[5]In Matter of Freidus v. Leary (supra), the Court held that the owner or other person entitled to possession of a vehicle stopped for illegal activity and removed to an auto pound by an authorized police officer or other person may be charged with reasonable cost for removal and storage payable before the vehicle is released.

[6]The Division's attempt to analogize petitioners' booting operation to towing is inconsistent with the advisory opinion rendered to petitioners (TSB-A-91[42]S), which determined that the "service of 'booting' vehicles, which are parked without authorization on private property does not constitute the sale of service of providing parking, garaging or storing of motor vehicles by persons operating a garage, parking lot or other place of business engaged in providing parking, garaging, or storing of motor vehicles pursuant to Sections 1105(c)(6), 1107(c) and 1212-A of the Tax Law" (TSB-A-91[42]S). The opinion concluded that the charge imposed by the petitioner "is a fee for the removal of the boot from the vehicle which is tangible personal property;" that a reasonable fee may be charged for the removal of such boot; and that, under section 1105(c)(3) of the Tax Law, "the attaching and removing of a boot immobilizing a vehicle is deemed to be the installing, maintaining, servicing and repairing of tangible personal property" (TSB-A-91[42]S).

4. The notices of determination, dated August 23, 1991, are cancelled.

DATED: Troy, New York
October 6, 1994

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

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