STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition of **ROBERT BRUCE McLANE ASSOCIATES, INC. AND ROBERT B. McLANE, OFFICER** 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 December 1, 1985 through May 31, 1991.	:	DECISION DTA Nos. 811542 and 812569
In the Matter of the Petition of **ROBERT BRUCE McLANE ASSOCIATES, INC.** for Revision of a Determination or for Refund of Sales and Use Taxes under Article 28 and 29 of the Tax Law for the Period June 1, 1990 through May 31, 1991.	:	

Petitioners Robert Bruce McLane Associates, Inc. and Robert Bruce McLane, Officer, 125 Church Street, New York, New York 10007, filed an exception to the determination of the Administrative Law Judge issued on November 17, 1994. Petitioners appeared by Gerald W. Cunningham, Esq. The Division of Taxation appeared by William F. Collins, Esq. (James P. Connolly, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a brief in opposition. Petitioners' reply brief was received on March 10, 1995, which date began the six-month period for the issuance of this decision. Petitioners' request for oral argument was denied.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether receipts from the performance of security services on capital improvement construction projects were properly subject to sales and use tax as receipts from the taxable sale of services.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

The record on submission provides little information concerning petitioners' business or operations. A close review of the field audit report and the auditor's workpapers, Exhibits "F" and "G", respectively, discloses that Robert Bruce McLane Associates, Inc. ("the corporate petitioner") provided security guard services at construction sites to various firms involved in the construction industry in New York City, including clients identified on workpapers of the auditor as HRH, Tishman, Zeckendorf, Silverstein Properties, Copley and Salomon Equities. The cover sheet for the field audit report shows that for an audit period from December 1, 1985 through May 31, 1991, petitioner had "taxable sales" after audit from such security guard services of $8,664,991.00 out of gross sales of $24,331,915.00. It appears that most of petitioner's nontaxable sales were from so-called "messenger services", sales of services outside of New York City, and sales to exempt organizations, as noted on worksheets of the auditor in Exhibit "G".

The Division of Taxation ("Division") issued a Notice of Determination dated September 28, 1992 against the corporate petitioner asserting sales tax due of $265,396.64, plus penalty and interest, for 22 sales tax quarters covering the period December 1, 1985 through May 31, 1991 as follows:

Tax Period Ended	Tax Asserted Due
February 28, 1986	$ 2,809.86
May 31, 1986	2,809.86
August 31, 1986	2,809.86
November 30, 1986	2,809.86

February 28, 1987	26,386.93
May 31, 1987	26,386.93
August 31, 1987	26,386.93
November 30, 1987	26,386.93
February 29, 1988	24,424.37
May 31, 1988	24,424.37
August 31, 1988	24,424.37
November 30, 1988	24,424.37
February 28, 1989	8,437.22
May 31, 1989	8,437.22
August 31, 1989	8,437.22
November 30, 1989	8,437.22
February 28, 1990	8,437.22
May 31, 1990	8,437.22
August 31, 1990	72.19
November 30, 1990	72.19
February 28, 1991	72.19
May 31, 1991	72.19
Total	$265,396.64

A corresponding notice dated October 8, 1992 was subsequently issued by the Division against Robert B. McLane, as an officer of the corporate petitioner, which also asserted sales tax due of $265,396.64, plus penalty and interest. Petitioners concede that Mr. McLane, as president of the corporate petitioner, was a person required to collect sales tax on behalf of the corporation.

The parties stipulated that the Notice of Determination dated September 28, 1992 was mailed by the Division on September 28, 1992. The petition challenging this notice was received by the Division of Tax Appeals on January 4, 1993, 98 days from the date of mailing of the notice. Petitioners did not submit any evidence to show that such petition was mailed within 90 days of the issuance of the notice, i.e., on or before December 27, 1992. Nonetheless, the Division, in footnote "2" of its brief, noted, in effect, that the issue concerning the timeliness of the corporate petitioner's petition is academic because:

> "Petitioner Robert McLane's Petition is timely. In the event that, after reviewing the merits of petitioner Robert McLane's Petition, the Division of Tax Appeals or the Tax Appeals Tribunal, were to direct the Division to revise the assessments issued to that party, the same adjustments would be made to the corporation's assessments."

Refund Claim

The corporate petitioner did not file sales tax returns for the first 18 of the 22 sales tax quarters at issue. However, near the conclusion of the audit, petitioner filed quarterly sales tax

returns, each dated July 2, 1991, for the quarters ending February 28, 1991 and May 31, 1991 reporting the following:

Quarter Ending	Gross Sales	Taxable Sales	Tax Due
February 28, 1991	$419,192.00	$419,192.00	$34,583.34
May 31, 1991	441,329.00	441,329.00	36,409.64
		Total:	$70,992.98

Petitioner remitted the tax shown due for these two quarters.

The corporation also filed quarterly sales tax returns, each dated March 10, 1992, for the quarters ending August 31, 1990 and November 30, 1990 reporting the following:

Quarter Ending	Gross Sales	Taxable Sales	Tax Due
August 31, 1990	$600,036.00	$600,036.00	$49,503.04
November 30, 1990	609,221.00	609,221.00	50,260.73
		Total:	$99,763.77

However, it did not remit the tax shown due for these two quarters. The parties stipulated that subsequently, on or about July 29, 1992, petitioners paid the sum of $41,000.00 to the Division on account for the audit period towards the assessments at issue.[1]

On or about December 17, 1993, the corporate petitioner filed amended returns for each of the four quarters set forth in Finding of Fact "4". Each of the amended returns reported that no sales tax was owed for such quarters. By a letter postmarked December 16, 1993, the corporate petitioner filed a sales tax refund application for these four quarters. The application for refund (Exhibit "C"), which was dated December 12, 1993, claimed a refund of $60,000.00[2] for the following reason:

---

[1] Petitioners are not seeking a refund of the $41,000.00 As noted below, petitioners contest only $214,059.00 of the amount asserted as due, which as noted above, is $265,396.64. The difference between these two amounts is $51,337.64. It appears that petitioners paid $41,000.00 on account instead of the $51,337.64 because, at the time of such payment (July 29, 1992), petitioners were anticipating a smaller assessment as noted in a letter of petitioners' representative dated July 29, 1991 included in Exhibit "F," the field audit report.

[2] The record does not disclose why petitioners' claim for refund is in the amount of $60,000.00 instead of $70,992.98, the amount remitted with the tax returns for the quarters ended February 28, 1991 and May 31, 1991, as noted above. Although somewhat speculative, petitioners might have intended that the difference of $10,992.98 ($70,992.98 less $60,000.00) should be applied to the remaining amount of tax it did not dispute of $10,337.64 ($51,337.64 less $41,000.00).

"This claim is based on erroneous overpayment of sales tax to the State of New York, based on incorrect instructions received by taxpayer from representatives of the New York State Department of Taxation and Finance . . . ."

By a letter dated January 6, 1994, the Division denied the refund claim of the corporate petitioner for the following reason:

"Since your business activities involve providing guard service, the receipts from your sale of services are subject to sales tax. All sales tax which was remitted or was required to be remitted by your company, was proper and cannot be refunded."

The parties stipulated that the petition dated December 7, 1992 would be treated "as a protest of the Division's denial [dated January 6, 1994] of the corporate petitioner's refund claim." Nonetheless, the corporate petitioner filed a separate petition dated January 26, 1994 to contest the denial of its refund claim and, as noted at the beginning of this determination, the two petitions have been consolidated for determination herein.

Audit Methodology Not Contested

Petitioners do not contest the audit procedures or methodology used in the sales tax field audit that gave rise to the assessments at issue. Furthermore, of the sales tax found due by the audit, petitioners contest only $214,059.00, which amount arose from the audit of the corporate petitioner's sales of guard services as a subcontractor at certain construction projects. Petitioners concede the correctness of the balance of the sales tax found due by the audit.

The construction projects, at which the corporate petitioner provided security guard services as a subcontractor, were all capital improvements and were not owned by exempt organizations. The parties stipulated that such construction projects:

"all had a ground size in excess of five thousand square feet and McLane Associates' services on those projects were mandated by the New York City Administrative Code, Title 27, Article 1, Section 27-1024 entitled 'Watchmen and Flagmen'."

Petitioners' representative, in a letter dated July 29, 1992 to the Division's auditor, which is included in Exhibit "F", requested that penalties be waived:

"Our client acknowledges that, in the event sales tax is found to have been due, but unpaid, during this period, interest will also be due. However, due to the confusing circumstances, it is our client's position and request that only simple interest be charged, and that penalties be waived.

"The failure to collect sales tax and remit same to the State was due to the confusing nature of the law, and not due to any willful neglect or effort. This is not a situation where the taxpayer collected tax but failed to remit same to the State. Here, the law is not at all clear. The taxpayer did not collect tax since they believed none was due. The taxpayer did not benefit in any way. In fact, this taxpayer will be severely and irreparably damaged since it may have to pay monies out of its own funds, with no recourse to the actual parties who benefited."

The parties executed a stipulation, which was dated January 31, 1994 by the Division's representative (Exhibit "E"). Relevant portions have been incorporated herein.

OPINION

The Administrative Law Judge first found that the corporate petitioner's petition was untimely because it was not filed within 90 days of the issuance of the Notice of Determination. However, the Administrative Law Judge went on to state that "the timeliness of the corporate petitioner's petition is academic because the Division has noted that it will make the same adjustments to the corporation's liability if the notice against Mr. McLane is revised by the Division of Tax Appeals or the Tax Appeals Tribunal" (Determination, conclusion of law "A").

The Administrative Law Judge next found that for the portion of the audit period up to December 31, 1990 the security services provided by the corporate petitioner were subject to the New York City sales tax under section 11-2040(a) of the Administrative Code of the City of New York which was enacted pursuant to the authority of Tax Law § 1212-A(h)(2)(i). For the audit period after June 1, 1990, the Administrative Law Judge noted that Tax Law § 1105(c) was amended to also impose the State sales tax on protective and detective services. The Administrative Law Judge rejected petitioners' argument, that the provision of protective and detective services was not subject to sales tax because the "end result" of such services was a capital improvement, as without merit (Determination, conclusion of law "D"). The Administrative Law Judge found that petitioners erroneously relied on Matter of Building Contrs. Assn. v. Tully (87 AD2d 909, 449 NYS2d 547). The Administrative Law Judge stated that there the Division had attempted to tax demolition and construction debris removal services

as "maintaining, servicing or repairing real property" under Tax Law § 1105(c)(5), but that the Court had rejected this attempt by the Division. Here, the Administrative Law Judge determined that the Division was not attempting to tax petitioners' services as "maintaining, servicing or repairing real property" but, rather, the Division was "relying on the specific statutory language that authorizes the taxing" of patrol and watchman services of every nature (Determination, conclusion of law "D"). In sum, the Administrative Law Judge stated that petitioners cannot ignore this statutory language and that, even if the "end result" test was applicable here, petitioners have failed to establish that the guard services satisfied such test (Determination, conclusion of law "D").

Lastly, the Administrative Law Judge, citing Matter of Edison Management Co., (Tax Appeals Tribunal, September 29, 1994), found nothing in the record to indicate that petitioners attempted to ascertain their proper tax liability, the most important factor to consider in determining whether reasonable cause exists. The Administrative Law Judge also rejected petitioners' claim that "the nature of the law" was confusing, stating that "the statutory provisions imposing sales tax on security services were clear" (Determination, conclusion of law "E").

On exception, petitioners argue that the providing of watch guards and security services by a subcontractor is not taxable when performed at a capital improvement construction site. Petitioners argue that the Appellate Division has considered the capital improvement exemption in Tax Law § 1115(a)(17) and found that this exemption "applies equally to sales of tangible personal property and to capital improvement related services" (Petitioners' brief on exception, p. 4). Petitioners also argue that the tax on protective and detective services imposed by the City of New York is "subject to the 'exemption provisions' of Article 28 of the Tax Law. Petitioners further argue that "[t]he deciding factor is whether or not the end result of the service is a capital improvement" and that here all of the projects involved were capital improvements (Petitioners' brief on exception, p. 4).

Petitioners next argue that because the sales tax imposed by section 11-2002 of the Administrative Code of the City of New York mirrors the tax on maintaining, servicing and repairing real property and the exception provided therein for capital improvements imposed by Tax Law § 1105(c)(5) and the capital improvement exemption contained in Tax Law § 1115(a)(7) is incorporated in section 11-2006(a) of the Administrative Code, any exemption from the State sales tax on services also applies to similar services performed in New York City (Petitioners' brief on exception, p. 9).

Petitioners disagree with the Administrative Law Judge's finding that even if the "end result" test was applicable, petitioners failed to establish that their services satisfied this test. Petitioners state that the Administrative Law Judge gave no support for this position "but quoted a portion of the Division's brief which created a new distinction between a physical requirement for the service as opposed to a mere legal requirement" and that in view of the written stipulation executed by the Division acknowledging the construction projects as capital improvements "such decision is arbitrary and capricious" (Petitioners' brief on exception, p. 11). Petitioners further argue that in view of the mandate of the Administrative Code requiring watchmen at capital improvement projects, "both the 'necessary part of the completion of a capital improvement' and the 'activity generating the need for the service' requirements have been met for compliance with the end result test" (Petitioners' brief on exception, p. 12). Petitioners state that if the construction projects proceeded without their services, then they would have proceeded illegally.

Finally, petitioners argue that the Administrative Law Judge erred in not following the reasoning of 20 NYCRR 541.8, the examples contained therein and numerous advisory opinions issued by the Division. Petitioners assert that these authorities support their contention that the services they provided were charges for temporary facilities at a construction site that are considered part of the capital improvement and, therefore, are not subject to tax.

In response, the Division argues that Building Contractors is not relevant to the issue at hand because the Division is not relying on Tax Law § 1105(c)(5) here but rather on section 11-

2040(a)(2) of the New York City Administrative Code and after June 1, 1990 on Tax Law § 1105(c)(8). The Division further argues that:

> "the Building Contractors court did not hold that 1105(c)(5) generally exempted all services relating to capital improvements. Rather, it held that 1105(c)(5) did not provide authority for the Division to impose a tax on a service necessary to the completion of a capital improvement. It did not preclude the Division from taxing such services under other tax imposition sections. Since it is undisputed that New York City Administrative Code § 11-2040(a)(2) and section 1105(c)(8) provide just such tax imposition authority, the Division's imposition of tax on McLane Associates' guard service is perfectly consistent with Building Contractors" (Division's brief in opposition, p. 13).

The Division also argues that the Administrative Law Judge properly rejected petitioners' reliance on 20 NYCRR 541.8 relating to the taxability of charges for temporary facilities at construction sites. The Division argues that "[t]he only tax imposition sections relevant to such services would be either Tax Law § 1105(c)(3) or (c)(5)" and that since both of these sections "contain specific language excluding from taxation services relating to the installation of capital improvements . . . the . . . regulations clarify that the facilities used to install capital improvements are not subject to sales tax" (Division's brief in opposition, p. 13). In addition, the Division notes that 20 NYCRR 541.8 specifically provides that guard and protective services are subject to the New York City sales tax.

With respect to the advisory opinions relied on by petitioners, the Division argues that one had nothing to do with services relating to a capital improvement and the others are not relevant here because the Division is not relying on Tax Law § 1105(c)(5) to tax the service but on section 11-2040(a)(2) of the Administrative Code and, after June 1, 1990, on Tax Law § 1105(c)(8) (Division's brief in opposition, p. 15).

Finally, the Division argues that while the "end result" test is not applicable here, if it were, petitioners have not shown that their guard service satisfies this test. The Division argues that in none of the decisions or advisory opinions relied on by petitioner was the "end result" test satisfied by a legally required service. Relying on Matter of St. Joe Resources Co. v. New York State Tax Commn. (72 NY2d 943, 533 NYS2d 51, revg on dissenting opn of Yesawich, J.

132 AD2d 98, 522 NYS2d 252), the Division states that there expenses associated with transporting ore from the mine did not meet the "end result" test and, therefore, petitioners' guard services do not satisfy the "end result" test.

In their reply brief, petitioners renew their argument that the Administrative Law Judge and Division have failed to recognize the significance of the fact that it was stipulated that the guard services were performed as a subcontractor on capital improvement sites.

In addition, petitioners again emphasize that the Administrative Law Judge and the Division failed to distinguish between ordinary protective services and the legally mandated guard services they provided at capital improvement sites.

Petitioners, on exception, have not raised the issue of the timeliness of the corporate petitioner's petition or the issue of whether reasonable cause exited. Therefore, we will not address these issues in our decision.

Except for the application of the "end result" test, we find that the Administrative Law Judge correctly and adequately addressed all of the arguments raised by petitioners on exception. Therefore, on these issues we affirm the determination of the Administrative Law Judge for the reasons stated in the determination.

With respect to the application of the "end result" test, the Administrative Law Judge concluded, without stating any rationale, that even if this test were applicable petitioners failed to establish that their guard services satisfied such test. Although we agree with the Administrative Law Judge that the "end result" test is not applicable, we disagree with the Administrative Law Judge's conclusion that, if applicable, the "end result" test has not been satisfied.

The Division's regulations at 20 NYCRR 527.7(4) articulate the "end result" test, which is applicable only to the tax imposed pursuant to Tax Law § 1105(c)(5), as follows:

> "(4) The imposition of tax on services performed on real property depends on the end result of such service. If the end result of the services is the repair or maintenance of real property, such services are taxable. If the end result of the same service is a capital improvement to the real property, such services are not taxable."

In Matter of Building Contrs. Assn. v. Tully (supra), the Appellate Division, Third Department held that because a capital improvement project generally cannot be completed without the removal of construction debris, these services fell within the "end result" test.

We see nothing in the regulation, nor in Building Contractors, that supports the Division's contention that the services must be physically, rather than legally, necessary in order to be considered a part of the capital improvement. Therefore, because the parties stipulated that all of the guard services at issue were performed at construction sites that were capital improvements and that the guard services were required by the New York City Administrative Code, we conclude that the guard services would satisfy the "end result" test, if this test were applicable.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Robert Bruce McLane Associates, Inc. and Robert B. McLane, Officer is denied;

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

3. The petition of Robert Bruce McLane Associates, Inc. dated December 7, 1992 is dismissed, the petition of Robert B. McLane, Officer dated December 7, 1992 is denied and the petition of Robert Bruce McLane Associates, Inc. dated January 26, 1994 is denied; and

4. The Notice of Determination dated October 8, 1992 is sustained and the disallowance dated January 6, 1994 of the refund claim is sustained.

DATED: Troy, New York
August 31, 1995

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

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

/s/Donald C. DeWitt
Donald C. DeWitt
Commissioner