STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
A-Z PARKING SERVICES, INC. AND ALBERT ZARATZ, AS OFFICER	:	DETERMINATION
		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.	:	

Petitioners, A-Z Parking Services, Inc. and Albert Zaratz,[1] as officer, 69-12 Austin Street, Forest Hills, New York 11375, filed a petition 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.

A hearing was held before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on September 17, 1992 at 1:30 P.M., with all briefs to be submitted by May 7, 1993. Petitioners' brief was filed on November 13, 1992, and the brief of the Division of Taxation was received on March 16, 1993.

Petitioners appeared by James J. Mahon, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Robert J. Jarvis, Esq., of counsel).

ISSUE

[1]The petition shows the spelling of the individual petitioner's surname as "Zaratz". Furthermore, prior to testifying at the hearing, Mr. Zaratz spelled out his name as such. However, there are several documents in the record, including the power of attorney, a notice of determination dated August 23, 1991, the Federal income tax return for A-Z Parking Services, Inc., and a contract between the corporate petitioner and Forest Hills Gardens Corporation which show the spelling of the individual petitioner's surname as "Zaretz". The variation in spelling was not explained in the record.

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

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 Law Olmsted, 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,[2] dated May 17, 1991 (which was adverse to petitioners), as follows:

> "Petitioner is engaged by owners of various private streets and various commercial establishments[3] 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 operator comes to the Petitioner's office to redeem the vehicle, the 'booting' team will go to the vehicle and remove the 'boot'.

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

[3]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.

> "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.
>
> "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[4] 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 . . . ."

SUMMARY OF THE PARTIES' POSITIONS

The Division contends that the application of the booting device to immobilize a car and its subsequent removal constitute the provision of services taxable under Tax Law § 1105(c)(3). The application of the booting device is the installation of tangible personal property while its removal constitutes the servicing or repairing of tangible personal property. The taxpayer "is 'installing' the booting device when that device is applied to the designated vehicle" and the "removal of petitioners' boot served to restore the booted vehicle to an operational condition." The Division analogizes to taxable towing services:

"[T]here is no material difference between towing of an illegally parked

[4]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."

> vehicle, which service has been traditionally treated as taxable, and petitioners' service of booting an illegally parked vehicle. Both activities are undertaken as part of a parking enforcement program, and both result in the vehicle's driver unhappily, but voluntarily, paying a fee for the service."

The Division further argues that "if it is found that either application of the boot or removal of the same is a taxable service, then A-Z's entire charge is taxable [emphasis in original]."

Petitioners 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."

CONCLUSIONS OF LAW

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

> "(c) The receipts from every sale, except for resale, of the following services:
>
> * * *
>
> "(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 . . . ."

B. It is observed that Tax Law § 1105(c)(3) does not create an exception to the imposition of sales tax. Rather, it defines what service activities are subject to tax. As a result, in analyzing this provision, which may be viewed as an "imposition statute", ambiguities are construed against the Division and in favor of the taxpayer (cf., Matter of Penn York Energy Corp., Tax Appeals Tribunal, October 1, 1992).

C. It is concluded 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.

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.

D. The 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:

> "The 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).

E. The petition of A-Z Parking Services, Inc. and Albert Zaratz, as officer, is granted, and the notices of determination and demands for payment of sales and use taxes due dated August 23, 1991 are cancelled.

DATED: Troy, New York
September 16, 1993

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE