STATE OF NEW YORK

DIVISION OF TAX APPEALS

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.	:	DETERMINATION 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 Articles 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 B. McLane, officer, 125 Church Street, New York, New York 10007, filed a petition dated December 7, 1992 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.

On January 26, 1994 and February 4, 1994, respectively, petitioners by their representative, Gerard W. Cunningham, Esq., and the Division of Taxation by William F. Collins, Esq. (James P. Connolly, Esq., of counsel) waived a hearing and agreed to submit such matter for determination.

Petitioner Robert Bruce McLane Associates, Inc. subsequently filed a petition dated January 26, 1994 for revision of a determination or forrefund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1990 through May 31, 1991.

On March 2, 1994 and March 11, 1994, respectively, petitioner by its representative,

Gerard W. Cunningham, Esq., and the Division of Taxation by William F. Collins, Esq. (James P. Connolly, Esq., of counsel) waived a hearing and agreed to submit this additional matter for determination and consolidation with the related matter noted above.

All documents and briefs to be submitted by the parties were due by June 10, 1994. The Division of Taxation's documents were received on March 1, 1994. Petitioners did not submit any additional documents.[1] Briefs were received as follows: petitioners' brief on March 30, 1994; the Division of Taxation's brief on May 20, 1994; and petitioners' reply brief on June 13, 1994. After due consideration of the record, Frank W. Barrie, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the petition dated December 7, 1992, received by the Division of Tax Appeals on January 4, 1993, represented a timely protest by the corporate petitioner, Robert Bruce McLane Associates, Inc., of the statutory notice dated September 28, 1992 issued against it.

II. 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.

III. Whether penalties imposed against petitioners should be abated.

FINDINGS OF FACT

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

[1]However, by a letter dated October 3, 1994, the Administrative Law Judge advised the parties that the petition dated January 26, 1994 and the waiver of hearing with regard to such petition had been marked into the record on submission as Exhibits "K" and "L", respectively.

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.[2]

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[3]

---

[2]Petitioners are not seeking a refund of the $41,000.00. As noted in Finding of Fact "8", petitioners contest only $214,059.00 of the amount asserted as due, which as noted in Finding of Fact "2", 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.

[3]The record does not disclose why petitioner's 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

for the following reason:

> "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

---

February 28, 1991 and May 31, 1991, as noted in Finding of Fact "4". Although somewhat speculative, petitioner 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).

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.

SUMMARY OF THE PARTIES' POSITIONS

Petitioner contends that its sales of security and watch guard services at construction sites were not subject to sales tax because they were performed on capital improvement projects. Petitioner analogizes to services involving the removal of construction debris from a capital improvement project, which was determined by the court in Matter of Building Contractors Assn. v. Tully (87 AD2d 909, 449 NYS2d 547) to be a capital improvement-related service based on an "end result test". Because the parties have stipulated that all of the projects involved were capital improvement projects, according to petitioner it necessarily follows that the "end result" of petitioner's provision of security and watch guard services was a capital improvement. In addition, petitioner argues that New York City Administrative Code § 11-2002(c) which taxes receipts from the sale of security services is invalid because it is inconsistent with Tax Law § 1105(c)(5). Finally, petitioner analogizes to "temporary facilities" on construction sites, such as the provision of temporary heat, temporary electric service, temporary protective pedestrian walkways and temporary plumbing, which are not subject to sales tax because the sales tax regulations provide that such "charges are a constituent part of the capital improvement" (20 NYCRR 541.8).

The Division counters that the guard services were subject to sales tax as protective services within the meaning of Tax Law § 1105(c)(8) and New York City Administrative Code § 11-2040(a)(2). Tax Law § 1212-a(f)(1) provided New York City with the authority to impose a sales tax on protective services during the portion of the audit period from December 1, 1985 through June 30, 1990. According to the Division, in 1990, by Laws of 1990 (ch 190) the Legislature amended the Tax Law to impose both State and local sales tax on protective and detective services, including guard, patrol and watchman services of every nature. The Division rejects petitioner's reliance on Tax Law § 1105(c)(5) and the "end result test" "because McLane Associates' guard service is not being taxed as a service relating to the maintenance of real property" (Division's brief, p. 9). Even if the "end result test" was applicable, petitioner has not established its guard service satisfies such test:

> "Whereas the rubbish removal service was a physical requirement necessary to the completion of a capital improvement, at most the guard service is a mere legal requirement" (Division's brief, p. 15).

CONCLUSIONS OF LAW

A. Tax Law § 1138(a)(1) provides that a notice of determination of sales tax due:

> "shall finally and irrevocably fix the tax unless the person against whom it is assessed, within ninety days after giving of notice of such determination, shall apply to the division of tax appeals for a hearing . . . ."

As noted in Finding of Fact "3", the parties stipulated that the Notice of Determination dated September 28, 1992 against the corporate petitioner was mailed by the Division on September 28, 1992. Petitioners have not submitted any evidence to show that the petition contesting such notice was mailed within 90 days of September 28, 1992. Therefore, such petition must be viewed as untimely since it was not received by the Division of Tax Appeals until January 4, 1993, 98 days from the date of mailing of the notice (cf., Matter of WSD United Transportation, Tax Appeals Tribunal, July 27, 1989). Nonetheless, as noted in Finding of Fact "3", 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.

B. Tax Law § 1212-A(h)(2)(i), which was in effect for the portion of the audit period up to December 31, 1990, provided as follows:

> "[New York City], acting through its local legislative body, is hereby authorized and empowered to adopt and amend local laws imposing in [New York City], for a period beginning no earlier than September [1, 1975] and ending December [31, 1990], taxes at a rate or rates not to exceed four percent . . . upon the receipts from every sale, except for resale, of any or all of the following services, in whole or in part:
>
> * * *
>
> "(B) Protective services and detective services, including, but not limited to, all services provided by or through alarm or protective systems of every nature, including, but not limited to, protection against burglary, theft, fire, water damage or any malfunction of industrial processes or any other malfunction of or damage to property or injury to persons, detective agencies, armored car services and guard, patrol and watchman services of every nature, whether or not any tangible personal property is transferred in conjunction therewith" (emphasis added).

Based upon this enabling statute, New York City enacted the following sales tax on protective and detective services:

> "On and after September [1, 1975], there is hereby imposed within the city and there shall be paid a tax at the rate of four percent upon the receipts from every sale, except for resale, of the following services:
>
> * * *
>
> "2. Protective and detective services, including, but not limited to, all services provided by or through alarm or protective systems of every nature, including, but not limited to, protection against burglary, theft, fire, water damage or any malfunction of industrial processes or any other malfunction of or damage to property or injury to persons, detective agencies, armored car services and guard, patrol and watchman services of every nature, whether or not any tangible personal property is transferred in conjunction therewith, but excluding protective and detective services performed by port watchmen . . ." (Administrative Code § 11-2040[a]).

C. Laws of 1990 (ch 190, § 173, eff June 1, 1990) amended Tax Law § 1105(c) so that State sales tax of 4% was also imposed on protective and detective services described as follows:

> "(8) Protective and detective services, including, but not limited to, all services provided by or through alarm or protective systems of every nature, including, but not limited to, protection against burglary, theft, fire, water damage or any malfunction of industrial processes or any other malfunction of or damage to property or injury to persons, detective agencies, armored car services and guard, patrol and watchman services of every nature other than the performance of such services by a port watchman licensed by the waterfront commission of New York

> harbor, whether or not tangible personal property is transferred in conjunction therewith" (emphasis added).

D. The security services provided by the corporate petitioner at construction sites were clearly subject to sales tax under the statutory provisions cited in detail above. Petitioners' argument that the provision of such services at construction sites was not subject to sales tax because the "end result" of such services was a capital improvement is without merit. Petitioners rely erroneously upon the decision in Matter of Building Contractors Assn. v. Tully (87 AD2d 909, 449 NYS2d 547) which invalidated the Division's former regulation at 20 NYCRR 527.7 to the extent it taxed demolition and construction debris removal services connected with a capital improvement. The court therein rejected the Division's attempt to tax such services as "maintaining, servicing or repairing real property" under Tax Law § 1105(c)(5):

> "The Tax Commission itself has very aptly described the commonly accepted meaning of 'maintaining, servicing or repairing real property' in the same regulation under review here: 'Maintaining, servicing and repairing are terms which are used to cover all activities that relate to keeping real property in a condition of fitness, efficiency, readiness or safety or restoring it to such condition' (20 NYCRR 527.7[a][1]) (emphasis added [by the court]). The removal of debris resulting from demolition or construction at a capital improvement project hardly fits within that definition" (Building Contractors Assn. v. Tully, supra, at 549).

The court went on to decide that "the end result" of the removal of construction and debris was a capital improvement and therefore fell within the capital improvement exemption from tax (Matter of Building Contractors Assn. v. Tully, supra, 449 NYS2d at 549).

However, in the matter at hand, the Division is not seeking to tax petitioners' security guard services as "maintaining, servicing or repairing real property" under Tax Law § 1105(c)(5). Rather, the Division is relying on the specific statutory language that authorizes the taxing of such services as noted above. Petitioners' creative reliance on an expansion of the "end result" analysis in Building Contractors Assn. v. Tully (supra), as well as on a regulation not on point (20 NYCRR 541.8), is without merit because such analysis renders meaningless statutory language specifically on point which taxes the services at issue. Every part of a statute must have a meaning (see, McKinney's Cons Laws of NY, Book 1, Statutes § 231; cf., Matter of Chanry Communications, Ltd., Tax Appeals Tribunal, March 7, 1991, comfirmed sub nom

Matter of Henry v. Wetzler, 183 AD2d 57, 588 NYS2d 924, affd 82 NY2d 859, 609 NYS2d 160, cert denied ___US___, 128 L Ed 2d 863 [wherein the Tribunal noted that in construing statutory provisions, all parts of a statute must be harmonized with each other as well as with the general intent of the whole statute]). In sum, petitioners' concocted analogy to removal of debris from construction sites ignores statutory language directly on point. In any event, the Division is correct that petitioners have failed to establish that the guard services satisfied the "end result test" even if such test was applicable.

E. Petitioners have not established that the failure to timely file returns and pay sales tax "was due to reasonable cause and not due to willful neglect" (Tax Law § 1145[a][1][iii]). The record is devoid of any evidence concerning the most important factor in determining whether reasonable cause and good faith exist: the extent of the taxpayer's efforts to ascertain the proper tax liability (see, Matter of Edison Management Co., Tax Appeals Tribunal, September 29, 1994). Furthermore, the contention by petitioners, as noted in Finding of Fact "10", that the "nature of the law" at issue was confusing is rejected. Rather, the statutory provisions imposing sales tax on security services were clear. It was petitioners' own creative expansion of a remotely related court case that caused confusion concerning their obligations under the sales tax law. Furthermore, although it appears that the taxpayers did not collect sales tax and "may have to pay monies out of [their] own funds", by not collecting sales tax that should have been collected, the taxpayers obtained an unfair bidding advantage over competitors in compliance with the obligation to collect sales tax.

F. The petition of Robert Bruce McLane Associates, Inc. dated December 7, 1992 is dismissed as untimely. The petition of Robert B. McLane, officer, dated December 7, 1992 is denied and the Notice of Determination dated October 8, 1992 is sustained. The petition of Robert Bruce McLane Associates, Inc. dated January 26, 1994 is denied and the disallowance dated January 6, 1994 of the refund claim is sustained.

DATED: Troy, New York
November 17, 1994

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE