

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**WORLDWIDE SECURITY ASSOCIATES, INC.** : DETERMINATION  
for Revision of a Determination or for Refund of Sales : DTA NO. 820233  
and Use Taxes under Articles 28 and 29 of the Tax Law :  
for the Period June 1, 2001 through August 31, 2003. :

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Petitioner, Worldwide Security Associates, Inc., 10311 South La Cienega Boulevard, Los Angeles, California 90045, 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 June 1, 2001 through August 31, 2003.

On April 29, 2005, petitioner, Worldwide Security Associates, Inc., by Richard Brickman, Esq., and on May 4, 2005, the Division of Taxation by Christopher C. O'Brien, Esq. (Michael P. McKinley, Esq., of counsel) waived a hearing and agreed to submit this case for determination, with all documents and briefs to be submitted by September 13, 2005, which date began the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Frank W. Barrie, Administrative Law Judge, renders the following determination.

***ISSUES***

I. Whether sales tax is due on petitioner's receipts from the sale of security services to airlines operating at John F. Kennedy International Airport.

II. Whether the Division of Taxation must first assess and collect any sales tax due from petitioner's provision of security services from the airlines and not from petitioner.

***FINDINGS OF FACT***

1. After an audit of petitioner’s sales for the period June 1, 2001 through August 31, 2003, the Division of Taxation (“Division”) increased petitioner’s gross sales and taxable sales as follows:

	Reported	After Audit	Increase After Audit
Gross Sales	\$21,221,934.00	\$22,983,085.00	\$1,761,151.00
Taxable Sales	8,376,246.00	15,258,240.00	6,881,994.37

The Division calculated additional sales tax due of \$568,405.59 on the additional taxable sales after audit of \$6,881,994.37. According to the Division’s audit report, these additional taxable sales resulted from “unsubstantiated exempt sales.”

2. During the audit period, petitioner provided security, baggage check and screening services at John F. Kennedy International Airport (“JFK”) in New York City to Delta Air Lines, Inc. (“Delta”) as well as so-called “Delta-Handled Carriers” which apparently<sup>1</sup> included Air Jamaica, Aeroflot, and China Airlines among others. Petitioner did not believe that its provision of screening services to the airlines was subject to sales tax and therefore did not bill its customers for sales tax on such services. Pursuant to a “Master Agreement for Airport Services” which governed petitioner’s business relationship with the airlines, the airlines were purchasing services from petitioner, as an independent contractor. Section 2.5 of this agreement provided as follows:

All Services shall be furnished by [petitioner]<sup>2</sup> as an independent contractor. All personnel utilized by [petitioner] in the furnishing of such services shall be

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<sup>1</sup> With the waiver of hearing, the factual record in this matter is sketchy.

<sup>2</sup> In the agreement, petitioner was referred to as “Contractor.” Such references have been changed to “petitioner” in the excerpts above.

employees of [petitioner] and under no circumstances shall be deemed employees of Delta.

Further, while section 3.5 of the agreement provided that “all amounts payable under this Agreement chargeable to Delta are exclusive of any and all sales and use taxes,” section 3.6 of the agreement provided as follows:

[Petitioner] shall be registered to collect sales tax and shall be responsible for the collection of applicable sales and use taxes in jurisdictions where such registration is required by law. Delta shall pay to [petitioner] any sales tax billed by [petitioner] imposed by any taxing authority required to be paid by [petitioner] or by Delta as a result of the performance of this Agreement. If claim is made against [petitioner] for the applicable sales tax, [petitioner] shall notify Delta immediately upon receipt of said notice. If requested by Delta in writing, [petitioner] shall, at Delta’s expense, take such action as Delta may reasonably direct with respect to such asserted liability and shall not pay any such charges, except under protest, if payment is necessary. If payment is made, [petitioner] shall, at Delta’s expense, take such action as Delta may reasonably direct to recover payment and shall, if requested, permit Delta in [petitioner’s] name to file a claim or commence an action to recover such payment. If all or any part of any charges are refunded or credited, [petitioner] shall repay Delta such part thereof as Delta shall have paid, including any interest received thereon.

3. Petitioner, a California corporation with its principal offices in Los Angeles, was a registered vendor for purposes of the collection and remittance of New York sales and use tax, and maintained a business location in the New York City borough of Queens during the period at issue.

4. The Division issued a Statement of Proposed Audit Change for Sales and Use Tax dated May 27, 2004 which asserted tax due for the period June 1, 2001 through August 31, 2003 in the amount of \$568,405.59 plus interest. In a response dated June 24, 2004, petitioner noted its disagreement with this proposed audit change:

Based on previous experience in working in the airline industry, [petitioner] had no reason to believe that screeners were subject to tax. . . . If tax is due for screeners, it should be billed directly to [the airlines] as [petitioner] is no longer servicing them in New York or any other jurisdictions.

Subsequently, the Division issued a Notice of Determination against petitioner dated August 2, 2004 asserting sales tax due of \$568,405.59 plus interest for the period June 1, 2001 through August 31, 2003.

***SUMMARY OF THE PARTIES' POSITIONS***

5. Petitioner contends that any tax due should be sought directly from Delta and related airlines. It points to an entry in the Division's audit record which noted that the team leader advised petitioner to sign the consent to the audit because "if Delta refuses to pay, they can write it off as a bad debt, and would not owe us the money." According to petitioner, the Division should be bound by this advice provided to petitioner and, in effect, estopped from collecting any tax due from it. Petitioner further states that Delta's current financial difficulties do not justify the Division's seeking payment of any tax due from it. Petitioner argues that Tax Law § 1105(c)(8) does not provide "any clear indication that airport security services are indeed subject to the subject sales tax" (Petitioner's brief, p. 4).

6. The Division maintains that sales tax is properly imposed on petitioner's receipts from the provision of security services to airlines at airports, relying upon *Matter of Combined Contract Services, Inc.* (Tax Appeals Tribunal, July 31, 1997). Further, according to the Division, as a vendor of taxable services in New York, petitioner "is a person required to collect tax" and its "ignorance of its responsibility to collect tax does not absolve it of this duty" (Division's brief, p. 4). Finally, the Division contends that petitioner's responsibility to collect tax cannot be obviated by "[a]ny advice given by the Division's auditor" (Division's brief, p. 5).

7. In its reply brief, petitioner emphasizes that the sales tax liability at issue resulted from services it provided "in the immediate aftermath of the September 11 tragedy" and that "many of the cities and other municipal governments and agencies for which Petitioner was providing its

services exempted this revenue from any form of taxation at all, in recognition of the extraordinary nature of the underlying events” (Petitioner’s reply brief, p. 3). Petitioner requests that if the assessment is upheld it should be provided with additional time, not to exceed 180 days, to “request that Delta immediately pay over the full amount of the assessment” (Petitioner’s reply brief, p. 3).

### ***CONCLUSIONS OF LAW***

A. Pursuant to Tax Law § 1105(c)(8), sales tax is imposed upon the receipts from every sale of the service of:

Protective and detective services, including, but not limited to, all services provided by or through alarm or protective systems of every nature . . . 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.

Since this provision does not create an *exception* to the imposition of sales tax, but rather, defines particular service activities that are subject to tax, it is properly viewed as an imposition of tax statute. Consequently, ambiguities are construed against the Division and in favor of the taxpayer (*see, Matter of Penn York Energy Corp.*, Tax Appeals Tribunal, October 1, 1992; *cf., Matter of Dunham’s Resort Corp.*, Tax Appeals Tribunal, October 13, 2005 [Tribunal affirmed the administrative law judge’s decision, which noted that although imposition of tax statutes are “strictly construed against the taxing authority,” the burden of proof to show entitlement to an exclusion from tax nonetheless remains with the taxpayer]).

B. A plain reading of the statutory terminology of “protective services” leads to the conclusion that petitioner’s provision of security services to airlines located at JFK is encompassed by this language (*see, Cooper-Snell Co. v. State of New York*, 230 NY 249, 129 NE 893 [statutes are to be read according to the natural and obvious import of their language

without resorting to subtle or forced construction]; *see also, Matter of Calandra*, Tax Appeals Tribunal, September 29, 1988 [Tribunal applied the “ordinary, everyday” meaning of a statutory term]). Protective services are services which “protect.” In this case, petitioner provided security services which are encompassed by the standard dictionary meaning of the term “protect” or “to cover or shield from exposure, injury, or destruction” (Webster’s Ninth New Collegiate Dictionary 946 [9<sup>th</sup> ed 1983]). The screening services provided by petitioner to keep airlines secure in their operation were plainly “protective services.”

In any event, petitioner has not met its burden of proof to establish that the security services it provided to airlines are properly excluded from being considered “protective services” subject to tax. In fact, as noted in footnote “1”, the factual record is sketchy and there is almost no evidence concerning the specific nature of the security services provided by petitioner. Since the burden of proof remained upon petitioner, despite the principle that statutes which impose tax are strictly construed against the taxing authority, petitioner must bear the consequences of any inadequacy in the factual record (*Matter of Dunham’s Resort Corp., supra*). Furthermore, the decision of the Tax Appeals Tribunal in *Matter of Combined Contract Services, Inc.* (July 31, 1997) [Tribunal decided that sales tax on the petitioner’s receipts from the sale of security services to American Airlines was not preempted by the Federal Airline Deregulation Act] by clear implication supports the conclusion herein that the receipts from such security services provided to airlines are subject to sales tax.

C. Pursuant to Tax Law § 1131(1), as a vendor, petitioner was a “person required to collect” the sales tax at issue from the airlines to which it provided security services. There is simply no basis in the law or regulations to *require* the Division to seek payment of the sales tax due directly from Delta or any other airlines.

D. Furthermore, the Division may not be bound by the advice or legal interpretation provided by its auditor noted in the findings of fact which may have led petitioner to believe that it would not be held liable for any sales tax which it was unable to collect from its customer, Delta Airlines. In particular, it is noted that petitioner's failure to collect sales tax at the time it provided the security services at issue to Delta was *not* the result of any *reliance* upon the advice or legal interpretation provided by the Division's auditor. It was only later, during the audit stage, that the Division's employee may have provided such advice or legal interpretation. Consequently, the situation at hand clearly does not rise to the level of one where the estoppel doctrine might be properly applied to bar the Division from holding petitioner liable for the unpaid sales tax due on its provision of security services to Delta and related airlines (*see, Matter of Vanderveer*, Tax Appeals Tribunal, August 15, 1994 [errors or misinterpretation of employees of the Division of Taxation were not binding on the Division if no reasonable reliance]).

E. Finally, there is no statutory or regulatory basis to direct the Division to delay its collection of sales tax determined to be due and owing by petitioner. Although petitioner's participation in ensuring airline security after September 11, 2001 is commendable, an administrative law judge lacks any *equitable* power to delay the collection of tax which is determined to be due and owing (*see, Matter of Eisenstein*, Tax Appeals Tribunal, March 27, 2003 [Tribunal rejected the administrative law judge's *equitable* determination despite the fact that it provided "a rational solution to petitioner's dilemma"]).

F. The petition of Worldwide Security Associates, Inc. is denied, and the Notice of Determination dated August 2, 2004 is sustained.

DATED: Troy, New York  
November 17, 2005

/s/ Frank W. Barrie  
ADMINISTRATIVE LAW JUDGE