

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
J. C. PENNEY COMPANY, 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, 1975 :
through May 31, 1978. :

DECISION

Petitioner, J. C. Penney Company, Inc., 1301 Avenue of the Americas, New York, New York 10019, 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, 1975 through May 31, 1978 (File No. 28546).

On September 19, 1985, petitioner, by its representative, Michael A. Pearl, Esq., filed a waiver of hearing and requested that this matter be decided by the State Tax Commission on the basis of the existing record and a stipulation of facts, with all briefs to be submitted by December 15, 1985.

For purposes of this proceeding, a pending petition filed by petitioner on a sales tax assessment in the amount of \$157,636.32 for the period June 1, 1978 through May 31, 1981, having an identical issue, has been consolidated with the instant matter and, by agreement of the parties' representatives, this decision will be binding on both matters.

ISSUE

Whether services performed for petitioner by New York Air Conditioning Corporation during the audit period were excluded from sales and use tax under section 1105(c)(5) of the Tax Law, which excludes from such taxation "interior

cleaning and maintenance services performed on a regular contractual basis for a term of not less than thirty days."

FINDINGS OF FACT

1. On October 20, 1979, as the result of a field audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, J. C. Penney Company, Inc., in the amount of \$57,340.69, plus interest of \$12,923.75, for a total due of \$70,264.44 for the period June 1, 1975 through May 31, 1978.

2. Petitioner had executed consents extending the period of limitation for assessment of sales and use taxes for the period June 1, 1975 through May 31, 1976 to October 30, 1979.

3. Petitioner is a Delaware corporation with its principal office at 1301 Avenue of the Americas, New York, New York 10019. During the audit period, in addition to its corporate headquarters at 1301 Avenue of the Americas, petitioner leased premises at 825 Seventh Avenue and 1700 Broadway in New York City.

4. During the audit period, New York Air Conditioning Corporation ("NYA") performed certain services on interior air conditioning equipment located on premises in New York City occupied by petitioner. Such services were performed on a regular contractual basis for more than thirty days. The approximately 210 tons of air conditioning equipment maintained by NYA at 1700 Broadway was used to provide a cool, dehumidified and dust-free environment for computer equipment. At 825 Seventh Avenue, NYA's services were performed on a central air conditioning system of approximately 100 tons that supplied air conditioning to the premises occupied by petitioner.

5. Under the contractual arrangement between petitioner and NYA, an employee was on-site at the 825 Seventh Avenue location from 8:00 a.m. to

6:00 p.m. from Monday through Friday. At the 1700 Broadway location, an NYA employee was on-site at all hours of the day, seven days a week. The environment needed for the proper functioning of computer equipment required the continuous operation of air conditioning to maintain certain temperature and humidity levels. Failure to maintain this environment could result in malfunctioning of the computers.

6. The services performed by NYA personnel were in accordance with a written "Preventive Maintenance" program developed jointly by NYA and petitioner. The program included performance of the following tasks on the air conditioning systems on a daily, weekly, or monthly basis:

- (a) cleaning fresh air fans;
- (b) cleaning and dusting the reheat and preheat ventilation system;
- (c) oiling, greasing and testing the efficiency of motors, pumps, and compressors;
- (d) monthly replacement of the more than 1,000 filters in the systems, which filters were supplied by petitioner;
- (e) keeping the coils clean by dusting on a regular basis and steam cleaning twice yearly;
- (f) cleaning, scraping, and painting the condenser pans to keep them from rusting;
- (g) cleaning the humidifiers;
- (h) cleaning the sprayheads in the cooling towers to prevent clogging;
- (i) keeping the floors, registers, and perimeter grilles free from dust and dirt by periodic vacuuming;
- (j) adding coolants and refrigerants, as needed.

7. NYA personnel performed routine parts replacement, such as replacing fan belts, grease cups, fuses and pulleys. Outside contractors were called for replacement of mechanical parts, such as compressors. Outside contractors were also called in to repair a breakdown or malfunction of the air conditioning system. In such case, the outside contractor billed NYA for parts and labor, and NYA separately invoiced petitioner for these amounts, plus a charge for its profit and overhead. The parties agree that \$28,670.38 of taxable sales, yielding four percent of the amount of tax at issue herein, represents the amount attributable to repair charges by outside contractors, and that such charges are subject to tax. Petitioner consents to payment of these taxes.

8. When a breakdown or serious malfunction of the air conditioning system occurred, the NYA person on duty shut down the system and turned on standby air conditioning equipment pending repair to the main system by an outside contractor.

9. The parties also agree that \$100,346.25 of taxable sales yielding fourteen percent of the amount invoiced by NYA to petitioner during the audit period represented the purchase by petitioner, or by NYA on petitioner's behalf, of supplies, tools, equipment, and other tangible personal property used in the performance of services rendered by NYA. Petitioner does not dispute the taxability of such tangible personal property and consents to payment of these taxes.

CONCLUSIONS OF LAW

A. That section 1105(c)(5) of the Tax Law imposes a tax on the receipts from every sale, except for resale, of the service of:

"Maintaining, servicing or repairing real property, property or land, as such terms are defined in the real property tax law, whether the services are performed in or outside of a building, as distinguished from adding to or improving such real property, property or land, by a capital improvement, but excluding services rendered by an individual who is not in a regular trade or business offering his services to the public, and excluding interior cleaning and maintenance services performed on a regular contractual basis for a term of not less than thirty days, other than window cleaning, rodent and pest control and trash removal from buildings."

B. That 20 NYCRR 527.7(c)(3)(iv) provides:

"Interior cleaning and maintenance services include ordinary janitorial services such as dusting, cleaning and waxing of the walls and floors of a building, oiling of door hinges, replacing light bulbs, and simple repairs such as replacement of washers."

C. That the services performed for petitioner by NYA, although performed on a regular contractual basis for more than thirty days, do not constitute "cleaning and maintenance services" excluded from taxation under of section 1105(c)(5) of the Tax Law, in that such term does not include complex, non-janitorial equipment maintenance tasks of a specialized nature, however routine Matter of J. C. Penney Co., Inc., State Tax Commission, October 17, 1980.

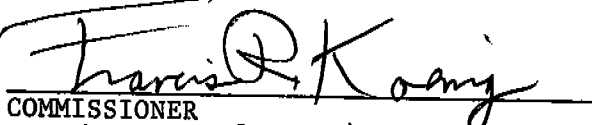
D. That the petition of J. C. Penney Company, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued October 20, 1979 is sustained.

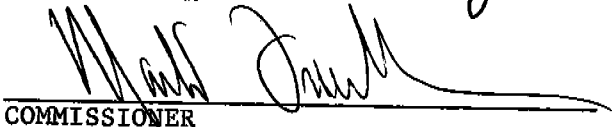
DATED: Albany, New York

STATE TAX COMMISSION

JAN 28 1986


PRESIDENT


COMMISSIONER


COMMISSIONER