

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
ALLIED MAINTENANCE CORPORATION	:	DECISION
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, 1974	:	
through November 30, 1978.	:	

Petitioner, Allied Maintenance Corporation, Two Pennsylvania Plaza, New York, New York 10121, 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 December 1, 1974 through November 30, 1978 (File No. 36359).

A formal hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 27, 1983 at 10:00 A.M. with all briefs to be submitted by August 15, 1983. Petitioners appeared by Graubard, Moskovitz, McGoldrick, Dannett & Horowitz (Allen Greenberg, Esq. and Emanuel Dannett, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Alexander Weiss, Esq., of counsel).

ISSUES

I. Whether petitioner is barred by the doctrine of collateral estoppel from litigating the issue of whether sales tax is due upon the receipts from the services provided by its employees classified as first and second operators.

II. Whether the receipts for the services provided by petitioner's first and second operators are subject to New York sales tax.

FINDINGS OF FACT

1. On November 20, 1981, the Audit Division issued to petitioner, Allied Maintenance Corporation ("Allied"), two notices of determination and demand for payment of sales and use taxes due. One Notice was for the period December 1, 1974 through May 31, 1978. This Notice assessed a tax due of \$383,043.62, plus interest of \$155,424.67, for a total amount due of \$538,468.29. The remaining Notice was for the period June 1, 1978 through November 30, 1978 and assessed a tax due of \$83,473.93, plus interest of \$22,918.84, for a total amount due of \$106,392.77.

2. The assessments were based upon the Audit Division's conclusion that the receipts from the services provided to certain customers of petitioner were subject to New York sales tax. At the hearing, petitioner withdrew its objection to all portions of the assessment except with respect to two customers - Rochdale Village, Inc. ("Rochdale") and Riverbay Corporation ("Riverbay"). With respect to Rochdale, petitioner is challenging sales tax asserted due of \$87,382.00. With respect to Riverbay, petitioner is challenging sales tax asserted due of \$91,018.00. After the hearing, the Audit Division withdrew that portion of the assessment pertaining to services provided by petitioner to New York Telephone Company.

3. Allied is a corporation which contracts to provide services to its clients. The type of services provided by Allied included mechanical, janitorial and aviation services, sky capping and loading aircraft.

4. On April 24, 1975, Allied entered into a contract with Riverbay to provide services in the utility plant facility and certain residential buildings in "Co-Op City" for a period of two years. The contract provided that Allied would provide its own staff and that it would "...have the full responsibility

for performing all the operation, maintenance, repairs and inspection services associated with the Co-Op City Utility Plant mechanical, electrical, underground and utility systems." Other systems which Allied took responsibility for servicing included the fueling system, cooling towers, pump rooms and substations. The contract executed on April 25, 1975 was extended by a subsequent agreement and remained in effect throughout the periods in issue.

5. Allied executed a contract, effective August 17, 1975, with Rochdale to provide mechanical services in the utility plant facility in Rochdale Village. The contract provided that Allied would have...

"the full responsibility for performing all the operation, maintenance, repairs, and inspection services at the Rochdale Village Power Station which are associated with total energy production for the Rochdale Village residential complex. The systems and equipment to be serviced shall include the applicable mechanical, electrical, and utility systems at the Power Station, underground distribution systems, cooling towers, fueling system, and pump and transformer rooms located in the twenty (20) residential buildings."

The contract entered into with Rochdale was extended by subsequent agreements and remained in effect throughout the periods in issue.

6. In accordance with the foregoing contracts, Allied performed preventive maintenance, operational maintenance and repair services for both Rochdale and Riverbay.

7. Co-Op City and Rochdale Village were both substantial apartment complexes. Co-Op City consisted of approximately twenty-two buildings, of which about twenty buildings were twenty-two stories high. Rochdale Village had twenty residential buildings.

8. In order to provide heat and air conditioning to the apartments, Co-Op City and Rochdale Village contained substantial utility plants. The utility plant for Co-Op City was approximately the size of a city block and housed such machines as a 6,250-ton chiller and a high pressure boiler that was three to

four stories high. Rochdale Village had equipment similar to Co-Op City, although about half the size. However, Rochdale Village had a power plant while Co-Op City did not. Each apartment complex had air conditioning equipment, heating equipment, a turbine, plumbers, boilers, motors, chillers and compressors. Most of the equipment could not be removed from either plant without destruction of the building in which it was located.

9. In order to operate the power plant at Rochdale Village and Co-Op City, Allied employed the services of a number of highly-skilled individuals. Among others, Allied employed welders, electricians, engineers, control technicians, carpenters, steam fitters and plumbers.

10. At the hearing, Allied acknowledged that sales tax was due on the revenue arising from the services mentioned in Finding of Fact "6".

11. In addition to the employees mentioned in Finding of Fact "9", Allied employed the services of individuals classified as first operators and second operators.

12. At the time an individual would be hired as a second operator, he would be unskilled. Upon being hired, a second operator would take part in a sixty-day training program. This training would include instruction relating to the various types of equipment in a physical plant, the function of the equipment, and how to maintain the equipment. Second operators would also be trained to read and understand the gauges on the equipment.

13. It was the job of the second operator to mop the floor of the engine room and control room and to "wipe down" panels. They would occasionally assist first operators with cleaning condenser tubes. This required opening up the condenser. Second operators would also clean the fuel pump. This would

entail removing a nozzle or strainer and placing it in cleaning fluid. Second operators would also clean the armature and winding using a vacuum cleaner.

14. First operators would start and stop equipment and adjust the temperature of the equipment under the direction of the engineer in charge of the watch. With regard to the stationary engine, the first operator would periodically "pull a burner". This would involve cleaning or replacing a nozzle on a predetermined schedule. This activity would be supervised by an engineer. First operators were also required to maintain logs that recorded pressure, temperature, and starting and stopping times of the equipment. This data was recorded every four hours and given to the engineer to review.

15. First and second operators had the similar job specifications, although second operators had more cleaning responsibilities. If a vacancy arose in a first operator position, a second operator could advance to the position of first operator.

16. Neither second nor first operators were licensed engineers. They were not permitted to perform their services unless an engineer was available at the plant. Operators did not repair or replace engine parts, dismantle motors, or overhaul transformers or electrical conductors.

17. Allied sent weekly and monthly bills to Riverbay and Rochdale. The weekly bills contained a schedule showing the number of hours worked by each category of employee during the preceding week.

18. The Audit Division argued at the hearing that petitioner was precluded from litigating the issue of whether sales tax was due upon the receipts from the services provided by petitioner's first and second operators. In July, 1979, the New York State Supreme Court, Appellate Division, Third Department, decided the case of Matter of Allied New York Services, Inc. v. Tully (83

A.D.2d 727). The Court held therein that sales tax was required to be collected on the receipts from the services provided by a wholly-owned subsidiary of petitioner arising from the building cleaning, janitorial and equipment maintenance services for several department stores in New York City.

CONCLUSIONS OF LAW

A. That collateral estoppel is a doctrine which seeks to prevent the relitigation of an issue between the same parties or those in privity (5 Weinstein-Korn-Miller, N.Y. Civ. Prac. ¶5011.23). In order to apply collateral estoppel, it is necessary to conclude that the issue currently in question was disposed of previously and that the party sought to be bound had a fair opportunity to have the issue resolved in its favor and was unsuccessful (see Siegel, New York Practice, §457, p. 605).

B. That collateral estoppel is an affirmative defense [CPLR §3018(b)]. The burden of proving the applicability of the doctrine of collateral estoppel is on the party raising it (CPLR §3018(b); Siegel, New York Practice §223, p. 268). In view of the fact that the services referred to in Matter of Allied New York Services, Inc. v. Tully (83 A.D.2d 727) were provided to department stores, while the services at issue herein were rendered to apartment complexes, the Department has failed to sustain its burden of proof of establishing that the principle of collateral estoppel precludes petitioner from raising the issue presented herein.

C. That during the period in issue, Tax Law §1105(c)(5) provided that a sales tax was due upon:

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

* * *

(5) 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.

Wages, salaries and other compensation paid by an employer to an employee for performing as an employee the services described in paragraphs (1) through (5) of this subdivision (c) are not receipts subject to the taxes imposed under such subdivision."

D. That the services provided by first and second operators, noted in Findings of Fact "13" through "15", were of a specialized and skilled nature which were made possible by the technical training they received. Accordingly, these services went far beyond the ordinary maintenance services contemplated by the exemption provided for by Tax Law §1105(c)(5) (see Matter of Heist Corp. v. State Tax Comm., 50 N.Y.2d 438, 444). Therefore, the receipts for the services provided by petitioner's first and second operators are subject to New York sales tax.

E. That the petition of Allied Maintenance Corporation is denied.


DATED: Albany, New York

FEB 29 1984

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER