

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of  
Allied New York Services, Inc. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of  
Sales & Use Tax :  
under Article 28 & 29 of the Tax Law  
for the Period 8/1/65 - 2/29/72. :

State of New York  
County of Albany

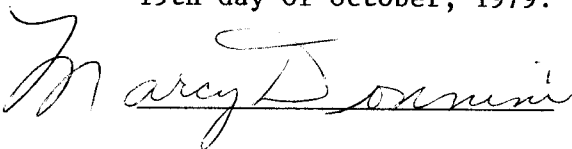
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 19th day of October, 1979, he served the within notice of Determination by mail upon Allied New York Services, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

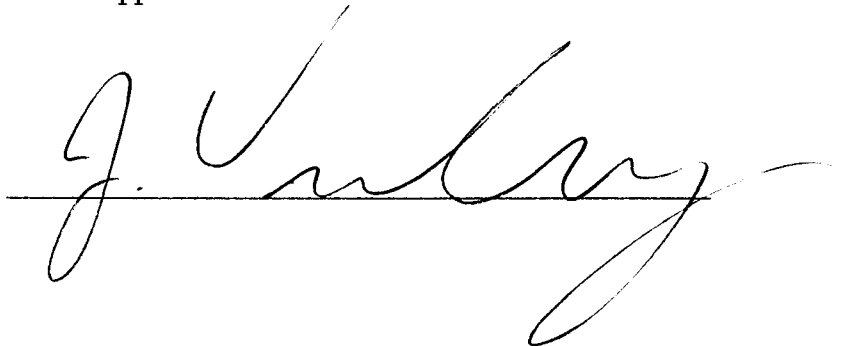
Allied New York Services, Inc.  
2 Pennsylvania Plaza  
New York, NY 10001

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this  
19th day of October, 1979.

  
Mary Dominick



STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :

of

Allied New York Services, Inc. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :

of a Determination or a Refund of

Sales & Use Tax :

under Article 28 & 29 of the Tax Law

for the Period 8/1/65 - 2/29/72. :

State of New York

County of Albany

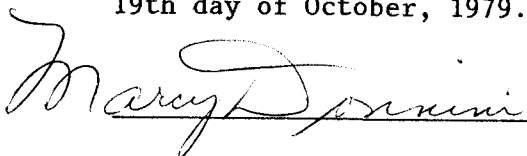
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 19th day of October, 1979, he served the within notice of Determination by mail upon Joseph H. Murphy the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

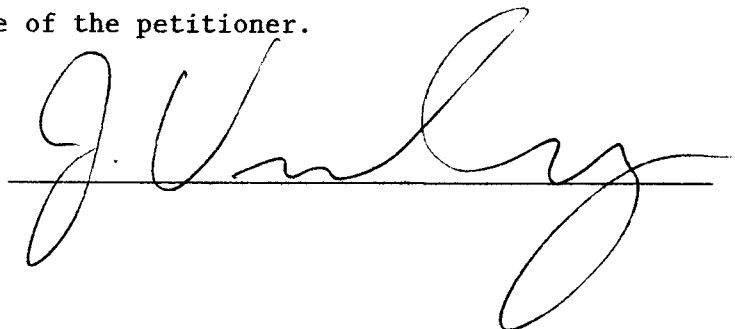
Mr. Joseph H. Murphy  
Hancock, Estabrook, Ryan, Shove & Hurst  
1400 Mony Plaza  
Syracuse, NY 13202

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this  
19th day of October, 1979.

  
Mary D. Dornini

  
Jay Vredenburg

STATE OF NEW YORK  
STATE TAX COMMISSION  
ALBANY, NEW YORK 12227

October 19, 1979

Allied New York Services, Inc.  
2 Pennsylvania Plaza  
New York, NY 10001

Gentlemen:

Please take notice of the Determination of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1138 & 1243 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance  
Deputy Commissioner and Counsel  
Albany, New York 12227  
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Joseph H. Murphy  
Hancock, Estabrook, Ryan, Shove & Hurst  
1400 Mony Plaza  
Syracuse, NY 13202  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Application	:	
of	:	
ALLIED NEW YORK SERVICES, INC.	:	DETERMINATION
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 August 1, 1965 through	:	
February 29, 1972.	:	

---

Applicant, Allied New York Services, Inc., 2 Pennsylvania Plaza, New York, New York 10001, filed an application 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 August 1, 1965 through February 29, 1972 (File No. 00414).

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Campus, Albany, New York, on January 20, 1977 at 1:15 P.M. Applicant appeared by Hancock, Estabrook, Ryan, Shove & Hust, Esqs. (Joseph H. Murphy, Esq., of counsel). The Sales Tax Bureau appeared by Peter Crotty, Esq. (Harry Kadish, Esq., of counsel).

ISSUES

- I. Whether receipts from sales of particular services performed by applicant were subject to sales tax.
- II. Whether the Sales Tax Bureau's audit was proper.
- III. Whether applicant is liable for penalties.

FINDINGS OF FACT

1. On March 19, 1973 as the result of an audit, the Sales Tax Bureau issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against applicant, Allied New York Services, Inc. Said Notice was issued for the period August 1, 1965 through February 29, 1972 in the amount of \$46,611.66, plus penalty and interest of \$21,650.26, for a total due of \$68,261.92.

2. During the period in issue, applicant contracted with five New York City department stores to perform particular cleaning and maintenance services for a term of not less than thirty days. Said contracts differed as to other services to be performed, and were not performed on any regular basis. Services included the following: starting and stopping of equipment such as air conditioning systems, turbines, chillers, compressors, pumps, boilers, water and disposal units; adjusting thermostats and various equipment; reading gauges and lubricating equipment; cleaning filters, steam traps and liquid filter mediums, and also air conditioning and heating systems, heating coils, chill-water coils and steam coils, filters and strainers; as well as cleaning outlets from stoves, ovens and plumbing fixtures.

3. During the period in issue, applicant had a contract with Lord and Taylor which only provided for porter, elevator operator and maid service within the store. The contract with Saks Fifth Avenue provided for "janitorial, porter, freight elevator and watchman services..." and also mechanical services.

4. Applicant, Allied New York Services, Inc., had a contract with Bonwit Teller during the same period that provided, in part, as follows:

"...building cleaning, routine mechanical functions and the operation of the freight and passenger elevators necessary to maintain the store substantially as at present...our services will not include the work performed by watchmen, electricians, elevator mechanics, carpenters or painters."

5. During the period in issue, applicant had a contract with Lane Bryant that provided in part for "...one full-time engineer to operate and maintain the air conditioning, ventilating, heating and ice water systems."

6. Applicant, Allied New York Services, Inc., also had a contract with Franklin Simon during this period which provided for periodic cleaning of certain specific areas. Under mechanical services it listed the following:

"re-fusing, plumbing maintenance; air conditioning and heating facilities servicing; re-lamping the stairwell, tenth floor hallway and entrance lobbies; and general maintenance of elevators (excluding those services contracted for on 34th Street automatic elevators)."

7. Applicant, Allied New York Services, Inc., would bill each department store weekly for the labor and related costs incurred in the preceding week, plus a service charge. Costs were divided on invoices between interior cleaning services and non-janitorial services. Applicant's staff engineer would determine what in his opinion was preventive maintenance, which applicant considered to be nontaxable, and what in his opinion was repair work, which applicant considered to be taxable, and on which tax was collected. Preventive maintenance services were performed to deter the failure of a system or of an item of equipment. This type of service involved lubricating, cleaning filters, steam traps and liquid filter mediums; cleaning air conditioning and heating systems, heating coils, chill-water coils, steam coils, filters and strainers, and outlets from stoves, ovens and plumbing fixtures; and replacing washers in faucets. Cleaning this kind of equipment is performed by steam cleaning, vacuum cleaning, cleaning with a chemical solution under pressure and punching with a brush. Motors are cleaned by dismantling, cleaning the armature, the winding and the starter, and then replacing the cleaned parts. Transformers and contactors were also cleaned.

8. The assessment of applicant, Allied New York Services, Inc., for the period August 1, 1965 through February 29, 1972 was the result of an audit, wherein it was found that sales tax on receipts for the repair services incidental to its preventive maintenance contracts was not collected. It was also found that sales tax in the amount of \$2,164.88 was paid by applicant on certain purchases, which applicant concedes and which is not at issue. An audit test was conducted for June of 1971 which found that 29 invoices contained non-janitorial services. Of six invoices billed to customer Saks Fifth Avenue, it was determined that an additional 34% should have been taxable from the work of an electrician and his foreman; therefore, an additional assessment of \$5,807.00 was determined to be due. Applicant had determined and reported that only 31% of the services performed for Saks was taxable. Of six invoices billed to customer Bonwit-Teller, it was determined that an additional 95% should have been taxable from the work of pipefitters and engineers, in their maintaining and overhauling an air conditioning plant; therefore, an additional assessment was determined to be due. Applicant had determined and reported that only 5% of their services were taxable. Of four invoices billed to customer City Specialty Co. (Franklin Simon), it was determined that an additional 65% should have been taxable from the work of a handyman and a foreman working on air conditioning and heating systems; therefore, an additional assessment was determined to be due. Applicant had determined and reported that only 35% of the services performed for City Specialty Co. was taxable. Of five additional invoices billed to customer Franklin Simon, it was determined that an additional 60% should have been taxable from the work of an engineer and mechanic in their operation and maintenance work and in their changing of filters; therefore, an additional assessment was determined to be due. Applicant had determined and reported that only 40% of their services was taxable.

In the eight additional invoices billed to customer Saks, it was determined that an additional 6% should have been taxable for the work of a chief engineer, an electrician's helper and a pipefitter. Applicant had determined and reported only 13% of the work to be taxable; therefore, an additional assessment was determined to be due.

Additional taxable sales due for June of 1971, based on these twenty-nine invoices, totaled \$17,748.00.

Total gross sales of applicant for the months of June, July and August of 1971 were \$5,805,941.00, resulting in a monthly average of \$1,935,314.00. The determination of applicant's percentage of error is as follows:

$$\frac{\$ 17,748.00 \text{ (additional taxable sales)}}{1,935,314.00 \text{ (average one-month total sales)}} = .9171 \text{ (percentage of error)}$$

The sum total of gross sales for each period in issue, times the percentage of error, times the appropriate sales tax due for each period in issue, equals the additional tax due for each period. Applicant's gross sales totaled \$84,941,894.00 and additional taxable sales, at the percentage of error of .9171%, totaled \$779,003.00; therefore, the total sales tax due, computed at the tax rate in effect for each period in issue, amounted to \$44,446.78.

9. Applicant, Allied New York Services, Inc., offered no documentary or other substantial evidence to indicate that the services performed for its customers were not performed on tangible personal property, or where real property was involved that capital improvements were made.

10. Applicant cooperated with the Sales Tax Bureau, acted in good faith at all times and relied on professional advice.



CONCLUSIONS OF LAW

A. That section 1105(c) of the Tax Law imposes a tax on the receipts from the sale of the service of the following:

(3) Installing tangible personal property or property not held for sale in the regular course of business...

\*\*\*

(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...and excluding interior cleaning and maintenance services performed on a regular contractual basis...

B. That the services performed for its customers by applicant, Allied New York Services, Inc., on tangible personal property, encompassed major repair tasks. The additional assessment by the Sales Tax Bureau did not include any interior cleaning and janitorial services. (Direan Operating Corp. v. Tax Commission 46 AD2d 191).

C. That the services performed for some of its customers by applicant, Allied New York Services, Inc., were not as per contract on any regular contractual basis.

D. That section 1138(a) of the Tax Law provides that the Tax Commission may determine tax due from such information as may be available, when a filed return is incorrect or insufficient; therefore, the use of a margin-of-error method by the Sales Tax Bureau for tax estimation was proper and justified.

E. That the application of Allied New York Services, Inc. is granted to the extent that interest in excess of the minimum interest and the penalty imposed pursuant to section 1145(a) of the Tax Law are waived; that the Sales Tax Bureau is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on March 19, 1973; and that, except as so granted, the application is in all other respects denied.

DATED: Albany, New York

OCT 19 1979

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER