

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
J.C. Penney Co., 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 6/1/72 - 5/31/75. :

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 17th day of October, 1980, he served the within notice of Decision by mail upon J.C. Penney Co., Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

J.C. Penney Co., Inc.
1301 Avenue of the Americas
New York, NY 10019

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
17th day of October, 1980.

Deborah A. Bank

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
J.C. Penney Co., Inc. :

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Sales & Use Tax :
under Article 28 & 29 of the Tax Law
for the Period 6/1/72 - 5/31/75. :

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 17th day of October, 1980, he served the within notice of Decision by mail upon Michael Pearl the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

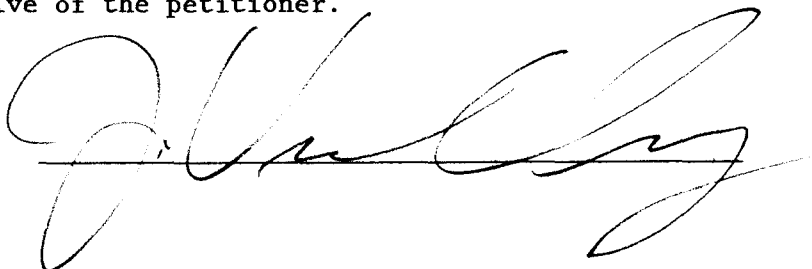
Mr. Michael Pearl
J.C. Penny Co., Inc. - Legal Dept.
1301 Avenue of the Americas
New York, NY 10019

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
17th day of October, 1980.


Deborah A. Bank



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

October 17, 1980

J.C. Penney Co., Inc.
1301 Avenue of the Americas
New York, NY 10019

Gentlemen:

Please take notice of the Decision 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
Michael Pearl
J.C. Penny Co., Inc. - Legal Dept.
1301 Avenue of the Americas
New York, NY 10019
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
J. C. PENNEY CO., INC.	:	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 June 1, 1972 through May 31,	:	
1975.	:	

Petitioner, J. C. Penney Co., 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, 1972 through May 31, 1975 (File No. 10864).

A formal hearing was held before Harry Issler, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 14, 1977 at 1:15 P.M. Petitioner appeared by Michael Pearl, Esq. The Audit Division appeared by Peter Crotty, Esq. (Alexander Weiss, Esq., of counsel). The hearing was continued at the same offices before Archibald F. Robertson, Jr., Hearing Officer, on September 27, 1978 at 9:15 A.M. Applicant again appeared by Michael Pearl, Esq. The Audit Division appeared by Peter Crotty, Esq. (William Fox, Esq., of counsel).

ISSUES

I. Whether services performed for petitioner by the New York Air Conditioning Corporation were exempted during the period herein involved 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".

II. Whether petitioner may properly claim a credit on its sales tax return for May of 1975 for the sales taxes applicable to its customer credit account bad debts written off during the period July 1, 1971 through December 31, 1972, and which arose within the three-year period of limitation on assessment.

FINDINGS OF FACT

1. On December 19, 1975, pursuant to an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due under Articles 28 and 29 of the Tax Law, against J. C. Penney Co., Inc., in the amount of \$370,379.65, plus penalty and interest of \$70,581.17, for a total of \$440,960.82. Petitioner paid \$254,689.19 of this assessment leaving a balance due of \$186,271.63 as of the date of this Notice. Petitioner disputes this balance due on the basis that it represents an assessment partially for tax on an item not properly subject to sales and use tax, and partially for tax against which petitioner claims it should be allowed a credit.

2. During the period herein involved, petitioner J. C. Penney Co., Inc., a merchandising concern licensed to do business in the State of New York, had its corporate headquarters at 1301 Avenue of the Americas, New York, New York; in addition, it occupied space at 825 Seventh Avenue and 1700 Broadway in New York City.

3. Petitioner and the New York Air Conditioning Corporation ("NYA") entered into an agreement on May 28, 1969 under the terms of which NYA agreed to perform maintenance services on air conditioning equipment located at petitioner's Broadway premises. The duration of the original agreement was from May 1, 1969 through April 30, 1974. This agreement was renewed periodically and extended to include maintenance of air conditioning equipment at the Seventh Avenue premises.

4. Under the agreement, NYA agreed to have at least one worker on petitioner's premises 24 hours a day, 365 days a year. Petitioner agreed to reimburse NYA at a flat labor rate. All materials and parts supplied by NYA were billable to and billed to petitioner on a cost-plus basis.

5. The agreement further required NYA to perform any necessary service to keep the equipment at peak efficiency. The services performed by NYA during the period herein involved included steam cleaning of all heating and cooling coils, replacement of filters, oiling and greasing motors, clearing drain lines, cleaning all equipment and machine rooms and replacing small bulbs and fan belts on the equipment itself, as well as calling in other firms for larger jobs.

6. Repairs requiring more than the replacement of a bulb, filter or belt occurred no more than once or twice a year during the period herein involved. When such work was required, the NYA worker on duty would turn on standby equipment and call in an outside firm specializing in that particular type of repair work. The cost of labor and parts provided by such firm was paid by NYA and billed to petitioner. NYA personnel did not assist the outside firms in making such repairs. Such repairs represented less than 5 percent of NYA's total billings to petitioner during the period herein involved.

7. Petitioner was billed during the period herein involved for certain NYA reimbursable expenditures, including the cost of work shoes and renting and laundering uniforms. These expenses were paid by NYA, as required by union contract, and in turn billed to petitioner.

8. Petitioner concedes that parts and materials provided by NYA during the period herein involved are subject to the imposition of use tax.

9. During the period herein involved, petitioner offered its customers purchases on credit under described terms with varying time periods for payment.

The entire value of all such sales on credit was reported for each sale on the sales tax return for the period in which such sale was made, and the entire tax thereon remitted.

10. Under petitioner's bad debt policy, when a credit account indebtedness was considered fully mature and uncollectible (six months without receipts of a payment), petitioner wrote off such uncollectible credit account amounts as bad debts. On its May 1975 sales tax return, petitioner took a credit for the sales taxes applicable to the bad debts which it wrote off during the period July 1, 1971 through December 31, 1972. Petitioner conceded that it cannot take a credit concerning bad debts which arose prior to the three-year period of limitation on assessments.

11. Petitioner acted in good faith at all times.

CONCLUSIONS OF LAW

A. 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" within the exclusion of section 1105(c)(5) of the Tax Law, in that such phrase does not include complex, non-janitorial equipment maintenance tasks of a specialized nature, however routine.

B. That on its May 1975 return, petitioner properly took a credit for sales taxes applicable to its customer credit account bad debts, which arose within and were actually written off within the three-year period of limitation on assessment. The dates for which such credit is properly taken are for sales made in the period March 1, 1972 through December 31, 1972.

C. That the Audit Division is ordered to recompute the Notice of Determination and Demand for Payment of Sales and Use Taxes Due so as to reflect the credit for sales tax granted for the period specified in Conclusion of Law "B" above.

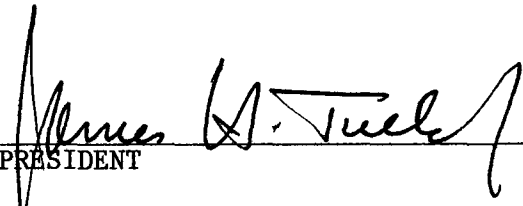
D. That interest in excess of the minimum statutory rate and penalty imposed pursuant to section 1145(a)(1) of the Tax Law are cancelled.

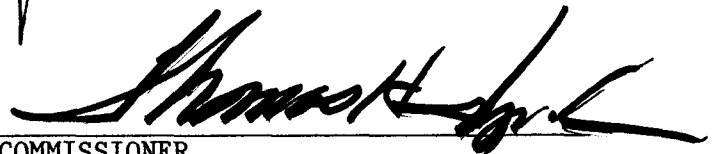
E. That the petition of J. C. Penny Co., Inc. is granted to the extent indicated in Conclusions of Law "C" and "D"; that, except as so granted, the petition is in all other respects denied.

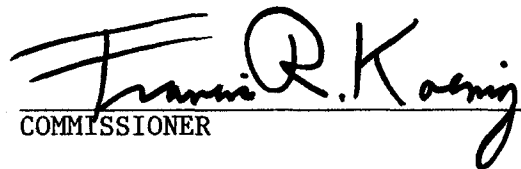
DATED: Albany, New York

OCT 17 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER