

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of

ADT Company, 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 3/1/67-5/31/71. :

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 6th day of March, 1981, he served the within notice of Decision by mail upon ADT Company, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

ADT Company, Inc.
155 Sixth Ave.
New York, NY 10013

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
6th day of March, 1981.

Ernest A. Hagelund

Jay Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

ADT Company, Inc. :

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for Redetermination of a Deficiency or a Revision :

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Sales & Use Tax :

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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 6th day of March, 1981, he served the within notice of Decision by mail upon Emanuel Demos 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. Emanuel Demos
White & Case
14 Wall St.
New York, NY 10005

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

6th day of March, 1981.

Gunnar P. Hagelund

Jay Vredenburg

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

March 6, 1981

ADT Company, Inc.
155 Sixth Ave.
New York, NY 10013

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
Emanuel Demos
White & Case
14 Wall St.
New York, NY 10005
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
ADT COMPANY 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 March 1, 1967 :
through May 31, 1971.

Petitioner, ADT Company, Inc., 155 Sixth Avenue, New York, New York 10013, 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 March 1, 1967 through May 31, 1971 (File No. 14743).

A formal hearing was held before Edward L. Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 14, 1978 at 9:15 A.M. Petitioner appeared by White & Case, Esqs. (Emanuel Demos and John Kearns, Esqs., of counsel). The Audit Division appeared by Peter Crotty, Esq. (Alexander Weiss, Esq., of counsel).

ISSUES

I. Whether annual service charges for local alarm services are subject to sales tax.

II. Whether advance service charges for central station signalling and/or local alarm services are subject to sales tax.

III. Whether nonrecoverable materials installed in connection with central station signalling and local alarm services are exempt from sales tax as additions or capital improvements to real property.

IV. Whether charges for leased telephone lines are subject to sales tax.

V. Whether payment by petitioner of sales taxes it did not collect but should have collected in the period at issue should be abated by the State Tax Commission where the liability for the sales tax was established by a 1974 ruling.

FINDINGS OF FACT

1. On August 22, 1974, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes (No. 90,752,971) against petitioner ADT Co. Inc. ("ADT") and Raymond Carey, William Halpen, Robert Dillion and Ernest Robert, individually and as officers, detailing the deficiency as follows:

<u>PERIOD ENDED</u>	<u>TAX</u>	<u>PENALTY & INTEREST</u>	<u>TOTAL</u>
5/31/67	\$ 18,237.59	\$ 16,413.83	\$ 34,651.42
8/31/67	18,050.62	15,704.03	33,754.65
11/30/67	18,259.30	15,337.81	33,597.11
2/29/68	19,966.46	16,172.83	36,139.29
5/31/68	21,830.64	17,027.89	38,858.53
8/31/68	25,427.50	19,070.62	44,498.12
11/30/68	20,977.62	15,103.88	36,081.50
2/28/69	22,299.13	15,386.39	37,685.52
5/31/69	44,396.55	29,301.72	73,698.27
8/31/69	29,810.77	18,780.78	48,591.55
11/30/69	29,713.93	17,828.35	47,542.28
2/28/70	29,093.48	16,583.28	45,676.76
5/31/70	28,535.92	15,409.39	43,945.31
8/31/70	27,876.51	14,217.02	42,093.53
11/30/70	29,190.64	14,011.50	43,202.14
2/28/71	32,084.10	14,437.84	46,521.94
5/31/71	34,051.03	14,301.43	48,352.46
TOTAL AMOUNT DUE	<u>\$449,801.79</u>	<u>\$285,088.59</u>	<u>\$734,890.38</u>

Petitioner ADT concedes liability in the amount of \$45,685.00. The Audit Division granted a credit of \$60,826.00 for use taxes paid by petitioner ADT on nonrecoverable materials used in making installations. At the formal hearing, the net amounts in dispute were agreed to be:

1. Local alarm annual service charges.....\$ 96,638.00
2. Local alarm and central station
advance service charges..... 116,799.00
3. Charges on leased lines..... 129,854.00

TOTAL IN DISPUTE \$343,291.00

2. Petitioner ADT executed six consents extending the period during which assessment could be made. The assessment was timely made, and the petition seeking redetermination of the sales tax deficiency was timely filed.

3. Petitioner ADT sells, installs, operates and maintains burglar alarm and fire alarm services. The services fall into two categories, i.e., central station and local alarm which includes direct connect. A central station system is one connected by leased telephone lines to a central station where signals are received and monitored. A local alarm system is one which operates an outside sounding device such as a bell or siren. A direct connect system is one which is generally used in outlying areas where signals are transmitted from the subscriber's premises to a municipality or to an answering service.

4. Both central station and local alarm burglar alarm systems are composed of a control set, internal wiring on the subscriber's premises, and detecting devices such as magnetic contacts, screens, foil, tripwire and lacing. The detecting devices installed by petitioner on a subscriber's premises are identical in central station and local alarm systems. They differ in that the central station installation is connected to a signal monitoring office from which uniformed guards are dispatched upon the sounding of an alarm; whereas a local alarm system terminates with a sounding device on the exterior of the protected premises (except for direct connect which is connected to police or fire headquarters) and no guard service is involved.

5. A decal stating that the premises are "Protected by ADT" is affixed to the doors and windows of the subscriber's premises upon completion of installation of all of petitioner's alarm systems. The decal is identical for central office and local alarm systems.

6. Installation, maintenance, inspection and components of burglar alarm systems, both central station and local alarm, is done by petitioner in accordance with standards set by Underwriter's Laboratories, Inc. ("UL") and local building codes. Upon completion of the installation of a burglar alarm system (whether central or local), petitioner is authorized by UL to issue a UL certificate. Issuance of a UL certificate enables petitioner's subscribers to receive insurance discounts.

7. Petitioner collects from subscribers an "advance service charge" at the outset of a contract for either central station or local alarm burglar or fire service. This charge covers installation of the alarm system. It is based on a rate for so many doors, windows, and other apertures. The charge does not vary if the installation requires more or less time and man-hours than that projected in the service charge. Petitioner contends that the charge covers labor and the cost of "non-recoverable materials" such as wire, lead foil, magnetic contacts, aero tubing and rosettes which would cost more to remove than their salvage value. Petitioner claims that labor is more than 92 percent of the "advance service charge" and that the expertise of the installer is a necessary prerequisite to petitioner's rendering exempt protective service. Petitioner argues that even if the devices placed in the premises of the subscriber are tangible personal property in the hands of petitioner, the personal property is used as a tool to provide protective guard service which is exempt from sales tax.

8. The components of a fire detection system include very similar items to that of a burglar alarm system. They include electrical wire and conduit which is run along and in or above ceilings, floors and walls to form a

continuous circuit on the perimeter of the protected premises, the magnetic contacts which are attached to or imbedded in doors and windows, mercury switch contacts attached to doors and windows, lead foil which is laminated to glass surfaces, control sets, aero tubing which is hung from the ceiling, rosettes which are implanted in the ceiling of small areas, lacing which is thin, brittle wire imbedded in narrow dowels which are combined into sheets which are then attached to the walls or made into cabinets for safes. The nonrecoverable materials are affixed to the subscriber's premises by drilling into the walls, doors, ceilings or stapled onto or imbedded in such surfaces.

9. The lines leased from the telephone company connect alarm systems on subscribers' premises with petitioner's central station monitoring facilities. The subscriber provides the electrical power for these lines, not the telephone company. The leased lines are signal grade wires which are not suitable for voice transmission. Petitioner does not charge subscribers the cost of leasing wires from the telephone company. The telephone company does not charge petitioner sales tax on the monthly lease rental.

10. Petitioner collected no sales taxes from its subscribers during the audit period. It paid no sales tax to New York City prior to 1965 nor to New York State after Article 28 of the Tax Law, effective August 1, 1965, transferred sales tax jurisdiction to the State of New York. Petitioner received its first sales tax audit and subsequent demand for payment of sales tax in 1974.

11. By an Opinion of Counsel dated January 29, 1974, the Department of Taxation and Finance set out its framework for determining the taxability under Article 28 of local alarm, central station and direct alarm systems. In the opinion, it was stated that the central alarm company was taxable on the charges to it on the lease of telephone lines. (This portion of the opinion

was changed by the State Tax Commission in Matter of Central Office Alarm Co., Inc. dated August 12, 1976.)

12. Petitioner urges that its chances of collecting the sales taxes at the present time for charges made during the period at issue are slim if not nil. Petitioner submits that until the 1974 opinion of Counsel for the Department of Taxation and Finance, it had no definitive way of knowing that its sales were subject to tax. Petitioner claims that since the Department of Taxation and Finance had not asserted liability for sales tax on alarm services during the nine years from 1965 to 1974, the State Tax Commission should use the discretion authorized in section 171 subd. eighteenth (as amended L. 1977 Chap. 123) to enter into a closing agreement whereby the tax found due can be abated. Petitioner relies on the statement that where the Opinion of Counsel of the Department of Taxation and Finance found cable TV taxable after eleven years of not having taxed it, the Appellate Division of the Supreme Court of the State of New York stated that failure to tax such transactions for such a lengthy period of time "Should create a presumption in favor of the taxpayer which can only be rebutted by a clear manifestation of legislative intent to the contrary." N.Y. State Cable Television v. State Tax Commission, 59 A.D.2d 81, 83 (1977). Petitioner asks that taxability as determined by the Commission be prospective rather than retroactive to the period covered by the audit.

13. Throughout the period from 1965 through 1974, petitioner was billed and paid real estate taxes on all its equipment located on subscribers' premises. Petitioner relied on advice of its counsel that equipment attached to telephone lines was subject to tax as real property, and therefore not subject to sales tax.

CONCLUSIONS OF LAW

A. That the annual service charges for local alarm service are not exempt from sales tax as a guard and protective service. That a decal on the premises may induce a chimera in the mind of an intruder that a guard may be alerted does not alter the fact that intrusion on the premises merely triggers an alarming noise. The protective service is the determinant factor. Holmes Electric Protective Co. v. McGoldrich, 262 A.D. 514 (1st Dept. 1941) 30 N.Y.S.2d 589 aff'd without opinion, 288 N.Y. 635 (1942). Without protective service, the entire service charge is subject to sales tax for the use of tangible personal property.

B. That the advance service charge for both central station and local alarm service is a charge for installation of tangible personal property, and petitioner is liable for the sales and use taxes on both labor and materials used therein. The credit given petitioner administratively in this instance should be limited to this particular case.

C. That the so-called non-recoverable materials used in making installations remain personal property the title to which never leaves petitioner. The Court in Central Office Alarm Co., Inc. v. State Tax Commission, 58 A.D.2d 162, 164 (3rd Dept. 1977) motion for leave to appeal denied, 44 N.Y.2d 642 discussed the definition of real property as set out in the Tax Law, section 1105(c) (3) and in the Real Property Law, section 120 sub. 12(d) and found that identical installed equipment did not constitute an addition or capital improvement to real property. The language of the decision is pertinent:

"Herein, the personal property which petitioner used in installing alarm systems did not become a physical part of the customer's property nor was such property transferred."

The nonrecoverable materials used in making installations are subject to sales and use taxes.

D. That charges for leased telephone lines are not subject to sales tax. The State Tax Commission considered this question in the Matter of Central Office Alarm Co., Inc. (August 12, 1976) and specifically over-ruled the Opinion of Counsel dated January 29, 1974. That determination was upheld in Central Office Alarm Co., Inc. v. State Tax Commission (supra).

E. That the sales taxes found due and unpaid for the period March 1, 1967 through May 31, 1971 are primarily due from petitioner's subscribers, and should have been collected by petitioner and paid over to the State. Petitioner is liable to the State for the tax required to be collected. (Section 1133(a) of the Tax Law.) Petitioner has the right under the Tax Law to seek payment of the tax from his customers as though the tax were part of the purchase price.

F. That sales taxes be assessed against local alarm annual service charges of \$96,638.00 and advance service charges on central office and local alarm service charges of \$116,799.00; and that the assessment of sales taxes on telephone leased lines charges of \$129,854.00 be cancelled; and that penalties and interest above the legal minimum be waived.

G. That, except as granted as set forth in Conclusion of Law "F" above, the petition of ADT Co. Inc. is in all other respects denied. The Audit Division is directed to recompute the Notice of Determination and Demand for Payment of Sales and Use Taxes Due (No. 90,752,971) dated August 22, 1974 (as amended by the letter dated March 25, 1976), and which as recomputed is hereby sustained.

DATED: Albany, New York

~~FEB 27 1981~~ MAR 06 1981

STATE TAX COMMISSION

James W. Tully
PRESIDENT

Thomas H. Sullivan
COMMISSIONER

Francis R. King
COMMISSIONER

TA 26 (9-79)

STATE OF NEW YORK

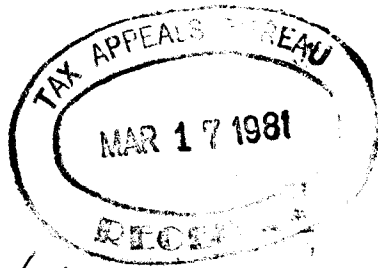
State Tax Commission

TAX APPEALS BUREAU

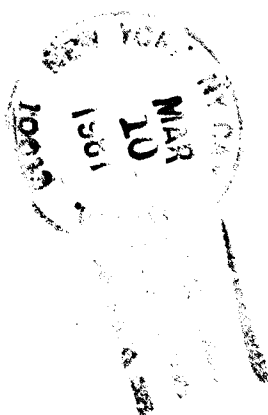
STATE CAMPUS

ALBANY, N. Y. 12227

ADT Company, Inc.
155 Sixth Ave.
New York, NY 10013



B/A
sent



REQUEST FOR BETTER ADDRESS

For DC. (28-29) 3-6

Requested by <i>J. Udenburg</i>	Tax Appeals Bureau Room 107 - Bldg. #9 State Campus Albany, New York 12227	Date of Request MAR 18 1981
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Please find most recent address of taxpayer described below; return to person named above.

Social Security Number <i>13-4922072-C</i>	Date of Petition <i>74-11-19</i>
Name <i>ADT Company, Inc.</i>	
Address <i>155 - Sixth Avenue New York, N.Y. 10013</i>	

Results of search by Files

<input checked="" type="checkbox"/> New address:	<i>A.D.T. Company, Inc. One World Trade Center, Suite 9200 New York, N.Y. 10048</i>
<input type="checkbox"/> Same as above, no better address	
<input type="checkbox"/> Other:	

Searched by <i>C. Roberts</i>	Section <i>Corp Tax Files</i>	Date of Search <i>3/23/81</i>
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PERMANENT RECORDFOR INSERTION IN TAXPAYER'S FOLDER

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STATE TAX COMMISSION

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of

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ADT Company, Inc.
One World Trade Center, Suite 9200
New York, NY 10048

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.

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27th day of March, 1981.

Conrad A. Hagelund

J. Vredenburg