

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of  
107 Delaware Associates :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of  
Sales & Use Tax :  
under Article 28 of the Tax Law  
for the Period 3/1/73 - 2/24/76. :

State of New York  
County of Albany

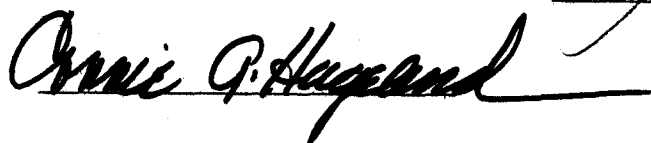
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 6th day of March, 1981, he served the within notice of Decision by mail upon 107 Delaware Associates, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

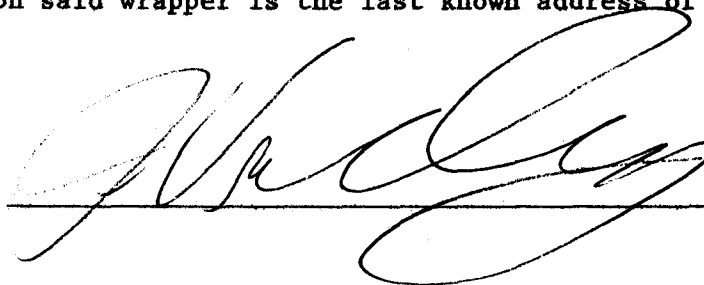
107 Delaware Associates  
107 Delaware Ave.  
Buffalo, NY 14202

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.

  
Annie G. Haggard

  
Jay Vredenburg

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :

of

107 Delaware Associates :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of  
Sales & Use Tax :  
under Article 28 of the Tax Law  
for the Period 3/1/73 - 2/24/76. :

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 Alvin M. Glick 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. Alvin M. Glick  
Falk, Siemer, Glick, Tuppen & Maloney  
2200 Main Place Tower  
Buffalo, NY 14202

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.

*Conrad A. Haglund*

*[Signature]*

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

March 6, 1981

107 Delaware Associates  
107 Delaware Ave.  
Buffalo, NY 14202

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  
Alvin M. Glick  
Falk, Siemer, Glick, Tuppen & Maloney  
2200 Main Place Tower  
Buffalo, NY 14202  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

107 DELAWARE ASSOCIATES

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, 1973 through  
February 29, 1976.

Petitioner, 107 Delaware Associates, 107 Delaware Avenue, Buffalo, New York 14202, 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, 1973 through February 29, 1976 (File No. 18385).

A formal hearing was held before Alan R. Golkin, Hearing Officer, at the offices of the State Tax Commission, State Office Building, 65 Court Street, Buffalo, New York, on March 21, 1979 at 9:15 A.M. Petitioner appeared by Falk, Siemer, Glick, Tuppen & Maloney, Esqs. (Alvin M. Glick, Esq., of counsel). The Audit Division appeared by Peter Crotty, Esq. (Alexander Weiss, Esq., of counsel).

ISSUES

I. Whether the designation of the taxes asserted against petitioner in the Notice of Determination and Demand for Payment of Sales and Use Taxes Due, as use rather than as sales taxes, rendered such document invalid.

II. Whether petitioner is liable for payment of sales taxes upon services performed for it by a related corporation.

FINDINGS OF FACT

1. On January 25, 1977, the Audit Division issued to petitioner, 107 Delaware Associates, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, which explained that, "Audit of your records has disclosed additional purchases subject to use tax," and which asserted additional taxes due, scheduled as follows:

<u>PERIOD ENDED</u>	<u>TAX</u>	<u>PENALTY &amp; INTEREST</u>	<u>TOTAL</u>
5/31/73	\$ 2,616.39	\$ 1,255.87	\$ 3,872.26
8/31/73	2,662.94	1,198.32	3,861.26
11/31/73	2,679.39	1,688.02	4,367.41
2/28/74	2,278.99	1,367.39	3,646.38
5/31/74	3,588.69	2,045.55	5,634.24
8/31/74	2,348.43	1,268.15	3,616.58
11/30/74	2,990.68	1,525.25	4,515.93
2/28/75	2,859.22	1,372.43	4,231.65
5/31/75	2,322.04	1,021.70	3,343.74
8/31/75	2,541.00	965.58	3,506.58
11/30/75	2,607.57	834.42	3,441.99
2/29/76	2,355.57	612.45	2,968.02
	<u>\$31,850.91</u>	<u>\$15,155.13</u>	<u>\$47,006.04</u>

Petitioner had duly executed two consents, extending the period of limitation for assessment of sales and use taxes for the period March 1, 1973 through February 29, 1976, to and including December 20, 1977.

2. On or about December 13, 1977, 107 Delaware Associates filed with the State Tax Commission a perfected petition for revision of the aforementioned determination. Petitioner alleged therein the following error on the part of the Audit Division:

"A determination that there were maintenance charges that were subject to Use Tax and the assessment [sic] of Use Tax in the amount of \$25,375.49 plus penalties and interest."

3. The answer served by the Law Bureau on or about February 10, 1978, alleged in pertinent part:

\* \* \*

"(B) That maintenance and repair services, taxable under §1105 of the Tax Law were performed for petitioner; and that no sales tax was paid by petitioner on the purchase price of said services, to a person required to collect the tax.

\* \* \*

"(D) That pursuant to §1133(b) of the Tax Law, petitioner is liable for payment of said unpaid sales taxes to the Tax Commission."

4. Petitioner is a New York partnership, the members of which are William D. Hassett, Jr., William D. Townsell and Robert A. Zugger. The same individuals are the shareholders in Stasset Corporation ("Stasset"), a domestic corporation.

5. On or about April 2, 1973, petitioner acquired title to the Statler Building in Buffalo, New York. During the period under review, petitioner was responsible for that portion of the business concerning office tenants, apartments and retail stores. Stasset operated the hotel, food and beverage, and banquet portions of the building.

6. Petitioner had no payroll. Maintenance services for the entire building were provided by Stasset employees. These services were interior day-to-day maintenance services, such as carpentry, painting, plumbing and electrical work; the employees performed no window cleaning, rodent or pest control nor trash removal. Rather than a bill being rendered to petitioner by Stasset, a bookkeeping journal entry was made each month, charging petitioner for 55 percent and Stasset for 45 percent of the wages and benefits paid to the maintenance employees. The percentages were based upon an estimate of the relative square footages that the office portion and the hotel portion bore to the entire building. Sales taxes were not collected, remitted nor reported by Stasset on the maintenance services performed by its employees for petitioner. Stasset did not earn a profit on the services.<sup>1</sup>

---

<sup>1</sup> During 1973 and 1974, maintenance services were apparently provided to petitioner under similar arrangements by W. D. Hassett Maintenance Corporation, a related company which is no longer in existence.

7. The maintenance services provided to petitioner by Stassetts were pursuant to an oral agreement of one year's duration, which was extended from year to year.

8. Mr. Zugger, as managing partner of petitioner and as president of Stassetts, had authority to direct the Stassetts maintenance employees, and to hire and discharge them.

9. This arrangement was established between petitioner and Stassetts as a matter of convenience, so that there would not be a duplication of payrolls, withholding tax returns, workmen's compensation reports, union contracts and the like.

10. On its state tax reports and its Federal income tax returns, Stassetts availed itself of a deduction for salaries paid to its employees and reported as income the 55 percent received on the books from petitioner.

#### CONCLUSIONS OF LAW

A. That the designation of the taxes asserted against petitioner in the Notice of Determination and Demand for Payment of Sales and Use Taxes Due as use taxes was not a fatal flaw which required that the deficiencies be vacated. The pleading served upon petitioner by counsel for the Audit Division apprised petitioner of the Division's position and set forth those sections of the Tax Law under authority of which the deficiencies were asserted.

B. That paragraph 5 of subdivision c of section 1105 of the Tax Law imposes sales tax upon the receipts from every sale, except for resale, of the following services:

"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."

C. That the charges to petitioner for maintenance services by Stassetts constituted receipts from maintaining, servicing and repairing the Statler Building within the intentment of section 1105(c)(5) and were thus subject to sales tax. See Matter of Ready Mix & Supply Corp., State Tax Comm., February 9, 1977.

D. That petitioner has failed to meet its burden to show that it is entitled to any of the several exclusions of section 1105(c)(5). The services performed by Stassetts were not "interior cleaning and maintenance services," which language refers only to ordinary janitorial services and such elementary repair tasks as replacing a faucet washer. C. H. Heist Corp. v. State Tax Comm., 50 N.Y.2d 438, modfg., 66 A.D.2d 499; National Elevator Industry v. N.Y.S. Tax Comm., 49 N.Y.2d 538; Direen Operating Corp. v. State Tax Comm., 46 A.D.2d 191. Nor did the charges to petitioner for the services constitute compensation paid by petitioner to its employees. That exclusion applies only where there exists an employer-employee relationship between the person performing the repair work and the person for whom such work is done. Airlift International v. State Tax Comm., 52 A.D.2d 688. Petitioner has elected for its own reasons to place the maintenance men and repairmen on Stassetts's payroll and may not now claim that these persons were its own employees. Finally, the services were not rendered "by an individual who is not in a regular trade or business offering his services to the public". The maintenance was provided on a regular, continuous basis by the employees of a corporation.



E. That pursuant to subdivision b of section 1133 of the Tax Law, petitioner is liable for payment to the State Tax Commission of sales taxes unpaid on maintenance services provided to petitioner by Stasset Corporation during the period at issue.

F. That the penalties and interest in excess of the minimum statutory rate are cancelled.

G. That the petition of 107 Delaware Associates is hereby granted to the extent indicated in Conclusion of Law "F"; that the notice of determination and demand for payment issued on January 25, 1977 is to be modified accordingly; and that except as so modified, the determination is in all other respects sustained.

DATED: Albany, New York

 MAR 06 1981

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER