

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

May 20, 1983

Gibraltar Management Co., Inc.
150 White Plains Rd.
Tarrytown, NY 10591

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 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 Law 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
Law Bureau - Litigation Unit
Building #9 State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
William D. Hecht
535 Fifth Ave.
New York, NY 10017
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

| | | |
|---|----------------------------|----------------------------|
| In the Matter of the Petition of Gibraltar Management Co., Inc. | : : : : : : | : : : : : : |
| 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 8/1/65-11/30/78. | | AFFIDAVIT OF MAILING |

State of New York
County of Albany

David Parchuck, 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 20th day of May, 1983, he served the within notice of Decision by certified mail upon Gibraltar Management Co., Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Gibraltar Management Co., Inc.
150 White Plains Rd.
Tarrytown, NY 10591

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
20th day of May, 1983.

David Parchuck

James A. Haglund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Gibraltar Management 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 8/1/65-11/30/78. :
_____ :

State of New York
County of Albany

David Parchuck, 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 20th day of May, 1983, he served the within notice of Decision by certified mail upon William D. Hecht the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

William D. Hecht
535 Fifth Ave.
New York, NY 10017

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
20th day of May, 1983.

David Parchuck

James A. Hecht

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
GIBRALTAR MANAGEMENT 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 August 1, 1965 :
through November 30, 1978.

Petitioner, Gibraltar Management Co., Inc., 150 White Plains Rd., Tarrytown, New York 10591, 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 August 1, 1965 through November 30, 1978 (File No. 31476).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 29, 1982 at 9:15 A.M. Petitioner appeared by William D. Hecht. The Audit Division appeared by Paul B. Coburn, Esq. (Paul Lefebvre, Esq., of counsel).

ISSUES

I. Whether petitioner is liable for tax on certain purchases of tangible personal property and services.

II. Whether the Audit Division properly used a test period as a basis for determining petitioner's tax liability for the period August 1, 1965 through November 30, 1978.

FINDINGS OF FACT

1. Petitioner, Gibraltar Management Co., Inc., is engaged in real estate management. Petitioner's properties are primarily shopping centers located throughout New York State.

2. On August 27, 1980, as the result of an audit, the Audit Division issued the following notices of determination and demand for payment of sales and use taxes due:

| <u>PERIOD</u> | <u>TAX DUE</u> | <u>PENALTY</u> | <u>INTEREST</u> | <u>TOTAL</u> |
|--|----------------|----------------|-----------------|--------------|
| August 1, 1965 through November 30, 1968 | \$ 1,638.07 | \$ 81.84 | \$ 2,506.10 | \$ 4,226.01 |
| December 1, 1968 through May 31, 1972 | 7,638.34 | 381.84 | 8,572.67 | 16,592.85 |
| June 1, 1972 through November 30, 1975 | 18,448.70 | 3,585.24 | 13,617.00 | 35,650.94 |
| December 1, 1975 through November 30, 1978 | 15,781.58 | 3,945.35 | 5,974.32 | 25,701.25 |

3. Petitioner was not registered with the Department of Taxation and Finance as a sales tax vendor until July 16, 1975. On November 25, 1975, petitioner requested that the Certificate of Authority be cancelled.

4. On audit, the Audit Division examined purchase invoices for the months of January, 1977 and June, 1977. This examination revealed that petitioner failed to pay a sales or use tax on purchases totaling \$15,222.17 or .00498 percent of total disbursements for all locations for the test months. Said percentage was applied to total disbursements for the audit period to arrive at the deficiencies referred to above.

5. At the hearing, counsel for the Audit Division conceded that sales tax was paid on purchases of \$1,212.25 and there was a \$27.00 transposition error. As a result, the taxable purchases for the test months should be adjusted to \$13,982.92.

Petitioner conceded that purchases of \$10,746.33 were subject to tax.

6. The purchases at issue, \$3,235.98, consist of the following:

| | |
|--|------------|
| a) maintenance services (snowplowing, parking lot sweeping) | \$1,206.00 |
| b) pro rata share of common area maintenance expenses | 744.44 |
| c) missing purchase invoices | 335.19 |
| d) dues | 160.25 |
| e) elevator and sewer pump maintenance | 155.00 |
| f) reimbursements paid to employees | 635.10 |

7. Petitioner argued that the snowplowing and parking lot sweeping were performed by individuals not in a regular trade or business of offering such services to the public. Similiarly, the common area maintenance was performed by employees of tenants and the tenants are not in the business of performing such services.

8. The dues referred to in Finding of Fact "6(d)" were for membership in the Apartment Owners Advisory Council, a trade association.

9. The elevator maintenance was for a monthly service charge of \$65.00. Petitioner offered a letter to show that its contract for elevator maintenance was an oil and inspection contract and not a full maintenance contract. However, said letter was not from the company performing the services.

The sewer pump maintenance was also an inspection contract.

10. The amounts classified above as reimbursements paid to employees consist of \$300.00 for a travel advance and \$335.10 for supplies purchased by employees. The purchase invoices for the supplies indicated that no sales tax was charged by the vendor.

11. During the test month of January, 1977, the purchases held subject to use tax amounted to \$10,075.58 of which \$7,852.76 (or approximately 78 percent) was for snowplowing.

12. Petitioner maintained adequate books and records from which the Audit Division could have determined the exact amount of petitioner's tax liability.

13. Petitioner's failure to pay the taxes at issue was due to reasonable cause and not willful neglect.

CONCLUSIONS OF LAW

A. That section 1105(c)(5) of the Tax Law imposes a tax on the receipts from the services of "maintaining, servicing or repairing real property... 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..." .

That 20 NYCRR 527.7(c)(1) provides that the exclusion for services rendered by individuals who do not offer these services to the public in a regular trade or business is limited to individuals who do occasional odd jobs in their spare time and who do not regularly perform such services either in their own business or as an employee.

B. That petitioner failed to establish that the individuals performing the maintenance services referred to in Finding of Fact "6(a)" and "6(b)" qualify for the exclusion provided in section 1105(c)(5) of the Tax Law. Accordingly, the charges made by such individuals constituted receipts from the sale of services within the meaning and intent of section 1105(c)(5) of the Tax Law.

C. That the dues paid to the Apartment Owners Advisory Council were not dues subject to the tax imposed under section 1105(f)(2) of the Tax Law.

D. That petitioner failed to show that tax was paid on the purchases referred to in Finding of Fact "6(c)" and therefore, is liable for such taxes in accordance with section 1133(b) of the Tax Law.

E. That Declaratory Ruling 77-01 issued by the State Tax Commission effective September 1, 1977, provides that elevator maintenance contracts which provide for general maintenance and limited repairs are not subject to tax.

Contracts which provide that if the company providing the maintenance services decides repairs are necessary and performs such repairs, are taxable contracts.

Prior to said ruling, the policy of the Tax Commission was that contracts for elevator maintenance in excess of 30 days were not taxable. Accordingly, the elevator maintenance performed in January, 1977 and June, 1977 is considered nontaxable.

F. That the maintenance performed on the sewer pump constituted services subject to tax under section 1105(c)(5) of the Tax Law.

G. That the supplies purchased by employees and subsequently reimbursed by petitioner constituted retail sales within the meaning and intent of section 1101(b)(4) of the Tax Law. The travel advance of \$300.00 is not taxable.

H. That although there is statutory authority for use of a test period to determine the amount of tax due, resort to such method of computing tax liability must be founded upon an insufficiency of record keeping which makes it virtually impossible to verify such liability and conduct a complete audit (Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44).

That since petitioner maintained adequate books and records, the Audit Division's use of a two month test period as a basis for estimating petitioner's tax liability for thirteen years was not proper. Accordingly, petitioner is liable only for the actual tax found due for the periods examined.

I. That the penalty is cancelled and interest shall be computed at the minimum statutory rate.

J. That the petition of Gibraltar Management Co., Inc. is granted to the extent that the purchases subject to tax are reduced to \$13,392.06 so as to conform with Conclusions of Law above as follows:

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| conceded by petitioner (Finding of Fact "5") | \$10,746.33 |
| maintenance services (Conclusion of Law "B") | 1,950.44 |
| missing purchase invoices (Conclusion of Law "D") | 335.19 |
| sewer pump maintenance (Conclusion of Law "F") | 25.00 |
| supplies (Conclusion of Law "G") | 335.10 |
| | <u>\$13,392.06</u> |

That the Audit Division is hereby directed to modify the notices of determination and demand for payment of sales and use taxes due issued August 27, 1980; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

MAY 20 1983

STATE TAX COMMISSION

Rodriguez
PRESIDENT

Francis R. Koenig
COMMISSIONER

W. H. [Signature]
COMMISSIONER

P 481 207 803

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

| | |
|---|----|
| Sent to | |
| Gibraltar Management Co., Inc. | |
| Street and No. | |
| 150 White Plains Rd. | |
| P.O., State and ZIP Code | |
| Tarrytown, NY 10591 | |
| Postage | \$ |
| Certified Fee | |
| Special Delivery Fee | |
| Restricted Delivery Fee | |
| Return Receipt Showing to whom and Date Delivered | |
| Return Receipt Showing to whom, Date, and Address of Delivery | |
| TOTAL Postage and Fees | \$ |
| Postmark or Date | |

PS Form 3800, Feb. 1982

P 481 207 804

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

| | |
|---|----|
| Sent to | |
| William D. Hecht | |
| Street and No. | |
| 535 Fifth Ave. | |
| P.O., State and ZIP Code | |
| New York, NY 10017 | |
| Postage | \$ |
| Certified Fee | |
| Special Delivery Fee | |
| Restricted Delivery Fee | |
| Return Receipt Showing to whom and Date Delivered | |
| Return Receipt Showing to whom, Date, and Address of Delivery | |
| TOTAL Postage and Fees | \$ |
| Postmark or Date | |

PS Form 3800, Feb. 1982