

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

September 28, 1983

Locy Development, Inc.  
P.O. Box 146  
Mayville, NY 14757

Gentlemen:

Please take notice of the Amended 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  
Ralph J. Gregg  
Albrecht, Maguire, Heffern & Gregg  
2100 Main Place Tower  
Buffalo, NY 14202  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

\_\_\_\_\_  
In the Matter of the Petition :  
of :  
Locy Development, 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 3/1/75 - 8/31/78. :

\_\_\_\_\_  
State of New York  
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 28th day of September, 1983, she served the within notice of Amended Decision by certified mail upon Locy Development, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Locy Development, Inc.  
P.O. Box 146  
Mayville, NY 14757

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  
28th day of September, 1983.

Susan Powell

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

Connie A. Hagelund

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition  
of

Locy Development, 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 3/1/75 - 8/31/78.

State of New York  
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 28th day of September, 1983, she served the within notice of Amended Decision by certified mail upon Ralph J. Gregg the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Ralph J. Gregg  
Albrecht, Maguire, Heffern & Gregg  
2100 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  
28th day of September, 1983.

*Susan Powell*

*Connie A. Hagelund*

AUTHORIZED TO ADMINISTER  
OATHS IN CONNECTION WITH TAX LAW  
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
LOCY DEVELOPMENT, INC.	:	AMENDED 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, 1975	:	
through August 31, 1978.	:	

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Petitioner, Locy Development, Inc., P.O. Box 146, Mayville, New York 14757 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, 1975 through August 31, 1978 (File No. 31284).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on May 11, 1982 at 2:45 P.M. Petitioner appeared by Ralph J. Gregg, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Patricia Brumbaugh, Esq., of counsel).

ISSUE

Whether intercorporate charges for maintenance services are subject to sales tax.

FINDINGS OF FACT

1. On December 18, 1979, as the result of an audit, the Audit Division issued a Notice and Demand for Payment of Sales and Use Taxes Due against petitioner, Locy Development, Inc., covering the period March 1, 1975 through August 31, 1978 for taxes due of \$2,021.39, plus interest of \$484.26, for a total of \$2,505.65.

2. Petitioner timely applied for a revision of the determination of deficiencies in sales tax alleging, inter alia, that the Statute of Limitations had expired as to certain periods; but thereafter conceded at the hearing that the above notice was timely as to all the periods.

3. Petitioner executed consents extending the period of limitation for assessment of sales and use taxes for the period March 1, 1974 through February 28, 1977, to December 20, 1979.

4. County Development Services, Inc. wholly-owned Chautauqua Lakeside Estates, Inc. ("Chautauqua") which wholly-owned Locy Development, Inc.

Chautauqua is concerned primarily with providing the financing for a condominium project known as Chautauqua Estates in Chautauqua, New York. Petitioner owns the land, golf course, restaurant, farmhouse, barn and maintenance buildings and 93 acres of vacant land. Chautauqua and petitioner entered into and formed a joint venture known as Locy Venture Co. ("Venture") to develop Chautauqua Estates. Venture was responsible for construction, sales and management of the project.

5. Maintenance services for the golf course and buildings owned by petitioner were provided by personnel carried on the books and records of Venture for payroll taxes, unemployment insurance and the like. The same personnel performed maintenance services on the condominium properties of Venture.

Venture allocated the gross wages of the maintenance personnel between the joint venture and petitioner in proportion to the services provided to each. Venture did not keep detailed records of the actual hours the maintenance personnel worked for each entity. Instead, the allocation percentage was

estimated by management. The day-to-day operations of both Venture and petitioner were managed by the same person.

6. The maintenance charges referred to above were never billed by Venture to petitioner, but rather were reflected in the form of bookkeeping journal entries recorded on the books of petitioner and Venture. Venture charged its proportionate share of the maintenance payroll to its payroll expense and the amount allocated to petitioner was charged as an account receivable. Petitioner recorded its share by debiting an expense account (no descriptive title) and crediting an account payable to Venture for the same amount. The cash account was used to record the reimbursement to Venture.

The managing partner of the Buffalo Office of Peat, Marwick, Mitchell & Co. testified that based on 22 years of experience as a certified public accountant (1) the accounting treatment of the transaction was correct and that he knew of no other accounting treatment it could be given; (2) that this is the type of payroll procedure he would recommend in an affiliated company situation because of its simplicity -- the elimination of all duplication by having one payroll recording, one payroll and one payroll system and (3) that the nomenclature used for the account on the books of Locy Development, Inc., whether it be called payroll expense, payroll maintenance, maintenance payroll or simply maintenance, was irrelevant as long as it indicated what the expense was for and the cost could be traced to determine income.

The Audit Division determined that the foregoing transactions constitute sales of services subject to the tax imposed under section 1105(c)(5) of the Tax Law. The taxability of the type of services performed or the amount held subject to tax are not in dispute. In addition, use taxes found due of \$346.76 on expense purchases are not at issue and petitioner has made payment thereof.

The Audit Division conceded that the notice should be adjusted to reflect this payment.

7. Petitioner took the position that the intercorporate charges were not taxable in that (1) it employed the maintenance personnel part-time and such personnel were also part-time employees of Venture which created an employer-employee relationship with both, and (2) the maintenance services were rendered by individuals (part-time employees of Venture and itself) who were not in a regular trade or business offering their services to the public.

8. The purpose of using Venture as the disbursing entity for payroll was to avoid duplication of paychecks, W-2's, withholding tax returns and similar reports. This is a common practice when two or more related business entities are under common control.

9. Venture performed no maintenance service for any person or firm other than for petitioner and did not at any time hold itself out to the public as being available for maintenance service.

Moreover, the maintenance personnel carried on the payroll of Venture were not in a regular trade or business offering their services to the public.

10. Included in petitioner's brief were proposed findings of fact as to which this Commission makes the following rulings:

a) Proposed findings 1 through 5, 8 through 19, 21, 23, 24, 26 through 28 are adopted and have been incorporated into this decision.

b) Proposed findings 20, 30 and 31 are rejected as being conclusory in nature.

c) Proposed findings 6 and 7 are rejected as being contradictory to Exhibit 1 which shows the relationship of four entities, County Development

Service, Inc., Chautauqua Lakeside Estates, Inc., Locy Development, Inc. and Locy Venture Co.

d) Proposed findings 22 and 25 are rejected as not supported by the evidence.

e) Proposed findings 29, 32 through 37 are rejected as being hypothetical and/or argumentative and not proper findings of fact.

#### CONCLUSIONS OF LAW

A. That section 1101(b)(5) of the Tax Law defines "sale" to include "...the rendering of any service, taxable under this article, for a consideration or any agreement therefor."

B. That section 1105(c)(5) of the Tax Law imposes a tax on "[t]he receipts from every sale... of the following services:

(5) "Maintaining, servicing or repairing real property, property or land... but excluding services rendered by an individual who is not in a regular trade or business offering his services to the public,....

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 subdivision (c) are not receipts subject to the taxes imposed under such subdivision."

C. The exclusion for an individual who does not offer 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. [20 NYCRR 527.7(c)(1)]

D. That an employer-employee relationship did not exist between petitioner and the individuals performing maintenance services; that said personnel were employed by and their wages paid by Locy Venture Co., a separate and distinct business entity.

That the bookkeeping entries recorded on petitioner's books and records as set forth in Finding of Fact "6" effectuate a "sale of services"



between Locy Venture Co. and petitioner within the meaning and intent of sections 1101(b)(5) and 1105(c)(5) of the Tax Law. (Matter of 107 Delaware Associates, State Tax Commission, March 6, 1981. Matter of Central Markets, Inc., State Tax Commission, April 9, 1982.)

That Venture provided maintenance services on a regular, continuous basis for petitioner and as such, does not qualify for the exclusion under section 1105(c)(5) of the Tax Law for an individual who is not in a regular trade or business offering his services to the public. Matter of 107 Delaware Associates, supra.

E. That petitioner did not pay sales tax to Venture on the maintenance services and therefore, it is liable for said taxes in accordance with section 1133(b) of the Tax Law.

F. That the petition of Locy Development, Inc. is denied and the Notice and Demand for Payment of Sales and Use Taxes Due issued December 18, 1979 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

SEP 28 1983

Roderick A. O'Clair  
PRESIDENT

Francis R. Kolmy  
COMMISSIONER

Mark J. Dineen  
COMMISSIONER

P 481 208 236

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
Locy Development, Inc.	
Street and No.	
P.O. Box 146	
P.O., State and ZIP Code	
Mayville, NY 14757	
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 481 208 237

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
Ralph J. Gregg	
Albrecht, Maguire, Heffernan & Co.	
Street and No.	
2100 Main Place Tower	
P.O., State and ZIP Code	
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Certified Fee	
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