

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

May 6, 1983

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

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 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
Law Bureau - Litigation Unit
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

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 6th day of May, 1983, he served the within notice of 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
6th day of May, 1983.

David Parchuck

James A. Hughes

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

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 6th day of May, 1983, he served the within notice of 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
6th day of May, 1983.

David Parchuck

Annunzio Aragona

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

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

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 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.

3. Petitioner, Locy Development, Inc., and Chautaugua Lakeside Estates, ("Chautaugua") Inc. are related corporations wholly-owned by County Development Services, Inc.

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

4. 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.

5. 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 and crediting an account payable to Venture for the same amount. The cash account was used to record the reimbursement to Venture.

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.

6. 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.

7. 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.

8. 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.

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 "5" 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

MAY 06 1983


PRESIDENT


COMMISSIONER


COMMISSIONER

P 481 207 689

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
Loay Development Inc	
Street and No.	
PS 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 481 207 690

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
Ralph J. Gregg	
Street and No.	
Robert Morris House	
P.O. State and ZIP Code	
100 Main Place West Buffalo NY 14202	
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