

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

November 10, 1983

Wizard Method, Inc.
1100 Connecting Rd.
Niagara Falls, NY 14304

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
Joseph A. Tringali
Brick, Brick & Elmer
91 Tremont St., P.O. Box 604
N. Tonawanda, NY 14120
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Wizard Method, 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 3/1/77 - 2/29/80. :
:

AFFIDAVIT OF MAILING

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 10th day of November, 1983, she served the within notice of Decision by certified mail upon Wizard Method, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Wizard Method, Inc.
1100 Connecting Rd.
Niagara Falls, NY 14304

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
10th day of November, 1983.

Maucha L. Sennelle

Connie A. Hagelund

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Wizard Method, 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 3/1/77 - 2/29/80. :

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 10th day of November, 1983, she served the within notice of Decision by certified mail upon Joseph A. Tringali the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Joseph A. Tringali
Brick, Brick & Elmer
91 Tremont St., P.O. Box 604
N. Tonawanda, NY 14120

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
10th day of November, 1983.

Marsha L. Brunelle

Connie Hagelund

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
WIZARD METHOD, 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, 1977 :
through February 29, 1980. :

Petitioner, Wizard Method, Inc., 1100 Connecting Road, Niagara Falls, New York 14304, 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, 1977 through February 29, 1980 (File No. 31009).

A formal hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on March 10, 1983, at 9:15 A.M. with all briefs to be submitted by June 2, 1983. Petitioner appeared by Brick, Brick, Elmer, Tringali & Belczak, P.C. (Joseph A. Tringali, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUE

Whether purchases of industrial cleaning equipment by petitioner were purchases for resale and thus not subject to sales and use tax.

FINDINGS OF FACT

1. On July 7, 1980, as the result of a field audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, Wizard Method, Inc., in the amount of \$47,142.96 plus

interest of \$4,110.92 for a total due of \$51,253.88 for the period March 1, 1977 through February 29, 1980.

2. On May 7, 1980, petitioner, by its president, Garlen Stoneman, had executed a consent extending the period of limitation for assessment of sales and use taxes for the period March 1, 1977 through February 29, 1980 to December 20, 1980.

3. Petitioner operates an industrial cleaning business in the Niagara Falls, New York area. Petitioner's activities involve removal of industrial waste material from pipes, boiler tubes, industrial tanks and sewers by application of high pressure water. Petitioner also provides removal of dry waste material from industrial buildings and storage areas by means of vacuum trucks. Petitioner's operations involve the use of expensive high performance equipment including high pressure water cleaning machines, wet vacuum trucks and dry vacuum trucks known as "supersuckers" which are effective in cleaning up chemical waste and spills.

4. On audit, the auditor found that petitioner was not paying sales tax on purchases of equipment, equipment repairs or garage maintenance. Petitioner's president explained that he considered all such purchases to be for resale because he believed his sales to be equipment rentals for which he collected and remitted sales tax. The auditor determined that petitioner did not rent equipment to its customers but rather provided an industrial cleaning service and thus purchases of equipment and repairs were subject to tax. To determine use tax due, the auditor utilized a test period audit of the periods March 1, 1979 through August 31, 1979, which disclosed recurring purchases subject to use tax in the amount of \$105,223.49, and September 1, 1977 through November 30,

1977, which disclosed recurring purchases subject to use tax of \$8,612.98.¹

The auditor computed error rates for the test periods and applied said rates to the entire audit period to determine use tax due on recurring purchases. The auditor also computed capital acquisitions of \$336,775.02 upon which no sales tax had been paid and which were subject to use tax² and additional sales tax due for sales tax billed but not collected in the amount of \$538.33. The additional sales tax due of \$538.33 is not in issue.

5. At the hearing the Audit Division conceded that petitioner had full and complete records and that, pursuant to the ruling in Chartair, Inc. v. State Tax Commission, 65 A.D. 2d 44, under the circumstances, use of the two test periods was unwarranted. Therefore, the only use tax due on recurring purchases would be that due for the test periods described above.

6. Petitioner billed its customers at one hourly rate for equipment and a different hourly rate for operators. Occasionally laborers who assisted the operators would be sent on jobs at a third hourly rate. Petitioner rarely leased only equipment with no operators. On such occasions petitioner would require an instructor to show the customer how to operate the equipment.

7. During the period in issue, petitioner's primary customer was Hooker Chemicals & Plastics Corp. ("Hooker"). By the terms of a typical agreement between petitioner and Hooker, Hooker's representative would direct petitioner's workers to the appropriate work area and tell them what was to be done with respect to the cleanup. Petitioner's workers were allowed only in their own work areas while at the Hooker plant. Petitioner's employees were required to

¹ Although described by the auditor as use taxes, any purchases made in New York State, would actually be subject to sales tax rather than use tax.

² The capital acquisitions were actually major equipment purchases which petitioner also considered to be for rental purposes.

abide by all of Hooker's safety rules and regulations which were mandated by Federal agencies. Failure to abide by said rules resulted in Hooker refusing entry to the violator. Petitioner supplied all basic safety equipment such as hard hats and safety shoes while Hooker supplied specialized safety equipment such as rubber suits and boots. Hooker required petitioner's employees to keep daily time sheets which had to be approved by Hooker representatives prior to payment of petitioner. Petitioner was required to provide worker's compensation and general liability insurance for its employees and all necessary permits for transportation of hazardous waste. The contract provided that "at all times during the performance of services as a result of this contract [petitioner] shall be considered an Independent Contractor."

8. Petitioner hired, fired and promoted its own employees, although a refusal of entry by Hooker was tantamount to firing since the bulk of petitioner's work was done with Hooker. Aside from safety rule compliance and direction as to location and general job requirements, it appears that there was no direct supervision by Hooker over petitioner's workers. All work was performed by petitioner's employees using petitioner's cleaning equipment and control of said equipment was at no time transferred to Hooker or any other customer other than on those rare occasions where only equipment was rented.

CONCLUSIONS OF LAW

A. That section 1105(a) of the Tax Law imposes a tax on the receipts from every retail sale of tangible personal property, except as otherwise provided in the Sales and Use Tax Law. Section 1101(b)(4)(i)(A) of the Tax Law defines a retail sale, in pertinent part, as a sale of tangible personal property to any person for any purpose other than for resale as such. Section 1105(c)(5) imposes a tax on receipts from every sale except for resale, of the service of

maintaining, servicing, or repairing real property, property or land, as such terms are defined in the real property tax law.

B. That section 1101(b)(5) defines sale, in pertinent part, as any transfer of title or possession or both, including a rental or lease, for a consideration. As provided in 20 NYCRR 526.7(e)(6), "[w]hen a lease of equipment includes the services of an operator, possession is deemed to be transferred where the lessee has the right to direct and control the use of the equipment."

C. That, although Hooker and other customers exercised some authority over petitioner's employees, the authority was very general and was primarily concerned with compliance with safety rules. The actual work was done by petitioner's employees using procedures learned from petitioner. Moreover, petitioner retained sufficient dominion and control over the equipment so as to be furnishing industrial cleaning services taxable under section 1105(c)(5) rather than sales or rentals of tangible personal property. Therefore, petitioner's equipment and repair purchases were not purchases for resale within the meaning and intent of section 1101(b)(4)(i)(A) and were taxable under section 1105(a).

D. That the petition of Wizard Method, Inc. is granted to the extent indicated in Finding of Fact "5"; that the Audit Division is directed to modify the Notice of Determination and Demand For Payment of Sales and Use Taxes Due issued July 7, 1980 accordingly; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

NOV 10 1983

STATE TAX COMMISSION

Rodolph G. G. G.
PRESIDENT

Francis R. Kolmy
COMMISSIONER

Mark
COMMISSIONER

P 470 315 147

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Wizard Method, Inc.</i>	
Street and No. <i>1100 Conneting Rd.</i>	
P.O., State and ZIP Code <i>Niagara Falls, NY 14304</i>	
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 470 315 148

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Joseph A. Tringali</i>	
Street and No. <i>91 Tremont St. P.O. Box 104</i>	
P.O., State and ZIP Code <i>N. Tonawanda, NY 14120</i>	
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