

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Chapin & Fagin, Division GCF, Inc. :
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Sales & Use Tax :
under Article 28 & 29 of the Tax Law for the :
Period 12/1/77-5/31/80. :
:

AFFIDAVIT OF MAILING

State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 8th day of May, 1985, he served the within notice of Decision by certified mail upon Chapin & Fagin, Division GCF, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Chapin & Fagin, Division GCF, Inc.
P.O. Box 246
Buffalo, NY 14240

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
8th day of May, 1985.

David Parchuck

Brian A. Adams

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Chapin & Fagin, Division GCF, Inc. :
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Sales & Use Tax :
under Article 28 & 29 of the Tax Law for the :
Period 12/1/77-5/31/80. :
:

AFFIDAVIT OF MAILING

State of New York :
ss.:
County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 8th day of May, 1985, he served the within notice of Decision by certified mail upon Paul M. Edgette, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Paul M. Edgette
Moot & Sprague
2300 Main Place Tower
Buffalo, NY 14202

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
8th day of May, 1985.

David Parchuck

Bonnie O'Donnell

Authorized to administer oaths
pursuant to Tax Law section 174

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

May 8, 1985

Chapin & Fagin, Division GCF, Inc.
P.O. Box 246
Buffalo, NY 14240

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, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only 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
Paul M. Edgette
Moot & Sprague
2300 Main Place Tower
Buffalo, NY 14202
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
CHAPIN & FAGIN DIVISION OF GCF, 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 December 1, 1977	:	
through May 31, 1980.	:	

Petitioner, Chapin & Fagin Division of GCF, Inc., P.O. Box 246, Buffalo, New York 14240, 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 December 1, 1977 through May 31, 1980 (File No. 35377).

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 April 26, 1984 at 2:45 P.M., with all briefs to be submitted by August 15, 1984. Petitioner appeared by Paul M. Edgette, Esq. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUE

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

FINDINGS OF FACT

1. Petitioner, Chapin & Fagin Division of GCF, Inc., was engaged in the business of scrap metal processing. GCF, Inc. had two wholly-owned subsidiaries, which were also engaged in scrap metal processing, Goldman Titanium, Inc. ("Goldman") and Cubra, Inc. ("Cubra"). All the companies shared common facilities located at 105 Dorothy Street, Buffalo, New York.

2. On September 18, 1981, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner covering the period December 1, 1977 through May 31, 1980 for taxes due of \$7,514.87, plus interest of \$1,311.40, for a total of \$8,826.27.

Following a pre-hearing conference, the amount of tax due was revised to \$7,241.73.

3. Petitioner executed consents extending the period of limitation for assessment of sales and use taxes for the period at issue to December 20, 1981.

4. Maintenance services on the premises occupied by petitioner, Goldman and Cubra were provided by personnel carried on the payroll of petitioner. Goldman and Cubra had no payroll. Each maintenance employee maintained a time sheet which set forth the hours worked and for whom these hours were expended. At the end of each payroll period, the amount of the maintenance payroll is broken down to reflect the charges allocated to each company. An overhead factor of about one-third is added to such charge to reflect indirect administrative costs. For accounting purposes, each company is charged, on a monthly basis, for its portion of the maintenance costs. Initially, this was done by bookkeeping journal entries. Sometime during the audit period, petitioner changed its method and issued an invoice to Goldman and Cubra for their proportionate share of the maintenance cost. Petitioner was reimbursed by a check from each subsidiary.

The Audit Division determined that the foregoing transactions between petitioner and its subsidiaries constituted sales of maintenance services subject to the tax imposed under section 1105(c)(3) of the Tax Law.

5. Petitioner took the position that (1) the amounts paid by each subsidiary to petitioner for the subsidiary's allocable portion of the maintenance employees' salaries represented wages paid by an employer to an employee and was thus not subject to sales tax, and (2) that the services provided were exempt under section 1105(c)(5) of the Tax Law as maintenance services performed on a regular contractual basis for a term of not less than 30 days.

6. Petitioner and Goldman entered into an agreement with Chapin & Fagin Employees Association whereby they recognized the Association as the exclusive representative of full-time and part-time production and maintenance employees. The agreement referred to both petitioner and Goldman as the employer.

7. One person, on behalf of all three corporations, directed the services of the maintenance personnel and had the authority to hire and discharge such personnel.

8. The services performed by the maintenance employees consisted of preventive maintenance and minor repairs to equipment. The maintenance employees did not perform janitorial services.

CONCLUSIONS OF LAW

A. That section 1105(c) of the Tax Law imposes a tax on "(t)he receipts from every sale, except for resale, of the following services:

* * *

(3) Installing tangible personal property...or maintaining, servicing or repairing tangible personal property,...

* * *

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."

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

That the bookkeeping entries recorded on petitioner's books and records and the issuance of invoices and checks as set forth in Finding of Fact "4" effectuate a "sale of services" between petitioner and its subsidiaries within the meaning and intent of sections 1101(b)(5) and 1105(c)(3) of the Tax Law. (Matter of 107 Delaware Associates v. State Tax Commission, ___ N.Y.2d ___, rev'ing. 99 A.D.2d 29.)

C. That the nature of the work performed by the maintenance personnel were services subject to tax imposed under section 1105(c)(3) of the Tax Law.

Since the maintenance employees did not perform interior cleaning and maintenance services, the exclusion of such services from the tax imposed under section 1105(c)(5) of the Tax Law is not applicable.

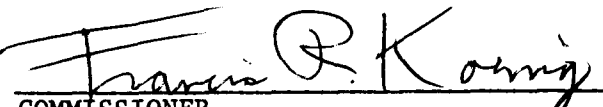
D. That the petition of Chapin & Fagin Division of GCF, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued September 18, 1981, as revised per Finding of Fact "2", is sustained.

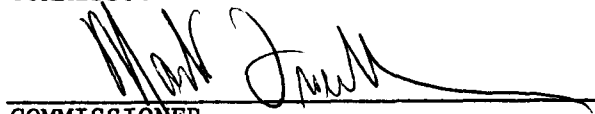
DATED: Albany, New York

STATE TAX COMMISSION

MAY 08 1985


PRESIDENT


COMMISSIONER


COMMISSIONER

P 693 169 803

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1983-403-517	Sent to <i>Supervisor & Family Dir of GCRS</i>	
	Street and No. <i>PO Box 246</i>	
	P.O., State and ZIP Code <i>Buffalo NY 14240</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	\$
PS Form 3800, Feb. 1982	Postmark or Date	

P 693 169 804

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1983-403-517	Sent to <i>Paul M. Edyette</i>	
	Street and No. <i>Wm & Sprague</i>	
	P.O., State and ZIP Code <i>2500 Main Place Torr</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	\$
PS Form 3800, Feb. 1982	Postmark or Date	