

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Edward Byrne :
d/b/a Byrne Maintenance Co. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Sales & Use Tax
under Article(s) 28 & 29 of the Tax Law for the :
Period 9/1/81 - 8/31/84.

State of New York :

ss.:

County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 6th day of April, 1987, he/she served the within notice of decision by certified mail upon Edward Byrne, d/b/a Byrne Maintenance Co. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Edward Byrne
d/b/a Byrne Maintenance Co.
249 Sheridan Boulevard
Inwood, New York 11696

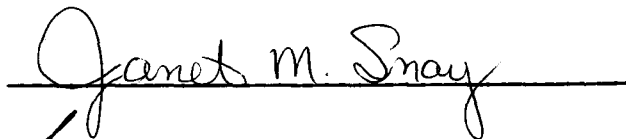
and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

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
6th day of April, 1987.



Authorized to administer oaths
pursuant to Tax Law section 174



STATE OF NEW YORK

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State of New York :

ss.:

County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 6th day of April, 1987, he served the within notice of decision by certified mail upon Robert Palombo, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert Palombo
P & P Business Services
560 Broad Hollow Rd., Suite 307
Melville, NY 11747

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
6th day of April, 1987.

David Parchuck
Authorized to administer oaths
pursuant to Tax Law section 174

Janet M. Snay

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

April 6, 1987

Edward Byrne
d/b/a Byrne Maintenance Co.
249 Sheridan Boulevard
Inwood, New York 11696

Dear Mr. Byrne:

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
Audit Evaluation Bureau
Assessment Review Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2086

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:
Robert Palombo
P & P Business Services
560 Broad Hollow Rd., Suite 307
Melville, NY 11747

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

EDWARD BYRNE
D/B/A BYRNE MAINTENANCE CO.

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 September 1,
1981 through August 31, 1984.

Petitioner, Edward Byrne d/b/a Byrne Maintenance Co., 249 Sheridan Boulevard, Inwood, New York 11696, 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 September 1, 1981 through August 31, 1984 (File No. 62195).

A hearing was held before Jean Corigliano, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 29, 1986 at 1:15 P.M., with all briefs to be submitted by February 5, 1987. Petitioner appeared by Robert Palombo. The Audit Division appeared by John P. Dugan, Esq. (Michael B. Infantino, Esq., of counsel).

ISSUE

Whether receipts from the sale of services performed under the terms of a service contract were subject to sales tax.

FINDINGS OF FACT

1. On April 3, 1985, the Audit Division issued to petitioner, Edward Byrne d/b/a Byrne Maintenance Co., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period September 1, 1981 through

August 31, 1984, asserting taxes due in the amount of \$12,935.85 plus minimum interest.

2. On December 4, 1984, petitioner executed a consent extending the period of limitation for assessment of sales and use taxes under Articles 28 and 29 of the Tax Law for the taxable period December 1, 1980 through August 31, 1982 to December 20, 1985.

3. On the basis of certain documents submitted to the Audit Division subsequent to the issuance of the notice, the amount of tax asserted has been reduced to \$11,576.67.

4. The remaining tax liability results from the Audit Division's determination that sales receipts arising out of a service agreement between petitioner and Haven Manor Nursing Home ("Haven Manor") for a period of three years commencing September 14, 1982 were subject to sales tax. Petitioner considered the services performed under the terms of this agreement to be excluded from the imposition of sales tax.

5. Petitioner installs and maintains air conditioning and refrigeration units. Under the terms of the service agreement at issue, petitioner was to perform certain services for Haven Manor including:

- (a) Maintaining on his own payroll a maintenance service staff of two persons who would work full time at Manor Haven under the control and supervision of petitioner;
- (b) routinely inspecting: the physical plant, fire detection and prevention systems, boiler equipment and the range hood system;
- (c) conducting proper testing and maintenance of: the emergency generator and transfer switching equipment, the fire alarm system, the standby system, fire extinguishers, boiler equipment and the elevator systems;
- (d) preparing reports regarding any deficiencies in the systems routinely inspected and tested;

- (e) providing ongoing preventive maintenance of all air conditioning and refrigeration units to include: spring startup, a check of refrigerant and oil on all units and normal lubrication and maintenance of all motors and other moving parts;
- (f) providing other special services to include the cleaning or replacement of filters twice a year and the cleaning of evaporator and condensing coils when necessary.

6. Petitioner's employees performed those tasks not associated with the air conditioning and refrigeration units, such as daily testing of the fire alarm system. They did not perform major repairs on any equipment, but they were responsible for contacting other service repair contractors when such repairs were needed. Although petitioner asserted that these employees also performed such tasks as cleaning floors and dusting, there is nothing in the service agreement to indicate that petitioner was responsible for such chores. Petitioner personally performed the tasks necessary for the ongoing preventive maintenance of the refrigeration and air conditioning units.

7. Petitioner billed Manor Haven one monthly sum for all services performed under the terms of the service agreement. When the air conditioning or refrigeration units required repairs or services beyond those provided for in the agreement, petitioner provided such services and billed Manor Haven separately. Petitioner collected sales taxes on these repairs and services.

8. Petitioner asserted that the tasks performed by his employees were maintenance services excluded from the imposition of sales tax by section 1105(c)(5) of the Tax Law; however, petitioner conceded that the sales tax does apply to that portion of the contract involving the maintenance services performed by him. Two air conditioning and refrigeration maintenance contracts between petitioner and Manor Haven were introduced to establish the relative

value of that portion of the service agreement which involved the same tasks as those performed under the contracts.

CONCLUSIONS OF LAW

A. That section 1105(c)(5) of the Tax Law imposes a sales tax upon the receipts from the sale of the service of "[m]aintaining, servicing or repairing real property, property or land", but excludes from the imposition of the tax "interior cleaning and maintenance services performed on a regular contractual basis for a term of not less than thirty days" (Tax Law § 1105[c][5]).

B. That by regulation, the State Tax Commission has limited the exclusion to "ordinary janitorial services such as dusting, cleaning and waxing of the walls and floors of a building, oiling of door hinges, replacing light bulbs, and simple repairs such as replacement of washers" (20 NYCRR 527.7[c][3][iv]). The tasks performed by petitioner (both personally and through his employees) do not come within the scope of the exclusion. Thus, all sales receipts arising under the service agreement are subject to sales tax.


C. That by agreement of the Audit Division, the sales and use tax liability asserted against petitioner is reduced to \$11,576.67.

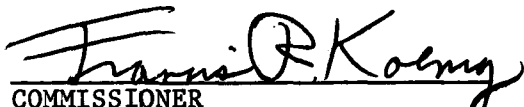
D. That the petition of Edward Byrne d/b/a Byrne Maintenance Co. is granted to the extent indicated in Conclusion of Law "C"; that the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on April 3, 1985 will be modified accordingly; and that in all other respects, the petition is denied.


DATED: Albany, New York

STATE TAX COMMISSION

APR 06 1987


PRESIDENT


COMMISSIONER


COMMISSIONER