STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions :

of :

ALLIEDBARTON SECURITY SERVICES LLC :

for Revision of Determinations or for Refund of :
Sales and Use Taxes under Articles 28 and 29 of the
Tax Law for the Periods June 1, 2006 through :
February 28, 2012.

In the Matter of the Petition :

of :

WILLIAM TORZOLINI :

for Revision of Determinations or for Refund of :
Sales and Use Taxes under Articles 28 and 29 of the
Tax Law for the Period March 1, 2009 through :
February 29, 2012.

In the Matter of the Petitions :

of :

DAVID I. BUCKMAN AND
WILLIAM C. WHITMORE :

for Revision of Determinations or for Refund of :
Sales and Use Taxes under Articles 28 and 29 of the
Tax Law for the Period March 1, 2010 through :
February 29, 2012. :

DETERMINATION
DTA NOS. 825169,
825690, 825691,
825692 AND 825693

Petitioner AlliedBarton Security Services LLC filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods June 1, 2006 through February 29, 2012.

Petitioner William Torzolini filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 2009 through February 29, 2012.

Petitioners David I. Buckman and William C. Whitmore filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 2010 through February 29, 2012.[1]

A hearing was held before Herbert M. Friedman, Jr., Administrative Law Judge, in New York, New York, on February 24 and 25, 2014, with all briefs to be submitted by July 17, 2014, which date commenced the six-month period for the issuance of this determination. Petitioners appeared by WTAS LLC (Raymond J. Freda, Esq., Kenneth T. Zemsky, Esq., and Tina Tsao, Esq., of counsel).[2] The Division of Taxation appeared by Amanda Hiller, Esq. (Anita K. Luckina, Esq., of counsel).

ISSUES

I. Whether petitioner's provision of reception services was properly considered by the Division of Taxation as "protective and detective services" and therefore constituted an enumerated service subject to sales tax under Tax Law § 1105(c)(8).

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[1] Petitioners Buckman, Torzolini, and Whitmore do not contest their responsible officer status for their respective periods and their liability in this case is contingent upon that of petitioner AlliedBarton Security Services LLC. As a result, references to petitioner in this determination shall solely mean AlliedBarton unless otherwise stated.

[2] WTAS LLC is now known as Andersen Tax LLC.

II. Whether the Division of Taxation properly disallowed petitioner's reliance on certain exemption certificates provided by its customers as purported agents of exempt entities.

FINDINGS OF FACT

1. Petitioner AlliedBarton Security Services LLC at all relevant times was a business primarily involved in providing security services to various clients, such as financial institutions. As part of its product, petitioner provided reception services to its customers.[3] Petitioner is headquartered in Conshohocken, Pennsylvania, and began doing business in New York in May 2006. It currently operates in 47 states. In a press release from 2008, petitioner marketed itself as "the industry's premier provider of highly trained security personnel."

2. Petitioner William Torzolini was concededly a responsible officer of petitioner and a person required to collect tax within the meaning of Tax Law § 1131(1) during the period March 1, 2009 through February 29, 2012. Petitioners David I. Buckman and William C. Whitmore, likewise, were admittedly responsible officers of petitioner during the period March 1, 2010 through February 29, 2012.

3. Petitioner provided varying levels of security officers, ranging from roving to stationary personnel, to various clients. These security officers' role was to serve as a deterrent to potential criminal activity and provide their clients with a safe and productive workplace. They required special training and, to act in the capacity of security guard, a license under New York's Security Guard Licensing Law.[4] In order to better perform their responsibilities, the security officers were provided with cell phones, handcuffs and, in the case of certain high-level guards, firearms.

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[3] Throughout the hearing and in its briefs, petitioner interchangeably identified this type of service as both reception and concierge services. Therefore, for purposes of this determination, they will be referred to collectively as "reception" or "receptionist" services.

[4] Comprised of Articles 7 and 7-A of the General Business Law and 19 NYCRR Parts 170 through 174.

Typically, for these positions, petitioner recruited individuals interested in law enforcement, including criminal justice majors, former police officers and military personnel, and subjected them to a thorough background check. This type of personnel accounted for approximately 95% of petitioner's revenue.

4. Petitioner also provided its clients with reception services. These employees typically were seated at a reception desk in a lobby, and their duties included greeting, screening and processing persons requesting access to the site, checking identification, preparing and issuing visitor passes, and refusing entry, if necessary. Unlike the security guards, the receptionists in New York did not require state licensing and were not provided with handcuffs or weapons of any kind. Reception services constituted approximately 5% of petitioner's revenue.

5. Petitioner recruited individuals with hotel, airport, or concierge/receptionist backgrounds for reception positions, and introduced into the record one of its electronic postings for soliciting potential receptionists. The posting identified the career site category as "Security Officer or Supervisor" and described petitioner as "the industry's premier provider of highly trained security personnel." As an incentive to potential applicants, petitioner's posting stated that "[a]s the first security services company selected as one of *Training* magazine's Top 125 training companies for five consecutive years, [petitioner] offers on-the-job, web-based and ongoing training programs for security officers, support and management personnel." The duties or responsibilities for the position listed in the posting were the same as those recited in Finding of Fact 4. Petitioner's posting for receptionists was listed on the website "www.greatsecurityjobs.com."

6. On occasion, a licensed security guard employed by petitioner performed the duties of a receptionist. Conversely, because he or she lacked the requisite New York State license, petitioner's receptionists never performed the duties of a security guard.

7. Petitioner generally had administrative account managers at client sites to oversee the day-to-day operations of its services. These managers had knowledge of whether a receptionist was on duty or if a security guard was performing that task. These daily operations were recorded on reports that were provided to petitioner's billing department.

8. Petitioner's security guards, receptionists, and supervisors wore uniforms, designed by petitioner, while on duty. A photo of six sample uniforms was placed in the record. The majority were police-like uniforms comprised of dark slacks and white shirts, replete with badges, which were worn by basic security guards and supervisors. The purpose of this style was to present a formidable, deterring appearance. The sample uniform worn by a receptionist consisted of a blue blazer, white shirt, maroon tie, and grey slacks. They wore no badge, but displayed petitioner's label, with its company name, on the blazer's breast. These uniforms were intended to portray a welcoming, friendly look. Petitioner allowed its clients to choose which uniforms would be appropriate for their facility, although petitioner had input into the selection process.

9. In the event of a disturbance or confrontation involving a receptionist and a visitor at one of petitioner's job sites, the receptionist was instructed to contact the petitioner's floor supervisor or point person for enforcement. The receptionists themselves were not permitted to physically interact with a potential threat.

10. In New York City, petitioner never provided reception services at locations staffed with security guards from a competitor. Instead petitioner's receptionists were always part of its

own larger group of security personnel. Conversely, petitioner had clients that solely hired its security guards and supervisors without the receptionists. In that case, reception services were often handled by another entity.

11. Three of petitioner's clients during the periods at issue were financial institutions, Duestche Bank and Credit Suisse, and an advertising agency, Ogilvy and Mather. At one point during this time, petitioner lost its reception services engagement with Duestche Bank to a competitor, Swiss Post, a firm that supplied solely reception services. Petitioner, however, did retain the remaining security services with that client.

12. On March 30, 2009, the Division of Taxation (Division) sent a letter to petitioner scheduling an appointment to commence a sales and use tax field audit of its business for the period June 1, 2006 through February 28, 2009. The Division's letter requested that all of petitioner's books and records pertaining to its sales and use tax liability for the audit period be available for review. Among the records specifically requested were the general ledger, cash receipts journal, federal income tax returns, purchase invoices, sales invoices, fixed asset purchase invoices, cash disbursements journal, bank statements, canceled checks and deposit slips for all accounts, and exemption documents. In August 2009, the Division's auditor traveled to petitioner's headquarters in Conshohocken to review the available records. Given the amount of sales tax periods to be examined, petitioner and the Division agreed to a test period audit for sales.

13. Certain invoices provided by petitioner to the Division separately listed reception services from other services. On some of these invoices, petitioner did not charge sales tax for the reception services, while on others, such tax was requested for nearly identical entries. No further explanation for this discrepancy was given on the particular invoices. Mitchell Weiss,

petitioner's vice president and chief accounting officer, testified at hearing that a possible explanation for the different treatment of the similar entries was that the reception services must have been provided by a licensed security guard on certain occasions and, thus, were taxable.

14. Reception and security service revenues were booked by petitioner under one account on its general ledger. That account was entitled "security services."

15. The Division's auditor did not observe petitioner's receptionists in the performance of their duties.

16. In addition, in the course of the audit, the auditor reviewed exemption documentation, including exempt sales invoices. During that review, the auditor discovered several properly substantiated exempt sales. He also found claimed exempt sales to two clients - Colliers ABR (Colliers),[5] a real estate management company, and FirstService Williams LLC (FirstService)[6] - that raised questions. Neither Colliers nor FirstService was an exempt entity itself. Instead, petitioner asserted that Colliers and FirstService represented that they were acting as agents of governmental entities when they purchased services. Both provided certain forms to petitioner in support of their claims and these forms were provided to the Division.

17. According to petitioner, Colliers represented itself to be an agent of the Metropolitan Transit Authority (MTA) on a form dated November 6, 2006. The form was numbered AC 946 and entitled "TAX EXEMPTION CERTIFICATE." Form AC 946 is a Department of Taxation and Finance form designed for use by employees of exempt governmental entities to exempt date specific transactions, such as a hotel stay or car rental. In this case, it listed petitioner as the firm furnishing services and MTA as the purchaser. In addition, it provided what Mr. Weiss assumed

[5] Colliers changed its name at some point to Cassidy Turley.

[6] FirstService was formerly known as Williams USA Realty Services or GVA Williams Real Estate.

to be MTA's tax identification number, and listed "security" and "November 6, 2006" as the nature and dates of the transaction for which it was provided. This document was executed by an unidentified individual as the employee of the exempt entity with the title "Director of Real Estate."[7] Finally, in the lower corner of the document was the handwritten entry "MTA (2 Broadway Trust), c/o Colliers ABR, In as Agent." The author and date of this entry was unidentified.

18. The Division was also provided with a property management agreement between MTA and Colliers dated August 1, 2006 and effective for the period October 1, 2006 to September 30, 2010 (MTA Agreement). The MTA Agreement stated that, when describing the nature of the relationship between Colliers and MTA, "[Colliers] will be acting only as an independent contractor, and nothing in this Agreement, expressed or implied, shall be construed as creating . . . an employment relationship or that of principal and agent . . . ." Meanwhile, Appendix E to the MTA Agreement, entitled "Colliers' Competitive Solicitation Process," provided that "Colliers shall use, for MTA's benefit, to the fullest extent permitted by law, MTA's exemption from State and local taxes and most Federal taxes."

19. Petitioner also placed into evidence a one-page contract or purchase order for services dated October 6, 2007 between it, as vendor, and Colliers, as customer. This document called for billing to "MTA c/o Colliers a/a/f."[8] It also stated that "[the MTA], as a New York State Public Authority, is exempt from paying New York sales tax. A tax exempt certificate will be

[7] In its brief, petitioner identified this individual as "Roco Krsulic." That identification is not present in the evidence in the record.

[8] It is undisputed that "a/a/f" stood for "as agent for."

provided." Several attachments were referenced and incorporated in the purchase order, none of which were attached to the document placed in the record.

20. Meanwhile, in support of purchases made by FirstService, the Division was provided with a form numbered ST-119.1, dated December 6, 2006, and entitled "New York State and Local Sales and Use Tax Exempt Organization Certificate." The form specified on its face that it may be used "only when an exempt organization is the direct purchaser and payer of record." It listed petitioner as the vendor and the City of New York Department of Citywide Administrative Services (DCAS) as the exempt organization making the purchase. It also displayed tax identification number 136400434, which Mr. Weiss again speculated was that of the City of New York. The nature and dates of the transaction for which it was provided were not stated, nor was FirstService listed on the form.

21. Petitioner also placed into the record an unnumbered form, dated January 1, 2006, and entitled "New York State and Local Sales and Use Tax Exempt Organization Certificate." This form listed petitioner as the vendor and "GVA Williams Real Estate, A/A/F NYCDCAS" as the exempt organization. It contained as the certificate number EX-136400434. Again, the nature and dates of the transaction for which it was provided were not stated. Petitioner maintained that the Division previously accepted this form as an exemption certificate in support of FirstService's purchase of services. During his testimony, the auditor denied that assertion, and expressed numerous concerns with the document.

22. In May 2005, prior to the audit period, the Division issued Publication 765, entitled "Sales and Fuel Excise Information for Properly Appointed Agents of New York Governmental Entities," in order to aid in determining whether a person is a properly appointed agent and whether their purchases are exempt from taxation. Publication 765 specifically stated that

"[e]ffective July 1, 2005, when making a purchase of tangible personal property or services, the agent of a governmental agency must provide the seller with Form ST-122, *Exempt Purchase Certificate for an Agent of a New York Governmental Entity* . . . . A copy of Form DTF-122, *Certification of Agency Appointment by a New York Governmental Entity*, must be attached to Form ST-122 . . . . " The publication also stated that "[i]f the seller accepts a properly completed Form ST-122 . . . and Form DTF-122 in good faith, the seller may use the forms to substantiate an exempt sale."

23. The record is devoid of any forms ST-122 or DTF-122 for transactions involving either Colliers or FirstService.

24. Petitioner did not present any witnesses from MTA, DCAS, Colliers or FirstService to confirm the purported agency relationships. Likewise, there are no supporting affidavits or letters from any of these entities in the record.

25. The services at issue that petitioner performed for Colliers and FirstService were concededly protective or detective in nature and, if not exempt, were otherwise taxable.

26. On February 24, 2011, following the audit, the Division issued to petitioner Notice of Determination number L-035455040-9, which asserted $1,957,326.80 in additional sales and use taxes due, plus interest, for the period June 1, 2006 through February 28, 2009. The additional tax emanated from the aforementioned untaxed sale of reception services, which the Division deemed to be protective or detective services in nature, and the disallowed exempt sales.

27. A Bureau of Conciliation and Mediation Services conference was held on September 27, 2011 with regard to notice number L-035455040-9. By conciliation order of May 18, 2012, the amount of tax due was reduced to $1,120,215.72. The conciliation order contained no explanation for the reduction.

28. In May 2011, a second sales and use tax field audit of petitioner was commenced and eventually expanded the period at issue to include March 1, 2009 through February 29, 2012. Again, petitioner's books and records were requested, and the Division's auditor reviewed them in Conshohocken in September 2011. Ultimately, the Division and petitioner only disagreed on the tax treatment of the reception services provided during this later audit period to Credit Suisse, Deustche Bank, and Ogilvy & Mather. These services were of the same nature as those provided by petitioner to its clients during the previous audit period.

29. On March 26, 2013, following the second audit, the Division issued to petitioner Notice of Determination number L-039171574-7, which asserted $798,110.10 in additional sales and use taxes due, plus interest, for the period March 1, 2009 through February 29, 2012. The additional tax solely reflected the untaxed sales of reception services.

30. Additionally, on March 29, 2013, Notice of Determination numbered L-039183443-5, was issued to petitioner William Torzolini, as a responsible officer of petitioner for the period March 1, 2009 through February 29, 2012. Petitioners David I. Buckman and William Whitmore were issued similar notices of determination, numbered L-039183441-7 and L-039183442-6, respectively, for the period March 1, 2010 through February 29, 2012. Petitioners Torzolini, Buckman and Whitmore do not contest that they were responsible officers of petitioner for their respective periods.

31. Petitioner made a payment of $77,289.05 towards the statutory notices in order to stop interest from accruing and seeks a refund of this amount if its petitions are granted.

SUMMARY OF THE PARTIES' POSITIONS

32. Petitioner argues that it provided separate, nontaxable reception services as part of a mixed transaction to clients, and that its receipts properly reflect the nature of the transaction by

separately stating the nontaxable services. It further asserts that New York State oversees the security guard industry in New York and requires licensing for such workers. Meanwhile, petitioner maintains that receptionists, such as those it provided, do not require licenses under New York law as they are excluded from the definition of security guard. Thus, petitioner argues that their services do not fall under the enumerated services listed in Tax Law § 1105(c)(8).

Concerning the exempt sales, petitioner states that it accepted and relied in good faith on exemption certificates provided by their clients. These clients held themselves out as, and were in fact, agents of exempt entities. Petitioner maintains that the Division improperly disregarded the substance of these transactions in a hypertechnical interpretation.

33. The Division states that the reception services, provided by a security services company, performed a gatekeeping or security function both standing alone and as part of an overarching security service and, thus, were taxable. Additionally, the Division maintains that petitioner failed to exercise reasonable ordinary due care when it accepted plainly improper exemption documentation from its customers and, therefore, lacked the requisite good faith to claim the exemptions. Finally, the Division argues that petitioner's purchasers were not agents of an exempt governmental entity.

CONCLUSIONS OF LAW

Reception Services

A. Tax Law § 1105(c)(8) imposes tax upon the provision of:

> [p]rotective and detective services, including, but not limited to, all services provided by or through alarm or protective systems of every nature, including, but not limited to, protection against burglary, theft, fire, water damage or any malfunction of industrial processes or any other malfunction of or damage to property or injury to persons, detective agencies, armored car services and guard, patrol and watchman services of every nature other than the performance of such services by a port watchman licensed by the waterfront commission of New York

harbor, whether or not tangible personal property is transferred in conjunction therewith.

This provision does not create an exemption from the imposition of sales tax, but rather, defines particular service activities that are subject to tax. Therefore, it is properly viewed as an imposition of tax statute and ambiguities are most strongly construed against the Division and in favor of the taxpayer (***see Matter of Grace v. New York State Tax Commn.***, 37 NY2d 193 [1975]; ***Matter of Building Contractors Association v. Tully***, 87 AD2d 909 [1982]; ***Matter of Penn York Energy Corp.***, Tax Appeals Tribunal, October 1, 1992). Nevertheless, even with this standard, proof of entitlement to an exclusion is petitioner's burden and it must show by clear and convincing evidence that the service it provided was not one of those set out in Tax Law § 1105(c)(8).

B. Statutory rules of construction provide that "[t]he legislative intent is to be ascertained from the words and language used, and the statutory language is generally construed according to its natural and most obvious sense, without resorting to an artificial or forced construction" (McKinney's Cons Laws of NY, Book 1, Statutes § 94). Where, as here, words of a statute have a definite and precise meaning, it is not necessary to look "elsewhere in search of conjecture so as to restrict or extend that meaning" (***Matter of Erie County Agricultural Society v. Cluchey***, 40 NY2d 194 [1976]). As the language of the statute is clear, it is appropriate to interpret its phrases in their ordinary, everyday sense (***Matter of Automatique v. Bouchard***, 97 AD2d 183 [1983]).

C. In determining the taxability of any service under Tax Law § 1105(c), the Tax Appeals Tribunal has held that the analysis must focus on "the service in its entirety, as opposed to reviewing the service by components" (***Matter of SSOV '81, Ltd.***, Tax Appeals Tribunal,

January 19, 1995; ***see also Matter of Southern Pacific Communications Co.***, Tax Appeals Tribunal, May 14, 1991). A service must be viewed in its entire context and not in isolation (***see Matter of F.W. Woolworth Co.***, Tax Appeals Tribunal, December 1, 1994). The primary function of a service is the controlling factor in determining taxability and a dissection of the service into taxable or nontaxable components is inappropriate (***see Matter of SSOV '81, Ltd.***).

Unquestionably, petitioner is a protective or detective services provider. Indeed, it publicly promoted itself during the audit period as "the industry's premier provider of highly trained security personnel." The record reflects that petitioner supplied its clients with a team of individuals, ranging from security guards to supervisors, each with a particular role and all with the common goal of protection. Often, one of the members of this team was the receptionist. All members of the security team, including the receptionists, wore comparable uniforms designed by petitioner and prominently bearing petitioner's name. Moreover, the receptionists worked in conjunction with the other security members, especially in the event of a disturbance. If asked to refuse access to a visitor, the receptionists were instructed to involve their fellow security team members, and not the local police. Additionally, petitioner's employment posting for potential receptionists emphasized the security nature of its business. It even listed its openings on a website entitled "greatsecurityjobs.com." Perhaps most tellingly, at least in New York, petitioner never provided reception services at locations staffed with security guards from a competitor. Instead, petitioner's receptionists were always part of a larger group of its own security personnel providing protective services. Hence, the primary function of the services provided by petitioner, which included its receptionists, was that described in Tax Law § 1105(c)(8) (***see Matter of SSOV '81, Ltd.***).

D. The duties of the receptionists themselves, as part of the larger security force, also support a conclusion that they provided protective or detective services. For instance, the receptionists were to 1) process and screen all people requesting access; 2) prepare and issue (and conversely, refuse) visitor passes; 3) announce all visitors; and 4) remain flexible to an ever changing environment. Indeed, petitioner's own training manual identified the daily tasks of the receptionist to include access control, surveillance and enforcement of its clients' policies. Clearly, these activities function to protect petitioner's clients from unwanted guests, exposure or disturbances.

Petitioner makes much of the fact that its receptionists must be excluded from taxation as they were neither defined nor licensed as security guards under New York's Security Guards Licensing Law. The fault with this argument, however, is that the term used in Tax Law § 1105(c)(8), "protective and detective services," encompasses more than just licensed security guards. In fact, the Division does not maintain that the receptionists were security guards. Instead, as it correctly points out, security services do not have to be openly intimidating to be protective and detective in nature and the receptionists performed a gatekeeping function as part of petitioner's overall product. They clearly were the front person in petitioner's security team provided to its clients. Consequently, the reception services at issue, based on the facts in the record, were protective or detective services in nature and subject to taxation under Tax Law § 1105(c)(8).

E. Petitioner also posits that its reception services were nontaxable under 20 NYCRR 533.2(b)(2) as they were separately listed on the relevant invoices as part of a mixed transaction. This regulation, however, requires the vendor to maintain records that provide sufficient detail to independently determine the taxable status or may be substantiated by supporting records. In the

instant case, certain invoices contain entries for reception services identified as nontaxable, while other invoices have like entries identified as taxable. This difference in tax treatment was unexplained on the face of the records themselves. Petitioner attempted to explain this discrepancy through the testimony of its witnesses, including Mr. Weiss, but their statements on this issue were speculative, and admittedly not based on direct knowledge. In sum, regardless of whether a mixed transaction actually existed, the requisite detail necessary to carve out reception services as nontaxable under the cited regulation was missing.

F. In addition, petitioner argues that a prior advisory opinion by the Division established that reception services are nontaxable, unless tangible personal property is rented or sold as part of the service.[9] In the cited advisory opinion, the Division found that charges for certain reception activities were not subject to sales tax in that particular instance. It is well settled, however, that advisory opinions are not precedential and are in no way binding herein (***see*** Tax Law § 171[24]; 20 NYCRR 2376.4; see also ***Matter of Exxon Mobil Corporation***, Tax Appeals Tribunal, May 24, 2012). Moreover, the facts in the cited advisory opinion differ from those in the case at bar, most particularly with regard to the nature and breadth of the reception services provided. In short, the advisory opinion does not persuasively support petitioner's position and, therefore, this argument must likewise fail.

Exempt Services

G. Petitioner also seeks an exemption from taxation for the services provided to Colliers and FirstService. It is presumed that all receipts for property or services of any type mentioned in subdivisions (a), (b), (c) and (d) of section 1105 of the Tax Law are subject to tax until the

[9] (***Richard W. Genetelli***, Advisory Opinion, TSB-A-97 [11]S [March 6, 1997]).

contrary is established, and the burden of proving that any receipt is not subject to tax is upon the person required to collect it or the customer (***see*** Tax Law § 1132[c]). A vendor who in good faith accepts from a purchaser a properly completed exemption certificate in a form prescribed by the Division, or other documentation similarly authorized, will not be held to be responsible for collecting tax from the customer (***see id.***; 20 NYCRR 532.4[b][2]). "Good faith" constitutes when a vendor has no knowledge the exemption certificate is false or fraudulently prepared. If reasonable ordinary due care is exercised, knowledge will not be imputed to the seller (***see*** 20 NYCRR 532.4[b][2][i]).

In order to establish nontaxability, and as provided for by Tax Law § 1132(c)(1), the Division prescribes for use exemption documents, including, as is pertinent here, exemption certificates evidencing an agency relationship (***see*** Publication 765, Form ST-122, *Exempt Purchase Certificate for an Agent of a New York Governmental Entity* and Form DTF-122, *Certification of Agency Appointment by a New York Governmental Entity*). When properly completed and timely accepted by a vendor from its customer, these certificates on their own satisfy the vendor's burden of proving the nontaxability of a sales transaction and relieves the vendor of its obligation to collect and remit sales tax on that transaction (***see*** Tax Law § 1132[c][1]; 20 NYCRR 532.4[b][2]; [c][1], [2][i]). An authorized exemption certificate is considered "properly completed" when it contains 1) the date prepared; 2) name and address of the purchaser; 3) name and address of the vendor; 4) identification number of the purchaser (if required on the certificate); 5) signature of the purchaser (or its authorized representative); and 6) any other information required to be provided on the particular certificate (***see*** Tax Law § 1132[c][2]; 20 NYCRR 532.4[b][2][ii]); [d][2]).

H. In the instant case, petitioner failed to provide the Division with the necessary prescribed exemption certificates. Petitioner's purchasers, Colliers and FirstServe, were not exempt entities themselves. Instead, they sought exemptions as agents of exempt entities. Unquestionably, Tax Law § 1116(a)(1) provides an exemption from sales and use taxes to governmental entities, including the State of New York, or any of its political subdivisions, such as the MTA or DCAS and that exemption would flow through to a contractor purchasing goods and services as the agent of that exempt organization (***see Matter of West Valley Nuclear Services Co., Inc.***, Tax Appeals Tribunal, November 13, 1998, ***confirmed*** 264 AD2d 101 [2000], ***lv denied*** 95 NY2d 760 [2000]). In order to facilitate that exemption, the Division has published information since 2005 in Publication 765 informing vendors of the need to use forms ST-122 and DT-122 under such circumstances. Indeed, proper use of these authorized forms, accepted in good faith, provides a vendor with protection from liability for the tax (***see*** Tax Law § 1132[c][1]; 20 NYCRR 532.4[b][2]). Despite this available guidance, petitioner, a sophisticated vendor with legal representation, carelessly accepted unauthorized documents from its purchasers rather than those publically required by the Division. The tendered certificates even listed the wrong purchasers, highlighting the fact that they were improperly completed. It is difficult to conclude that petitioner used the reasonable ordinary due care called for in 20 NYCRR 532.4[b][2][i] by ignoring the requirements laid out in Publication 765 or even carefully reading the documents in question. Hence, petitioner's failure to comply prevents it from initially satisfying its burden of proving the exemption under Tax Law § 1132(c).

I. The presumption of taxability created under Tax Law § 1132(c), even without a properly completed exemption certificate, though, is rebuttable through other evidence (***see Matter of RAC Corp. v. Gallman***, 39 AD2d 57[1972]). Accordingly, where a vendor fails to obtain a

timely or properly completed certification of nontaxable status, such failure does not change the tax status of the transaction, and the taxpayer retains the right to prove that such sale was in fact not subject to tax (***see*** 20 NYCRR 532.4[b][6]). Rather, the failure to obtain timely and properly completed exemption certifications merely deprives the vendor of the right to rely solely on that certification to meet its burden (***id.***). Thus, the specific question here becomes whether, in light of all the facts and circumstances, petitioner has provided sufficient evidence to establish that its claimed but disallowed exempt sales to Colliers and FirstServe were not subject to tax as its purchasers acted as an agent of the governmental entities (***see Matter of Intercontinental Audio & Video, Inc.***, Tax Appeals Tribunal, January 4, 1996; ***see also*** 20 NYCRR 532.4[b][4][v]).

In order to analyze this issue, traditional agency principles must be applied (***see Matter of West Valley Nuclear Services Co., Inc.***; ***Matter of MGK Constructors***, Tax Appeals Tribunal, March 5, 1992). "Agency is a fiduciary relationship which results from a manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and the consent of the other to act" (***Smirlock Realty Corp. v Title Guar. Co.***, 70 AD2d 455, 464 [1979]). A finding of agency requires a showing that the principal authorized a fiduciary relationship (***see Matter of Hooper Holmes, Inc. v. Wetzler***, 152 AD2d 871 [1989], ***lv denied*** 75 NY2d 706 [1990]).

J. First, the evidence of the relationship between MTA and Colliers must be examined based on the record. It is readily apparent that certain aspects of this relationship are indicative of a principal-agency relationship, while others indicate that Colliers was an independent contractor. As petitioner correctly points out, the unauthorized certificate and purchase order in the record identified Colliers as agent for the MTA. Moreover, certain provisions of the MTA Agreement require MTA's approval over various acts by Colliers. Additionally, Colliers was

entitled to pledge MTA's credit in the purchase of materials and services reasonably required in the ordinary course of business in its operation of the building. Finally, and perhaps most potently for petitioner, Appendix E of the MTA Agreement allows that "Colliers shall use, for MTA's benefit, to the fullest extent permitted by law, MTA's exemption from State and local taxes and most Federal taxes." All of these facts certainly support petitioner's claim.

Nevertheless, the MTA Agreement clearly states, under the unambiguous heading "Nature of Relationship," that "[i]n taking any action pursuant to this Agreement, [Colliers] will be acting only as an independent contractor, and nothing in this Agreement, expressed or implied, shall be construed as creating . . . an employment relationship or that of principal and agent between [Colliers] . . . and MTA . . . ." This express provision denying an agency relationship is devastating to petitioner's claim. It directly contravenes the requirement that the principal, in this case MTA, authorized an agency relationship with Colliers, and is impossible to ignore. Furthermore, petitioner failed to offer either the testimony or written substantiation of a representative of MTA or Colliers affirming the claimed agency status. Given petitioner's burden to clearly and convincingly demonstrate its entitlement to an exemption from tax, the conflicting language in the MTA Agreement, in conjunction with the lack of confirmation from MTA or Colliers, compel the conclusion that petitioner has not met its burden of proving that the requisite agency relationship existed between Colliers and MTA at the time the services were rendered (***see Matter of Swet***, Tax Appeals Tribunal, February 22, 1991).

K. The record contains even less to support a finding of an agency relationship between FirstService and DCAS at the relevant time. There is no contract between FirstService and the governmental entity creating an agency relationship in evidence, nor is there a purchase order evidencing such a situation. Again, petitioner did not present any witness or corroborating

written statement from the DCAS or FirstService for its position. In sum, petitioner seeks an exemption for the FirstService transactions based on the strength of an improper exemption certificate, which alone is clearly insufficient to meet its burden.

L. The petitions of AlliedBarton Security Services LLC, David I. Buckman, William Torzolini, and William C. Whitmore are denied, and the notices of determination dated February 24, 2011, March 26, 2013, and March 29, 2013, are sustained.

DATED: Albany, New York
December 18, 2014

/s/ Herbert M. Friedman, Jr.
ADMINISTRATIVE LAW JUDGE