

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions :
of :
GARRISON PROTECTIVE SERVICES, INC. : DETERMINATION
for Revision of Determinations or for Refund of Sales : DTA NO. 826738
and Use Taxes under Articles 28 and 29 of the Tax Law :
for the Period March 1, 2009 through November 30, 2011. :
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Petitioner, Garrison Protective Services, Inc., 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 November 30, 2011.

A formal hearing was held before Kevin R. Law, Administrative Law Judge, in New York, New York, on April 26 and 27, 2016, with all briefs to be submitted by January 6, 2017, which date commenced the six-month period for issuance of this determination. Petitioners appeared by Morgan, Lewis & Bockius, LLP (Charles R. Bogle, Esq. of counsel) and the Law Offices of Raymond A. Guisto, P.C. (Brooke Anthony, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Michael Hall).

ISSUES

I. Whether Grenadier Realty Corporation was an agent of the New York City Housing Authority such that its purchase of security services from petitioner was exempt from sales tax.

II. Whether Grenadier Realty Corporation's purchase of security services from petitioner was exempt from sales tax as a sale for resale.

III. Whether the Division of Taxation should be estopped from asserting sales tax on petitioner's sales of security services on sales to Grenadier Realty Corporation.

IV. Whether reasonable cause exists allowing for the abatement of penalties.

FINDINGS OF FACT

1. Petitioner, Garrison Protective Services, Inc., during the years in issue was a provider of security guard services.

2. In January 2012, the Division of Taxation (Division) commenced a sales and use tax audit of petitioner for the period March 1, 2009 through November 30, 2011. The auditor deemed petitioner's sales records to be adequate to complete a detailed audit.

3. Pursuant to a test period agreement, petitioner agreed to the Division's use of a test period method to determine tax due on sales. The Division conducted a test period audit of sales and expense purchases for the period March 1, 2009 through May 31, 2009, and June 1, 2011 through August 31, 2011. This period was selected as representative of petitioner's business activity during the audit period.

4. The test determined that there were six customers who were not charged sales tax for which no exemption documents were provided; to wit: Grenadier Realty Corp. (Grenadier), Avalon Gardens, the Hampton Center for Rehabilitation, Lavallo Construction, Racane, and Contractor Security Inc.

5. Based on the failure to have documentation supporting the claimed tax exempt sales, the auditor determined an error rate and extrapolated the test results to the audit period resulting in additional taxable sales of \$4,048,441.56 and additional sales tax due of \$347,761.13. The auditor noted that the sales to Grenadier amounted to 76% of the disallowed tax exempt sales.

The auditor also reconciled petitioner's sales tax filings to petitioner's sales tax accrual account resulting in an additional \$4,684.17 of sales tax. In addition, the Division asserted use tax of \$6,531.59 on petitioner's expense purchases and tax of \$1,916.68 on fixed assets for a total proposed tax of \$360,893.57.

6. During the course of the audit, the auditor requested that petitioner provide tax exemption documentation to support the claimed exempt sales. Specifically, petitioner claimed that Grenadier was an agent of the New York City Housing Authority (NYCHA) and therefore exempt from tax. The auditor referred petitioner to DTF Publication 765 and requested petitioner provide completed Exempt Purchase Certificate for an Agent of a New York Governmental Agency (Form ST-122) and a Certification of Agency Appointment by a New York Governmental Agency (Form DTF-122) from Grenadier.

7. Petitioner was able to provide a completed ST-122 that was dated June 14, 2012. The ST-122 indicated that Grenadier had requested a completed DTF-122 from the NYCHA and was awaiting NYCHA's response.

8. On November 22, 2013, the Division issued a notice of determination (notice number L-040437426-4) asserting sales and use tax due of \$360,893.57 plus penalties pursuant to Tax Law § 1145(a)(1). The tax on expenses and on fixed assets has not been challenged. Instead, only the portion of the tax attributable to the disallowed tax exempt sales to Grenadier has been contested. Petitioner also challenges the imposition of penalties.

9. Grenadier was one of five or six private management firms selected through a request for proposals to (RFP) manage property for the NYCHA pursuant to the NYCHA's private management program. The private management program outsourced management of scattered

sites in the NYCHA's portfolio to private managers. John Aber, an employee of NYCHA from September 2001 through November 2010, noted that from a cost standpoint it was cheaper for NYCHA to outsource the management of these sites rather than manage the sites itself. Mr. Aber indicated that the private managers were subject to the same rules and regulations that the NYCHA authority were subject to.

10. Pursuant to two master contracts with the NYCHA (management contracts), Grenadier managed various apartment buildings located at the Bronx Developments in Management Area BX3 (BX3) and the Manhattan Brooklyn 1 Site (MB1). One management contract covered the buildings in BX3 and the contract covered the apartments in MB1. Other than the specific sites covered, the management contracts were virtually identical.

11. "Management Services" was defined in Article 1 of each management contract as the "services related to the operation and maintenance of the [apartment buildings] as set forth in Articles 6 and 7" of the management contracts. Articles 6 and 7 of the management contracts set forth Grenadier's obligation under the contracts and included, amongst other duties: collecting rents, handling rentals pursuant to the NYCHA's rules and regulations, terminating tenancies as required, inspection and maintenance of rental units, resident relations, providing security and various other duties as set forth in the management contracts.

12. Section 6.12 of the management contracts provided that Grenadier was responsible for providing and implementing a security plan and maintaining and servicing existing security systems in the apartment buildings. In connection with the security plan, Grenadier was authorized to hire a private security firm.

13. Article 4.06 of the management contracts provided that in performing its services,

Grenadier and its subcontractors had to perform in accordance with the directions of appropriate NYCHA personnel.

14. Article 4.07 of each management contract specifically provided:

“In performing the Services, [Grenadier] has the status of an independent contractor. [Grenadier] may bind the [NYCHA] only as set forth in this Agreement. Neither [Grenadier] nor its employees nor Subcontractors are to represent themselves to be, nor shall they deemed to be, employees of the [NYCHA]. [Grenadier] is solely responsible for payment of all compensation owed to its personnel and its Subcontractors. [Grenadier] is solely responsible for payment of all employment-related taxes and other taxes owed by [Grenadier] (excluding real estate taxes, water charges and sewer rents), and liabilities incurred by [Grenadier].”

15. Pursuant to the management contracts, Grenadier was required to develop specifications for the performance of services and was required to use standard specifications to solicit the best offers from competitive services. Grenadier was required “to include a ‘most favored customer’ provision in all contracts for [enumerated] Services to ensure the best possible price for the [NYCHA].”

16. With regard to taxes, Section 8.12 of the management contracts provided that the NYCHA would not pay any tax unless the NYCHA’s exemption from tax was repealed.

17. Grenadier was required to follow NYCHA purchasing procedures when purchases of goods or services were required. As relevant here, purchases of goods or services in excess of \$25,000.00 were required to be put out to bid. In hiring petitioner, Grenadier published an RFP, approved by the NYCHA, for security services at MB1 and BX3. Bids were submitted to the NYCHA and were opened and reviewed by the NYCHA. Grenadier would also review the bids and notify the NYCHA of any disqualified bidders. The NYCHA had the right to disapprove any potential subcontractor.

18. In February 2009, Grenadier and petitioner entered into two separate contracts (the

subcontracts) for the provision of security services at the apartments buildings Grenadier managed pursuant to its management contracts with the NYCHA. As with the management contracts between Grenadier and the NYCHA, one subcontract covered the security services in BX3 and the other covered MB1. Other than the specific sites covered, the subcontracts were virtually identical. Each subcontract referenced the respective Grenadier management contract with the NYCHA. Grenadier signed each contract “As Agent.”

19. Petitioner did not collect sales tax from Grenadier on the security services provided at BX3 and MB1 because, according to petitioner, NYCHA was exempt from taxation.¹ The understanding of petitioner, Grenadier and the NYCHA was that no tax was to be collected or paid on such services.

20. In accordance with the management contracts, Grenadier would prepare an annual budget for the management of the respective sites for approval by the NYCHA. The budget was not a lump sum but rather a line item budget with the particular line items amounts simply paid over to the various recipients. Grenadier’s management fee was a separate line item in the respective budgets. As a consequence, Grenadier did not receive any additional monies based on the line item amounts paid for subcontractors. Grenadier could not keep any budgeted monies not expended.

21. Pursuant to the management contracts, NYCHA advanced funds for the payment of expenses on a monthly basis and were required to be deposited into a segregated account. According to Jane Krieger, Grenadier’s president during the audit period, all of the operating

¹ Pursuant to Public Housing Law § 401, the NYCHA is a public authority and, therefore, exempt from sales tax pursuant to Tax Law § 1116(a)(1).

accounts for the NYCHA properties that Grenadier managed were set up with Grenadier as agent of the NYCHA. An example of one account lists the following as payor:

“NYCHA-MB1
GRENADIER REALTY CORP., AS AGENT”

22. The NYCHA provided its private managers with a series of virtually identical letters dated June 23, 1999, January 1, 2008 and February 15, 2012. Each of the letters is addressed “To Whom it May Concern” and provided the following text, with minor variations:

“The New York City Housing Authority does not have to pay State and City sales or compensating use tax pursuant to N.Y. Tax Law § 1116 (a) (1) and N.Y.C. Admin. Code § 11-201(e). Purchases made by any contractors for use in performance of a contract between the Housing Authority and that contractor are also exempt from sales or use tax.

Under regulations issued by the New York State Department of Taxation and Finance, the Housing Authority is not required to file an exempt organization certificate with its contractors. Instead a copy of any contract signed by the Housing Authority and a contractor doing business with the authority is considered proof of the exempt status of purchases made for use in the performance of that contract, pursuant to Title 20 NYCRR § 541.3(a).”

Grenadier provided its vendors with copies of such letters when it started working with them to indicate that its purchases of sales of services in connection with the NYCHA’s sites was exempt from tax. Petitioner, however, did not come into possession of these letters until after the subject audit commenced.

23. Darlene Couto, one of petitioner’s managers, testified that petitioner’s policy was to collect tax unless the customer was exempt. Ms. Couto explained that petitioner had provided security services to a skilled nursing facility and petitioner assumed all a skilled nursing facility are tax exempt. She testified that since Avalon Gardens and Hampton Gardens were skilled nursing facilities, tax was not collected. Upon being informed that Avalon Gardens and

Hampton Gardens were not tax exempt, petitioner took corrective action to rectify the mistake. With respect to Lavalley Construction and Racane, Ms. Couto explained that these customers were builders that claimed to be exempt from sales tax as they were doing capital improvement work. With respect to petitioner's failure to collect sales tax on Contractor Security, Inc., Ms. Couto explained that this entity was a security firm that petitioner provided security services for as a subcontractor. According to Ms. Couto, the ultimate end customer was charged sales tax although no exemption documents, such as a Sale for Resale Certificate, were provided. Finally, with respect to the security provided at the NYCHA sites, Grenadier specifically informed petitioner that no sales tax was to be charged as the NYCHA was an exempt entity.

CONCLUSIONS OF LAW

A. Tax Law § 1105(c)(8) specifically imposes tax upon the provision of security services. Tax Law § 1116(a)(1) exempts purchases by New York State agencies, instrumentalities, public corporations and political subdivisions from sales and use taxes. All receipts from the provision of security services are presumed subject to tax until the 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]).

B. In order for a taxpayer to make tax exempt sales to a private entity as an agent for a

New York governmental entity, the taxpayer must obtain from the private entity a properly completed Form ST-122, Exempt Purchase Certificate for an Agent of a New York Governmental Entity, and a copy of Form DTF-122, Certification of Agency Appointment by a New York Governmental Entity, must be attached to Form ST-122. (*see* Publication 765). Properly completed and timely accepted certificates 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]). In this case, however, petitioner was not provided such documentation. Nonetheless, the absence of such documentation does not end the inquiry, as nontaxability may be established through other evidence (*see Matter of RAC Corp. v. Gallman*, 39 AD2d 57 [3d Dept 1972]). Here, the inquiry focuses on whether Grenadier was an agent of NYCHA.

C. In asserting that Grenadier was not an agent of the NYCHA, the Division relies heavily on the contractual language which states that Grenadier is an independent contractor. Contrary to this line of reasoning, Grenadier's status as an independent contractor does not preclude a finding of agency (*Kern-Limerick v. Scurlock, Commissioner of Revenue for Arkansas*, 347 US 110 [1954]). Unlike the contractual language in *Matter of Allied Barton* (Tax Appeals Tribunal, February 16, 2016), the contracts at issue herein do not specifically disclaim an agency relationship between Grenadier and the NYCHA. Regardless, "[a] disclaimer of agency between the parties is not binding in determining their true relationship" (2A NY Jur 2d, Agency & Independent Contractors, § 25; *Gulf Insurance Company v. Transatlantic Reinsurance Company*, 69 AD3d 71 [1st Dept 2009]).

D. "Agency is a jural relationship between a principal and an agent 'which results from

the manifestation of consent of one person to allow another to act on his or her behalf and subject to his or her control, and consent by the other so to act” (*LeBlanc v. Skinner*, 103 AD3d 202, 210 [2d Dept 2012] *quoting Maurillo v. Park Slope U–Haul*, 194 AD2d 142, 146 [2d Dept 1993]; *see also Smirlock Realty Corp. v. Title Guar. Co.*, 70 AD2d 455 [2d Dept 2012]). 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 [3d Dept 1989] *lv denied* 75 NY2d 706 [1990]). It is a relationship whereby “one retains a degree of direction and control over another” (*Garcia v. Herald Tribune Fresh Air Fund, Inc.*, 51 AD2d 897 [1st Dept 1976]). In this case, it is determined that there was an agency relationship between Grenadier and NYCHA.

E. The record clearly evinces the fiduciary relationship between Grenadier and NYCHA and a high degree of direction and control over Grenadier by the NYCHA.

"[A] ‘fiduciary’ is one who transacts business, or who handles money or property, which ‘is not his own or for his own benefit, but for the benefit of another person, as to whom he stands in a relation implying and necessitating great confidence and trust on the one part and a high degree of good faith on the other part’” (*Board of Managers of the Fairways at North Hills Condominium v. Fairway at North Hills, et al.*, 193 AD2d 322, 325 (2d Dept 1993) *quoting* Black's Law Dictionary, 625 [“fiduciary capacity”] [6th ed. 1990]).

As private manager, Grenadier was acting on behalf of NYCHA in all aspects of the management of the apartment buildings subject to the specific control of NYCHA. Part of Grenadier’s management responsibilities included the provision of security for the health and welfare of NYCHA’s tenants, employees and property. In fulfilling its obligation to provide security, Grenadier enlisted petitioner’s services upon which petitioner did not charge sales tax because NYCHA is a public authority exempt from tax. Consistent with the contract between Grenadier and the NYCHA, wherein it specifically stated that NYCHA was exempt from tax, the

understanding of petitioner, Grenadier and the NYCHA was that no tax was to be collected or paid on such services. The present matter is distinguished from *Matter of MGK Constructors* (Tax Appeals Tribunal, March 5, 1992) where the petitioner therein was denied an exemption from sales tax as the contract in issue was to build a tunnel for a governmental entity and security was ancillary to the main purpose of the contract. Here, Grenadier was hired to manage the property. The contracts between Grenadier and NYCHA specifically set forth Grenadier's management obligations; the provision of security falls directly under that management umbrella. In fulfilling its obligation to provide security, Grenadier was required to provide and implement a security plan approved by the NYCHA for the provision of security. The provision of security was an integral part of the contract and not ancillary as asserted by the Division.

F. Indicative of the agency relationship is the degree of control that the NYCHA exercised over Grenadier and petitioner. The NYCHA had to approve virtually all aspects of the management of the buildings Grenadier was charged with managing. Section 4.06 of the contracts provided that in performing its services, Grenadier and its subcontractors (which includes petitioner) had to perform in accordance with the directions of appropriate NYCHA personnel. In addition, the management contracts do not disclaim Grenadier's status as an agent of NYCHA. Here, Grenadier required NYCHA approval before procuring Garrison's services and petitioner's contracts with Grenadier specifically reference Grenadier and NYCHA's contracts. In procuring petitioner's services, the management contracts required Grenadier to use an RFP "to ensure the best possible price for the [NYCHA]." In this case, the record makes it abundantly clear that the real beneficiary of the tax exemption was the NYCHA (*see Matter of Sweet Associates v. Gallman*, 36 AD2d 95 [3rd Dept 1971] *affd* 29 NY2d 902 [1972] *citing*

Matter of Briggs v. Page, 20 AD2d 834 [3rd Dept 1961]). Accordingly, petitioner has sustained its burden of proving that the security services at the NYCHA properties managed by Grenadier are exempt from taxation.

G. In addition, the provision of security services by petitioner also qualifies for a tax exemption as a sale for resale. In order to establish that a transaction is exempt as a sale for resale, Grenadier's purchases of security services must have been purchased for resale as such (*see* Tax Law § 1132[c]; *Matter of AGL Welding Supply Co. v. Commissioner of Taxation & Fin.*, 238 AD2d 734 [3d Dept 1997] *lv denied* 90 NY2d 808 [1997]; *Matter of Robert Bruce McLane Assocs. v. Urbach*, 232 AD2d 826 [3d Dept 1995]; *Matter of P-H Fine Arts v. New York State Tax Appeals Tribunal*, 227 AD2d 683 [3d Dept 1996] *lv denied* 89 NY2d 804 [1996]; *Matter of Savemart, Inc. v. State Tax Commn.*, 105 AD2d 1001 [3d Dept 1984] *appeal dismissed* 64 NY2d 1039 [1985], *lv denied* 65 NY2d 604 [1985]). In this case the record reflects that such services were purchased for resale. The subcontracts for the provision of security services were put out to bid and were a line item in Grenadier's budget separate and apart from the management fee charged by Grenadier. To the extent they were purchases by Grenadier, they were purchased for resale to the NYCHA. The consumer in this case was not Grenadier but was the NYCHA, an exempt entity. As previously determined, the purchase of security services was not incidental to the management of the housing sites, but was an integral part of the management services (*see Matter of Laux Adv v Tully*, 67 AD2d 1066 [3d Dept 1979]).

H. Finally, petitioner also argued that the Division should be estopped from asserting tax on the sales to Grenadier pursuant to its management contracts with the NYCHA based upon the series of letters provided by the NYCHA to Grenadier. Although, this issue has been rendered

moot, it is nonetheless addressed for sake of a complete record (*see Matter of Riehm v. Tax Appeals Tribunal*, 179 AD2d 970 [3d 1992] *lv denied* 79 NY2d 759 [1992] *reargument denied* 80 NY2d 893 [1992]).

In general, the doctrine of estoppel does not apply to governmental acts unless there are exceptional facts which require its application to avoid a manifest injustice (*see Matter of Consolidated Rail Corp.*, Tax Appeals Tribunal, August 24, 1991, *confirmed* 231 AD2d 140 [3d Dept 1997] *appeal dismissed* 91 NY2d 848 [1997]). This rule is considered especially strong when a taxing authority is involved, because public policy supports the enforcement of the Tax Law (*see Matter of Glover Bottled Gas Corp.*, Tax Appeals Tribunal, September 27, 1990). The doctrine of estoppel may be invoked against the Division if: (i) there a right to rely on the representation; (ii) whether there was such reliance; and (iii) whether the reliance was to the detriment of the party who relied upon the representation (*see Matter of Consolidated Rail Corp.*). Here, there were no representations by the Division that would trigger the doctrine. Although there were representations by the NYCHA concerning the exempt status of purchases of goods and services, there were none by the Division, the agency charged with administering the tax. In addition, petitioner did not come into possession of such letters until after the audit commenced. Finally, the regulation referenced in the letters, 20 NYCRR 541.3, “applies to purchases by contractors of tangible personal property for use in performing construction contracts, as such contracts are defined in 20 NYCRR 541.2” (*West Valley Nuclear Services Co., Inc.*, Tax Appeals Tribunal, November 13, 1998 *confirmed* 264 AD2d 101 [3d Dept 2000] *lv denied* 95 NY2d 760 [2000]). Accordingly, petitioner has failed to show the Division should be estopped from asserting tax on the sales of security services to Grenadier.

I. Finally, the Division assessed penalty herein pursuant to Tax Law § 1145(a)(1)(i). Tax Law § 1145(a)(1)(i) provides that any person failing to file a return or pay over any sales or use tax shall be subject to a penalty. This penalty may be canceled if the failure was “due to reasonable cause and not due to willful neglect” (Tax Law § 1145[a][1][iii]). By operation of law, the penalties on the portion of the proposed tax attributable to sales to Grenadier are cancelled. However, penalty remains on the balance of the tax asserted due not challenged in the subject notice. While petitioner has not challenged the tax on the remaining disallowed exempt sales, it asserts that reasonable cause for abatement of the penalties is present. In this case, it is determined that reasonable cause is lacking. There is no dispute that petitioner failed to obtain exemption documentation as required by law. Petitioner’s reliance on its customers’ claims that they were exempt from taxation is not reasonable given the Division’s articulated requirements and the petitioner’s failure to properly follow same. Likewise, petitioner’s attempt to rectify the situation after the fact does not provide reasonable cause for its failure to collect tax or obtain the appropriate exemption documents in the first instance. Accordingly, penalty on the remaining amounts of tax are sustained.

J. The petition of Garrison Protective Services, Inc., is granted to the extent of Conclusions of Law E, F, G and I, but is otherwise denied; the Division is directed to modify the Notice of Determination in accordance therewith; and the Notice of Determination as modified together with penalties and interest, is sustained.

DATED: Albany, New York
July 6, 2017

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE