

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition :

of :

EVERGREEN GARDENS, LLC : **DETERMINATION**
 : **DTA NO. 828403**
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, 2013 through :
September 30, 2016. :
:

Petitioner, Evergreen Gardens, LLC,¹ 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, 2013 through September 30, 2016.

On December 6, 2018 and December 17, 2018, respectively, petitioner, appearing by Herschel Friedman, CPA, and the Division of Taxation, appearing by Amanda Hiller, Esq. (Howard Beyer, Esq., of counsel), waived a hearing and agreed to submit this matter for determination based upon documents and briefs to be submitted by July 9, 2019, which date began the six-month period for issuance of this determination. After review of the evidence and arguments presented, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner's purchase of guard and protective services is subject to New York state and local sales tax.

¹ In some of the documents submitted into the record, petitioner's name appears as Evergreene Gardens, LLC.

FINDINGS OF FACT

The parties submitted a joint stipulation of facts into the record. Such stipulated facts have been substantially incorporated into the findings of fact set forth herein.

1. Petitioner, Evergreen Gardens, LLC, at all relevant times, was engaged in a project that consisted of the development of a parcel of real estate located in the City of New York (Project). The Project was new construction of an eight-story building.

2. The Project, in its totality, constituted a capital improvement as defined by Tax Law § 1101 (b) (9).

3. As part of the Project, petitioner engaged the services of a company called ISSM Protective Services (ISSM).

4. ISSM provided guard and protective services in conjunction with the Project (protective services).

5. The Project was of sufficient² size so as to mandate the use of ISSM's protective services by local law, i.e., the Administrative Code of the City of New York § 28-701.2C33 (3303.3) (a/k/a New York City Building Code § 3303.3).

The New York City Building Code § 3303.3 provides that:

“[w]here an individual building being constructed or demolished has a footprint of between 5,000 square feet (1524m²) and 40,000 square feet (12192m²), a competent watchperson shall be on duty at the site during all hours when operations are not in progress, from the time when the foundation is poured to when all work has concluded and the certificate of occupancy or temporary certificate of occupancy has been issued. Where the building has a footprint of more than 40,000 square feet (12192m²), at least one additional watchperson shall be on duty for each additional 40,000 square feet (12192m²) of building footprint, or fraction thereof. The watchperson shall be familiar with emergency notification procedures to the Fire Department, shall possess a valid security guard registration with the State of New York, shall hold a valid fire guard

² The record is silent as to the specific size of the Project.

certificate from the Fire Department and for a major building shall have completed the training required by Section 3310.10.”

6. ISSM charged and collected sales tax from petitioner in an amount totaling \$14,978.78 for the protective services it provided in conjunction with the Project.

7. Petitioner filed a form AU-11, application for credit or refund of sales or use tax (application), with the Division of Taxation (Division) that was dated October 6, 2016, which sought a refund of the sales tax it paid to ISSM. In its application, petitioner claimed that ISSM provided guard and protective services that permitted the construction of a new eight-story building. It further claimed that all of ISSM’s charges were expenses incurred in conjunction “with adding or improving real property by a capital improvement, as defined by New York Tax Law Section 1105 (c) (5)” and were excluded from sales tax.

8. Petitioner’s application sought a total refund in the amount of \$14,978.78.

9. On February 27, 2017, the Division issued a refund claim determination notice (document locator number AM1610032690) that denied petitioner’s application in its entirety. The explanation section of the refund claim determination notice provided the following detailed explanation:

“Your claim for refund is being denied because the service you purchased did not fit the criteria for a Capital Improvement.

Per New York State Sales Tax Law Section 1101, a capital improvement is any addition or alteration to real property that meets all three of the following conditions:

- It substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property.
- It becomes part of the real property or is permanently affixed to the real property so that the removal would cause material damage to the property or article itself.
- It is intended to become a permanent installation.

The services provided by the vendor, ISSM Protective Services, do not meet the criteria above and are not eligible for refund.”

10. The protective services provided by ISSM in this matter constitute “protective and detective services” as that term is used in Tax Law § 1105 (c) (8).

11. Petitioner agrees that ISSM’s protective services would have been subject to state and local sales tax pursuant to Tax Law § 1105 (c) (8), had they not been provided in conjunction with a capital improvement.

12. The parties have stipulated that the only issue is whether ISSM’s charges for the protective services in this matter are subject to state and local sales tax pursuant to Tax Law § 1105 (c) (8), or whether such charges are not subject to state and local sales tax solely because they were provided in conjunction with a capital improvement.

13. Petitioner submitted into the record an application for refund of sales tax paid on interior design services filed by petitioner’s representative. In addition to the application and supporting documents, petitioner also submitted, among other documents, a printout of the Division’s e-MPIRE APAC refund claim inquiry notes summary related to the same (refund claim notes summary). Review of this refund claim notes summary indicates that the Division approved the refund claim in full because both interior design services and project management services to later implement the plans were provided, and as a result, they were no longer interior design services but were contractor services that were exempt from sales tax when done with a capital improvement.

CONCLUSIONS OF LAW

A. Pursuant to Tax Law § 1105 (c) (8), sales tax is imposed upon the receipts from every sale, except for resale, of the service of:

“Protective 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.”

Pursuant to Administrative Code of the City of New York § 11-2040 (2), sales tax is imposed upon the receipts from every sale, except for resale, of the service of:

“Protective 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, whether or not any tangible personal property is transferred in conjunction therewith, but excluding protective and detective services performed by port watchmen as defined in article two of section one of part one of chapter eight hundred eighty-two of the laws of nineteen hundred fifty-three, and licensed pursuant to article ten of such section, part and chapter of such law, and except to the extent otherwise taxable under article twenty-eight of the tax law.”

B. As noted in the above findings of fact, the development project in which petitioner was engaged was the construction of a new eight-story building in New York City. Petitioner, as part of the Project, engaged ISSM to provide protective services in conjunction with the Project. In this case, the parties have stipulated that the Project at which ISSM provided protective services was a capital improvement project and the Project was of sufficient size so as to mandate ISSM’s services by local law (*see* Administrative Code of the City of New York § 28-701.2C33 [3303.3]). The parties also stipulated that the protective services provided by ISSM constituted “protective and detective services” for sales tax purposes, which services are subject to state and local tax pursuant to Tax Law § 1105 (c) (8). There is no dispute that the services provided by ISSM in this matter would be subject to Tax Law § 1105 (c) (8) if purchased as a stand-alone service. However, petitioner contends that ISSM provided protective services in conjunction with a capital improvement, which services are not subject to sales tax.

C. The taxability of protective and detective services purchased in conjunction with capital improvements was decided in *Matter of Robert Bruce McLane Assocs., Inc. v Urbach* (232 AD2d 826 [3rd Dept 1996]). In *McLane*, the Appellate Division, Third Department, upheld the Tax Appeals Tribunal's decision in *Matter of Robert Bruce McLane Assocs., Inc.* (Tax Appeals Tribunal, August 31, 1995), which upheld a determination that the purchase of security services performed in conjunction with a capital improvement were subject to sales tax. Just as in the present matter, the parties in *McLane* stipulated that the security services were provided in conjunction with, and were a required prerequisite to, a capital improvement (*see McLane*, 232 AD2d at 827). The Court, in *McLane*, addressed the issue of whether the security services at issue were properly taxed pursuant to Tax Law § 1105 (c) (8), or whether they should have been taxed pursuant to Tax Law § 1105 (c) (5) (*see id.*). The Court held that, despite being purchased as a necessary pre-requisite to a capital improvement, security services are independently taxed pursuant to Tax Law § 1105 (c) (8). In reaching its holding, the Court concluded "that Tax Law § 1105 (c) (8), which specifically imposes a sales tax upon security services of every nature, takes precedence over the more general language of Tax Law § 1105 (c) (5)" (*see McLane*, 232 AD2d at 828). The Court further held that since Tax Law § 1105 (c) (8), unlike Tax Law § 1105 (c) (5), does not contain a capital improvement provision, the "end result test" does not apply (*see id.*). Given the Court's definitive holding in *McLane*, petitioner's purchases of protective services provided by ISSM in conjunction with the capital improvement project are subject to tax pursuant to Tax Law § 1105 (c) (8) and Administrative Code of the City of New York § 11-2040 (2).

D. Petitioner does not contest the precedential nature of *McLane*. Rather, petitioner contends that the attorneys for the petitioners in *McLane* "could've done a better job." It further

contends that *McLane* was decided almost twenty-five years ago, and “additional facts and proof have emerged and developed in the nature of published tax department policy,” and “Tax Appeal [sic] Tribunal rulings” that did not exist at the time *McLane* was decided “and or were not before the court in *McLane*.” Petitioner argues that protective services that are taxable pursuant to Tax Law § 1105 (c) (8) have been analyzed by both the Division and the Tax Appeals Tribunal outside of such section. In support of such arguments, petitioner relies upon *Matter of L & L Painting Co., Inc.* (Tax Appeals Tribunal, June 2, 2011); the Division’s technical services bureau memorandum titled *Sales Tax Treatment of Certain Temporary Facilities*, (TSB-M-14[15]S); a technical services bureau advisory opinion, TSB-A-12(18)(S); the Division’s Taxpayer Guidance Division tax bulletin (TB-ST-400) that explains how sales and use taxes apply to interior decorating and design services; and documentation related to an approved application for refund of sales and use taxes paid on services that were no longer interior design services but were contractor services exempt from sales tax when done with a capital improvement (*see* finding of fact 13). After review of these cited authorities, I find that none of them support petitioner’s novel arguments.

E. In sum, in accordance with the Court’s holding in *McLane*, petitioner’s purchases of protective services provided by ISSM in conjunction with the capital improvement project are subject to tax pursuant to Tax Law § 1105 (c) (8) and Administrative Code of the City of New York § 11-2040 (2). Therefore, the Division properly denied petitioner’s application for refund of the state and local sales taxes paid on such guard and protective services.

F. The petition of Evergreen Gardens, LLC is denied and the refund claim determination notice, dated February 27, 2017, is sustained.

DATED: Albany, New York
January 09, 2020

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE