

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MILNOR CONSTRUCTION CORP., AND	:	
MILTON NOVIE AND NORMA NOVIE, AS	:	DETERMINATION
OFFICERS OF MILNOR CONSTRUCTION CORP.	:	DTA No.'s 814463,
		814464 AND 814465 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 June 1, 1990 through May 31, 1993.	:	

Petitioners, Milnor Construction Corp., 203-02 Rocky Hill Road, Bayside, New York 11361-3002, and Milton Novie and Norma Novie, as officers of Milnor Construction Corp., 27-11 Bayside Lane, Flushing, New York 11358-1055, 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 June 1, 1990 through May 31, 1993.

On October 29, 1996 and December 13, 1996, respectively, petitioners, by Morton Leben, CPA, and the Division of Taxation, by Steven U. Teitelbaum, Esq. (Robert Tompkins, Esq., of counsel), waived a hearing and agreed to submit the matter for determination based on documents and briefs submitted by July 25, 1997, which date commenced the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Timothy J. Alston, Administrative Law Judge, renders the following determination.

ISSUE

Whether purchases of watchman services made pursuant to construction contracts with the New York City Board of Education and the School Construction Authority were properly excluded from sales tax as purchases for resale.

FINDINGS OF FACT

1. On March 17, 1994, following an audit, the Division of Taxation (“Division”) issued to petitioner Milnor Construction Corp. a Notice of Determination which assessed \$43,798.53 in additional sales and use tax due, plus accrued interest of \$9,189.45, for a total amount due of \$52,987.98 for the period June 1, 1990 through May 31, 1993.

2. On April 27, 1994, the Division issued to petitioners Milton Novie and Norma Novie, as officers of Milnor Construction Corp., identical notices of determination which asserted \$43,798.53 in additional sales and use tax due, plus accrued interest of \$9,607.72, for a total amount due of \$53,406.25 for the period June 1, 1990 through May 31, 1993. These notices were issued to petitioners Milton Novie and Norma Novie as responsible officers of Milnor Construction Corp. pursuant to Tax Law §§ 1131(1) and 1133(a). Petitioners Milton Novie and Norma Novie do not contest their status as responsible officers of Milnor Construction Corp. Accordingly, unless otherwise indicated, all references to petitioner herein shall refer to Milnor Construction Corp.

3. Petitioner is a general contractor. During the period at issue petitioner was engaged in performing capital improvement projects pursuant to contracts entered into with the New York City Board of Education and, later, with the New York City School Construction Authority (NYSCA).¹ There were eleven such projects during the audit period. The contracts required

¹ The New York City School Construction Authority was created pursuant to Public Authorities Law § 1725 *et seq*, effective December 19, 1988.

petitioner to provide security for the construction sites. Pursuant to these provisions, petitioner purchased watchman services totaling \$530,881.00 during the audit period. Petitioner did not pay sales tax on its purchases of these services. On audit, the Division determined that sales tax was properly payable on petitioner's purchases of watchman services and assessed tax due on such purchases of \$43,798.53.² The entire amount of the tax assessment thus results from petitioner's failure to pay sales tax on its purchases of watchman services.

4. As noted previously, petitioner purchased watchman services in connection with eleven school projects during the audit period. These projects are identified in the record by the following school names: P.S. 55 Queens, P.S. 75 Kings, I.S. 125 Queens, P.S. 70 Queens, P.S. 269 Kings, P.S. 752 Queens, P.S. 128 Manhattan, P.S. 173 Manhattan, P.S. 11 Queens, P.S. 152 Manhattan(1), and P.S. 152 Manhattan(2). The contracts for these projects contained the following provisions regarding the general contractor's, i.e., petitioner's, responsibility to provide security:

a) P.S. 55 Queens - Section 13.03 of the General Conditions of the contract between petitioner and the NYCSCA required petitioner to "guard the Site from injury or loss in connection with the Work." Article 38 of the Supplemental General Requirements of the same contract imposed the following requirements upon petitioner:

"A. Watchman.

1. Provide watchman (guard) on premises at all hours of non-working days, and from 4:00 p.m. to 8:00 a.m. on all working days. The contractor shall be responsible for watchman services for the Authority and Board of Education

²On audit the Division also reviewed petitioner's sales, fixed asset purchases and expense purchases. The Division accepted petitioner's sales as reported and determined that the appropriate tax was paid on all fixed asset purchases. The review of expense purchases revealed additional tax due of \$2,397.47, plus interest, which was agreed to and paid by petitioner.

property, as well as his own, in situations where scaffolding is erected from the ground or where any type of construction due to his activity facilitates unlawful access to Board of Education premises.

2. Watchman shall be in uniform and shall be an employee of a guard service company licensed and bonded in New York State, and approved by the Project Officer.

3. Watchman must be experienced in construction guard service.

4. Watchman shall be required to hold a 'Certificate of Fitness' issued by the Fire Department for Fire Guards, and he shall, during his tour of duty, perform the duties of Fire Guards in addition to his security obligations.

5. Maintain guard service from the day field offices or project sign are erected, whichever is earlier, until completion of work or, until notification from the Authority that this service is no longer required.

6. The contractor will credit the Authority twice the hourly rate for each hour the watchman is not present at the job site in accordance with the above."

b) P.S. 75 Kings - This contract also referenced General Conditions section 13.03 which, as noted above, required petitioner to protect the site from injury and loss in connection with the work. In addition, section 01010 of the General Requirements of this contract made petitioner responsible for watchman services for the Authority and Board of Education property, as well as petitioner's own, and further required the watchman to be on duty whenever the normal complement of the custodian staff was not present.

c) I.S. 125 Queens - This contract contained the standard language of General Conditions section 13.03 which, as noted, required petitioner to guard the site from injury or loss in connection with the project and to guard the adjacent property. This contract also contained Supplemental General Requirements detailing watchman requirements in language identical to that quoted in Finding of Fact "(4)(a)".

d) P.S. 70 Queens - This contract also contained the standard language of General Conditions section 13.03. Section 1.13 of specifications section 01010 of this contract required that petitioner employ a watchman service at its own expense to protect the site and that such watchman must be present at the site 24 hours a day 7 days a week unless 5 other men are working and unless the normal complement of the custodian staff was not present.

e) P.S. 269 Kings - This contract contained language identical to that quoted in Finding of Fact "(4)(a)". This contract also called for an additional watchman allowance of \$50,000.00 which was deleted in a subsequent amendment.

f) P.S. 752 Queens - This contract was similar to P.S. 269 Kings. In addition, this contract required petitioner to furnish a Guard Shack in a location approved by the Executive Director.

g) P.S. 128 Manhattan - This contract contained language similar to that quoted in Finding of Fact "(4)(a)". It also provided for an allowance for additional watchman services and further provided that any unspent balance of the allowance shall be credited to the Board of Education. The contract also stated that the Board of Education Project Superintendent "shall make daily checks on Watchman's services."

h) P.S. 173 Manhattan - The watchman provisions in this contract were similar to the provisions in the P.S. 128 Manhattan contract.

i) P.S. 11 Queens - The watchman provisions in this contract were also similar to the provisions contained in the P.S. 128 Manhattan contract.

j) P.S. 152 Manhattan (1) - The watchman provisions in this contract were similar to the P.S. 128 Manhattan contract.

k) P.S. 152 Manhattan (2) - This contract required petitioner to provide a watchman on premises all hours of nonworking days and from 4:00 P.M. to 8:00 A.M. on all working days.

5. The contracts for P.S. 55 Queens, P.S. 75 Kings, I.S. 125 Queens, and P.S. 70 Queens were commenced under the School Construction Authority. The contracts for P.S. 269 Kings, P.S. 752 Queens, P.S. 128 Manhattan, P.S. 173 Manhattan, P.S. 11 Queens, and P.S. 152 Manhattan(1) were commenced under the Board of Education, but were subsequently turned over to the School Construction Authority by the Board. P.S. 152 Manhattan(2) was commenced under the Board of Education, but was not turned over to the School Construction Authority.

6. Patrol and Guard Services, Inc., a provider of the watchman and guard services purchased under the contracts discussed above, issued itemized bills to petitioner for these services. Petitioner then submitted itemized requests for payment to the appropriate City agency, e.g., the School Construction Authority. Petitioner requested payment for watchman services in the same manner as it requested payment for all other costs incurred pursuant to the subject contracts. In the normal course of business, petitioner would be reimbursed for costs incurred under the contracts, including the cost of the watchman services.

7. Petitioner submitted into evidence eight Contractor Exempt Purchase Certificates (Form ST-120.1) issued by petitioner to Patrol and Guard Enterprises, Inc. which claimed exempt purchases in connection with the following projects: I.S. 125 Queens, P.S. 55 Queens, P.S. 128 Manhattan, P.S. 752 Queens, P.S. 173 Manhattan, P.S. 269 Brooklyn, P.S. 152 Manhattan, and P.S. 11 Queens. Although the forms as completed indicate that the purchases are exempt because “the tangible personal property is for incorporation into the above project for an exempt organization,” the transactions between petitioner and Patrol and Guard Enterprises were for watchman services. It is noted that Form ST-120.1 contains a check box to indicate resale of services in connection with the listed project. Petitioner issued the ST-120.1 forms in response to letters from Patrol and Guard Enterprises, Inc. dated May 13, 1993 specifically requesting such

forms. The forms were requested by Patrol and Guard Enterprises and issued by petitioner after the Division had begun its audit of petitioner.

8. Petitioner also submitted into evidence a letter dated November 5, 1996 addressed to petitioner from a New York City Construction Authority attorney which stated the Authority's opinion that the guard and watchman services purchased by petitioner under the contracts as discussed herein should be exempt from sales tax because they were "procured by [petitioner] for resale to the Authority for the benefit of a public construction project."

CONCLUSIONS OF LAW

A. Tax Law § 1105(c)(8) imposes sales tax on the receipts from every sale, except for resale, of protective and detective services, including patrol and watchman services. There is no dispute in the instant matter that the watchman services purchased by petitioner pursuant to the school construction contracts were protective and detective services within the meaning of Tax Law § 1105(c)(8). Petitioner asserts, however, that such services were purchased for resale, as opposed to at retail, and were therefore excluded from tax.

B. The Division's regulations regarding the resale exclusion provide:

"(1) Where a person, in the course of his business operations, purchases tangible personal property or services which he intends to sell, either in the form in which purchased, or as a component part of other property or services, the property or services which he has purchased will be considered as purchased for resale, and therefore not subject to tax until he has transferred the property to his customer.

"(2) A sale for resale will be recognized only if the vendor receives a properly completed resale certificate" (20 NYCRR 526.6[c][1] and [2]).

C. In *Matter of MGK Constructors* (Tax Appeals Tribunal, March 5, 1992) the Tribunal addressed the issue of whether the purchase of guard services by a construction contractor pursuant to a contract with an agency of the City of New York were excluded from sales tax as

purchases for resale. The petitioner in that case, MGK Constructors, had contracted with the City to build a water tunnel. MGK was expressly required to provide guard services as a condition of its contract. In its decision the Tribunal emphasized that MGK's contract was for the construction of a water tunnel and not for the provision of guard services. The Tribunal characterized the requirement for guard services as a "condition of the contract" and "another specification set forth by the City." The Tribunal further described the "essential nature" of the provision for guard services as "one of many expense items which are necessary to satisfy the contractual obligation of constructing a water tunnel." Relying primarily on *Matter of Laux Adv. v. Tully* (67 AD2d 1066, 414 NYS2d 53 [where the court held that an advertising agency's purchases of materials and services to prepare mechanicals was not for the *primary purpose* of reselling them to customers but rather to place advertisements in publications for its customers]), the Tribunal held that the provision of guard services was not for the purpose of selling them to the City, but rather to satisfy a contractual requirement, thereby allowing petitioner to fulfill its obligation to build a water tunnel. The Tribunal thus found that guard services purchased by MGK were not purchased for resale.

D. In my view, *Matter of MGK Constructors (supra)* is controlling in this matter. Here, as in that case, petitioner was expressly required by construction contracts to provide guard services. The subject contracts, however, were not for guard services, but were for capital construction, specifically school construction. Similar to the situation in *MGK*, there is nothing in the contracts which indicates that the guard services were to be resold to the Board of Education or the School Construction Authority. Moreover, notwithstanding the fact that the contracts set certain parameters regarding the qualifications of the guards and their hours, there is no evidence in the record to show that the guards were under the direction and control of the Board of

Education or the School Construction Authority while performing their duties (*see, Matter of D-M Restaurant*, Tax Appeals Tribunal, April 18, 1991). Accordingly, as in *MGK Constructors*, the guard service provisions in this case were contractual requirements necessary to satisfy petitioner's primary contractual obligation of school construction. The guard services were thus purchased not for resale, but to enable petitioner to complete its contract. Accordingly, pursuant to the Tribunal's holding in *Matter of MGK Constructors (supra)*, petitioner's purchases of guard services pursuant to the Contracts do not qualify for the resale exclusion and were therefore properly subject to tax.

E. In *Matter of MGK Constructors*, the Tribunal stated that "the guard services were in the nature of an item of *overhead*, rather than a purchase for resale" (emphasis added). Petitioner disputes this classification, arguing that since the guard services may be attributed to specific contracts they are not properly classified as overhead. The Tribunal's statement amounts to *obiter dicta*, for whether the guard services are overhead or not, the Tribunal's holding in *MGK Constructors* is based on the conclusion that such services were not purchased primarily for resale. Similarly, in this case, petitioner's failure to qualify for the resale exclusion rests on the fact that its primary purpose in making the subject purchases was not to resell them to the City but to complete its contract. Accordingly, whether the services are properly classified as overhead is not dispositive herein.

F. Petitioner sought to distinguish the instant matter from *MGK Constructors* by noting that petitioner provided exemption certificates to the guard services vendor (*see, Finding of Fact "7"*). In contrast, there were no exemption certificates presented or offered by MGK. This factual difference is not sufficient, however, to justify a different result in this matter. The issuance of a properly completed resale certificate does not relieve a purchaser, such as

petitioner, of his burden of proving that the purchase was for resale and thus excluded from tax (*see*, Tax Law § 1132[c]; 20 NYCRR 532.4[b][1]). Rather, a properly completed and timely resale certificate may relieve the vendor (seller) of responsibility for collecting tax (*see*, 20 NYCRR 532.4[b][2]). Accordingly, notwithstanding its issuance of resale certificates, petitioner was still required to prove that its purchases of guard services were for resale. As discussed above, petitioner has not met its burden. Furthermore, if the purpose of the exemption certificates is to demonstrate petitioner's intent to purchase the guard services for resale at the time of purchase, then the certificates which were submitted herein provide little support for this proposition since the purchases were made pursuant to contracts which were entered into several years earlier.³

G. Petitioner also attempted to factually distinguish the instant matter from several decisions involving the resale exclusion (*e.g.*, *Matter of Niagara Lubricant Co. v. State Tax Commn.*, 120 AD2d 885, 502 NYS2d 312, *lv denied* 68 NY2d 607, 506 NYS2d 1031; *Matter of Burger King v. State Tax Commn.*, 51 NY2d 614, 435 NYS2d 489; *Matter of Cut-Outs, Inc. v. State Tax Commn.*, 85 AD2d 838, 446 NYS2d 436; *Matter of Custom Management v. State Tax Commn.*, 148 AD2d 919, 539 NYS2d 550; *Matter of Laux Adv.v. Tully, supra*). Petitioner did not, however, distinguish the instant matter from *MGK Constructors (supra)* and as discussed above, the holding of the Tribunal in that case is controlling herein.

H. Petitioner also contended that the imposition of tax on petitioner's purchases of guard services would unconstitutionally transfer funds from one municipality (the City of New York) to

³Similarly, the School Construction Authority's letter (*see*, Finding of Fact "8") lends little support to petitioner's position. In my view, the legal opinion contained in this letter is inconsistent with the prevailing case law.

another (the State of New York). As noted above, this determination has concluded that petitioner did not resell the purchased services to any City agency. The tax herein is thus imposed on petitioner's purchases as a contractor and not on the City. Petitioner's contention is therefore rejected.

I. The petitions of Milnor Construction Corp., Milton Novie, as officer of Milnor Construction Corp., and Norma Novie, as officer of Milnor Construction Corp. are denied, and the notices of determination dated March 17, 1994 and April 27, 1994 are sustained.

DATED: Troy, New York
January 15, 1998

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE