

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
GARRISON PROTECTIVE SERVICES, INC. : DECISION :
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. :
:

The Division of Taxation, appearing by Amanda Hiller, Esq. (Michael Hall), filed an exception to the determination of the Administrative Law Judge issued on July 6, 2017.

Petitioner appeared by Law Office of Raymond A. Giusto (Brooke Anthony, Esq., of counsel).

The Division of Taxation filed a brief in support of the exception. Petitioner filed a brief in opposition. The Division of Taxation filed a reply brief. Oral argument was heard on June 28, 2018, in New York, New York, which date began the six-month period for issuance of this decision.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

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.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except that we have modified findings of fact 12, 16, 18, 19 and 21. We have also added additional findings of fact, numbered 24 through 28 herein. We make these changes to more fully reflect the record. The Administrative Law Judge's findings of fact, the modified findings of fact and the additional findings of fact appear below.

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

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, Lavalley 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 was exempt from tax. The auditor referred petitioner to DTF Publication 765 and requested that petitioner provide a 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 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 (RFP) to manage property for NYCHA pursuant to NYCHA's private management program. The private management program outsourced management of scattered sites in 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 as NYCHA.

10. Pursuant to two master contracts with 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 other 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, among other duties: collecting rents, handling rentals pursuant to 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. Article 6.11 of the management contracts provided that Grenadier was responsible for providing and implementing a security plan and maintaining and servicing existing security hardware at the apartment buildings. Article 6.11 of the management contracts also provided that Grenadier was responsible for engaging the services, at Grenadier's discretion, of a private

security firm in connection with the security plan.

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, article 8.12 of the management contracts provided that NYCHA would not pay any tax unless NYCHA’s exemption from tax was repealed. Article 4.07 provided that Grenadier was responsible for payment of all compensation owed to its subcontractors and that Grenadier was responsible for payment of all taxes that it owed and liabilities that it incurred.

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 NYCHA, for security services at MB1 and BX3. Bids were submitted to NYCHA and were opened and reviewed by NYCHA. Grenadier would also review the bids and notify NYCHA of any disqualified bidders. 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 apartment buildings that Grenadier managed pursuant to its management contracts with NYCHA. As with the management contracts between Grenadier and NYCHA, one subcontract covered the security services at BX3 and the other covered MB1. Other than the specific sites covered, the subcontracts were virtually identical. Each subcontract referenced and incorporated the respective Grenadier management contract with NYCHA. Grenadier signed each contract under a line indicating “As Agents For” followed by a blank space.

19. Petitioner did not collect sales tax from Grenadier on the security services provided at BX3 and MB1 because NYCHA was exempt from taxation.¹ The understanding of petitioner, Grenadier and NYCHA was that no tax was to be collected or paid on such services. Article 10.5 of the subcontracts provided that, if applicable, Grenadier would provide petitioner with NYCHA’s New York state sales tax exemption certificate for petitioner’s use.

20. In accordance with the management contracts, Grenadier would prepare an annual budget for the management of the respective sites for approval by NYCHA. The budget was not

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

a lump sum, but rather a line item budget with the particular line item amounts simply paid over by Grenadier 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. In accordance with the contracts, such funds were deposited into a segregated account under Grenadier's control. According to Jane Krieger, Grenadier's president during the audit period, all of the operating accounts for NYCHA properties that Grenadier managed were set up with Grenadier as agent of NYCHA. An example of one account lists the following as payor:

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

22. 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 NYCHA's sites were 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 that all skilled nursing facilities were 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 Laval 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 for which petitioner provided security services 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 NYCHA sites, Grenadier specifically informed petitioner that no sales tax was to be charged as NYCHA was an exempt entity.

24. Under the management contracts, Grenadier and its subcontractors (including petitioner) were required to comply with prevailing wage rate as determined under HUD or the New York State Labor Law, as well as prevailing wage rates under the Davis Bacon Act for subcontracts involving construction work (Article 19.01). Grenadier and its subcontractors

(including petitioner) were also subject to NYCHA requirements to hire NYCHA tenants to work in the apartment developments where possible (Article 10.01). Grenadier was required to perform annual apartment inspections in compliance with NYCHA and HUD standards and procedures (Article 6.06). According to Ms. Krieger, the former president of Grenadier, compliance with many of these requirements was specific to management of NYCHA properties and was not standard in the property management business.

25. In performing services under the management contracts and the subcontracts, Grenadier and petitioner were required to “undertake their work in accordance with the directions of [NYCHA personnel]” and to “observe the requirements and parameters established by [NYCHA]” (Article 4.06). NYCHA had the authority to approve, and remove, any Grenadier personnel or any subcontractor from work on a project (Article 4.01). NYCHA’s approval was required before any subcontractor could perform any services under the management contracts (Article 5.01). Pursuant to these provisions, NYCHA personnel and Grenadier employees regularly interacted in the management of the buildings. NYCHA personnel reviewed work orders to ensure that such orders were addressed in a timely manner; NYCHA technicians examined roof leaks, boiler and elevator issues and provided guidance as to how to address such problems; NYCHA provided guidance regarding timely and proper preparation of vacated apartments for releasing; and NYCHA approved evictions.

26. Grenadier rented apartments to tenants on NYCHA’s waiting list and pursuant to NYCHA’s rules and regulations (Article 6.03). Grenadier also terminated tenancies pursuant to NYCHA procedures and was authorized to retain an attorney for appeals of such administrative determinations and proceedings in housing court (Article 6.05).

27. By an email dated January 3, 2014, Jeffrey Pagelson, the controller of NYCHA, denied a request by Grenadier for NYCHA to provide it with a signed form ST-122 (*see* finding of fact 6) because “Grenadier is not an agent of NYCHA.” The email also stated Mr. Pagelson’s opinion that Grenadier’s purchases under the management contracts were exempt from sales tax.

28. Grenadier’s former president, Ms. Krieger, testified at the hearing that Grenadier was “technically” not an agent of NYCHA.

28. As noted, the subcontracts required (and received) NYCHA’s approval. NYCHA also specifically approved all payments to petitioner under the subcontracts by advancing Grenadier funds for the payment of petitioner on a monthly basis (*see* finding of fact 21).

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge noted that sales of security services like those provided by petitioner are generally subject to sales tax. He also noted that otherwise taxable purchases are generally exempt from sales tax when made by New York governmental entities. He further observed that a vendor may make tax-free sales to a private entity acting as an agent of a governmental entity so long as the vendor obtains certain properly completed and timely received forms from the purchaser. Here, although Grenadier did not provide petitioner with the required forms, the Administrative Law Judge found that petitioner could nonetheless establish the nontaxability of its sales to Grenadier through other evidence.

Upon review of the record, the Administrative Law Judge found a fiduciary relationship between Grenadier and NYCHA and a high degree of direction and control over Grenadier by NYCHA. Specifically, the Administrative Law Judge found that Grenadier was acting on NYCHA’s behalf in all aspects of the management of the apartment buildings and was subject to

the specific control of NYCHA. The Administrative Law Judge also noted the degree of control that NYCHA exercised over Grenadier with respect to the various aspects of apartment building management, including approval of Grenadier's contracts with petitioner. Additionally, the Administrative Law Judge found that it was the understanding of petitioner, Grenadier and NYCHA that no tax was to be paid on security services. The Administrative Law Judge concluded that Grenadier was in an agency relationship with NYCHA and that petitioner's sales of security services to Grenadier were not subject to tax.

As a separate basis for the nontaxability of the receipts in question, the Administrative Law Judge also found that, even if Grenadier was not NYCHA's agent, its purchases of petitioner's security services were for resale to NYCHA. In support of this finding, the Administrative Law Judge cited the fact that Grenadier's budget contained a line item for the cost of petitioner's services that was separate and apart from Grenadier's management fee.

The Administrative Law Judge also determined that, contrary to petitioner's contention, the Division was not estopped from asserting tax on petitioner's sales of security services to Grenadier.

Regarding penalties, the Administrative Law Judge noted that, given his conclusion that petitioner's sales to Grenadier were nontaxable, penalties imposed with respect to tax due on such sales were also canceled. The Administrative Law Judge sustained penalties imposed with respect to the balance of the tax asserted due in the notice of determination. In support, the Administrative Law Judge noted that petitioner failed to obtain exemption documentation for the remaining disallowed exempt sales and that its reliance on its customers' claims that they were exempt was unreasonable.

ARGUMENTS ON EXCEPTION

The Division contends that Grenadier was not an agent of NYCHA and that, accordingly, petitioner's sales of security services were properly subject to sales tax. The Division asserts that the record shows no manifestation of consent on the part of NYCHA that Grenadier act as its agent. To the contrary, the Division notes that an employee of NYCHA expressly denied that Grenadier was its agent. The Division notes also that Grenadier purchased security services from petitioner as part of the management services that Grenadier provided to NYCHA. The Division further observes that petitioner billed Grenadier for its services and that Grenadier paid petitioner for such services.

The Division argues that petitioner's claim that NYCHA directed Grenadier's actions as a principal would direct an agent is unsupported by the record. The Division contends that, while NYCHA provided oversight, Grenadier was hired to manage the properties with its own employees and did so manage the properties. Contrary to petitioner's contention that NYCHA controlled all aspects of managing the properties, the Division notes that it was petitioner's responsibility under its contracts with Grenadier to properly maintain staffing levels. The Division thus contends that NYCHA's oversight does not transform NYCHA's relationship with Grenadier into that of a principal and agent.

The Division also notes that petitioner failed to provide the prescribed documents that would have relieved it of its obligation to collect tax. The Division contends that petitioner was not a contractor and did not have an agency contract as those terms are defined in its regulation regarding contractors and contracts with exempt organizations. The Division also asserts that NYCHA's refusal to provide Grenadier with documentation supporting Grenadier's claim of

agency supports the Division's position.

The Division cites the contractual language stating that Grenadier and petitioner are independent contractors; the absence of Division-prescribed certification of Grenadier's agency; the express denial of Grenadier's agency by an NYCHA employee; and Grenadier's asserted inability to bind NYCHA's credit or to alter NYCHA's legal relationship with third parties as supportive of its position that Grenadier was not NYCHA's agent.

Although NYCHA had a high degree of control over Grenadier under their contracts and although tangible personal property purchased by Grenadier under the contracts became NYCHA's property, the Division asserts that these are not critical factors in determining the existence of an agency relationship. Rather, the Division contends that the most important factor is whether Grenadier could bind NYCHA's credit and that the fact that Grenadier could not bind NYCHA's credit shows the lack of an agency relationship. The Division also notes that Grenadier was not required to engage a security services provider under the contracts, but had discretion to do so. The Division thus argues that even if Grenadier had a fiduciary duty to NYCHA, such a duty is not determinative of an agency relationship.

The Division further contends that the Administrative Law Judge improperly concluded that the security services were purchased by Grenadier for resale to NYCHA. The Division contends that Grenadier purchased the services from petitioner not exclusively for resale as required but in order to fulfill its obligation to provide management services to NYCHA. According to the Division, the purchased services were thus more in the nature of an item of overhead. The Division also asserts that NYCHA's dollar-for-dollar reimbursement indicates that there was no resale of the services.

Finally, the Division asserts that petitioner has made no showing that penalties were wrongly assessed.

Petitioner contends that the Administrative Law Judge properly determined that its sales of security services to Grenadier were exempt from sales tax because Grenadier was acting as an agent for NYCHA in procuring those services. Petitioner asserts that the record shows that NYCHA authorized Grenadier to act as its agent and that Grenadier accepted such appointment pursuant to the guidelines set forth in the Division's own Publication 765 ("Sales and Fuel Excise Tax Information for Properly Appointed Agents of New York Governmental Entities" [Pub 765]). In support of this assertion, petitioner notes that Grenadier's management of apartment buildings was within NYCHA's authority; that NYCHA's appointment of Grenadier was prior to Grenadier's engagement of petitioner and was thus timely; that the agency relationship is in writing, as shown by the management contracts and the subcontracts, which describe the scope of Grenadier's authority; that the terms of the management contracts and the subcontracts were consistent with an agency relationship between NYCHA and Grenadier; that the management contracts gave NYCHA control over Grenadier's actions in managing the apartment buildings; that NYCHA was responsible for Grenadier's expenses incurred in the performance of its duties under the contracts and Grenadier did not expend any of its own funds in managing the apartment buildings; that Grenadier's agency for NYCHA was disclosed to third parties; and that Grenadier had the ability to bind NYCHA's credit because NYCHA was liable for Grenadier's purchases.

Petitioner also seeks to counter the Division's assertion that the reference to Grenadier in the management contracts as an independent contractor is inconsistent with an agency

relationship. Petitioner asserts that this reference was intended to distinguish between employees and non-employees. Petitioner also contends that an individual can be both an independent contractor and an agent, but not an employee, of a principal.

Petitioner contends that its inability to obtain exemption forms does not bar its claim of exemption. Under such circumstances, petitioner asserts that it may prove entitlement to the claimed exemption by other evidence and that it has provided such other evidence in the present matter.

Petitioner also agrees with the Administrative Law Judge's alternative theory that Grenadier purchased the security services at issue for resale to NYCHA. Petitioner notes that NYCHA reviewed in advance and approved Grenadier's line item expenses and then deposited funds into a segregated account from which Grenadier paid such expenses. Petitioner contends that NYCHA thus paid the expenses using Grenadier's account as a conduit. Petitioner notes that Grenadier's checks in payment of petitioner identified Grenadier "as agent" and that NYCHA ultimately used petitioner's services at its buildings for the benefit of its tenants.

Finally, petitioner contends that, even if this Tribunal determines that petitioner's sales to Grenadier were taxable, all penalties imposed in the notice of determination must be abated. Petitioner argues that it was reasonable for petitioner to expect that the services provided to Grenadier were exempt from taxation. Petitioner notes that the management contracts indicate that no sales tax was to be charged on purchases made pursuant thereto; that the RFPs to submit bids in connection with Grenadier's management of the properties stated that no tax was to be included in any bid; and that the budgets submitted by Grenadier and approved by NYCHA did not include sales tax for any item thereon.

OPINION

Tax Law § 1105 (c) (8) imposes sales tax upon the receipts from every sale, except for resale, of protective and detective services. The services that petitioner provided to Grenadier are subject to tax under this provision.

Tax Law § 1116 (a) (1) exempts from sales tax purchases made by New York State agencies, instrumentalities, public corporations and political subdivisions. Purchases made by NYCHA are exempt from tax under this provision.

Although not expressly provided by statute, it is well-established that purchases made by an agent of an entity entitled to exemption under Tax Law § 1116 (a) (1) are also exempt under that provision when the agent is acting within the scope of its agency (*see Matter of MGK Constructors*, Tax Appeals Tribunal, March 5, 1992; *see also Matter of West Valley Nuclear Servs., Co.*, Tax Appeals Tribunal, November 13, 1998, *confirmed* 264 AD2d 101 [3d Dept 2000], *lv denied* 95 NY2d 760 [2000] [involving an exemption for agents of the federal government pursuant to Tax Law § 1116 (a) (2)]; 20 NYCRR 541.2 [c]; Pub 765). Accordingly, Grenadier's purchases of security services from petitioner would be exempt from sales tax if Grenadier made such purchases as an agent of NYCHA.

As with all receipts for property or services subject to tax under Tax Law § 1105, receipts from the provision of security services are presumed subject to tax until the contrary is established, and the burden of proving nontaxability is upon the vendor, i.e., the person required to collect the tax, or the customer (Tax Law § 1132 [c]). Petitioner bears this burden here.

Where, as here, petitioner claims an exemption from tax, we must construe the statute strictly and narrowly against petitioner, albeit not so narrowly as to defeat the exemption's

purpose (*see e.g. Matter of Costco Wholesale Corp.*, Tax Appeals Tribunal, March 6, 2017; *Matter of Grace v New York State Tax Commn.*, 37 NY2d 193, 196 [1975], *rearg denied* 37 NY2d 816 [1975], *lv denied* 338 NE2d 330 [1975]). Like all taxing statutes, an exemption is properly construed in a practical way (*Matter of Qualex, Inc.*, Tax Appeals Tribunal, February 23, 1995).

We observe that the Tax Law and the Division's regulations do provide a safe harbor by which a vendor, such as petitioner, may be relieved of the responsibility to collect sales tax from a private entity, like Grenadier, who claims to be an agent of a New York governmental entity. Specifically, the vendor 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 (*see* Pub 765). Such certificates, when properly completed and timely received, satisfy the vendor's burden of proving the nontaxability of a sales transaction and relieve the vendor of its obligation to collect and remit sales tax on that transaction (*see* Tax Law § 1132 [c] [1]).

In this case, however, petitioner did not produce properly completed ST-122 or DTF-122 forms. Accordingly, petitioner's sales to Grenadier remain presumptively taxable and petitioner continues to bear the burden of showing that its sales to Grenadier were nontaxable (*see* 20 NYCRR 532.4 [c] [6]). Petitioner can meet this burden by other evidence establishing that Grenadier purchased petitioner's security services as NYCHA's agent.

On the question of whether a private entity has entered into an agency relationship with a governmental entity, we apply common law principles of agency (*see Matter of West Valley Nuclear Servs. Co.; Matter of MGK Constructors*). As the Administrative Law Judge correctly

noted, “[a]gency 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 Matter of Custom Mgt. Corp. v New York State Tax Commn.*, 148 AD2d 919 [3d Dept 1989]). 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]) and that the principal “retain[ed] a degree of direction and control over [the agent]” (*Garcia v. Herald Tribune Fresh Air Fund*, 51 AD2d 897 [1st Dept 1976]).

“Primary characteristics of an agent-principal relationship are that the agent is placed in a position to affect or alter the legal relations between the principal and third parties in matters within the scope of the agency and that the principal has the right to control the conduct of the agent with respect to matters entrusted to it” (*Tip Top Farms v Dairylea Coop.*, 114 AD2d 12, 22 [2d Dept 1985], *appeal dismissed* 67 NY2d 829 [1986], *affd* 69 NY2d 625 [1986], *cert denied* 481 US 1029 [1987] *citing Smirlock Realty Corp. v Title Guar. Co.*, 70 AD2d 455, 464 [2d Dept 1979]).

Upon review of the record, and pursuant to the following discussion, we find that NYCHA had a sufficient degree of direction and control over Grenadier such that an agency relationship existed between those entities during the period at issue. As a consequence, we find that Grenadier’s purchases of security services from petitioner, made by Grenadier under the subcontracts, were exempt from sales tax pursuant to Tax Law § 1116 (a) (1).

The record shows that NYCHA was subject to many statutory and regulatory requirements in its ownership and management of public housing. Grenadier became subject to many of those requirements under the terms of the management contracts. In this way, many of the means and methods by which Grenadier could perform its management duties were circumscribed and thus

controlled by NYCHA (*Tip Top Farms v Dairylea Coop.*). Specifically, Grenadier was required to follow NYCHA's procurement procedures, including public bidding for purchases of goods and services in excess of certain thresholds (*see* finding of fact 17). Such a public bidding procedure ultimately led to Grenadier's contract with petitioner for security services (*see* finding of fact 9). Grenadier and its subcontractors (including petitioner) were required to comply with prevailing wage rate as determined under HUD or the New York State Labor Law, as well as prevailing wage rates under the Davis Bacon Act for subcontracts involving construction work (*see* finding of fact 24). Grenadier and its subcontractors (including petitioner) were also subject to NYCHA rules that required the hiring of NYCHA tenants to work in the apartment developments where feasible (*id.*). Grenadier was required to perform annual apartment inspections in compliance with NYCHA and HUD standards and procedures (*id.*). The record shows that compliance with many of these requirements was specific to management of NYCHA properties and was not standard in the property management industry (*id.*). Thus, Grenadier had greater control over means and methods in managing property for private entities than it did in managing NYCHA's properties.

In performing services under the management contracts and the subcontract, Grenadier and petitioner were required to "undertake their work in accordance with the directions of [NYCHA personnel]" and to "observe the requirements and parameters established by [NYCHA]" (*see* finding of fact 25). Consistent with this provision, NYCHA had the authority to approve, and remove, any Grenadier personnel or any subcontractor from work on a project (*id.*). NYCHA's approval was required before any subcontractor could perform any services under the Master Contract (*id.*). Consistent with these provisions, NYCHA personnel and Grenadier employees

regularly interacted in the management of the buildings (*id.*). Specifically, NYCHA personnel reviewed work orders to ensure that such orders were addressed in a timely manner; NYCHA technicians examined roof leaks, boiler or elevator issues and provided guidance as to how to address such problems; NYCHA provided guidance regarding timely and proper preparation of vacated apartments for releasing; and NYCHA approved evictions (*id.*). Grenadier was thus subject to NYCHA's control on a day-to-day basis.

NYCHA's consent to allow Grenadier to act on its behalf is also manifest in Grenadier's authority with respect to apartment rentals and evictions. Grenadier rented the apartments to tenants on NYCHA's waiting list and pursuant to NYCHA's rules and regulations (*see* finding of fact 26). Grenadier also terminated tenancies pursuant to NYCHA procedures and was authorized to retain an attorney for appeals of such administrative determinations and proceedings in housing court (*id.*). Grenadier thus had the authority to alter the legal relationships between NYCHA and third parties, i.e., residents of the apartment buildings. As noted, such authority is a primary characteristic of a principal-agent relationship (*Tip Top Farms v Dairylea Coop.*).

We agree with the Administrative Law Judge that, contrary to the Division's assertion, the management contracts' reference to Grenadier as an independent contractor does not preclude a finding of agency. As petitioner notes, given the context, this provision appears intended to distinguish Grenadier's status from that of an employee. In any event, it is hornbook law that an independent contractor may or may not be an agent (*see* Restatement [Second] of Agency § 14N [1958]; *Columbia Broadcasting Sys., Inc. v Stokley-Van Camp, Inc.*, 522 F2d 369, 375 [2d Cir 1975]). Furthermore, as the Administrative Law Judge noted, even if this provision could be

construed as a disclaimer of agency, such a disclaimer is not determinative of agency status; rather, such status is determined by the true relationship of the parties (*Gulf Ins. Co. v Transatlantic Reins. Co.*, 69 AD3d 71, 96 [1st Dept 2009] citing *Rubenstein v Small*, 273 App Div 102, 104 [1st Dept 1947]). Similarly, the lack of an express agency clause in the management contracts is but one factor in our analysis of the parties' true relationship (*see Matter of MGK Constructors*, Tax Appeals Tribunal, March 5, 1992).

For the same reasons, the disclaimer of agency by the controller of NYCHA does not determine the issue (*see* finding of fact 27). Additionally, our review of the testimony of Grenadier's former president indicates that her statement that Grenadier was "technically" not an agent reflects her understanding that NYCHA did not expressly designate Grenadier as an agent, not from any consideration of the substantive relationship between Grenadier and NYCHA (*see* finding of fact 28). We thus give this statement little weight.

As the Division correctly notes, the management contracts gave Grenadier discretion to subcontract with a security firm in order to fulfill its obligation to provide and implement a security plan for the apartment buildings (*see* finding of fact 12). Certainly such discretion as to methods and means is one factor against a finding of agency. In our view, however, the totality of the facts and circumstances as discussed above compels a finding in favor of an agency relationship between NYCHA and Grenadier. Moreover, we observe that, having exercised such discretion, any subcontracts for security services required NYCHA's approval. Furthermore, all payments under the subcontracts were specifically approved by NYCHA by means of the monthly expense advances (*see* finding of fact 21).

As we have determined that petitioner's sales to Grenadier are exempt from sales tax under

Tax Law § 1116 (a) (1), the Administrative Law Judge's alternate theory of nontaxability, i.e., sales for resale, is moot.

Finally, as noted, the Administrative Law Judge sustained the imposition of penalties with respect to the portion of the proposed tax that is unrelated to petitioner's sales to Grenadier and that was not challenged by petitioner in its petition in the present matter. While petitioner argued against penalties in its brief, it did not file an exception to the determination. Accordingly, we do not address penalties in this decision (*see* 20 NYCRR 3000.17 [b] [1] [i]).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Garrison Protective Services, Inc. is granted to the extent indicated in paragraph 4 below, but is in all other respects denied; and
4. The notice of determination, dated November 22, 2013, is modified to exclude from the audit assessment petitioner's sales of security services to Grenadier; the Division is directed to recompute petitioner's liability accordingly; and, as so modified, the notice of determination is sustained.

DATED: Albany, New York
December 27, 2018

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner

/s/ Anthony Giardina
Anthony Giardina
Commissioner