

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition :  
of :  
**EVERGREEN GARDENS, LLC** : DECISION  
for Revision of a Determination or for Refund of : DTA NO. 828403  
Sales and Use Taxes under Articles 28 and 29 of the :  
Tax Law for the Period September 1, 2013 through :  
September 30, 2016. :  
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Petitioner, Evergreen Gardens, LLC,<sup>1</sup> filed an exception to the determination of the Administrative Law Judge issued on January 9, 2020. Petitioner appeared by Herschel Friedman, CPA. The Division of Taxation appeared by Amanda Hiller, Esq. (Melanie Spaulding, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a reply brief. Oral argument was heard by teleconference on August 27, 2020, which date began the six-month period for issuance of this decision.

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

***ISSUE***

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

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge except for finding of fact 13, which we have modified to more accurately reflect the record. The Administrative Law

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

Judge's findings of fact and the modified finding of fact are set forth below.

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 sufficient size<sup>2</sup> 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 (1524m<sup>2</sup>) and 40,000 square feet (12192m<sup>2</sup>), 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 (12192m<sup>2</sup>), at least one additional watchperson shall be on duty for each additional 40,000 square feet (12192m<sup>2</sup>) 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 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

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<sup>2</sup> The record is silent as to the specific size of the Project.

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 a 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 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, the sale was not treated as the sale of interior design services but was instead treated as a service by a construction contractor that constituted a capital improvement and was not taxable.

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

The Administrative Law Judge began her determination by reviewing the Tax Law and New York City Administrative Code provisions relevant to this proceeding. Next, the Administrative Law Judge reviewed the case law pertaining to the taxability of protective and detective services and concluded that *Matter of Robert Bruce McLane Assoc. v Urbach* (232 AD2d 826 [3rd Dept 1996]) was precedent for the taxability of protective and detective services purchased in

conjunction with a capital improvement project. Based on the holding in *McLane*, the Administrative Law Judge determined that petitioner's purchases of protective services provided by ISSM are subject to state and local sales taxes and, therefore, she determined that the Division properly denied petitioner's application for refund.

### *ARGUMENTS ON EXCEPTION*

Petitioner argues that the capital improvement provision of Tax Law § 1105 (c) (5) applies to all services covered by Tax Law § 1105 (c), including the services in Tax Law § 1105 (c) (8). Petitioner maintains, therefore, that the subject protective services are excluded from tax as they were provided in conjunction with a capital improvement. Petitioner contends that since Tax Law § 1105 (c) (5) is an imposition statute, the Division has the burden to prove that the protective services are taxable and any doubt as to the application of tax accrues to the benefit of petitioner.

Petitioner argues that there is nothing more compelling in Tax Law § 1105 (c) (8) to elevate it over Tax Law § 1105 (c) (5) as the controlling subdivision in terms of determining whether the subject protective services are taxable. Petitioner argues that the legislature's failure to include a capital improvement provision in Tax Law § 1105 (c) (8) cannot be interpreted as an intentional denial of capital improvement treatment to the services in Tax Law § 1105 (c) (8). It argues that the later adoption of Tax Law § 1105 (c) (8) should not be deemed to impliedly repeal the provisions of Tax Law § 1105 (c) (5).

Petitioner attempts to distinguish the instant facts and legal arguments from those in the *McLane* proceeding. Petitioner maintains that *McLane* stands for the strict and narrow application of capital improvement treatment only in Tax Law § 1105 (c) (3) and (5). Petitioner asserts, however, that the Division clearly gives capital improvement treatment to services that

are specified outside of Tax Law § 1105 (c) (3) and (5). Petitioner contends that services taxable under Tax Law § 1105 (c) (2), (7) and (8) have been determined to be capital improvements, notwithstanding the fact that none of those subdivisions include a separate capital improvement provision. As an example, petitioner contends that the installation of protective systems, taxable under Tax Law § 1105 (c) (8), have been treated as capital improvements under Tax Law § 1105 (c) (5). Further, petitioner asserts that interior decorating and design services, normally taxable under Tax Law § 1105 (c) (7), are deemed not taxable when implemented as part of a capital improvement. Petitioner maintains that there are no grounds for the Division to give capital improvement treatment to some, but not other, taxable services in Tax Law § 1105 (c). Petitioner argues that the Division has not properly followed the ruling in *McLane*. Instead, petitioner maintains that the Division applies the capital improvement rules inconsistently, which amounts to arbitrary and improper decision making that should result in the reversal of the Division's refund claim determination notice.

On exception, the Division asserts that the determination was proper in all respects and should be affirmed without modification. The Division argues that the taxability of protective and detective services purchased in conjunction with a capital improvement project was conclusively decided in *McLane*. It argues that Tax Law § 1105 (c) (3) and (5) explicitly exempt capital improvements from taxation, and that there is no inconsistency between allowing exemptions pursuant to those sections and not allowing them under Tax Law § 1105 (c) (8), which includes no capital improvement exemption. The Division maintains that the Legislature's failure to include a matter within a particular statute is an indication that its exclusion was intentional and that petitioner may not read an exemption into the law that was not explicitly granted by the Legislature. It contends that the specific language of Tax Law § 1105

(c) (8) takes precedence over the more general language of Tax Law § 1105 (c) (3) and (5). The Division further argues that the “end result test” found in 20 NYCRR 527.7 (b) (4) is limited to repair and maintenance of real property and should not be applied to protective and detective services, which are inherently different than services to repair or maintain property.

The Division denies petitioner’s assertion that its application of the capital improvement rules is arbitrary or inconsistent. It maintains that petitioner failed to sustain its burden of proof and that the determination of the Administrative Law Judge should be affirmed.

### ***OPINION***

Petitioner takes exception to the determination of the Administrative Law Judge, which denied its petition seeking a refund of state and local sales tax paid on purchases of protective services provided at the construction site of a new eight-story building project in New York City. The Project in totality was a capital improvement and was of sufficient size to require the use of protective services under local law (*see* finding of fact 5). Petitioner engaged ISSM to provide protective services in conjunction with the Project. The parties agree that the protective services provided by ISSM constitute “protective and detective services” as that term is used in Tax Law § 1105 (c) (8). Further, there is no dispute that the services provided by ISSM would be taxable under Tax Law § 1105 (c) (8) if purchased as stand-alone services. Petitioner, however, contends that the protective services were provided in conjunction with a capital improvement and, as such, are not subject to sales tax.

### **Background**

Tax Law § 1105 (c) imposes sales tax on the receipts from every sale, except for resale, of the services enumerated in that subdivision. Tax Law § 1105 (c) (3) (iii) imposes tax on the service of installing tangible personal property but provides an exception when the installed

property will constitute a capital improvement. Tax Law § 1105 (c) (5) imposes sales tax on services related to maintaining, servicing or repairing real property but distinguishes such services from “adding to or improving such real property . . . by a capital improvement.” When considering services performed on real property pursuant to Tax Law § 1105 (c) (5), the imposition of tax on the service will depend on the “end result” of such service. If the end result of the service is the repair or maintenance of real property, such service will be taxable. If the end result of the service is a capital improvement to real property, such service will not be taxable (*see* 20 NYCRR 527.7 [b] [4]).

The term “capital improvement” is defined in Tax Law § 1101 (b) (9) (i) as an addition or alteration to real property which: (A) substantially adds to the value of real property, or appreciably prolongs the useful life of the real property; and (B) becomes part of the real property or is permanently affixed to the real property so that removal would cause material damage to the property or article itself; and (C) is intended to become a permanent installation.

Tax Law § 1105 (c) (8), imposes sales tax 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.”

### **Statutory Construction**

We first observe that under the Tax Law, a petitioner bears the burden of proof in any proceeding before the Division of Tax Appeals except where that burden has been specifically



allocated to the Division (20 NYCRR 3000.15 [d] [5]). It is presumed that all receipts for services of any type mentioned in Tax Law § 1105 (c) are subject to tax until the contrary is established, and the burden of proving that any receipt is not taxable will be upon the person required to collect the tax or the customer (Tax Law § 1132 [c] [1]; *Mendon Leasing Corp. v State Tax Commn.*, 135 AD2d 917, 918 [3rd Dept 1987], *lv denied* 71 NY2d 805 [1988]).

Accordingly, in this proceeding, petitioner has the burden to prove that the refund claim determination notice issued by the Division is erroneous and that the charges for the services in question were not taxable.

As an initial matter, petitioner argues that Tax Law § 1105 (c) is an imposition statute and must be construed most strongly against the Division and in favor of petitioner. It is well established that “[a] statute which levies a tax is to be construed most strongly against the government and in favor of the citizen. The government takes nothing except what is given by the clear import of the words used, and a well-founded doubt as to the meaning of the act defeats the tax” (*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], quoting *People ex rel. Mutual Trust Co. v Miller*, 177 NY 51, 57 [1903]). This principle is applicable, however, only in determining whether property, income, a transaction or event is subject to taxation (*id*). It is clear from a plain reading of Tax Law § 1105 (c) (8) that sales tax is imposed upon the receipts from the sale of protective services at issue here. Tax Law § 1105 (c) (8) does not contain an exemption for capital improvement-related services. Therefore, as a matter of statutory construction, the question here is not whether the subject services are subject to taxation, but whether taxation is negated by a statutory exclusion or exemption (*see Wegman’s Food Mkts.*,

*Inc. v Tax Appeals Trib. of the State of N.Y.*, 33 NY3d 587, 592 [2019]; *Grace v New York State Tax Commn.*, 37 NY2d at 196).

Turning to the substance of the proceeding, the taxability of security guard services provided at a construction site was decided in *Matter of Robert Bruce McLane Assoc., Inc. v Urbach*. As in the instant proceeding, the security guard services at issue there were provided in conjunction with a capital improvement and were a legally required prerequisite to a capital improvement. In *McLane*, the Court addressed the issue of whether security services 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 prerequisite to a capital improvement, security services are independently taxed pursuant to Tax Law § 1105 (c) (8). In reaching its holding, the Court noted that the Legislature did not add a capital improvement exemption in Tax Law § 1105 (c) (8) similar to the language of Tax Law § 1105 (c) (3) (iii) and (c) (5). It observed that “[t]he failure of the Legislature to include a matter within a particular statute is an indication that its exclusion was intended” (*id.* at 828, citing to *Pajak v Pajak*, 56 NY2d 394, 397, citing McKinney’s Cons Law of NY Book 1, Statutes § 74). Further, the Court recognized “that where the Legislature enacts a specific provision directed at a particular class, and a more general provision in the same statute which might appear to encompass that class, the specific provision will be applied” (*id.*, citing *People v Marrero*, 71 AD2d 346, 349-350 [1979]; *see* McKinney’s Cons Laws of NY, Book 1, Statutes § 238; *see also* *People v Mobil Oil Corp.*, 48 NY2d 192, 200 [1979]). 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).

Notwithstanding the clear precedential import of the Appellate Division decision in *McLane*, petitioner argues that the *McLane* decision should be “revisited.” It contends that the Division has inconsistently applied the *McLane* ruling and has inconsistently followed its own regulations, some of which, petitioner asserts, were adopted without the necessary legislative authorization. We disagree.

Tax Law § 1105 (c) (8) was added to the Tax Law by section 173 of Chapter 190 of the Laws of 1990 some 25 years after § 1105 (c) (3) and (5) were enacted.<sup>3</sup> The legislative history of Tax Law § 1105 (c) (8) clearly indicates the Legislature’s desire to impose a new tax on detective and protective services, where no such tax had been specifically imposed before at the state level. The memorandum in support of Chapter 190 states that:

“Sections 167 through 194 of the bill relate to sales tax provisions which broaden the State base primarily by adding certain taxes that currently are imposed only in New York City. These taxes include parking, interior decorating and design services, protective and detective services and certain interior cleaning and maintenance services.

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Section 173 of the bill adds new paragraphs (6), (7) and (8) to section 1105 (c) of the Tax Law to impose tax at the rate of four percent on the services of providing parking, garaging or storing motor vehicles, interior decorating and design services and protective and detective services. These services are identical to the authorization and imposition currently in effect for New York City” (Memorandum in Support, NY Assembly Bill 11693, pp 38, 39).

Contrary to the assertions made by petitioner, and as interpreted by the court in *McLane*, a plain reading of the two subdivisions leads to the conclusion that through the later-adopted Tax Law § 1105 (c) (8), the Legislature intended to impose tax on a specific set of services and, as such, Tax Law § 1105 (c) (8) should take precedence over the general provisions of Tax Law

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<sup>3</sup> Tax Law § 1105 (c) (3) and (5) were added to the Tax Law by Chapter 93 of the Laws of 1965, which incorporated broad changes to the sales tax provisions of the then-existing law.

§ 1105 (c) (5). The failure of the Legislature to include a capital improvement provision in Tax Law § 1105 (c) (8), therefore, can be taken as an indication that its exclusion was intended (*see McLane; see also Pajak* 56 NY2d at 397).

Notwithstanding the Court's interpretation of Tax Law § 1105 (c) (8) in *McLane*, petitioner argues that the capital improvement provision of Tax Law § 1105 (c) (5) applies to all services covered by Tax Law § 1105 (c) and, therefore, the subject services should be found not taxable because they were purchased in conjunction with a capital improvement. In support of its argument, petitioner points to the Division's treatment of temporary facilities at construction sites. Pursuant to 20 NYCRR 541.8 (a), subcontracts to provide temporary facilities at construction sites, which are a necessary prerequisite to the construction of a capital improvement to real property, are considered a part of the capital improvement to real property. The charges for materials and installation of such facilities are, therefore, not subject to tax, provided the subcontractor receives a copy of the properly completed certificate of capital improvement issued by the customer to the contractor (*see* 20 NYCRR 541.8 [a]).

In *Matter of L&L Painting Co., Inc.*, Tax Appeals Tribunal, June 2, 2011, the Tribunal determined that the installation of a platform as part of a protective containment system was a necessary prerequisite to the construction of a capital improvement to real property. The substantive work of the project involved stripping the Pulaski Bridge in New York City down to bare steel and applying a new protective coating system. Nearly a third of the project's cost related to the installation of the platform and containment system to prevent lead paint, dust, and other debris from falling onto pedestrians, traffic, train tracks, into the Newton Creek below, or being released into the air. The Tribunal concluded that the platform was a temporary facility at

a construction site and a necessary prerequisite to a capital improvement and therefore was not subject to sales tax.

Petitioner contends that the protective containment system in *Matter of L&L Painting Co., Inc.* and the temporary protective pedestrian walkways listed in 20 NYCRR 541.8 (a) are “protective systems” that are taxable under Tax Law § 1105 (c) (8), but have been deemed by the Division to be not subject to tax as necessary prerequisites to a capital improvement pursuant to Tax Law § 1105 (c) (5) (*see* TSB-M-14 [15][S], Sales Tax Treatment of Certain Temporary Facilities Provided at Construction Sites). Petitioner alternately argues that the rule regarding temporary facilities at construction sites in 20 NYCRR 541.8 is an expansion of the Tax Law and was improperly adopted by the Division without legislative authorization.

The question of whether the protective containment system in *Matter of L&L Painting* was taxable under Tax Law § 1105 (c) (8) was not at issue in that case. Accordingly, *Matter of L&L Painting* provides little support to petitioner’s position herein. Moreover, we find that petitioner has failed to meet its burden to show that the regulation at 20 NYCRR 541.8 is irrational and inconsistent with Tax Law § 1105 (c) (3) and (5) (*Matter of Titan Elevator & Lift, LLC*, Tax Appeals Tribunal, September 11, 2017).

Petitioner also points to the Division’s treatment of interior decorating and design services set forth in Tax Bulletin TB-ST-400 (2011) (Interior Decorating and Design Services) as another example of how otherwise taxable services are considered as nontaxable capital improvements under Tax Law § 1105 (c) (5). Generally, interior decorating and design services relate to the planning and design of interior spaces and are subject to sales tax pursuant to Tax Law § 1105 (c) (7). When the services provided consist of a combination of renderings or plans *followed by later implementation of the plans*, the Division treats the person providing the services as a

construction contractor.<sup>4</sup> As a result of that distinction, the sale of such a combination is not treated by the Division as the sale of interior decorating or design services, but will instead be treated as a service to tangible personal property, real property or both and, therefore, analyzed under Tax Law § 1105 (c) (3) or (5). Consistent with the provisions in those two subdivisions, if the work performed constitutes the installation of tangible personal property that when installed constitutes a capital improvement to real property, the transaction is not taxable (*see* Tax Bulletin TB-ST-400). Petitioner posits that if the Division can determine that interior decorating and design services are provided by a construction contractor as to avoid the imposition of tax pursuant Tax Law § 1105 (c) (7), then it is inconsistent and arbitrary for it not to determine that a subcontract for protective services provided in conjunction with a capital improvement is also provided by a construction contractor so as to avoid the imposition of sales tax pursuant to Tax Law § 1105 (c) (8).

We find nothing irrational or unreasonable in the Division’s policy as set forth in TB-ST-400 for interior decorating and design services. Nor is petitioner’s situation analogous to the situation described above. That is, according to the bulletin, a service provider who provides interior design plans and then implements those plans is considered to be a construction contractor and the combination of those services may be eligible for capital improvement treatment. Petitioner does not provide a similar combination of services. It provides guard and protective services taxable under Tax Law § 1105 (c) (8) and which are not eligible for capital improvement treatment under *McLane*.

In this proceeding, petitioner seeks the benefit of an exemption from sales tax; hence, it carries the burden of proving that it comes within the language of the exemption (*Matter of*

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<sup>4</sup> “Construction contract” and “construction contractor” are defined in 20 NYCRR § 541.2 (a) (1) and § 541.2 (d), respectively.

*Grace v New York State Tax Commn.*, at 195). Furthermore, petitioner must demonstrate that its interpretation of the statute is the only reasonable construction (*Matter of 677 New Loudon Corp. v State of N.Y. Tax Appeals Trib.*, 85 AD3d 1341, 1342-43 [3rd Dept 2011], *affd* 19 NY3d 1058 [2012], *rearg denied* 20 NY3d 1024 [2013], *cert denied* 571 US 952 [2013] [internal quotation marks and citations omitted]).

We have considered the facts and petitioner's arguments and find that the law requires affirmance of the Administrative Law Judge's determination and denial of the petition. The Division has acted appropriately in determining that the protective services at issue here are taxable pursuant to Tax Law § 1105 (c) (8). We find nothing irrational or unreasonable in the Division's determination that sales tax is specifically imposed on the subject services pursuant to § 1105 (c) (8) and that the capital improvement provision of § 1105 (c) (5) does not apply to those services. We agree with the determination of the Administrative Law Judge that the taxability of guard services purchased in conjunction with a capital improvement project was definitively decided in *McLane*. Given the ruling in *McLane*, we are bound to find that 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).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Evergreen Gardens, LLC is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Evergreen Gardens, LLC is denied; and
4. The refund claim determination notice dated February 27, 2017 is sustained.

DATED: Albany, New York  
March 1, 2021

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

/s/ Anthony Giardina  
Anthony Giardina  
Commissioner