STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
BAKER PROTECTIVE SERVICES, INC. D/B/A WELLS FARGO ALARM SERVICES, INC.	:	DECISION DTA NO. 816899
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, 1990 through February 29, 1996.	:	

Petitioner Baker Protective Services, Inc. d/b/a Wells Fargo Alarm Services, Inc., c/o Borg-Warner Security Corp., 200 South Michigan Avenue, Chicago, Illinois 60604, filed an exception to the determination of the Administrative Law Judge issued on October 26, 2000. Petitioner appeared by KPMG Peat Marwick LLP (Richard W. Goldstein, Esq. and Harold F. Soshnick, Esq., of counsel). The Division of Taxation appeared by Barbara G. Billet, Esq. (Cynthia E. McDonough, Esq., of counsel).

Petitioner filed a brief in support of its exception and the Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument was not requested.

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

ISSUES

I. Whether the Division of Tax Appeals has jurisdiction over a sales tax refund claim filed by petitioner for the period September 1, 1995 through February 29, 1996 which has yet to be denied by the Division of Taxation..

II. Whether, pursuant to the provisions of Tax Law § 1101(b)(4)(i), petitioner is entitled to a refund of the sales tax paid on its purchases of alarm equipment which it subsequently provided to its customers in connection with its furnishing of central station monitoring services.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "1," "2," "5," "8," "11" and "13" which have been modified. We have also made an additional finding of fact. The Administrative Law Judge's findings of fact, the modified findings of fact and the additional finding of fact are set forth below.

We modify finding of fact "1" of the Administrative Law Judge's determination to read as follows:

> Baker Protective Services, Inc. d/b/a Wells Fargo Alarm Services, Inc. ("petitioner") is in the business of providing alarm systems and related support services to its customers.[1] Petitioner provides three general types of alarm systems: (1) local alarm systems, (2) direct alarm systems and (3) central station alarm systems. The alarm equipment utilized for each of these types of systems is identical; the difference in the alarm systems is in the level of ancillary support services which petitioner provides to its customers and, as between direct and central station systems, the

[1]Petitioner's customers sometimes are referred to in the record as "subscribers," e.g., Petitioner's Exhibit "3."

> mode of transmission of the alarm signal to the police or fire department rather than petitioner's central monitoring station.[2]

We modify finding of fact "2" of the Administrative Law Judge's determination to read as follows:

> Petitioner retains legal title to all of the equipment which it installs and uses in its alarm systems and it reserves the right in its contracts to remove or abandon its equipment from the customer's premises at the termination of a contract. Most of petitioner's contracts with its customers are for a duration of five years unless earlier terminated by the parties. Petitioner's customers are required to include petitioner's alarm equipment in the coverage provided in the customer's liability and fire insurance policies. If a customer goes out of business, petitioner sometimes leaves its alarm equipment at the former customer's business location, so that it can contract with any new business that takes over the premises (Ex. "I"). [3]

For a local alarm system, petitioner installs the alarm equipment at the customer's location. Depending upon the customer's particular needs, the equipment usually consists of infrared and sonic motion detectors, photo-electric beams, door and window contacts, card access units, wires, a central control unit and an on-premises audible alarm. Upon an intrusion or other problem, the alarm will sound at the customer's premises.

A direct alarm system utilizes the identical equipment as that which is installed in the customer's home or building for a local alarm system. In a direct alarm system, however, the alarm is connected to the local police department via an ISDN or digital telephone line. Upon an intrusion, the alarm may, if the customer so chooses, sound on the customer's premises, but it

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[2]We modified finding of fact "1" of the Administrative Law Judge's determination to more completely reflect the record.

[3]We modified finding of fact "2" of the Administrative Law Judge's determination to more completely reflect the record.

will also alert the local police department. The direct alarm system is gradually being phased out of the market due to the fact that a high instance of false alarms associated with direct systems has resulted in police departments beginning to refuse to respond to the alarms.

We modify finding of fact "5" of the Administrative Law Judge's determination to read as follows:

> A central alarm system is identical to the local and direct systems with respect to the equipment installed at the customer's premises. Upon an intrusion, the central alarm system transmits a signal to petitioner's central monitoring station whereupon petitioner will confirm the accuracy and nature of the cause of the alarm. Petitioner will then contact the local police department or other emergency services and will also contact the customer. William C. Walsh, petitioner's Vice President for Sales and Marketing from 1990-1996 testified that petitioner used the central alarm equipment to provide its customers with "protective services" (Tr., pp. 66-67). Paragraph "6a"[4] of petitioner's contract for the central alarm service[5] states, in part, that:
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> > The obligation of Wells Fargo Alarm to provide service relates to the *monitoring solely of the alarm systems specified in the Schedule of Equipment* and Wells Fargo Alarm is not obligated to repair, service, replace, operate or assure the operation of any device, system or property belonging to Subscriber or to any third party . . . (emphasis added).[6]

Petitioner filed two applications for credit or refund of sales and use taxes, each dated June 20, 1996. One application was for the period September 1, 1990 through August 31, 1995 (hereinafter "Period I") and sought a refund in the amount of $1,807,631.41. The other

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[4]On the reverse side.

[5]Part of the Division's Exhibits "E" and "L."

[6]We modified finding of fact "5" of the Administrative Law Judge's determination to more accurately reflect the record.

application was for the period September 1, 1995 through February 29, 1996 (hereinafter "Period II") and claimed a refund due in the amount of $133,510.77. Each stated, in relevant part, as follows: "The claimant erroneously reported its acquisition of resale inventory items as 'Purchases Subject to Use Tax.' The materials purchased are transferred to the claimant's service customers and are exempt from use tax under NY Sec. 1101(b)(4)(I)."

On December 13, 1996, the Division of Taxation ("Division") denied in full, petitioner's refund claim for Period I on the basis that petitioner maintained title to the equipment installed on its customers' premises and that the equipment was not actually being rented or sold but was used in performing protective services. The Division has neither granted nor denied petitioner's claim for refund for Period II.

We modify finding of fact "8" of the Administrative Law Judge's determination to read as follows:

> Following the Division's denial of its claim for refund for Period I, petitioner filed a request for a conciliation conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS") with respect to *both* refund claims. Between the time when the Division denied petitioner's refund claim for Period I and the time when the BCMS conciliation conference was held (November 20, 1997), the auditor who reviewed the claim and his supervisor retired from their employment with the Division. In March 1998, after the conciliation conference was held, auditors Roxanne Balduzzi and Jean Barrett (both of these auditors appeared as advocates at the conciliation conference) traveled to petitioner's location in Valley Forge, Pennsylvania and reviewed petitioner's refund claim for Period I along with supporting documentation. The auditors reviewed petitioner's business and accounting procedures and examined audit work papers, sales and use tax returns, books and ledgers and purchase invoices relating to the equipment for which the claims for refund were made for Period I. The auditors worked with petitioner's tax manager, Alison Rosskamp, who explained that petitioner could not account

> for exactly which equipment was used in direct, local or central station alarm systems. Based upon petitioner's customer billings for the different types of systems and services provided, Ms. Rosskamp and the auditors agreed that 57.25 percent of petitioner's business was attributable to the local and direct alarm businesses and the balance, 42.75 percent, represented its central station alarm business. Ms. Rosskamp testimony at hearing appeared to suggest that petitioner's invoices for the Period II refund application had also been reviewed by the auditors (Tr., p. 87). The audit documents in the record do not reflect such a review for Period II. Further, Ms. Rosskamp's later testimony appeared to contradict her earlier statement, since she later suggested that the refund claim for Period II was to be included as part of the Division's follow-up audit, *infra* (Tr., p. 88).[7]

On May 4, 1998, Auditor Roxanne Balduzzi sent a memorandum to the conciliation conferee in which she conceded that petitioner's refund claim for Period I should be granted in the sum of $1,005,137.00, which amount was attributable to the tangible personal property for the local and direct alarm sales. Ms. Balduzzi agreed that the equipment used by petitioner in its local and direct alarm sales was purchased for resale since petitioner was leasing tangible personal property and not supplying a service to its customers.

By a Conciliation Order (CMS No. 160924) dated October 16, 1998, a refund in the amount of $1,034,869.00 for Period I was granted to petitioner.[8]

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[7]We modified finding of fact "8" of the Administrative Law Judge's determination to more completely reflect the record.

[8] The reason for the discrepancy between the amount conceded in the auditor's memorandum to the conciliation conferee and the amount of the refund actually granted in the Conciliation Order is that in the memorandum, the auditor stated that the last quarter of the refund claim for Period I (June 1, 1995 through August 31, 1995) had not yet been audited. Therefore, she sought to add the amount of the refund claimed for this quarter ($51,933.76) to the refund claim for Period II. Apparently, the conciliation conferee chose not to add this quarter to Period II. Accordingly, 57.25 percent of the refund claim, or $29,732.00, was added to the amount conceded by the auditor to be due to petitioners. The resulting amount of $1,034.869.00 ($1,005,137.00 + $29,732.00) was the amount of the refund granted in the Conciliation Order.

We modify finding of fact "11" of the Administrative Law Judge's determination to read as follows:

> During the auditors' visit to Valley Forge, Pennsylvania, a follow-up audit encompassing the period from September 1, 1995 through May 31 or August 31, 1998 was scheduled and Jean Barrett was assigned to perform this audit. In 1998, petitioner was bought out by ADT which has failed to provide additional records or engage in discussions with the auditors concerning this audit period. The Division has made no negative determination with regard to the Period II refund claim.[9]

With respect to its alarm systems, petitioner most frequently used a standard contract which had an initial term of five years with renewals thereafter. A small number of customers preferred to purchase the equipment outright, but this type of transaction was usually limited to local alarm systems.

The starting point for each type of contract, including outright sales of equipment, was an installation charge consisting of the cost of the equipment used, taxes and the cost of labor to install the equipment. Petitioner individually determined the contract charges for each customer. Depending upon the customer, the charges were paid in a variety of methods. A portion was paid at the outset upon installation and the remainder was included in recurring monthly charges. In all cases, petitioner sought to fully recover its equipment costs and labor within the first 18 to 24 months of the contract.

In addition to the front-loaded installation charges, petitioner added charges for the services it provided for each of its respective alarm systems. For local and direct systems, these services primarily consisted of periodically monitoring and repairing the equipment as needed.

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[9]We modified finding of fact "11" of the Administrative Law Judge's determination to more completely set forth the record.

With respect to the central station alarm systems, monitoring and repair elements were included as was a charge for the central monitoring services. Petitioner also added overhead costs and a profit element to its contracts. The payment of sales tax by petitioner on its purchases of alarm equipment was included as an overhead cost in calculating its charge for services to customers. In a standard five-year contract, petitioner did not ordinarily begin to realize profits until the third year due to the fact that the equipment and installation costs were recovered first.

Customers were provided with written contracts and monthly fee invoices. Contracts provided to customers included a Schedule of Protection[10] which set forth the equipment which was being provided to the customers pursuant to the contract. The Schedule of Protection did not provide the customer with an itemized charge or cost breakdown of the equipment provided by petitioner. A Schedule of Protection Worksheet showed estimated equipment costs for each customer which petitioner used to determine its overall pricing; however, this worksheet was kept in petitioner's file for the particular customer and, unlike the Schedule of Protection, was not provided to the customer. Petitioner's standard contract did not contain the words "lease" or "rental" in referring to the equipment provided to the customers. The contract entered into between petitioner and its customers wherein petitioner agreed to provide a central station protective signaling service contained a provision stating that petitioner agreed to install and maintain, or cause to be installed or maintained during the term of the agreement, in the customer's (subscriber's) premises:

> Central Station Protective Signaling Systems including transmitters, controls, wire connections and instruments necessary to convey signals from the Subscriber's premises to Wells Fargo

[10]Sometimes, infra, "Schedule of Equipment."

> Alarm's Central Station, sensing devices, appliances, cabinets, cables, conduits, foils, screens, springs, tubing, switches, wires and all other materials associated therewith as specified in the Schedule of Protection, and will, subject to the terms and conditions hereof, until termination of this agreement, maintain such systems in good working order, with the understanding that such entire systems are and shall remain the personal property of Wells Fargo Alarm.

Since all of the separate elements of petitioner's contracts and invoices were fully taxable, neither the contracts nor the invoices separately stated the costs of the equipment, labor costs for installation, ancillary support or overhead elements of the monthly charges.

We modify finding of fact "13" of the Administrative Law Judge's determination to read as follows:

> Petitioner at all times retained title to the alarm equipment. Petitioner attempted to upgrade its alarm systems during a contract's term in order to keep current with technology (Tr., p. 52). During the contract term, if petitioner needed to service the equipment, it needed to obtain the permission of the customer to enter its premises. After the expiration of the contract term (usually five years), the right to possession of the alarm equipment reverted to petitioner. Petitioner also had the right to remove the equipment upon contract termination or default by the customer. If petitioner desired to remove the equipment and was denied access by its customer to do so, it had to turn over the matter to its legal department.
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> Since 1990, the equipment used in alarm systems advanced rapidly due to pressure put on the industry by insurance companies and police agencies to upgrade technology. As a result of this pressure which was a result of frequent false alarms, advances were made in camera, sensor and transmission technology. Alarm systems went from perimeter protection to more motion detection and interior protection. Accordingly, at the end of a standard five-year contract, a customer's equipment was often antiquated and

> obsolete.[11] If the contract was not renewed, it would not be unusual for petitioner to leave the equipment at the customer's premises, i.e., abandon it if considered to be of little value or if there existed no competitive reason to remove it (id.).
>
> However, if a competitor was going to be servicing one of petitioner's customers, petitioner would remove the equipment to prevent a competitor from getting ahold of the equipment or technology.[12]

The Financial Accounting Standard Board promulgates rules known as the Generally Accepted Accounting Principles (GAAP) which are the rules by which all audited financial statements are issued. In 1995, petitioner's parent company, Borg-Warner Security Corporation began to recognize long-term alarm service contracts as "sales-type" leases rather than "operating" leases under the provisions of Financial Accounting Standard No. 13. This type of accounting recognizes that one transfers the equipment to the possession and use of the customer and it is, therefore, expensed immediately upon transfer. Previously, under the operating lease provisions, the equipment portion of the alarm contract had been capitalized as a long-term fixed asset of petitioner which had been depreciated. Pursuant to Financial Accounting Standard No. 13, at least 90 percent of the cost of petitioner's equipment was recoverable during the initial contract term of five years.

Petitioner maintained a "no-value" or "zero-value" inventory account for used equipment that was kept for spare or replacement parts. Due to technological advances in alarm equipment,

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[11]Page 3 of attachment to petitioner's Request for Conciliation Conference, Ex. "E".

[12]We modified finding of fact "13" of the Administrative Law Judge's determination to clearly set forth the record.

the depreciation period for this equipment was reduced to 8 years in the late 1980s (petitioner previously depreciated its alarm equipment over a 15 to 18 year period).

We make the following additional finding of fact.

> The audit papers (Exhibit "G") in evidence do not reflect that the Division's auditors reviewed petitioner's books and records or considered petitioner's refund application for Period II. Documents and audit work papers in this exhibit appear to relate to the refund application for Period I. Letters from petitioner's employees which are contained in this exhibit, and which argue for granting of the refund for Period I, do not even mention the refund claim for Period II. Since petitioner was bought out by ADT, the Division's auditor has not been able to speak with ADT's Tax Manager or make a determination with respect to the refund application for Period II (Tr., p. 30).

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge noted that, at the time petitioner filed its applications for refund of sales and use taxes, section 1139(b) of the Tax Law provided that the Commissioner of Taxation "may" grant or deny such an application in whole or in part and shall notify the applicant by mail accordingly. However, Chapter 441 of the Laws of 1998 (effective July 22, 1998) amended Tax Law § 1139(b) to provide that the commissioner "shall grant or deny [an application for refund or credit] in whole or in part *within six months of receipt of the* application . . ." (emphasis added).

Since the Division failed to either grant or deny petitioner's application for refund of sales and use taxes for Period II, petitioner sought to have the Division's failure to act deemed a denial of the application.

The Administrative Law Judge found that the central purpose of the 1998 amendment to section 1139(b) was to ensure that a taxpayer would have an application for credit or refund acted

upon expeditiously. However, the Administrative Law Judge rejected petitioner's argument and concluded that Tax Law § 1139(b) revealed no legislative intent for the amendment to be applied retroactively.

The Administrative Law Judge noted that petitioner had timely filed its refund claim for Period II. If that application was not ultimately granted by the Division, petitioner may, upon denial, in whole or in part, file a request for a conciliation conference or a petition for an administrative hearing with the Division of Tax Appeals. If any part of the refund is subsequently granted, such refund must also include interest from the date of payment of the tax (Tax Law § 1139[d]). Therefore, the Administrative Law Judge concluded that only the Period I refund application could be adjudicated herein.

Next, the Administrative Law Judge considered petitioner's assertion that it should be entitled to a refund of sales and use taxes paid on its purchases of alarm equipment in connection with its central alarm monitoring services. Petitioner contended that it paid the tax on its purchases of the equipment and then subsequently collected (and remitted) tax on the same value (the sales tax was included in the base price charged to customers), thereby permitting the State to collect tax on the same alarm equipment multiple times.

The Administrative Law Judge rejected this argument, finding that there were two separate and distinct transactions which are subject to tax in this case. In the first transaction, petitioner paid tax on its purchases of equipment which it then used to provide central station alarm monitoring services. The second transaction was petitioner's furnishing of these central station alarm monitoring services which, by virtue of Tax Law § 1105(c)(8), required petitioner to collect tax from its customers on the sale of these services and remit the tax to the State. The

Administrative Law Judge pointed out that petitioner recovered the sales tax paid on its purchases of alarm equipment by including such amounts as an overhead cost when calculating its charges for services to customers. It was petitioner's recoupment of its expenses (one of which is the sales and use taxes paid on the purchase of the equipment used in providing the service) which resulted in a "tax on tax" situation.

Petitioner next contended that central monitoring services were included as a taxable service under Tax Law § 1105(c)(8). Pursuant to Chapter 190 of the Laws of 1990 (effective June 1, 1990), this shifted the imposition of sales tax on the alarm equipment from petitioner to its customers, thereby justifying a refund of all sales and use taxes which it paid on purchases of the equipment. Petitioner relied on an Opinion of Counsel dated January 29, 1974 and a decision of the former State Tax Commission, ***Matter of the Petition of Wells Fargo Alarm Servs., Div. of Baker Protective Servs.*** (TSB-H-83[225]S) as support for this argument. The Administrative Law Judge rejected petitioner's position noting that at the time the former State Tax Commission decision and Opinion of Counsel were rendered (prior to the 1990 amendment to section 1105[c][8]), both were accurate statements of the law.

Petitioner urged that its transfers of the central station monitoring alarm equipment to its customers were sales, because the transfers constituted leases or rentals of the equipment. The Division's regulations,[13] petitioner argued, provide that the terms "rental," "lease" and "license to use" refer to all transactions in which there is "a transfer for a consideration of possession of tangible personal property without a transfer of title to the property." The Administrative Law Judge rejected this argument noting that the agreements between petitioner

[13]20 NYCRR 526.7(c)(1)

and its customers made no mention of a lease or rental of alarm equipment. Further, petitioner's invoices to its customers did not indicate a separate charge for the alarm equipment provided.

The Administrative Law Judge noted that while a transfer of possession is an element of a lease or rental, it is merely a factor to be considered in making a determination as to whether a lease or rental existed. The Administrative Law Judge found that the alarm equipment (the tangible personal property at issue) was placed by petitioner in the custody of its customers, since, in order to provide central alarm monitoring services, petitioner was required to have alarm equipment on the customer's premises.

However, while petitioner provided a Schedule of Protection to its customers which set forth the equipment being provided to the customer, the Schedule of Protection did not provide the customer with an itemized charge or cost breakdown of the equipment supplied by petitioner. The Schedule of Protection Worksheet which contained estimated equipment costs for each customer was kept by petitioner in its files and was not furnished to the customer. Therefore, the Administrative Law Judge found that absent a showing that the customers were made aware that they were leasing or renting tangible personal property and were *agreeing* to do so, evidence as to petitioner's treatment of the transfer of alarm equipment as a lease on its internal documents for legal or accounting purposes was of no import.

Petitioner placed great significance on the fact that with respect to its local and direct alarm businesses, the Division had already agreed that petitioner leased alarm equipment to its customers. The result of that agreement was a refund of 57.25 percent of petitioner's refund claim for Period I. However, the Administrative Law Judge pointed out, in the local and direct alarm businesses, the only thing which petitioner provided to its customers was the alarm

equipment. Petitioner provided no monitoring services to its local and direct business alarm customers, just equipment. The refund agreed upon was granted by the Division because petitioner was purchasing alarm equipment which was then resold or leased to its customers thereby qualifying as a purchase for resale. By contrast, the Administrative Law Judge found that in the instance of the central station alarm equipment, petitioner was not reselling or leasing the equipment; it was purchasing it to use in providing a security or protective service to the customers.

The Administrative Law Judge found that petitioner could not provide the central station alarm monitoring service without having the necessary alarm equipment on the customers' premises. The Administrative Law Judge found that petitioner's services were not severable from the equipment provided. Accordingly, the Administrative Law Judge, in rejecting petitioner's claim, concluded that it was not entitled to a refund of sales and use taxes paid on its purchases of alarm equipment on the basis that it purchased the equipment for lease or rental to its customers.

Petitioner also asserted that it was entitled to a refund of the sales and use taxes paid on the purchase of the alarm equipment supplied to its customers in conjunction with its providing of central station alarm monitoring services, because the equipment was actually transferred to the customers.

The Administrative Law Judge rejected this claim, pointing out that petitioner left or abandoned the alarm equipment at the customer's premises when it was in petitioner's best interests, from a cost efficiency standpoint, to do so. Since the equipment was often technologically obsolete at the expiration of a five-year contract, the cost to petitioner to remove

the equipment usually made it more cost efficient to leave it at the customer's premises. The Administrative Law Judge noted the Division's regulation at 20 NYCRR 534.5(d), which provides:

> No refund or credit is allowable for tax paid on tangible personal property purchased by a person performing a taxable service where such person is the user of the property and such property is not transferred to the purchaser of the service in conjunction with the performance of the service subject to tax. For example, the transfer of such property through abandonment by the user at the site where the service was performed, or the transfer of such property to the purchaser of the service, as a means of disposition of such used property, is not deemed to be a transfer in conjunction with the rendering of a taxable service.

When petitioner had reason to believe that a customer was canceling service with petitioner in order to switch to a competitor, petitioner would remove the alarm equipment to prevent the competitor from using the equipment or gaining knowledge as to the technology used by petitioner. Admittedly, petitioner would reuse the reclaimed alarm equipment for replacement parts; it maintained a "no-value" or "zero-value" inventory account for used equipment kept for spare or replacement parts. Accordingly, the Administrative Law Judge concluded that petitioner is not entitled to a refund of sales and use taxes paid on its purchases of this alarm equipment utilized in the furnishing of central station alarm monitoring services provided to its customers.

ARGUMENTS ON EXCEPTION

Petitioner takes exception to so much of finding of fact "11" of the Administrative Law Judge's determination as states that "ADT . . . has failed to provide additional records or engage in discussions with the auditors" concerning Period II.

Petitioner also takes exception to so much of finding of fact "13" of the Administrative Law Judge's determination as states that "at the end of a standard five-year contract, a customer's

equipment was *often* antiquated and obsolete;" and the language that states, "[i]f the contract was not renewed, petitioner often would opt not to remove the equipment and would, therefore, abandon it if considered to be of little value or if there existed no competitive reason to remove it" (emphasis added).

Petitioner takes exception to Conclusions of Law "A," "B," "E" and "F" of the Administrative Law Judge's determination. Petitioner argues, as it did below:

(i) With regard to Conclusion of Law "A" of the Administrative Law Judge's determination: Petitioner argues that the Division of Tax Appeals has jurisdiction over petitioner's refund claim for Period II, because the Division of Taxation has neither granted nor denied the claim which was filed on June 26, 1996. Petitioner argues that the Division has already audited petitioner's books and records for Period II. Moreover, petitioner states, its refund claim was already filed on July 22, 1998, the effective date of the amendment to Tax Law § 1139(b), which required the granting or denial of an application for refund or credit within six months of receipt thereof. Petitioner argues that since the Division took no action on its refund claim for Period II, the application should be deemed denied under Tax Law § 1139(b), as amended. Petitioner disagrees with the Administrative Law Judge's conclusion that the amendment to Tax Law § 1139(b) cannot be given retroactive application. Petitioner also disagrees with the Administrative Law Judge's conclusion that in order to obtain relief from the requirement that it exhaust its administrative remedies, a party must show "substantial prejudice" to its position by reason of administrative delay which significantly and irreparably handicapped it in mounting a defense in an adversary proceeding. Petitioner urges that ***Matter of Sylcox v. Chassin*** (227 AD2d 834, 642 NYS2d 411), cited by the Administrative Law Judge, is irrelevant, since that case

enunciated a rule for proceedings brought under the State Administrative Procedure Act ("SAPA").

(ii) Petitioner argues that the Administrative Law Judge erred in finding (Conclusion of Law "B") that it is petitioner's recoupment of overhead expenses (including amounts paid as sales and use tax on purchases of equipment used in providing its service) that results in a "tax on tax" situation. Petitioner argues that the double tax occurs because sales and used tax is imposed on its purchase of equipment and again upon the total amount of the services petitioner provided to its customers. Further, petitioner urges that the Administrative Law Judge erred in applying the decision in ***Matter of Helmsley Enters. v. Tax Appeals Tribunal*** (187 AD2d 64, 592 NYS2d 851, ***lv denied*** 81 NY2d 710, 600 NYS2d 197) to the facts here. Petitioner claims that, unlike the facts in ***Helmsley***, its central alarm monitoring service is completely severable from its equipment leasing business and not an incident thereto.

(iii) Petitioner takes exception to Conclusion of Law "E" arguing that the Administrative Law Judge placed undue emphasis on the presence or absence of the terms "lease" or "rental" in petitioner's agreements in determining whether a lease or rental of alarm equipment existed. Petitioner argues that the record establishes that petitioner leased or rented alarm equipment to its customers. Petitioner also disagree with the Administrative Law Judge's statement that "while transfer of possession is clearly an element of a lease or rental, it is merely a factor to consider in making a determination as to whether a lease or rental existed" (Determination, Conclusion of Law "e"). Petitioner also takes exception to the fact that the Administrative Law Judge referred to *Black's Law Dictionary* to define the term "lease." The Administrative Law Judge concluded with respect to central alarm equipment, that petitioner was not reselling or leasing equipment,

but purchasing it to use in providing a service to its customers. Petitioner disagrees. Petitioner maintains that the record shows that its monitoring business and its equipment leasing business were severable. Petitioner argues that when it provided central station alarm monitoring services to customers and alarm equipment to the same customers, it was performing two distinct and separate business activities. The Administrative Law Judge found that the alarm equipment used was inseverable from the central alarm monitoring service petitioner provided to its customers, since the service could not be provided unless petitioner first installed alarm equipment. Petitioner claims this is error. Petitioner also argues that the Administrative Law Judge erred in rejecting its contention that it is entitled to a refund of sales and use taxes paid on the purchase of alarm equipment on the basis that the equipment was purchased for resale (lease) to its central station alarm monitoring customers.

With regard to Conclusion of Law "F" of the Administrative Law Judge's determination, petitioner takes exception to the conclusion that it is not entitled to a refund of sales and use taxes paid on the purchase of alarm equipment, because the equipment was not "actually transferred" to its customers in connection with the provision of central station monitoring services. Further, petitioner argues that ***Matter of Chem-Nuclear Sys.*** (Tax Appeals Tribunal, January 12, 1989) does not control the determination of whether petitioner "actually transferred" alarm equipment to its customers. Petitioner argues that ***Chem-Nuclear*** articulated a test for determining whether property is transferred to a customer pursuant to providing taxable services, and that petitioner met that test. Petitioner urges it is entitled to a refund of sales and use taxes paid on the purchase of alarm equipment to prevent the equipment from being subject to sales tax multiple times.

OPINION

Tangible personal property purchased by a taxpayer and supplied to its customers as a component part of its services to its customers is not purchased for resale within the meaning of Tax Law §1101(b)(4) when the taxpayer, such as petitioner here, retains ownership of the property (***Matter of Albany Calcium Light Co. v. State Tax Commn.***, 44 NY2d 986, 408 NYS2d 333).

Petitioner claims that it leases or rents to its customers the alarm equipment it installs at its customer locations as part of its central station alarm monitoring service. We disagree. Petitioner's contracts that were made part of the record make clear that: a) petitioner retains title; b) there is no separately stated rental charges for equipment lease or rental made known to its customers; and c) petitioner retains, at all times, the right to retrieve or not to retrieve the equipment, at its option. The Administrative Law Judge pointed out that the alarm equipment (the tangible personal property at issue) was placed by petitioner in the custody of its customers, since such equipment on the customer premises was necessary in order to provide petitioner's central alarm monitoring services. Petitioner took exception to this conclusion. However, since petitioner's contracts provide that it is only obligated to monitor equipment which is set forth on its Schedule of Equipment, we find petitioner's exception on this conclusion to be without merit. Based on the record here, petitioner could not provide its central station alarm monitoring service unless it first installed alarm equipment. Petitioner argues that it could provide its service to someone who owns its own equipment. However, all of the contracts that are in evidence provide that the alarm equipment which petitioner monitors is limited to that which it owns.

Petitioner claims that its rental of equipment is completely severable from the monitoring services it provides. We disagree. The alarm equipment used by petitioner to provide its central station alarm monitoring service to its customers is incidental to provision of that service. Therefore, the purchases of alarm equipment by petitioner for use in providing its central alarm monitoring service does not qualify as a purchase for resale and is subject to sales or compensating use tax when purchased by petitioner (Tax Law § 1101[b][4][i]; 20 NYCRR 526.6[c][6]).

We also reject petitioner's argument that the refund claim for Period II was covered by the Division's audit for Period I. We do not find this argument supported by the record. We agree with the Administrative Law Judge that we lack jurisdiction to consider entitlement to refund or credit for Period II because the Division has never denied petitioner's application, in whole or in part. Therefore, so much of the petition as pertains to Period II is dismissed without prejudice.

We affirm the determination of the Administrative Law Judge for the reasons stated therein. After a thorough review of the evidence in the record and the arguments made thereon, we conclude that the Administrative Law Judge has completely and correctly addressed each of the arguments raised by petitioner.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Baker Protective Services, Inc. d/b/a Wells Fargo Alarm Services, Inc is denied;

2. The determination of the Administrative Law Judge is affirmed; and

3. The petition of Baker Protective Services, Inc. d/b/a Wells Fargo Alarm Services, Inc., for a refund of sales and use taxes for the period September 1, 1990 through August 31, 1995 is granted to the extent indicated in Finding of Fact "10" of the Administrative Law Judge's determination, but is otherwise denied.

DATED: Troy, New York
November 1, 2001

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.
Joseph W. Pinto, Jr.
Commissioner