STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
BAKER PROTECTIVE SERVICES, INC. D/B/A WELLS FARGO ALARM SERVICES, INC.	:	DETERMINATION DTA #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 a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1990 through February 29, 1996.

A hearing was held before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on October 20, 1999 at 10:30 A.M., with all briefs to be submitted by April 26, 1999, which date began the six-month period for the issuance of this determination. Petitioner appeared by KPMG LLP (Richard W. Goldstein and Harold F. Soshnick, Esqs., of counsel). The Division of Taxation appeared by Barbara G. Billet, Esq. (Cynthia E. McDonough and James Della Porta, Esqs., of counsel).

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 petitioner is entitled to a refund of sales and use taxes paid on the purchase of alarm equipment in connection with its providing central alarm monitoring services in order to prevent the alarm equipment from being subject to sales tax multiple times.

III. Whether the inclusion of central alarm monitoring services as a taxable service under Tax Law §1105(c)(8), effective June 1, 1990, shifts the imposition of the sales tax on the alarm equipment from petitioner to petitioner's customers as a matter of law.

IV. 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

1. 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. 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 mode of transmission of the alarm signal to the police department or the central monitoring station.

2. Petitioner retains legal title to all of the equipment which it uses in its alarm systems and it has the right to remove that equipment from the customer's premises at the end of a contract. Most of petitioner's contracts with its customers are for a duration of five years.

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.

4. 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 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.

5. 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 or other problem, the alarm 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 and will also contact the customer.

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

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)."

7. 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.

8. 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"). 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 original refund claim along with supporting documentation. The auditors reviewed petitioner's business and accounting procedures and examined audit workpapers, sales and use tax returns, books and ledgers and purchase invoices relating to the equipment for which the claims for refund were made. 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.

9. 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.

10. 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.[1]

11. 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.

12. 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

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[1] 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.

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. 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 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 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.

13. Petitioner at all times retained title to the alarm equipment. 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 (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.

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. If the contract was renewed, the equipment frequently had to be upgraded or replaced. If 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.

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.

14. 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.

15. 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, 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).

SUMMARY OF THE PARTIES' POSITIONS

16. Petitioner maintains:

a. 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 contends that the Division has already audited petitioner's books and records for this period. Moreover, petitioner's refund claim was already filed on July 22, 1998, the effective date of an 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;

b. The inclusion of central alarm monitoring services as a taxable service under Tax Law § 1105(c)(8) shifts the imposition of sales tax on alarm equipment from petitioner to its customers;

c. Petitioner contends 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;

d. Petitioner states that it is entitled to a refund of sales and use taxes paid on the purchase of alarm equipment because the equipment was actually transferred to its customers in connection with the provision of central station monitoring services; and

e. Petitioner 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.

17. In response, the Division asserts the following:

a. No denial, in whole or in part, has been made by the Department. Tax Law § 1139(b), which provides that an application for refund or credit must be granted or denied within six months of receipt, was made effective July 22, 1998 which is well after submission of the refund claims at issue and is, therefore, not applicable in this matter;

b. Petitioner is not entitled to a refund of sales and use taxes on its purchase of the alarm equipment because it is not resold as such, it does not become a physical component part of the property upon which the taxable services are performed and it is not actually transferred to the customer within the meaning of Tax Law § 1101(b)(4)(I);

c. The pass through of sales tax to its customers as a cost of petitioner does not result in double taxation because it is petitioner's choice to include the sales taxes which it paid in the overhead costs passed through to customers. Petitioner pays other taxes such as property, utility and corporate franchise taxes. These taxes are presumably passed on to its customers as well.

CONCLUSIONS OF LAW

A. At the time when petitioner filed its claims for refund (June 20, 1996), Tax Law § 1139 (former [b]) provided:

> If an application for refund or credit is filed with the commissioner of taxation and finance as provided in subdivision (a) of this section, the commissioner of taxation and finance may grant or deny such application in whole or in part and shall notify such applicant by mail accordingly.

Chapter 441 of the Laws of 1998 amended Tax Law § 1139(b), effective July 28, 1998, to provide as follows:

> If an application for refund or credit is filed with the commissioner of taxation and finance as provided in subdivision (a) of this section, the commissioner of taxation and finance shall grant or deny such application in whole or in part *within six months of receipt of the application* in a form which is able to be processed and shall notify such applicant by mail accordingly (emphasis added).

Because the Division has failed to grant or deny petitioner's application for refund of sales and use taxes for Period II despite the fact that such application was filed (as of the date of the hearing) more than three years prior to the hearing, petitioner seeks to have such failure to grant or deny deemed a denial which would then grant jurisdiction to the Division of Tax Appeals to rule on the merits of such claim, since petitioner filed a timely request for a conciliation conference with the Division's Bureau of Conciliation and Mediation Services (***see***, Tax Law §§ 170[3-a][a]; 1139[b]; ***Matter of Roland***, Tax Appeals Tribunal, February 22, 1996).

In response, the Division maintains that due to a failure by the company which purchased petitioner in 1998 to furnish books and records for Period II, it has been unable to complete its audit for this period thereby rendering the Division incapable of making a determination as to whether or not the application should be granted or denied.

While petitioner correctly points out in its reply brief that, based upon correspondence contained in the bill jacket for chapter 441 of the Laws of 1998, the central purpose of the amendment to Tax Law § 1139(b) was to ensure that a taxpayer would have a claim acted upon expeditiously, the effective date of the amendment was July 22, 1998, more than two years after the filing of petitioner's refund claim for Period II.

> As a general rule, statutes are to be construed as prospective in operation only, and they are not to receive a retroactive construction. . . . It is well settled also that a statute will not be given a retroactive construction unless an intention to make it retroactive is to be deduced from its wording, and a law will not receive a retroactive construction unless its language, either expressly or by necessary implication, requires that it be so construed. . . . Accordingly, a statute should not be given a

> retroactive effect when it is capable of any other construction (McKinney's Cons Laws of NY, Book 1, Statutes § 51).

A reading of Tax Law § 1139(b) reveals no indication that the Legislature intended for the amendment to apply retroactively. While, clearly, this petitioner would prefer to litigate both claims for refund at the same time, it has timely filed its claim for Period II and, if not granted by the Division, it 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 or all of the refund is subsequently granted, such refund shall also require the inclusion of interest from the date of payment of the tax (Tax Law § 1139[d]). In order to obtain relief from the requirement that it must exhaust its administrative remedies prior to judicial intervention, a party must establish substantial prejudice by reason of the delay which significantly and irreparably handicapped it in mounting a defense in an adversary administrative proceeding (***Matter of Sylcox v. Chassin***, 642 NYS2d 411, 227 AD2d 834). Petitioner has made no such showing of substantial prejudice. Accordingly, only the refund application for Period I shall be adjudicated herein.

B. Petitioner asserts that it should be entitled to a refund of sales and use taxes paid on the purchase of alarm equipment in connection with its central alarm monitoring services to prevent the equipment from being subject to tax multiple times. It contends that it paid the tax on its purchase 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. In support of its position, petitioner cites to ***Matter of Burger King, Inc. v. State Tax Commn.*** (51 NY2d 614, 623, 435 NYS2d 689) wherein the Court stated that: "[t]his holding also brings that statute within the spirit underlying

our sales tax law, which is to impose the tax only upon the sale to the ultimate consumer, at which time the price paid for the taxable item would presumably be at its highest."

As the Division correctly points out, there are two separate and distinct transactions which are subject to tax in this case. In the first transaction, petitioner pays tax on its purchases of equipment which it uses to provide central station alarm monitoring services. The second transaction is petitioner's furnishing of these central station alarm monitoring services which, by virtue of Tax Law § 1105(c)(8), requires petitioner to collect tax from its customers on the sale of these services and remit the tax to the State. 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. It is 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 results in a "tax on tax" situation.

In ***Matter of Helmsley Enterprises, Inc. v. Tax Appeals Tribunal*** (187 AD2d 64, 592 NYS2d 851), the taxpayer, a hotel operator, included the sales and use taxes which it paid on purchases of guestroom furniture, furnishings and items supplied for use or consumption by guests in its room charges to its guests. That taxpayer made a similar argument that to deny it a purchase-for-resale exclusion would result in unlawful multiple sales taxation on the same items of personal property. The Court, noting that the same multiple taxation would exist in any case where personal property is furnished as an incident to the provision of services, stated that to accept petitioner's argument that this kind of multiple taxation is sufficient to establish eligibility for a sales tax exclusion would have potentially limitless application and must, therefore, be rejected. Petitioner's argument must also be rejected for the same reason.

C. Petitioner contends that the inclusion of central monitoring services as a taxable service under Tax Law § 1105(c)(8), effective June 1, 1990, shifts 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 its purchases of the equipment. In support of this proposition, petition cites to a January 29, 1974 Opinion of Counsel which was rendered prior to the 1990 amendment to the Tax Law and to a decision of the former State Tax Commission, ***Matter of the Petition of Wells Fargo Alarm Services, Div. Of Baker Protective Services, Inc.*** (TSB-H-83[225]S), both of which held that the alarm company is the retail purchaser or consumer of the materials (the alarm equipment) used in a central alarm monitoring business since it was (prior to 1990) providing a nontaxable service. Clearly, at the time that this former State Tax Commission decision and Opinion of Counsel were rendered, both were accurate statements of the law. As they considered the taxability of alarm equipment purchased in connection with providing a central alarm monitoring service which was not then taxable, both were concerned with a potential loophole in taxing this equipment. That is undoubtedly why the alarm company was deemed to be the retail purchaser or consumer of the equipment; because if this was not the case and the company was permitted to purchase the equipment for resale and thereby not pay tax on its purchase of this equipment, it is likely that the State would have collected no tax on this equipment since it was apt to be included in the provision of a nontaxable service.

In addition, the former State Tax Commission, in ***Matter of Wells Fargo Alarm Services, Div. Of Baker Protective Services, Inc. (supra)***, held that with respect to equipment used in the local and direct alarm businesses, since all charges to its customers were subject to tax (as receipts for the use of tangible personal property and as receipts from the sale of services of installing, maintaining, servicing and repairing tangible personal property), the vendor *could*

purchase such equipment as an exempt purchase for resale. "Could" is the important word, however. Petitioner, in its brief in the present matter, seeks to have the conclusion drawn that since central station monitoring is now a taxable service and the equipment can, therefore, no longer escape taxation, its customers should now be considered the end-users of the central alarm equipment just as they have been for direct and local alarm customers. Whether a vendor is purchasing the alarm equipment for resale is dependent upon the facts and circumstances of each transaction. This is true whether the equipment is to be used in local and direct alarm systems or in central station alarm systems. It is, therefore, necessary to determine whether this petitioner's purchases of the central alarm monitoring equipment entitled it to a refund of the sales and use taxes paid on such purchases, i.e., to ascertain whether, as petitioner maintains, the equipment was, in fact, purchased for resale or was actually transferred to its customers in connection with the provision of the central station monitoring services.

D. Tax Law §1105(a) imposes a tax upon every retail sale of tangible personal property unless otherwise excluded, excepted or exempted.

Tax Law §1101(b)(5) defines "sale" as:

> [a]ny transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume . . . conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor.

Tax Law §1101(b)(4)(I) defines "retail sale", in pertinent part, as follows:

> A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property, or (B) for use by that person in performing the services subject to tax under paragraphs . . . (8) of subdivision (c) of section eleven hundred five where the property so sold becomes a physical component part of the property upon which the services are performed or where the property so sold is later transferred to the purchaser of the service in conjunction with the performance of the service subject to tax.

Effective June 1, 1990, chapter 190 of the Laws of 1990 added a new paragraph (8) to Tax Law § 1105(c) which imposed a tax upon the receipts from every sale, except for resale, of:

> Protective and detective services, including, but not limited to, all services provided by or through alarm or protective systems of every nature, including, but not limited to, protection against burglary, theft, fire, water damage or any malfunction of industrial processes or any other malfunction of or damage to property or injury to persons, detective agencies, armored car services and guard, patrol and watchman services of every nature . . . whether or not tangible personal property is transferred in conjunction therewith.

E. Petitioner contends 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. This is in spite of the fact that the agreements entered into between petitioner and its customers did not state that the customers were leasing or renting the equipment (***see***, Finding of Fact "12").

20 NYCRR 526.7(c)(1) provides 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 the transfer of title to the property." This regulation goes on to state that "[w]hether a transaction is a 'sale' or a 'rental, lease or license to use' shall be determined in accordance with the provisions of the agreement." As previously noted, the agreements between petitioner and its customers made no mention of a lease or rental of the alarm equipment. Petitioner's invoices to its customers did not indicate a separate charge for the alarm equipment provided. Petitioner, pointing to 20 NYCRR 526.7(e)(4), attempts to demonstrate that a lease was effectuated because there was a transfer of possession of the equipment. 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. There can be no dispute 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 equipment on the customer's premises.

A "lease" is defined as "[a]ny agreement which gives rise to relationship of landlord and tenant (real property) or lessor and lessee (real or personal) property" (Black's Law Dictionary, 800 [5th ed 1979]). While petitioner provided a Schedule of Protection to its customers which set forth the equipment being provided to the customer, this 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 in petitioner's file and was not furnished to the customer. Therefore, 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 own treatment of its transfer of alarm equipment as a lease for legal and accounting purposes is of little import in this matter.

In its reply brief, petitioner places great importance on the fact that with respect to petitioner's local and direct alarm businesses, the Division has already agreed that petitioner leased alarm equipment to its customers, the result of which was a refund of 57.25 percent of its refund claim for Period I. In the local and direct alarm businesses, however, the only thing which petitioner provided to its customers was the equipment; no monitoring services were furnished by petitioner. The refund was granted by the Division because petitioner was purchasing alarm equipment which was resold or leased to its customers thereby qualifying as a purchase for resale. 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 service to the customer.

In ***Matter of AGL Welding Co., Inc.*** (Tax Appeals Tribunal, April 28, 1994), the Tribunal stated this principle as follows:

> Where a vendor incidentally supplies tangible personal property to its customers as a part of the vendor's rendering of a taxable service, and there is no separate charge for the property, the property is not purchased by the vendor for resale (***Matter of Albany Calcium Light Co. v. State Tax Commn.***, [44 NY2d 986, 408 NYS2d 333]; ***Matter of U-Need-A-Roll Off Corp. v. New York State Tax Commn.***, 67 NY2d 690, 499 NYS2d 921). Moreover, it has been held that to qualify for the resale exclusion, the tangible personal property must be purchased *exclusively* for the purpose of resale (***Matter of Michelli Contr. Corp. v. New York State Tax Commn.***, 109 AD2d 957, 486 NYS2d 448, emphasis added).

With respect to billing methods, i.e., separately charging for the property instead of billing for a single charge which includes both the services and the property provided, the Court in ***Matter of Atlas Linen Supply Company v. Chu*** (149 AD2d 824, 540 NYS2d 347, 349) noted that "[a] petitioner's billing methods can provide substantial evidence to support a determination that a service and not a rental of property is involved." In that case, the Court determined that the provision of linens to that petitioner's customers was purely incidental to its primary or essential business of laundering, stating that "[t]hese operations were 'inseparably connected' to each other and cannot be considered separate transactions for tax purposes." Petitioner maintains that ***Atlas Linen Supply*** is distinguishable from its case because its central station alarm monitoring services are severable from its alarm equipment leasing operations. While it is true that a substantial portion of petitioner's business was the leasing (or sale) of alarm equipment, i.e., the equipment used in local or direct alarm systems, it is also true that petitioner could not provide the central station alarm monitoring service without installing the equipment on the customers' premises and, as such, petitioner is incorrect in its assertion that the services were severable from the providing of the equipment. Accordingly, petitioner's contention that it

is 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 is rejected.

F. In the alternative, petitioner maintains that it is 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. As previously noted (***see***, Conclusion of Law "D"), sales and use taxes are imposed on any retail sale of tangible personal property to any person, for any purpose other than for resale or for use by that person in performing a service subject to tax under Tax Law §1105(c)(8) where the property so sold becomes a physical component part of the property upon which the services are performed or where the property so sold is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax. Tax Law §1105(c)(8) imposes a tax upon protective services such as the central station alarm monitoring service provided by petitioner which is at issue in this matter.

20 NYCRR 526.6(c)(6) provides:

> Tangible personal property purchased for use in performing services which are taxable under section 1105(c)(1), (2), (3), (5), (7) and (8) of the Tax Law is purchased for resale and not subject to tax at the time of purchase, where the property so sold (I) becomes a physical component part of the property upon which the services are performed, or (ii) is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax.

Petitioner does not contend that the alarm equipment became a physical component part of the customer's property; it does, however, allege that the alarm equipment was actually transferred to the customer of the monitoring service and, as such, is not subject to tax. In support of its position, petitioner cites to ***Matter of Chem-Nuclear Systems, Inc.*** (Tax Appeals Tribunal, January 12, 1989).

In that case, the taxpayer ("Chem-Nuclear") was in the business of providing radioactive waste management services which included consulting and waste processing, packaging, transportation and disposal services. Three New York customers contracted with Chem-Nuclear to process and dispose of nuclear waste. As a part of the process, Chem-Nuclear delivered to its customers liners into which it would pump radioactive waste. The liners were then transported by Chem-Nuclear to its disposal site for burial.

These liners were purchased by Chem-Nuclear outside of New York but were used in New York. Chem-Nuclear paid use tax to New York and thereupon petitioned for a refund on the basis that it "actually transferred" the liners to its customers in conjunction with its providing taxable waste management services. While, as petitioner in the present matter correctly notes, the Tribunal held that Chem-Nuclear had actually transferred the liners to its customers, the facts in Chem-Nuclear are distinguishable from the case at issue herein.

In discussing whether the liners were "actually transferred," the Tribunal noted that Chem-Nuclear would ultimately retake physical possession of the liners only because all three of the New York customers elected to have it transport the radioactive waste. Chem-Nuclear's retaking of the liners was only to transport them for disposal. The Tribunal noted that: "[t]he liners were not reused in any manner by petitioner since they were for all practical purposes not reusable after the processing phase." Also of significance to the Tribunal was the fact that the customers retained legal responsibility under State and Federal law for the package of radioactive waste. Clearly, this is where the facts in ***Chem-Nuclear*** differ from the facts of this case. This was noted by the Tribunal in ***Matter of Waste Management of New York, Inc.*** (Tax Appeals Tribunal, March 21, 1991, ***confirmed*** 185 AD2d 479, 585 NYS2d 883) wherein the Tribunal, in contrasting ***Waste Management*** with ***Chem-Nuclear***, stated:

> Operative to our conclusion in that decision [***Chem-Nuclear***] was the fact that once the liners were exposed to radioactive waste and contaminated, the liners were no longer reusable by petitioner. For all practical purposes, the liners were effectively consumed in the processing of the customers' waste. . . . We found the fact of repossession immaterial since the liners were effectively consumed and could not be reused by the taxpayer upon repossession. The transfer in ***Chem-Nuclear*** was the functional equivalent of a permanent transfer. . . . This crucial fact, that the equipment is capable of reuse by the vendor and is not effectively consumed in the performance of the service, requires a conclusion that the equipment was not actually transferred to the customers within the meaning of Tax Law § 1101(b)(4)(I)(B).

In the present matter, 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. 20 NYCRR 534.5(d) 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. Based upon 20 NYCRR 534.5(d) and the decisions of the Tax Appeals Tribunal in ***Matter of Chem-Nuclear Systems, Inc. (supra)*** and

Matter of Waste Management of New York, Inc. (supra), it cannot be found that petitioner transferred the alarm equipment to its customers. Accordingly, 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.

G. 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 extent indicated in Finding of Fact "10"; and except as so granted, is in all other respects denied.

DATED: Troy, New York
October 26, 2000

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE