STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

SITE SAFETY LLC et al.,

Plaintiffs,

-against-

DECISION AND ORDER/JUDGMENT
Index No.: 908673-23

THE NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, and AMANDA HILLER, as Acting New York State Commissioner of Taxation and Finance, in Her Official Capacity,

Defendants.

(Supreme Court, Albany County, All Purpose Term)

(Justice Kimberly A. O'Connor, Presiding)

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O'CONNOR, J.:

Background

On June 2, 2020, the Department of Taxation and Finance ("Department") issued an Advisory Opinion in relation to services provided by the Safety Group, LTD ("Safety Group").[1] The Safety Group asked the Department to determine "whether the services it provides construction sites for its site safety managers, fire safety manager, and emergency watchman services are subject to New York State and local sales and use tax under Articles 28 and 29 of the Tax Law." Upon a consideration of Safety Group's Services, the Advisory Opinion concluded that its services "are within the scope of protective and detective services subject to sales tax under Tax Law § 1105(c)(8)" and clarified that "the limited exception for governmentally mandated inspection services from the sales tax imposed under Tax Law § 1105(c)(3) or (5) does not apply to it."

Thereafter, on September 15, 2023, in light of this Advisory Opinion, Site Safety LLC, City Safety Compliance Corp., Safety and Quality Plus, Inc., AP Tristate-Safety, Corp., Menotti Enterprise, LLC, The Casa Group, Inc., Nova Safety Associates, LLC, Construction Realty Safety Group Inc., NextWave Safety Consulting LLC, Safety Dynamics, LLC, and NYC Façade Safety Corp. commenced this action against the Department, seeking a declaration that Tax Law § 1105(c)(8) does not apply to governmentally mandated Site Safety Manager ("SSM") and Site Safety Coordinator ("SSC") services (collectively "Site Safety Services") provided by plaintiffs. Defendants moved for an order, pursuant to CPLR 3211(a)(2) and CPLR 3211(a)(7), dismissing the complaint for lack of subject matter jurisdiction and failure to state a cause of action, and plaintiffs cross-moved for summary judgment. By Decision and Order, the Court (O'Connor, J.),

[1] The Safety Group is not a party in this action.

the Court granted defendants' motion to dismiss the Complaint and denied plaintiffs' cross-motion for summary judgment as premature.

Plaintiffs appealed the Court's Decision and Order. Pending appeal, plaintiff Dunn Co. Safety LLC voluntarily discontinued its claims. On April 17, 2025, the Appellate Division, Third Department modified the Court's Decision and Order, reversing the dismissal of the claims alleged by plaintiffs Safety and Quality Plus, Inc., AP Tristate-Safety Corp., Menotti Enterprise, LLC, and The Casa Group, Inc. ("plaintiffs"). The Third Department affirmed the Court's dismissal of plaintiffs' cross-motion for summary judgment as prematurely filed prior to joinder of issue, and remitted the matter to allow defendants to file an Answer. On May 5, 2025, defendants filed an Answer and moved for summary judgment pursuant to CPLR 3212 and 3001, seeking to obtain a declaratory judgment stating that Site Safety Services are taxable under Tax Law § 1105(c)(8). Plaintiffs cross-moved for summary judgment pursuant to CPLR 3212 and 3001, seeking a declaratory judgment that Section of 1105(c)(8) of the Tax Law is wholly inapplicable to plaintiffs' Site Safety Services. Defendants opposed and plaintiffs replied in further support of their cross-motion.

Analysis

As the Third Department noted in its Memorandum and Order, there are no factual issues presented in this matter. Insofar as both parties move for summary judgment for a declaratory order, the question presented to the Court is a pure question of law: Do Site Safety Services, as defined by the New York City Building Code, qualify as "protective or detective" services subject to taxation under Tax Law § 1105(c)(8)? The "protective and detective services" which are subject to taxation under Tax Law § 1105(c)(8) are broadly defined to include the following:

> [A]ll 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 security services of every nature other than the performance of such services by a security officer licensed by the New York Waterfront Commission or the waterfront commission of New York harbor, whether or not tangible personal property is transferred in conjunction therewith.

I. The New York City Building Code

The New York City Building Code is enumerated in Title 28, Chapter 7 of the Administrative Code of the City of New York ("Building Code"). The Building Code provides that "[n]o permit shall be issued for the type of work listed in Section 3310.1 until a site safety plan that meets the requirements of Article 110 of Chapter 1 of Title 28 of the Administrative Code has been approved by the department" (Building Code § 3310.3). If a project requires a Site Safety plan, the general contractor is directed to "enact and maintain a site safety monitoring program to implement such site safety plan" which complies with Building Code Sections 3310.5 through 3310.10 (§ 3310.4). Section 3310.5 of the Building Code requires that a SSM or SSC be assigned to any site which requires a Site Safety plan. For the construction or alteration of a building, the SSM or SSC must "be present at the site during all times while active work is occurring and through all phases of work, beginning with excavation and continuing until the building is enclosed and the sidewalk shed removed" (Building Code § 3310.5.2). Similarly, for the demolition of a building, the SSM or SSC must be present at the site at all times "while active work is occurring and through all phases of work, beginning with the removal of any glass, asbestos, or facade and, for a full demolition, continuing until the site has been backfilled to grade, or for a partial demolition until the building is enclosed and the sidewalk shed removed" (Building Code § 3310.5.2).

The SSM and SSC are required to perform the following duties:

> [M]onitor compliance with the site safety plan, the tenant or occupant protection plan, and the requirements of this chapter and any rules promulgated thereunder by performing the duties required by Sections 3310.8.1 through 3310.8.5 and by performing all other safety duties assigned by the owner or general contractor to meet legal requirements (Building Code § 3310.8).

II. Defendants' Contentions

In support of their motion for summary judgment which seeks declaratory judgment in the affirmative, defendants submitted an Attorney Affirmation, the Third Department's Memorandum and Order, two Advisory Opinions issued by the Department, a Statement of Material Facts, and a Memorandum of Law. Upon review of the aforementioned services subject to taxation, defendants maintain that Site Safety Services qualify as a taxable protective service. Defendants argue that the Building Code provides that SSMs and SSCs have a duty to patrol, a duty to alert others of hazards, and a duty to act to remedy that hazard. Citing to the Building Code, defendants maintain that SSMs and SSCs have a duty to protect against water damage, fire, damage to property, and injury to persons – all hazards which are expressly stated in Tax Law § 1105(c)(8) (citing Building Code §§ 3303.14.2, 3304.1.2, 3316.7.6).

Defendants reject plaintiffs' argument that SSMs and SSCs lack the legal authority to prevent hazards, and emphasize that the language set forth in Tax Law § 1105(c)(8) does not limit the application of taxation to protective services only to those who have the "legal authority" to prevent hazards. Similarly, defendants argue that plaintiffs incorrectly allege that Tax Law § 1105(c)(8) excludes all licensed professionals providing services. Looking to the language of Tax Law § 1105(c)(8), defendants state that "protective services include, but are 'not limited to, all services provided' by 'alarm and protective systems of every nature' and 'patrol and security services of every nature' " (NYSCEF Doc. No. 50, quoting Tax Law § 1105[c][8]).

Defendants maintain that the Third Department's holding in *Compass Adjusters & Investigators v. Comm'r of Taxation & Fin.*, 197 A.D.2d 38 (3d Dept. 1994) (hereinafter "*Compass Adjusters*") does not support the conclusion that Tax Law § 1105(c)(8) only applies to licensed security services. Defendants argue that in this matter, the Third Department analyzed separate statutory language within Tax Law § 1105(c)(8), to determine whether the terms "detective services" and "detective agency" includes a person who is licensed as an independent insurance adjuster. Defendants emphasize that in holding that insurance adjusters licensed under the Insurance Law are not subject to sales tax under Tax Law § 1105(c)(8), the Third Department did not state that the applicability of Tax Law § 1105(c)(8) was limited to activities that require licensure or registration under the General Business Law ("GBL").

Defendants further argue that despite plaintiff's assertion to the contrary, the Third Department has consistently held that "services that New York City Law requires to be provided at construction sites, i.e., 'governmentally mandated' services, can be taxable pursuant to Tax Law § 1105(c)(8)" (NYSCEF Doc. No. 50, citing *Matter of Evergreene Gardens, LLC v. Tax Appeals Trib. of the State of N.Y.*, 208 A.D.3d 1515, 1516 [3d Dep't 2022]; *Matter of Robert Bruce McLane Assoc. v. Urbach*, 232 A.D.2d 826, 827 [3d Dep't 1996]). Defendants maintain that Site Safety Services are distinguishable from the receptionist services which were found to be non-taxable by the Tax Appeals Tribunal ("Tribunal") in *Matter of AlliedBarton Sec. Servs. LLC*, 2016 WL 796625 (Tax Appeals Trib. Feb. 16, 2016) (hereinafter "*AlliedBarton*"). Defendants allege that "[u]nlike a receptionist who stays seated in a building lobby and primarily facilitates communications and the comings and goings of visitors, site safety managers and coordinators conduct regular patrols of the work site and proactively look for safety hazards or non-compliance with applicable codes" (NYSCEF Doc. No. 50, citing Building Code §§ 3310.8.3.1, 3310.8.3.2).

In support of their motion for summary judgment, defendants annexed copies of two Advisory Opinions from the Department. The first Advisory Opinion, dated July 17, 2025, analyzed whether receipts from the sale of services from the installation, inspection, maintenance or repair of fire alarm systems, kitchen fire suppression systems, gas station fire suppression systems, fire sprinklers and fire extinguishers are exempt from New York State and local sales and use tax. The advisory opinion states, in part, that "[t]he services of maintenance and repair of fire equipment are subject to tax because these services keep the equipment in a condition of fitness, efficiency, readiness or safety" (NYSCEF Doc. No. 47). The Department furthered that although inspections that are government-mandated are not subject to sales tax, inspections that are not government-mandated…are subject to tax under Tax Law § 1105(c).

The second Advisory Opinion, dated June 2, 2020, asked the Department to determine whether receipts from annual inspections of backflow prevention services are subject to New York State and local sales and use tax. In reaching its determination, the Department defined maintenance, service, and repair duties in the following manner:

> New York State and local sales taxes are imposed on receipts from the service of installing tangible personal property, and the services of maintaining, servicing or repairing tangible personal property and real property. See Tax Law § 1105(c)(3), (5); TSB-A-13(39)S. The terms "maintaining, servicing and repairing" include "all activities that relate to keeping property in a condition of fitness, efficiency, readiness or safety, or restoring it to such condition." 20 NYCRR 527.5 (a)(3), 527.7(a)(1). A diagnostic service that tests the function of a piece of equipment is generally considered a taxable maintenance service, even if no repair is performed. 20 NYCRR 527.5(a)(3)….However, inspections that are government mandated and are performed solely for code compliance and are not related to or performed in conjunction with installing, repairing, maintaining or servicing tangible personal property or real property are not subject to sales tax. See TSB-A-17(14)S; TSB-A-05(11)S; TSB-A-96(67)S.

III. Plaintiff's Opposition and Cross-Motion

In opposition to defendants' motion for summary judgment and in support of plaintiffs' cross-motion for summary judgment, plaintiffs maintain that Tax Law § 1105(c)(8) does not apply to Site Safety Services. Citing to Tax Law §§ 1101(b), plaintiffs emphasize that "sales of services provided within New York State are not subject to sales and use tax unless the services are specifically enumerated as taxable" (NYSCEF Doc. No. 57). Plaintiffs argue that defendants provide an attempt to apply an incorrect standard of review in arguing that as a general matter, "tax statutes should be construed to insure the collection of all designated taxes where a supportable theory can be found" (NYSCEF Doc. No. 50). Plaintiffs maintain that this standard should only be applied where a case involves issues of tax *collection*. Plaintiffs argue that in this matter, the issue is focused upon whether the provisions of Tax Law § 1105(c)(8) *impose* a sales and use tax on Site Safety Services. Plaintiffs state that as a statute imposing a tax, the interpretation of Tax Law § 1105(c)(8) should not go "beyond the clear import of the language of the statute" (NYSCEF Doc. No. 57).

Plaintiffs note that Advisory Opinions and Tax Tribunal Decisions are separate and distinct categories of New York State tax rulings. Plaintiffs state that Advisory Opinions are nonprecedential and nonbinding opinions which represent the views of the Commissioner of Taxation and Finance, whereas a Tax Tribunal Decision is a binding decision on both taxpayers and the "Department unless 'the petitioner or the commissioner, or both, petitions for judicial review' " (NYSCEF Doc. No. 57, quoting Tax Law § 2016). Plaintiffs argue that because there is no Tax Tribunal Decision under review in this case, any judicial decisions cited by defendants do not impact the appropriate standard of review in this case, which plaintiffs maintain is one of initial statutory interpretation.

Turning to the interpretation of "protective and detective services" as taxed under Tax Law § 1105(c)(8), plaintiffs allege that both the Third Department and the Tribunal have equated the terms of Tax Law § 1105(c)(8) with terms found in the GBL. Plaintiffs state that in *Compass Adjusters*, the Third Department recognized that "the Tax Law contains no definition of" the services taxed under Tax Law § 1105(c)(8), and equated the terms of Tax Law § 1105(c)(8) with similar terms found under the GBL. While plaintiffs recognize that the Third Department examined different terms within Tax Law § 1105(c)(8), plaintiffs maintain that the question presented in *Compass Adjusters* "is a parallel inquiry to the question presented here" (NYSCEF Doc. No. 57). Comparing the two issues presented, plaintiffs state that the question presented in *Compass Adjusters* was "whether the terms 'detective services' and 'detective agency' under Tax Law § 1105(c)(8) include a person who is licensed as an independent adjuster for insurance companies under the Insurance Law" whereas in this proceeding, the question is whether "the term 'protective…services' under Tax Law § 1105(c)(8) includes a person who is licensed as a Site Safety Service provider under the Building Code" (NYSCEF Doc. No. 57).

Plaintiffs argue that as was found by the Third Department in *Compass Adjusters*, Site Safety Service providers are licensed individuals who perform licensed services which fall outside the scope of Tax Law § 1105(c)(8). Plaintiffs emphasize that following this holding by the Third Department, the Tribunal also equated the terms of Tax Law § 1105(c)(8) with those found in the GBL (citing *Allied Barton*, 2016 WL 796625 at *10). Plaintiffs argue that in *AlliedBarton*, the Tribunal held that it was "appropriate to equate the term protective services to the definition of 'Watch, guard or patrol agency' " as set forth in GBL § 71(2), and further found that while "not an exclusive list, a review of the list of types of services set forth in Tax Law § 1105(c)(8) indicates that the statute is intended to encompass those services that resemble those provided by [licensed]

security officers" (NYSCEF Doc. No. 57, quoting *AlliedBarton*, 2016 WL 796625, at *10). Plaintiffs argue that that like the receptionist services at issue in *AlliedBarton*, Site Safety Services do not resemble services provided by licensed security officers. Plaintiffs argue that neither services required direct handling nor engaging in protective activities, and note that in *AlliedBarton*, if a security issue arose, the service provider was directed to "contact a security officer who would handle the issue" (*id.*), whereas for Site Safety Service providers, if a safety issue arose at a New York City building site, the provider was directed to notify individuals who are authorized to "order the necessary corrective action" (NSYCEF Doc. No. 57, citing Building Code § 3310.8.2).

Plaintiffs next argue that it would be statutorily redundant to tax Site Safety Services for protective services when the Tax Department already taxes protective services performed by "a competent watchperson" assigned to the site (Building Code § 3303.3; *see Matter of Evergreene Gardens, LLC*, DTA 828403, 2021 WL 1619368 (NY Tax App Trib., Mar. 1, 2021), *confirming order sub nom. Evergreene Gardens, LLC v. Tax Appeals Tribunal*, 208 A.D.3d 1515 [3d Dep't 2022]; *Matter of 608 Franklin, LLC*, DTA 828452, 2021 WL 1619394 (NY Tax App Trib., Mar. 1, 2021), *confirming order sub nom. 608 Franklin, LLC v. Tax Appeals Tribunal*, 208 A.D.3d 1516 [3d Dep't 2022]). Plaintiffs state that pursuant to Building Code § 3303.3, all watchpersons are required to "be familiar with emergency notifications procedures to the Fire Department,…possess a valid security guard registration with the State of New York, [and]…hold a valid watchperson certificate from the Fire Department" (Building Code § 3303.3). Plaintiffs argue that the Building Code does not require Site Safety Service providers to obtain licensing because Site Safety Services do not constitute protective services.

Plaintiffs emphasize that the Building Code does not mandate that Site Safety Service providers act as watch, guard or patrol agents, and do not perform protective services provided by licensed security officers. Plaintiffs argue that in light of the precedent set forth by the Third Department and the Tribunal, Site Safety Services are beyond the taxability of Tax Law § 1105(c)(8). Plaintiffs state that insofar as the primary duty of Site Safety Service providers is to "monitor compliance" with the Building Code, Site Safety Service providers perform their duties in an advisory capacity only. Citing to Building Code § 3310.8.1-3310.8.5, plaintiffs state that to fulfill their duty to monitor compliance with the Building Code, Site Safety Service providers are directed to "consult with contractors and other building personnel and observe certain construction and demolition activities occurring at New York City building sites" (NYSCEF Doc. No. 57). Plaintiffs note that when a providers observes a Building Code violation, they are merely required to report the condition and violation in a daily log and notify the Department of the conditions (*see* Building Code § 3310.8.2); they are not required to relieve contractors, stop work, issue violations, or order any corrective action. Plaintiffs argue that the notifications made by Site Safety Service providers do not differ from the remedies available to a citizen who observes a safety violation at a New York City building site. Looking to other duties imposed by the Building Code, plaintiffs argue that the Building Code requires "construction superintendents" to "take all appropriate *action to correct* [an] unsafe work or condition, including . . .ordering the person or persons to correct the unsafe work or condition, to cease operations, or to leave the job site" (NYSCEF Doc. No. 57, quoting Building Code § 3301.13.9) (emphasis added). Plaintiffs state that in contrast, Site Safety Service providers are not required to take any action to correct unsafe conditions, nor are they required to order the correction of unsafe conditions.

Plaintiffs further argue that the Appellate Division, First Department has issued nontax judicial rulings which support plaintiffs' representation that Site Safety Service providers operate in an advisory capacity only. Plaintiffs state that in *Dejesus v. Downtown Re Holdings LLC*, the First Department held that a Site Safety Service provider was entitled to dismissal of contract and indemnification claims against it because the provider's "failure to identify and correct the unsafe work condition" did not constitute negligence (217 A.D.3d 524, 525-526 [1st Dep't 2023]). Plaintiff argues that the Court granted dismissal in this matter because the provider's role on the project was solely in an "advisory capacity" and the provider "had no authority to supervise the contactors[,]...control or stop the work...[or] correct work hazards" (*id.* at 526-527). Plaintiffs state that in *Velez v. LSG 105 West 28th, LLC*, the First Department similarly held that the Site Safety Service provider's alleged "failure to correct any unsafe work does not constitute negligence because it did not have the authority to control or stop the work, and it did not exercise any supervisory control over plaintiff's work" (236 A.D.3d 617, 618 [1st Dep't 2025]).

Plaintiffs reject defendants' contention that Site Safety Service providers' duty to protect against water damage, fire, damage to property, and injury to persons is taxable under Tax Law § 1105(c)(8). Plaintiffs argue that those protective services enumerated in Tax Law § 1105(c)(8) only refer to services "provided by or through alarm or protective *systems*[,]" and Site Safety Services are not provided by or through any type of alarm or protective system. Plaintiff interprets an alarm system to mean an "alarm device" which plaintiffs maintains is consistent with the legislative history of Tax Law § 1105(c)(8). Plaintiffs state that prior to the enactment of Tax Law § 1105(c)(8), former Tax Law § 1212-A(f)(1) imposed a New York City sales tax on protective services, including "protective devices such as alarm devices" (Senate Debate Transcripts, Legislative History, L. 1975, ch. 397) (emphasis added). Plaintiffs further note that New York

Administrative Code § 527.2(d)(4), which identified the sales and use tax impose on the sale of utility and similar services, identifies an "alarm system" as a system that "transmits signals telegraphically" (20 NYCRR 527.2[d][4]).

Plaintiffs then state that even if Site Safety Services were otherwise taxable, the Department does not have a rational basis for imposing tax on government mandated Site Safety Services while excluding other government mandated services from tax obligations. Plaintiffs argue that the Department has inconsistently enforced Tax Law § 1105(c)(8) in its Advisory Opinions. Plaintiffs note that while the Advisory Opinion issued on June 2, 2020 (TSB-A-20(14)S) stated that the Department's existing "exception for governmentally mandated inspection services from the sales tax imposed under Tax Law § 1105(c)(3) or (5) does not apply" to Tax Law § 1105(c)(8), the Department also separately stated in an Advisory Opinion (TSB-A-20[12]S) that "inspections that are government mandated and are performed solely for code compliance and are not related to or performed in conjunction with installing, repairing, maintaining or servicing tangible personal property or real property are not subject to sales tax." Plaintiffs state that although the nontaxable government mandated inspection services identified in TSB-A-20(12)S and Site Safety Services are both government mandated services performed for code compliance, the Department irrationally refused to extend the same exception from tax to Site Safety Services. Plaintiff stresses that the Department's unequal enforcement of Tax Law § 1105(c)(8) further supports a Court declaration that Tax Law § 1105(c)(8) does not apply to Site Safety Services.

IV. Defendants' Opposition to Plaintiffs' Cross-Motion

Defendants argue that plaintiffs misstate that the Department is not entitled to deference on its interpretation of Tax Law § 1105(c)(8). Defendants allege that even where the question at issue is one of pure statutory interpretation, an administering agency's interpretation of its

associated statutes is entitled to some deference. Defendants clarify that an agency is only afforded no deference where the agency's "interpretation or regulation is 'at variance with the clear wording of the statutory provision' " (NYSCEF Doc. No. 58, quoting *Matter of New York Life Ins. Co. v. State Tax Commn.*, 80 A.D.2d 675, 676 [3d Dep't 1981]) (hereinafter "*Matter of New York Life*"). Defendants maintain that the plain language of Tax Law § 1105(c)(8) supports the Department's interpretation that Tax Law § 1105(c)(8) applies to Site Safety Services. While recognizing that Advisory Opinions are persuasive, non-binding authority, defendants argue that the two Advisory Opinions cited by plaintiffs (*see* TSB-A-09[4]S; TSB-A-11[11]S) relate to the taxation of detective services, not the taxation of protective services. Defendants similarly allege that the Court's holding in *Compass Adjusters* is distinguishable, because the Third Department discussed the taxation of detective services, not protective services.

Defendants then argue that plaintiffs use *AlliedBarton* to impermissibly limit the application of Tax Law § 1105(c)(8) to protective services provided by security officers, licensed or otherwise. Defendants assert that when interpreting *AlliedBarton*, plaintiffs conflate the services at issue by characterizing them as security receptionist services when the employees at issue performed typical receptionist services. Defendants reject plaintiffs' contention that the presence of other taxable service providers forecloses or limits the application of Tax Law § 1105(c)(8) to Site Safety Services, as "[r]edundancy has no relevant to the applicability of Tax Law § 1105(c)(8)" (NYSCEF Doc. No. 58). Turning to plaintiffs' characterization of Site Safety Services as "advisory," defendants argue that there is "no requirement that protective or detective services have some minimum level of affirmative, corrective action required in the face of a perceived hazard" (NYSCEF Doc. No. 58). Defendants further argue that the First Department cases cited by plaintiffs do not sustain their assertion that "there is nothing inherently protective in

nature about the duties imposed on Site Safety Service providers under the Building Code[,]" as it would be irrational to assert that services which ensure "the safety of persons and property by means of patrol, inspection, compliance, and correction" are not protective in nature (NYSCEF Doc. No. 58, citing *Velez v. LSG 105 West 28th, LLC*, 236 A.D.3d at 617; *Dejesus v. Downtown Re Holdings LLC*, 217 A.D.3d at 524).

Defendants next reject plaintiff's argument that Site Safety Services are not subject to Tax Law § 1105(c)(8) because they are not "protective systems," emphasizing that the language of Tax Law § 1105(c)(8) broadly stated "including, but not limited to…protective systems of every nature." Defendants state that plaintiff's comparison of Tax Law § 1105(c)(8) to a prior New York City tax statute is not sufficient to overrule the broad language set forth in Tax Law § 1105(c)(8), and highlight that tax law is expected to evolve over time "in the face of 'shifts in understandings of economic realities,' and 'new wisdom born of experience' " (NYSCEF Doc. No. 58, quoting *Nat'l Elevator Indus., Inc. v. N.Y. State Tax Com.*, 49 N.Y.2d 538, 548 [1980]). Defendants reject plaintiffs' comparison of the Departments' Advisory Opinions, stating that it is inappropriate for plaintiffs to use highly fact-specific tax audit outcomes to expand this action for declaratory judgment beyond a pure question of law.

V. Plaintiffs' Reply

Plaintiffs maintain that the Third Department has clearly stated that where an agency interprets a statute through an Advisory Opinion, " '**no deference** to defendant's interpretation of the statute is required' " by the Court (NYSCEF Doc. No. 61, quoting *Compass Adjusters*, 197 A.D.2d at 42) (emphasis added). Plaintiffs state that *Matter of New York Life* does not support defendant's claim that the Court should offer some deference to the Department's interpretation of Tax Law § 1105(c)(8) because that matter involved a CPLR Article 78 review of a prior agency

determination of the State Tax Commission, the administrative body which came before the New York State Tribunal, whereas here, there is no agency determination under review. Plaintiffs maintain that "[t]he legal interpretation of any statue [sic] is '[u]ltimately … the court's responsibility; it cannot be delegated to the agency charged with the statute's enforcement' " (NYSCEF Doc. No. 61, quoting *Matter of Moran Towing & Transp. Co. v. New York State Tax Commn*, 72 N.Y.2d 166, 173 [1988]).

Plaintiffs contend that the Department's inconsistent application of Tax Law § 1105(c)(8) is, at the very least, relevant for purposes of interpreting the statute. Plaintiffs note that in *Matter of New York Life*, the Court noted that the State Tax Commission's "prior inconsistent application of the statute 'demonstrates vacillation, inconsistency and obvious doubt concerning the respondent's own interpretation' " (NYSCEF Doc. No. 61, quoting 80 A.D.2d at 676). Plaintiffs argue that the Department's inconsistent application of Tax Law § 1105(c)(8) signals the same doubt surrounding the Department's interpretation of Tax Law § 1105(c)(8). Plaintiffs emphasize that Tax Law § 1105(c)(8) must be strictly construed in favor of plaintiffs as taxpayers, without any deference to the Department's interpretation of the statute. Plaintiffs argue that defendants' interpretation of *Compass Adjusters* and *AlliedBarton* is unreasonably narrow, as both decisions address and interpret Tax Law § 1105(c)(8). Plaintiffs state that defendant's interpretation of the receptionist in *AlliedBarton* as "typical receptionists" is inaccurate, as "the Tax Appeals Tribunal regularly and explicitly describes the services of those receptionist employees as a 'hybrid' of general receptionist services and services that are more akin to protective or detective services—i.e., security receptionist services" (NYSCEF Doc. No. 61).

VI. Standard of Review

A party moving for summary judgment must establish "the cause of action or defense . . . sufficiently to warrant the court as a matter of law in directing judgment" in the moving party's favor (CPLR 3212[b]). Thus, "[o]n a motion for summary judgment, the movant has the initial burden to establish its prima facie entitlement to summary judgment as a matter of law by submitting evidentiary proof in admissible form, demonstrating the absence of any material issues of fact" (*Durr v. Capital Dist. Transportation Auth.*, 198 A.D.3d 1238, 1239 [3d Dep't 2021] [internal quotation marks and citations omitted]; *see Matter of New York City Asbestos Litig. v. Chevron Corp.*, 33 N.Y.3d 20, 25-26 [2019]; *Xiang Fu He v. Troon Mgt., Inc.*, 34 N.Y.3d 167, 175 [2019]; *Deleon v. New York City Sanitation Dep't*, 25 N.Y.3d 1102, 1106 [2015]; *see also* CPLR 3212[b]).

Where no issues of fact exist and the Court is "presented with a question of statutory interpretation, [the Court's] primary consideration is to ascertain and give effect to the intention of the Legislature" (*Town of Aurora v. Village of E. Aurora*, 32 N.Y.3d 366, 372 [2018] [internal quotation marks and citations omitted]). When the interpretation of a statute "involves the specialized competence or expertise the agency has developed in administering the statute[,]" "deference is accorded to the agency's interpretation of the statute" (*Wang v. James*, 40 N.Y.3d 497, 501-502 [2023]). However, "where the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency…and the judiciary need not accord any deference to the agency's determination" (*id.* at 502 [internal quotation marks, brackets and citations omitted]; *see International Union of Painters & Allied Trades, Dist. Council No. 4 v. New York State Dept. of Labor*, 32 N.Y.3d 198, 209 [2018]; *Compass Adjusters*, 197 A.D.2d at 42).

The Court of Appeals has noted that in general, "ambiguities in tax statutes should 'be construed in favor of the taxpayer and against the taxing authority' " (*Walt Disney Co. v. Tax Appeals Trib.*, 42 N.Y.3d 538, 549 [2024], quoting *Quotron Sys. v. Gallman*, 39 N.Y.2d 428, 431 [1976]). This " 'principle is, however, applicable only in determining whether property, income, a transaction, or event is subject to taxation' " (*Matter of Wegmans Food Mkts., Inc. v. Tax Appeals Trib. of the State of N.Y.*, 33 N.Y.3d 587, 592 [2019], quoting *Matter of Grace v. New York State Tax Commn.*, 37 N.Y.2d 193, 196 [1975]). When "it is undisputed that the taxpayer's income is subject to the taxing statute, but he claims an exemption from taxation" (*Matter of Grace v. New York State Tax Commn.*, 37 NY2d at 196), "the presumption is in favor of the taxing power" (*Matter of Wegmans Food Mkts., Inc. v. Tax Appeals Trib. of the State of N.Y.*, 33 N.Y.3d at 592 [internal quotation marks and citations omitted]).

In the absence of a statutory definition, the Court must "construe words of ordinary import with their usual and commonly understood meaning, and in that connection have regarded dictionary definitions as useful guideposts in determining the meaning of a word or phrase" (*Matter of Walsh v. New York State Comptroller*, 34 NY3d 520, 524 [2019] [internal quotation marks and citations omitted]). " 'The failure of the Legislature to include a matter within a particular statute is an indication that its exclusion was intended' " (*Matter of Sweeney v. Dennison*, 52 A.D.3d 882, 883 [3d Dep't 2008], quoting *People v. Tychanski*, 78 N.Y.2d 909, 911 [1991] [further citations omitted]; *see Matter of Diegelman v. City of Buffalo*, 28 N.Y.3d 231, 237 [2016]; McKinney's Cons. Laws of N.Y., Book 1, Statutes § 74). That being said, "a statute must be construed as a whole and that its various sections must be considered together and with reference to each other" (*Town of Aurora v. Village of E. Aurora*, 32 N.Y.3d at 372 [internal quotation marks, ellipsis, and citations omitted]).

VII. Application

Guided by the Court's analysis in *Compass Adjusters*, the Court finds that it is not required to give deference to the Department's interpretation of Tax Law § 1105(c)(8), as the question at issue is one of pure statutory reading and analysis (*see Compass Adjusters*, 197 AD2d at 42; *see Matter of New York Life Ins. Co. v. State Tax Commn.*, 80 A.D.2d 675, 676 [3d Dep't 1981], *affd sub nom. Matter of Metro. Life Ins. Co. v. State Tax Commn. of State*, 55 N.Y.2d 758 [1981]). Article 28 of the Tax Law contains no definition of detective or protective services. In support of the Complaint, plaintiffs annexed a copy of an "Important Notice," N-90-20, which was released by the Department with the enactment of Tax Law § 1105(c)(8). This notice stated that the protective and detective services subject to New York State and local sales and use tax "include but are not limited to…[a]ll types of protective services, including…Private Investigator Services" and "Watchmen and Patrol Services" (NYSCEF Doc. No. 4). In *Compass Adjusters*, the Third Department equated the terms "detective services or detective agency" to the broad definition of "Private Investigator" set forth in GBL § 71(1). Similarly, in *AlliedBarton*, the Tribunal equated the term "protective services" to the definition of "[w]atch, guard or patrol agency" set forth in GBL § 71(2), which includes the following:

> [T]he business of watch, guard or patrol agency and shall also mean and include, separately or collectively, the furnishing, for hire or reward, of watchmen or guards or private patrolmen or other persons to protect persons or property or to prevent the theft or the unlawful taking of goods, wares and merchandise, or to prevent the misappropriation or concealment of goods, wares or merchandise, money, bonds, stocks, choses in action, notes or other valuable documents, papers, and articles of value, or to procure the return thereof or the performing of the service of such guard or other person for any of said purposes.

In *Compass Adjusters*, the Third Department was asked to determine whether plaintiffs' services were subject to the sales and use tax imposed by Tax Law § 1105(c)(8). Plaintiffs were licensed as both independent adjusters pursuant to Insurance Law Article 21 and private investigators

pursuant to GBL Article 7. The Third Department clarified that because GBL § 71(1) expressly excludes independent adjusters from the definition of "private investigator" and plaintiffs had two separate licensures, the taxability of their services was based upon the nature of the activity performed. The Third Department held that private investigators who perform activities which require licensure under GBL Article 7 are subject to sales tax under Tax Law § 1105(c)(8) (*see Compass Adjusters*, 197 A.D.2d at 42). The Court agrees with defendants that this holding did not simply limit the applicability of Tax Law § 1105(c)(8) to services which required licensure under GBL Article 7. Rather, because independent adjusters were expressly excluded from the general definition of "private investigator"—a term which the Third Department used to define "detective services"—the Third Department held that services which required the licensure of an independent adjuster were not considered to be "detective services" within the meaning of Tax Law § 1105(c)(8). On this basis, the Court finds that the scope of Tax Law § 1105(c)(8) was not intended to be limited to services which require licensure under GBL Article 7, and declines to interpret the scope on the basis of GBL licensure alone.

In both *Compass Adjusters* and *AlliedBarton*, the taxability of the service at issue hinged upon the nature of the duties performed by the service provider, not solely upon the type of licensure required or not required. As Site Safety Service providers, a SSM or SSC who discovers a violation of Chapter 33 the Building Code or any rules promulgated thereunder must "immediately notify the person or persons responsible for creating the violation, whether these persons are employed by the general contractor or by subcontractors" (Building Code § 3310.8.2). If the SSM or SSC is not able to obtain the cooperation of the identified persons responsible for creating the violation, the SSM or SSC has a duty to notify "the direct supervisor of the person or company responsible for creating the violation and request that the supervisor order the necessary

corrective action" (Building Code § 3310.8.2). If the supervisor is not present or available, the SSM or SSC must notify the construction superintendent, or if there is no construction superintendent, any other supervisory personnel, manager, or officer of the permit holder (Building Code § 3310.8.2).

Pursuant to Building Code § 3310.8.2.1, if the SSM or SSC discovers any of the following seventeen conditions, he or she has a duty to immediately notify the Department:

> 1. A person is operating a crane, derrick, or hoisting equipment on the site without a permit and refuses to desist from operating the equipment;
> 2. A crane is being operated by an unlicensed operator and such unlicensed operator refuses to desist from operating the crane;
> 3. No flagperson is present during crane operation where required by this chapter;
> 4. Sidewalk sheds required by the site safety plan are not in place during construction or demolition activity;
> 5. Permits have not been issued for the sidewalk sheds;
> 6. The designer and/or supplier of sidewalk sheds has not certified that the sheds have been erected in accordance with the approved drawings;
> 7. Any incident has occurred;
> 8. Required standpipe is not in place at each story below the construction or demolition floor;
> 9. Required standpipe valves are not in place at each story below the construction or demolition floor;
> 10. Required standpipe is not capped;
> 11. Required standpipe is not connected to a water source or fire department connection;
> 12. Required standpipe fire department hose connection is obstructed;
> 13. Required standpipe fire department hose connections are not marked by a red light and a sign reading, "Standpipe Connection";
> 14. A breach exists in the required standpipe risers, cross connections, or fire department connections;
> 15. The standpipe alarm activates;
> 16. Stairs are not provided in accordance with Section 3303.11; or
> 17. An elevator or hoist is not available in accordance with Section 3303.12.

Site Safety Service providers are also required to "perform spot checks of the site on a regular basis" (Building Code § 3310.8.3.1), perform inspections on the site (Building Code § 3310.8.3.2), and record inspections, site violations, and corrective actions in a safety log (Building Code §§ 3310.8.2, 3310.8.3.4-3310.8.4.2). In order to lawfully perform the duties enumerated within

Chapter 33 of the Building Code, Site Safety Service providers are required to be registered design professionals with specific certifications. A SSM must obtain a Certified Safety Professional ("CSP") designation from the Board of Certified Safety Professionals ("BCSP") (*see* Building Code § 28-402.1), and an SSC must obtain a Construction Health and Safety Technician ("CHST") designation from the BCSP (*see* Building Code § 28-403.2). License is defined within Chapter 4 of the Building Code to include the following:

> A license, registration, certification or other evidence, issued by the department pursuant to this chapter, representing that an individual…meets the qualifications and requirements as set out in this chapter and in the rules of the department and is authorized to engage in the particular trade, occupation or business as indicated on the license and representing that such license, with associated plate and/or seal, where applicable, has been renewed as required and is currently in effect (Building Code § 28-401.3).

The Court does not dispute the determination by the Tribunal in *AlliedBarton* that "protective services" should include the "[w]atch, guard or patrol agency" services set forth in GBL § 71(2). When examining the applicability of Tax Law § 1105(c)(8) to security guard services performed at construction sites in New York City, the Third Department stated that the Legislature "clear[ly] inten[ded] to impose a sales tax upon patrol and watchperson services of every nature" (*Matter of Robert Bruce McLane Assoc. Inc. v. Urbach*, 232 A.D.2d 826, 828 [3d Dep't 1996]; *see Evergreene Gardens, LLC v. Tax Appeals Trib.*, 208 A.D.3d 1515, 1516 [3d Dep't 2022]). While the Court does not believe that the taxability of a service under Tax Law 1105(c)(8) hinges on licensure alone, the type of licensure required for the performance of a service can be relevant when determining whether a service falls outside the scope of a "guard, patrol [or] security service[]" (Tax Law 1105[c][8]). The Court agrees with plaintiffs that a comparison of a "competent watchperson" and Site Safety Service providers is instructive here. Where a building has a footprint between 5,000 and 40,000 square feet, the Building Code requires the site to have

a watchperson on site, who is required to watch/monitor the building site "during all hours when operations are not in progress" (Building Code § 3303.3). Contrasting the required licensure of a Site Safety Service provider to the licensure required of a "competent watchperson" under the Building Code, a Site Safety Service provider is required to have a BCSP or a CHST certification, whereas a watchperson is required to possess both a valid New York State security guard registration and a valid watchperson certificate from the Fire Department, which requires knowledge of the emergency notification procedures to the Fire Department (*see* Building Code § 3303.3). Considering the aforementioned duties of Site Safety Service providers, as well as the required licensure, the Court finds that Site Safety Services should not be characterized as "guard, patrol [or] security services" (Tax Law § 1105[c][8]), as the regulatory monitoring duties of a Site Safety Service provider are distinguishable from that of a security guard, watchperson, or patrolman, and do not require watch, guard or patrol agency licensure under GBL 71(2).

Pursuant to the language of Tax Law 1105(c)(8), the imposition of sales and use tax also applies to "all services provided by or through alarm or protective systems of every nature, including but not limited to, protection against…any malfunction of industrial processes or any other malfunction of or damage to property or injury to persons." While the Court recognizes that the list is not exhaustive, Tax Law § 1105(c)(8) explicitly includes protective services against burglary, theft, fire, and water damage. Within the New York Administrative Code, a "[s]ecurity or fire alarm system (alarm system)" is defined as [a]n aggregation of devices, equipment or services designed to signal the presence of intrusion, break-in, theft, movement, sound, fire, heat, smoke, explosion, etc." (19 NYCRR 195.1[a]). The Building Code was enacted, in part, to "regulate building construction in the City of New York in the interest of public safety, health, welfare and the environment" (Building Code § 28-101.2). While Site Safety Service providers

have a duty to notify other individuals on the building site of a Building Code violation, such violations do not necessarily signal the presence of a malfunction or damage to the building site, but rather, that construction or demolition of a building is not in compliance with required regulations.

The Tribunal clarified its finding in *AlliedBarton* when analyzing the taxability of security managing and monitoring services (*In the Matter of the Petitions of Secureworks, Inc.*, 2021 WL 7209101, at *13 [Feb. 17, 2021]) ("*Secureworks*"), stating that its "holding in *AlliedBarton* was not so narrow as to exclude services that do not actively and directly guard or protect property or persons" (*id.*). The Tribunal clarified that "while petitioner may not take overt action to block attempted connections by threat actors at the moment they occur, by configuring their customers' appliances to determine who is allowed access and maintaining them to ensure they are operational with the most current policies, petitioner is actively protecting and guarding its customers' networks from threats" (*id.*). The Tribunal further held that by "notifying its customers when petitioner believes an event or events may be a threat to its customers' networks, such review and notification is analogous to an alarm system within the meaning of Tax Law § 1105 (c) (8)" (*id.*).

This security monitoring service is distinguishable from the monitoring services of a Site Safety Service provider, because the security monitoring service provider's duty is to protect or guard from active security threats to a customer network, whereas the Site Safety Service provider's monitoring duty is to ensure compliance with regulatory standards, which although created in furtherance of public safety, health, welfare and the environment (*see* Building Code § 28-101.2), do not directly prevent against harm to the public or property. Thus, the duty to notify other site workers or the Department of the presence of a potential or future safety issue through regulatory noncompliance can be distinguished from protective services of a security monitoring

service, guard, patrolman, or watchman against burglary, theft, fire, and water damage, which impose an affirmative duty upon the service provider to signal the presence of an existing danger. Considering the foregoing, and construing the ambiguous language of Tax Law § 1105(c)(8) in favor of the taxpayer (*see Walt Disney Co. v. Tax Appeals Trib.*, 42 N.Y.3d at 549; *Quotron Sys. v. Gallman*, 39 N.Y.2d at 431), the Court finds that Site Safety Services should not be defined as services provided by or through a detective or protective system which protects against the "malfunction of industrial processes or any other malfunction of or damage to property or injury to persons" (Tax Law § 1105[c][8]). As the Court has held that Site Safety Services providers do not perform guard, patrol or security services, and cannot be defined as services provided by or through a detective or protective system which protects against the malfunction of industrial processes or any other malfunction of or damage to property or injury to persons, the Court concludes that Site Safety Services are not detective or protective services subject to sales and use tax under Tax Law § 1105(c)(8). Accordingly, the Court grants plaintiffs' cross-motion for summary judgment which seeks a declaratory judgment that Section of 1105(c)(8) of the Tax Law is wholly inapplicable to plaintiffs' Site Safety Services.[2] In light of this determination, the Court denies defendants' motion for summary judgment.

Any remaining arguments not specifically addressed herein have been considered and found to be lacking in merit or need not be reached in light of this decision.

Accordingly, it is hereby

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[2] The Court recognizes that the Department has issued Advisory Opinions which distinguish "inspections that are government mandated and are performed solely for code compliance" from inspections which are not government mandated, yet finds that Tax Law § 1105(c)(8) itself does not provide an exemption for government mandated inspections. To the extent that plaintiffs challenge inconsistencies between Advisory Opinions issued by the Department, such issues would require the Court to evaluate fact-specific advisory determinations which are outside of the scope of this declaratory action which is limited solely to statutory interpretation (*see Compass Adjusters*, 197 A.D.2d at 42).

ORDERED AND ADJUDGED, that defendants' motion for summary judgment is denied; and it is further

ORDERED AND ADJUDGED, that plaintiffs' cross-motion for summary judgment is granted; and it is further

ORDERED, ADJUDGED, AND DECLARED, that Section of 1105(c)(8) of the Tax Law is wholly inapplicable to plaintiffs' Site Safety Services.

This memorandum constitutes the Decision and Order/Judgment of the Court. The original Decision and Order/Judgment is being uploaded to the NYSCEF system for filing and entry by the Albany County Clerk. The signing of this Decision and Order/Judgment and uploading to the NYSCEF system shall not constitute filing, entry, service, or notice of entry under CPLR 2220 and § 202.5-b(h)(2) of the Uniform Rules for the New York State Trial Courts. Counsel is not relieved from the applicable provisions of those Rules with respect to filing, entry, service, and notice of entry of the original Decision and Order/Judgment.

SO ORDERED.

ENTER.

Dated: December 2, 2025
Albany, New York

Kimberly A. O'Connor

HON. KIMBERLY A. O'CONNOR
Acting Supreme Court Justice

Papers Considered:

1. Summons, dated September 15, 2023; Complaint, dated September 15, 2023, with Exhibits A-M annexed;
2. Answer, dated May 5, 2025; Notice of Motion for Summary Judgment, dated May 5, 2025; Affirmation of Noah C. Engelhart, Esq., in Support of Motion, dated May 5, 2025, with Exhibits A-C annexed; Statement of Material Facts, dated May 5, 2025; Memorandum of Law, dated May 5, 2025;
3. Plaintiffs' Notice of Cross-Motion for Summary Judgment, dated June 25, 2025; Statement of Material Facts, dated June 25, 2025; Affirmation of Julia M. Hilliker, Esq., in Support of Cross-Motion, dated June 25, 2025, with Exhibits 1-2 annexed; Memorandum of Law

in Opposition to Defendants' Motion for Summary Judgment and in Support of Plaintiffs' Cross-Motion for Summary Judgment, dated June 25, 2025;

4. Defendants' Memorandum of Law in Response to Plaintiffs' Cross-Motion for Summary Judgment and Reply Memorandum of Law in Further Support of Defendants' Motion for Summary Judgment, dated July 7, 2025; *and*
5. Plaintiffs' Reply Memorandum of Law in Further Support of Plaintiffs' Cross-Motion for Summary Judgment, dated July 23, 2025.