

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
BI-COUNTY ELECTRIC CORPORATION :  
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 June 1, 1987 :  
through February 28, 1991. :

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DETERMINATION  
DTA NOS. 811880  
AND 811883

In the Matter of the Petition :  
of :  
ROBERT E. REZNY, OFFICER OF :  
BI-COUNTY ELECTRIC CORPORATION :  
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 June 1, 1987 :  
through February 28, 1991. :

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Petitioner Bi-County Electric Corporation, 2279 Jerusalem Avenue, North Bellmore, New York 11710, 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 June 1, 1987 through February 28, 1991.

Petitioner Robert E. Rezny, officer of Bi-County Electric Corporation, 247 Park Avenue, Merrick, New York 11566, 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 June 1, 1987 through February 28, 1991.

A consolidated small claims hearing was held before Arthur Johnson, Presiding Officer, at the offices of the Division of Tax Appeals, 175 Fulton Avenue, Hempstead, New York, on October 12, 1994 at 1:15 P.M., with additional evidence to be submitted by January 18, 1995. Petitioner Bi-County Electric Corporation appeared by Robert E. Rezny. Petitioner Robert E.

Rezny appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Dennis Simmons).

### ISSUES

I. Whether the Division of Taxation accurately determined additional sales and use taxes due from Bi-County Electric Corporation for the period June 1, 1987 through February 28, 1991.

II. Whether the corporation's written agreement to a test-period audit method precludes it from now challenging the audit based on the production of records for the entire audit period.

### FINDINGS OF FACT

Petitioner Bi-County Electric Corporation ("the corporation") operated an electrical contracting business that performed capital improvements, repairs and service work. Petitioner Robert E. Rezny was president of the corporation.

On April 20, 1992, following an audit of the corporation's books and records, the Division of Taxation ("Division") issued a Notice of Determination to the corporation covering the period June 1, 1987 through February 28, 1991 for taxes due of \$47,729.41, plus penalty of \$18,726.03 and interest of \$20,843.01, for a total amount due of \$87,303.45. A separate notice was issued to "Robert R. Rezny"<sup>1</sup> on April 20, 1992, as officer of the corporation, under Tax Law §§ 1131(1) and 1133. Mr. Rezny did not dispute his personal liability for any taxes determined due from the corporation.

The corporation executed an Audit Method Election form on May 30, 1991 which authorized the Division to use a test-period audit method to determine any sales or use tax liability in lieu of an audit method which utilized all records within the audit period. The agreement stated that it did not preclude the protest of the audit results on grounds such as the particular test period selected, the inclusion of certain transactions within the test, the taxability of certain transactions or the method of projecting the results of the test period findings.

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<sup>1</sup>Petitioner's name should read Robert E. Rezny.

The test period selected for the audit of sales and purchases of materials and expense items was initially September 1, 1989 through November 30, 1989. It was later expanded to include December 1, 1989 through February 28, 1990. The corporation considered all of its work as capital improvement and thus reported no taxable sales.

The Division analyzed purchases of materials for the test period and classified them into three categories as follows:

no tax paid, corporation claimed used in exempt jobs	\$ 52,938.47
tax paid	117,003.15
no tax paid	<u>9,723.24</u>
	Total \$179,664.86

Next, the Division analyzed tax-exempt jobs it found in the test period and determined that the cost of the materials used in such jobs amounted to \$20,379.09. The Division reviewed the invoices for other sales to ascertain if the corporation had properly considered that its services were entirely in the nature of capital improvements. The Division found taxable repairs and service calls of \$37,173.66 for the sample period. The cost of materials used in the taxable sales was \$14,542.34. The exempt purchases determined above for tax-exempt and repair sales (\$34,921.43) was deducted from purchases on which no tax was paid (\$64,522.63) to arrive at additional taxable purchases of \$29,601.20, or an error factor of 16.476 percent.<sup>2</sup> This percentage was applied to material purchases for the audit period to determine total taxable purchases of \$289,304.14. The purchases were allocated between Nassau County and Suffolk County and resulting tax due was \$22,678.69.

The taxable repair sales found in the test period for which the corporation had not collected sales tax represented 5.775% of gross sales. This percentage was applied to gross sales for the audit period in order to compute additional taxable sales of \$198,781.07 with tax due thereon of \$21,109.72, after allocating to Nassau County and Suffolk County.

The audit also revealed that the corporation had not paid sales taxes on auto expenses of

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<sup>2</sup>The total purchases with no tax paid was \$62,661.71 and not \$64,522.63, thereby the additional taxable purchases should have been \$27,740.28 and the error rate 15.4%.

\$5,194.65 for the test period. An error rate of 18.9% was calculated and used to project a total liability in this area of \$3,671.48. Fixed assets were examined in detail and it was discovered that no tax was paid on purchases of \$3,369.00 resulting a liability of \$269.52.

On March 19, 1993, the Bureau of Conciliation and Mediation Services issued an order that sustained the amount of tax assessed but cancelled the penalty and reduced interest to the minimum.

At the initial audit appointment, the Division requested the corporation to provide all exemption certificates, including capital improvement certificates. Petitioner Robert E. Rezny and his accountant indicated that none were available but suggested that he could obtain them. Mr. Rezny submitted capital improvement certificates to the auditor on or about January 21, 1992 when the audit was concluding. The auditor advised Mr. Rezny that certificates not timely presented were subject to review as to their validity regarding the actual work performed. Every sales invoice in the test period was reviewed with the corporation's then-representative to ascertain the specific work performed. Some invoices had a combination of repairs and capital improvements. The auditor rejected any certificate if the work described on the invoice to which the certificate related was determined to be repairs and maintenance.

The corporation took the position that it should not be liable for tax on any sales where the customer provided a capital improvement certificate.

The corporation argued that the Division misclassified much of the work it performed as taxable repairs rather than capital improvements. The corporation submitted 109 invoices amounting to \$16,830.00 which it claimed to be nontaxable. It also attached a capital improvement certificate to the invoice.

The invoices described the work performed. Typical examples of the corporation's work are as follows:

- (a) replace switch
- (b) replace bulbs
- (c) rewire equipment and switches
- (d) supply and install 600 AMP fuses
- (e) supply and install replacement receptacle
- (f) replace ballast for fixture

- (g) install power for sign
- (h) replace fixtures
- (i) rewire air conditioning unit
- (j) extend & box dishwasher line
- (k) replace circuit breaker
- (l) install new ceiling outlet
- (m) repair compressor
- (n) replace and rewire pool fixture
- (o) relocate circuits and outlet damaged by forklift
- (p) convert panel from 200 volt to 110 volt

One invoice included interest charges of \$34.50.

The corporation submitted documentation relating to the Division's analysis of purchases and claimed that purchases of \$6,334.61 were either tax exempt or tax was paid to the supplier. The corporation established \$11.65 in nontaxable miscellaneous charges on two invoices and \$660.43 of materials used in tax-exempt jobs.

The corporation submitted a list of customer accounts deemed uncollectible for the years 1986, 1987, 1989, 1991 and 1992 totalling \$299,555.23. The corporation claimed a credit for taxes allegedly paid on materials of \$22,188.00 during the test period that were purchased and consumed on jobs on which it was not paid for the material.

The corporation submitted a list of jobs performed for tax-exempt organizations during the period July 1987 through February 1991. For the test period of September 1, 1989 to February 28, 1990, the list did not indicate any further sales to exempt organizations than that allowed by the Division.

The corporation believed that the test period did not sufficiently reflect the extent of its work for tax-exempt organizations and wanted to substantiate a detailed review for the audit period rather than utilizing the results of the test period.

The corporation submitted the invoices for all the fixed assets determined to be taxable by the Division. It argued that the purchases were not taxable giving various reasons. A review of the invoices showed that sales tax was not paid to the suppliers on purchases of tangible personal property. However, the auditor made a \$10.00 error when listing the purchase price of T-shirts from one invoice.

The corporation submitted invoices and statements from suppliers of auto parts and

repairs alleging that tax was paid to the supplier. The evidence presented did not establish that any sales tax was paid to the supplier on the purchases found by the Division for the test period.

#### CONCLUSIONS OF LAW

A. The sale of tangible personal property to a contractor for use or consumption in construction is a retail sale and subject to sales and use tax, regardless of whether tangible personal property is to be resold as such or incorporated into real property as a capital improvement or repair. Whenever a contractor uses materials, on which the contractor has paid sales tax, in a repair or maintenance contract (except interior cleaning and maintenance contracts of 30 days or more) subject to the sales tax on services under Tax Law § 1105(c), the contractor may be entitled to a refund or credit of the portion of the tax he paid attributable to the materials transferred to the customer (Tax Law § 1101[b][4][i]; 20 NYCRR 541.1[b]).

B. Receipts from the performance of a capital improvement to real property by a contractor are not subject to the sales tax (20 NYCRR 541.1[c]). Receipts from the services of repairing maintaining or servicing of real property (except the interior cleaning and maintenance contracts of 30 days or more described in 20 NYCRR 527.7[c][3]) and tangible personal property and the receipts from the installation of tangible personal property that remains tangible personal property are subject to the New York State and local sales tax unless otherwise exempt (20 NYCRR 541.1[d]).

C. Tangible personal property purchased by a contractor that is to become an integral component part of real property owned by an organization described in Tax Law § 1116(a) is exempt from the New York State and local sales tax (20 NYCRR 541.1[e]).

D. Maintaining, servicing and repairing are terms which are used to cover all activities that relate to keeping real property in a condition of fitness, efficiency, readiness or safety or restoring it to such condition (20 NYCRR 527.7[a][1]).

The imposition of tax on services performed on real property depends on the end result of such service. If the end result of the service is the repair to maintenance of real property, such services are taxable. If the end result of the same service is a capital improvement to the real

property, such service is not taxable (20 NYCRR 527.7[b][4]).

Tax Law § 1101(b)(9) defines capital improvement as:

"(i) An addition or alteration to real property which:

"(A) Substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property; and

"(B) Becomes part of the real property or is permanently affixed to the real property so that removal would cause material damage to the property or article itself; and

"(C) Is intended to become a permanent installation."

E. The corporation authorized the Division to use a test-period audit method in its audit of sales and purchases of materials and recurring expenses.

The corporation considered all of its sales to be capital improvements. The Division, however, determined that 5.775% of the sales constituted repair and maintenance services. The corporation did not provide capital improvement certificates when the Division was reviewing sales invoices in or about April 1991 but presented them later in January 1992. Since the certificates were not timely submitted, the Division was not obligated to accept the certificate, in and of itself, as satisfying the corporation's burden of proof concerning the taxability of the sale (see, 20 NYCRR 532.4[b]). However, the fact that a vendor has failed to receive timely or proper documentation of the claimed exempt status of any particular transaction does not change the tax status of the transaction. Thus, a vendor which has timely protested a determination of tax always has the right to prove the nontaxability of any transaction through the presentation of proper documentation (20 NYCRR 532.4[b][6]).

I have reviewed the invoices submitted by the corporation relating to amounts claimed as nontaxable capital improvements and I conclude that the Division properly classified the work as taxable repairs and maintenance under Tax Law § 1105(c)(5) and rejected the capital improvement certificates.

The only nontaxable sale documented for the test period was the interest charge of \$34.50.

The corporation consented to the use of a test-period audit method with full knowledge of

its right to insist upon a complete audit based on all of its records. The consent precluded the corporation's claim at hearing that a complete audit of materials used in jobs with tax exempt organizations was required (Matter of Wallach v. Tax Appeals Tribunal, \_\_\_ AD2d \_\_\_, 614 NYS2d 647).

F. The corporation established nontaxable material purchases of \$672.08 (Finding of Fact "8"). The evidence otherwise failed to prove that the purchases were nontaxable or that tax was paid to the supplier.

G. The corporation being a contractor is considered the retail consumer of the materials purchased for use in capital improvement work. The corporation did not collect any sales tax from its customers on either capital improvement or repair sales. Consequently, the corporation is not entitled to any credit or refund for sales tax in its write-off of bad debts.

H. The evidence submitted by the corporation with respect to its claim of additional sales to tax-exempt organizations, nontaxable acquisition of fixed assets, and tax paid auto expenses was insufficient to sustain its burden of proof, except for a \$10.00 transposition error.

I. The petitions of Bi-County Electric Corporation and Robert E. Rezny are granted to the extent that the liability be initially adjusted to reflect the computation error in footnote "2". Additionally, the amount of tax due shall be recomputed in accordance with Conclusions of Law "E", "F" and "H". The Division is hereby directed to modify the notices of determination issued April 20, 1992. The petitions are in all other respects denied.

DATED: Troy, New York

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PRESIDING OFFICER