STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

MELLEN ELECTRIC CONSTRUCTION CO., INC.
AND SEYMOUR MELLEN, AS OFFICER

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, 1979
through May 31, 1983.

DECISION

Petitioners, Mellen Electric Construction Co., Inc. and Seymour Mellen, as officer, 10-39 44th Drive, Long Island City, New York 11101, 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, 1979 through May 31, 1983 (File No. 57807).

A hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on February 26, 1987 at 9:15 A.M. Petitioners appeared by Eugene Miller, CPA. The Audit Division appeared by John P. Dugan, Esq. (Gary Palmer, Esq., of counsel).

ISSUES

I. Whether Mellen Electric Construction Co., Inc. is liable for tax on materials purchased for a specific construction project but not incorporated into the project by the petitioner corporation.

11. Whether Seymour Mellen was personally liable for any taxes determined due from Mellen Electric Construction Co., Inc.

FINDINGS OF FACT

1. Petitioner Mellen Electric Construction Co., Inc. ("corporation") was an electrical contractor engaged in construction contracts in the New York City area. Seymour Mellen was the sole officer and stockholder of the corporation.

2. On October 19, 1984, as the result of an audit, the Audit Division issued notices of determination and demands for payment of sales and use taxes due against Mellen Electric Construction Co., Inc. covering the period June 1, 1979 through May 31, 1983 for taxes due of $12,460.26, plus interest of $3,525.83, for a total of $15,986.09. On the same date, identical notices were issued to Seymour Mellen, as officer of the corporation, under the provisions of sections 1131(1) and 1133 of the Tax Law.

3. Seymour Mellen executed six consents on behalf of the corporation which extended the period of limitation for assessment of sales and use taxes for the period June 1, 1979 through November 30, 1981 to December 20, 1984.

4. The corporation maintained complete and adequate books and records. The corporation agreed to the use of a test period audit method in lieu of a detailed examination of its books and records. The audit disclosed the following areas of deficiency:

a) disallowed nontaxable sales	$ 3,305.67
b) fixtures and equipment	535.86
c) balance due in sales tax accrual account	21,855.58
additional tax due	$25,697.11
less: credit due on materials used in taxable sales	13,236.85
net tax due	$12,460.26

The corporation conceded that it was liable for the taxes determined due in (a) and (b) above. Likewise, the Audit Division conceded that the corporation is entitled to the credit indicated above. The unresolved portion of the audit represents the debit balance in the sales tax accrual account which was the tax

payable on materials purchased for a specific construction contract but never installed by the corporation.

5.   The corporation had entered into a contract with Cohen Bros. to complete the electrical work for an office building located at 805 Third Avenue, New York, New York.   In 1982, many problems arose with the construction project which caused the relationship between Cohen Bros. and the corporation to deteriorate.   Finally, the corporation left the job and was compensated with a lump-sum amount for previously completed work and to extinguish the corporation's liability to subcontractors.   At the same time, the corporation transferred to Cohen Bros. all materials that were purchased and stored for use in performing the contract.

6.   When the corporation purchased and stored materials for the Cohen Bros. contract, it accrued the sales tax liability on the cost of the materials because certain suppliers did not collect the sales tax.   The corporation, however, did not pay the accrued liability with the applicable sales tax return.

7.   The corporation took the position that Cohen Bros. **is** liable for the tax on the materials since the materials were used by Cohen Bros. to complete the project after the above settlement was made.

8.   Petitioner Seymour Mellen was the sole officer of the corporation.   He signed sales tax returns and was responsible for the financial affairs and management of the business.

<u>CONCLUSIONS **OF** LAW</u>

A.   That section 1101(b)(4)(1) of the Tax Law provides that a sale of tangible personal property to a contractor, subcontractor or repairman for use or consumption in erecting buildings or structures **is** deemed a retail sale

regardless of whether the tangible personal property is to be resold as such before it **is so** used or consumed.

B.   That the purchase of materials by the corporation for use in the Cohen Bros. contract was a retail sale as defined in section **1101(b)(4)(i)** of the Tax Law, and subject to the tax imposed under section 1105(a) of the Tax Law at the time of the purchase. Since the sales tax was not collected by the supplier, the corporation properly accrued a liability for the payment of tax on such materials on its books and records. The corporation *is* liable for its failure to pay the tax directly to the Tax Commission in accordance with the provisions of section 1133(b) of the Tax Law. The sales tax expense on the materials should have been made part of the negotiated settlement with Cohen Bros.

C.   That Seymour Mellen was a person required to collect tax pursuant to section 1131(1) **of** the Tax Law and therefore has personal liability for the tax determined due from the corporation in accordance with section 1133(a) of the Tax Law.
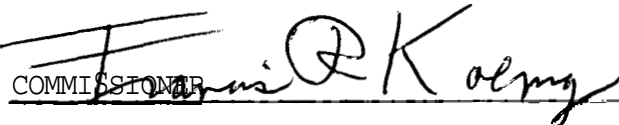
D.   That the petition of Mellen Electric Construction Co., Inc. and Seymour Mellen, as officer, is denied and the notices of determination and demands for payment of sales and use taxes due issued October 19, *1984* are sustained.

DATED: Albany, New York   STATE TAX COMMISSION

JUN 18 1987

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PRESIDENT

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COMMISSIONER

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COMMISSIONER