

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of

NAGER ELECTRIC CO. INC.

AFFIDAVIT OF MAILING  
OF NOTICE OF DECISION  
BY (CERTIFIED) MAIL

For a Redetermination of a Deficiency or  
a Refund of Sales & Use  
Taxes under Article(s) 28 & 29 of the  
Tax Law for the ~~Year~~ Period(s)  
August 1, 1965 - November 30, 1968

State of New York  
County of Albany

Lynn Wilson , being duly sworn, deposes and says that  
she is an employee of the Department of Taxation and Finance, over 18 years of  
age, and that on the 25th day of April , 1972 , she served the within  
Notice of Decision (or Determination) by (certified) mail upon NAGER ELECTRIC  
CO. INC. (representative of) the petitioner in the within

proceeding, by enclosing a true copy thereof in a securely sealed postpaid

wrapper addressed as follows: Nager Electric Co. Inc.  
426 Broadway  
Brooklyn, New York  
Attention: Mr. Schiff

and by depositing same enclosed in a postpaid properly addressed wrapper in a  
(post office or official depository) under the exclusive care and custody of  
the United States Post Office Department within the State of New York.

That deponent further says that the said addressee is the (representative  
of) petitioner herein and that the address set forth on said wrapper is the last  
known address of the (representative of the) petitioner.

Sworn to before me this

25th day of April , 19 72

Rae Zimmerman

Lynn Wilson

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of

NAGER ELECTRIC CO. INC.

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OF NOTICE OF DECISION  
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August 1, 1965 - November 30, 1968

State of New York  
County of Albany

Lynn Wilson , being duly sworn, deposes and says that  
she is an employee of the Department of Taxation and Finance, over 18 years of  
age, and that on the 25th day of April , 19 72, she served the within  
Notice of Decision (or Determination) by (certified) mail upon CITY OF NEW YORK,  
LAW DEPARTMENT (representative of) the petitioner in the within  
proceeding, by enclosing a true copy thereof in a securely sealed postpaid  
wrapper addressed as follows: City of New York  
Law Department  
Municipal Bldg.  
New York, New York 10007  
Attention: Samuel J. Warms, Esq.  
and by depositing same enclosed in a postpaid properly addressed wrapper in a  
(post office or official depository) under the exclusive care and custody of  
the United States Post Office Department within the State of New York.

That deponent further says that the said addressee is the (representative  
of) petitioner herein and that the address set forth on said wrapper is the last  
known address of the (representative of the) petitioner.

Sworn to before me this

25th, day of April , 19 72

Rae Zimmerman

Lynn Wilson

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of

NAGER ELECTRIC CO. INC.

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For a Redetermination of a Deficiency or  
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Taxes under Article(s) 28 & 29 of the  
Tax Law for the ~~(year(s))~~ Period(s)  
August 1, 1965 - November 30, 1968

State of New York  
County of Albany

Lynn Wilson, being duly sworn, deposes and says that  
she is an employee of the Department of Taxation and Finance, over 18 years of  
age, and that on the 25th day of April, 1972, she served the within  
Notice of Decision (or Determination) by (certified) mail upon Edwin Efros, Esq.

(representative of) the petitioner in the within  
proceeding, by enclosing a true copy thereof in a securely sealed postpaid

wrapper addressed as follows: Edwin Efros, Esq.  
708 Third Avenue  
New York, New York

and by depositing same enclosed in a postpaid properly addressed wrapper in a  
(post office or official depository) under the exclusive care and custody of  
the United States Post Office Department within the State of New York.

That deponent further says that the said addressee is the (representative  
of) petitioner herein and that the address set forth on said wrapper is the last  
known address of the (representative of the) petitioner.

Sworn to before me this

25th day of April, 1972.

Rae Zimmerman

Lynn Wilson



STATE OF NEW YORK  
DEPARTMENT OF TAXATION AND FINANCE

STATE TAX COMMISSION

NORMAN F. GALLMAN, PRESIDENT  
A. BRUCE MANLEY  
MILTON KOERNER

BUILDING 9, ROOM 214A

STATE CAMPUS  
ALBANY, N. Y. 12227

AREA CODE 518  
457-2655, 6, 7

STATE TAX COMMISSION  
HEARING UNIT

EDWARD ROOK  
SECRETARY TO  
COMMISSION

ADDRESS YOUR REPLY TO

DATED: Albany, New York  
April 25, 1972

**Wager Electric Co. Inc.**  
425 Broadway  
Brooklyn, New York

**Attention Mr. Schiff**

**Gentlemen:**

Please take notice of the **DETERMINATION** of  
the State Tax Commission enclosed herewith.

Please take further notice that pursuant to section(s)  
**1138 & 1243** of the Tax Law any proceeding  
in court to review an adverse decision must be commenced  
within **4 months** after the date of this notice.

Any inquiries concerning the computation of tax due or  
refund allowed in accordance with this decision or  
concerning any other matter relating hereto may be  
addressed to the undersigned. These will be referred  
to the proper party for reply.

Very truly yours,

**Lawrence A. Newman**  
Hearing Officer

cc Petitioner's Representative  
Law Bureau

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Application	:	
of	:	
NAGER ELECTRIC CO., INC.	:	DETERMINATION
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	:	
August 1, 1965 through November 30, 1968.	:	

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Nager Electric Co., Inc. applied 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 August 1, 1965 through November 30, 1968.

A formal hearing was held before Lawrence A. Newman, Hearing Officer, in the offices of the State Tax Commission, in the City of New York, on December 13, 1971. The applicant was represented by Edwin Efros, Esq. The Sales Tax Bureau was represented by Edward H. Best, Esq. (Solomon Sies, Esq. of Counsel). The City of New York appeared (with the consent of the applicant) amicus curiae by J. Lee Rankin, Esq. (Samuel J. Warms, Esq. and Max A. Fingelberg, Esq. of Counsel).

#### ISSUE

Whether purchases made by a contractor pursuant to a "cost plus a percentage" contract were purchases for resale.

#### FINDINGS OF FACT

1. The applicant, Nager Electric Co., Inc., filed New York State and local sales and use tax returns for the periods August 1, 1965 through November 30, 1968.

2. On September 9, 1969, the applicant consented to an extension of the period of limitation on assessment for the periods in issue to October 1, 1970.

3. On August 21, 1970, the Sales Tax Bureau issued a Notice of Determination, numbered 90,742,843, in the amount of \$10,154.47, plus penalties and interest.

4. On October 19, 1970, Nager Electric Co., Inc. filed an application for revision of the determination, contending that the purchases of material used in electrical work on the premises of Bellevue Hospital were purchases for resale to the City of New York and exempt from sales and use taxes.

5. Nager Electric Co., Inc. contracted with the Department of Hospitals of the City of New York to perform a contract consisting of the electrical work to be done in connection with the rehabilitation of Bellevue Hospital. This contract was what is known as a cost plus a percentage contract; that is to say, the compensation for the performance of the work was to be the actual cost of the materials and labor plus a percentage of that cost. Since one of the costs would be the tax determined, the City of New York may be contractually liable for the additional tax, and therefore is indirectly affected by the outcome of this proceeding.

6. The preprinted and handwritten language of the applicant's bid for the contracted electrical work and lighting fixtures, (designated as Capital Project HO-214, Contract No. 4, 1966/1967) required that "the said bidder.....will execute the contract and perform all its terms....and will provide, furnish and deliver all the work, materials, supplies, tools and appliances for all labor and materials necessary or required....for the percentage fee above cost of nine percent".

7. The specifications for the electrical work were contained in a report of proposed Bellevue Hospital improvements, prepared by the architectural firm of Pomerance and Breines, and incorporated in the bound volume encompassing the contractor's proposed bid. Included in the report were the estimated costs of the various phases of the total project, including the electrical work, computed for the architects by firms of engineers and builders.

8. The specific requirements listed in the contract included "furnishing all labor, supervision, materials, equipment, appliances, and tools and scaffolding necessary and required to do all electrical work, and to install all lighting fixtures as indicated on the electrical drawings, and as described in the specifications..." All materials used in the work were delivered to and billed to Nager Electric Co., Inc. by its suppliers. A separate sale of materials was not made to the City of New York.

9. Nager agreed to deliver, through the architect, to the City of New York, a monthly report "in detail of all moneys paid out on account of the cost of the work during the previous month for which it is to be reimbursed...with original payrolls for labor checked and approved by the City of New York, and all receipted bills". Thereupon, 90% of the costs and 80% of the percentage fee, for the previous month would be disbursed to the contractor. The balance would be paid upon satisfactory completion of the contract.

10. The contract in issue is a lump sum contract, and not a time and materials contract. The applicant is the consumer of the materials purchased and used on the contract. The City of New York, as purchaser, received a completed improvement to real property.

DETERMINATION

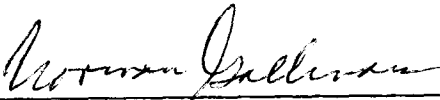
A. The purchases of materials made by Nager Electric Co., Inc. pursuant to a "cost plus a percentage" contract with the City of New York were not purchases for resale, and Nager was the ultimate consumer of the materials, rendering it liable for the applicable sales and use taxes.


B. The Notice of Determination is sustained, and the application for revision of the determination is denied.

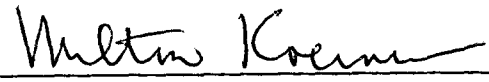
DATED: Albany, New York

*April 25, 1972.*

STATE TAX COMMISSION

  
COMMISSIONER

  
COMMISSIONER

  
COMMISSIONER