

This case was never signed by the Tax Commission.

It is a sales tax case which was sent to Mr. Cuttler to
be handled administratively.

4/16/73

MEMORANDUM

TO : Commissioner Milton Koerner

FROM : Abram J. Cuttler

SUBJECT: Formal Determination
Brown and Tenny Electric Co., Inc.

You asked for my comments on the determination prepared for signature of the State Tax Commission.

This involves a construction contract with the Alice Hyde Memorial Hospital Association, an exempt organization.

The Law exempts the tax on materials incorporated into real property in a construction contract with an exempt organization providing that the contractor sells the materials as tangible personal property to the exempt organization before installation. This should be evidenced by a time and materials contract which must have two characteristics:

1. A separate price for materials and a separate price for labor or installation.
2. A clause in the contract which states that title to the materials sold by the contractor to the owner shall immediately vest in the owner upon delivery to the job site before installation or incorporation into the project.

The so called "title clause" has been held by the Law Bureau to be a necessary part of the contract to qualify.

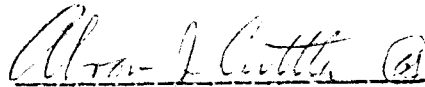
The contract in question does contain a separation between price and labor, but does not contain the so called "title clause". Consequently, in September, 1968, Counsel Best ruled with respect to the Alice Hyde contract that was entered into in 1966-67, that the contract did not show that the materials purchased by the contractor for the job were sold to the owner while they still retained the characteristics of tangible personal property. There is no title clause or other indication that title to the materials passed to the property owner prior to their incorporation into the project.

However, in view of the dictum of the court in the Sweet Associates case and the Legislation proposed by the Department to exempt materials that are used in construction on behalf of an exempt organization regardless of the form of contract, the Department appears to be disposed to relax its insistence that contracts contain the "magic words" to comply with form.

Consequently, I agree with the hearing determination to recognize the contract to permit the exemption of the materials that were used in construction for the exempt organization, even though it does not contain the so called "passing of title clause".

However, I am concerned about the wording of the determination and other determinations on the same subject which may provide a basis for other taxpayers to claim a refund of taxes paid with voluntary or desk audit assessments on contracts that did not contain the prescribed clause and which qualify as a time and materials contract in accordance with the opinion of Counsel and the administration by the Sales Tax Bureau in accordance therein.

In cases of this sort where the Commission is disposed to recognize an exemption of materials on contracts which are technically defective, I would prefer that the adjustment be made by remanding the case to the Sales Tax Bureau or, if the Tax Commission were to sign the determination, that the wording of the determination shall not be used as a precedent or form a basis for others to claim refunds or credits where taxes had been assessed or paid due to contract defects.



Abram J. Cuttler
Director, Sales Tax Bureau

February 20, 1973

*To be remanded to Sales Tax
Bureau to implement exemption of materials.
Milton Koerner - 3/13/73*

MEMORANDUM

TO : Mr. Cuttler
FROM : Commissioner Koerner
SUBJECT: Brown and Tenney Electric Co., Inc.

A hearing was held on the taxpayer's petition for a review of our determination that sales tax was due in connection with a contract that Brown and Tenney Electric Co., Inc. had at the Alice Hyde Hospital.

The hearing officer has recommended that a determination be made in favor of the taxpayer. Inasmuch as this case involves an assessment made prior to the decision in Sweet Associates v. Gallman, it would seem that this determination might be correct.

Prior to concurring therewith I would like you to review the file and indicate your position with respect thereto.

Milton Koerner
Commissioner

February 13, 1973

Attachment - Brown and Tenney Electric Co., Inc. file

RECEIVED
DEPT. OF TAX & FINANCE
SALES TAX BUREAU
FEB 14 1973
Refer to
File

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application	:	
of	:	
BROWN AND TENNEY ELECTRIC CO. INC.	:	DETERMINATION
for a 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 May 31, 1967.	:	

Brown and Tenney Electric Co. Inc. applied for a revision of a determination of sales and use taxes under Articles 28 and 29 of the Tax Law for the period August 1, 1965 through May 31, 1967.

A formal hearing was held at the offices of the State Tax Commission, Utica, New York, on November 18, 1970, before L. Robert Leisner, Hearing Officer. The taxpayer was represented by its president, Ernest F. Brown, and the Income Tax Bureau was represented by Edward H. Best, Esq., (Alexander Weiss, Esq., of Counsel).

ISSUE

Was taxpayer's contract entered into with the Alice Hyde Memorial Hospital of Malone, New York, an exempt organization, a time and materials contract so as to qualify for an exemption under section 1116(a)(4) of the Sales Tax Law?

FINDINGS OF FACT

1. Taxpayer timely filed New York State sales tax returns for the periods involved.
2. A Notice of Determination of sales tax for the period August 1, 1965 through May 31, 1967, was issued on November 1, 1968, against the taxpayer under Notice No. 90,756,571. The Sales Tax Bureau asserted the contract on the Alice Hyde Memorial Hospital of Malone, New York was a lump sum contract.

3. The taxpayer applied for a revision of the determination of the deficiencies.

4. The Alice Hyde Memorial Hospital furnished a sales tax exemption certificate to the taxpayer.

5. The Alice Hyde Memorial Hospital Association entered into a contract on April 12, 1967, with the taxpayer, which specified \$87,177.00 was for materials and \$42,070.00 was for services.

6. The parties had a previous contract which was deemed non-taxable and the parties proceeded on the same basis. The architect advised the taxpayer that the job was nontaxable. The taxpayer bid the job as nontaxable and the parties intended that the sales tax exemption of the hospital apply to this contract.

CONSLUSIONS OF LAW

A. The contract was not a lump sum contract. The exemption certificate of the hospital applies to this contract. Section 1116(a) (4) of the Tax Law. Sweet Associates v. Gallman, _____ N.Y. 2d, _____ (Jan. 1972); affirming 36 A.D. 2d 95, 318 N.Y.S. 2d; Briggs v. Page, 15 A.D. 2d 34, 221 N.Y.S. 2d 843.

B. The taxpayer's application for a revision is granted. It is determined that there is no sales tax due from the taxpayer for the period involved.

DATED: Albany, New York

STATE TAX COMMISSION

COMMISSIONER

COMMISSIONER

COMMISSIONER