

HICKSON ELECTRIC CORP.

*Sales Tax 1973*

THIS CASE WAS NEVER SIGNED BY THE TAX COMMISSION.

IT WAS SENT TO MR. CUTTLER, SALES TAX DIRECTOR TO BE  
HANDLED ADMINISTRATIVELY.

4/17/73

*rough draft  
LRL copy*

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Application  
of

HICKSON ELECTRIC CORP.

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 ~~April 28~~,  
~~February 28~~ February 28, 1969.

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The taxpayer applied 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 February 28, 1969.

A formal hearing was held at the offices of the State Tax  
Commission, Rochester, New York on April 28, 1971 and April 29, 1971,  
before L. Robert Leisner, Hearing Officer. The taxpayer was  
represented by Nixon, Hargrave, Devans & Doyle and Wiser, Shaw, &  
Freeman, Esqs. The Sales Tax Bureau was represented by Saul Heckelman,  
Esq. (Alexander Weiss, Esq., of Counsel).

#### ISSUE

Where an electrical contractor entered into contracts for electrical  
work on capital improvements to real property with charitable and exempt  
institutions with a separate breakdown for labor and materials and  
the contracts provided that no sales tax was to be charged the  
institutions, was the electrical contractor liable for sales tax  
on the materials?

#### FINDINGS OF FACT

1. The taxpayer, Hickson Electric Corp., is a New York corporation  
with its principal place of business at 37 Richmond Street, Rochester,  
New York.

Hickson Electric Corp. timely filed New York State sales and use tax returns for the period August 1, 1965 through February 28, 1969.

2. On December 31, 1969, the State of New York, Department of Taxation and Finance, Sales Tax Bureau, determined that taxpayer was liable for additional sales and use taxes, penalties and interest under Notice No. 90,451,241.

3. On March 24, 1970, the taxpayer timely applied to the Tax Commission (hereinafter "Respondent") for a hearing with respect to the December 31, 1969, determination letter.

4. By letters of May 27, 1970, and September 22, 1970, Respondent reduced the alleged deficiencies in taxes from \$30,051.36 to \$23,523.44.

In January, 1970, pursuant to agreement with the Sales Tax Bureau, Xerox Corporation paid \$7,796.86 of the alleged deficiency plus interest of \$1,496.93 thereon, computed at the rate of six percent per year. On June 11, 1970, applicant paid Respondent \$6,279.92 and on October 30, 1970 applicant paid Respondent \$16,917.12. These payments together representing the full amount of tax shown to be due in Respondent's letter of September 22, 1970, plus the full amount of the penalties and interest charged by Respondent to applicant.

5. Of the total deficiency, the amount now in dispute is \$9,746.33, plus interest and penalties on that amount of \$3,174.71, and \$4,295.75 in penalties and interest in excess of six percent per year charged by Respondent on the remainder of the alleged tax deficiency.

6. The amount of tax in dispute is based upon the sales to <sup>purchases of materials</sup> ~~for capital improvements to exempt institutions.~~ ~~which~~ ~~purchasers~~ <sup>the</sup> ~~were exempt from tax.~~ <sup>the purchases of materials</sup>

*contracts for the various*  
Grouped by *institutions* ~~institutions~~, the sales *taxes* in issue are as follows:

|                     |                 |
|---------------------|-----------------|
| School for the Deaf | \$1,266.45      |
| Eastman School      | 296.04          |
| Unitarian Church    | 510.59          |
| Presbyterian Church | 571.28          |
| Museum              | 3,370.66        |
| Harley School       | 2,147.98        |
| U of R              | 274.08          |
| Civic Center        | <u>1,309.25</u> |
| <u>TOTAL</u>        | \$9,746.33      |

A. UNITARIAN CHURCH PROJECT

7. By an undated contract between First Unitarian Church of Rochester, New York ("Unitarian"), and Robert F. Hyland & Sons, Inc. ("Hyland"), Hyland agreed to "provide all the materials shown and described in ..." various specifications. By a separate, undated contract Hyland agreed to provide all labor necessary for the proper construction and completion of the work described in various specifications.

Article 6 of the materials contract provides that Unitarian will pay Hyland all costs incurred for the proper providing of the materials. ✓

U Hyland was to receive a fixed profit of \$8,000 for the sale of the materials it was required to provide to Unitarian, but the total cost of materials including fee was not to exceed \$146,416.00 unless Unitarian made changes in the specifications.

Article 6.3 of the materials contract provides that, "No sales taxes shall be charged on any items sold to Owner [Unitarian] pursuant to this contract. Owner shall provide contractor with a copy of its Exemption Certificate demonstrating no liability for such taxes."

Article 11 of the materials contract provides that title to all materials shall pass to Unitarian no later than the time at which payment is made.

8. Title to all materials in fact passed to Unitarian when removed from the truck at the job site.

9. By a letter of October 13, 1967, taxpayer agreed with Hyland to furnish the necessary electrical fixtures for \$10,298.00 and to install them for \$11,726.00. U

U The letter of October 13, 1967, notes that the proposed amounts do not include any State sales tax.

10. The proposed amounts would have been higher if applicant had expected the sales to be subject to tax. U

U Unitarian, Hyland and taxpayer thought that tax was not due on the materials used on the construction project and intended that the total cost of the project to Unitarian be reduced by that amount.

U When the contracts were drafted the parties intended to qualify the sales for exemption from the tax.

11. The taxpayer submitted to Hyland, and Hyland submitted to Unitarian, itemized bills for work done on the project stating separately the cost attributable to labor and the cost attributable to materials. U

U 12. No tax was charged on any of the bills submitted to Hyland or Unitarian. U

U The taxpayer and Hyland were of the understanding that the sales were exempt. ~~Tr. 29-240171-89 (Hassett)~~.

#### B. PRESBYTERIAN CHURCH PROJECT

12. By a contract dated January 23, 1968, between the First Presbyterian Society of Pittsford, New York, ("Presbyterian") and Anthony Link Sons, Incorporated ("Link"), Link agreed to do certain construction work for Presbyterian.

Presbyterian agreed to pay Link \$130,400.00 for materials used in the construction project and \$286,280.00 for labor to be performed with respect to the construction work. U

U The contract provides that \$130,400.00 is the total purchase price for which Link shall sell and Presbyterian shall purchase all building materials and supplies necessary to complete the project. U

U Presbyterian represents in the contract with Link that it is exempt from the State sales tax. U

U The contract provides that title to the building materials and supplies shall pass to Presbyterian upon delivery to the site.

13. By contract dated February 19, 1968, between Link and the taxpayer, applicant agreed to furnish materials and to do the work required by various specifications. U

U The contract with Link provides that taxpayer shall be paid \$14,000.00 for the materials furnished and \$25,053.00 for the labor to be performed. U

U The contract notes that, "The owner [Presbyterian] is claiming tax exemption."

U Title to all materials delivered to the building site by taxpayer passed to Presbyterian at the time of delivery since the subcontract provides that applicant is to be bound by the terms of the prime contract.

U Presbyterian, Link and taxpayer throught that tax was not due on the materials used in the construction project and intended that the total cost of the project to Presbyterian ~~xs~~ be reduced by that amount. U

When the contracts were drafted the parties intended to qualify the sales for exemption from the tax.

All applications for payment from applicant to Link and from Link to Presbyterian were separately stated to show the portion of the payment that was due for materials supplied and the portion that was due for labor performed.

14. No tax was charged Link or Presbyterian on any of the applications for payment. )

U Taxpayer and Link were of the understanding that the sales were exempt.

C. COLUMBUS CIVIC CENTER

15. Taxpayer was the prime contractor for remodeling work on two occasions and did a series of other small jobs for the Columbus Civic Center ("Civic Center").

16. By an oral contract evidenced by a letter of June 10, 1966, taxpayer agreed to do some remodeling work on the 6th and 10th floors of Civic Center. )

U The letter provided that Civic Center would be charged \$7,680.00 for materials and \$9,240.00 for labor. )

U The letter notes that the proposed price was computed without including any amount for sales tax.

17. By letter of June 22, 1967, taxpayer proposed to furnish and install for Civic Center electrical service and distribution  
ment  
equipment for a sum not in excess of \$27,500.00. )

U Actual charges for the project were to be based upon cost of materials, labor, labor insurance, cartage and expendable tools, plus fifteen percent for overhead and five percent for profit.

18. Various other contracts between taxpayer and Civic Center are evidenced by bills marked as Exhibit C-3 and dated between February 24, 1967 and November 26, 1968.

19. All of the bills to Civic Center separately stated the charges for labor and the charges for materials. All charges for materials were fully itemized. ✓

U All of the bills to Civic Center were computed without including any amount for tax.

20. Title to all materials used in remodeling passed to Civic Center when delivered to the job site.

21. Taxpayer was issued an Exemption Organization Certificate by Civic Center.

22. Civic Center agreed to reimburse taxpayer for any sales tax paid with respect to sales to it and to ~~defend~~ defend applicant, if necessary.

Applicant and Civic Center thought that tax was not due on the materials used in the remodeling projects and intended that the total cost of the projects to Civic Center be reduced by those amounts. Amounts charged Civic Center for materials would have been higher if taxpayer had believed the sales to be subject to tax.

was

When the contract/agreed upon and performed the parties intended to qualify the sales for exemption from the tax. ✓

U Applicant did not charge tax on its bills to Civic Center because it understood that the sales were exempt.

D. ROCHESTER SCHOOL FOR THE DEAF-ADMINISTRATIVE BUILDING

23. Taxpayer was the prime contractor on the remodeling contract for Rochester School for the Deaf ("School") and did work for School on two other occasions as a subcontractor.



By letters of April 23, 1968 and June 12, 1968, taxpayer agreed to remodel School's Administration Building for a cost not to exceed \$4,894.00 for materials and \$11,897.00 for labor.

Taxpayer's bills to School separately stated the charges for labor and the charges for materials and noted that School is exempt from sales tax. All charges for materials were fully itemized.

Title to all materials used in the remodeling passed to School when delivered to the job site.

24. Taxpayer and School thought that tax was not due on the materials used in the remodeling project and intended that the total cost of the project to School be reduced by that amount. Amounts charged to <sup>the Rochester</sup> School <sup>for the Deaf</sup> would have been higher if applicant had believed the sales to be subject to tax.

Taxpayer did not charge tax on its bills to School because it understood that the sales were exempt.

E. ROCHESTER SCHOOL FOR THE DEAF - INTERMEDIATE DORMITORY

25. By a contract dated October 19, 1966, between School and Saucke Bros. Construction Co., Inc. ("Saucke"), Saucke agreed to sell to School all the materials and perform all the work needed to construct an intermediate dormitory.

The contract was specifically drafted to provide that Saucke would "sell to the Owner" the materials used to build the intermediate dormitory.

School agreed to pay Saucke \$149,800.00 for all materials to be incorporated in the work and \$256,113.00 for all other contract obligations.

Article 3 of the contract also provides that School will increase these payments if any sales tax is imposed for materials sold to School.

The amount charged School by Saucke for the construction project would have been \$7,490.00 more if Saucke had charged sales tax on the materials.

By letter of November 27, 1967, Saucke agreed with taxpayer to pay \$12,080.00 for materials to be used in subcontracting work to be done on the intermediate dormitory and \$20,551.00 for labor.

Title to all materials used in the subcontracting passed to School when delivered to the job site.

The amount charged School for the subcontracting work would have been \$604.00 (five percent of \$12,080.00) more if taxpayer had charged tax on the materials.

26. Taxpayer did not charge tax on its bills to Saucke because it understood that the sales were exempt from tax. ✓

✓ Taxpayer, Saucke and School thought that tax was not due on the materials used in the construction project and intended that the total cost of the project to <sup>the Rochester</sup> School be reduced by that amount. <sub>for the Bldg.</sub>

F. ROCHESTER SCHOOL FOR THE DEAF - THE COMMONS BUILDING

27. By a contract dated November 1, 1967, between Saucke and Schook, Saucke agreed to provide the materials and perform the work necessary for the construction of a commons building. The contract provided that Saucke would be paid \$169,300.00 for all materials and \$288,280.00 for all labor, overhead and profit.

The specifications for the contract for the construction of the commons building provided that the contractor's bid would state separately the cost of materials and the cost of labor, overhead and profit. The purpose of separately stating the cost for materials and the cost for labor was to cause the sales of the materials to be exempt from tax.

The specifications also provided that if sales tax were imposed, School would indemnify and save harmless any contractor or subcontractor.

The subcontract for the electrical work to be performed in connection with the construction of the commons building provided that taxpayer would be paid \$16,895.00 for the materials used and \$20,915.00 for the labor to be performed.

None of the requisitions included a charge for tax. Title to all materials used in the construction project passed to the School when delivered to the job site.

28, Taxpayer, Saucke and School thought that tax was not due on the materials used in the construction project and intended that the total cost of the project be reduced by that amount. When the contract was agreed upon and performed it was intended to qualify the sales for exemption from the tax.

G. UNIVERSITY OF ROCHESTER - EASTMAN SCHOOL

29. By agreement of January 12, 1968, between taxpayer and A.W. Hopeman & Sons Company ("Hopeman"), and equipment to complete some electrical subcontracting work at the University of Rochester Eastman School of Music ("University of Rochester").

The agreed price for the subcontract work was to be computed on a time and materials basis not to exceed \$11,000.00 for

materials and \$9,500.00 for labor. The agreement provided specific standards by which the cost of labor and materials were to be computed.

30. Title to the materials used in the subcontracting work passed to University of Rochester when delivered to the job site.

Although the prime contract between Hopeman and University of Rochester is not in evidence as an exhibit, since it was an oral contract, the invoices separately state the cost of labor and the cost of materials. The invoices ~~are~~ reflect that the prime contract provided that University of Rochester would purchase the necessary materials from Hopeman.

The invoices demonstrate that Hopeman would supply the necessary labor and materials on a "cost-plus" basis.

31. The invoices from applicant to Hopeman separately state, in detail, the labor and materials used in the subcontracting work and state that the sales are exempt from tax.

32. Taxpayer, Hopeman and University of Rochester thought that tax was not due on the materials used in the construction project and intended that the total cost of the project be reduced by that amount. The contract was agreed to and performed in a manner intended to qualify the sales for exemption from the tax. ✓

✓ Taxpayer did not charge sales tax on its invoices to Hopeman because it thought the sales to be exempt and because it had been instructed not to charge the tax.

33. Additionally, Hopeman did not charge sales tax on its sales to University of Rochester. The price would have been higher if Hopeman had charged sales tax.

H. ROCHESTER MUSEUM ASSOCIATION

34. By agreement of August 9, 1965, between Stewart & Bennett, Inc. (Stewart") and Rochester Museum Association ("Museum"), Stewart agreed to provide the labor and materials necessary for the construction of a planetarium.

The agreement provided that Stewart would be reimbursed, inter  
alia, for the cost of all materials, supplies, equip~~xxx~~<sup>ment</sup> and transportation required in the construction of the planetarium. The agreement further provided that Stewart would be reimbursed for any sales taxes.

35. By an agreement of ~~xxxxxx~~ February 14, 1968, between taxpayer and Stewart, applicant agreed to perform electrical work in exchange for reimbursement of all costs for labor and materials, plus a fixed fee of \$25,000.00.

The paragraph of the agreement relating to the sales tax was struck and, a letter attached to the contract indicates that applicant and Stewart thought that the sales were ~~xx~~ exempt from tax.

36. Invoices submitted by taxpayer to Stewart and by Stewart to Museum separately stated the cost of the labor and the cost of the materials. None of the invoices included amounts for tax.

Article 10 of the prime contract provides that title to all materials shall pass to Museum no later than the time at which payment is made. ✓

✓ Title to all materials in fact passed to Museum when removed from the truck at the job site.

37. Taxpayer, Stewart and the Museum thought that tax was not due on the materials used in the construction project and intended that the total cost of the project be reduced by that amount. When the contract was drafted the parties intended to qualify the sales for exemption from the tax.

The cost to Museum of the materials would have been higher if tax had been charged.

I. THE HARLEY SCHOOL

38. By an agreement dated February 2, 1968, between The Harley School ("Harley") and Stewart & Bennett, Inc. ("Stewart"), Stewart agreed to provide all the labor and materials necessary for the proper construction of a new building.

The agreement provided that Stewart would be reimbursed, inter alia, for the cost of all materials, supplies, equipment and transportation required in the construction of the building. The agreement further provided that Stewart would be reimbursed for any sales taxes.

By an agreement dated August 18, 1967, between applicant and Stewart, taxpayer agreed to furnish and install all required electrical equipment in the building for a fixed fee of \$6,000.00 plus costs.

The paragraph of the agreement relating to the sales tax was struck and, ~~as can be seen from~~ the exemption certificate <sup>was</sup> attached to the contract, <sup>the</sup> taxpayer and Stewart thought that the sales were exempt from tax.

39. Invoices submitted by taxpayer to Stewart and By Stewart to Harley separately state the cost of labor and the cost of materials. None of the invoices include amounts for tax with the exception of ~~minor~~ minor amounts included on Stewart invoices to Harley.

~~Article~~

Article 11 of the prime contract provided that title to all materials shall pass to Harley no later than the time at which payment is made. ✓

✓ Title to all materials in fact passed to Harley when removed from the truck at the job site.

40. Taxpayer, Stewart and Harley thought that tax was not due on the materials used in the construction project and intended that the total cost of the project be reduced by that amount. When the contract was drafted the parties intended to qualify the sales for exemption from the tax.

41. Applicant and Stewart did not include tax on the invoices submitted to Harley because they thought that no tax was due. ✓

✓ The cost to Harley of the materials would have been higher if tax had been charged.

J. 685 MT. HOPE AVENUE

42. By letters of October 4, 1966, and October 10, 1966, between Stewart and University of Rochester, Stewart agreed to remodel property located at 685 Mt. Hope Avenue for \$65,800.00

By agreement dated November 14, 1966, and November 22, 1966, taxpayer agreed to furnish and install electrical work for Stewart.

The electrical subcontractor provided that applicant was to be paid \$5,220.00 for the materials necessary for the job and \$6,482.00 for labor.

43. Requisitions submitted by taxpayer to Stewart separately stated the cost of the labor and the cost of the materials. ✓

✓ The first requisition notes that the sales are exempt from tax. ✓

✓ The ~~second~~ second requisition adds to the total contract

~~price~~  
price sales tax of five percent.

Applicant subsequently refunded the sales tax to Stewart upon receipt of a Resale Certificate from Stewart. ✓

✓ A proper Resale Certificate was given taxpayer by Stewart.

44. ~~RE~~ Applicant did not include sales tax on the invoices submitted to University of Rochester because it thought no tax was due.

45. In ~~each of~~ <sup>above</sup> the applicable instances <sup>above</sup> "Unitarian", "Presbyterian", "Civic Center", Rochester School for the Deaf, University of Rochester, Rochester Museum Association, and Harley School qualify for exemption from sales tax under Tax Law section 1116(a)(4), and in each of those instances, that fact is not in dispute.

46. Throughout its business the taxpayer sought to collect and pay over all sales taxes it believed were due.

*Conclusions of Law*  
I. ~~10.~~ The contracts were not lump sum contracts but were time and materials contracts. The institutions for which the buildings were built were exempt from sales tax. The institutions negotiated the contracts so that the contracts provided no sales tax was to be applied to the purchase of the materials. The exempt institutions received the benefit of a lower price. The materials for the buildings were not subject to sales tax. Sweet-Associates v. Gallman, 36 AD 2d 95, affd. N.Y. 2d.

II. ~~10.~~ The taxpayer acted in good faith. The penalties are abated and remitted.

III. ~~10.~~ The taxpayer's applications for a refund of the sales, <sup>tax</sup> the penalties and excess interest previously paid (see paragraph 5 above) is granted.

IV. ~~50.~~ Pursuant to the Tax Law, interest shall be paid on the amount of the ~~XXXXXX~~ refund, from October 30, 1970, (see paragraph 4 above) until the date of payment.

DATED: Albany, New York STC