

BUREAU OF LAW

MEMORANDUM

TO: State Tax Commission

FROM: Martin Schapiro, Hearing Officer

SUBJECT: Sweet Associates, Inc.
Article 28 - Sales taxes
Periods commencing August 1,
1965 and ended November 30, 1966

The issue raised herein is whether or not the taxpayer, a contractor having won the bid for construction of a school building for the Schenectady School District has entered into a lump sum contract with the School District so that there is no resale of purchases of materials by him to the School District or has entered into a time and materials contract in which the materials purchased by the contractor have been resold to the School District and thus not subject to tax.

The facts herein, more specifically set forth in the determination, disclose that the School District sent out notices to bidders in accordance with section 103 of the General Municipal Law for the construction of the school building and awarded the bid to the taxpayer on the basis of the total amount bid for both materials and labor. Section 103 of the General Municipal Law provides, however, that a contract for the purchase of materials must be awarded to the lowest responsible bidder on the basis of the price for the materials and not on the total for materials and labor. The decision accordingly, holds that the contract, if in conformity to section 103 of the General Municipal Law must be a lump sum contract in which title to the materials did not pass until such materials were incorporated to the building and structure and therefore, are no longer tangible personal property. Since, therefore, there was no resale of the property as tangible personal property, the decision taxing the purchases of the building materials to the contractor must stand.

Minor problems present itself with respect to the rental of equipment by the contractor and the purported resale of tools and supplies. There have, however, been no facts presented by the taxpayer showing any resale of such tools and supplies or rental of equipment.

After reviewing the memorandum of law submitted by Counsel for the taxpayer, ~~and~~ which memorandum is enclosed in the file, I am of the opinion that assessment was properly and correctly issued.

I have therefore prepared a proposed determination sustaining the tax.

If you agree with the proposed determination which sustains the assessment, kindly return the same to the Law Bureau for further processing.

Hearing Officer

MS:nn

Enc.

SA
May 27, 1969

STATE OF NEW YORK

STATE TAX COMMISSION

IN THE MATTER OF THE APPLICATION

OF

SWEET ASSOCIATES, INC.

FOR A HEARING TO REVIEW A DETERMINATION :
ASSESSING OR DENYING A REFUND OR CREDIT :
OF SALES AND/OR USE TAXES UNDER ARTICLE :
28 OF THE TAX LAW FOR THE PERIODS :
COMMENCING AUGUST 1, 1965, AND ENDED :
NOVEMBER 30, 1966 :

Sweet Associates, Inc., having filed an application for a hearing to review a determination assessing or denying the refund or credit of sales and/or use taxes under Article 28 of the Tax Law for the periods commencing August 1, 1965, and ended November 30, 1966, and a hearing having been held on February 27, 1968, at the office of the State Tax Commission, State Campus, Albany, New York, before Martin Schapiro, Hearing Officer, at which hearing the taxpayer appeared by its attorney, A. S. Clayman, Esq., and the matter having been duly considered

The State Tax Commission hereby finds:

(1) That the City School District of the City of Schenectady by notice to bidders invited sealed bids for the construction of a building addition to Halsey Elementary School in Schenectady, New York. That the instructions to the bidders provided that:

"ARTICLE A.20 - AWARD OF CONTRACT

A. Each Contract will be awarded, if at all, to the lowest responsible Bidder as determined by the Owner according to law, and the provisions of the Contract Documents.

1. In determining who is the lowest bidder, the Owner shall compare the totals of all bids for such subdivision or branch of work for (a) Materials, supplies and equipment rental only and (b) All work except materials, supplies and equipment rental in respect to the base bids and all accepted alternate bids, whether additive or deductive."

Sweet Associates, Inc., the taxpayer herein, submitted a proposal for the construction of the addition to Halsey Elementary School and as such bidder proposed to furnish all labor, materials and equipment to perform the contract for the construction of such building in accordance with certain drawings and specifications and further submitted certain base price and alternate price proposals in accordance with certain schedules set forth. All of the base bids and alternate bids set forth amounts bid for (a) materials, supplies and equipment rental, (b) bids for all work except materials, supplies and equipment rental and (c) the total of such amounts (a) and (b). After comparing all the proposals bid with respect to the total amount bid by each bidder for (a) materials, supplies and equipment rental and (b) work, and after giving consideration to the responsibility of the bidder to perform the contract, the contract for the construction of the addition to the Halsey Elementary School was awarded to the taxpayer, Sweet Associates, Inc.

(2) The Contractor's Proposal submitted by the taxpayer to the City School District of the City of Schenectady contained the following provisions:

"The undersigned, as Bidder, proposes to furnish all labor, materials, and equipment to perform the General Construction Contract for the construction of the Halsey Elementary School . . . for the sums set forth in the following schedule.

**SCHEDULE OF PROPOSALS
GENERAL CONSTRUCTION**

BASE BIDS: Proposal for performing all General Construction Work necessary or proper for or incidental to construction and completion of the Malsey Elementary School.

(a) Bid for materials, supplies, and equipment rental, _____

\$ _____

(b) Bid for all work except materials, supplies, and equipment rental, _____

\$ _____

(c) Total Proposal, total of (a) plus (b),

\$ _____

(3) That on June 10, 1966 the aforesaid contract was entered into between the taxpayer (the Contractor) and the school district (the Owner); the contract contains the following provisions which are set forth in the agreement between the taxpayer and the school district:

"SECTION 5. COMPENSATION TO BE PAID CONTRACTOR

(A) The Contractor agrees to sell and the Owner agrees to purchase all the supplies and materials (including rental of equipment) required, necessary, and proper for or incidental to the execution of the contract for _____ work for the sums set forth below:

Base bid \$ _____

Alternate Proposal No. _____
(Add or deduct)

Alternate Proposal No. _____
(Add or deduct)

Aggregate bid, Part (A) \$ _____

(B) The Contractor agrees to perform all work exclusive of the furnishing of supplies and materials and of the rental of equipment for _____ work for the sums set forth below:

Base bid \$ _____

Alternate Proposal No. _____
(Add or deduct)

Alternate Proposal No. _____
(Add or deduct)

Aggregate bid, Part (B) \$ _____

SECTION 10. DETERMINING DATE OF COMPLETION

(A) Final inspection of the work by the Architect shall be made within 10 days after receipt of the Contractor's written request therefor, providing in the opinion of the Architect, the work has progressed to the point where a final inspection is justified. The work will be deemed complete as of the date of such inspection, if, upon such inspection, the Architect finds that no further work remains to be done at the site.

SECTION 13. FINAL PAYMENT:

(A) After the Architect determines that the Contractor has completed the work required under his contract, pursuant to Section 10 of this Agreement entitled 'Determining Date of Completion', the Contractor shall submit all required certificates and documents, together with a requisition for the final balance claimed to be due under the contract . . .

(B) The Contractor must also submit with such final requisition a final verified statement of any and all alleged claims against the Owner, in any way connected with or arising out of this contract, setting forth with respect to each such claim the total amount thereof, the various items of labor and materials included therein, and the alleged value of each such item . . .

(C) Upon determining the balance due hereunder, other than on account of claims, the Architect will prepare and certify a claim form for final payment in that amount, less any and all deductions authorized to be made by the Owner under this contract or by law. Such claim form shall thereupon be filed with the School District Clerk.

(E) Payment pursuant to such final claim form, less any deductions authorized to be made by the Owner under this contract or by law, shall constitute the final payment, and shall be made by the Owner within 30 days after the filing of such claim form in such office.

SECTION 29. ALL LEGAL PROVISIONS DEEMED INCLUDED:

(A) It is the intent and understanding of the parties to this contract that each and every provision of law required to be inserted in this contract shall be and is inserted herein. Furthermore, it is hereby stipulated that every such provision is to be deemed to be inserted herein, and if, through mistake or otherwise, any such provision is not inserted, or is not inserted in correct form, then this contract shall forthwith, upon the application of either party, be amended by such insertion so as to comply strictly with the law and without prejudice to the rights of either party hereunder.

SECTION 29A. EFFECT OF SALES TAX LITIGATION ON VALIDITY OF AGREEMENT:

It is recognized by the parties hereto that the solicitation of bids by the bidders in the form used in the bid sheet herein whereby bidders separately stated prices for (a) the sale to the Owner of materials, supplies, and rental of equipment and (b) all work required for the performance of the contract except materials, supplies, and rental of equipment, and the preparation of the agreement in accordance with such bid form are solely to enable the Owner to utilize and benefit from its status as a governmental agency or instrumentality exempt from the New York State Sales Tax.

If this agreement or any of the contract documents should be attacked by the New York State Department of Taxation and Finance or any other agency or employee of the State of New York or by anyone else and be declared illegal by any court because of such division of the total amount required for the performance of this contract into separate parts for furnishing materials, supplies, and rental of equipment on the one hand and the performance of all work except such materials, supplies, and rental of equipment on the other hand, such action or decision shall not relieve any party under this contract of its obligations thereunder. In the event this contract should be declared invalid as aforesaid, then the bids accepted for the performance of this contract and this agreement and other contract documents shall be treated by the parties hereto as though the bids were submitted as and the Agreement referred to a single lump sum figure consisting of the total of the figures submitted for the above described division or parts respectively for materials, supplies, and rental of equipment on the one hand and the performance of all work except materials, supplies, and rental of equipment on the other."

(4) That the general conditions of the contract contain the following provisions:

"ARTICLE C.01 - DEFINITIONS AND PRINCIPLES

A. The Contract Documents consist of the Agreement executed by the parties, the Notice to Bidders, the Instructions to Bidders, the Contractor's Proposal, the General Conditions, the Technical Specifications, the Performance and Payment Bonds, the Drawings, all modifications of the foregoing documents prior to their execution, and all change orders thereto subsequent to their adoption. Any personal pronoun of the singular number and masculine gender, where used in the Contract Documents, refers to an individual, a co-

partnership, firm, corporation, Board or Committee. The Contract Documents are mutually cooperative, complimentary and correlating.

K. **CONTRACT** shall mean the contract between Owner and Contractor and shall consist of the Contract Documents; wherever the term 'contract' is mentioned in the specifications, it refers to said Contract Documents unless a clear reference is made to a separate contract.

L. **WORK**: Refers to and includes all plant, labor, materials, supplies, equipment and other facilities necessary to the carrying out and the completion of the terms of the contract."

That, further, Article C.23 of the general conditions entitled "Certificates and Applications for Payment" provides in effect for partial monthly installment payments of the work so far erected including in such payment the payment for materials which have become part of the building erected so far and further provide that no payment is to be made for the materials which have not become part of the erected work but are merely stored on the premises, except in exceptional or unusual circumstances.

(5) In pursuance of such contract the taxpayer (a) purchased building materials, (b) purchased tools and supplies and (c) rented equipment which were all used in the performance by the taxpayer of the contract with the Schenectady School District. The taxpayer did not pay any sales or use tax on such purchases or rentals.

(6) The taxpayer filed sales and use tax returns for all of the taxable periods commencing August 1, 1965, and ended November 30, 1966, but excluded therefrom all sales and/or use taxes on purchases made by him of (a) building materials, (b) supplies and (c) rentals of equipment. Determinations were thereupon issued assessing a tax of \$1,692.35 with interest of \$52.46 on such purchases and rentals by the taxpayer (Notice No. 90,751,129-A, dated February 16, 1967).

Of the additional tax in the amount of \$1,692.35 assessed against the taxpayer \$5.81 represented the tax on equipment rentals by the taxpayer and \$84.21 represented tools and supplies which although used by the taxpayer in the performance of his contract were not incorporated into the building. The remaining tax represented building materials which were incorporated in the buildings as part thereof during the construction of the buildings. The taxes and interest assessed were paid.

(7) The taxpayer contends that the sale to it of building materials and supplies and the rental to it of equipment which were purchased by it were required to be purchased and were so purchased for the purposes of resale to the Schenectady School District in accordance with the provisions in the contract contained in the general conditions as follows:

"ARTICLE C.21A - EXEMPTION FROM SALES AND COMPENSATING USE TAXES OF THE STATE OF NEW YORK

- A. The Owner is exempt from payment of Sales and Compensating Use Taxes of the State of New York on all supplies and materials sold to it and on rental fees on all equipment used on or for the project pursuant to the provisions of this contract and these taxes are not to be included in bids.
- B. The purchase by the Contractor of the supplies and materials sold hereunder will be a purchase or procurement for resale and therefore not subject to the New York State sales or compensating use taxes. (The term 'supplies and materials' as used in this article and the next two articles in the General Conditions includes fees for the rental of equipment). The sale of such supplies and materials by the Contractor to the Owner will not be subject to the aforesaid sales or compensating use taxes . . . "

The taxpayer contends further that pursuant to the contract, materials, supplies and tools and equipment were resold as tangible personal property by the taxpayer to the school district, and that accordingly such sales to the taxpayer were for resale and thus exempt from taxation within the intent and meaning of and in accordance with the definition of "retail sale" set forth in Section 1101(b)(4) of the Tax Law.

(8) The taxpayer further contends that no tax should be imposed on it for materials and supplies which it purchased, since the economic effect would be to pass on such tax to the school district which is an exempt organization under Article 28 of the Tax Law.

(9) That the taxpayer asserts that the aforesaid contract was awarded to it by the school district in conformance to and compliance with Section 103 of the General Municipal Law which provides in part as follows:

"§ 103. Advertising for bids; letting of contracts; criminal conspiracies.--

1. Except as otherwise expressly provided by an act of the legislature or by a local law adopted prior to September first, nineteen hundred fifty-three, all contracts for public work involving an expenditure of more than twenty-five hundred dollars and all purchase contracts involving an expenditure of more than one thousand dollars, shall be awarded by the appropriate officer, board or agency of a political subdivision or of any district therein including but not limited to a soil conservation district, to the lowest responsible bidder furnishing the required security after advertisement for sealed bids in the manner provided by this section. In any case where a responsible bidder's gross price is reducible by an allowance for the value of used machinery, equipment, apparatus or tools to be traded in by a political subdivision,

the gross price shall be reduced by the amount of such allowance for the purpose of determining the low bid. In cases where two or more responsible bidders furnishing the required security submit identical bids as to price, such officer, board or agency may award the contract to any of such bidders. Such officer, board or agency may, in his or its discretion, reject all bids and readvertise for new bids in the matter provided by this section." (Emphasis added.)

Upon all the above foregoing facts and all the evidence and exhibits herein, the State Tax Commission hereby

DETERMINES:

(A) That the contract was awarded to Sweet Associates, Inc., the taxpayer herein, as the lowest responsible bidder in accordance with and pursuant to the instructions to bidders which provided that the contract would be awarded to the lowest responsible bidder based upon a comparison of the totals of all bids for work including materials, supplies, equipment rentals and all other work; that the contract was awarded pursuant to Section 103 of the General Municipal Law;

(B) That the contract was not awarded and executed solely on the basis of the lowest responsible bid for supplies and materials, including rental of equipment as required by Section 103 of the General Municipal Law which provides that " . . . all purchase contracts involving an expenditure of more than one thousand dollars shall be awarded . . . to the lowest responsible bidder . . . ". The contract was awarded and executed on the basis of the "Total Proposal" (finding of fact number 2) consisting of the total of (A) plus (B), (A) being the bid for materials, supplies and equipment rental and (B) being the bid for all work except materials, supplies and equipment rental, as required by Section 103 of the General Municipal Law which provides that " . . . all contracts for public work involving an expenditure

of more than twenty-five hundred dollars . . . shall be awarded . . . to the lowest responsible bidder . . . ". The contract, therefore, is not a separate purchase contract for materials and supplies entered into pursuant to Section 103 of the General Municipal Law but is a contract for public work entered into pursuant to such section; that to hold otherwise would require a conclusion that the contract was entered into in violation of the provisions of Section 103 of the General Municipal Law, and, therefore that the contract between the taxpayer and the school district was an illegal contract (Gerzof v. Sweeney, 16 N.Y. 2d 206, 22 N.Y. 2d 297). In determining the taxpayer's liability for the sales and use tax on the materials, supplies and rental equipment, the provisions of the contract attempting to provide for the sale and purchase of the materials, supplies and rental equipment are treated as a nullity, since it cannot be presumed that the parties intended to enter into a contract which was illegal (Friedman v. State of New York, 242 App. Div. 314, aff'd. 268 N.Y. 530).

(G) That, further, since the contract provides "The solicitation of bids by bidders in the form used in the bid sheet herein whereby bidders separately stated prices for (a) the sale . . . of materials, supplies . . . and (b) all work required for the performance of the contract and the preparation of the agreement in accordance with such bid form are solely to enable the owner to utilize and benefit from its status as a governmental agency or instrumentality exempt from New York Sales Tax." (finding of fact number 3), the parties expressly intended to disregard the provisions in the agreement which purported to create a separate contract for the sale of materials and supplies for all purposes except that of attempting to avoid payment of sales tax on the materials and supplies purchased by the contractor; that such provisions, which are of no economic substance or value and were inserted solely for tax purposes, must accordingly be disregarded in determining the nature of the contract; Gregory v. Helvering,

69 F. 2d 809, aff'd. 293 U.S., 465.

(D) That the contract for public work entered into between the parties which (a) defined "work" as "All plant, labor, materials, supplies, equipment and other facilities necessary to the carrying out and the completion of the terms of the contract", (b) provided that the work would be deemed complete as of the date of inspection of the architect designated by the school district, (c) provided that final payment was to be made only after the "Architect determines that the Contractor has completed the work required under his contract", (d) prohibited interim payment for materials until the same were incorporated in the building except in exceptional or unusual circumstances and (e) was awarded on the basis of the total amount for all work including labor, materials, supplies and equipment, was a lump sum contract requiring the taxpayer to build an addition to the school, under which lump sum contract the taxpayer furnished labor, materials, supplies and equipment.

(E) That since the contract was a lump sum contract, title to the building materials did not pass to the school district until after the same were incorporated in the addition to the building and became a physical component part of the real property; that, accordingly, the building materials were transferred to the school district as real property since at the time the school district acquired the addition to the building, the building materials were no longer tangible personal property. Therefore, there was no resale of tangible personal property by the taxpayer to the school district, and the taxpayer, not the school district, was the ultimate consumer of such building materials as tangible personal property; that there was, therefore, a retail sale to the taxpayer of building materials purchased by him for the performance of the contract, in accordance with the definitions of the words "retail sale" and "sale" set forth in Section 1101(b)(4) and (5) of the Tax Law; that, in accordance with Section 1105(a) of the Tax Law, the tax was properly imposed on the

receipts from such retail sales of the tangible personal property consisting of building materials purchased by the taxpayer.

(F) That even if the provisions in the agreement were to be considered as a resale by the contractor to the school district of the materials and supplies purchased by the contractor in performance of his contract such resale would not be that of materials and supplies in their form as tangible personal property but in the form of real property after such materials and supplies were incorporated in the addition to the building which was constructed by the taxpayer pursuant to the contract.

(G) That if the taxpayer is correct in its contention, set forth in finding of fact number 7, that the contract was one of purchase and sale of tangible personal property consisting of materials and supplies, then such contract would be illegal and null and void since the contract would then have been awarded in violation of the bidding requirements of Section 103 of the General Municipal Law and there would, therefore, be no resale by the taxpayer to the school district of the materials and supplies purchased by the taxpayer, resulting in the liability of the taxpayer for the sales tax on the materials and supplies which it purchased; that, however, the taxpayer is incorrect in its contention that a separate contract for the sale of materials and supplies as tangible personal property was created, and is therefore liable for the payment of tax not by virtue of a void contract, but by virtue of the fact that the contract was a valid lump sum contract as determined herein.

(H) That the taxpayer's contention, set forth in finding of fact number 8, that the economic burden of the tax is shifted on the school district does not relieve the taxpayer of his liability to pay the tax, Alabama v. King and Boozer, 314 U.S. 1, 86 L ed. 3.

(I) That the taxpayer has failed to establish that there was any delivery or transfer of the tools and supplies used by the taxpayer in performing the work or that there was any retail sale

of such tools and supplies as such words "sale" or "retail sale" are defined pursuant to Section 1101(b)(4) and (5) of the Tax Law; that accordingly, there was no resale of such tools and supplies purchased by the taxpayer and that portion of the tax representing tax on such tools and supplies (\$84.21) was properly imposed in accordance with Section 1105(a) of the Tax Law.

(J) That the equipment which was rented by the taxpayer in performance of his work was not rerented by the taxpayer to the Schenectady School District and there was, accordingly, no resale within the definitions of the words retail sale and sale set forth in Section 1101(b)(4) and (5) of the Tax Law; that that portion of the tax (\$5.81) which was imposed on the receipts from such equipment rentals was properly imposed in accordance with Section 1105(a) of the Tax Law.

(K) That the taxes assessed in the determination are proper and lawful and the determination assessing such tax is hereby affirmed.

DATED: Albany, New York on the 15th day of July, 1969.

STATE TAX COMMISSION

Norman Gallman
PRESIDENT

Bruce Menley
COMMISSIONER

Milton Krerner
COMMISSIONER