

STATE OF NEW YORK.
STATE TAX COMMISSION

In the Matter of the Petition

of

DAVIS-ECKERT-JOINT VENTURE

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or :
a Revision of a Determination or a Refund :
of Sales and Use :
Taxes under Article(s) 28 and 29 of the :
Tax Law for the ~~XXXXXX~~ Period(~~s~~) :
August 1, 1965 through February 28, 1969.

State of New York
County of Albany

John Huhn , 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 13th day of December , 19 78, she served the within
Notice of Determination by (~~certified~~) mail upon Davis-Eckert-
Joint Venture (~~representative of the~~) the petitioner in the within proceeding,
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows: Davis-Eckert-Joint Venture
1062 Central Avenue
Albany, New York 12205

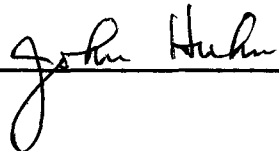
and by depositing same enclosed in a postpaid properly addressed wrapper in a
(post office or official depository) under the exclusive care and custody of
the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the (~~representative of the~~
~~of the~~) 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

13th day of December , 1978





STATE OF NEW YORK
STATE TAX COMMISSION

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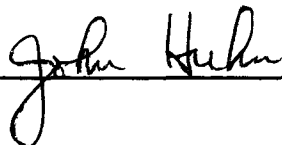
John Huhn, being duly sworn, deposes and says that
~~she~~ is an employee of the Department of Taxation and Finance, over 18 years of
age, and that on the 13th day of December, 1978, ~~she~~ served the within
Notice of Determination by ~~(certified)~~ mail upon Donald J. Egan and
James L. Magavern
(representative of) the petitioner in the within proceeding,
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows: Donald J. Egan and James L. Magavern, Esqs.
Magavern, Magavern, Lowe & Beilewech
900 Prudential Building
Buffalo, New York 14202
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 Postal Service within the State of New York.

That deponent further says that the said addressee is the (representative
of the) 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

13th day of December, 1978







STATE OF NEW YORK
STATE TAX COMMISSION
TAX APPEALS BUREAU
ALBANY, NEW YORK 12227

JAMES H. TULLY JR., PRESIDENT
MILTON KOERNER
THOMAS H. LYNCH

December 13, 1978

**Davis-Eckert-Joint Venture
1062 Central Avenue
Albany, New York 12205**

Gentlemen:

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

You have now exhausted your right of review at the administrative level. Pursuant to section(s) **1138 & 1243** of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within **4 months** from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to the Deputy Commissioner and Counsel to the New York State Department of Taxation and Finance, Albany, New York 12227. Said inquiries will be referred to the proper authority for reply.

Sincerely,

**Michael Alexander
Supervising Tax
Hearing Officer**

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application :
of :
DAVIS-ECKERT-JOINT VENTURE : 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 :
February 28, 1969. :

Applicant, Davis-Eckert-Joint Venture, 1062 Central Avenue, Albany, New York 12205, filed an application 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 February 28, 1969 (File No. 01888).

A formal hearing was held before L. Robert Leisner, Hearing Officer, at the offices of the State Tax Commission, State Office Building, Buffalo, New York, on October 20, 1971. Applicant appeared by Donald J. Egan, Esq. and James L. Magavern, Esq. The Sales Tax Bureau appeared by Saul Heckelman, Esq. (Alexander Weiss, Esq., of counsel).

ISSUE

Whether applicant's purchases of materials were subject to sales tax where it entered into a subcontract for capital improvements for an exempt organization, incorporating provisions of the general contract which provided that a) the bid price was exempt from sales tax and b) the purchases were for resale to said exempt organization.

FINDINGS OF FACT

1. Applicant, Davis-Eckert-Joint Venture, filed New York State sales and use tax returns for the period August 1, 1965 through February 28, 1969.

2. A Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period August 1, 1965 through February 28, 1969 was issued on October 20, 1969, against applicant for taxes due of \$11,296.59, plus penalty and interest.

3. Applicant timely filed an application for revision of said determination.

4. On August 2, 1966, applicant entered into a subcontract with the Planet Construction Corp. for capital improvements for the Dormitory Authority of the State of New York at the State University at Albany.

5. The subcontract incorporated the provisions of the general contract. The general contract provided that the Dormitory Authority was exempt from New York State, city and county sales and use taxes on all materials and supplies sold to it, and that "These taxes are not to be included in bids." The general contract also contained provisions stating that the title to materials would pass upon delivery, and that there was a resale to the tax exempt Dormitory Authority. The general contract also stipulated that subcontractors' purchase of supplies and materials would not be subject to sales and use taxes "...provided that subcontract agreements provide for the resale of such supplies and materials prior to and separate and apart from the incorporation of such supplies and materials into the permanent construction...."

6. The Sales Tax Bureau contended that the subcontract must be a time-and-material contract in order for the materials purchased to be exempt from sales tax. Applicant asserted that the exclusion of the sales tax from the contract exempted the purchase of materials from sales tax.

7. The general contractor, the Dormitory Authority and applicant did not intend to include a sales tax on the bid prices of the capital improvements, and no sales tax was in fact charged to or collected from the general contractor or the Dormitory Authority.

CONCLUSIONS OF LAW

A. That the general contract provision which states that the Dormitory Authority was a tax exempt institution and, therefore, no sales or use taxes should be included in the bid price or charges to it for the purchase of materials by the contractors is the controlling factor in this case. No sales tax is imposed on purchases of materials for capital improvements made for the Dormitory Authority, where the general contract provides that sales tax should not be included in the bid or charges to it. Sweet Associates v. Gallman, 29 N.Y. 2d 902.

B. That the application of Davis-Eckert-Joint Venture is granted and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued October 20, 1969 is cancelled.

DATED: Albany, New York

December 13, 1978

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER