

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

LO BELLO ELECTRIC, INC.

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 ~~Year(s)~~ Period(s) :
December 1, 1969 through November 30,
1972.

State of New York
County of Albany

John Huhn , being duly sworn, deposes and says that
he is an employee of the Department of Taxation and Finance, over 18 years of
age, and that on the 14th day of February , 1979 , he served the within
Notice of Determination by ~~certified~~ mail upon Lo Bello Electric, Inc.

~~(representative of)~~ the petitioner in the within proceeding,
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows:

Lo Bello Electric, Inc.
2314 Eastchester Road
Bronx, New York 10469

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

14th day of February , 1979.

Marilyn J. Pafman

John Huhn

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

LO BELLO ELECTRIC, INC.

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) :
December 1, 1969 through November 30,
1972.

State of New York
County of Albany

John Huhn, being duly sworn, deposes and says that
he is an employee of the Department of Taxation and Finance, over 18 years of
age, and that on the 14th day of February, 1979, he served the within
Notice of Determination by ~~(certified)~~ mail upon Elias R. Zachary, CPA
(representative of) the petitioner in the within proceeding,
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows:
Elias R. Zachary, CPA
10-5 Granada Crescent
White Plains, NY 10603
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

14th day of February, 1979

Marilyn J. Papineau

John Huhn



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

February 14, 1979

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

Lo Bello Electric, Inc.
2314 Eastchester Road
Bronx, New York 10469

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,

Joseph Chyrywaty
Hearing Examiner

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application :
of :
LO BELLO ELECTRIC, 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 December 1, 1969 through :
November 30, 1972. :

Applicant, Lo Bello Electric, Inc., 2314 Eastchester Road,
Bronx, New York 10469, 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 December 1, 1969 through
November 30, 1972 (File No. 10213).

A small claims hearing was held before Raymond Siegel, Hearing
Officer, at the offices of the State Tax Commission, Two World Trade
Center, New York, New York, on December 14, 1977. Applicant appeared
by Elias R. Zachary, CPA. The Sales Tax Bureau appeared by Peter
Crotty, Esq. (Samuel Freund, Esq., of counsel).

ISSUES

I. Whether applicant, a contractor, may be relieved from the
responsibility of collecting sales tax from its customers by accepting
a certificate of Capital Improvement from said customer, according to
the meaning and intent of section 1132(c) of the Tax Law.

II. Whether the adjusted results of an audit of applicant's books and records and of a post-assessment conference by the Sales Tax Bureau properly reflect applicant's sales and use tax liability for the period December 1, 1969 through November 30, 1972.

FINDINGS OF FACT

1. Applicant, Lo Bello Electric, Inc., filed New York State sales and use tax returns for all tax periods from December 1, 1969 through November 30, 1972.

2. On September 17, 1973, the Sales Tax Bureau issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Lo Bello Electric, Inc. Said Notice was issued as the result of a field audit and disclosed additional sales and use taxes due of \$8,182.42, plus penalty and interest of \$2,108.68, for the period December 1, 1969 through November 30, 1972.

3. The aforesaid field audit of applicant's books and records revealed the following:

(a) The vendor did business as both a prime contractor and a subcontractor of electrical work.

(b) An analysis of February 1970's and July 1971's purchases of materials disclosed that applicant paid sales tax on all purchases of materials.

(c) An analysis of nontaxable sales for September and October of 1972 resulted in a 7.1% disallowance of reported nontaxable sales for

the two months tested. This percentage was applied to nontaxable sales reported for the audit period (\$1,747,128.00), to result in additional taxable sales of \$124,046.00 and additional tax due of \$8,182.42.

4. A conference took place on April 25, 1974 at the Bronx District Office of the Department of Taxation and Finance, at which the Sales Tax Bureau (based on documentary evidence and other information presented at the conference) reduced the assessment. The results of said conference were as follows:

(a) Additional capital improvement certificates and invoices were allowed, wherein capital improvements were made to real property. The resultant balance of disallowed nontaxable sales reported for the test period of September and October, 1972 amounted to \$3,335.00 as follows:

| | <u>DISALLOWED</u> | <u>TESTED</u> |
|----------------------------------|-------------------|--------------------|
| September 1972 Gristede Brothers | \$ 670.00 | |
| Gristede Brothers | 1,535.00 | |
| Paine Weber | 231.00 | |
| | <u>\$2,436.00</u> | <u>\$27,543.00</u> |
| October 1972 Nevins Warehouse | 479.00 | |
| Scamporlino | 420.00 | |
| | <u>\$ 899.00</u> | <u>\$65,935.86</u> |
| Two Months Totals | \$3,335.00 | \$93,478.86 |

A recomputation for the test period revealed a 3.5% disallowance of nontaxable sales, which resulted in additional taxable sales of \$61,149.00 for the audit period.

(b) In addition, a disallowance of \$4,155.00 was made against credits claimed for the cost of materials used in taxable sales. This was based on the examiner's computation of the average cost of materials used (24.2%), which was arrived at by determining the ratio of total purchases (\$513,365.00) to total sales (\$2,117,191.00) during the audit period.

(c) Based on the above, the Sales Tax Bureau reduced the additional sales and use taxes due from \$8,182.42 to \$4,307.75.

(d) Applicant disagreed with these findings and requested a formal hearing.

5. Applicant presented certificates of capital improvement and invoices relating to four of the disallowed sales in the test period.

6. The two invoices to Gristede Brothers describe a mixed sale and installation of fixtures (produce cases, refrigerators, etc.), as well as installation of electrical conduit and wiring, without any breakdown as to itemized selling prices. This installation constitutes a taxable repair.

7. The invoice to Nevins Warehouse, Bronx, New York, in October of 1972 for \$479.00 describes the furnishing and installation of wiring and receptacles for a new 220 volt line. This installation constitutes a capital improvement to real property.

8. The invoice to Miss Scamporlino, Bronx, New York, in October of 1972 for \$420.00 describes the furnishing and installation of new, 220 volt service, a circuit breaker, and two outlets in a home. This installation constitutes a capital improvement to real property.

9. Applicant has substantiated an additional \$899.00 as capital improvements to real property (per Findings of Fact "7" and "8," above). The resultant adjusted disallowance is \$2,436.00, or 2.6% of nontaxable sales reported for the two month test period of September and October, 1972. Application of this 2.6% disallowance against nontaxable sales reported for the audit period results in additional taxable sales of \$45,425.00 for the period December 1, 1969 through November 30, 1972.

10. Applicant protested the use of an average cost of materials used in taxable sales, because applicant stated that it used a job-cost method. Applicant did not submit any documentary evidence to substantiate the tax credits taken on its sales tax returns.

CONCLUSIONS OF LAW

A. That the certificates of capital improvement accepted by applicant, Lo Bello Electric, Inc., did not relieve applicant of bearing the burden of proof necessary to show that the work done was, in fact, a nontaxable capital improvement, in accordance with the meaning and intent of section 1132(c) of the Tax Law.

B. That applicant has sustained its burden of proving the nontaxability of sales for all but three invoices in the test months of September and October of 1972; that the three invoices (amounting to \$2,436.00) constitute 2.6% of nontaxable sales reported for the test months and that the application of this 2.6% disallowance to reported nontaxable sales of \$1,747,128.00 for the entire audit period results in additional taxable sales of \$45,425.00.

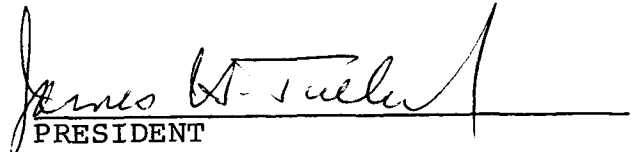
C. That applicant failed to sustain its burden of proving what was the cost of materials used in determining the sales tax credit as deducted on its returns. That the method used by the Sales Tax Bureau was appropriate to arrive at the cost of materials used, according to the meaning and intent of section 1138(a) of the Tax Law.

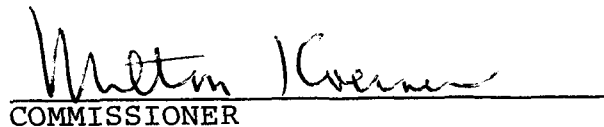
D. That the application of Lo Bello Electric, Inc. is granted to the extent indicated in Conclusion of Law "B," above; that the Sales Tax Bureau is hereby directed to accordingly modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued September 17, 1973 and that, except as so granted, the application is in all other respects denied.

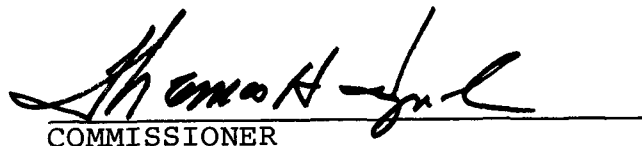
DATED: Albany, New York

STATE TAX COMMISSION

February 14, 1979


PRESIDENT


COMMISSIONER


COMMISSIONER