

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Cross Island Electric Corp. :
AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Sales & Use Tax :
under Article 28 & 29 of the Tax Law for the Period:
5/4/74 - 8/31/75.

State of New York
County of Albany

Jay Vredenburg, 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 30th day of October, 1981, he served the within notice of Decision by certified mail upon Cross Island Electric Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Cross Island Electric Corp.
c/o John Worrell
45 Terry Rd.
Smithtown, L.I., NY 11787

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 petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
30th day of October, 1981.

Ann R. Haglund

J. Vredenburg

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

October 30, 1981

Cross Island Electric Corp.
c/o John Worrell
45 Terry Rd.
Smithtown, L.I., NY 11787

Gentlemen:

Please take notice of the Decision 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:

NYS Dept. Taxation and Finance
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
CROSS ISLAND ELECTRIC CORP.	:	DECISION
	:	
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 May 4, 1974	:	
through August 31, 1975.	:	

Petitioner, Cross Island Electric Corp., 45 Terry Road, Smithtown, New York, 11787, filed a petition 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 May 4, 1974 through August 31, 1975 (File No. 14141).

A formal hearing was held before Melvin S. Barasch, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 14, 1978. Petitioner appeared by John Worrell, President of the corporation. The Audit Division appeared by Peter Crotty, Esq. (Irwin Levy, Esq., of counsel).

ISSUE

Whether petitioner Cross Island Electric Corp. is liable for tax on materials used in the performance of lump-sum capital improvement contracts with Suffolk County and the Town of Babylon.

FINDINGS OF FACT

1. On March 24, 1976, the Audit Division issued to petitioner Cross Island Electric Corp. a Notice of Determination and Demand for Payment of Sales and Use Taxes Due. The Notice set forth the following additional tax, penalty and interest:

<u>Period Ended</u>	<u>Tax Due</u>	<u>Penalty & Interest</u>	<u>Total</u>
5/31/74	\$ -0-	\$ -0-	\$ -0-
8/31/74	3,148.21	1,322.25	4,470.46
11/30/74	7,019.94	2,527.18	9,547.12
2/28/75	(839.52)	(77.30)	(916.82)
5/31/75	695.30	166.87	862.17
8/31/75	1,360.63	244.91	1,605.54
11/30/75	-0-	128.91*	128.91
Total	\$11,384.56	\$4,312.82	\$15,697.38

* Interest Due on Late Payment of Bulk Sale #081,800.

2. Petitioner timely filed a petition for a hearing to review the notice of determination.

3. At a conference prior to this hearing, \$2,595.37 of the tax due assessed on the notice of determination was cancelled and petitioner conceded to a tax liability of \$589.20 exclusive of penalty and interest.

4. The amount at issue is \$8,199.99. The tax was determined by the Audit Division through a review of petitioner's material purchases it made to perform lump-sum capital improvement contracts entered into with Suffolk County as well as the Town of Babylon. The auditor reviewed \$100,588.38 of purchases for the Town of Babylon job and found \$95,547.66 subject to tax. He reviewed \$20,503.52 of purchases for the Suffolk County job and found \$19,140.07 subject to tax. The amount of purchases subject to tax was determined to be 94.7115 percent. This percentage was applied to the total purchases for both jobs of \$123,684.04, which resulted in tax due of \$8,199.99.

5. Petitioner's contract with the Town of Babylon was entered into July 18, 1974 and provided for the installation of lighting facilities and miscellaneous electrical work in the "Construction of Park facilities -- Phase III, Tanner Park project, (Site #41, Town of Babylon, Suffolk County, N.Y.)". The contract with Suffolk County was entered into on July 10, 1974 and similarly

provided for the installation of "site lighting" at the Suffolk County Community College.

6. Petitioner's work on the lump-sum capital improvement contracts with the Town of Babylon and Suffolk County was started and payment from the governmental agencies was received after September 1, 1974.

7. Petitioner received from the Town of Babylon notification that as a governmental agency, the town was exempt from sales and use taxes. Petitioner excluded sales tax from the bid estimate for the Town of Babylon job.

8. Petitioner offered no documentary evidence with respect to the lump-sum capital improvement contract with Suffolk County.

9. Petitioner maintained sufficient books and records from which the Audit Division could have determined the exact amount of tax due.

10. Petitioner, at all times, acted in good faith.

CONCLUSIONS OF LAW

A. That where the evidence indicates that at the time of the execution of the contract a) the contracting parties were aware of the exempt status of the organization, b) the parties intended to exclude taxes on purchases for the performance of the contract and c) no sales tax was charged the exempt institution, no sales or use tax is applicable. (Sweet Associates v. Gallman, 29 N.Y.2d 902).

B. That petitioner's purchases of materials which were used in the performance of the contract entered into with the Town of Babylon are exempt from tax.

C. That petitioner failed to sustain its burden of proof with respect to its contract with the County of Suffolk. Therefore, petitioner is liable for tax on materials used in the Suffolk County lump-sum capital improvement

contract.

D. That although there is statutory authority for use of a test period to determine the amount of tax due, resort to such method of computing tax liability must be founded upon an insufficiency of recordkeeping which makes it virtually impossible to verify such liability and conduct a complete audit (Chartair Inc., v. State Tax Commission, 65 A.D.2d 44, 411 N.Y.S.2d 41).

E. That petitioner maintained adequate books and records from which the actual tax on materials used in the Suffolk County contract could have been determined. Accordingly, the tax due is reduced to the amount due on the purchases actually reviewed.

F. That penalty and interest in excess of the minimum statutory rate authorized by section 1145(a)(1) of the Tax Law are cancelled.

G. That the petition of Cross Island Electric Corp. is granted to the extent indicated in Finding of Fact "3" and Conclusions of Law "B", "E", and "F" above. The Audit Division is directed to accordingly modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued March 24, 1976. Except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

OCT 30 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER