

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Meeker Electric Co., Inc. :
: 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 3/1/69-2/29/72. :

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 2nd day of October, 1981, he served the within notice of Decision by certified mail upon Meeker Electric Co., Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Meeker Electric Co., Inc.
375 Portion Road
Lake Ronkonkoma, NY 11779

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
2nd day of October, 1981.

Carrie A. Hegland

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Meeker Electric Co., Inc. :
AFFIDAVIT OF MAILING
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Period 3/1/69 - 2/29/72.

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 2nd day of October, 1981, he served the within notice of Decision by certified mail upon Terence F. Gaffney the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Terence F. Gaffney
Gaffney & Mainella
394 Old Country Rd.
Garden City, NY 11530

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
2nd day of October, 1981.

Gennine A. Hagelund

J. Vredenburg

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

October 2, 1981

Meeker Electric Co., Inc.
375 Portion Road
Lake Ronkonkoma, NY 11779

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,

Kathy P. Plattenbach

STATE TAX COMMISSION

cc: Petitioner's Representative
Terence F. Gaffney
Gaffney & Mainella
394 Old Country Rd.
Garden City, NY 11530
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
MEEKER ELECTRIC CO., INC.	:	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 March 1,	:	
1969 through February 29, 1972.	:	

Petitioner, Meeker Electric Co., Inc., 375 Portion Road, Lake Ronkonkoma, New York 11779, 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 March 1, 1969 through February 29, 1972 (File No. 01878).

A formal hearing was held before Paul B. Coburn, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 23, 1974. Petitioner appeared by Terence F. Gaffney, Esq. and Frederic Recksiek, Controller. The Audit Division appeared by Saul Heckelman, Esq. (Solomon Sies, Esq., of counsel). The hearing was continued at the same location on July 17, 1979 before Herbert Carr, Hearing Officer. Petitioner appeared by Gaffney & Mainella, Esqs. (Terence F. Gaffney, Esq., of counsel). The Audit Division appeared by Peter Crotty, Esq. (Abraham Schwartz, Esq., of counsel).

ISSUE

I. Whether materials purchased for use in performing construction contracts with exempt entities were subject to tax.

II. Whether the audit procedures used were appropriate means of determining the tax due.

III. Whether petitioner has been unconstitutionally denied equal protection of law.

FINDINGS OF FACT

1. Petitioner is an electrical contractor. The major part of its business consists of negotiating and performing public improvement construction contracts.

2. After an audit, by Notice of Determination dated May 22, 1972 the Department of Taxation and Finance assessed additional tax of \$91,503.19, plus penalty and interest of \$25,697.77, for a total of \$117,200.96. Upon a reaudit, the Audit Division recommended reducing the assessment to \$26,176.49, plus penalty and interest of \$10,760.82, for a total of \$36,937.31.

3. During the tax period in question, petitioner purchased building materials which were referable to the following contracts with exempt entities:

- (a) Nassau County Welfare Building, February 14, 1967
- (b) Central School District No. 5, October 17, 1969
(Petitioner's Exhibit 3).
- (c) Central School District No. 5, November 17, 1967
(Petitioner's Exhibit 4)
- (d) Central School District No. 5, March 1, 1968
(Petitioner's Exhibit 5).
- (e) Board of Education, UFS District #1, January 14, 1971
(Petitioner's Exhibit 6)
- (f) Board of Education, UFS District #1, April 30, 1969
(Petitioner's Exhibit 7)
- (g) County of Suffolk, Contract #4, April 4, 1969
(Petitioner's Exhibit 8)
- (h) County of Suffolk, Contract #5, September 20, 1968
(Petitioner's Exhibit 9)

4. The contracts with the school districts are all on American Institute of Architects Document A101, which is entitled:

"Standard Form of Agreement Between
Owner and Contractor
where the basis of payment is a
Stipulated Sum"

Each such contract provides that the contract sum is a lump sum. Each such contract provides for progress payments to be made on the 10th day of each month for 90% of the value of labor, materials and equipment incorporated in the work and 90% of the value of materials and equipment suitably stored at the site or at some other location agreed upon by the parties.

5. The contracts with Suffolk County provided that for a lump sum, the petitioner would provide all materials, appliances, tools and labor to complete the required electric work. The instructions to the bidders were silent as to the requirement for payment of sales tax. The method of payment was to be stated in the general conditions, which were not furnished as Exhibits.

6. The contract for the Nassau County Welfare Building was not furnished as an exhibit. Petitioner's president, Mr. Glennon, testified that initially, he was going to include sales tax in his bid, but when he spoke to County staff he was told not to include sales tax, and he deleted it from his bid, saving the County \$18,000.00, plus overhead and profit.

7. The amount of the sales tax normally payable upon construction materials was omitted from petitioner's bids because of the tax exempt status of the owners. The intention of the parties was to preserve the tax benefit to owners which were tax exempt entities.

8. The general ledger, sales journal, purchaser invoices, copies of corporate income tax returns, sales invoices and exempt use certificates were

available upon audit. The books and records maintained by petitioner were adequate.

9. The examiner analyzed sales for the quarter ending August 31, 1969 and found \$1,507.35 in sales which were incorrectly reported as nontaxable. The examiner determined a percentage of error which he applied to reported taxable sales over the entire period, to find additional taxable sales of \$10,644.89. No evidence was presented on this point.

10. The examiner tested purchase invoices under \$4,500.00 for July 1969, and found 99.7 percent non-tax paid. He applied this percentage to the audit period March 1, 1969 through August 31, 1969. A similar test for November 1969 found 86.0876 percent non-tax paid, which was applied to the audit period September 1, 1969 through February 29, 1972. Upon reaudit, seven months were used instead of November 1969 and a non-tax paid percentage of 29 percent was found, which was applied in the conference report to a portion of the audit. All purchase invoices over \$4,500 were examined; of \$1,414,471.53, it was found that \$725,840.76 were non-tax paid.

11. An allowance of .2997 percent was given for material purchases used in repair work.

12. Additional liability on a fixed asset acquisition amounted to \$4,000.00; no evidence was presented on this point.

13. Petitioner's controller reviewed all invoices for the period March 1, 1969 through February 29, 1972 and found that taxes were unpaid in the amount of \$1,203.57.

14. The petitioner questions the constitutionality of the sales tax, with respect to the requirements of collection of tax by the vendor and violation of the due process guarantees of the constitution.

CONCLUSIONS OF LAW

A. The constitutionality of the laws of the State of New York is presumed at the administrative level of the State Tax Commission.

B. That since the intention of the parties with respect to contracts (a), (b), (c), (d), (e), (f), (g) and (h), was to preserve the tax benefit to the exempt entities by reducing the bid price, the purchases of materials which are directly referable to those contracts are not subject to tax, notwithstanding the form of the agreements as "stipulated sum" or "lump sum". (Matter of Briggs v. Page, 15 A.D. 2d 34, 20 A.D. 2d 834; Matter of Sweet Associates, Inc. v. Gallman, 36 A.D. 2d 95, 29 N.Y.2d 902).

C. The audit procedure with respect to a test of purchase invoices under \$4,500.00, with a projection across the entire audit period is incorrect. Only those purchase invoices under \$4,500.00 which were actually reviewed in the seven month test described in Finding of Fact "10", which were not referable to the contracts listed in Finding of Fact "3" are subject to tax.

D. All purchase invoices in excess of \$4,500.00 were reviewed; therefore any which were not referable to the contracts in Finding of Fact "3" are subject to tax.

E. The invoices reviewed and admitted as taxable by petitioner's controller under finding of fact "13" are subject to tax.

F. The sales described in Finding of Fact "9" are subject to tax, for the period ending August 31, 1969. The projection across the audit period, where all quarters could have been reviewed, is invalid.

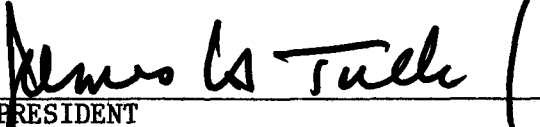
G. The fixed asset acquisition described in Finding of Fact "12" is subject to tax.

H. The Notice of Determination is modified to the extent required by Conclusions of Law "B" through "G", and the Audit Division's recommendation in Finding of Fact "2"; and all penalties and interest in excess of the statutory minimum are waived.


DATED: Albany, New York

OCT 02 1981

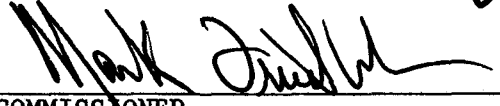
STATE TAX COMMISSION



PRESIDENT



COMMISSIONER



COMMISSIONER