

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition  
of  
Dwyer 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 9/1/66-11/30/67.

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 3rd day of January, 1983, he served the within notice of Decision by certified mail upon Dwyer Electric Co., Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

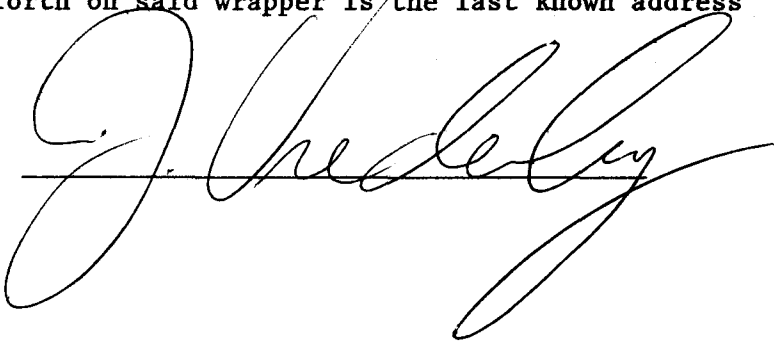
Dwyer Electric Co., Inc.  
c/o Matco Electric Co., Inc.  
Azone Rd.  
Johnson City, NY 13790

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  
3rd day of January, 1983.

Kathy Pfaffenbach



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Dwyer 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 9/1/66-11/30/67. :

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 3rd day of January, 1983, he served the within notice of Decision by certified mail upon Stanley Pelter the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Stanley Pelter  
141 Washington Ave.  
Endicott, NY 13760

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  
3rd day of January, 1983.

Kathy Pufferbach

J. Vredenburg

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

January 3, 1983

Dwyer Electric Co., Inc.  
c/o Matco Electric Co., Inc.  
Azone Rd.  
Johnson City, NY 13790

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) 1139 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  
Law Bureau - Litigation Unit  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Stanley Pelter  
141 Washington Ave.  
Endicott, NY 13760  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Dwyer 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 September 1, 1966 :  
through November 30, 1967.

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Petitioner, Dwyer Electric Co., Inc. c/o Matco Electric Co., Inc., Azone Road, Johnson City, New York 13790 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 September 1, 1966 through November 30, 1967 (File No. 15118).

A small claims hearing was held before Judy M. Clark, Hearing Officer, at the offices of the State Tax Commission, 164 Hawley Street, Binghamton, New York, on December 3, 1981 at 2:45 P.M. Petitioner appeared by Stanley Pelter, C.P.A. The Audit Division appeared by Paul B. Coburn, Esq. (Barry Bresler, Esq., of counsel).

ISSUE

Whether petitioner's purchases of materials for the performance of various electrical contracts with exempt institutions and a private corporation were subject to sales and use taxes.

FINDINGS OF FACT

1. Petitioner, Dwyer Electric Co., Inc., timely filed New York State sales and use tax returns for the period September 1, 1966 through November 30, 1967.

2. On October 24, 1968, petitioner timely filed five applications for refund of sales and use taxes paid during each of the five sales tax quarters falling within the period in issue. The claims were based on tax paid on purchases made in connection with performance of contracts and subcontracts with tax exempt organizations.

3. On March 3, 1976, the Audit Division denied petitioner's refund claim based on a determination that the contracts did not qualify as time and materials contracts with exempt organizations. On May 27, 1976, petitioner requested a hearing.

4. Petitioner's business involved electrical contracting work for various organizations usually involving major construction resulting in capital improvements. In June, 1972, petitioner's business was taken over by Matco Electric Co., Inc. which is pursuing this petition as Dwyer's successor in interest.

5. The claim for refund arose out of purchases made pursuant to ten contracts entered into during the period in issue as follows:

- (1) Contract (16760) with The Rochester General Hospital, Incorporated dated March 1, 1966 for \$136,583.00.
- (2) Contract (16762) with Mother of Sorrows Parish, Rochester dated February 21, 1966 for \$67,302.00.
- (3) Contract (16930) with Monroe County Center for Rehabilitation Agencies, Inc., Rochester dated July 21, 1966 for \$286,789.00.
- (4) Contract (17031) with A. Friedrich & Sons Co., general contractor for Rochester General Hospital dated October 25, 1966 for \$29,142.00.
- (5) Contract (17056) with Eastman Kodak Co., Rochester dated December 9, 1966 for \$16,910.00.
- (6) Contract (17272) with A. W. Hopeman & Sons Co., Rochester, general contractor for the University of Rochester Medical Center dated June 30, 1967 for \$8,593.92.

- (7) Contract (17280) with University of Rochester Space Science Laboratory dated June 16, 1967 for \$218,529.00.
- (8) Contract (17355) with Robson & Woese, Inc., general contractor for the University of Rochester dated July 7, 1967 for \$9,500.00.
- (9) Contract (17381) with C. P. Ward, Inc., general contractor for the University of Rochester Medical Center dated November 30, 1967 for \$9,855.00.
- (10) Contract (17387) with John Luther and Sons Co., general contractor for the University of Rochester Medical Center dated November 30, 1967 for \$3,169.48.

6. Contracts (1), (6), (7), (9) and (10) were all contracts with exempt organizations in which time and materials charges were separately stated. Sales tax was not included in the contract price. Exempt Organization Certificates were attached to each contract or were held by the general contractor on subcontracts indicating an intent by the organizations to take advantage of the exemption.

7. Contract (4) was a lump-sum contract with no breakdown of time and materials charges; however, no tax was charged and an Exempt Organization Certificate was held by the general contractor. The contract clearly expressed an intent to take advantage of the exemption by the organization.

8. Contract (8) was a lump-sum contract with no breakdown of time and materials. There was no information pertaining to whether tax was included in the price or whether there was intent by the organization to avail itself of the exemption.

9. Contract (2) was a lump-sum contract which was amended a year after signing to indicate separate time and materials charges. No Exempt Organization Certificate was attached and there was no indication that sales tax was or was not included in the price. There was also no indication of intent by either party to use the exemption to benefit the exempt organization.

10. Contract (3) was a lump-sum contract which was amended one year prior to completion to separately list time and materials charges. An Exempt Organization Certificate was attached, as well as correspondence from both parties indicating an awareness of the exemption and an intent to take advantage of it.

11. Contract (5) was a lump-sum contract with a private, non-exempt corporation. A direct payment permit was attached.

12. Other than submission of the contracts, petitioner presented no testimony or evidence in support of its position either during the hearing or in the allocated time following the hearing.

#### CONCLUSIONS OF LAW

A. That section 1116(a)(4) of the Tax Law provides, in pertinent part, that, subject to limitations, sales by or to organizations operated "exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes..." will not be subject to sales and use taxes.

B. That where contracts with exempt organizations separately list time and materials charges, express an intent to take advantage of the tax exempt status and sales tax is not included in the bid or contract price, no sales tax is applicable to purchases (Sweet Associates, Inc. v. Gallman, 29 N.Y.2d 902, 903). Accordingly purchases made in performance of contracts (1), (6), (7), (9) and (10) described in Finding of Fact "6" are exempt from tax and petitioner is entitled to a refund of taxes actually paid and substantiated with reference to said contracts.

C. That where a contract provision states that a tax exempt organization is a party to the contract and that no sales or use taxes are included in the contract price or in charges to it for materials purchased, no sales tax is

imposed on purchases of materials by the contractor (Matter of Davis-Eckert-Joint Venture, State Tax Commission, December 13, 1978). Therefore, purchases made pursuant to contract (4) in Finding of Fact "7" are exempt from tax and petitioner is entitled to a refund.

D. That inasmuch as contract (3) in Finding of Fact "10" was amended one year prior to job completion with the clear intention of both parties to take advantage of the exemption for the benefit of the tax exempt organization, it has met the requirements of Sweet Associates, Inc., supra and is exempt from tax; and, therefore, petitioner is entitled to a refund.

E. That purchases of materials for lump-sum contracts with tax exempt organizations will be taxable, absent any other qualifying circumstances (Matter of Joseph Davis, Inc., State Tax Commission, December 13, 1978, aff'd 76 A.D.2d 946). Other than an amendment which attempted to specify time and materials charges, contract (2) in Finding of Fact "9" evidenced no exemption certificate or other indications of intent to take advantage of the tax exemption. Absent such qualifying circumstances, the contract is subject to tax.

F. That, unless contracts with a tax exempt organization are time and materials contracts or express an intent to take advantage of the exemption for the benefit of the exempt organization, sales tax will apply (Sweet Associates, Inc. v. Gallman, supra). Contract (8) described in Finding of Fact "8" is a lump-sum contract expressing no intent to take advantage of the exemption and is thus subject to tax.

G. That the authorization to use a direct payment permit under section 1132(c) of the Tax Law extends only to the permit holder. The acceptance of a direct payment permit does not relieve a contractor of liability for taxes on the contractor's retail purchases (Matter of A-1 Fence Co., State Tax Commission,

July 3, 1981). Therefore, purchases pursuant to lump-sum contract (5) discussed in Finding of Fact "11" are subject to sales tax.

H. That the petition of Dwyer Electric Co., Inc. is granted to the extent indicated in Conclusions of Law "B", "C" and "D" above; that the Audit Division is directed to refund the amount appropriately due the petitioner; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

JAN 3 1983

STATE TAX COMMISSION

*Robert A. Kunkin*  
ACTING PRESIDENT

*Francis Q. Koehn*  
COMMISSIONER

*Walter J. [unclear]*  
COMMISSIONER