

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

July 15, 1983

Neil R. Nielsen, Inc.
18 Woodside Ave.
Oneonta, NY 13820

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 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 Law 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
Building #9 State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Frank W. Getman
16 Dietz St.
Oneonta, NY 13820
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Neil R. Nielsen, 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 9/1/71-5/31/74.

State of New York
County of Albany

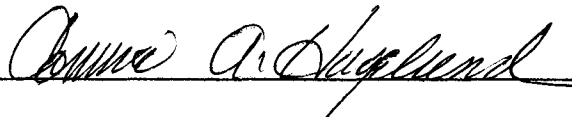
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 15th day of July, 1983, she served the within notice of Decision by certified mail upon Neil R. Nielsen, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Neil R. Nielsen, Inc.
18 Woodside Ave.
Oneonta, NY 13820

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
15th day of July, 1983.





AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Neil R. Nielsen, 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 9/1/71-5/31/74. :

State of New York
County of Albany

Connie Hagelund, 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 15th day of July, 1983, she served the within notice of Decision by certified mail upon Frank W. Getman the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Frank W. Getman
16 Dietz St.
Oneonta, NY 13820

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
15th day of July, 1983.

Connie A. Hagelund

Kathy Pfaffenbach

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
NEIL R. NIELSEN, 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, 1971	:	
through May 31, 1974.	:	

Petitioner, Neil R. Nielsen, Inc., 18 Woodside Avenue, Oneonta, New York 13820, 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, 1971 through May 31, 1974 (File No. 14892).

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, 164 Hawley Street, Binghamton, New York, on September 15, 1982 at 10:45 A.M., with all briefs to be submitted by January 1, 1983. Petitioner appeared by Frank W. Getman, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Barry M. Bresler, Esq., of counsel).

ISSUE

Whether petitioner's purchases of materials for the performance of contracts with exempt institutions were subject to sales and use tax.

FINDINGS OF FACT

1. On December 20, 1974, as the result of a field audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, Neil R. Nielsen, Inc., in the amount of \$30,134.27, plus penalty and interest of \$6,666.15, for a total due of \$36,800.42 for the period September 1, 1971 through May 31, 1974.

2. Petitioner was a general contractor and, during the period in issue, entered into three capital improvement contracts with two exempt organizations, Fox Memorial Hospital ("Fox") located in Oneonta, New York, and The Mary Imogene Bassett Hospital ("Bassett") located in Cooperstown, New York.

3. On audit, the Audit Division determined that the aforesaid contracts did not qualify as time and materials contracts with exempt organizations and that use tax was due on the materials purchased by petitioner for use in conjunction with performance of said contracts. The Audit Division determined that \$819.55 was due on purchases for a contract with Fox, \$131.91 was due on purchases for a road construction contract with Bassett, and \$29,182.81 was due on purchases for a resident housing project contract with Bassett.

4. The Fox contract was an oral agreement. No evidence was offered indicating whether the contract contained a breakdown of time and materials charges, whether sales tax was included in the bid price or whether an exempt organization certificate was issued. Petitioner claimed that the \$819.55 tax due on purchases for the Fox contract had already been paid. The Audit Division could find no evidence of such payment and petitioner produced no evidence of such payment either at the hearing or thereafter.

5. The Bassett road construction contract separately listed materials and labor charges; however, there was no indication of whether sales tax was included in the bid price for materials and there was no exemption certificate or other indication of intent to take advantage of the tax exemption.

6. The Bassett resident housing project contract separately stated all time and materials charges, a letter sent confirming the bid expressly stated that sales tax was not included in the bid price, and an exempt organization certificate was attached indicating an intent by the hospital to take advantage of the exemption.

CONCLUSIONS OF LAW

A. That during the period under review, section 1115(a)(15) of the Tax Law exempted:

"Tangible personal property sold to a contractor, subcontractor or repairman for use or consumption in erecting a structure or building of an organization described in subdivision (a) of section eleven hundred sixteen...; provided, however, no exemption shall exist under this paragraph unless such tangible personal property (i) is to become an integral component part of such structure, building or real property and (ii) is to be resold to such organization as tangible personal property before it has become a part of such structure, building or real property."

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, 36 A.D.2d 95, aff'd., 29 N.Y.2d 902). Accordingly, purchases made in performance of the Bassett resident housing contract described in Finding of Fact "6" are exempt from tax and the \$29,182.81 tax due thereon is cancelled.

C. 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 separately stating total material costs and labor and other costs, the road construction contract with Bassett described in Finding of Fact "5" evidenced no exemption certificate or other indications of intent to take advantage of the tax exemption and failed to indicate whether sales tax was included in the contract price. Absent such qualifying circumstances, the contract is subject to tax (Matter of Dwyer Electric Co., Inc., State Tax Commission, January 3, 1983).


D. That, inasmuch as petitioner produced no evidence whatsoever concerning the nature of its contract with Fox Memorial Hospital, the purchases made in performance of said contract are subject to sales and use tax. Moreover, petitioner was unable to prove, either during the hearing or thereafter, that it had previously remitted the \$819.55 tax due on said purchases.


E. That the petition of Neil R. Nielsen, Inc. is granted to the extent indicated in Conclusion of Law "B"; that the Audit Division is directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued December 20, 1974; and that, except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

JUL 15 1983


PRESIDENT


COMMISSIONER


COMMISSIONER

P 481 208 070

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to Neil R. Nielsen Inc	
Street and No. 18 Woodside Ave	
P.O., State and ZIP Code Oleana N.Y. 13820	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return Receipt Showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

PS Form 3800, Feb. 1982

P 481 208 071

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to FRANK W. Getman	
Street and No. 16 Dietz St	
P.O., State and ZIP Code Oleana N.Y. 13820	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return Receipt Showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

PS Form 3800, Feb. 1982