

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

FONDA MANUFACTURING CORP.

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 & 29 of the
Tax Law for the ~~XXXXXX~~ Period ~~(X)~~
August 1, 1965 through May 31, 1970.

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 25th day of August, 1978, ~~he~~ served the within
Notice of Determination by ~~(XXXXXX)~~ mail upon Fonda Manufacturing Corp.

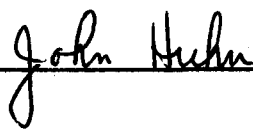
~~(XXXXXXXXXX)~~ the petitioner in the within proceeding,
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows: Fonda Manufacturing Corp.
1 Cayadutta Street
Fonda, New York 12068

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 ~~(XXXXXXXXXX)~~
~~(XXXX)~~ petitioner herein and that the address set forth on said wrapper is the
last known address of the ~~(XXXXXXXXXX)~~ petitioner.

Sworn to before me this
25th day of August, 1978.





STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

FONDA MANUFACTURING CORP.

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 & 29 of the :
Tax Law for the ~~years 1965~~ Period (x) :
August 1, 1965 through May 31, 1970.

State of New York
County of Albany

John Huhn , being duly sworn, deposes and says that
xhe is an employee of the Department of Taxation and Finance, over 18 years of
age, and that on the 25th day of August , 1978, xhe served the within
Notice of Determination by ~~(certified)~~ mail upon Sidney Meyers
(representative of) the petitioner in the within proceeding,
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows: Sidney Meyers, Esq.
51 Chambers Street
New York, New York 10007

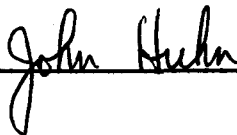
and by depositing same enclosed in a postpaid properly addressed wrapper in a
(post office or official depository) under the exclusive care and custody of
the United States Postal Service within the State of New York.

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

25th day of August , 1978.







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

August 25, 1978

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

**Fonda Manufacturing Corp.
1 Cayadutta Street
Fonda, New York 12068**

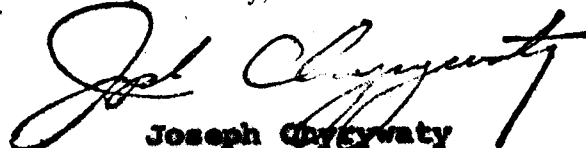
Gentlemen:

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 Czerwaty
Hearing Examiner**

cc: Petitioner's Representative
Taxing Bureau's Representative

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Application :
of :
FONDA MANUFACTURING CORP. : 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 August 1, 1965 through :
May 31, 1970. :
:

Applicant, Fonda Manufacturing Corp., 1 Cayadutta Street, Fonda, New York 12068, 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 August 1, 1965 through May 31, 1970 (File Nos. 11158 and 01458).

A small claims hearing was held before Joseph A. Milack, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 25, 1977. Applicant appeared by Sidney Meyers, Esq. The Sales Tax Bureau appeared by Peter Crotty, Esq. (Francis Cosgrove, Esq., of counsel).

ISSUES

I. Whether the Notice of Determination and Demand for Payment of Sales and Use Taxes Due was timely issued.

II. Whether the purchase of certain chemicals by applicant for use in its dyeing process constituted tangible personal property for resale as such, or whether the purchase constituted physical component parts of tangible personal property exempt from the imposition of sales and use tax.

III. Whether applicant was required to collect sales tax from its customers on the sale of shipping containers.

IV. Whether applicant was subject to sales and use taxes for purchases of natural gas and electricity used for heating and lighting its office and plant facilities.

V. Whether the test period used on audit was unreasonable and arbitrary.

FINDINGS OF FACT

1. On September 11, 1970 as the result of an audit, the Sales Tax Bureau issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against applicant, Fonda Manufacturing Corp., for the period August 1, 1965 through May 31, 1970 for taxes due of \$23,620.20, plus penalty and interest of \$7,002.94, for a total due of \$30,623.14. The amount due was subsequently reduced by the Sales Tax Bureau to \$22,862.07, plus penalty and interest. On or about December 8, 1970, applicant filed an application for a hearing to review the aforementioned determination.

2. Fonda Manufacturing Corp. is a domestic corporation organized under the laws of the State of New York. It is engaged in the manufacture of cloth and knitted fabric. The firm weaves, dyes and processes its own fabric and sells the finished product to the apparel and shoe industries. The factory is located in Fonda, New York, and the executive offices are located in New York, New York.

3. In the course of its operation, applicant purchases its own yarn which it knits into "greige" goods, a raw fabric having no color. After the greige goods come off the knitting machines, they are then brought to the dye house where they are dyed to a specific color in accordance with orders therefor. To facilitate the dyeing process, the greige goods are placed in electrically operated dye vats. At this point there is an infusion of chemicals and water to soften the cloth in preparation for its final coloring and finishing. The dye is poured into the vat, while other chemicals (softeners) are added to make the dye adhere uniformly. A catalyst is also added to the mixture for the purpose of giving mobility to the softener. There is a continuous flow of water so that no residue or sediment remains in the vat. From the dyeing process, the fabric goes to the finishing room where it receives a charge of electricity which causes various loops to stand up so that they can be sheared. Occasionally, a finishing resin or backing is applied to the fabric. The fabric is then wound up and placed in cartons or polyester bags.

4. On October 28, 1969, the Sales Tax Bureau received a Consent Extending the Period of Limitation for Assessment of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the period August 1, 1965 through August 31, 1967, to September 20, 1970, bearing the name of Fonda Manufacturing Corp. and signed by Viola Bisnett, Assistant Secretary.

5. On audit, the Sales Tax Bureau examiner analyzed expense purchases for the months of December of 1967, January and February of 1968 and July, August and September of 1969. The examiner determined that .0152% of said purchases consisted of items not used in the manufacturing process, i.e., boiler repairs, office supplies, tools, etc. Said purchases were held subject to both the state and local tax. The examiner also determined that .0097% of expense purchases were subject to the State use tax only. Said items consisted of machine parts (such as knitting needles) with a useful life of one year or less, as well as miscellaneous manufacturing supplies used in connection with exempt machinery.

6. The examiner held that 10% of total purchases of electricity and gas were used to heat and light the plant, and, therefore, were subject to both the State and local tax.

7. Chemicals purchased during the audit period were discussed with one of applicant's employees directly responsible for the use of these chemicals. The auditor was advised which chemicals did not stay with the product and held such chemicals taxable at the State rate. Taxable purchases of chemicals amounted to .0236% of total expense purchases.

8. No tax was paid on shipping containers when purchased. To determine the amount of taxable shipping containers, the Sales Tax Bureau examiner tested sales for the period May through August of 1969. It was determined that in-state shipments amounted to 62% of total shipments. It was then established that 75% of in-state shipments went to New York City, 10% to Fulton County, 5% to Montgomery County and 10% to other areas where no local tax was imposed. The Sales Tax Bureau used these percentages to compute the tax due on the shipping containers.

9. In the course of the Sales Tax Bureau's audit, applicant was represented by Mrs. Viola Bisnett. She had control of the books and records at applicant's Fonda, New York, office and had authority to sign its payroll checks. She represented herself to be the proper and responsible person, with authority to act on behalf of applicant. The officers of applicant knew that an audit was being conducted at the Fonda plant, but did not participate in the conduct of said audit. Mrs. Viola Bisnett did not appear at the hearing.

10. Applicant now contends that Mrs. Bisnett was not an officer of applicant corporation but merely the bookkeeper, and that she did not have any authority to sign the Consent referred to in Finding of Fact "4", supra.

11. Applicant failed to present sufficient evidence to refute the findings on audit. Although applicant contended that the test period was arbitrary, no proof was submitted to substantiate such

contention, nor was any evidence submitted to the effect that a different test period would cause a different result. The representative for applicant consented to the test period used.

12. Applicant failed to submit any evidence that the shipping containers were for resale.

13. Reasonable cause exists for the waiver of penalty and interest, in excess of the minimum statutory rate.

CONCLUSIONS OF LAW

A. That applicant, Fonda Manufacturing Corp., was responsible for the acts of its agent, Mrs. Viola Bisnett, who had apparent authority to sign the consent on behalf of the applicant, on which consent the auditor relied. (Wen Croy Realty Co. v. The Public National Bank & Trust Company, 260 NY, 84; Welsh v. Hartford Ins. Co., 73 NY, 5, 10). The failure of applicant's officers to make proper inquiry with respect to the audit (of which they had knowledge) constituted an act of acquiescence of the acts of Mrs. Viola Bisnett.

B. That the Notice of Determination and Demand for Payment of Sales and Use Taxes Due was timely issued within the meaning and intent of section 1147(c) of the Tax Law.

C. That the chemicals used as softeners and catalysts in the dyeing process were not intended to be converted into nor did they become a component part of the product produced or manufactured for sale by the applicant, and that the chemicals used were supplies.

D. That the purchase by applicant of the chemicals referred to in Conclusion of Law "C", supra, did not constitute either tangible personal property for resale as such, or a physical component part of tangible personal property within the intent and meaning of section 1101(b)(4)(i)(A) of the Tax Law.

E. That the shipping containers sold by applicant to its customers constituted a retail sale of tangible personal property, within the intent and meaning of section 1105(a) of the Tax Law. That applicant was required to collect sales tax from its customers on the sale of the shipping containers within the intent and meaning of section 1132(a) of the Tax Law. Dairyalea Cooperative, Inc. v. State Tax Commission, 41 AD 2d 312, 342 NYS 2d 761.

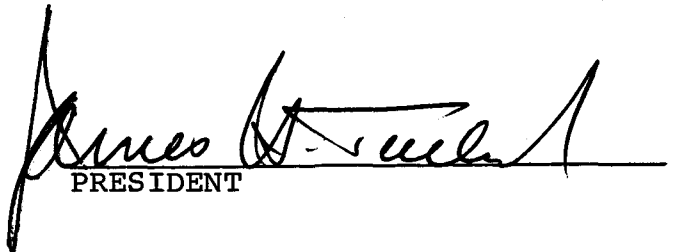
F. That the test period used by the auditor was neither unreasonable nor arbitrary. (W.T. Grant Company v. Joseph, 2 NY 2d 196, affirming 286 App. Div. 995).

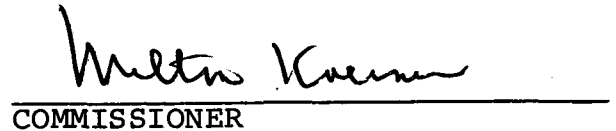
G. That applicant was liable for sales and use taxes on the purchase of gas and electricity used to heat and illuminate its office and plant facilities. That such gas and electricity was not used directly and exclusively for manufacturing purposes.

H. That the application of Fonda Manufacturing Corp. is granted to the extent that interest, in excess of the minimum statutory rate, and the penalty imposed pursuant to section 1145(a) of the Tax Law are cancelled, and that, except as so granted, the application is in all other respects denied.

DATED: Albany, New York
August 25, 1978

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER