

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of
HARD FACE WELDING AND MACHINE COMPANY, :
INC. and JON WATSON, PRESIDENT and :
GEORGE RICOTTA, TREASURER :
For a Redetermination of a Deficiency or :
a Revision of a Determination or a Refund :
of Sales and Use :
Taxes under Article(s) 28 and 29 of the :
Tax Law for the ~~Year(s)~~ Period(s) ended :
May 31, 1972 through May 31, 1976.

AFFIDAVIT OF MAILING

State of New York
County of Albany

John Huhn, 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 March, 1979, she served the within

Notice of Determination by ~~(certified)~~ mail upon Hard Face Welding and Machine
Company, Inc. and Jon Watson, President and
George Ricotta, ~~(representative of)~~ the petitioner in the within proceeding,
Treasurer

by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed

as follows: Hard Face Welding and Machine Company, Inc.
and Jon Watson, President and George Ricotta, Treasurer
196 Philadelphia Street
Buffalo, New York 14207

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)~~
~~xxxx~~ 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 March, 1979.

Maurice J. Papineau

John Huhn

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of
HARD FACE WELDING AND MACHINE COMPANY :
INC. and JON WATSON, PRESIDENT and
GEORGE RICOTTA, TREASURER
For a Redetermination of a Deficiency or :
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AFFIDAVIT OF MAILING

State of New York
County of Albany

John Huhn , 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 March , 1979 , she served the within
Notice of Determination by (~~certified~~) mail upon Richard N. Weinstein

(representative of) the petitioner in the within proceeding,

by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed

as follows: Richard N. Weinstein, Esq.
Saperston, Day & Radler
815 Liberty Bank Building
Buffalo, New York 14202

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 March , 1979.

Marilyn J. Papineau

John Huhn



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

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

March 15, 1979

Hard Face Welding and Machine Company, Inc.
and Jon Watson, President and George Ricotta, Treasurer
196 Philadelphia Street
Buffalo, New York 14207

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 and 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,

MICHAEL ALEXANDER
SUPERVISING TAX HEARING OFFICER

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application	:	
of	:	
HARD FACE WELDING AND MACHINE COMPANY,	:	
INC. and JON WATSON, PRESIDENT and	:	DETERMINATION
GEORGE RICOTTA, TREASURER	:	
for Revision of a Determination or for	:	
Refund of Sales and Use Taxes under	:	
Articles 28 and 29 of the Tax Law for the	:	
Periods ended May 31, 1972 through May 31,	:	
1976.	:	

Applicants, Hard Face Welding and Machine Company, Inc., and Jon Watson, president and George Ricotta, treasurer, 196 Philadelphia Street, Buffalo, New York 14207, 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 periods ended May 31, 1972 through May 31, 1976 (File No. 18277).

A formal hearing was held before Alan R. Golkin, Hearing Officer, at the offices of the State Tax Commission, State Office Building, 65 Court Street, Buffalo, New York, on August 16, 1977 at 10:45 A.M. Applicants appeared by Richard N. Weinstein, Esq. The Sales Tax Bureau appeared by Peter Crotty, Esq. (Andrew Haber, Esq., of counsel).

ISSUES

I. Whether certain machinery and equipment purchased and/or used by applicant prior to September 1, 1974 were used or consumed directly and exclusively in the production of tangible personal

property for sale by manufacturing or processing and, therefore, were exempt from sales and use taxes under section 1115(a)(12) of the Tax Law.

II. Whether certain machinery and equipment purchased and/or used by applicant after August 31, 1974 were used or consumed directly and predominantly in the production of tangible personal property for sale by manufacturing or processing and, therefore, were exempt from sales and use taxes under section 1115(a)(12) of the Tax Law.

III. Whether parts, tools and supplies purchased and/or used by applicant prior to September 1, 1974 were used or consumed directly and exclusively in the production of tangible personal property for sale by manufacturing or processing and, therefore, were exempt from local sales and use taxes under section 1210(a)(1) of the Tax Law.

IV. Whether parts, tools and supplies purchased and/or used by applicant since September 1, 1974 were used or consumed directly and predominantly in the production of tangible personal property for sale by manufacturing or processing and, therefore, were exempt from local sales and use taxes under section 1210(a)(1) of the Tax Law.

V. Whether the industrial gases purchased by applicant were used and consumed directly and exclusively in the production of tangible personal property for sale by manufacturing or processing and, therefore, were exempt from sales and use taxes under section 1115(c) of the Tax Law.

FINDINGS OF FACT

1. On May 8, 1975, applicant, Hard Face Welding and Machine Company, Inc. (hereinafter "Hard Face" or "applicant") filed a claim for refund with the Sales Tax Bureau for sales and use taxes in the amount of \$5,343.54, covering the periods ended May 31, 1972 through February 28, 1975.

2. In connection with said refund claim, the Sales Tax Bureau performed an audit of Hard Face's books and records. On March 7, 1977, as a result thereof, it issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against applicants for taxes due of \$27,655.23, plus penalty and interest of \$11,530.47, for a total due of \$39,185.70 for the period June 1, 1973 through May 31, 1976.

3. On audit, the Sales Tax Bureau's auditor determined that Hard Face was a "service" industry, based on an analysis of sales invoices for the month of November, 1973. Said analysis revealed that 96.54% of applicant's sales were of services, and that 3.46% of its sales represented the production of tangible personal property for sale.

4. Based on the determination that applicant was a "service" industry, the auditor disallowed the refund claim with respect to purchases of industrial gases (oxygen and acetylene) and the rental of production equipment.

5. In addition, the auditor determined that applicant was liable for sales and use taxes on machinery and equipment purchases of \$163,984.00 and on parts, tools and supply purchases of \$242,149.00 for the period June 1, 1973 through May 31, 1976.

6. On April 11, 1977, applicants timely filed an application for a hearing to review the determination made by the Sales Tax Bureau.

7. Hard Face is an industrial corporation engaged in the application of hard face alloys, ceramics and cement (a mixture of ceramic and metal) to various metals through various methods to increase the resistance of said metals to abrasion, wear, heat and corrosion. In addition to the above, Hard Face also manufactured new parts for customers and performed one or more operations such as machining and finishing, as well as assembling of new, partly finished, or used parts supplied by the customer.

8. Hard Face prepares technical job sheets for each and every job, indicating the procedure to be utilized, the customer, numbers of invoices and purchase orders, hours involved, cost of the job and whether or not parts or component parts were supplied, purchased or manufactured by Hard Face or supplied by its customer.

9. Hard Face prepares sales invoices for billing purposes to be sent to its customers, containing information as to invoice number, job-sheet number and type of work performed.

10. Applicant's work processes and books and records contain technical and sophisticated references and terms not commonly understood outside of applicant's industry.

11. Applicant prepared a description of job classifications delineating its work in five categories, which represented all work done by applicant, to wit:

- a) Customer supplies part or parts to applicant, and applicant prepares, coats and finishes said parts.

b) Applicant supplies raw materials for and manufactures the parts needed by its customer and supplies the required coating and/or finish.

c) Customer supplies used part or parts to applicant, and applicant prepares, coats and finishes the part or parts.

d) Applicant supplies raw materials for and manufactures parts needed by its customer, but applies no coating or finish.

e) Customer supplies parts to applicant, and applicant dismantles and reassembles customer's parts and perhaps utilizes a process for coating or finishing.

12. Applicant's principal activity is to apply hard surface coatings to materials for use by customers, which activity requires preparation, coating and finishing. Its equipment was not used predominantly (much less exclusively) in the production of tangible personal property for sale.

13. The industrial gases used or consumed by applicant were used as fuel for heat in the application of the coatings described above.

14. The metals and other substances purchased by applicant were used or consumed in the application of coatings and comprised the coating substance.

15. For the most, Hard Face receives used parts from customers which are prepared and to which a replacement coating is applied;

customers retain ownership of their parts, and applicant performed a maintenance-style service, albeit sophisticated.

16. Job classifications b and d account for a total of 20.1% of the sales dollars and 24.6% of direct labor hours keyed to production of tangible personal property for sale.

17. Hard Face paid sales taxes on certain purchases and to that extent, portions of the Notice of Determination and Demand for Payment of Sales and Use Taxes Due are erroneously calculated and should be adjusted accordingly. The Sales Tax Bureau also erroneously included Hard Face's labor as machinery and equipment. Schedule E details all such items (Exhibit K). Hard Face prepared its own schedule of said items on which tax was already paid and which showed Hard Face labor included as machinery and equipment.

CONCLUSIONS OF LAW

A. That applicant seeks exemption from taxation of sales and use taxes under section 1115 of the Tax Law and, therefore, bears the burden of proof of demonstrating that its business activities fall within the parameters of the statutory language which is to be strictly construed. (Grace v. State Tax Commission, 37 NY 2d 193).

B. That applicant failed to sustain its burden of proof with regard to its sales within job classifications a, c and e, because proof was insufficient with regard to the requirement that the tangible personal property claimed to have been manufactured or processed was for sale; as to these job classes, applicant is a

"service" business rather than a producer. (Matter of Auburn Crown Tire Co., Inc., State Tax Commission, December 2, 1975).

C. That applicant sustained its burden of proof with regard to the sales included in job classifications b and d, since tangible personal property was manufactured or produced for sale.

D. That applicant's equipment was not used exclusively for the production of tangible personal property for sale prior to September 1, 1974, nor was it used predominantly for sale, as seen from the computed percentages of sales' dollars and direct labor hours in job classifications b and d (Matter of Auburn Crown Tire Co., Inc., *supra*).

E. That industrial gases used by applicant were used or consumed for the production of tangible personal property for sale only relating to job classifications b and d and is, therefore, exempt from the imposition of sales and use taxes to the extent used in classifications b and d, in accordance with section 1115(c) of the Tax Law.

F. That certain purchases were made by applicant on which sales tax was paid; as to those items, the Notice of Determination and Demand for Payment of Sales and Use Taxes Due should be decreased.

G. That the Sales Tax Bureau erroneously included as taxable machinery and equipment, Hard Face labor; with regard to said labor, the Notice of Determination and Demand for Payment of Sales and Use Taxes Due should be decreased.

H. That except as provided in Conclusion of Law "E", applicant is not entitled to an exemption from sales and use taxes under section 1115(a)(12) or section 1115(c) of the Tax Law (Matter of Auburn Crown Tire Co., Inc., supra).

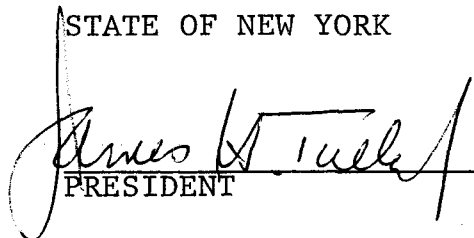
I. That applicant acted in good faith; therefore, the penalties and interest in excess of the minimum statutory rate are cancelled.

J. That the application of Hard Face Welding and Machine Company, Inc., Jon Watson, president and George Ricotta, treasurer, is granted to the extent indicated in Conclusions of Law E, F, G & I, above; that the Sales Tax Bureau is hereby directed to accordingly modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued March 7, 1977; and that, except as so granted, the application is in all other respects denied.

DATED: Albany, New York

March 15, 1979

STATE OF NEW YORK


PRESIDENT


COMMISSIONER


COMMISSIONER