

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Harry F. Fallon & Sons, 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 9/1/72-8/31/75. :

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 22nd day of February, 1980, he served the within notice of Determination by mail upon Harry F. Fallon & Sons, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

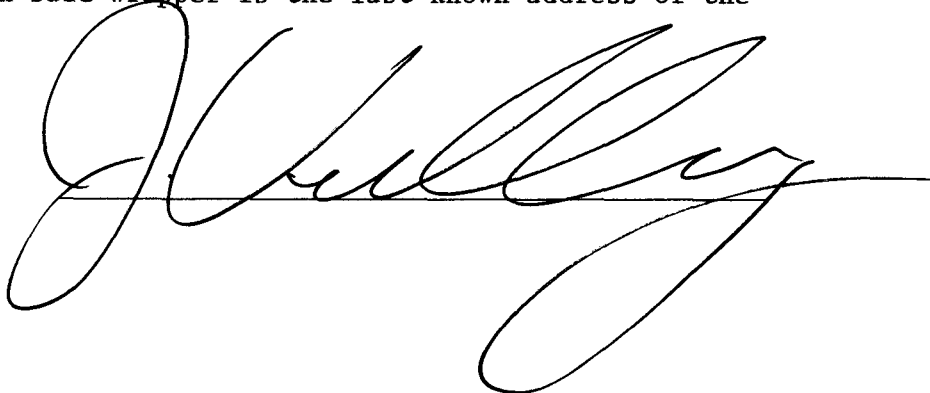
Harry F. Fallon & Sons, Inc.
7907 Seventh Ave.
Brooklyn, NY 11228

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
22nd day of February, 1980.

Joanne Knapp



STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Harry F. Fallon & Sons, Inc. :

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for Redetermination of a Deficiency or a Revision :
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Sales & Use Tax :
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for the Period 9/1/72-8/31/75. :

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 22nd day of February, 1980, he served the within notice of Determination by mail upon Thomas J. Keenan the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Thomas J. Keenan
225 Broadway
New York, NY

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
22nd day of February, 1980.

Joanne Knapp

J. Vredenburg

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

February 22, 1980

Harry F. Fallon & Sons, Inc.
7907 Seventh Ave.
Brooklyn, NY 11228

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:

NYS Dept. Taxation and Finance
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Thomas J. Keenan
225 Broadway
New York, NY
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application	:	
of	:	
HARRY F. FALLON and SONS, INC.	:	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 September 1,	:	
1972 through August 31, 1975.	:	

Applicant, Harry F. Fallon and Sons, Inc., with offices located at 7907-7th Avenue, Brooklyn, New York 11228, 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 September 1, 1972 through August 31, 1975 (File No. 15286).

A formal hearing was held before Edward Goodell, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 28, 1978 at 9:15 A.M. Applicant appeared by Thomas J. Keenan, Esq. The Audit Division appeared by Peter Crotty, Esq. (Irwin Levy, Esq., of counsel).

ISSUES

I. Whether applicant is liable for additional sales taxes asserted pursuant to an audit, with respect to the period September 1, 1972 through August 31, 1975.

II. Whether the Audit Division is estopped from asserting a deficiency in excess of \$800.00.

FINDINGS OF FACT

1. Applicant, Harry F. Fallon and Sons, Inc., filed timely New York State sales and use tax returns for the period September 1, 1972 through August 31, 1975.

2. A Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period September 1, 1972 through August 31, 1975 for \$13,809.51, plus \$4,996.02 in penalties and interest, for a total of \$18,805.53 was issued to applicant on April 2, 1976.

3. Prior thereto, on October 22, 1975, applicant signed a Consent Extending Period of Limitations for Assessment of Sales and Use Taxes Under Articles 28 and 29 of the Tax Law. Said consent provided that the amount of sales and use taxes due from applicant for the taxable periods June 1, 1972 through May 31, 1975 under the Tax Law, could be determined at anytime on or before December 20, 1976.

4. Applicant subsequently filed an application for revision of the determination issued April 2, 1976.

5. (a) For the period at issue, applicant reported in the sales and use tax returns, gross sales totaling \$1,068,565.00, taxable sales totaling \$225,236.00 and sales tax due totaling \$16,973.96.

(b) For the period at issue, applicant reported in the sales and use tax returns credits totaling \$12,441.88 against the aforesaid total sales tax due of \$16,973.96 and, accordingly, paid the total amount of sales tax for the period at issue of \$4,532.08.

6. On audit by the Audit Division, applicant agreed to the use of the period from March 1, 1975 to May 31, 1975 as a test period for purchases and to the use of the period from December 1, 1974 to May 31, 1975 as a test period for sales.

7. (a) The auditor for the Audit Division determined that for the period at issue applicant's gross sales amounted to the total sum of \$1,068,565.00 and that applicant's taxable sales for said period amounted to the total sum of \$225,236.00.

(b) The auditor for the Audit Division disallowed all the credits taken by applicant against sales tax due for the period at issue amounting to the aforesaid total sum of \$12,441.88.

(c) The auditor for the Audit Division further determined that applicant had made purchases totaling \$18,085.33 during the period at issue that were subject to the payment of sales tax thereon amounting to the total sum of \$1,340.22, no part of which had been paid.

(d) The auditor for the Audit Division further determined that applicant had office supplies expenses during the period at issue totaling \$373.75 subject to use tax amounting to \$27.41, no part of which had been paid.

8. Based on the aforesaid determination, the auditor for the Audit Division reported in his field audit report that the applicant's total sales and use tax deficiency for the period at issue is the sum of \$13,809.51 and recommended penalty and interest thereon in the sum of \$4,996.02, or a total amount of \$18,805.53 as aforesaid.

9. During the period at issue applicant was engaged in the business of electrical contracting, primarily with and for industrial concerns and, as reported by the auditor for the Audit Division, "almost all sales" made by applicant were for the purpose of "capital improvements".

10. The auditor for the Audit Division in his examination of sales made by applicant during the test period aforesaid from December 1, 1974 to May 31, 1975 found that of a total of applicant's sales for said period amounting to \$119,064.91, \$119,036.91 thereof were for capital improvements and that of that amount applicant had improperly charged sales tax on sales for capital improvements totaling \$114,068.41 or 95.8 percent of applicant's total sales for said test period.

11. The accountant for applicant testified at the hearing aforesaid that in conversations he had with the said auditor for the Audit Division and his supervisor during the course of and subsequent to the making of said audit, it was stated that applicant's deficiency for sales and use taxes for the period at issue would be "probably in the area of \$800.00".

CONCLUSIONS OF LAW

A. That applicant did not meet its burden of proof that applicant is not liable for the additional sales tax asserted pursuant to the audit made with respect to the period from September 1, 1972 through August 31, 1975.

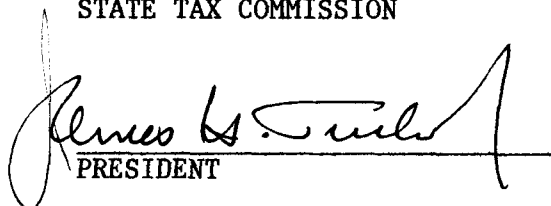
B. That the Audit Division was not estopped from asserting a deficiency in excess of \$800.00, to wit the sum of \$13,809.51, together with penalty and interest thereon.

C. That in view of the determination by the auditor for the Audit Division, that 95.8 percent of the sales tax charges made by applicant on sales during the aforesaid test period were improper charges for materials used for capital improvements, the Audit Division is directed to recompute the disallowed credits for the period at issue on the basis of the same percentage, namely from 100 percent thereof to 95.8 percent of said disallowed amount and to recompute penalty and interest on such recomputed amount of disallowed credits.

D. That except as expressly provided in Conclusion of Law "C" above, the application of Harry F. Fallon and Sons, Inc., is denied and the Notice of Determination and Demand, dated April 2, 1976, is in all respects sustained.

DATED: Albany, New York

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER

COMMISSIONER