

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Manhattan Industries, Inc. :
c/o Donald H. Kallman, Exec. Vice President : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Sales & Use Tax :
under Article 28 of the Tax Law
for the Years 1972 - 1974. :

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 18th day of March, 1981, he served the within notice of Decision by mail upon Manhattan Industries, Inc., c/o Donald H. Kallman, Exec. Vice President, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

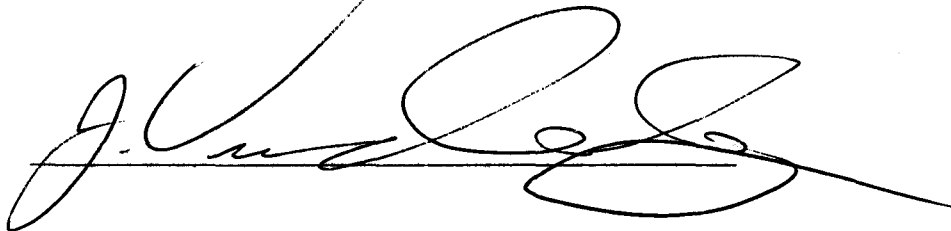
Manhattan Industries, Inc.
c/o Donald H. Kallman, Exec. Vice President
1271 Avenue of the Americas
New York, NY 10020

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
18th day of March, 1981.

Cornie P. Hogeland



STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Manhattan Industries, Inc. :
c/o Donald H. Kallman, Exec. Vice President : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Sales & Use Tax :
under Article 28 of the Tax Law
for the Years 1972 - 1974. :

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 18th day of March, 1981, he served the within notice of Decision by mail upon William Epter the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

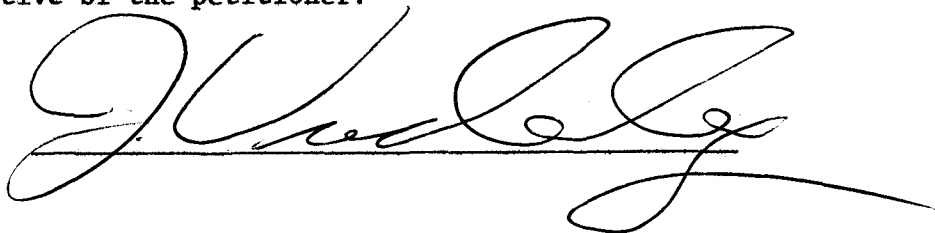
Mr. William Epter
Fiscal Consultants Ltd.
415 Lexington Ave.
New York, NY 10017

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
18th day of March, 1981.

Cornie A. Haglund



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

March 18, 1981

Manhattan Industries, Inc.
c/o Donald H. Kallman, Exec. Vice President
1271 Avenue of the Americas
New York, NY 10020

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 & 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
William Epter
Fiscal Consultants Ltd.
415 Lexington Ave.
New York, NY 10017
Taxing Bureau's Representative

STATE TAX COMMISSION

In the Matter of the Petition :
of :
MANHATTAN INDUSTRIES, 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 :
January 1, 1972 through December 31, 1974. :

A formal hearing was held before Frank A. Romano, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 6, 1977 and June 21, 1978. Petitioner appeared by Joseph J. Kroth, Tax Manager. The Audit Division appeared by Peter Crotty, Esq. (Andrew S. Haber and J. Ellen Purcell, Esqs., of counsel).

Whether petitioner was entitled to a refund for sales taxes paid for materials used for its advertising and promotional endeavors.

1. On or about July 12, 1974, petitioner filed a claim for refund for State and New York City sales taxes for the period January 1, 1972 through December 31, 1972 in the amount of \$24,050.49. Similar claims were filed on July 22, 1974 for the period January 1, 1973 through December 31, 1973 in the

amount of \$41,676.43 and on February 6, 1975 for the period January 1, 1974 through December 31, 1974 in the amount of \$46,518.19.

On March 18, 1976, the Audit Division advised the petitioner that the claim for refund was denied, in part, in the amount of \$52,122.07. On March 19, 1976, the petitioner filed an application for a hearing to review the denial.

2. Petitioner, Manhattan Industries, Inc. ("Manhattan"), is engaged in the production and sale of shirts.

It is a national marketer and its advertising and sales promotion activities are national efforts. In the course of a sales campaign, Manhattan arranges for the production of certain advertising materials (statement enclosures, television commercials, and newspaper ads) through an advertising agency, Triton Advertising, Inc., ("Triton"). Following a decision to promote a particular product, representatives of Manhattan meet with representatives of Triton to discuss the basic layout of the ad or commercial, i.e., the selling points and the product benefits to be emphasized. A Triton employee produces a dummy, i.e., a sketch of the advertisement, including a sketch of the proposed photograph and copy (words characterizing the advertisement).

The agency, which receives costs plus a commission, hires the models for the commercial, arranges for the photographers, employs a stylist to choose the clothes which the model will wear, and employs a typography house to set the type for the advertisement. Triton hires all the support personnel necessary to provide Manhattan with a layout. The photographs and copy are placed on a mechanical. A mechanical is a board covered with tissue on which are pasted each of the elements (photograph and copy) of the ad to be printed. The mechanical is sent to a printer who makes color plates and proofs of the ad. On Manhattan's approval of the proofs, the printer makes

completed brochures, placing names of retail stores in the appropriate places. The completed brochures are then shipped to the respective stores.

Following the decision to make a television commercial, representatives of Manhattan meet with Triton to discuss the layout, selling points and product benefits to be incorporated in the commercial. The agency assigned writer composes the advertisement in comic strip form, with a picture characterized by words at the bottom of the comic strip (story board). Triton hires the entire support staff necessary for the production of the commercial. On approval of the story board by Manhattan, Triton arranges for the filming of the commercial. Some of the films are made in New York State and some are made out of state. The editing of the commercial is done both in and out of New York State. On Manhattan's approval of the master commercial, duplicate prints are made for the stores to run. The master is kept on file at a laboratory so that duplicates may be ordered. Some master commercials are stored at laboratories in New York State for a period of three to four years, to be subsequently disposed of or kept on file as Manhattan sees fit.

3. The major elements in petitioner's advertising campaign are as follows:

- a) Television and Radio T.V. Commercials to be run by retailers and Manhattan in major markets across the United States.
- b) Magazine Advertisements placed by Manhattan in national publications.
- c) Trade Advertising placed by Manhattan in nationally distributed apparel and textile market newspapers and magazines.
- d) Retail Newspaper Ads and Layouts prepared by Manhattan for stores around the country to use in advertising Manhattan merchandise.

- e) Display Material produced by Manhattan for stores across the country to use in window and counter presentations of Manhattan merchandise.
- f) Sales Promotion Materials are prepared for use by salesmen to explain the benefits of Manhattan's merchandise, encourage its purchase, and stimulate retail promotional activity.
- g) Retail Statement Enclosures are produced by the company and sent directly to its retailers who in turn mail them out to the consumers on their charge account lists along with their monthly statements.
- h) Trade Shows are utilized by Manhattan to display merchandise along with the appropriate display material in a Manhattan prepared booth at regional marts throughout the country. Demonstrators and audio-visual aids are also employed.

Triton billed the petitioner for all materials used in its endeavors and State sales tax was added thereto.

Some of the invoices covered only one stage of production. Other invoices encompassed an entire transaction. Advertising and promotional materials were used within New York State and nationally.

4. By allocating the percentage of gross sales in New York State to total United States sales, petitioner computed that portion of its advertising and promotional materials that remained in New York State. In 1972, 11.36% of gross sales were in New York; therefore, 88.64% of the gross taxes were claimed for refund. This formula is consistent with that known as "pool of creditable items" long used in this State (New York sales divided by total

United States sales multiplied by total merchandise supplies purchased in New York).

5. Petitioner matched all 1972 invoices not approved for sales tax refund to previously approved invoices marked Petitioner's Exhibits 3A to 3Y.

(These invoices and adding machine tapes are available for inspection at Manhattan Industries' Administrative Office in Glen Rock, New Jersey.)

The thirteen matched categories of invoices are as follows: (Numbers refer to Hearing Exhibits)

3A unbound books - salesman's presentations (approved for refund)

3B pull out folder - salesman's promotion

3C newspaper ad (approved for refund)

3D custom ad

3E ad Daily News Record (approved for refund)

3F custom ad layout

3G statement enclosures (advertisement) (approved for refund)

3H same as 3G different type of ad sent throughout the country

3I Spring/Summer catalogue (approved for refund)

3J Christmas catalogue (shipped throughout country)

3K television voice over narration (approved for refund)

3L Gene Edwards "Guy Flip" TV & Radio Series

3M MRA (Menswear Retailers of America) country wide sales promoter material (approved for refund)

3N sashes show material

3O Promotion for numerous stores original Hudson presentation (approved for refund)

3P Hudson's logo on ads

3Q Presentation for Jordan Marsh/F. Fox/May Co. (approved for refund)

3R Presentation of Allied Stores

3S Grove Cronin insert "backs" (approved for refund)

3T back of "BUM Shirt" statement enclosures for Macy's
not used in Macy's New York but nationwide)

3U National ad (approved for refund)

3V National ads to conform to new type requirements

3W menswear October NAMSB (National Assn. Mens and Boys
Sportswear Buyers) (approved for refund)
3X custom color ads

3Y customizing video tapes dyes (approved for refund)
3Z custom ad for Hudson's Master Commercial

(Invoices marked 3AA, 3BB, 3CC and 3DD were for various stages of commercial production.)

6. The following guidelines were set forth to petitioner by the Instructions and Interpretations Unit of the State Tax Department in a letter of December 2, 1976, in answer to the taxability status of master prints, and residual payment:

- "1. Television Commercial Produced by an Independent Producer
All purchases of tangible personal property, which become a physical component part of the television commercial, and all necessary services (actors, camera crews, writers, film processors, sound mixers and dubbers, film editors, etc.) acquired by an independent producer, engaged by an advertising agency on behalf of a sponsor, to produce a completed television commercial and the exhibition prints (which are to be used in broadcasting) are purchased for resale (as provided in section 1101(b)(4)(i) of the Tax Law) on the advertising agency. Accordingly, the independent producer is not required to pay any sales tax on his purchases, provided he furnishes a valid resale certificate to his supplier. However, the independent producer is required to collect appropriate tax on the total charge for all completed television commercials and exhibition prints which are delivered in New York State. If the independent producer makes delivery of the completed television commercial and the exhibition prints outside New York State, for use outside New York State, there is no tax imposed at any stage of the transaction, including the final sale at retail, as provided in section 1115(d) of the Tax Law. Any subsequent return of the property to New York State, for any use in New York State, will subject such use to the compensating use tax imposed under section 1110 of the Tax Law."

CONCLUSIONS OF LAW

A. That section 1119(a) of the Tax Law provides for a refund or credit of sales or use taxes with respect to:

"(2) on the sale or use of tangible personal property purchased in bulk, or any portion thereof, which is stored and not used by the purchaser or user within this state if that property is subsequently reshipped by such purchaser or user to a point outside this state for use outside this state...."

B. That promotional materials purchased in bulk qualify for refund or credit pursuant to section 1119(a) (2). However, the tangible personal property purchased from Triton on which the denial was made constitute elements used in the production of promotional material and not a component part of said materials.

C. That the application of Manhattan Industries, Inc. is denied and the denial of refund issued by the Audit Division on March 18, 1976 is sustained.

DATED: Albany, New York

MAR 18 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER