

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Mohawk Finishing Products, Inc.	:	
for Redetermination of a Deficiency or a Revision	:	AFFIDAVIT OF MAILING
of a Determination or a Refund of Sales & Use Tax	:	
under Article 28 & 29 of the Tax Law for the	:	
Period 12/1/76-11/30/79.	:	

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 6th day of October, 1982, he served the within notice of Decision by certified mail upon Mohawk Finishing Products, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

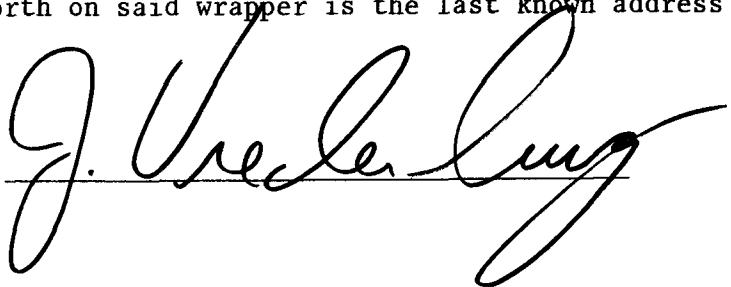
Mohawk Finishing Products, Inc.
RD #4, Perth Rd.
Amsterdam, NY 12010

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
6th day of October, 1982.


AUTHORISED TO SIGN
CAPS FOR THE TAX LAW
SECTION 171



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Mohawk Finishing Products, 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 12/1/76-11/30/79. :

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 6th day of October, 1982, he served the within notice of Decision by certified mail upon William E. Moore the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

William E. Moore
McKee and Moore
42 Division St.
Amsterdam, NY 12010

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
6th day of October, 1982.

Cornelia D. Hageland

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO E.S. 170
SECTION 172

J. Vredenburg

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

October 6, 1982

Mohawk Finishing Products, Inc.
RD #4, Perth Rd.
Amsterdam, NY 12010

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
Law Bureau - Litigation Unit
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
William E. Moore
McKee and Moore
42 Division St.
Amsterdam, NY 12010
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
MOHAWK FINISHING PRODUCTS, INC.
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 December 1,
1976 through November 30, 1979.

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DECISION

Petitioner, Mohawk Finishing Products, Inc., RD#4, Perth Road, Amsterdam, New York 12010, 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 December 1, 1976 through November 30, 1979 (File No. 30170).

A small claims hearing was held before Judy M. Clark, Hearing Officer, at the offices of the State Tax Commission, Building 9, State Campus, Albany, New York, on October 26, 1981, at 1:15 P.M. Petitioner appeared by William E. Moore, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Harry Kadish, Esq., of counsel).

ISSUES

I. Whether "demand charges" billed to petitioner by its supplier of electric service were properly included in the portion of electricity held subject to tax on audit.

II. Whether the allocation rate of electricity used by the Audit Division in determining non-production usage was correct.

FINDINGS OF FACT

1. On June 20, 1980, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Mohawk Finishing Products, Inc. covering the period December 1, 1976 through November 30, 1979.

The Notice asserted additional tax due of \$1,953.84 plus simple interest of \$764.92 for a total of \$2,718.76 as a result of a field audit.

2. Petitioner is a manufacturer of furniture repair and restoration products qualifying for certain exemptions under section 1115(a) and (c) of the Tax Law.

3. On audit, the Audit Division reviewed purchases made by petitioner and determined additional taxes due and credits for overpayment of taxes as follows:

Expense Purchases @ 7%	\$ 930.10
Expense Purchases @ 4%	262.49
Expense Purchases @ 3%	[420.43]
Utilities - Gas	1,340.54
Utilities - Electric	3,570.23
Capital Expenditures (Net)	[3,729.09]
Total Use Tax Due	<u>\$1,953.84</u>

The Audit Division conceded that the Notice should be amended to delete additional tax due of \$260.76 on artwork and layout charges for catalogs, leaving tax due of \$1,693.08.

4. The items at issue involve only the additional tax in the amount of \$3,570.23 on charges for electric service. A utility survey, under the direction of the Audit Division, was performed by an electrician hired by petitioner. The survey determined that 1311 kilowatt hours of electricity was consumed daily for non-production purposes. Based on an average of 2835 kilowatt hours consumed daily, a non-production allocation rate was determined to be 46 percent. The Audit Division held 46 percent of the total utility billed, including demand charges, as being for non-production use and therefore taxable under section 1105(b) of the Tax Law. It was the Audit Division's position that the demand charges are part of the receipts subject to tax and that the allocation rate should be accordingly applied to such charges.

5. Petitioner's utility bills from Niagara Mohawk Power Corporation included demand charges based on the peak load or greatest amount of electricity used during a period as tested at fifteen-minute intervals by a demand or surge meter. Demand charges were billed based on the measured surge of kilowatts as opposed to the measured kilowatt hours of electricity consumed. For example, the utility bill rendered for the period September 14, 1979 to October 16, 1979 and presumed to be the basis for the determination of the non-production ratio included 316.8 kilowatts for demand metered and billed. The electric consumption was metered and billed at 90,720 kilowatt hours.

6. Petitioner contended that the use of production machinery and equipment had the greatest effect on the surge meter in measuring demand as opposed to general lighting and office equipment. It therefore reasoned that the demand charges should be excluded from the total charges in applying the non-production allocation rate.

7. Petitioner was in disagreement with the allocation rate determined for non-production use of electricity in that it was much higher than the norm for a manufacturing operation. Petitioner did not conduct any further survey to redetermine the allocation rate.

8. Sales Tax Information Letter No. 39 provides a formula to determine taxable use of electricity whereby an average month is used in determining the number of kilowatt hours used for general lighting. The survey performed in Finding of Fact "4" was based on a one-day usage of kilowatt hours for lighting and compared to the daily average of kilowatt hours billed over a 32-day period. The allocation rate is not accurate in that days when the office and plant were shut down is included in the average daily kilowatt hours, which incorrectly reflects production usage when the plant is in operation. Based on one month

or a 20-day work month in conjunction with the survey, the allocation rate of non-production usage is 28.9 percent.

CONCLUSIONS OF LAW

A. That the demand charges billed petitioner by its utility supplier for electric service was properly included in the charges to which the non-production allocation rate was applied. The demand charges were an addition to the bill rendered whereby the utility adjusted the rate charged based on the requirements of its customers. As such they were properly included in receipts subject to tax under section 1105(b) of the Tax Law.

B. That the allocation rate of electricity for non-production usage is reduced to 28.9 percent pursuant to Finding of Fact "8".

C. That the petition of Mohawk Finishing Products, Inc. is granted to the extent indicated in Conclusion "B" above; that the Audit Division is directed to accordingly modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued June 20, 1980 along with the amendment pursuant to Finding of Fact "3"; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

OCT 06 1982

STATE TAX COMMISSION

ACTING
PRESIDENT

COMMISSIONER

COMMISSIONER