

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of

CLAYTON H., JR. and JOANNE C. GIBBS

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 ~~year(s)~~ Period(s) :  
March 1, 1974 through December 31, 1974.

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 31st day of March , 1978, ~~he~~ served the within  
Notice of Determination by ~~(certified)~~ mail upon Clayton H., Jr. and  
Joanne C. Gibbs (~~representative of~~) the petitioner in the within proceeding,  
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed  
as follows: Mr. & Mrs. Clayton H. Gibbs, Jr.  
3513 North Gravel Road  
Medina, New York 14103

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

31st day of March , 1978.





STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition

of

CLAYTON H., JR. and JOANNE C. GIBBS

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~~)  
March 1, 1974 through December 31, 1974.

State of New York  
County of Albany

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~~he~~ is an employee of the Department of Taxation and Finance, over 18 years of  
age, and that on the 31st day of March, 1978, ~~he~~ served the within  
Notice of Determination by ~~(certified)~~ mail upon Duane C. Johnson, Jr.

(representative of) the petitioner in the within proceeding,

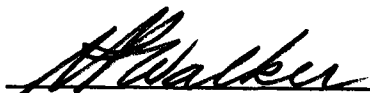
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed  
as follows: Duane C. Johnson, Jr., Esq.  
420 West Avenue  
Medina, New York 14103

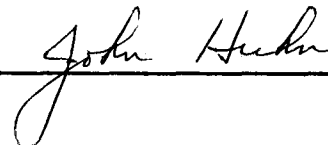
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Sworn to before me this

31st day of March, 1978







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

March 31, 1978

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

Mr. & Mrs. Clayton M. Gibbs, Jr.  
3513 North Gravel Road  
Medina, New York 14103

Dear Mr. & Mrs. Gibbs:

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) **1139 & 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 Chyzywaty**  
**Hearing Examiner**

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Application	:	
	:	
of	:	
	:	
CLAYTON H., JR. and JOANNE C. GIBBS	:	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 March 1, 1974 through	:	
December 31, 1974.	:	

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Applicants, Clayton H., Jr. and Joanne C. Gibbs, 3513 North Gravel Road, Medina, New York 14103, 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 March 1, 1974 through December 31, 1974 (File No. 11810).

A small claims hearing was held before Joseph Chyrywaty, Hearing Officer, at the offices of the State Tax Commission, One Marine Midland Plaza, Rochester, New York, on August 9, 1977 at 1:15 P.M. Applicants appeared by Duane C. Johnson, Esq. The Sales Tax Bureau appeared by Peter Crotty, Esq. (Richard Kaufman, Esq., of counsel).

#### ISSUE

Whether the applicants are entitled to a refund of sales tax paid on the purchase of tangible personal property which was subsequently incorporated into real property.

FINDINGS OF FACT

1. On March 11, 1975, applicants, Clayton H., Jr. and Joanne C. Gibbs, filed an Application for Credit or Refund of State and Local Sales or Use Tax in the amount of \$1,420.90. At the hearing in this matter, the applicants amended the amount of refund claimed to \$1,042.01. The period covered by the claim was March 1, 1974 through December 31, 1974. It represented sales taxes paid on the purchase of tangible personal property which was subsequently incorporated into real property.

2. On May 28, 1975, the Sales Tax Bureau denied the refund claim in full, on the grounds that the applicant purchased tangible personal property rather than a capital improvement.

3. On January 26, 1974, applicants entered into an agreement with The Barden and Robeson Corporation to purchase the materials for a house. The agreement stated in part that "...THE BARDEN & ROBESON CORPORATION is a material supplier and that they are in no way obligated for, on the Job Labor or any materials not covered by this Contract...." The Barden and Robeson Corporation billed the applicants for sales tax in the amount of \$969.71 and delivered the materials for the house to North Gravel Road, Medina, New York.

4. The applicant also purchased additional materials (e.g., insulation, gutters, storm doors, a prefabricated fireplace, stone and topsoil) necessary for the completion of their house. The

sales tax paid on these purchases and on the purchase from The Barden and Robeson Corporation is the basis for the refund claim.

5. On March 2, 1974, applicant Clayton H. Gibbs, Jr. entered into an agreement with Sam Grogan, which called for the erection of a house and the installation of roofing and siding. He also entered into other subcontractual agreements calling for the installation of a foundation, all dry wall work and all gutter and downspout work.

6. Applicants contended that purchases of tangible personal property which were subsequently incorporated into real property were exempt from the sales tax within the meaning and intent of section 1115(a)(17) of the Tax Law.

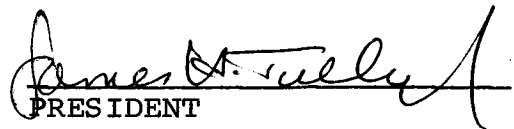
#### CONCLUSIONS OF LAW

A. That section 1115(a)(17) of the Tax Law exempts "Tangible personal property sold by a contractor, subcontractor or repairman to a person...for whom he is adding to, or improving real property, property or land by a capital improvement...." The materials purchased by applicants are not exempt from tax within the meaning and intent of section 1115(a)(17) of the Tax Law since the seller of the materials did not perform a capital improvement.

B. That the application of Clayton H., Jr. and Joanne C. Gibbs is denied and the Notice of Refund Denial issued May 28, 1975 is sustained.

DATED: Albany, New York  
March 31, 1978

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER