

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

JOSEPH DAVIS, INC. .

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 and 29 of the :
Tax Law for the ~~XXXXXX~~ Period ~~(X)~~ :
August 1, 1965 through February 28, 1969.

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 13th day of December , 1978, ~~he~~ served the within
Notice of Determination by ~~(certified)~~ mail upon Joseph Davis, Inc.

(~~representative of~~) the petitioner in the within proceeding,
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows: Joseph Davis, Inc.
120 West Tupper Street
Buffalo, New York 14201

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

13th day of December , 1978.

W. Walker

John Huhn

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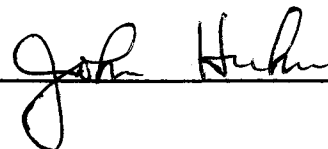
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Sworn to before me this

13th day of December, 1978







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

December 13, 1978

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

**Joseph Davis, Inc.
120 West Tupper Street
Buffalo, New York 14201**

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) **1130 & 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 :
JOSEPH DAVIS, 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 August 1, 1965 through :
February 28, 1969. :

Applicant, Joseph Davis, Inc., 120 West Tupper Street, Buffalo, New York 14201, 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 August 1, 1965 through February 28, 1969 (File No. 01940).

A formal hearing was held before L. Robert Leisner, Hearing Officer, at the offices of the State Tax Commission, State Office Building, Buffalo, New York, on October 20, 1971. Applicant appeared by Donald J. Egan, Esq. and James L. Magavern, Esq. The Sales Tax Bureau appeared by Saul Heckelman, Esq. (Alexander Weiss, Esq., of counsel).

ISSUE

Whether applicant's purchases of materials, supplies, tools and equipment rentals for the performance of various building contracts for capital improvements, for exempt institutions and private industrial corporations, were subject to sales and use taxes.

FINDINGS OF FACT

1. Applicant, Joseph Davis, Inc., timely filed New York State sales and use tax returns for the period August 1, 1965 through February 28, 1969.
2. On October 8, 1969 as the result of an audit, the Sales Tax Bureau issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against applicant for taxes due of \$32,972.70, plus penalty and interest, for the period August 1, 1965 through February 28, 1969. The amount due on said Notice was later reduced by the Sales Tax Bureau to \$32,093.34, plus penalty and interest.
3. Applicant timely filed an application for revision of the determination of deficiencies in sales and use tax.
4. Applicant was a contractor engaged in the business of installing heating, ventilating and air-conditioning, plus related equipment.
5. The taxes determined were sales and use taxes based primarily on the purchase of materials for contracts performed by applicant for tax exempt organizations and for two private industrial corporations. Said taxes relate to the period August 1, 1965 through February 28, 1969. According to the information supplied to applicant by the auditor, the taxes arose primarily out of nine contracts in the following amounts:

(1)	Contract (6929) with Board of Education, Alden Central School, dated 10/5/64.	\$ 2,090.99
(2)	Contract (6939) with Board of Education, Towns of Clarence, Newstead, etc., dated 12/1/64.	1,676.69
(3)	Contract (6943) with Wright and Kremers, Inc., general contractor for the State University Construction Fund, Brockport State College, dated 3/15/65.	12,588.20
(4)	Contract (6978) with Cowper Co., general contractor for State University Construction Fund, State University at Buffalo, dated 5/20/65.	3,980.96
(5)	Contract (6979) with Stimm Associates, Inc. general contractor for Chevrolet Motors Division, dated 4/22/65.	7,677.27
(6)	Contract (6990) with Vitale Bros., general contractor for State University Construction Fund, Geneseo State College, dated 6/25/65.	1,572.26
(7)	Contract (6997) with Hooker Chemical Corpora- tion, Durez Plastics Division, dated 8/16/65.	107.47
(8)	Contract (7067) with V.J. Gautieri, Inc., general contractor for the State University Construction Fund, Fredonia State College, dated 6/10/66.	332.09
(9)	Contract (7132) with C. Pfeil Construction Co., general contractor for State University Construction Fund, Alfred University, dated 11/18/67.	485.14
		<u>\$30,511.07</u>

6. In addition, the Sales Tax Bureau's auditor determined taxes due of \$1,582.27, which represent sales and use taxes on supplies, tools and equipment rentals purchased for the various contracts.

7. Applicant contends that a capital improvement construction contract with a tax exempt organization, exempts all purchases required for the performance of the contract from sales tax. Applicant also contends that the contractors really intended to enter time-and-materials contracts and that the contracts can be reformed several years later (without the consent of the taxing authority) to obtain a tax exemption. The taxpayer further contends that the materials were separate or identified by delivery and were nontaxable, and that it was the intent of the law to exempt purchases on all construction for exempt organizations.

8. The Sales Tax Bureau contends that all contracts must be deemed taxable unless a) there is an exempt institution and the contract breaks down time and materials in the contract and b) a separate bill is submitted for the material and c) the contract signifies that materials purchased for the performance of the contract are exempt from sales tax by reason of the exemption granted to the exempt institution.

9. Contracts (1) and (2) are lump-sum contracts.

10. Contract (3) is a lump-sum contract. The contract by its terms also includes the 3% Monroe County sales tax.

11. Contract (4) is a lump-sum contract, which contract provides further that "This subcontract is based on a 3% Sales Tax." (pg. 3)

12. Contracts (5) and (7) are lump-sum contracts for private industrial corporations. Contract (7) has an inscription that the owner has a direct pay permit.

13. Contracts (6), (8) and (9) were lump-sum subcontracts for capital improvements for exempt organizations. There is no reference to sales tax in the contracts. There were "reformatations" several years later in 1969, which attempted to specify time and materials. The evidence of intent on bid prices was not convincing. The general contracts were not in evidence.

14. There were also purchases which had been made for tools and equipment and rentals, for jobs for tax exempt institutions.

15. At all times, applicant acted in good faith.

CONCLUSIONS OF LAW

A. That where the facts indicate that the contract was a labor or time-and-materials contract with an exempt organization and the exempt institution was not charged sales tax, the purchases of materials for the performance of the contract are tax exempt. Sweet Associates v. Gallman, 29 N.Y. 2d 902.

B. That where the contract with the exempt organization, by its express terms, states that there is to be no sales tax included in the bid price and none is so included, the purchases of materials for the performance of the contract are tax exempt. Sweet Associates v. Gallman, 29 N.Y. 2d 902.

C. That where the evidence indicates that at the time of the execution of the contract a) the contracting parties were aware of the exempt status of the organization, b) the parties intended to exclude taxes on purchases for the performance of the contract and c) no sales tax was charged the exempt institution, no sales tax is applicable. Sweet Associates v. Gallman, 29 N.Y. 2d 902.

D. That parties cannot reform the contract at a later date to make the contract nontaxable. After performance of the contracts, the later reformation of contracts (to which reformations the Sales Tax Bureau was not a party) will have no significance on the sales tax effects of the contract or the purchases of materials required to perform the contracts.

E. Purchases of materials for lump-sum contracts with tax exempt organizations will be taxable, absent any other qualifying circumstances.

F. That purchases of materials for lump-sum contracts with private industrial corporations are subject to tax.

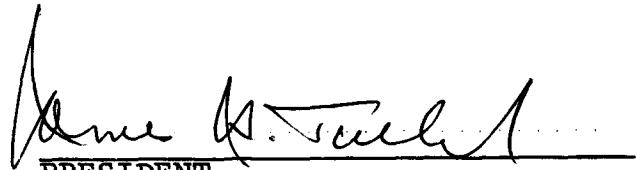
G. That purchase of supplies, tools and equipment rentals are subject to sales and use taxes.

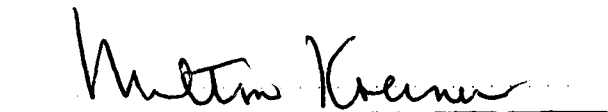
H. That the application of Joseph Davis, Inc. is granted to the extent that the penalties and interest in excess of the minimum statutory rate are cancelled; that the Sales Tax Bureau is hereby directed to accordingly modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued October 8, 1969, and that, except as so granted, the application is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

December 13, 1978


PRESIDENT


COMMISSIONER


COMMISSIONER



New York State Department of
TAXATION and FINANCE

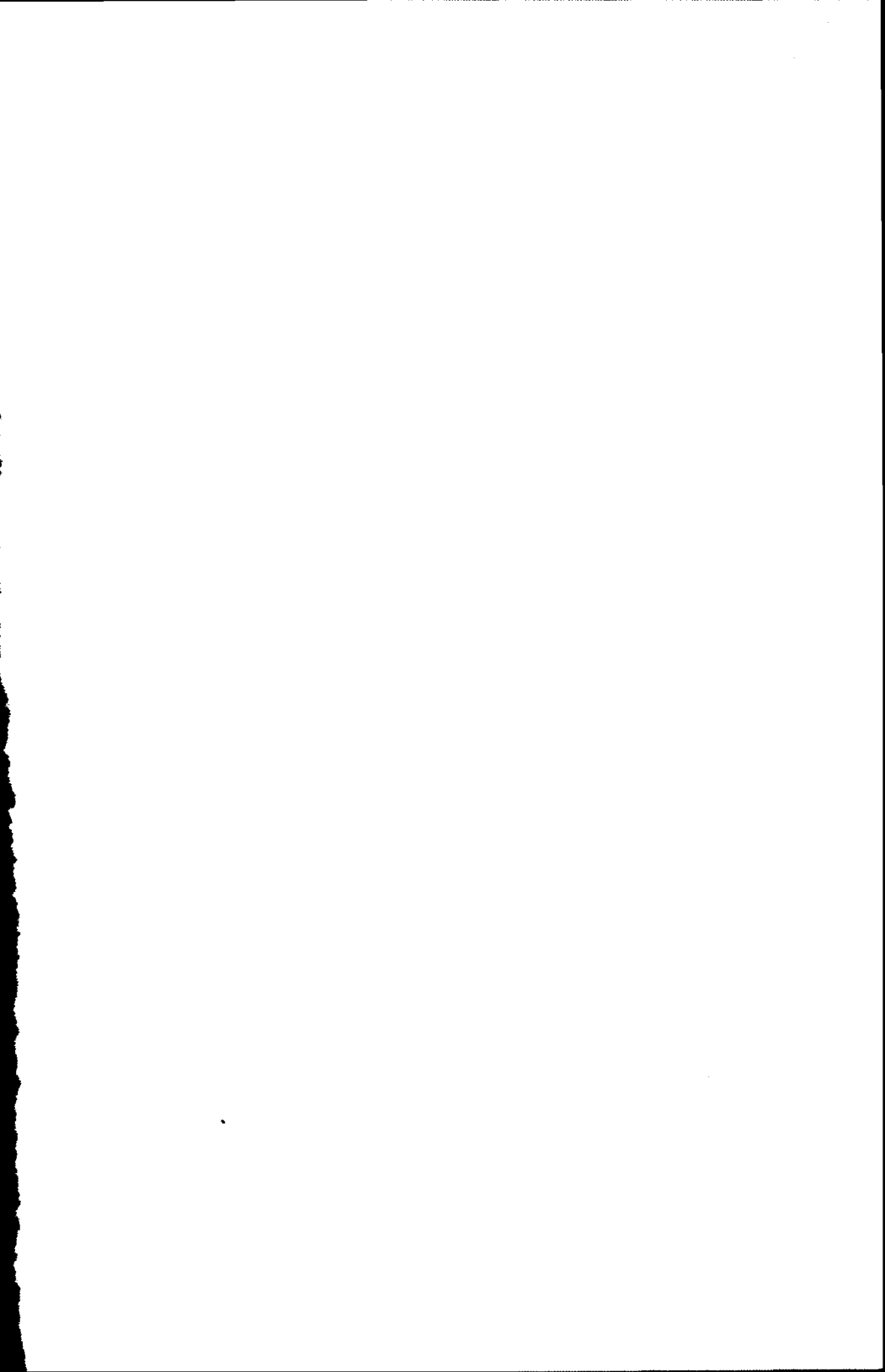
TAX APPEALS BUREAU

Sec. To Tax Commission

TO

Determination was remailed
December 27, 1978.

M-75 (5/76)



TA-26 (4-76) 25M

FORMAL HEARING

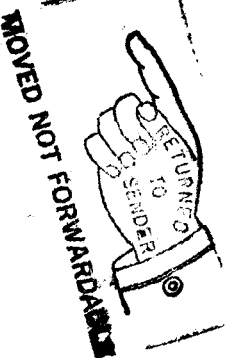
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TAX APPEALS BUREAU

STATE CAMPUS

ALBANY, N. Y. 12227



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Magavern, Magavern, Lowe & Beilewech
900 Prudential Building
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REC'D DEPT. TAX & FINANCE

BUFFALO, N.Y.
JUN 18 1978

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Marcy Donnini

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