

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
J. F. Townhouse, Inc. : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Sales & Use Tax :
under Article 28 & 29 of the Tax Law for the :
Period 11/11/71. :

State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 6th day of February, 1985, he served the within notice of Decision by certified mail upon J. F. Townhouse, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

J. F. Townhouse, Inc.
247 Genesee St.
Utica, NY 13501

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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 February, 1985.

David Parchuck

Garnie A. Waples
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
J. F. Townhouse, Inc. : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision :
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under Article 28 & 29 of the Tax Law for the :
Period 11/11/71. :

State of New York :
ss.:
County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 6th day of February, 1985, he served the within notice of Decision by certified mail upon James C. Oster, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

James C. Oster
Groben, Liddy, Cardamone & Gilroy
185 Genesee St.
Utica, NY 13503

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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 February, 1985.

David Parchuck

Bennie R. Haglund
Authorized to administer oaths
pursuant to Tax Law section 174

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

February 6, 1985

J. F. Townhouse, Inc.
247 Genesee St.
Utica, NY 13501

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 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law 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
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
James C. Oster
Groben, Liddy, Cardamone & Gilroy
185 Genesee St.
Utica, NY 13503
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

J. F. TOWNHOUSE, 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 November 11, 1971.

Petitioner, J. F. Townhouse, Inc., 247 Genesee Street, Utica, New York
13501, 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 November 11,
1971 (File No. 01622).

On June 14, 1984, petitioner waived its right to a hearing and requested
that a decision be rendered based on the entire record contained in its file,
including briefs to be submitted by August 27, 1984. After due consideration
of the record, the State Tax Commission hereby renders the following decision.

ISSUE

Whether equipment purchased by petitioner and installed in leased premises
constituted capital improvements exempt from sales and use tax.

FINDINGS OF FACT

1. On November 12, 1971, petitioner herein, J. F. Townhouse, Inc.,
obtained, through assignment from James D. Fotos and Irene A. Fotos, a license
to operate a McDonald's fast food restaurant located at 247 Genesee Street,
Utica, New York and a 20 year lease for said restaurant. James D. Fotos and
Irene A. Fotos had acquired the license from McDonald's System, Inc. and the
lease from Franchise Realty Interstate Corporation.

2. On September 16, 1971, Mr. Fotos, owner of 100 percent of the stock of petitioner herein, had entered into an agreement with Illinois Range Company for the purchase of certain restaurant equipment to be used in the McDonald's restaurant located at 247 Genesee Street, Utica, New York. By invoice dated November 30, 1971, Illinois Range Company billed Mr. and Mrs. Fotos \$41,760.00 for various equipment and \$5,134.00 for installation and delivery, for a total of \$46,894.00. Said invoice also billed New York State sales tax of \$1,875.76 ($\$46,894.00 \times .04$). The total due shown on said invoice of \$48,769.76 ($\$46,894.00 + \$1,875.76$) was reduced by a deposit of \$15,000.00 which had been made on or about September 16, 1971, leaving a balance due of \$33,769.76. By check dated January 13, 1972, petitioner made payment to Illinois Range Company of the \$33,769.76 balance due.

3. On December 12, 1972, petitioner submitted an Application for Credit or Refund of State and Local Sales or Use Tax claiming a refund of \$1,021.11 on the grounds that a portion of the aforementioned equipment purchased from Illinois Range Company became a part of the building when installed and, as such, was exempt from sales and use tax as a capital improvement. Attached to the application for refund was a photocopy of the Illinois Range Company invoice dated November 30, 1971, wherein petitioner marked the following items as exempt capital improvements:

<u>ITEM</u>	<u>AMOUNT</u>
a) Multimixer Stand-Complete	\$ 629.00
b) Center Island - Complete	5,098.00
c) Multiplex Twin "1200" Disp. Sys.	4,263.00
d) Syrup Rail, w/Step, Freestanding	458.00
e) Vollrath Walk-In Refrig.	3,866.00
f) 3 Compartment Sink w/ Drainboard	840.00
g) Undercounter Shelving	1,000.00
h) Menu Board (Florida Plastics)	294.00
i) Bally Freezer	3,945.00
j) Installation & Delivery	5,134.00
Total	<u>\$25,527.00</u>

4. Pursuant to a letter dated March 2, 1973, the Audit Division advised petitioner that its claim for refund was denied in full. Petitioner timely filed a petition with the State Tax Commission for a redetermination of the refund denial.

5. Petitioner's lease agreement for the McDonald's restaurant located at 247 Genesee Street, Utica, New York provided, pursuant to Article II, Section 5, that:

"Lessee agrees to purchase, install and maintain all at his own expense the sign, including the arches, and the trade fixtures and equipment in accordance with the plans, specifications and layout of McDonald's System, Inc., or any of its subsidiaries."

Said lease also provided, pursuant to Article III, Section 5, that:

"By this lease, Lessor does not acquire any right, title or interest in or to any property of Lessee except such rights as are specifically stated in the Lease."

6. The record is devoid of any evidence as to the manner in which the items in question were affixed to the leased realty. Also, there is no evidence in the record to show that the items in question, if removed, would cause substantial damage to said items or to the realty.

CONCLUSIONS OF LAW

A. That petitioner has failed to show that the items in question were affixed to the leased realty with any degree of permanency or that the items in question, if removed, would be substantially damaged or would cause damage to the realty. Furthermore, the inference is warranted that petitioner did not intend the items in question to be permanent installations since, pursuant to the lease agreement, title to said items remained with petitioner and did not pass to the lessor. Flah's of Syracuse, Inc. v. Tully, 89 A.D.2d 729.


B. That the various items in question did not, when installed in the leased realty, constitute capital improvements within the meaning and intent of sections 1101(b)(9) and 1105(c)(3)(iii) of the Tax Law.

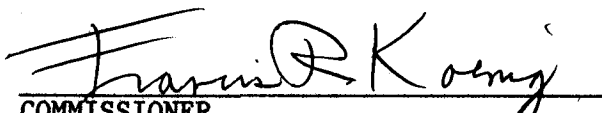
C. That the petition of J. F. Townhouse, Inc. for refund is denied in its entirety and the notice of refund denial dated March 2, 1973 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

FEB 06 1985


PRESIDENT


COMMISSIONER


COMMISSIONER

P 693 169 531

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1983-403-517

PS Form 3800, Feb. 1982

Sent to	<i>James A Oster</i>
Street and No.	<i>Broken Liddy Cardemore</i>
P.O., State and ZIP Code	<i>185 Genesee St. Albany</i>
Postage	<i>Utica N.Y. 13503</i>
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return receipt showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

P 693 169 530

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

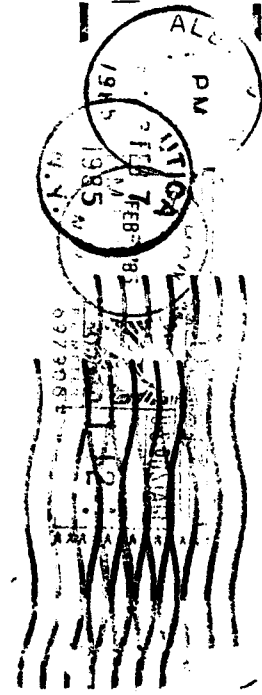
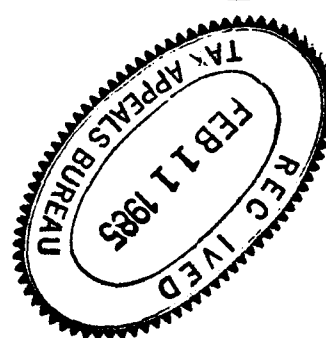
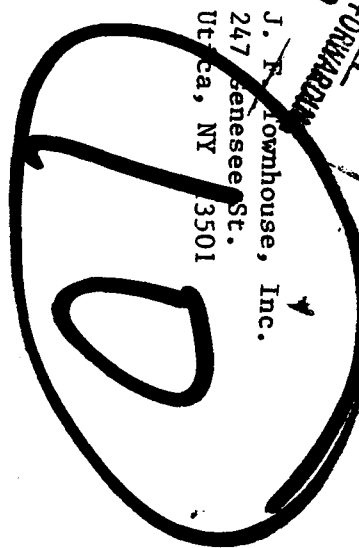
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Form 3800, Feb. 1982

Sent to	<i>J. F. Townhouse Inc.</i>
Street and No.	<i>247 Genesee St.</i>
P.O., State and ZIP Code	<i>Utica NY 13501</i>
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return receipt showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	



TA 26 (9-79)
STATE OF NEW YORK
State Tax Commission
TAX APPEALS BUREAU
STATE CAMPUS
ALBANY, N. Y. 12227

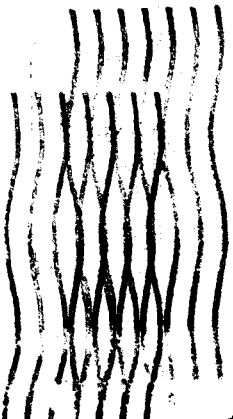
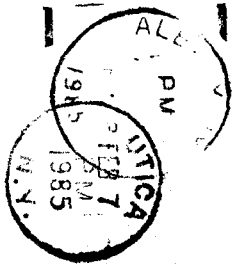
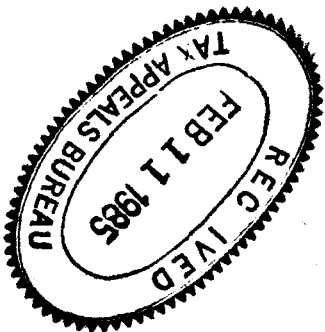
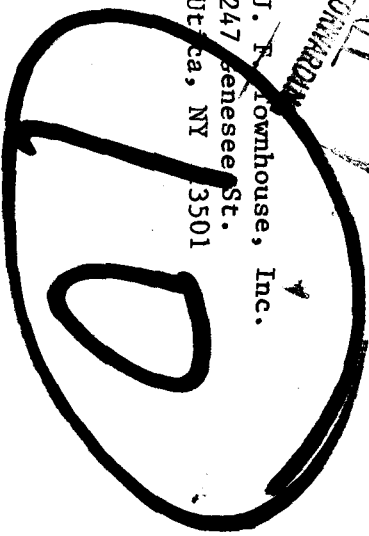


TA 26 (9-79)
STATE OF NEW YORK
State Tax Commission
TAX APPEALS BUREAU
STATE CAMPUS
ALBANY, N. Y. 12227

CERTIFIED
P 693 169 530
MAIL

RETURNED
TO
SENDER
AUTHORIZED TIME FOR FORWARDING
HAS EXPIRED

J. F. Downhouse, Inc.
247 Senessee St.
Utica, NY 13501



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

February 6, 1985

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STATE TAX COMMISSION

cc: Petitioner's Representative
James C. Oster
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185 Genesee St.
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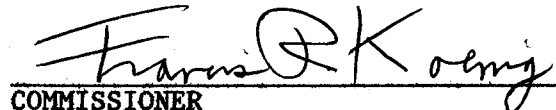
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DATED: Albany, New York

STATE TAX COMMISSION

FEB 06 1985


PRESIDENT


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