

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

---

In the Matter of the Petition	:	
of	:	
<b>MIRON RAPID MIX CONCRETE CORPORATION</b>	:	DECISION
for Revision of a Determination or for Refund	:	DTA No. 807311
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period March 1, 1986	:	
through November 30, 1988	:	

---

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on October 4, 1990 with respect to the petition of Miron Rapid Mix Concrete Corporation, C.P.O. Box 1598, Kingston, New York 12401 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, 1986 through November 30, 1988. Petitioner appeared pro se by its president, secretary and general counsel Stephen E. Miron, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Robert Jarvis, Esq., of counsel).

Both parties filed briefs on exception. Oral argument was held at the request of the Division of Taxation on July 18, 1991.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

***ISSUE***

Whether the chassis of the Oshkosh Forward Placement Concrete Carrier/Mixer is exempt from the imposition of sales and use tax because it is used or consumed directly and predominantly in the production for sale of tangible personal property.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

On June 12, 1989, the Division of Taxation issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner, Miron Rapid Mix Concrete Corporation ("Miron"), spanning the period March 1, 1986 through November 30, 1988 and assessing a sales tax liability in the amount of \$54,795.30, plus interest. The notice was based upon the results of a field audit of the business operations of Miron as described hereinafter.

During the course of the audit, the auditor reviewed invoices relating to the purchase by Miron of ten Oshkosh S-Series Forward Placement Carriers/Mixers from the Oshkosh Truck Corporation located in Oshkosh, Wisconsin. The total cost of each vehicle was \$113,600.00. The purchase invoices showed a separate amount for the mixer and chassis of each vehicle because, it was explained to the auditor, federal excise tax is attributable to only the chassis. The auditor computed the sales tax due only on the cost of the ten chassis, as it is the position of the Division of Taxation ("Division") that the mixer portion of the vehicle is exempt from the imposition of sales and use tax as machinery or equipment used or consumed directly and predominantly in the production for sale of tangible personal property.

Petitioner is engaged in the business of manufacturing, selling and delivering transit mix concrete. To carry out its business, Miron owns and operates a dry batch plant in Kingston, New York as well as the concrete mixer vehicles at issue herein. The chassis and mixer drum of the vehicles are manufactured by the Oshkosh Truck Corporation, which sells each vehicle as a complete unit.

The Oshkosh Forward Placement Concrete Carrier/Mixer has its cab located at the front of the chassis. Directly behind the cab is the water tank, with sight gauge, which is employed by the mixer system. Located behind the water tank is the mixer drum, which extends forward over both the water tank and the cab. At the rear of the chassis is the power plant, or engine, which includes the cooling system, hydraulic system, electrical system and air system. The air, electrical and hydraulic systems are all connected to both the chassis and the mixer drum. The mixer is powered hydraulically by the vehicle's power plant. The air system to the vehicle is

connected into the mixer drum so that if the mixer is removed, the vehicle can not operate. Furthermore, without the mixer, the vehicle's brakes can not function as the air reservoir needed for the brake system is located in the mixer drum. This contrasts with a conventional concrete mixer where the chassis is independent of the mixer so that if the mixer is removed, the chassis can still operate.

Mounted on the outside of the cab is a hydraulic pressure gauge, which measures the "slump", or consistency, of the concrete in the drum. Inside the cab are the controls for rotating the drum, the controls for the chute which delivers the concrete from the mixer to the pour site and the controls for the water tank. To achieve the proper slump, the water from the tank can be added to the concrete in the mixer en route and/or at the job site.

At the dry batch plant, sand, stone, cement and water, in specific proportions, are loaded into the mixer drum of the concrete truck. This initial phase is referred to as the charging process. During the charging process, the drum rotates approximately 16 times per minute. Upon completion of the loading of the component parts of the concrete and during the trip to the delivery site, the drum rotates approximately 3 times per minute. At the job site, the drum rotates approximately 10 to 12 times per minute until the proper consistency of the concrete is attained. The consistency is measured by the slump gauge which is located on the vehicle. If more water is needed to achieve the correct consistency, it will be added at the job site from the water tank contained on the vehicle.

When the concrete is the desired consistency and the site is ready to receive the product, the concrete is discharged from the truck into a chute which directs the product to the desired location. The mixer drum rotates continuously on the job site and during delivery of the concrete. Upon completion of the delivery of the concrete, water is added to the drum to keep the residual concrete moist. During the return trip to the plant, the drum continues to rotate to avoid damaging the mixer and to keep the leftover concrete or wash water from setting in the drum. The residual concrete is returned to the plant and used to make cubes that are employed in the production of retaining walls.

***OPINION***

In the determination below, the Administrative Law Judge determined that the purchases of truck chassis by petitioner were exempt from sales tax under Tax Law § 1115(a)(12), as this machinery was used directly and predominantly in the production of tangible personal property.

On exception, the Division sets forth the following arguments: 1) this case is indistinguishable from State Tax Commission cases that have held that the chassis portion of the combined unit does not qualify for the production exemption; 2) petitioner has not shown that the chassis and the mixer drum of the unit are so structurally integrated and inseparable that the entire chassis must be considered a subcomponent of the mixer assembly; 3) the record does not support a finding that all chassis components in question are used directly in the production of transit mix concrete; and 4) petitioner has not carried its burden of proving the entire chassis is used predominantly for production rather than for transportation.

In response, petitioner sets forth the following arguments: 1) the line of prior cases with respect to transit mix chassis is inapplicable to the present case; 2) by virtue of the inseparability of its component parts, the Oshkosh S-Series chassis functions directly and predominantly in the production of tangible personal property; and 3) the Administrative Law Judge's determination is correct and should be upheld.

We affirm the determination of the Administrative Law Judge.

Tax Law § 1115(a)(12) provides an exemption from sales and use taxes for machinery and equipment with a useful life of more than one year that is "used or consumed directly and predominantly in the production of tangible personal property" (Tax Law § 1115[a][12] [emphasis added]).

The two requisite elements of use are defined in the regulations at 20 NYCRR 528.13. One of the characteristics by which machinery and equipment is considered to be used "directly" in production is that it "have an active causal relationship in the production of the product to be sold" (20 NYCRR 528.13[c][1][ii]). Machinery or equipment is used predominantly in production if over 50% of its use is directly in the production process (20 NYCRR 528.13[c][4]).

The issues raised in this case are governed largely by Matter of B.R. DeWitt, Inc. (Tax Appeals Tribunal, September 19, 1991), a case decided by this Tribunal subsequent to the parties' submission of briefs on appeal. In DeWitt, we were faced with the identical issue: whether the chassis portion of concrete mixer trucks was exempt from sales tax pursuant to Tax Law § 1115(a)(12). In concluding that the chassis were exempt, we rejected the Administrative Law Judge's determination that the transportation of the concrete mix was separate and distinct from the production phase, and allowed the production exemption under Tax Law § 1115(a)(12). Citing case law and applicable regulations allowing the exemption for transportation equipment used during the production phase, we held that the correct analysis in determining whether such equipment is directly used in production requires an evaluation of the equipment in the context in which it is used (Matter of B.R. DeWitt, Inc., supra). More specifically, we held that it is the relationship of the transportation equipment to the production process that determines whether the equipment is exempt, not simply its nature as "transportation equipment" (Matter of B.R. DeWitt, Inc., supra, citing Matter of St. Joe Resources Co. v. New York State Tax Commn., 132 AD2d 98, 522 NYS2d 252, 256 [dissenting opn], revd on dissenting opn below 72 NY2d 943, 533 NYS2d 51).

Applying this standard in DeWitt, we found it critical to examine the sequence of events leading up to the tendering of the concrete to the customer. In DeWitt, the concrete ingredients were withdrawn from storage at the taxpayer's plant, measured and then placed into the mixer drum of the truck. The ingredients were then mixed to the proper consistency as the truck traveled to the customer. Finding that the production phase clearly started by the time the ingredients were charged into the trucks, and continued uninterrupted in a unified process until the concrete was manufactured and delivered, we concluded that the entire use of the mixer trucks was intimately and directly connected to the process of producing concrete and, thus, the trucks were "production equipment" under Tax Law § 1115(a)(12) (Matter of B.R. DeWitt, Inc., supra).

Moreover, upon finding the chassis to be "production equipment," we explicitly rejected the approach of applying the exemption to a truck on a component by component basis, instead finding that the entire mixer truck functioned as an integrated and harmonious whole, and on this basis qualified for the production exemption (Matter of B.R. DeWitt, Inc., *supra*, citing Matter of Niagara Mohawk Power Corp. v. Wanamaker, 286 App Div 446, 144 NYS2d 458).

We feel that the facts before us are indistinguishable from DeWitt. In this case, as in DeWitt, the raw materials were loaded into the mixer drum of the concrete truck at the dry batch plant. From this point, the rotation of the drum, the critical element in the production process, begins and continues without interruption until it reaches the delivery site. At the site, the drum continues to rotate until the proper consistency of the concrete is reached, at which point the concrete is discharged.

Based on these facts, we agree with the Administrative Law Judge's finding that the chassis is used directly and predominantly in the production process, thus qualifying for the exemption under Tax Law § 1115(a)(12).

In light of our decision in DeWitt, which clearly rejects the first three arguments raised by the Division on exception, we feel that it is unnecessary to address these arguments individually. Instead, we will address only the Division's contention that petitioner failed to prove that the chassis were predominantly used in production.<sup>1</sup>

The Division argues that, assuming the chassis are found to be used directly in production, the assessment should stand in light of petitioner's failure to show they were used "predominantly" in production. Specifically, the Division contends that the trucks' return trips to their dry batch plant are at a point subsequent to the time production had ended. Thus, it contends that petitioner has failed to prove that the trucks were used in production more than 50% of the time as required by the regulations.

---

<sup>1</sup>Petitioner states in its brief that the Division's argument on this matter should not be heard as it failed to specifically request a conclusion of law that the chassis in question failed to meet the 50% test. We do not agree. By stating in its "Requested Finding of Fact 3" that "[t]he chassis of the vehicles at issue is not used more than 50% for producing ready mix concrete" the Division clearly established this as an issue for determination before the Tribunal.

As stated above, machinery or equipment is used predominantly in production if "over 50% of its use is directly in the production process" (20 NYCRR 528.13[c][4], emphasis added). Thus, if it is shown that the use of the truck going to the customer's site as well as the return trip was use "directly in production," then the "predominant" test would be met as well.

We find guidance on the meaning of "directly" in Matter of Envirogas, Inc. v. Chu (114 AD2d 38, 497 NYS2d 503, affd 69 NY2d 632, 511 NYS2d 228). In that case, water trucks were used to haul water to a gas production site for drilling and hydrofracture procedures, as well as to remove waste water and fluids used in this activity and to collect impurities removed from the gas. Because it was found that the essence of gas production is drilling and hydrofracture as well as removal of impurities in the gas, the water trucks used in this removal were held to be "production machinery and equipment," and, thus, fell within the purview of the exemption (Matter of Envirogas, Inc. v. Chu, supra, 497 NYS2d 503, 507).

In Matter of International Salt Co. v. New York State Tax Commn. (79 AD2d 343, 437 NYS2d 757), a case cited by petitioner, equipment used to remove and store excess salt was held to qualify for the exemption in that such removal was a necessary and integral operation in the production of rock salt. This conclusion was based on the fact that it was essential to remove this by-product so that the conveyor system could continue to operate (Matter of International Salt Co. v. New York State Tax Commn., supra).

An inherent characteristic of the production of transit mix concrete is the transportation of the production plant to the customer's site while it simultaneously mixes the raw materials and transforms them into concrete. Concomitant with this unique production process is the removal of the plant from the customer's location after the concrete has been delivered. Because we find that the return of the production facility is part of the essence of transit mix concrete production, we hold that 100% of the use of petitioner's chassis is directly in production, entitling them to the exemption (see, Matter of Envirogas, Inc. v. Chu, supra; Matter of International Salt Co. v. New York State Tax Commn., supra).

We also find Matter of St. Joe Resources Co. v. New York State Tax Commn. (*supra*) to be instructive on this issue. There, trucks used to transport zinc ore from mines to a mill where it was processed were denied the sales tax exemption, as the trucks were not used directly in mining activities. It was held that the trucks simply provided a means of transporting raw materials. Focusing on the definitions of "administration" and "production" provided in the regulations, it was noted that the transporting of raw materials was a use explicitly included under "administration." Thus, it was held that the trucks fell outside of "production machinery and equipment" (Matter of St. Joe Resources Co. v. New York State Tax Commn., *supra*, 522 NYS2d 252, 256; *see*, 20 NYCRR 528.13[b][1], [2]). In reaching this conclusion, Judge Yesawich, in his dissenting opinion at the Appellate Division, also used examples provided in the regulations as guideposts for his decision, finding the trucks more akin to "trucks transporting materials on a public road" (non-exempt)<sup>2</sup> than "conveying material within a plant" (exempt).<sup>3</sup>

We find our decision to be consistent with the guidelines applied in St. Joe Resources. First, we find the use of the chassis to be more akin to the fork lift examples in the regulations (20 NYCRR 528.13[c][2] example 7; 20 NYCRR 528.13[c][4] example 11). Further, we find the chassis indistinguishable from the example of a commercial fishing vessel, which the regulation states is deemed to be used directly in production (20 NYCRR 528.13[c][2] example 4). In both of these cited examples as well as in our case, a function of the machinery is to transport goods during production (*see*, Matter of B.R. DeWitt, Inc., *supra*). Just as the examples in the regulations do not separately classify the inevitable period in which the forklift returns to the loading site empty, or the vessel travels to the fishing site empty, neither should the return of the chassis with an empty mixer unit be separately classified. This unitary treatment of the forklift and commercial fishing vessel in the production phase is a logical one which, in our

---

<sup>2</sup>"Trucks which are required to be registered with the Department of Motor Vehicles used to transport raw materials from a pit to a processing plant over a public road are not used directly in production" (20 NYCRR 528.13[c][2] example 7).

<sup>3</sup>"A fork lift is used only in conveying material from one assembly line to another assembly line in a plant. The fork lift is used directly in production" (20 NYCRR 528.13[c][2] example 8).

opinion, is a correct interpretation of the statutory language provided by the Legislature, and should govern in this instance.

Accordingly, it is ORDERED, ADJUDGED, and DECREED that:

1. The exception of the Division of Taxation is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Miron Rapid Mix Concrete Corporation is granted; and
4. The Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued June 12, 1989 is cancelled.

DATED: Troy, New York  
January 9, 1992

/s/John P. Dugan  
John P. Dugan  
President

/s/Francis R. Koenig  
Francis R. Koenig  
Commissioner

/s/Maria T. Jones  
Maria T. Jones  
Commissioner