STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of B. R. DeWITT, 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 March 1, 1983 through November 30, 1985.	:	
In the Matter of the Petition of BYRON R. DeWITT, OFFICER OF B. R. DeWITT, 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 March 1, 1983 through November 30, 1985.	:	DETERMINATION
In the Matter of the Petition of ESTATE OF GENE A. DeWITT, OFFICER OF B. R. DeWITT, 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 March 1, 1983 through November 30, 1985.	:	

Petitioner B. R. DeWitt, Inc., Route 63, Pavilion, New York 14525, 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 March 1, 1983 through November 30, 1985 (File No. 806601).

Petitioner Byron R. DeWitt, officer of B. R. DeWitt, Inc., c/o B. R. DeWitt, Inc., Route 63, Pavilion, New York 14525, filed a petition forrevision 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, 1983

through November 30, 1985 (File No. 806604).

Petitioner Estate of Gene A. DeWitt, officer of B. R. DeWitt, Inc., c/o Paul S. Boylan, Executor, 45 West Main Street, LeRoy, New York 14482, 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 March 1, 1983 through November 30, 1985 (File No. 806605).

A consolidated hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 462 Washington Street, Buffalo, New York, on October 26, 1989 at 9:15 A.M., with all briefs to be submitted by January 26, 1990. Petitioners appeared by Paul S. Boylan, Esq., and Marvin Laufer, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUES

I. Whether petitioner's purchases of concrete mixer trucks, concrete mixer truck "glider kits," chassis and engines, concrete mixer truck repair parts and services, and motor fuel consumed by petitioner's concrete mixer trucks were exempt from sales tax pursuant to Tax Law § 1115(a)(12) and (c).

II. Whether petitioner has shown that the Division's assessment of tax on certain expenditures classified on petitioner's records as "airplane rental" was improper.

FINDINGS OF FACT

Petitioner, B. R. DeWitt, Inc.,[1] is in the business of manufacturing and selling concrete. The majority of petitioner's sales are of "transit mix" concrete. The process of manufacturing transit mix concrete begins at petitioner's plant where proper proportions of sand, gravel, cement and water are measured and then "charged" into the mixer drum of a concrete mixer vehicle. The mixer drum then commences rotating in a counterclockwise manner to thoroughly mix the ingredients. The mixer is powered hydraulically by the vehicle's engine. Proper mixing of the ingredients results from a specified number of rotations within a specified period of time. Failure to adhere to these specifications may result in the purchaser's rejection of the load.

After the drum begins rotating, the vehicle is dispatched to the job site. All of petitioner's concrete mixing vehicles are equipped with a water supply and, if necessary, the driver may add water to the mix en route. While traveling to the job site, the drum continues to rotate and thereby thoroughly mixes the load. Upon reaching the job site, additional water is necessary for the concrete to achieve the proper "slump", i.e. consistency. Once this additional water has been mixed into the batch and the mix has achieved the proper slump, the manufacturing process is completed and the load is discharged.

Once a load of concrete has been discharged at the job site, the mixer vehicle returns to the plant. On its return trip, the mixer drum is rotated in a clockwise manner while water is run through the drum in order to clean the drum and to prevent residual concrete from setting up inside the drum.

The primary variable in the process of manufacturing transit mix concrete of a particular quality and consistency is the distance from petitioner's plant to the job site. This distance

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[1]Notices of determination issued to Byron R. DeWitt and the Estate of Gene A. DeWitt were premised upon these individuals' liabilities as responsible officers of B. R. DeWitt, Inc. Neither of the individual petitioners disputed their status as responsible officers. Consequently, all references to petitioner herein, unless otherwise indicated, refer to the corporate petitioner, B. R. DeWitt, Inc.

affects the rate of revolutions of the drum in mixing the ingredients in transit and the amount of water to be added to the mix at the plant. It is generally advisable to arrive at the job site with the mixed product in a relatively dry state and then add water to the mix at that time to bring the product to the proper consistency, since adding water to a dry product is easy while removing moisture from product which is too wet is unfeasible.

The maximum amount of mixing time allowable from the point where water is introduced into the drum is 90 minutes. If the concrete is mixed in the drum longer than 90 minutes, it is not saleable. Petitioner thus cannot supply transit mix concrete to a job site located more than 90 minutes from its plant.

Petitioner also manufactures and sells truck mix concrete. Truck mix concrete is usually sold to smaller accounts where petitioner is unsure of whether the customer will be ready for the load when the mixer truck arrives. The difference between truck mix and transit mix is that with truck mix the mixing is done on-site as opposed to in transit.

On August 5, 1987, following an audit, the Division of Taxation issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due which assessed $250,847.20 in tax due, plus penalty and interest, for the period March 1, 1983 through November 30, 1985.

Also on August 5, 1987, the Division issued identical notices of determination to petitioners, Byron R. DeWitt and the Estate of Gene A. DeWitt. These petitioners were assessed as persons required to collect tax on behalf of the corporate petitioner and did not dispute their status as such persons.

Subsequent to the issuance of the notices herein, the Division adjusted the assessments herein downward to $147,747.78 in tax due, plus penalty and interest.

At hearing the Division conceded certain adjustments to the assessments herein. Specifically, in the capital assets component of the audit, the Division agreed to the following adjustments:

(a) The Division included the following four Pavilion Truck Sales Corp. invoices

twice and therefore duplicated its assessment with respect to such invoices:

Invoice No.	Invoice Amount	Tax Assessed
54689	$2,805.32	$196.37
55467	1,016.14	71.13
55859	489.09	34.24
57153	117.88	8.25
	$4,428.43	$309.99

(b) The Division conceded that either tax was paid or no tax was due in respect of the following Pavilion Truck Sales Corp. invoices included as taxable on audit:

Invoice No.	Invoice Amount	Tax Assessed
10221 (or 1967)	$18,404.00	$1,288.28
61204 (or 634)	7,750.00	542.50
	$26,154.00	$1,830.78

The assessment remaining at issue results from the Division's analysis of petitioner's records of purchases in three major areas: capital assets, diesel fuel and gasoline, and recurring expense purchases.

Capital Assets

The Division assessed tax of $16,348.37 on petitioner's purchases during the audit period of seven concrete mixer trucks, complete with a mixer drum, and one concrete mixer truck chassis (without a mixer drum) for a total of $233,548.08. Of this total, the value allocated to the mixer drums was $44,000.00.

The Division also assessed tax of $2,425.74 on petitioner's purchases of five mixer engines totalling $34,653.49. These engines were installed in mixer trucks and powered both the truck and the mixer drum.

Finally, the Division assessed tax of $4,420.35 on petitioner's purchases of $63,147.87 of glider kits and glider kit parts. These kits and the kit parts are used to build trucks upon which the mixer drums are later installed. The complete unit (truck and drum) constitutes a concrete mixer vehicle.

Petitioner conceded liability with respect to the tax assessed on $40,606.54 in other capital asset purchases.

Diesel Fuel and Gasoline

The Division assessed $80,087.40 in tax due on petitioner's purchases of $1,144,105.64 in diesel fuel and gasoline during the audit period. This fuel was consumed in the operation of the concrete mixer trucks as described herein (Findings of Fact "1" through "6").

Recurring Expense Purchases

In the area of recurring expense purchases, the Division analyzed all such purchases made by petitioner during the period September 1, 1984 through May 31, 1985 and assessed tax due of $39,483.67 on purchases totalling $567,367.44. Of this amount, petitioner conceded as taxable purchases totalling $53,953.14.

The disputed purchases in the recurring expense area fall into two categories. The first of these is $399,201.90 in expense items directly attributable to concrete mixer trucks. In large part, these were purchases of tires and parts, including radiators, cables, transmissions, axles, pumps, etc., for the mixer trucks. These purchases also included oil, grease, antifreeze, filters and repairs.

The Division also assessed tax on expenses totalling $114,212.40 set forth on petitioner's books as "airplane rental". This expense consisted of monthly payments to Genesee LeRoy Stone, Inc., a related corporation to petitioner, in amounts as follows:

Month	Amount of Payment
9/84	$ 11,913.08
10/84	11,986.19
11/84	10,841.99
12/84	10,677.03
1/85	11,867.50
2/85	13,932.75
3/85	13,776.07
4/85	13,283.76
5/85	15,934.03
	$114,212.40

The payments for "airplane rental" were made in connection with petitioner's use of an aircraft owned by Genesee LeRoy Stone, Inc.

CONCLUSIONS OF LAW

A. Section 1115(a)(12) of the Tax Law provides for an exemption from sales and use

taxes for receipts from the sale of the following:

> "Machinery or equipment for use or consumption directly and predominantly in the production of tangible personal property... for sale, by manufacturing, [or] processing...."

B. For purposes of the above-cited exemption, 20 NYCRR 528.13(b) defines "production", in relevant part, as follows:

> "(1) The activities listed in paragraph (a)(1) of this section are classified as administration, production or distribution.
>
> (i) Administration includes activities such as sales promotion, general office work, credit and collection, purchasing, maintenance, transporting, receiving and testing of raw materials and clerical work in production such as preparation of work, production and time records.
>
> (ii) Production includes the production line of the plant starting with the handling and storage of raw materials at the plant site and continuing through the last step of production where the product is finished and packaged for sale.
>
> (iii) Distribution includes all operations subsequent to production, such as storing, displaying, selling, loading and shipping finished products."

C. As a general proposition, statutory exemptions from tax are strictly construed against the party claiming the exemption (Matter of T.V. Data, Inc., Tax Appeals Tribunal, March 2, 1989, citing Matter of Grace v. State Tax Commn., 37 NY2d 193, 196).

D. Petitioner has failed to establish entitlement to the production exemption under Tax Law § 1115(a)(12) with respect to its purchases of mixer trucks, glider kits and chassis, and mixer truck engines.

As noted above, 20 NYCRR 528.13(b) defines, for purposes of Tax Law § 1115(a)(12), activities which may or may not be classified as production. The mixing of concrete as described herein fits comfortably within the definition of "production" set forth in the regulation. The transportation of the product from petitioner's plant to the job site, however, does not. This activity may be classified (as the Division contends) as "administration" under the regulation. This activity might also be classified as "distribution". Most important, however, is that this activity is not "production". Although both the mixing and transportation activities are closely linked, since both take place, to an extent, concurrently, the transportation of the mix to the job site is a separate and distinct activity from the transformation of the

disparate ingredients into a final saleable product, i.e. the concrete production process. The transportation of the product thus falls outside the production phase. This distinction may be seen in the fact that the transportation of concrete is not necessary to the production of concrete. Indeed, petitioner could, and does, cause the manufacturing process to occur entirely at the job site (see Finding of Fact "6"). While petitioner's transit mix transportation system appears necessary to make the sale of ready-mix concrete an economically viable business activity, such a finding is not a determinative factor to establish entitlement to the production exemption (see, Matter of Cole Sand and Gravel Corp., State Tax Commn., January 10, 1983).

E. In accordance with the foregoing, petitioner's purchase of glider kits and chassis were properly subject to tax. The sole use of the chassis was to transport product. Such use does not constitute a use directly and predominantly in production (see, Matter of B. R. DeWitt, Inc., State Tax Commn., December 31, 1984). Petitioner's purchase of engines for its mixer trucks was also properly subject to tax. Although these engines also powered the mixer drum (an exempt use), there is no evidence that the engines' predominant use was to power the mixer drum (see 20 NYCRR 528.13[c][4]).

F. With respect to petitioner's purchase of complete mixer trucks, it is appropriate, in light of the discussion above, to consider the mixer drum separate and distinct from the truck chassis. In accordance with the above discussion, the mixer drum is exempt and the chassis is not. Petitioner's allocation of $44,000.00 of the total mixer truck expenditure of $233,548.08 (see Finding of Fact "12") is reasonable. The Division is directed to adjust its assessment in respect of the mixer truck purchases accordingly.

G. Tax Law § 1115(c) exempts from taxation purchases of fuel "for use or consumption directly and exclusively in the production of tangible personal property...for sale". In accordance with Conclusion of Law "F", petitioner's purchases of fuel used to propel the mixer trucks was not consumed in production. Fuel consumed in the operation of the mixer drum, however, was used directly and exclusively in production and purchases of such fuel were properly exempt from tax. Petitioner did not present specific evidence as to the amount of fuel

consumed in the operation of the mixer drum. The Division, however, in connection with the motor fuel tax, has recognized an industry standard with respect to the off-road use of concrete mixer trucks. Specifically, by Technical Services Bureau memorandum dated August 1979 (TSB-M-79[4]M), the Division concluded that fuel consumed in off-highway use by concrete mixer trucks constituted approximately 26% of the total consumption of fuel by such vehicles. As a result of such findings, the memorandum directed that an allowance for off-highway use not to exceed 26% of the total fuel consumed by mixer trucks be allowed as a credit on motor fuel tax returns.

The uncontested evidence in the record is that the use of the vehicles at the job site consisted of the final stage of manufacturing concrete by mixing the ingredients in the barrel (see Finding of Fact "2"). The fuel consumed in this use at the job site was consumed in production and therefore exempt from tax. It is reasonable to infer that petitioner's job site fuel consumption corresponds with petitioner's off-highway fuel use. It is therefore reasonable to apply the Division's industry standard of a 26% allowance for off-highway fuel use to the exemption claimed herein. Accordingly, the Division is directed to adjust petitioner's audited taxable fuel purchases to allow an exemption under Tax Law § 1115(c) with respect to 26% of such total purchases.

H. With respect to petitioner's recurring expense purchases directly attributable to the mixer trucks, since these vehicles (except for the mixer drums) do not qualify for the production exemption (Conclusion of Law "D"), these expense items are also properly taxable.

I. In support of its claim for exemption, petitioner cites cases from other jurisdictions (see, Van's Material Company v. Department of Revenue, 173 Ill App 3d 284, 527 NE2d 515, affd 131 Ill 2d 196, 545 NE2d 695) dealing with the exemption of concrete mixer trucks from sales and/or use tax under statutes similar to Tax Law § 1115(a)(12). The position of such other jurisdictions is unpersuasive. The conclusion reached herein is premised upon a review of the relevant New York statutes and regulations promulgated thereunder. Obviously, other jurisdictions may interpret similar statutes differently. Petitioner also cited Matter of DeWitt

Concrete Corp. (State Tax Commn., November 16, 1977) and Matter of B. R. DeWitt, Inc. (State Tax Commn., May 23, 1980) in support of its position. In those cases, the former State Tax Commission granted petitioner's claim for an investment tax credit under the Corporation Franchise Tax Law (Article 9-A) with respect to purchases of ready-mix cement trucks as tangible personal property used principally in the production of goods by manufacturing. These cases are also unpersuasive. As noted previously, the conclusion reached herein is premised upon a review of the relevant statutes and regulations promulgated thereunder. Whether the investment tax credit cases were correctly decided under the pertinent statutes and regulations is not at issue herein.

J. Petitioner has also failed to show that the assessment in respect of the recurring airplane expenses was improper. The record indicates that these expenses were listed on petitioner's books as "airplane rental". Moreover, these expenditures were classified on petitioner's books as expense items and not capital expenditures. Additionally, these charges were incurred in connection with petitioner's use of the airplane. These facts support the Division's contention that petitioner rented the plane. The only evidence to the contrary is petitioner's accountant's testimony that the airplane was the subject of a joint purchase by petitioner and certain other related corporations. This statement, absent any corroborating documentation, is clearly insufficient to overcome both the presumption of taxability (Tax Law § 1132[c]) and the evidence indicating that the charges were, indeed, taxable. The "airplane rental" charges were therefore properly taxable.

K. The petitions of B. R. DeWitt, Inc., Byron R. DeWitt, officer of B. R. DeWitt, Inc., and the Estate of Gene A. DeWitt, officer of B. R. DeWitt, Inc., are granted to the extent indicated in Conclusions of Law "F" and "G"; the Division of Taxation is directed to adjust the three notices of determination and demands for payment of sales and use taxes due in accordance therewith and in accordance with Findings of Fact "9" and "10"; except as so granted, the petitions are in all respects denied and, except as so adjusted, the notices of determination are sustained.

DATED: Troy, New York

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ADMINISTRATIVE LAW JUDGE