STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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.	:	DECISION DTA Nos. 806601, 806604, 806605
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.	:	

Petitioners B. R. DeWitt, Inc., 6895 Ellicott Street, Pavilion, New York 14525, Byron R. DeWitt, Officer of B. R. DeWitt, Inc., P.O. Box 95, Pavilion, New York 14525 and Estate of Gene A. DeWitt, Officer of B. R. DeWitt, Inc., c/o Boylan & Boylan, 45 West Main Street, Le Roy, New York 14482 and the Division of Taxation each filed an exception to the determination of the Administrative Law Judge issued on August 30, 1990 with respect to petitioners' 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. Petitioners appeared byPaul 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).

Petitioners filed a brief on exception. The Division of Taxation replied by a letter. Oral argument was heard at the request of petitioners on April 25, 1991.

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

ISSUES

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

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "1" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

We modify finding of fact "1" of the Administrative Law Judge's determination to read as follows:

> 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 stockpiles of sand and gravel and silos of cement and water are maintained. The proper proportions of sand, gravel, cement and water are withdrawn from these storage sites at the plant, 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

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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.

> 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.[2]

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.

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[2] Finding of fact "1" of the Administrative Law Judge's determination read as follows:

> 1. Petitioner, B. R. DeWitt, Inc.,* 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.
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> *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.

We modified this fact to reflect additional details from the record.

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 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 totaling $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.

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 totaling $567,367.44. Of this amount, petitioner conceded as taxable purchases totaling $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 totaling $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.

Opinion

The Administrative Law Judge determined that the only part of a mixer truck that was entitled to the production exemption of section 1115(a)(12) of the Tax Law was the mixer drum. Consequently, the Administrative Law Judge concluded that the purchases of the glider kits and chassis, the mixer truck engines and the complete mixer trucks (except for the mixer drums) were subject to sales tax. Although noting that the mixing and transportation of the mix to the job site were closely linked, the Administrative Law Judge concluded that the transportation of the mix was separate and distinct from its transformation into a saleable product. On this basis the Administrative Law Judge determined that all of the components of the mixer truck, except for the mixer drum, were used in transportation and that transportation was not production. Similarly all of the recurring purchases related to the mixer trucks were held not to be exempt. The Administrative Law Judge further held that fuel consumed to propel the mixer trucks was not used in production but that fuel consumed to operate the mixer drum was used in production. The Administrative Law Judge stated that petitioner had not established how much fuel was used with respect to the mixer operation, but the Administrative Law Judge allowed petitioner an exemption for 26% of its fuel purchases based on the Division's policy of treating mixer trucks as if they consumed 26% of their fuel in off-highway use for motor fuel tax purposes. Lastly, the Administrative Law Judge held that petitioner had failed to prove that the portion of the assessment based on recurring airplane expenses was improper.

On exception, petitioner argues that the Administrative Law Judge incorrectly stated the standard of construction applicable to an exemption. Further, petitioner asserts that the Administrative Law Judge erred in concluding that transportation activities could not be a part

of production. Petitioner argues, relying on the Division's regulations, that transportation is not per se outside of the production exemption, but that only transportation that occurs before production begins or after it ends is excluded from the exemption. The Administrative Law Judge also erred, claims petitioner, in dividing the mixer trucks into components and finding only the drums exempt. The entire mixer truck is necessary to production, petitioner argues. Since the mixer trucks are used exclusively in production, petitioner contends that all of the fuel consumed and all of the recurring expense purchases related to the trucks are also exempt. Lastly, although initially excepted to, petitioner concedes that the expenses known as "airplane rent" were properly assessed and subject to sales tax (Petitioner's brief on exception, p. 14).

The Division took exception to the Administrative Law Judge's treatment of 26% of petitioner's fuel purchases as exempt. In support of its exception, the Division contends that the 26% figure for motor fuel tax purposes was based on the off-highway use of cement mixer trucks and that off-highway use encompasses more activity, and thus more fuel use, than just the operation of the mixer drum on the truck. In response to petitioner's exception, the Division argues that the Administrative Law Judge applied the correct standard of construction. With respect to petitioner's argument that transportation is not necessarily excluded from production, the Division restates its regulations at 20 NYCRR 528.13 (defining "directly") and 20 NYCRR 528.13 (defining "predominantly") and states that petitioner must show that each piece of equipment meets the requirements. The Division then states that all of the items except for the mixer drums "for the reasons stated by the Administrative Law Judge, do not qualify as production equipment" (Division's letter on exception, p. 2).

We modify the determination of the Administrative Law Judge.

We agree with petitioner that the Administrative Law Judge erred in concluding that labeling an activity as "transportation" necessarily excludes it from the realm of production and the production exemption of section 1115(a)(12) of the Tax Law. In our view, the correct analysis requires an evaluation of the equipment in the context in which it is used (see, Matter of National Fuel Gas Distrib. Corp., Tax Appeals Tribunal, March 14, 1991) to determine

whether the equipment is directly used in production. Simply identifying equipment as transportation equipment is no substitute for this analysis. Our view is in accord with the case law under section 1115(a)(12) as well as the Division's regulations.

In Matter of Envirogas, Inc. v. Chu (114 AD2d 38, 497 NYS2d 503, affd 69 NY2d 632, 511 NYS2d 228), the court evaluated a variety of pieces of transportation equipment used in connection with the production of gas and determined that trucks and other similar equipment used to transport personnel and equipment to the production site were engaged in administration and, thus, were not production equipment. On the other hand, trucks that were used to haul water to the production site and to remove waste water and other production wastes were concluded to be production equipment because the trucks were used in activities that were at the essence of gas production. This decision indicates 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. This principle was further recognized in the dissenting opinion of Justice Yesawich in Matter of St. Joe Resources Co. v. New York State Tax Commn. (132 AD2d 98, 522 NYS2d 252, 256 [dissenting opn], rev on the dissenting opn below 72 NY2d 943, 533 NYS2d 51) where he stated that trucks used inside of a mine would qualify as production equipment "given their intimate and direct connection with the production process" while trucks engaged in hauling ore from the mine down the road to the mill were not production equipment because they were used after the mining process had been completed and before the milling process had commenced.

The Division's regulations also recognize that transportation equipment used during the production phase qualifies for exemption. For example, the regulations state that a crane used to unload raw materials which will go directly into storage for production, and a fork lift used in conveying material from one assembly line to another, qualify for exemption (20 NYCRR 528.13[b][3] example 1; [c][2] example 8). Moreover, the regulations provide that a commercial fishing vessel is production equipment (20 NYCRR 528.13[c][2] example 4). On the other hand, the regulations provide that transportation equipment used to move raw

materials before the production phase begins does not qualify for exemption (20 NYCRR 528.13[c][3] example 7).

Therefore, the question to be resolved is whether the mixing trucks were used in the production phase of concrete production. Production is defined by the Division's regulations to "include 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" (20 NYCRR 528.13[b][1][ii]). As stated in the facts describing petitioner's manufacture of concrete, the concrete ingredients are withdrawn from storage at petitioner's plant, measured and then placed ("charged") into the mixer drum of the truck. The ingredients are then mixed to the proper consistency as the truck travels to the customer, in the case of transit mix, or mixed at the site, in the case of truck mix concrete. In either case, the production phase has clearly started by the time the ingredients are charged into the trucks, since this activity comes after the handling and storage of the raw materials at the plant site. Thus, the mixer trucks are not like the railway cars in Matter of Rochester Ind. Packer v. Heckelman (83 Misc 2d 1064, 374 NYS2d 991) which were determined to be transporting raw materials prior to the start of the manufacturing process. Further, the production phase here continues uninterrupted in a unified process in a single plant (the mixer truck) until the concrete is manufactured and delivered (cf., Matter of St. Joe Resources v. State Tax Commn., supra [where the trucks transported ore between two distinct processes conducted at two distinct plants, a mine and a mill]). We conclude that the entire use of the mixer trucks is intimately and directly connected to the process of producing concrete and, therefore, the trucks are production equipment under section 1115(a)(12) of the Tax Law.

As the discussion above suggests, we see no basis for the Division's approach of applying the exemption to a truck on a component by component basis. The entire mixer truck functions as a producing unit and on this basis qualifies for the production exemption (see, Matter of Niagara Mohawk Power Corp. v. Wanamaker, 286 AD 446, 144 NYS2d 458 [where the court held that an entire steam plant, specifically including the structures that supported, braced and

housed the machinery, was used directly and exclusively in production because it functioned as an integrated and harmonious whole]). Further, this result is consistent with the Division's regulations that treat a fishing vessel as an indivisible whole in qualifying for the exemption and the court's treatment of the trucks in Matter of Envirogas, Inc. v. Chu (supra). Therefore, we conclude that petitioner's purchase of the complete mixer trucks as well as the components to build a mixer truck, i.e., the mixer engines, the glider kits and chassis, are all exempt pursuant to section 1115(a)(12) of the Tax Law.

Since our holding above is that petitioner's mixer trucks are used only in production, it follows that petitioner has established that all of the fuel consumed by the trucks was exempt pursuant to section 1115(c) of the Tax Law as fuel consumed exclusively in production and that the purchases of parts and supplies for the mixer trucks were also exempt from tax pursuant to section 1105-B(a) of the Tax Law. Thus, the only portion of the assessment that is sustained is that imposed with respect to the payments for petitioner's airplane rental, as petitioner has conceded that it has not sustained its burden to prove these purchases were not subject to tax.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioners 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. is granted to the extent that the purchases of the mixer trucks, the glider kits and chassis, the mixer truck engines, the fuel for the operation of the mixer trucks and the recurring expense items directly related to the mixer trucks are exempt from tax, but the exception is otherwise denied;

2. The exception of the Division of Taxation is denied;

3. The determination of the Administrative Law Judge is modified to the extent indicated in paragraph "1" above but is otherwise affirmed;

4. 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 paragraph "1" above but are otherwise denied; and

5. The Division of Taxation is directed to modify the notices of determination dated August 5, 1987 in accordance with paragraph "1" above but such notices are otherwise sustained.

DATED: Troy, New York
September 19, 1991

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

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

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