STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition of **A. COLARUSSO AND SON, 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 September 1, 2003 through May 31, 2006.	DECISION DTA NO. 822704

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on July 8, 2010. The Division of Taxation appeared by Mark Volk, Esq. (Michael Hall, of counsel). Petitioner appeared by Tuczinski, Cavalier, Gilchrist & Collura, P.C. (Thomas J. Collura, Esq. and Jennifer M. Boll, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception. Petitioner filed a brief in opposition. The Division of Taxation filed a reply brief. Oral argument, at the request of the Division of Taxation, was heard on May 11, 2011 in Troy, New York.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision. Commissioner Nesbitt took no part in the consideration of this matter.

ISSUE

Whether the Division of Taxation correctly determined that sales and use taxes were due on the expenses incurred on petitioner's purchase of a truck scale and a milling machine.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except for findings of fact "11," "15," "16," "17," "18" and "20," which have been modified. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

During the period in issue, petitioner, A. Collarusso and Son, Inc., performed road and bridge construction, maintained a quarry, manufactured blacktop and excavated sand and gravel. For cost accounting purposes, petitioner's four divisions, consisting of sand and gravel, construction, quarry, and blacktop, maintained separate records.

On November 29, 2007, the Division of Taxation (Division) issued a Notice of Determination (Assessment # L-029473574-8) to petitioner, which assessed sales and use taxes in the amount of $85,547.96 plus interest in the amount of $17,544.46 for a balance due of $103,092.42.

On June 12, 2006, the Division commenced an audit of petitioner. Following the completion of the audit, two items remained in issue. Petitioner challenged the Division's decision to assess sales and use tax on the purchase of a milling machine and a steel deck truck scale.

The Truck Scale

On February 9, 2005, petitioner executed a Certificate of Capital Improvement with Pro-Tech Scale Service. The certificate called for the removal and disposal of an existing truck scale and the purchase of a new 60-foot-by-11-foot permanent truck scale, guide rail and weight indicator. It also called for the construction of new reinforced concrete piers, installation and

calibration of the scale, interfacing a new indicator to the existing personal computer, operator training and certification with weights and measures. The certificate was not executed by the seller.

On or about February 14, 2005, petitioner purchased a WXT Bridgmont HD BMS Low Pro 8 Series Steel Deck Truck Scale from Pro-Tech Scale Service. The cost of the scale, including installation and freight, was $42,690.00.

When the truck scale was purchased, it was a complete replacement. No parts of the old scale were used.

The new scale was made of steel and weighed approximately 20 tons. The scale was not on wheels, and it had a useful life of approximately 20 years depending upon the wear and tear. The scale was attached to the land through anchor bolts that were embedded into the concrete piers. The scale structure was placed on top of the piers and held down to the structure by anchor bolts. There was a ramp leading to the scale made of asphalt and concrete. A stairway was also embedded into the structure.

Petitioner owned the land upon which the scale was installed.

Petitioner used the scale to weigh trucks that carried products purchased from petitioner's sand and gravel mine, which was located across the street from the scale. When a customer entered the property, the truck was weighed before it acquired any product. After the product was placed in the truck, the truck was weighed again. The difference in weight was used to determine the amount the customer was charged. Vehicles did not need to travel over the scale to enter or leave the area where the mine was located.

There is a building located next to the scale for the people who work in the sand and gravel division and for the computer system that was used to measure the weight of the trucks. After a truck was weighed, the truck driver would enter the office and obtain a bill of lading and a weight slip.

We modify finding of fact "11" of the Administrative Law Judge's determination to read as follows:

> If the company wanted to move the truck scale, the item would have to be disassembled in the reverse process in which it was assembled, including cutting the anchors. Removal of the truck scale would leave the cement pillars, which are buried in the ground. Transporting the truck scale would require placing the dissembled materials onto heavy machinery similar to that used to originally move the truck scale onto petitioner's property.
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> Next to the ramp and the truck scale area is a flat asphalt road, which allows for entrance and egress without traveling on either the ramp or scale. If the truck scale were removed, petitioner would need to level the asphalt ramp in order to make that portion of the road usable. At its highest point, the ramp appears to be around or less than 48 inches. The rails are attached to rocks that do not appear to be attached to the ground.[1]

The company from whom petitioner purchased the scale stated that this model scale could not be certified as a portable scale because a portable scale must have a self-contained steel sub-frame and may not be attached to a permanent concrete foundation. Petitioner did not consider buying a portable scale because its intent was to use the scale in the same location for its useful life.

A mining property that has a truck scale is more valuable than property that does not have a scale. If the mine were sold as a mine, a buyer would expect to receive the truck scale. The

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[1] We modify this fact to more accurately reflect the record.

truck scale substantially adds to the value of the property as a mine.

Petitioner purchased the weight scale for $42,690.00, without paying tax, resulting in an assessment of $3,521.93. The Division did not consider this item a capital improvement because it was bolted onto cement slabs in the ground.

We modify finding of fact "15" of the Administrative Law Judge's determination to read as follows:

> When the truck scale fails, a new truck scale will be purchased and installed. The prior truck scale was also anchored with bolts. The record shows that petitioner left the cement pillars connecting the old truck scale in the ground.

The Milling Machine

We modify finding of fact "16" of Administrative Law Judge's determination to read as follows:

> Since the 1950s, petitioner has been producing a product called hot mix asphalt (HMA), which is commonly used to pave roads and highways, otherwise known as blacktop. HMA consists of petroleum-based liquid asphalt, crushed stone and sand that is heated and mixed together. Generally, six percent of HMA is made of asphalt. The asphalt serves to bind together the sand and stone particles, which range from a half millimeter to 20 millimeters in diameter. Between 150 and 300 degrees Fahrenheit, the asphalt is viscous and the HMA can be used to pave roads.
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> HMA may be created from both virgin asphalt and recycled asphalt pavement (RAP). Asphalt is a refined petroleum product. Its price is directly correlated to and subject to the volatility in the price of oil. RAP is reclaimed asphalt that had been previously laid as a road and depleted through use. RAP may be collected from any deployment of asphalt, typically roads and parking lots. Freshly removed RAP cannot be used for anything by petitioner until it is resized and sorted for quality control. By adding RAP into the process, creating HMA utilizes less non-recycled, virgin asphalt. This produces a two-fold benefit by lessening the environmental impact and decreasing the financial cost of creating

HMA.[2]

We modify finding of fact "17" of the Administrative Law Judge's determination to read as follows:

> The first step in creating HMA blends is to have pavement to recycle. Petitioner obtained its pavement from contracts where petitioner performed services or from other parties contracts and, typically, did not charge for removing the used pavement. A milling machine removes asphalt from a highway, parking lot or other paved surface and places it into a truck for transportation to a plant for recycling.[3]

We modify finding of fact "18" of the Administrative Law Judge's determination to read as follows:

> On May 31, 2006, petitioner purchased the subject Wirtgen Milling Machine W2000. The milling machine was equipped with a combo cutter, folding conveyor, multiplex for one side, trolley and wire rope kit. The milling machine was only used for removing asphalt.[4]

The milling machine was purchased for $598,000.00 without the payment of sales tax and, upon audit, the Division determined that tax was due on this item in the amount of $47,840.00. Petitioner recorded the acquisition of the asset in its construction division.

We modify finding of fact "20" of the Administrative Law Judge's determination to read as follows:

> Petitioner had a number of reasons for purchasing the machine, including selling recycled asphalt. At the time of purchase, petitioner noted the rising price of raw asphalt and entered into the business of generating RAP for sale because it believed that asphalt prices would go "pretty" high. Creating its own RAP would also provide petitioner with

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[2] We modify this fact to more accurately reflect the record.

[3] We modify this fact to more accurately reflect the record.

[4] We modify this fact to more accurately reflect the record.

greater control over its own RAP needs. Further, petitioner's competitors were also adopting similar business strategies.[5]

Petitioner uses RAP in its own asphalt because it permits the company to offer the customer a lower price to perform the job. The use of RAP does not result in a cost savings to the company in performing construction services.

Petitioner mines limestone, sand and gravel. These commodities are used in the construction division and in the blacktop division.

The limestone quarry, which is about 500 acres, is a rock hard quarry in which the company drills and blasts rock from the ground. The limestone in this quarry is on the surface. There may be some topsoil or trees that have to be removed prior to the drilling and blasting. The rock is transported to a crushing facility, which converts it into a product, which is then placed in stockpiles for sale to the public. Among other things, the concrete and asphalt were used for drainage.

The sand and gravel area is about 100 acres. The sand and gravel are dug out with an excavator or front-end loader, placed into trucks and carried to a plant for processing, and stockpiled and sold to the public. The sand and gravel are used in concrete, asphalt and in masonry.

There are different methods of extraction with respect to limestone, sand, gravel and RAP. In order to extract limestone, the company uses dynamite. In order to extract sand and gravel, the company uses a front-end loader or excavator and, to create RAP, the company uses a milling machine.

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[5] We modify this fact to more accurately reflect the record.

The company has never cut a roadway, extracted RAP and not used it for paving. There have been some construction projects where the asphalt would be removed but the owner, per the contract, retained the material. This has been done by the State of New York or the New York State Thruway Authority. They request the retention of the material prior to the start of bidding on the project.

During the audit, the Division concluded that the milling machine was subject to tax because the asset was recorded in petitioner's construction division. This indicated to the Division that the intent in acquiring the machine was for use in construction.

The Division's field audit report shows that, after the assessments were issued, petitioner's representative presented information to the Division that established that petitioner sold 49 percent of the blacktop it produced to itself.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge canceled the Notice of Determination because he determined that petitioner had shown clear entitlement to exemptions for both the truck scale and milling machine.

The Administrative Law Judge found that the truck scale was a capital improvement because it added substantial value to the land, was bolted to the land, and was intended to be there for its useful life. The Administrative Law Judge also found that removing the truck scale would cause material damage because the item's removal would cause a safety hazard. The Administrative Law Judge held that the milling machine constituted machinery for the production of goods for sale because it was the first step, i.e. extracting used pavement, in

creating RAP for blended HMA, known as blacktop.

ARGUMENTS ON EXCEPTION

The Division argues that the determination should be reversed because the Administrative Law Judge erroneously concluded that both the truck scale and the milling machine were exempt from sales tax. The Division argues that petitioner properly bears the burden of proving entitlement to its exemptions and that, for the truck scale and milling machine, petitioner failed to show entitlement to either the capital improvement or manufacturing exemption. The Division argues that the Administrative Law Judge arrived at erroneous conclusions because he misplaced the burden of proof on the Division. The Division also takes issue with the credibility and weight accorded to the testimony of petitioner's witness.

Petitioner argues that the Administrative Law Judge properly determined that it met the burden of proving clear entitlement to the exemptions for both the truck scale and the milling machine. Petitioner contends that the burden was properly placed on them, as opposed to the Division, and references its submissions and testimony provided at the hearing. Accordingly, petitioner argues that we should affirm the determination in full.

OPINION

Tax Law § 1105(c) imposes sales tax on the receipts of every sale in this state, with certain exceptions. Neither party disputes that the acquisition of the truck scale and milling machine constitute receipts within the meaning of Tax Law § 1101(3). Rather, the issue is whether receipts from the truck scale and milling machine are properly exempt from taxation under Tax Law 1105(c)(3)(iii) and Tax Law § 1115(a)(12).

The party seeking an exemption from taxation bears the burden of proof (***see Matter of Brookfield Power New York Corp.***, Tax Appeals Tribunal, November 10, 2010). It must bring forth clear and convincing evidence showing clear entitlement to a statutorily granted exemption from tax (***see Golub Service Sta. v. Tax Appeals Trib.***, 181 AD2d 216 [1992], ***quoting Luther Forest Corp. v. McGuiness***, 164 AD2d 629 [1991]). With these standards in mind, we consider petitioner's articles and the respective exemptions separately.

The Truck Scale

We first address whether petitioner's purchase of a truck scale was entitled to the statutory exemption for capital improvement under Tax Law § 1105(c)(3)(iii). This section provides an exemption for receipts from the purchase of a capital improvement to real property, which is defined by Tax Law § 1101(b)(9).

Tax Law § 1101(b)(9)(i) defines capital improvement as an addition or alteration to real property that:

> (A) Substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property; and
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> (B) Becomes part of the real property or is permanently affixed to the real property so that removal would cause material damage to the property or the article itself; and
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> (C) Is intended to become a permanent installation.

A taxpayer must show that each element of the statutory test is met in order to show a prima facie entitlement to the capital improvement exemption (***see Rochester Gas and Elec. Corp. v. State Tax Commn.***, 128 AD2d 238 [1987]; ***Flah's of Syracuse v. Tully***, 89 AD2d 729 [1982]).

We agree with the conclusion that petitioner met the first element of the test by proving

that the truck scale added substantial value to the mine and its operation. Petitioner's executive vice president, Paul Colarusso, credibly testified that a mine with a scale is more valuable than a mine without one and that it is an industry standard for mines to have truck scales in order to weigh the excavated minerals. Accordingly, we find that petitioner adduced sufficient evidence to prove that the substantial value element is met.

We reject the Division's argument that petitioner's witness's testimony is insufficient to prove that the scale added substantial value to the property. Determinations of credibility and weight are the province of the trier of fact and, absent contradictions in the record, are entitled to deference (***see Matter of Troutman Street Assoc.***, Tax Appeals Tribunal, June 1, 1995). Herein, the Administrative Law Judge determined the testimony of Mr. Colarusso to be credible based upon the witness's 30 years of experience working in the mining industry, which included purchasing mines. This is not a situation where the witness lacks either competency or veracity and the record contains no evidence proving the witness to be incredible (***c.f. Matter of Impath Inc.***, Tax Appeals Tribunal, January 8, 2004 [reversing credibility findings where the witnesses lacked competency]; ***Matter of Avildsen***, Tax Appeals Tribunal, May 19, 1994).[6]

Turning to the second element, the Administrative Law Judge analogized this case to ***Matter of Dairy Barn Stores*** (Tax Appeals Tribunal, October 5, 1989), and held that petitioner met its burden of proving that removing the truck scale would result in damage to the mine. The Administrative Law Judge concluded that this element was met because removal would force

[6] We also note that, contrary to the Division's argument, there is no requirement that a taxpayer prove substantial value by submitting estate appraisals, comparable value analysis, and similar documentation. A taxpayer need only submit evidence that is clear and convincing, which petitioner has done with regards to the substantial value element of Tax Law § 1101(b)(9)(i).

petitioner to level the land where the truck scale is currently installed. The Administrative Law Judge also concluded that this element was met because the truck scale was attached to concrete piers and was not readily mobile.

We reverse on this point. Upon our review, we found that petitioner introduced little evidence proving that removing the truck scale would cause material damage to the functionality of either the article or the mine itself. Petitioner argued that it was not required to introduce such evidence because the ***Matter of Dairy Barn Stores*** standard requires that, to meet Tax Law § 1101(b)(9)(i)(B), a taxpayer need only show damage, generally, to the affixed property. It also submitted that the subject truck scale could be moved but that the situation is similar to removal of the scoreboard in ***Matter of NAE, Inc.*** (Tax Appeals Tribunal, March 16, 1995). We disagree.

Tax Law § 1101(b)(9)(i)(B) clearly indicates that a taxpayer seeking the capital improvement exemption must prove that removing the subject article would cause material damage to either the property or the article itself. Contrary to petitioner's assertions, in ***Matter of Dairy Barn Stores*** (***supra***), we found material damage because removal would require dismantling the subject article and, once reassembled, the article would no longer function properly. Further, in ***Matter of NAE, Inc.*** (***supra***), we found that the taxpayer met the material damage prong because removal would cause material damage to both the article and the property because it would require demolishing the article and portion of the roof to which it was attached.[7] Accordingly, we reject petitioner's arguments on the material damage element.

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[7] ***See also Matter of Amusements of WNY*** (Tax Appeals Tribunal, May 26, 2011), wherein we found material damage would occur in moving the superstructure of a wooden roller coaster because removal would require the destruction of almost all other components allowing the article to either function or be defined as a wooden roller coaster, including all wood parts, bolts to the wood, and the accompanying carriage house.

We now turn to the facts in the record and note that there is no evidence proving that removal of the truck scale would impact petitioner's ability to extract minerals from the mine (***c.f. Matter of NAE***, ***Inc., supra*** [removal of the scoreboard would require removing portions of the roof, which would damage the ability of the property to function as a stadium]). Among the evidence submitted were photographs of the truck scale and accompanying area, which are located at what appears to be an entrance and exit to the mine. The photographs seem to indicate that the same concrete bed used for the old truck scale was used for the new truck scale because they are located at the exact same place. The record clearly shows that the cement pillars for the old truck scale remain in place, which contradicts petitioner's supposition that removal of the scale would require excavating the cement piers. Photographs indicate that the ramps need not be used to enter or egress from the mine because there is a parallel flat roadway to such ramps. Taking these facts together, we find that removal of the truck scale would not cause a "gaping" hole, but, as characterized by petitioner, "ancillary damage" that would require milling and flattening the ramps (Oral Argument Transcript, p. 16).

We find that this is clearly not material damage as defined by case law (***see Matter of L & L Painting***, Tax Appeals Tribunal, June 2, 2011 [finding material damage where removal of exterior coatings on a bridge would result in the bridge deteriorating and collapsing into the East River]; ***see also Matter of NAE, Inc., supra***; ***Matter of Amusements of WNY***, ***supra***. As such, we find that petitioner failed to prove that the truck scale was permanently affixed such that removal would cause material damage to either the property or the article itself (Tax Law § 1101[b][9][i][B]). The foregoing obviates the need to discuss whether petitioner intended the

truck scale to become a permanent installation.

Accordingly, we reverse the determination of the Administrative Law Judge on this issue because petitioner did not adduce clear and convincing evidence showing entitlement to the capital improvement exemption for the truck scale.

The Milling Machine

We next address whether petitioner's purchase of a milling machine was entitled to the statutory exemption provided for production machinery under Tax Law § 1115(a)(12), commonly known as the production exemption. Tax Law § 1115(a) provides exemptions from sales and use taxes, imposed under Articles 28 and 29, for certain specifically enumerated items. At issue is Tax Law § 1115(a)(12), which provides, in part, an exemption to items as follows:

> Machinery or equipment for use or consumption directly and predominantly in the production of tangible personal property, gas, electricity, refrigeration or steam for sale, by manufacturing, processing, generating, assembling, refining, mining or extracting, but not including parts with a useful life or one year or less or tools or supplies used in connection with such machinery or equipment.

We note that the legislative intent behind Tax Law § 1115(a)(12) "is to avoid a pyramiding tax on essential products used in any given manufacturing process" (***Finch, Pruyn & Co. v. Tully***, 69 AD2d 192 [1979] [holding that chemicals used in the creation of paper met the exemption]). A taxpayer shows entitlement to this exemption upon a showing of clear and convincing evidence that the machinery at issue is used or consumed as a necessary and integral part in the "production" of tangible personal property "for sale" (***see International Salt v. State Tax Commn.***, 79 AD2d 343 [1981]; ***see also*** Tax Law § 1115[a][12]).

Production is defined as "starting with the handling and storage of raw materials . . . and

continuing through the last step of production where the product is finished and packaged for sale" (20 NYCRR 528.13[b][1][ii]; ***see also Envirogas Inc. v. Chu***, 114 AD2d 38 [1986], ***affirmed*** 69 NY2d 632 [1986]). Tax Law § 1101(5) defines the terms "sale, selling or purchase," for purpose of sales tax, as, "[a]ny transfer of title or possession or both . . . in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under [Article 28], for a consideration or any agreement therefor."

Turning to the issue of whether the milling machine's handling of RAP meets the production requirement, we give attention to "the nexus extant between the end product and the machinery or equipment so as to ascertain if the bond or union between them is such that it can be said that the machinery or equipment is necessary and essential to production" (***Rochester Independent Packer v. Heckelman***, 83 Misc2d 1064, 1065 [1975]).

The record shows that the first step in the process of producing both certain types of blacktop (i.e. recycled blends of HMA) and RAP is to acquire previously deployed blacktop. It is undisputed that the subject milling machine exclusively performed this function. Following the milling and acquisition of RAP, the next steps in the production process were to transfer the material to petitioner's plant, where the pieces are inspected for quality, re-ground to the particular specification, and melted in with virgin asphalt and the other components of HMA. The end result is a blend of HMA that can then be laid as blacktop. The record also shows that the milling machine provided the essential first step in selling RAP because it gathered the raw used asphalt, which would otherwise be deployed as blacktop in a roadway or parking lot. Given

these facts, we hold that petitioner met its burden of proving that the subject milling machine was used as a first step in the production process.

In so holding, we find that the Division's view of the milling machine's function as mere collection and grinding, separate and apart from producing a marketable product for sale, is incongruous with the legislative intent of Tax Law § 1115(a)(12) (***see Finch, Pruyn & Co. v. Tully, supra***; ***American Communications Tech. v. Tax Appeals Trib.*** 185 AD2d 79 [1993] [stating the legislative intent to combating pyramiding taxes imposed prior to the end-product of consumer goods]; ***Eastman Kodak v. Department of Taxation & Fin.***, Sup Ct, Monroe County, November 22, 1989, Siracuse, J.). The functions provided by the milling machine constitute the first step in the manufacturing process of both blended HMA and RAP and neither product can be made without first tearing up blacktop (***see International Salt v. State Tax Commn.***, ***supra*** at 345 [equipment qualified for the manufacturing exemption where the article removed by-products that were essential to keep other production machinery functioning]). Accordingly, we reject the Division's application of Tax Law § 1115(a)(12) as unreasonable because it ignores the reality that the milling machine provides the critical first step in creating both of these items.

We also find that the material produced by the milling machine was for sale as required by Tax Law § 1115(a)(15). When a taxpayer sells services using its own manufactured goods, a taxpayer must show that it also sells the manufactured product "separately from the services it provides" (***Midland Asphalt Corp. v. Chu***, 136 AD2d 851, 853 [1988] [holding manufactured items not for sale when taxpayer failed to show it sold asphalt separately from its paving services]); ***Southern Tier Iron Works v. Tully***, 66 AD2d 921 [1978], ***lv denied*** 46 NY2d 713

[1979] [taxpayer failed to prove that it sold steel beams separately from its construction services]). Herein, we find that the Administrative Law Judge properly relied upon the Division's field audit report. Contrary to the Division's assertions, we find no misinterpretation in the Administrative Law Judge's reading of the field audit report because the document speaks for itself.

The field audit report states that petitioner was in the business of selling the manufactured blacktop because the Division determined that petitioner sold 51 percent of its blacktop to third parties (***see DJH Construction v. Chu***, 145 AD2d 716 [1988]; 20 NYCRR 531.3[b][1][i][*b*]). We also note that the report also indicates that the Division itself determined that certain capital and expense purchases were exempt because petitioner met the production exemption (***see*** Tax Law § 1115[a][15]). Given the findings of the Division in its field audit report, we conclude that petitioner was in the business of selling asphalt separately from its paving business. Accordingly, we hold that petitioner is entitled to the manufacturing exemption for the milling machine because the article performs a necessary function in the process of manufacturing certain types of blacktop for sale.

We have considered the remaining arguments and find them without merit or not requiring a different result.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is granted to the extent that taxes, penalty and interest assessed on petitioner's purchase of the truck scale are sustained, but is otherwise denied;

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

3. The petition of A. Colarusso and Son, Inc. is granted to the extent indicated in paragraph "2" above, but is otherwise denied;

4. The Notice of Determination, dated November 29, 2007, is modified to the extent that tax, penalty, and interest assessed on the milling machine is cancelled, but is in all other respects, sustained.

DATED: Troy, New York
June 23, 2011

/s/ James H. Tully, Jr.
James H. Tully, Jr.
President

/s/ Carroll R. Jenkins
Carroll R. Jenkins
Commissioner