

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
MIRON RAPID MIX :
CONCRETE CORPORATION : DETERMINATION
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, Miron Rapid Mix Concrete Corporation, C.P.O. Box 1598, Kingston, New York 12401, 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, 1986 through November 30, 1988 (File No. 807311).

A hearing was held before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on January 30, 1990 at 1:15 P.M., and was continued to conclusion before the same Administrative Law Judge at the same location on March 8, 1990 at 11:00 A.M., with all briefs to be submitted by June 7, 1990. Petitioner appeared on both hearing dates by Stephen Miron, Esq. The Division of Taxation appeared on both hearing dates by William F. Collins, Esq. (Robert Jarvis, Esq., of counsel).

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

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.

SUMMARY OF THE PARTIES' POSITIONS

The Division claims that the truck chassis are used in the administrative phase of manufacturing, not the production phase, and are therefore subject to sales tax.

Petitioner asserts that the chassis of the Oshkosh Forward Placement Concrete Carrier/Mixer and the mixer drum are a single, integrated unit which, taken as a whole, qualifies for the manufacturing exemption. Petitioner also states that the Oshkosh mixer is distinguishable from a conventional mixer because the mixer drum on a conventional mixer can be removed without immobilizing the vehicle.

CONCLUSIONS OF LAW

A. 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.

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. In order for machinery or equipment to be considered as used "directly" in production, 20 NYCRR 528.13(c)(1) provides that it must:

- (i) act upon or effect a change in material to form the product to be sold, or
- (ii) have an active causal relationship in the production of the product to be sold, or
- (iii) be used in the handling, storage or conveyance of materials or the product to be sold, or
- (iv) be used to place the product to be sold in the package in which it will enter the stream of

commerce.

D. It is the position of the Division of Taxation that the mixer drum is machinery or equipment used directly and predominantly in the production of tangible personal property for sale and therefore exempt from the imposition of sales and use tax. In contrast, the Division argues, the truck chassis does not so qualify as it is involved in transporting the concrete and the mixer, rather than being involved in the production of the concrete. This argument, however, ignores the role played by the chassis and its components in the production of the concrete. It is indisputable, as pointed out by the Division, that the chassis transports the mixer and the concrete to the job site. It is also indisputable, however, that the chassis has the power plant, which drives both the chassis and the mixer, the cooling, hydraulic, electrical and air systems which serve both the chassis and the mixer drum, the water tank and the controls for the water, chute and mixer drum. In addition, the engine remains running during the entire production of the concrete. Without the mixer drum, the vehicle's brakes would not function nor would the vehicle be able to operate. Both the mixer and the chassis are useless without the other.

Although the chassis is used to transport the concrete to the job site, it is also intricately involved in the production of the concrete. It performs in the production phase during the loading process, en route to the job site and at the job site. Pursuant to 20 NYCRR 528.13(c)(1)(ii), the chassis does have an active causal relationship in the production of the concrete to be sold. Without the functions provided by the chassis and its components, the overall production process of the concrete could not be carried out. The entire vehicle is essential to the production of the concrete. The functions performed by the chassis are a necessary and integral part of the production process, and it is closely integrated with other exempt machinery and equipment (mixer drum) (see, International Salt Company v. State Tax Commission, 79 AD2d 343; Matter of T.V. Data, Inc., Tax Appeals Tribunal, March 2, 1989). A line drawn between taxation and exemption as urged by the Division would be artificial and not reflective of the integrated nature of the relationship between the chassis and the mixer drum (production machinery and equipment) with which it works. The Oskosh vehicle is an

inseparable and single piece of equipment as it is fit for one purpose.

E. In addition, the chassis was used predominantly in production as over 50% of its use was directly in the production phase (20 NYCRR 528.13[c][4]). This conclusion is not negated by the fact that the chassis is involved in transporting the concrete at the same time it is involved in producing such concrete. The chassis and its components are involved with the mixer drum in the production of concrete from the time the material is loaded into the mixer drum to the time it is unloaded at the job site. The exempt function of machinery or equipment cannot be ignored because it is simultaneously performing a taxable function.

F. The petition of Miron Rapid Mix Concrete Corporation is granted and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated June 12, 1989 is cancelled.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE