STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
A. COLARUSSO AND SON, INC.	:	DETERMINATION DTA NO. 822704
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.	:	

Petitioner, A. Colarusso and Son, Inc., 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 September 1, 2003 through May 31, 2006.

A hearing was held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on September 15, 2009 at 10:30 A.M., with all briefs to be submitted by January 19, 2010, which date began the six-month period for the issuance of this determination. Petitioner appeared by Tuczinski, Cavalier, Gilchrist & Collura, P.C. (Thomas J. Collura, Esq., and Jennifer M. Boll, Esq., of counsel). The Division of Taxation appeared by Daniel Smirlock, Esq. (Michael J. Hall).

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

1. 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.

2. 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.

3. 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

4. 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.

5. 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.

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

7. 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.

8. Petitioner owned the land upon which the scale was installed.

9. 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.

10. 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.

11. If the scale were removed, petitioner would have to excavate and level the ground. Otherwise, there would be a safety hazard. If the company wanted to move the scale, it would have to be disassembled in the reverse process in which it was assembled and transported with heavy machinery. In addition, petitioner would have to build new ramps and structures.

12. 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.

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

14. 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.

15. When the truck scale fails, a new truck scale will be purchased and installed. The prior truck scale was also anchored with bolts.

The Milling Machine

16. On May 31, 2006, petitioner purchased a Wirtgen Milling Machine W2000. The milling machine was equipped with a combo cutter, folding conveyor, multiplex for one side, trolley and wire rope kit.

17. A milling machine removes asphalt from a highway, parking lot or other paved surface and places it into a truck for transportation to an asphalt plant for recycling. Petitioner purchased

the machine to generate recycled asphalt pavement, popularly known as RAP, for asphalt manufacturing. The milling machine can mill paved surfaces up to a depth of 13 inches.

18. The first step in the process of manufacturing RAP is to have pavement to recycle. The pavement was obtained from contracts on which petitioner performed services or from other parties' contracts. There is enough of a cost savings to petitioner from obtaining asphalt on another party's contract that petitioner does not charge for this process. The pavement was then put through another process that resized it so that it could be introduced into the hot mix. The process of making hot mix asphalt, known as HMA, consists of combining liquid asphalt, crushed stone and sand. The machine in issue recycled existing asphalt pavement to reclaim some of the asphalt in the pavement. When RAP was added to the hot mix asphalt, less liquid asphalt, known as virgin asphalt, was needed. This process resulted in a cost benefit as well as an environmental benefit because reserves are not depleted to manufacture the material.

19. 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.

20. After it purchased the machine, petitioner started a new line of business, producing and selling RAP. Petitioner had a number of reasons for purchasing the machine. Petitioner thought that the price of RAP was going to increase. Therefore, in order to be competitive, it needed to produce RAP and use it in the hot mix asphalt. Petitioner also purchased the machine so it would have control over the stream of RAP.

21. 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.

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

23. 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, and is then placed in stockpiles for sale to the public. Among other things, the concrete and asphalt were used for drainage.

24. 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.

25. 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.

26. 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.

27. 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.

28. 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.

CONCLUSIONS OF LAW

A. Tax Law § 1105(c)(3) imposes a sales tax on the receipts from the installation of tangible personal property not held for sale in the regular course of business. An exception to this general rule is provided in Tax Law § 1105(c)(3)(iii), which states that the installation of property which, when installed, constitutes an addition or capital improvement to real property, property or land, as those terms are defined in the Real Property Tax Law will not be considered a receipt subject to tax.

A capital improvement is an addition or alteration to real property which:

> (A) Substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property; and
>
> (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 article itself; and
>
> (C) Is intended to become a permanent installation (Tax Law § 1101[b][9][i]).

B. The record clearly shows that the installation of the weight scale substantially added to the value of the land. The scale was purchased at a cost of $42,690.00. Further, Paul Colarusso, petitioner's executive vice president, credibly testified, on the basis of his research on purchasing mines, that a mining property that has a scale is more valuable than property that does

not have a scale. Contrary to the argument in the Division's brief, there is no requirement that petitioner present real estate appraisals, comparables or value studies to support its assertion that the weight scale substantially added to the value of the land.

C. Petitioner has also established that the scale is permanently affixed to the real property. In a manner which is analogous to that presented in ***Matter of Dairy Barn Stores, Inc.*** (Tax Appeals Tribunal, October 5, 1989), the nature of the article itself as well as the method of installation suggest permanency. The scale weighs approximately 20 tons and is attached to the land, which petitioner owns, through anchor bolts that are embedded into concrete piers. The scale structure is placed on top of the piers and held down by anchor bolts. A ramp, made up of asphalt and concrete, leads up to the scale. A stairway is also embedded into the structure.

Although petitioner could have purchased a portable scale, it did not do so because its intent was to use the scale in the same location for the useful life of the scale. Further, the company from which 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.

It is also significant that the scale was installed at the request of the owner of the underlying property. Under similar circumstances, the Tribunal stated in ***Dairy Barn***:

> While this factor alone may not be conclusive of petitioner's intention to make the installations permanent, it nevertheless holds considerable sway. 'An owner is much more likely to intend permanency than one in possession of premises temporarily, as for example a tenant.' (Marine Midland Trust Co. v. Ahern, 16 NYS2d 656, 660; Van Buren v. Gallo, 157 Misc. 289, 283 NYS 453.)

D. Petitioner has presented convincing proof that the scale was adapted and essential to petitioner's business. The evidence shows that the scale was used to weigh trucks that carry products purchased from petitioner's mine. It was connected to a computer system, located in an

adjacent building, that measured the weight of the trucks. Measuring the weight of the trucks was essential in order to determine the amount to charge customers. Under the circumstances, there is nothing to suggest that the use was only temporary. Therefore, it is concluded that the installation of the scale was intended to be permanent.

E. The last question is whether the scale became a part of the real property or was permanently affixed to the realty so that removal would cause material damage to the realty or the scale (Tax Law § 1101[b][9][ii]). The record shows that the scale was attached to the land with anchor bolts that were embedded into concrete piers. Clearly, the item was permanently affixed within the meaning of ***Dairy Queen***.

With a weight of nearly 20 tons, the scale was obviously not readily mobile (***see Matter of Dairy Queen***). If the scale were to be moved, it would have to be disassembled in the reverse order in which it was assembled. Moreover, in order to avoid a safety hazard, the land where the scale was located would have to be excavated and leveled. In view of the forgoing, it is concluded that the scale was permanently affixed to the realty so that its removal would cause permanent damage to the realty.

F. On the basis of the foregoing, it is concluded that the scale became part of the real property or was permanently affixed to the real property and that petitioner met all of the conditions for a finding that the scale was a capital improvement.

G. Tax Law § 1115(a)(12) provides, in pertinent part, that receipts from "[m]achinery or equipment for use or consumption directly and predominantly in the production of tangible personal property . . . for sale, by . . . extracting . . . " shall be exempt from the sales and use taxes imposed under Article 28 of the Tax Law. Here, the evidence shows that petitioner used the milling machine to extract pavement from roadways and parking lots and grind it up for use

in producing hot mix asphalt, which is primarily sold to customers. This process makes it less expensive for customers who purchase hot mix asphalt from petitioner. The milling machine is not used for any process other than extracting and rough grinding of RAP. It follows that the expense incurred for the purchase of the milling machine was exempt from tax pursuant to Tax Law § 1115(a)(12) (***see Matter of DJH Construction, Inc. v. Chu***, 145 AD2d 716 [3d Dept 1988]).

H. Contrary to the position claimed by the Division, it is clear from the foregoing that the use of the milling machine was a "necessary and integral" part of the extraction process as that term was used in ***Matter of International Salt Co. v. Tax Commn*** (79 AD2d 343 [3d Dept 1981]) and ***Matter of Niagara Mohawk Power Corp. v. Wannamaker*** (286 AD2d 446 [4th Dept 1955], ***affd*** 2 NY2d 764 [1956]). In fact, it was an integral part of the first step of the production process. Morever, although it appears that petitioner purchased the machine for more than one reason, it is clear that a central reason for the purchase was to start a new line of business consisting of purchasing and selling RAP. It is noteworthy that the Division's field audit report shows that petitioner sold less than one-half of the RAP it produced to itself. In sum, the Division's argument that petitioner has not established that the milling machine was used to produce tangible personal property for sale is contrary to weight of the evidence in the record.

I. The petition of A. Colarusso and Son, Inc. is granted to the extent that the Division is directed to reduce the amount of tax assessed in the Notice of Determination, dated November

29, 2007, by the tax assessed on the purchase of the truck scale and the milling machine; as modified, the notice is otherwise sustained together with such interest as may be lawfully due.

DATED: Troy, New York
July 8, 2010

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE