STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of MIDLAND ASPHALT CORP. for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Periods Ending February 28, 1980 through August 31, 1982.	DECISION

Petitioner, Midland Asphalt Corp., 640 Young Street, Tonawanda, New York 14150, 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 periods ending February 28, 1980 through August 31, 1982 (File No. 45418).

A hearing was held before James J. Morris, Jr., Hearing Officer, at the offices of the State Tax Commission, State Office Building, 65 Court Street, Buffalo, New York on June 19, 1985 at 1:15 p.m. with all briefs received by November 26, 1985. Petitioner appeared by Gross, Shuman, Silver, Laub & Gilfillan, P.C. (Jeffrey A. Human, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUES

I. Whether certain equipment purchased by petitioner qualifies for the tax exemption provided in section 1115(a)(12) of the Tax Law for machinery and equipment used directly and predominantly in the production of tangible personal property for sale by manufacturing or processing.

II. Whether certain electricity purchased by petitioner was used directly and exclusively in the production of tangible personal property for sale by manufacturing or processing.

III. Whether the receipts from the purchase of a mix-paver are exempt from tax as a purchase for resale.

FINDINGS OF FACT

1. On June 20, 1983, the Audit Division issued to petitioner, Midland Asphalt Corp., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due asserting additional tax due of $19,613.16 exclusive of interest for the periods ending February 28, 1980 through August 31, 1982 inclusive. Petitioner had executed a consent extending the period of limitation for assessment authorizing issuance of a notice assessing taxes for the aforementioned periods on or before June 20, 1983.

2. The asserted tax due relates to:

(a) $76,726.34 of purchases of equipment for petitioner's emulsion mill in Tonawanda, New York, all of which had a useful life in excess of one year;

(b) $12,938.27 of purchases of electricity for the emulsion mill in Tonawanda, New York separately metered to machinery and equipment;

(c) $8,428.84 of purchases used to renovate petitioner's facility in Victor, New York of which $6,604.49 were for valves, vents, heating elements, gauges, and similar items having a useful life in excess of one year and $1,824.35 of which was for excavation work upon which sales tax was paid; and

(d) $144,469.31 for the purchase of a mix-paver on May 5, 1980 which equipment had a useful life in excess of one year and required the service of a skilled operator for its operation.

3. Petitioner, Midland Asphalt Corp., has been in business for 45 years. For the past 16 years it has had the capability to manufacture emulsified asphalt. Prior to having such capability petitioner's operation was limited to spray application, delivering to bulk, or delivering to mix with a customer's aggregate.

4. Petitioner is a member of the Liquid Asphalt Distributors Association and the Associate General Contractors of America and is also affiliated with the Asphalt Emulsion Manufacturer Association.

5. Petitioner maintains three plants located in Tonawanda, Buffalo and Victor, New York. Based at those plants are 10 bulk hauling units, 23 asphalt distributors for spray application, 6 mix-pavers to mix and place cold mix pavement, and 2 pug mill mixers to mix and combine emulsion for stockpile patch and pothole patch. Petitioner has the ability to store as inventory approximately 800,000 gallons of asphalt.

6. Petitioner views itself as a manufacturer of asphalt and a distributor of asphalt. Petitioner distributes asphalt: (a) F.O.B. its plants; (b) by delivering asphalt in bulk to the customer; (c) by applying asphalt via spraying it onto the road, highway, parking lot or other surface; or (d) by applying emulsified asphalt to the road, highway, parking lot or other surface through a mix-paver.

7. Approximately 5 percent of the asphalt output of petitioner's Tonawanda plant is delivered in bulk to customers' storage by petitioner.

8. Approximately 5 percent of the asphalt output of petitioner's Tonawanda plant is sold F.O.B. by petitioner to customers.

9. Ninety percent of the asphalt output of the Tonawanda plant is delivered, distributed and applied by petitioner to the road, highway, parking lot or other surfaces of the customers through the use of one of petitioner's specialized distribution and application vehicles. This however comprises only about 50 percent of the asphalt petitioner so delivers, distributes and applies. The other 50 percent is purchased by petitioner from other manufacturers of asphalt.

10. The Tonawanda plant contains an asphalt emulsion mill housed in a separate building from the garage where petitioner's vehicles are kept.

The asphalt emulsion mill, as described by petitioner's production manager, takes asphalt cement which is basically a heavy oil residue from the petroleum refining process and through the addition of special chemicals and equipment disperses the heavy oil in a water medium. The cement is broken down into microscopic sized particles which are then chemically held in a water medium. As further described by petitioner's plant manager, asphalt cement is a thermo-plastic fluid which in order to pump it, handle it or make it flow would have to be heated to 275 to 300 degrees Fahrenheit. Through the addition of chemicals, the dispersed emulsified asphalt, as manufactured at petitioner's plant, can be stored at temperatures in the range of 150 to 175 degrees Fahrenheit, and such emulsified asphalt is therefore "safer" and may be handled by different equipment.

11. The emulsified asphalt is used generally in "pavement maintenance". It is a bonding agent or waterproofing agent for existing pavement structures and is an adhesive which would cement natural aggregates together.

12. Petitioner's asphalt products are produced to standard State of New York or ASTM specifications.

13. The mix-paver is a specialized piece of equipment used in pavement construction. In general, it mixes crushed stone or aggregate with asphalt and then lays such mixtures to desired width and depth over prepared and graded roadbed or other pavement surface. The aggregate is supplied to the mix-paver by a dump truck which moves along slightly in front of the mix-paver feeding the aggregate to the machine. The mixtures laid down by the mix-pavers must be compacted by a road roller or other similar device.

14. With respect to petitioner's use of its mix-pavers, the road preparation, dump truck and aggregate, and road roller are all provided by some person(s) (usually the municipality owning the road) other than petitioner.

15. Petitioner always provides an operator for its mix-pavers except in rare instances where a mix-paver is rented on a long term basis outside western New York.

16. Petitioner is responsible for transporting the mix-paver to the work site. Petitioner pays its operators' wages and is responsible for fuel and other operating expenses of the mix-paver.

17. Petitioner's operator is responsible to see that the mix-paver is operated properly and responsibly in that such person could refuse to operate the machine in a manner which is dangerous or in which it might be damaged. The operator however is directed by the job foreman as to where to lay down the asphalt mix, how fast to go and to what width and depth to lay the mixture.

18. Petitioner usually bids for its sales on a seasonal basis. As concerns road maintenance it usually deals directly with the particular municipality and as concerns new construction it usually deals with a contractor or subcontractor involved in such project. Generally, its bids are for delivery of asphalt on demand by the season rather than for any particular quantity of asphalt.

19. Since the asphalt is produced to general standard specifications, petitioner's bids are quoted with respect to providing a particular grade of asphalt F.O.B. and then separate prices are quoted for the same grade: (a) delivered and applied; (b) delivered and mixed; and (c) delivered and stockpiled. An additional cost would be "added on" dependent upon any specialized equipment which may be required by the bid specifications.

20. The invoices introduced into evidence at the hearing all reflect a separate change for "rental" of the mix-paver where petitioner made a sale of delivered and mixed asphalt. Said rental charge as expressed on petitioner's invoices was stated either in terms of cost per gallon of asphalt supplied or as an hourly rate. Petitioner compiled average daily production and approximate average daily gallonage delivered and mixed statistics to determine the per gallon rate to be charged to approximate petitioner's hourly rate of $75.00 an hour. None of the invoices reflected a separate cost for the driver's wages.

21. No bid specifications nor contracts (a) underlying the selected representative invoices presented at the hearing or (b) with respect to any other sales of petitioner were presented or offered into evidence at the hearing.

22. No testimony or evidence was presented at the hearing with respect to how often, if ever, the mix-paver is "rented" to customers under circumstances where petitioner does not also supply the asphalt to be distributed and applied thereby.

23. Petitioner objects to being characterized as a contractor and claims that, insofar as is at issue herein, it is engaged in the business of manufacturing asphalt products for sale and the rental of machinery used to apply and distribute asphalt to pavement surfaces.

CONCLUSIONS OF LAW

A. That Section 1101(b) of the Tax Law in pertinent part provides:

> "(4) Retail sales. (i) A sale of tangible personal property to any person for any purpose, other than... (B) for use by that person in performing the services subject to tax under paragraphs (1), (2), (3) and (5) of subdivision (c) of section eleven hundred five where the property so sold becomes a physical component part

> of the property upon which the services are performed or where the property so sold is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax. Notwithstanding the preceding provisions of this subparagraph, a sale of any tangible personal property to a contractor, subcontractor or repairman for use or consumption in erecting structures or buildings, or building on, or otherwise adding to, altering, improving, maintaining, servicing or repairing real property, property or land, as the terms real property, property or land are defined in the real property tax law, is deemed to be a retail sale regardless of whether the tangible personal property is to be resold as such before it is so used or consumed.

B. That section 1105(c) of the Tax Law taxes the service of installing tangible personal property except property which when installed will constitute a capital improvement to real property (Tax Law §1105[c][3][iii]) and the service of maintaining servicing or repairing real property, property or land as distinguished from adding to or improving such real property, property or land by a capital improvement (Tax Law §1105[c][5]).

C. That despite petitioner's contentions to the contrary, when petitioner sells asphalt to customers on a "distributed and applied" basis, petitioner is within the meaning and intent of Articles 28 and 29 of the Tax Law, a contractor, subcontractor or repairman engaged in the business of providing the services of maintaining, servicing or repairing real property, property or land including such services as may also result in capital improvement to real property, property, or land.

D. That it appears from the record that the overwhelming majority of petitioner's business concerned sales of asphalt to customers on a distributed and applied basis whether such application be by way of its spray application vehicles or its mix-pavers (see Finding of Fact "9").

E. That petitioner's invoices reflect a charge for "rental" of its mix-paver. However, no bid specifications or contracts were submitted in evidence to

reflect the nature of the contractual obligations between petitioner and the customer. No lease agreements setting forth the respective rights and obligations of the parties were submitted into evidence. Petitioner's invoices might reflect "rental" of the mix-paver, yet may also reflect the additional "add-on" charge petitioner provides in its bids where specialized equipment is required by the municipality to be supplied by the successful bidder.

F. That only purchases made for the exclusive purposes of resale come within the resale exclusions provided in section 1101(b)(4)(i) of the Tax Law (Micheli Contracting Corporation v. New York State Tax Commission, State Tax Commission, May 27, 1983, aff'd. 109 A.D.2d 957 [3d Dept. 1985]; Matter of A. Tomassi & Co., Inc., State Tax Commission, April 25, 1985) and section 1132(c) of the Tax Law places the burden of proving the purchase for resale upon the person claiming the same. Petitioner has failed to prove that the mix-paver was purchased and exclusively used for resale.

G. That section 1115(a)(12) of the the Tax Law provides an exemption for machinery and equipment used directly and predominantly in the production of tangible personal property for sale by manufacturing, processing, generating or assembling.

H. That the regulations of the State Tax Commission define predominantly to mean that over 50 percent of the equipment's use is directly in the production phase of a process (20 NYCRR 528.13[c][4]).

I. That petitioner has shown that 10 percent of the output of the Tonawanda plant is sold to customers (Findings of Fact "7" and "8") either F.O.B. or in bulk. The remaining 90 percent of the output is delivered and applied by petitioner (Finding of Fact "9") resulting in either a maintenance or repair, or a capital improvement to real property, property or land (Conclusion of Law "C"). Machinery

and equipment used to produce goods later installed by the manufacture of such goods into a capital improvement does not qualify for the exemption provided in section 1115(a)(12) if less than 50 percent of the output is not sold as such as tangible personal property. (Matter of Reactor Controls, Inc., Northeast Services Division, State Tax Commission, February 18, 1986; see also Southern Tier Iron Works v. Tully, 66 A.D.2d 921 [3d Dept. 1975]).

J. That an exemption from taxation must clearly appear, and the party claiming it must be able to point to some provision of law plainly giving the exemption (Matter of Grace v. New York State Tax Commission, 37 N.Y.2d 193 [1975]). The petitioner submitted no bid specifications nor copies of its contracts for sale of its asphalt produced at the Tonawanda plant to show sales of such product in excess of 10 percent of the output of said plant. Petitioner has thus failed in its burden of proof to show that its equipment, both at the Tonawanda and Victor plants, was used at least 50 percent of the time in producing tangible personal property for sale on an uninstalled basis. (See also Matter of Lawrence Hunter, State Tax Commission, May 27, 1983)

K. That petitioner has shown that the Tonawanda plant is used 10 percent of the time directly and exclusively in the production of tangible personal property for sale (Findings of Fact "7" and "8", Conclusion of Law "I") and 10 percent of petitioner's use of electricity separately metered to the machinery and equipment at said plant (Finding of Fact "2[b]") is thus exempt from the sales tax pursuant to section 1115(c) of the Tax Law.

L. That the notice of determination erroneously asserts sales tax upon purchases in the amount of $1,824.35 upon which petitioner had already paid tax (Finding of Fact "2[c]").

M. That the petition is granted to the extent noted in Conclusions of Law "K" and "L" and is in all other respects denied and the Notice of Determina-

tion and Demand, except as so noted in Conclusions of Law "K" and "L", is in all other respects sustained together with such interest as by law allowed.

DATED: Albany, New York

JUN 30 1986

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER