STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition of Reale Construction Co., Inc.	:	AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision of a Determination or a Refund of Sales & Use Tax under Article 28 & 29 of the Tax Law for the Period 6/1/74 - 5/31/76.	:	

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 5th day of September, 1980, he served the within notice of Decision by mail upon Reale Construction Co., Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Reale Construction Co., Inc.
c/o Anthony Reale, Pres.
206 Champlain Ave.
Ticonderoga, NY 12883

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
5th day of September, 1980.

Debbie Bank

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

September 5, 1980

Reale Construction Co., Inc.
c/o Anthony Reale, Pres.
206 Champlain Ave.
Ticonderoga, NY 12883

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1138 & 1243 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
REALE CONSTRUCTION CO., INC.	:	DECISION
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 June 1, 1974 through May 31, 1976.	:	

Petitioner, Reale Construction Co., Inc., 206 Champlain Avenue, Ticonderoga, New York 12883, 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 June 1, 1974 through May 31, 1976 (File No. 17801).

A small claims hearing was held before Judy M. Clark, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Campus, Albany, New York, on January 9, 1980 at 10:45 A.M. Petitioner appeared by Anthony Reale, President. The Audit Division appeared by Ralph J. Vecchio, Esq. (Harry Kadish, Esq., of counsel).

ISSUE

Whether a rock crusher leased by applicant is exempt from the sales tax under section 1115(a)(12) of the Tax Law.

FINDINGS OF FACT

1. On February 22, 1977, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Reale Construction Co., Inc. for the period June 1, 1974 through May 31, 1976 in the amount of $1,287.18 tax plus penalties and interest as a result of a field audit. The entire tax due resulted from the lease by petitioner of a rock crusher.

2. On audit, the Audit Division held that the lease by petitioner of a rock crusher used to crush rock into gravel was subject to sales tax. The Audit Division determined that the rock crusher did not qualify as exempt machinery on the grounds that the gravel was not sold by petitioner, but such gravel was used by petitioner in the performance of its construction contracts.

3. It was the petitioner's position that the rock crusher at issue should be exempt under section 1115(a)(12) of the Tax Law as equipment used in the production of tangible personal property for sale. Petitioner contended that the processed gravel was resold to the State of New York in the performance of its contracts.

4. Petitioner's primary business activity was the construction of highways for the New York State Department of Transportation. Petitioner's contracts with the Department of Transportation were unit-price lump sum contracts. The gravel processed by the rock crusher was incorporated into the highways constructed for New York State. Petitioner did not sell gravel to others.

CONCLUSIONS OF LAW

A. That section 1115(a)(12) exempts from tax machinery or equipment for use or consumption directly and predominantly (exclusively prior to September 1, 1974) in the production of tangible personal property <u>for sale</u> by processing.

B. That the rock crusher leased by petitioner was not used in the processing of gravel for sale within the meaning and intent of section 1115(a)(12), but rather the rock crusher was used to process gravel for use in the performance of petitioner's contracts.

C. That the petition of Reale Construction Co., Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued February 22, 1977 is sustained.

DATED: Albany, New York
SEP 05 1980

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER