

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

January 10, 1983

Cole Sand & Gravel Corp.
c/o Bruce Tehan, Treasurer
P.O. Box 30
Scottsville, NY 14546

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 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
Law Bureau - Litigation Unit
Albany, New York 12227
Phone # (518) 457-2070

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
COLE SAND AND GRAVEL 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 Period June 1, 1975
through May 31, 1978.

DECISION

Petitioner, Cole Sand and Gravel Corp., P.O. Box 30, Scottsville, New York 14546, 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, 1975 through May 31, 1978 (File No. 25620).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, One Marine Midland Plaza, Rochester, New York, on January 20, 1982, at 2:45 P.M. Petitioner appeared by Bruce Tehan and Anthony Lima. The Audit Division appeared by Ralph J. Vecchio, Esq. (Thomas Sacca, Esq., of counsel).

ISSUES

- I. Whether certain tools are used or consumed directly and predominantly in the production of tangible personal property.
- II. Whether certain vehicles constitute machinery or equipment used directly and predominantly in the production of tangible personal property.
- III. Whether certain repair parts are exempt from tax under section 1115(a)(12) of the Tax Law.

FINDINGS OF FACT

1. Petitioner, Cole Sand and Gravel Corp., was a surface mining operation engaged in the production and sale of crushed stone and sand.

2. On December 18, 1978, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner covering the period June 1, 1975 through May 31, 1978 for taxes due of \$1,665.69, plus penalty and interest of \$695.69, for a total of \$2,362.38.

3. Petitioner executed a consent extending the period of limitation for assessment of sales and use taxes for the period June 1, 1975 through August 31, 1975, to December 20, 1978.

4. On audit, the Audit Division examined petitioner's purchase invoices for the period November 1, 1976 through October 31, 1977 and determined that purchases of supplies amounting to \$945.13 were subject to New York State tax and other operating expense purchases of \$6,284.73 were subject to New York State and local taxes. Error factors were computed for the different rates and were used to determine a tax liability of \$1,192.44 for the entire audit period.

The audit also disclosed taxes due of \$196.62 on capital acquisitions and \$276.63 on certain expense items of a nonrecurring nature. As the result of a pre-hearing conference, the audited taxes due on capital acquisitions was reduced to \$168.62. Said amounts are not being contested by petitioner.

5. The Audit Division conceded that petitioner maintained sufficient books and records from which the exact amount of tax due on recurring expenses could have been determined and therefore, the use of a test period was not proper and the taxes due of \$1,192.44 should be reduced to \$477.74, the actual amount found due for the test period. In addition, the Audit Division conceded that the tax should be further reduced to \$460.71 to reflect its examination of certain documents after the audit was completed.

6. The Audit Division imposed a combined New York State and local tax on purchases of the following tools: CM pullers, drill set, tap and die set, rethreading die set, grinding wheels and a hook for a hoist.

The CM puller is used to repair breaks in the conveyor system. The hook is part of a crane used to lift repair parts to the processing plant. The other tools mentioned above are also used in some manner to repair or maintain production machinery and equipment.

Petitioner took the position that tools are exempt from local tax.

7. The Audit Division held petitioner liable for tax on gasoline used in a pit truck, water truck and a pick-up truck. The pit truck is a unlicensed vehicle used exclusively in the plant area to carry repair parts. The water truck is also an unlicensed vehicle which is used to wet down the area to prevent dust. This is required by the Department of Environmental Conservation. Petitioner used two licensed pick-up trucks in its operation. One is used for various purposes on the plant site while the other is used to get mail and go to the bank. The pick-up trucks are used interchangeably for such purposes. Petitioner considers one pick-up truck, as well as the pit truck and the water truck as exempt equipment since they are essential to production.

8. The Audit Division imposed a tax on certain parts purchased in the amount of \$391.36. Petitioner argued that \$298.36 of that amount was for parts for a dozer, loader and the trucks described in Finding of Fact "7"; and that, such parts had a useful life of more than one year. Petitioner also argued that one-half (\$48.40) of the parts purchased for the pick-up trucks should be exempt since one is used for production purposes.

9. Reasonable cause existed for petitioner's failure to pay the taxes at issue.

CONCLUSIONS OF LAW

A. That section 1115(a)(12) of the Tax Law provides an exemption for "(m)achinery or equipment for use or consumption directly and predominantly in the production of tangible personal property...for sale, by manufacturing...but not including parts with a useful life of one year or less or tools or supplies used in connection with such machinery, equipment...".

That section 1210(a)(1) of the Tax Law provides that local taxes enacted by any city of less than one million or by any county or school district shall exclude all sales of tangible personal property for use or consumption directly (emphasis added) and predominantly in the production of tangible personal property, ...for sale, by manufacturing.

"Directly" means (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 [20 NYCRR 528.13(c)(1)].

B. That the tools set forth in Finding of Fact "6" are used in the maintenance and repair of production machinery or equipment; that such use is not directly and predominantly in production within the meaning and intent of section 1210(a)(1) of the Tax Law and 20 NYCRR 528.13(c)(1).

C. That the pit truck, water truck and the pick-up trucks described in Finding of Fact "7" do not constitute machinery and equipment for use or consumption directly and predominantly in production within the meaning and intent of section 1115(a)(12) of the Tax Law or 20 NYCRR 528.13.

The fact that the above equipment is essential to the production process or required by another state agency are not determining factors as to whether such equipment qualifies for the exemption provided for under section 1115(a)(12) of the Tax Law.

D. That since the vehicles referred to in Conclusion of Law "C" are not exempt, the repair parts for such vehicles are subject to tax, regardless of the length of their useful life.

That petitioner failed to establish which parts, if any, were for the dozer or loader (exempt machinery) or that the useful life of such parts were more than one year. A statute or regulation authorizing an exemption from taxation is to be strictly construed against the taxpayer (Matter of Grace v. New York State Tax Commission, 37 N.Y. 2d 193).

E. That in accordance with Findings of Fact "4" and "5", the additional taxes due are reduced to \$905.96.

F. That the penalty is cancelled and interest shall be computed at the minimum statutory rate.

G. That the petition of Cole Sand and Gravel Corp. is granted to the extent indicated in Conclusions of Law "E" and "F"; that the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued December 18, 1978; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

JAN 10 1983

STATE TAX COMMISSION
Robert M. Burchard
ACTING PRESIDENT
Francis R. Kaemig
COMMISSIONER
Mark J. Smith
COMMISSIONER

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Cole Sand & Gravel Corp. :

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 6/1/75-5/31/78. :

State of New York
County of Albany

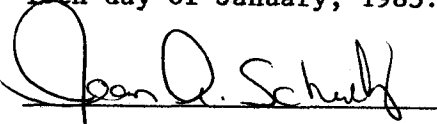
Kathy Pfaffenbach, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 10th day of January, 1983, he served the within notice of Decision by certified mail upon Cole Sand & Gravel Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Cole Sand & Gravel Corp.
c/o Bruce Tehan, Treasurer
P.O. Box 30
Scottsville, NY 14546

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
10th day of January, 1983.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



P 278 401 559
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
 NOT FOR INTERNATIONAL MAIL
 (See Reverse)

SENT TO <u>Cole Sand & Gravel Corp.</u>		
<u>C/O Bruce Tehan, Treasurer</u>		
STREET AND NO. <u>P.O. Box 30</u>		
P.O., STATE AND ZIP CODE <u>SCOTTSVILLE, NY 14546</u>		
POSTAGE	\$	
CONSULT POSTMASTER FOR FEES	CERTIFIED FEE	¢
	SPECIAL DELIVERY	¢
	RESTRICTED DELIVERY	¢
	OPTIONAL SERVICES	
	RETURN RECEIPT SERVICE	
	SHOW TO WHOM AND DATE DELIVERED	¢
	SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY	¢
SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY	¢	
SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY WITH RESTRICTED DELIVERY	¢	
TOTAL POSTAGE AND FEES		\$
POSTMARK OR DATE		

PS Form 3800, Apr. 1976