

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

December 31, 1984

B. R. DeWitt, Inc.
c/o Bruce R. Tehan
P.O. Box 95
Pavilion, NY 14525

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, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law 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
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
B. R. DeWitt, Inc. :
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Sales & Use Tax :
under Article 28 & 29 of the Tax Law for the :
Period 3/1/80 - 5/31/80. :
:

AFFIDAVIT OF MAILING

State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 31st day of December, 1984, he served the within notice of Decision by certified mail upon B. R. DeWitt, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

B. R. DeWitt, Inc.
c/o Bruce R. Tehan
P.O. Box 95
Pavilion, NY 14525

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
31st day of December, 1984.

David Parchuck

Nicholas J. Williams
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

IN SENATE

JANUARY 1, 1902

REPORT OF THE

COMMISSIONERS OF THE LAND OFFICE
IN RESPONSE TO A RESOLUTION
PASSED BY THE SENATE
MAY 1, 1899

ALBANY:

JOHN B. LEECH, JR.,

PRINTED BY THE STATE OF NEW YORK
AT THE OFFICE OF THE COMMISSIONERS OF THE LAND OFFICE
IN RESPONSE TO A RESOLUTION
PASSED BY THE SENATE
MAY 1, 1899

ALBANY:
JOHN B. LEECH, JR.,
PRINTED BY THE STATE OF NEW YORK
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PASSED BY THE SENATE
MAY 1, 1899

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
B. R. DeWITT, 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 March 1, 1980	:	
through May 31, 1980.	:	

Petitioner, B. R. DeWitt, Inc., c/o Bruce R. Tehan, P.O. Box 95, Pavilion, New York 14525, 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, 1980 through May 31, 1980 (File No. 37956).

A small claims hearing was held before John F. Koagel, Hearing Officer, at the offices of the State Tax Commission, One Marine Midland Plaza, Rochester, New York, on December 7, 1983 at 10:45 A.M. Petitioner appeared by Bruce R. Tehan, Vice President. The Audit Division appeared by John P. Dugan, Esq. (Thomas C. Sacca, Esq. of counsel).

ISSUE

Whether the truck chassis used in connection with the production of "transit mix" concrete are exempt from sales tax as equipment used directly and predominantly in the production of tangible personal property for sale.

FINDINGS OF FACT

1. On June 20, 1980, the Audit Division issued a Notice and Demand for Payment of Sales and Use Taxes Due against petitioner, B. R. DeWitt, Inc., in the amount of \$1,420.80, plus penalty of \$71.04 and interest of \$14.21, for a

total due of \$1,506.05 for the period March 1, 1980 through May 31, 1980 as the result of a bulk sale which occurred in March, 1980.

2. Petitioner entered into a contract in March, 1980 to purchase from D & T Franzese Brothers, Inc. and Watkins Transit Mix, Inc. a parcel of land with a concrete plant and attached fixtures and personal property, four cement mixers attached to truck chassis and one loader. The purchase price of \$165,000.00 was allocated as follows:

Real estate and concrete plant	\$125,000.00
Four truck mixers and one loader	<u>40,000.00</u>
Total	\$165,000.00

The Audit Division characterized the transaction as a bulk sale and petitioner disagreed; however, whether the transaction was a bulk sale is not at issue herein.

3. On audit, the auditor determined that the truck chassis were subject to sales tax but that the cement mixers and the loader were exempt from sales tax as equipment used directly and predominantly in the production of tangible personal property for sale. Since the \$40,000.00 allocated to equipment did not break down the purchase price according to the various components, the auditor in order to obtain an accurate estimate of the sales price of the chassis, mixers and loader, computed two percentages using the sellers' original cost of the equipment. The original total cost of all the equipment was \$72,734.56 and the original cost of the loader was \$5,400.00. The auditor divided the cost of the loader by the total cost to arrive at a figure of 7.5 percent, which represented the ratio of the loader's cost to the total cost. He applied the 7.5 percent to the March, 1980 contract price of \$40,000.00 and determined that the portion of the price attributed to the loader was \$3,000.00. The auditor subtracted the \$3,000.00 from the \$40,000.00 to arrive at a price

for the trucks and mixers of \$37,000.00. The auditor had figures breaking down the original cost of a truck chassis and mixer for only one truck and mixer unit. He compared the price of the truck, \$18,125.06, to the total cost of the truck/mixer unit of \$28,225.06 and determined that the truck chassis represented 64 percent of the original cost. The auditor applied the 64 percent to the contract price computed for the trucks and mixers of \$37,000.00 and determined taxable equipment to amount to \$23,680.00. He multiplied this figure by the 6 percent New York State and Genesee County tax rate to arrive at tax due on the sale of \$1,420.80.

4. Petitioner manufactures and sells "transit mix" concrete. The process involves funneling the proper proportions of sand, gravel, concrete and water into the mixer drum of the concrete mixer vehicle at the cement plant. Power from the truck motor causes rotation of the mixer drum and mixing of the aggregates to make "transit mix" concrete. The mixing occurs partly as the vehicle is driven over the highway from the plant to the job site where the load must be discharged within 30 minutes after mixing has been completed.

5. Petitioner received a prior State Tax Commission decision dated November 16, 1977 in its favor holding that, with respect to the investment tax credit to the corporation franchise tax, its truck chassis and cement mixers were property used in the production of goods and, therefore, qualified for the investment tax credit. Petitioner maintains that its trucks are used in the production of concrete and that if they are considered to be items of production for corporation tax purposes, they should be considered to be items of production for sales tax purposes. The Audit Division argues that the regulations under the Sales Tax Law differ from the regulations under the Corporation Franchise Tax Law and that petitioner's trucks are used in the administration phase of

manufacturing, not the production phase and are, therefore, subject to sales tax.

CONCLUSIONS OF LAW

A. That section 1115(a)(12) of the Tax Law provides, in pertinent part, that receipts from the sale of machinery and equipment for use or consumption directly and predominantly in the production of tangible personal property for sale by manufacturing or processing are exempt from sales and use tax.


B. That truck chassis used in connection with mixer drums and truck motors or cabs in the production of "transit mix" concrete do not constitute machinery for use or consumption directly and predominantly in the production of tangible personal property. Matter of Colonial Sand & Stone Co., Inc., State Tax Commission, June 30, 1977; Matter of Colonial Sand & Stone Co., Inc., State Tax Commission, June 11, 1982.

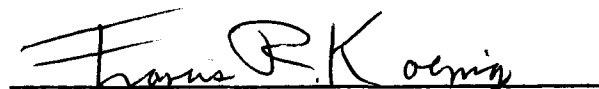
C. That the petition of B. R. DeWitt, Inc. is denied and the Notice for Payment of Sales and Use Taxes Due reflecting a deficiency of \$1,506.05 is sustained.

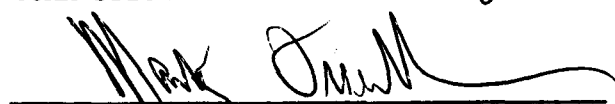
DATED: Albany, New York

STATE TAX COMMISSION

DEC 31 1984


PRESIDENT


COMMISSIONER


COMMISSIONER

P 470 316 344

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	B.A. DeWitt Inc
Street and No.	415 Bruce St Elex
P.O., State and ZIP Code	PO Box 95
Postage	Perkerson 17414525
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return Receipt Showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

PS Form 3800, Feb. 1982