STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ALL WAYS CONCRETE PUMPING, LLC	:	DETERMINATION DTA NO. 827228
for Revision of a Determination or Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 2012 through February 28, 2015.	:	

Petitioner, All Ways Concrete Pumping, LLC, 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, 2012 through February 28, 2015.

A hearing was held before Winifred M. Maloney, Administrative Law Judge, in Albany, New York, on March 24, 2017, at 11:00 A.M., with all briefs to be submitted by October 13, 2017, which date began the six-month period for issuance of this determination. Pursuant to Tax Law § 2010 (3), the six month period was extended to nine months. Petitioner appeared by Lynn, D'Elia, Temes & Stanczyk (Michael Stanczyk, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Anita Luckina, Esq., of counsel).

ISSUES

I. Whether All Ways Concrete Pumping, LLC's purchase of concrete pump units are exempt from sales and use taxes as machinery or equipment used directly and predominantly in production pursuant to Tax Law § 1115 (a) (12).

II. Whether concrete pump units installed on truck chassis are exempt from tax pursuant to Tax Law § 1115 (a) (26).

FINDINGS OF FACT[1]

1. Petitioner, All Ways Concrete Pumping, LLC, is a New York limited liability company that was organized by filing its Articles of Organization with the New York State Secretary of State on April 21, 2005.

2. Petitioner provides a concrete pumping service for private individuals, commercial jobs and bridge contractors. Its pumping service begins at the point of discharge of the concrete mix from the ready mix supplier and culminates at the point of discharge of the concrete mix from the end of the hose, with placement at the location indicated by its customer.

3. One hundred percent of the time that petitioner is providing its services, it is doing so in a transaction involving the ultimate sale of concrete.

4. A majority of the time, petitioner acts as a subcontractor of a general contractor. In providing concrete pumping services to a general contractor, petitioner takes possession of the concrete mix from the general contractor and then pumps and conveys it to its final placement point, where the flat work crew, generally masons (employees of the general contractor or a subcontractor), will form, place and compact, smooth and finish the concrete mix in its final location where it hardens, after which the general contractor sells the concrete to the ultimate purchaser. As part of its pumping service, petitioner will work with the ready mix concrete supplier (e.g., Saunders Concrete Company, Inc., or Northern Ready Mix) and the general contractor to assist the engineer in designing a mix that has the requisite qualities for the job and that is capable of being delivered via pumping.

5. A minority of the time, petitioner will purchase the concrete mix from a third party

---

[1] The parties entered into a stipulation of facts, and those facts have been incorporated herein.

ready mix supplier, take possession of it, pump and convey same to the final location in connection with its sale of the same to the property owner or the general contractor (who would then resell same to the owner of the property).

6. In order to provide concrete pumping services at construction sites, petitioner owns and uses several pieces of equipment that include truck-mounted concrete pump units and trailer-mounted concrete pump units.

7. During the period June 1, 2012 through February 28, 2015, petitioner purchased four truck-mounted concrete pump units and a trailer-mounted concrete pump unit (trailer pump unit), from Putzmeister America, Inc. (Putzmeister), for use in its concrete pumping business. Putzmeister manufactures several concrete pump unit models, each of which contain specific design characteristics and boom lengths. It permanently affixes each concrete pump unit to a truck chassis (truck pump unit). At the construction site, the mechanical system of the concrete pump unit is powered by the truck's engine with a pump cell. With respect to the four truck pump units purchased by petitioner, each one was sold from Putzmeister's Sturtevant, Wisconsin facility. Each invoice issued to petitioner listed the purchase price of the specific model concrete pump unit separately from the purchase price of the Mack truck to which it was affixed. When each Mack truck pump unit was registered in New York State, petitioner paid sales tax on the Mack truck to the New York State Department of Motor Vehicles (DMV). However, the DMV did not collect sales tax on the concrete pump unit affixed to the Mack truck at the time of the same's registration. The weight of the four truck pump units varies from 55,000 pounds for the smallest to 113,000 pounds for the heaviest.[2] Each of those truck pump units has an

[2] The pump unit model's design and boom length affect the weight of the truck pump unit.

overweight permit issued by the New York State Department of Transportation (DOT).

8. In addition to concrete pump units, Putzmeister manufactures, among other items, trailer pump units. During the period at issue, petitioner purchased a trailer pump unit from Putzmeister, weighing 6,000 pounds. Petitioner uses "a regular pickup truck" to tow that trailer pump unit.

9. Petitioner did not pay tax to Putzmeister on its purchases of the four truck pump units and the trailer pump unit. While petitioner did pay sales tax on the four Mack trucks, it did not pay sales tax to New York State on the concrete pump units mounted on those Mack trucks. Petitioner did not pay sales tax to New York State on its purchase of the trailer pump unit. Petitioner did not pay sales tax to New York State on the concrete pump units and the trailer pump unit for the applicable years because it believed such purchases were exempt under New York law.

10. In April 2015, the Division of Taxation (Division) commenced a sales and use tax audit of petitioner's books and records for the period June 1, 2012 through February 28, 2015.[3] In reviewing petitioner's books and records, the auditor conducted a detailed review of capital purchases for the audit period and expense purchases for the test period January 1, 2014 through December 31, 2014 (a period representative of business activity). The auditor also conducted a cursory review of petitioner's sales records for the test period.

11. After reviewing petitioner's books and records, the auditor determined additional tax in the total amount of $92,140.55 was due on petitioner's capital and expense purchases for the

[3] Item 2 of the stipulation of facts incorrectly stated that "[t]he Division conducted a sales and use tax audit ("sales tax") of the Company in 2016 for the period June 1, 2012 through February 26, 2015 (the "Audit Period") . . . ." Finding of fact 10 accurately reflects the month and year in which the audit was commenced and the audit period at issue.

period June 1, 2012 through February 28, 2015. With respect to capital purchases, the auditor found additional taxable purchases of $1,129,162.18 and determined additional tax due in the amount of $86,940.97 for the audit period. The majority of the additional tax determined to be due on the capital purchases related to petitioner's purchase of four concrete pump units attached to the chassis of trucks[4] and a trailer pump unit (disputed pump units). Specifically, the auditor determined additional tax due on petitioner's Putzmeister purchases as follows:

Invoice Date	Description	Additional Tax Due
7/23/2012	BSF 47-5.16 H concrete pump unit	$42,608.00
6/25/2014	BSF 32Z.16H concrete pump unit	$22,040.00
7/31/2014	BSF 31Z.16H concrete pump unit	$ 6,200.00
8/26/2014	BSF 38Z.16H concrete pump unit	$ 9,640.00
5/14/2014	Trailer pump unit[5]	$ 4,736.00
	Total additional tax due	$85,224.00

With respect to expense purchases, the auditor determined additional expense purchases in the amount of $64,994.76, and additional tax due in the amount of $5,199.58 on the same for the period June 1, 2012 through February 28, 2015.

12. The Division subsequently issued to petitioner a statement of proposed audit change for sales and use tax, dated July 9, 2015, which asserted additional tax due on capital and expense purchases as noted above and thereby asserted a total of $92,140.55, plus interest of $13,693.84, for a total amount due of $105,834.39.

13. On July 20, 2015, petitioner sent a letter to the Division with a payment of

[4] The auditor determined that the truck tax had been paid to the DMV on all four truck pump units, but additional tax was due on the pump units.

[5] The invoice for the trailer pump is not part of the record.

$105,834.39, representing the full amount due, which was paid in protest as to the amount that covered the disputed pump units.

14. The Division issued a notice of determination, number L-043470380, to petitioner, dated August 6, 2015, asserting additional sales and use taxes due in the amount of $92,140.55 for the period June 1, 2012 through February 28, 2015, plus interest in the amount of $13,693.84, less a payment/credit of $105,834.39.

15. On August 27, 2015, petitioner submitted an application for credit or refund of sales and use tax, form AU-11, (refund claim) in the amount of $94,384.48. The refund claim sought a refund of the tax paid on the disputed pump units because those units were exempt from tax pursuant to Tax Law §§ 1115 (a) (12) and (26).

16. On September 16, 2015, petitioner filed a petition with the Division of Tax Appeals in protest of notice of determination L-043470380. In its petition, petitioner asserted that the Division erroneously determined tax to be due on the disputed pump units because a concrete pump unit is exempt under Tax Law § 1115 and 20 NYCRR 528.13. The petition contested tax in the amount of $94,384.48. Among the documents attached to the petition were copies of the notice of determination and petitioner's refund claim.

17. By letter dated March 1, 2016, the Division returned petitioner's refund claim to Michael Stanczyk, Esq., petitioner's representative. The letter stated that the refund claim was being returned and was not being reviewed since it involved "the same issue as the DTA protest of assessment L-043470380-4."

18. At the beginning of the hearing held in this matter, the parties stipulated that the hearing covered both the refund request for the audit period and the notice of determination for the audit period at issue. The Division agreed that the matter was fully paid and ultimately what

petitioner is seeking is a refund. Notwithstanding the amount set forth in the refund claim,[6] the parties agree that the amount of tax at issue herein is $85,224.00, plus applicable interest. Petitioner is seeking a refund of $85,224.00, plus applicable interest.

19. At the hearing, petitioner presented the testimony of its vice president, Kenneth A. Sroka.[7] As of the date of the hearing, Mr. Sroka had worked for and owned petitioner for 12 years. Mr. Sroka worked for a ready mix concrete pump supplier for 20 years prior to going into business with his wife.

20. Concrete is "an artificial stone" that is made from a mixture of cement, water, fine aggregate or sand, course aggregate, usually gravel or crushed stone, and if necessary also with concrete admixtures[8] and concrete additives,[9] "by the hardening of the cement paste (cement-water mixture)." Before hardening, the freshly mixed concrete is more or less "fluid" and can be made into almost any shape, and when it is hardened as an artificial stone it retains this shape.

21. Concrete technology comprises all tasks that serve the purpose of guaranteeing the desired construction material properties of concrete with the available base materials. With the current state of concrete technology, pumpable concrete is no longer classified as a special type of concrete. Rather, it is a construction material regulated by a specified concrete standard and a

---

[6] The petition seeks the same amount as set forth in the refund claim.

[7] Petitioner's president is Diane Sroka, Mr. Sroka's wife.

[8] Concrete admixtures are usually powered substances that are added to the concrete. They mainly work physically and usually serve as an aid for better workability, less water repellence (bleeding), higher structural imperviousness or as coloration. There are two types of admixtures, type I and type II. Type I admixtures are inert, non-reactive substances that mainly improve workability through a "filler" affect, e.g., powered rocks, color pigments. Type II admixtures are reactive substances that improve hardness that, in addition to improving workability, also cause changes in the physical properties of the concrete, e.g., coal fly ash, micro-silica.

[9] Concrete additives are usually liquid, and have a "physico-chemical action." They are classified into the following "efficiency" groups depending on their effect in freshly-mixed or hardened concrete: concrete deflocculants, plasticising admixtures, air-entraining agents, water resisting admixtures, setting retarders, and setting accelerators.

required specified composition.

22. The pumpability of the concrete is considered when the concrete mixture is being designed and manufactured, and both the composition of the concrete mixture and the pump unit's pipe diameter are taken into account. To ensure that the ready mix concrete mix meets the job and pumpability specifications, an engineer designs the concrete mixture, usually in consultation with the contractor, the ready mix supplier and the pumper, i.e., petitioner. Pumpable concrete can be pushed under pressure through a pipeline system that may include flexible hose as well as steel pipeline.

23. A concrete mix that is poured directly from a ready mix truck may be stiffer and have a different mix ratio than a concrete mix that can be pumped through a truck pump unit or a trailer pump unit. A concrete mix going through pumps is specifically designed for pump units to be able to keep it flowable, in a liquid state, and not to set up (harden) in the pipelines through which petitioner conveys the concrete mix to its final placement location. A concrete mix that will be pumped versus poured may require additional admixtures and chemical additives, and/or water to keep the concrete mix flowing through the pipelines while retaining the desired hardening properties. The concrete mix is fabricated, including the addition of admixtures and chemical additives, primarily at the ready mix plant and/or in the ready mix truck. Chemical admixtures and additives may be added to affect the setting time of the concrete mix. For example, in the winter additional chemicals may be needed to help the concrete mix set up in the cold temperatures. Air-entrained concrete[10] contains billions of microscopic air cells per cubic foot. These air pockets relieve internal pressure on the hardened concrete by providing tiny

[10] Entrained air is produced during mechanical mixing of concrete that contains an air-entraining admixture.

chambers for water to expand into when it freezes. This is especially important where the hardened concrete will be exposed to external weather conditions.

24. A concrete pump unit is a device designed to convey the concrete mix to placement sites via pipes and/or hoses. It is used for pumping operations on a construction site.

25. As noted in finding of fact of 7, petitioner purchased four truck pump units from Putzmeister. Each one of those truck pump units is equipped with, among other items, a hopper, a hydraulic pump system, a multi-section boom, and a set of outriggers.

26. The hopper is located at the rear of the truck pump unit. Its lid lifts up and the ready mix truck backs up to the pump unit and discharges the concrete mix into the hopper. The hopper has a grate the concrete mix falls through which prevents any large rocks or chunks from plugging the pump unit's pipes. A remixer paddle (also called an auger) located inside the hopper remixes the concrete mix to keep it liquid and flowable. There are two pistons that pump the concrete mix through the boom for placement.

27. The multi-section boom on the each of petitioner's truck pump units stands up and unfolds. It is hydraulically driven, remote operated, and can extend vertically from 101 feet to 155 feet (depending upon the model), for doing buildings, bridge decks, basements and the like. The boom consists of long metal pipes through which the hydraulic engine pumps the concrete mix from the hopper. At the end of the boom, there is a delivery hose. The pump unit delivery hose is capable of efficiently accessing hard to reach locations, such as the second or higher floor of a multi-story building. A set of outriggers come out to provide stability to the truck pump unit during pumping. The operator of the truck pump unit monitors the pressure gauge on the side of the pump unit to ensure that the concrete mix is flowing through the boom and the delivery hose

to the placement location.[11] The operator is also in radio contact with the mason who is placing the pumped concrete mix at the final placement location. The mason will direct the operator to move the boom as needed to ensure proper placement of the pumped concrete mix. Then, the flat work crew compacts, smooths and finishes the placed, pumped concrete mix where it hardens

28. Only petitioner's employees operate the truck pump units. Usually one employee accompanies the truck pump unit as its driver and operator. However, on a job where petitioner has to add chemical additives to the concrete mix, there would be two of its employees present at the same.

29. When necessary, an optional spray bar on the truck pump unit allows chemical additives to be added into the concrete mix in the hopper.[12] If a spray bar is not used, then the chemical additives may be poured into the concrete mix in the hopper. The hopper's remixer paddle will mix the chemical additives into the concrete mix prior to pumping.

30. A trailer pump unit is relatively the same as a truck pump unit except there is less boom. The trailer pump unit has a hopper containing a grate and a remixer, and a hydraulic system that moves two pistons back and forth to pump the concrete mix. As is the case with a truck pump unit, the ready mix truck pours the concrete mix into the trailer pump unit's hopper. The trailer pump unit uses a line pouring system, i.e., the delivery hose or steel pipe lays on the ground, and cannot reach high aerial locations like the truck pump unit can using the boom.[13]

---

[11] An increase in pressure could mean that the pump is starting to clog, or the pump unit is pumping a lot harder than it would with a more fluid-based concrete mix.

[12] It is unclear from the record whether any of the four truck pump units were equipped with the spray bar.

[13] The trailer pump unit can convey the concrete mix horizontally over long distances.

The trailer pump unit is useful for residential projects, such as basements and pools, because it is easily maneuvered in and out of the job site. In addition to concrete pumping, the trailer pump unit is also used for shotcreting applications. Shotcrete is concrete that is sprayed onto vertical or horizontal surfaces for decorative or reinforcement purposes. Shotcrete mix is very specific and must be controlled at the job site, and it may require the addition of admixtures or pumping faster or slower. Petitioner's service is from the discharge point of the ready mix truck to the discharge point at the end of the trailer pump unit's delivery hose where the mason places the concrete mix. After placement, the flat work crew compacts, smooths and finishes the concrete mix where it hardens. The function of the trailer pump unit is to convey concrete mix.

31. The disputed pump units are operated by petitioner's employees, they are not rented to third parties, and no third parties are allowed to operate them.

32. The pumping process used by both the truck pump unit and the trailer pump unit changes the characteristics of the concrete mix while it is being conveyed. Both pump units use pressure to convey the concrete mix through the pipeline system to the placement location. In the pipeline, the concrete mix is subjected to hydraulic pressure that compresses it, starting the drying process and creating heat, resulting in slump loss,[14] air loss,[15] and temperature gain.[16]

33. On construction projects on which petitioner is providing pumping services, a

---

[14] Slump is the measure of concrete consistency and fluidity (the thickness and wetness of the concrete mix). It shows the flow and overall workability of freshly mixed concrete. The higher the slump, the wetter the mix. Depending upon how far the concrete mix must be pumped, the slump could lose up to seven inches.

[15] For a truck pump unit, the air loss is usually two percent. For a trailer pump unit, the air loss is about one-half percent or one percent.

[16] The temperature gain can be up to five degrees depending upon how far the concrete is pumped through the truck pump unit. The temperature gain is less for a trailer pump unit, it is usually only one degree.

uniformity test of the concrete mix will be conducted by the project engineer or a testing lab (hired by the general contractor or the owner). In conducting the uniformity test, the concrete mix is tested before it goes into either the truck pump or trailer pump unit's hopper, and as it comes out of the pump unit's pipeline at the placement point. The flow of the concrete mix through the pump unit stops until the uniformity test is completed at the placement point. The composition of the concrete mix on the ready mix truck must be as specified for the project. If the uniformity test shows that the composition is not as specified, the ready mix truck's load is rejected, and the next ready mix truck's concrete mix would be tested. The characteristics of the pumped concrete mix at the placement point must be within the concrete composition specifications established for the project.

34. Petitioner is a preferred vendor for New York State. For a state job, the uniformity test is conducted on each ready mix truck load, i.e., ten yards of concrete mix. On DOT projects, the uniformity test is conducted in accordance with DOT's standard specifications. If the concrete mix, after it comes out of petitioner's pump units, does not meet DOT specifications then petitioner would be liable for the costs of replacing the same.

35. For a commercial job, i.e., non-New York State, the uniformity test is conducted after every 50 yards of concrete mix (about an hour of continuous pumping). If the concrete mix does not meet the specifications after it is pumped, and it is due to a failure of petitioner's pump unit or petitioner's employee's failure, petitioner will be obligated to pay for the unusable concrete mix. Delivery of concrete mix not to specifications would be a breach of the agreement between petitioner and its customer. Any malfunctions or errors in connection with the pumping (whether too hot, too wet, too many or little chemical additives, or otherwise) are the liability of petitioner.

36. Chemical additives are used to, in part, ensure the uniformity tests are passed. They

are also used to ensure "pumpability" of the concrete mix, so that the concrete mix can be pumped through the disputed pump units to its final destination. The chemical additives also affect the set time of the concrete mix (how long it takes to dry).

37. Usually, the ready mix supplier provides petitioner with the chemical additives to put into the hopper unit. Petitioner's employees are in charge of dispensing the chemicals into the pump unit. If too much chemical additive is put into the hopper, it can cause the concrete mix to set up in the pipes during pumping. On occasion, petitioner's employees will add water to the concrete mix in the hopper of the pump unit.

38. The location (height and distance from the pump unit), placeability and curability are affected by the slump of the concrete mix. For example, a 6 or 7 inch slump may be used when the concrete mix is being pumped for placement on a second floor of a building.

39. Many times the pumping jobs have to be changed on the fly and the chemical additives to be added changed. At times when the right mix of chemical additives is not available, usually due to a change in the type or location to be pumped to, the job will have to be postponed until the next day so that the proper concrete mix and chemical additives can be obtained.

40. Pumped concrete mix does not always require additional chemical additives or water.

41. Petitioner submitted proposed findings of fact numbered 1 through 43. Such proposed findings of fact have been generally accepted and incorporated herein except proposed finding of fact 1, which is in the nature of a legal conclusion; proposed finding of fact 42, which is argumentative; and proposed findings of fact 12, 13, 14, 18, 23, 29, 30, 31, 32, 33, 34, 35, 38, 39 and 43, which have been rejected as inaccurate or not supported by the record. In ruling on petitioner's proposed findings of fact, if any part of a proposed finding of fact is unsupported by the record, the proposed finding of fact has been rejected in its entirety. Additional findings of

fact were also made.

SUMMARY OF THE PARTIES' POSITIONS

42. Petitioner contends that the five pump units are used directly and predominantly in the processing and conveying of tangible personal property, i.e., pumped concrete, for sale and should, therefore, be exempt from sales tax pursuant to Tax Law § 1115 (a) (12). Petitioner maintains that it uses the pump units, a majority of the time, as a subcontractor who provides a processing and conveying service in connection with the ultimate seller's sale of the concrete, and a minority of the time, as the ultimate seller of the concrete itself. It further maintains that during 100% of the time the pump units are being used, "they are intimately and directly connected to the processing and conveying of the final product, which is pumped and hardened in place concrete." Petitioner argues that the entire use of the pump units is a necessary part of the overall process of producing pumped concrete.

43. Petitioner also asserts that the four truck pump units are exempt from sales tax pursuant to Tax Law § 1125 (a) (26). It claims that those concrete pump units are attached to truck chassis that can be and are used to tow certain items, and each truck pump unit weighs in excess of 55,000 pounds and requires an overweight permit from DOT. Therefore, the four truck pump units should additionally be exempt for this reason.

44. The Division contends that neither the pump truck units nor the trailer pump unit are eligible for the production exemption because they are not used to manufacture a product for sale. It further contends that petitioner's product is a pumping service and the subject "pump units are used only to perform that service, i.e., deliver ready mix concrete from the transit mixer - the production plant on wheels - to the point of final placement at the job site." The Division maintains that petitioner does not perform a processing service that becomes part of the concrete

sold because any effects on the concrete due to pumping are an anticipated but unwanted consequence of pumping. It further maintains that the concrete is prepared and sold by an unrelated ready mix supplier before it is discharged by the transit mixer into the pump unit, and the petitioner only provides a concrete pumping service.

45. The Division also asserts that the pump units do not qualify for exemption as equipment installed on a tractor, trailer or semi-trailer because the facts do not establish that the truck chassis and pump trailer are qualifying vehicles pursuant to Tax Law § 1125 (a) (26).

CONCLUSIONS OF LAW

A. As the instant matter presents the issue of whether petitioner is entitled to an exemption from sales tax, it must be first noted that statutes and regulations authorizing exemptions from taxation are to be strictly and narrowly construed (***see Matter of International Bar Assn. v Tax Appeals Tribunal***, 210 AD2d 819 [3d Dept 1994], ***lv denied*** 85 NY2d 806 [1995]; ***Matter of Estate of Lever v New York State Tax Commn.***, 144 AD2d 751 [3d Dept 1988]). In order to qualify for the exemption, petitioner bears the burden of clearly proving entitlement to the exemption sought (***see Matter of Grace v New York State Tax Commn.***, 37 NY2d 193 [1975], ***reargument denied*** 37 NY2d 816 [1975], ***lv denied*** 338 NE2d 330 [1975]).

B. Tax Law § 1115 (a) (12), in relevant part, provides an exemption from sales and use tax for:

> "[m]achinery or equipment for use or consumption directly and predominantly in the production of tangible personal property . . . for sale, by manufacturing, processing, generating, assembling, refining, mining or extracting, but not including parts with a useful life of one year or less or tools or supplies used in connection with such machinery or equipment."

C. 20 NYCRR 528.13 (b) (1) defines those activities which constitute "administration," "production" or "distribution," providing as follows:

"(i) *Administration* includes activities such as sales promotion, general office work, credit and collection, purchasing, maintenance, transporting, receiving and testing raw materials and clerical work in production such as preparation work, production and time records.

(ii) *Production* includes the production line of the plant starting with the handling and storage of raw materials at the plant site and continuing through the last step of production where the product is finished and packaged for sale.

(iii) *Distribution* includes all operations subsequent to production, such as storing, displaying, selling, loading and shipping finished products."

20 NYCRR 528.13 (b) also provides as follows:

"(2) The exemption applies only to machinery and equipment used directly and predominantly in the production phase. Machinery and equipment partly used in the administration and distribution phases does not qualify for the exemption, unless it is used directly and predominantly in the production phase.

* * *

(4) Production ends when the product is ready to be sold."

20 NYCRR 528.13 (c) defines the terms "directly" and "predominantly" as follows:

"(1) *Directly* means the machinery or equipment must, during the production phase of a process:

(i) act upon or effect a change in material to form the product to be sold, or

(ii) have an active casual 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.

(2) Usage in activities collateral to the actual production process is not deemed to be used directly in production.

* * *

(4) Machinery or equipment is used predominantly in production, if over 50 percent of its use is directly in the production phase of a process.

(5) Machinery or equipment used in production by someone other than its owner is exempt under the same conditions as other machinery and equipment."

D. For equipment to be used directly in production it must perform a continuous, synchronized operation that is necessary and integral to the production process (***see Matter of International Salt Co. v State Tax Commn.***, 79 AD2d 343, 344 - 348 [3d Dept 1981]; ***Matter of Niagara Mohawk Power Corporation v Wanamaker***, 286 AD2d 446 [4th Dept 1955], ***affd*** 2 NY2d 764 [1956]). In order to determine whether the pump units are used directly in production of the product to be sold, it is first necessary to define petitioner's product and thereby determine which activities are part of the production process. In determining whether the equipment meets the production requirement, it is necessary to give attention "to the nexus extant between the end product and the machinery or equipment so as to ascertain if the bond or union between them is such that it can be said that the machinery is necessary and essential to production" (***Matter of Rochester Independent Packer, Inc. v Heckelmann***, 83 Misc 2d 1064, 1065 [Sup Ct, Albany County 1975]). The Division maintains that pumped concrete is not a special type of concrete; it is ready mix concrete that has been pumped. It further maintains that the production process of the freshly mixed concrete ends at the point when the ready mix supplier's truck discharges it into the hopper of the pump unit. The Division contends that petitioner performs a concrete pumping service distinct from and independent of the production of concrete for sale. It further contends that the pump units are designed and used only to deliver freshly mixed concrete. Petitioner maintains that the final product being sold is pumped and hardened in place concrete, not freshly mixed concrete. It contends that the pump units convey and process the concrete mix prior to reaching its ultimate physical composition and final location.

E. The record in this matter shows that petitioner conveys and processes the pumpable concrete mix, and its product is, as described by petitioner, pumped concrete. That pumped concrete is part of the overall production process of the final product, hardened concrete. Mr. Sroka credibly testified about petitioner's business, including the manner in which the pump units are operated on job sites. Petitioner provides concrete pumping services for private individuals, commercial jobs and bridge contractors. Its pumping services begin at the point of discharge of the concrete mix from the ready mix supplier and culminate at the point of discharge of the concrete mix from the end of the hose, with placement at the location indicated by its customer. Petitioner uses the disputed pump units, i.e., the four truck pump units and the trailer pump unit, to convey the concrete mix to placement locations. To ensure that a concrete mix meets the job and pumpability specifications, an engineer designs it, usually in consultation with the contractor, the ready mix supplier and petitioner (***see*** finding of fact 22). A concrete mix being pumped through a pump unit is specifically designed to keep the concrete mix flowable, in a liquid state, and not to harden in the pipelines through which it is conveyed by petitioner to its final placement location (***see*** finding of fact 23). The ready mix supplier discharges the fresh pumpable concrete mix into one of petitioner's pump units.[17] A remixer paddle located inside the pump unit's hopper remixes the concrete mix to keep it liquid and flowable (***see*** finding of fact 26). The pump unit has two pistons that pump the concrete mix. The pumping process uses hydraulic pressure to convey the concrete mix through the pipeline system to the placement location. The hydraulic pressure causes physical changes to the concrete mix as it is conveyed through the pipeline system to the placement location (***see*** finding of fact 32). On construction

[17] In providing its pumping operations, petitioner's use of either one of its truck pump units or its trailer pump unit is controlled by the specifications of a particular construction project.

projects on which concrete pumping services are provided, a uniformity test of the concrete mix is conducted by the project engineer or a testing lab. In conducting the uniformity test, the concrete mix is tested before it goes into the pump unit's hopper, and as it comes out of the pump unit's pipeline at the placement point (***see*** finding of fact 33). If the characteristics of the pumped concrete mix at the discharge point are not within the concrete composition specifications established for the project, petitioner will be liable for replacing of the same (***see*** findings of fact 33, 34, and 35). With respect to the Division's contention that any changes effectuated on the concrete during the pumping process are an anticipated but unwanted consequence of transporting the concrete through the placement pipeline, and are not part of the production process, it is meritless. The pump units were designed to, and are used to, apply hydraulic pressure to the concrete mix to convey it through the pipeline system. This pressure is desired and causes physical changes to the concrete mix as it is pumped. In as much as, the pump unit changes the physical characteristics of the concrete mix (20 NYCRR 528.13 [c] [1] [i]), it has "an active casual relationship in the production of the product to be sold" (***see*** 20 NYCRR 528.13 [c] [1] [ii]). As such, the disputed pump units process the concrete mix, and are used directly in the production of pumped concrete that is part of the overall production process of the final product, hardened concrete (***see*** Tax Law § 1115 [a] [12]).

F. As to the statutory requirement that equipment exempt under Tax Law § 1115 (a) (12) must be used predominantly in production, at all times the pump units are being used to process and convey the concrete mix as part of the overall production of hardened concrete (***see*** findings of fact 3, 4, and 5). The pump units thus meet the "predominantly" requirement of Tax Law § 1115 (a) (12) (***see*** 20 NYCRR 528.13 [c] [4]). Accordingly, petitioner's concrete pump units are exempt production machinery or equipment within the meaning of Tax Law § 1115 (a) (12).

G. Petitioner claims that the four trucks with the pump units attached are also exempt from tax pursuant to Tax Law § 1115 (a) (26). For purposes of creating a complete record for purpose of any review on appeal, petitioner's secondary claim for exemption will be addressed.

H. Tax Law § 1115 (a) (26) provides an exemption from sales and use tax for:

> "[t]ractors, trailers or semi-trailers, as such terms are defined in article one of the vehicle and traffic law, and property installed on such vehicles for their equipping, maintenance or repair, provided such vehicle is used in combination where the gross vehicle weight of such combination exceeds twenty-six thousands."

20 NYCRR 528.26 [b] [1] defines a tractor as

> "a motor vehicle designed and used as a power unit in combination with a semitrailer [sic] or trailer, or two such trailers in tandem. Any such motor vehicle shall not carry cargo except that a tractor and a semitrailer [sic] engaged in the transportation of automobiles may transport motor vehicles on part of the power unit."

A semi-trailer "is any trailer which is so designed that when operated the forward end of its body or chassis rests upon the body or chassis of the towing vehicle" (20 NYCRR 528.26 [b] [2]). A trailer is any vehicle not propelled by its own power and drawn on a public highway by a motor vehicle, except a trailer primarily used for other purposes and only occasionally drawn by a vehicle (***see*** 20 NYCRR 528.26 [b] [3]). A qualifying vehicle is defined as

> "a tractor, trailer or semitrailer, provided such qualifying vehicle is used in combination with any vehicles where the gross vehicle weight of such combination exceeds 26,000 pounds. Trailers and semitrailers which otherwise meet the requirement for exemption when combined with a tractor are considered a qualifying vehicle though combined with a truck (20 NYCRR 528.26 [b] [6])."

I. Contrary to petitioner's claim, the four truck pump units do not qualify for the exemption under Tax Law § 1115 (a) (26). Although the weight of the truck pump units exceed the gross weight requirement (***see*** finding of fact 7), they are neither tractors nor trailers. The pump units are permanently affixed to the truck chassis, they are not trailer mounted, they have

no wheels of their own, and they do not tow behind **(*id.*)**.

J. After an audit of petitioner's books and records, the Division determined additional tax in the total amount of $92,140.55 was due on petitioner's capital and expense purchases for the period June 1, 2012 through February 28, 2015 (***see*** finding of fact 11). With respect to capital purchases, the Division found additional taxable purchases of $1,129,162.18 and determined additional tax due in the amount of $86,940.97 for the audit period. The majority of the additional tax determined to be due on the capital purchases related to petitioner's purchase of four concrete pump units and a trailer pump unit, which amount totaled $85,224.00 (***id***). Subsequently, a statement of proposed audit change was issued to petitioner that asserted additional tax in the total amount of $92,140.55, plus interest of $13,693.84 (***see*** finding of fact 12). On July 20, 2015, petitioner submitted a check to the Division in payment of $105,834.39, representing the full amount due, which was paid in protest as to the amount that covered the four truck pump units and the trailer pump unit (***see*** finding of fact 13). On August 6, 2015, the Division issued notice of determination L-043470380 asserting additional sales and use taxes due in the amount of $92,140.55 for the period June 1, 2012 through February 28, 2015, plus interest in the amount of $13,693.84, less a payment/credit of $105,834.39 (***see*** finding of fact 14). On August 27, 2015, petitioner submitted a refund claim seeking a refund of the tax paid on the five concrete pump units (***see*** finding of fact 15). On September 16, 2015, petitioner filed a petition in protest of notice of determination L-043470380, asserting that the Division erroneously determined tax to be due on the five concrete pump units (***see*** finding of fact 16). In a letter dated March 1, 2016, the Division returned petitioner's refund claim, stating in the same that the refund claim was being returned and was not being reviewed because it involved the same issue as the DTA protest of assessment L-043470380 (***see*** finding of fact 17). That letter is deemed to

be a denial of petitioner's refund claim (***see*** Tax Law § 1139 [b]).

At the beginning of the hearing held in this matter, the parties stipulated that the hearing covered both the refund claim and the notice of determination (***see*** finding of fact 18). The Division agreed that the matter was fully paid and ultimately petitioner is seeking a refund in the amount of $85,224.00 (***id***.) In conclusions of law E and F, it was determined that the five concrete pump are exempt production machinery or equipment under Tax Law § 1115 (a) (12). As such, the Division is directed to modify notice of determination L-043470380 in accordance with conclusions of law E and F, and issue a refund in the amount of $85,224.00, plus applicable interest.

K. The petition of All Ways Concrete Pumping, LLC is granted, notice of determination L-043470380 is modified in accordance with conclusions of law E, F and J , and the Division is directed to issue a refund in accordance with conclusion of law J.

DATED: Albany, New York
July 12, 2018

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE