

**New York State Department of Taxation and Finance**  
**Taxpayer Services Division**  
**Technical Services Bureau**

TSB-A-85(39)S  
Sales Tax  
August 28, 1985

STATE OF NEW YORK  
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S840222A

On February 22, 1984 a Petition for Advisory Opinion was received from Gernatt Asphalt Products, Inc., Taylor Hollow Road, Box 400, Collins, New York 14034.

Petitioner, the owner and operator of a gravel plant, produces sand and gravel by extraction and processing for sale to contractors and asphalt producers. In 1981 Petitioner assembled the gravel plant on location from components (such as conveyors, bins, shaker screens, scalping tanks, sand classifiers and dewatering screws) shipped to the site by various manufacturers. Petitioner rented welding, earth-moving and other equipment needed for the erection of the plant. This equipment was rented from a related corporation, Dan Gernatt Gravel Products, Inc., which also supplied a labor force to help Petitioner's own employees with the set-up and assembly of the new installation. Petitioner exercised dominion and control of the equipment rented from the related corporation. Petitioner submitted with its Petition for Advisory Opinion an itemized bill submitted by Dan Gernatt Gravel Products, Inc. This bill includes separate charges for each piece of construction equipment and for labor supplied with the equipment.

Petitioner raises two issues with respect to the application of Article 28 of the Tax Law to its aforementioned rental of equipment.

Issue (1)

Is the equipment rented by Petitioner eligible for the exemption from sales tax allowed for machinery and equipment used in a manufacturing process?

Section 1115(a)(12) of the Tax Law provides an exemption from sales and use tax for "machinery and 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. . . ."

Sales and Use tax Regulations Section 528.13 states, in part:

"(c) Directly and predominantly. (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 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.

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

(3) Machinery used to produce other machinery or equipment or parts for self use in production is considered 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."

Thus, pursuant to regulation section 528.13(c)(3), machinery used to produce other machinery or equipment is considered to be used directly in production and will qualify for the exemption under section 1115(a)(12) if it meets the other conditions specified in section 528.13 of the regulations. In this regard the applicable period for determining predominant use will be the period of rental of the equipment.

Since the Petition for Advisory Opinion submitted by Petitioner does not contain sufficient information regarding the specific use by Petitioner of each piece of machinery, it is not possible to determine whether any particular piece of equipment qualifies for the exemption. However, it should be noted that only equipment directly used in the assembly of the gravel plant components will qualify for exemption. Machinery used in collateral activities (such as the construction of foundations for the gravel plant) will not qualify for exemption.

#### Issue (2)

Is the rental of equipment between related corporations a taxable event?

Section 1101 of the Tax Law offers, in part, the following definitions:

"(a) When used in this article the term "person" includes an individual, partnership, . . . corporation.  
. . .

Section 1105(a) of the Tax Law imposes a sales tax on the receipts from the retail sale (which includes rentals) of tangible personal property.

Section 526.7 (d)(8) of the Sales and Use Tax Regulations provides with respect to inter-corporate transactions:

"(i) The sale of property by one related corporation to another related corporation is a retail sale, and taxable to the extent of the consideration paid, or the fair market value, if the consideration paid is not an adequate indication of the true value of the property transferred."

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In accordance with the foregoing, the rental of equipment by Petitioner from Dan Gernatt Gravel Products, Inc., is not exempt by virtue of the two corporations being related corporations.

DATED: August 12, 1985

s/FRANK J. PUCCIA  
Director  
Technical Services Bureau

NOTE: The opinions expressed in Advisory Opinions  
are limited to the facts set forth herein.