

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

TSB-A-93 (30)S
Sales Tax
April 26, 1993

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S930107A

On January 7, 1993 a Petition for Advisory Opinion was received from Thomas Crawford, 181 South Main Street, Canandaigua, New York 14424.

The issue raised by Petitioner, Thomas Crawford, is whether the receipts from the rental of a "power screen", a top soil screening machine, is exempt from sales tax under the provisions of Section 1115(a)(12) of the Tax Law.

The "power screen" is a portable machine which can be taken to construction job sites. The owner of the "power screen", a partnership, rents the machine to contractors for use at the job site. The contractors load dirt and other debris from the job site into the machine. The machine is then used to sift the materials. The rocks, stones, sticks and other debris are separated from the dirt. The contractor then sells the resulting finely sifted soil to landscapers, homeowners, etc.

Section 1101 of the New York Tax Law states, in part:

Definitions.- -

(b) When used in this article for the purposes of the taxes imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and by section eleven hundred ten, the following terms shall mean:

(4) Retail sale. (i) A sale of tangible personal property to any person for any purpose,

(5) Sale, selling or purchase. Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume (including, with respect to computer software, merely the right to reproduce), conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor.

Section 1105 of the Tax Law states, in part:

Imposition of sales tax.- - ... there is hereby imposed and there shall be paid a tax ... upon:

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

Section 1115 of the Tax Law states, in part:

Exemptions from sales and use taxes. - - (a) Receipts from the following shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten:

(12) Machinery or equipment for use or consumption directly and predominantly in the production of tangible personal property, ... for sale, by ... mining or extracting, ...

Section 528.13 of the Sales and Use Tax Regulations states, in part:

Machinery and equipment used in production; telephone and telegraph equipment; parts, tools and supplies. [Tax Law, §1115(a)(12)] (a) Exemption.

(1) Exemption from statewide tax. An exemption is allowed from the tax imposed under subdivisions (a) and (c) of section 1005 [sic] of the Tax Law, and from the compensating use tax imposed under section 1110 of the Tax Law, for receipts from sales of the following:

(i) Machinery or equipment (including parts with a life of more than one year) used or consumed directly and predominantly in the production for sale of tangible personal property, ... by ... mining or extracting

Generally, the rental or lease of a "power screen" will be considered to be a retail sale as defined under Sections 1101(b)(4) and (5) of the Tax Law. However, in the instant matter the "power screen" will qualify for the exemption from sales tax under the provisions of Section 1115(a)(12) of the Tax Law and Section 528.13 of the Sales and Use Tax Regulations provided the lessee (contractor) uses the machine predominantly (more than 50% of use) in a mining or extracting operation to produce topsoil for sale. The contractor will be considered to be mining or extracting when the topsoil at the contractor's jobsite is dug up, processed through the "power screen" and then sold to landscapers, home owners or others by the contractor for removal and use by the purchaser at a location or locations other than at the contractor's jobsite. In such an instance, the lessor's receipts from the rental or lease of the "power screen" will not be subject to the tax imposed under Section 1105(a) of the Tax Law. The lessor should obtain a properly completed form ST-121, Exempt Use Certificate from the lessee (contractor) as substantiation that the lease or rental transaction was exempt from sales and use tax.

In any instance where more than 50% of the topsoil produced by the "power screen" is used by the contractor or purchaser for some purpose at the contractor's jobsite location, the contractor will not be considered to have used the "power screen" for mining or extracting. Accordingly, the rental or lease receipts in such an instance will not qualify for the exemption provided under

TSB-A-93 (30)S
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Section 1115(a)(12) of the Tax Law but will be subject to the tax imposed on a retail sale under Section 1105(a) of the Tax Law.

DATED: April 26, 1993

/s/
PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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