BEFORE THE HEARING OFFICER
OF THE TAXATION AND REVENUE DEPARTMENT
OF THE STATE OF NEW MEXICO

IN THE MATTER OF THE PROTEST OF
BUILDER'S EQUIPMENT CO., INC., NO. 95-02
I.D. NO. 01-731747-00 9, PROTEST
TO ASSESSMENT NO. 1819354.

DECISION AND ORDER

This matter came on for hearing before Gerald B. Richardson, Hearing Officer, on March 2, 1995. Builder's Equipment Co., Inc. (hereinafter "Taxpayer") was represented by Paul S. Wainwright, Esq. and by its accountant, Curt D. McGill. The Taxation and Revenue Department (hereinafter "Department") was represented by Margaret B. Alcock, Special Assistant Attorney General. The parties have granted the Hearing Officer additional time to issue his decision in this matter.

Based upon the evidence and the arguments presented, IT IS **DECIDED AND ORDERED** AS FOLLOWS:

FINDINGS OF FACT

1. The Taxpayer is in the business of selling heavy equipment and machinery and is located in Albuquerque, New Mexico.

2. Among other equipment, the Taxpayer sells portable screening plants used to screen gravel and portable spokane plants which are used to crush rock. Both types of equipment are used for the construction of roads. Both types of machinery are available from the manufacturer as stationary equipment or portable equipment. When sold as portable equipment, the equipment is mounted on a frame with axles and wheels so that it may be towed.

3. Portable spokane plants, also called portable jaw crusher plants are large rock crushing plants which are designed to be moved over roads and highways so as to be able to be transported from jobsite to jobsite. The ones sold by the Taxpayer vary in length from 29 to 45

feet and weigh between 41,000 and 109,000 pounds. The plant is mounted on a strong chassis constructed of steel I-beams and feature double or triple axles, large truck wheels and tires (like those on semi-trailers) and air brakes.

4. The portable screening plants sold by the Taxpayer vary in length from approximately 73 to 81 feet and are designed to be drawn on roads or highways by tractor trailer rigs from jobsite to jobsite. The plants are mounted on double axles mounted with large truck tires and wheels.

4. When portable screening plants and portable spokane plants are transported, a special permit is needed to move them on the highway because they are not "highway legal" without such a permit.

5. Portable screening plants and portable spokane plants are not self-propelled, but are built so that they may be towed.

6. Sometime in 1973 or 1974, Frank Touloumis, the Taxpayer's President, attended a tax workshop put on by the Department. At that time Mr. Fred O'Cheskey was the Commissioner of Revenue, the top position at the Department. Mr. Touloumis had a conversation with Commissioner O'Cheskey about whether the portable screening plants and spokane plants qualified for the 50% deduction from gross receipts tax provided in the former version of what is now § 7-9-62 NMSA 1978. Commissioner O'Cheskey informed Mr. Touloumis that the deduction applied.

7. Pursuant to an audit of the Taxpayer for the period of January 1, 1988 through August 31, 1993, on June 30, 1994 the Department issued Assessment No. 1819354 to the Taxpayer assessing a total of $16,565.32 in gross receipts tax, compensating tax, penalty and interest.

8. On July 28, 1994 the Taxpayer mailed to the Department a written protest of Assessment No. 1819354

DISCUSSION

The issue to be determined herein is whether the Taxpayer is eligible to claim the deduction, found at § 7-9-62 NMSA 1978, with respect to the Taxpayer's receipts from selling portable spokane plants and portable screening plants. The Taxpayer had claimed the deduction in filing its gross receipts tax returns, and upon audit, the Department had disallowed the deduction.

> Section 7-9-62 provides as follows:
> Fifty percent of the receipts from selling agricultural implements, farm tractors, aircraft ***or vehicles that are not required to be registered under the Motor Vehicle Code*** may be deducted from gross Receipts. Any deduction allowed under Section 7-9-71 NMSA 1978 must be taken before the deduction allowed by this section is computed. (emphasis added).

The Taxpayer claims that the portable plants qualify as vehicles not subject to registration under the Motor Vehicle Code because they meet the definition of "special mobile equipment." Section 66-3-1 NMSA 1978 of the Motor Vehicle Code addresses the types of vehicles which are subject to registration. Specifically, it provides:

> Every motor vehicle, trailer, semitrailer and pole trailer, when driven or moved upon a highway, shall be subject to the registration and certificate of title provisions of the Motor Vehicle Code except:
>
> * * * * *
>
> D. any special mobile equipment as herein defined; . . . .

Special mobile equipment is defined in the Motor Vehicle Code at § 66-1-4.16(J) NMSA 1978 as follows:

> "special mobile equipment" means every vehicle not designed or used primarily for the transportation of persons or property and incidentally operated or moved over the highways, including but not limited to farm tractors, road construction or maintenance machinery, ditch-digging apparatus, well-boring apparatus and concrete mixers;

The Taxpayer argues that the portable screening plants and spokane plants meet this definition because they are road construction machinery, they are incidentally moved over the

highways (when being moved from jobsite to jobsite), and they are not designed or used primarily for the transportation of persons or property.

The Department does not dispute these matters but rests its denial of the deduction upon its contention that these portable plants must first meet the definition of a "vehicle" before one considers whether the plants are vehicles not subject to registration, such as special mobile equipment. The Department contends that the portable plants do not qualify as vehicles and so the deduction does not apply. Section 66-1-4.19(B) of the Motor Vehicle Code defines a vehicle as follows:

> "vehicle" means every device in, upon or by which any person or property is or may be transported or drawn upon a highway, including any frame, chassis or body of any vehicle or motor vehicle, except devices moved exclusively by human power or used exclusively upon stationary rails or tracks;

The Department contends that the portable plants do not meet the definition of vehicle because the purpose of this machinery is to screen and crush road materials. As such it is not designed to carry persons or property, but rather, it is designed to carry only itself.

In support of this contention the Department relies upon ***Kaiser Steel Corporation v. Revenue Division,*** 96 N.M. 117, 628 P.2d 687, ***cert. den***. 96 N.M. 116, 628 P.2d 686 (1981) and ***Gibbons & Reed Company v. Bureau of Revenue,*** 80 N.M. 462, 457 P.2d 710 (1969). Both cases involved whether the taxpayer was eligible for the 50% deduction from compensating tax for vehicles not required to be registered under the Motor Vehicle Tax. This deduction, now found at § 7-9-77(A) NMSA 1978, is the compensating tax equivalent of the deduction at issue herein for gross receipts tax, and the reasoning of the courts is thus applicable to the issue herein. Both cases held that the equipment for which the deduction was claimed must meet the definition of a vehicle to qualify for the deduction. ***Gibbons & Reed***, 80 N.M. at 465, ***Kaiser Steel,*** 96 N.M. at 123.

In ***Gibbons & Reed,*** the Supreme Court determined that a 100 ton mining "mole" used to transport employees, supplies and excavated materials in and out of a mine and which ran on rails

was not a vehicle and thus would not qualify for the compensating tax deduction. The Court based its conclusion that the mole cannot be classified as a "vehicle" because it was not a device upon, or by which persons or property may be transported upon a highway. ***Id***. 80 N.M. at 465. ***Kaiser Steel*** involved the question of whether a huge dragline used to remove overburden for coal surface mining and a continuous miner, which is a mobile coal cutting and loading machine on caterpillar type treads, qualified for the compensating tax deduction comparable to the deduction at issue herein. In determining the matter, first the court analyzed whether the dragline and continuous miner were vehicles. It concluded that they were not because although they might be "capable" of being moved on the highways, they could not do so without severely damaging the highway, and thus did not meet the criteria of being a machine which moves on the highway. Additionally, it found that the equipment did not qualify because it was not self-propelled because it was powered by a trailing electrical cable powered from an outside source. With respect to this issue, the Department has conceded for purposes of this case that the equipment need not be self-propelled to qualify as a vehicle. This is correct. While "motor vehicles" as defined in the Motor Vehicle Code at § 66-1-4.11 refers to self propelled vehicles, the definition of "vehicle" is not so narrow. It includes devices which are "drawn upon a highway." ***See,*** § 66-1-4.19(B).

The second part of the court's analysis in ***Kaiser Steel*** involved the determination of whether the dragline and continuous miner could still qualify for the deduction by meeting the definition of "special mobile equipment" not subject to the registration requirements of the Motor Vehicle Code. The court concluded they did not qualify. First, the court rejected the taxpayer's argument that the devices need not meet the definition of a "vehicle" if they could meet the definition of "special mobile equipment." Although it did not explain the basis for rejecting this argument, it is apparent from the definition of "special mobile equipment" that it must also be a vehicle, since it is defined as, "every ***vehicle*** not designed or used primarily for the transportation of persons or property and incidentally operated or moved over the highways, ..." (emphasis

added). The court then went on to conclude that the dragline and continuous miner also didn't meet the portion of the definition that they be incidentally operated or moved over the highways. ***Id***. 96 N.M. at 123. Presumably the court based this determination upon the evidence about the damage which would be caused to the highways by moving such machinery.

Turning now to the Department's arguments, the Department is correct in its contention that the portable plants at issue herein must be vehicles to qualify for the deduction. ***Kaiser Steel, supra***. The Department argues that the portable plants are not vehicles because their primary purpose is for screening or crushing materials, not for carrying persons or property. Additionally, the Department argues that the portable plants cannot be vehicles because it argues that to be a vehicle, a device must be used to transport persons or ***other*** property, not to transport just itself.

With respect to the first argument, the Department reads the definition of vehicle more narrowly than it is written. There is no stated requirement that the primary use of a vehicle is to transport persons or property. The definition of a vehicle is fairly broad, ". . . ***every*** device in, upon or by which any person or property is or may be transported or drawn upon a highway, ..." (emphasis added). Section 66-1-4.19(B). Additionally, the definition of "special mobile equipment," a subset of "vehicles," specifically eschews any such requirement that the primary purpose is to transport persons or property. Special mobile equipment is defined to mean, "every vehicle ***not designed or used primarily for the transportation of persons or property***. . . ." (emphasis added) Section 66-1-4.16(J).

The Department's second argument, that to be a vehicle, a device must transport persons or other property than itself is not supported by the definition of "vehicle." It speaks broadly of a vehicle being a "device in, upon or by which ***any*** person or property is or may be transported. . . ." (emphasis added). Section 66-1-4.19(B). There can be no argument that portable screening and spokane plants are not property. It is also noteworthy that in ***Kaiser Steel***, although the Director's decision from which Kaiser appealed had adopted the view argued herein by the Department, the

court, in affirming the Director's decision did not reach or decide this matter, but based its determination that the equipment did not meet the definition of a vehicle based upon other considerations.

From all of the foregoing, it thus appears that the portable screening and spokane plants meet the definition of "special mobile equipment" and are "vehicles" not subject to the registration requirements of the Motor Vehicle Code. They are "vehicles" because they are a "device in, upon or by which any . . . property may be transported or drawn upon a highway." They meet the definition of "special mobile equipment because they are not designed or used primarily for the transportation of persons or property, they are incidentally operated or moved over the highways, and they fall within the enumerated category of road construction machinery. This result is consistent with the court's ruling in ***Kaiser Steel***. As opposed to the dragline and continuous miner which could not be moved upon a highway without doing substantial damage to the highway itself, the portable plants at issue herein are specifically designed to incidentally be moved on the highway, so that they may be moved from jobsite to jobsite.

CONCLUSIONS OF LAW

1. The Taxpayer filed a timely, written protest to Assessment No. 1819354, pursuant to Section 7-1-24 NMSA 1978 and jurisdiction lies over the parties and the subject matter of this protest.

2. In order to qualify for the deduction from gross receipts tax found at § 7-9-62 NMSA 1978 for the receipts from selling a vehicle not required to be registered under the Motor Vehicle Code, the machinery sold must meet the definition of a "vehicle" under the Motor Vehicle Code.

3. Special mobile equipment as defined in the Motor Vehicle Code is a category of vehicles.

4. The portable screening plants and portable spokane plants sold by the Taxpayer are

"vehicles" which qualify as "special mobile equipment" as those terms are defined in the Motor Vehicle Code and as such, the Taxpayer's receipts from selling those portable plants are subject to the 50% deduction from gross receipts found at § 7-9-62 NMSA 1978.

For the foregoing reasons, the Taxpayer's protest is hereby granted. The Department is hereby Ordered to abate that portion of Assessment No. 1819354 which assessed gross receipts tax, penalty and interest based upon the Department's denial of the Taxpayer's claim of deduction pursuant to § 7-9-62 NMSA 1978.

Done, this 12th day of April, 1995.