

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-01(14)S
Sales Tax
April 17, 2001

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S000911C

On September 11, 2000, the Department of Taxation and Finance received a Petition for Advisory Opinion from Tallmadge Woods STP Associates, LLC, c/o Cahn Wishod & Knauer, LLP, 425 Broadhollow Road, Suite 315, Melville, New York 11747.

The issue raised by Petitioner, Tallmadge Woods STP Associates, LLC, is whether the equipment, materials, and supplies purchased by Petitioner and its contractors for the construction of a sewage treatment plant qualify for the exemption from sales tax provided under Section 1115(a)(12) of the Tax Law.

Petitioner submitted the following facts as the basis for this Advisory Opinion.

Petitioner is the owner of the site on which a 400,000- gallon sewage treatment plant (“STP”) will be constructed to service the lands of Petitioner’s members, who are developers in the surrounding communities. Petitioner will retain the contractors to build the STP, which, upon completion, will be dedicated, without charge, to the County of Suffolk or its nominee, pursuant to a recorded Sewer Agreement. The County of Suffolk will own and operate the STP, which will process, treat, and dispose of human and/or commercial waste that comes in from Petitioner’s surrounding lands. No manufacturing or industrial facilities will be constructed on such lands.

Applicable Law and Regulations

Section 1105(a) of the Tax Law imposes a tax on “[t]he receipts from every retail sale of tangible personal property, except as otherwise provided in this article.”

Section 1105(c) of the Tax Law imposes sales tax, in part, upon:

The receipts from every sale, except for resale, of the following services:

* * *

(2) Producing, fabricating, processing, printing or imprinting tangible personal property, performed for a person who directly or indirectly furnishes the tangible personal property, not purchased by him for resale, upon which services are performed.

Section 1105-B(a) of the Tax Law provides, in part:

Receipts from the retail sales of parts with a useful life of one year or less, tools and supplies for use or consumption directly and predominantly in the production of tangible personal property, gas, electricity, refrigeration or steam for sale by manufacturing, processing, generating, assembling, refining, mining or extracting shall be exempt from the tax imposed by subdivision (a) of section eleven hundred five of this article. (Emphasis added)

Section 1115(a) of the Tax Law provides, in part:

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, gas, electricity, refrigeration or steam 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. . . . (Emphasis added)

* * *

(15) Tangible personal property sold to a contractor, subcontractor or repairman for use in (i) erecting a structure or building (A) of an organization described in subdivision (a) of section eleven hundred sixteen . . . or (ii) adding to, altering or improving real property, property or land (A) of such an organization . . . as the terms real property, property or land are defined in the real property tax law; provided, however, no exemption shall exist under this paragraph unless such tangible personal property is to become an integral component part of such structure, building or real property.

(16) Tangible personal property sold to a contractor, subcontractor or repairman for use in maintaining, servicing or repairing real property, property or land (i) of an organization described in subdivision (a) of section eleven hundred sixteen . . . as the terms real property, property or land are defined in the real property tax law; provided, however, no exemption shall exist under this paragraph unless such tangible personal property is to become an integral component part of such structure, building or real property.

Section 1115(a)(40) of the Tax Law, as added by Chapter 63 of the Laws of 2000, effective March 1, 2001, exempts from the sales tax imposed by Section 1105(a) and from the compensating use tax imposed by Section 1110 of the Tax Law:

Machinery or equipment for use or consumption directly and predominantly in the control, prevention, or abatement of pollution or contaminants from manufacturing or industrial facilities, to the extent such machinery or equipment is not otherwise exempt under paragraph twelve of this subdivision.

Section 1116(a) of the Tax Law provides, in part:

Except as otherwise provided in this section, any sale . . . by or to any of the following . . . shall not be subject to the sales and compensating use taxes imposed under this article:

(1) The state of New York, or any of its agencies, instrumentalities, public corporations (including a public corporation created pursuant to agreement or compact with another state or Canada) or political subdivisions where it is the purchaser, user or consumer, or where it is a vendor of services or property of a kind not ordinarily sold by private persons

Section 527.4 of the Sales and Use Tax Regulations provides, in part:

(a) *Imposition.* (1) Section 1105(c)(2) of the Tax Law imposes a tax on the receipts from services of . . . processing . . . tangible personal property, performed for a person who directly or indirectly furnishes the property.

* * *

(b) *Producing.* Producing means the manufacture of a product from raw materials and any process in which raw materials loses its identity when the production process is completed.

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

* * *

(b)(1)(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.

* * *

(d) *Waste treatment equipment.* (1) Machinery and equipment used for disposing of industrial waste, as part of a process for preventing water or air pollution, will be considered as being used directly and predominantly in production by manufacturing, processing, generating, assembling, refining, mining or extracting, if

(i) the machinery and equipment is purchased by a manufacturer and used predominantly to actually treat, bury, or store waste materials from a production process, and

(ii) over 50 percent of the waste treated, buried or stored results from the production process.

Example 1: A manufacturing plant has a pumping station to transmit effluent from an industrial process to a municipal sewage treatment system. The equipment at the pumping station is exempt.

Example 2: A manufacturing plant has a treatment plant at which it treats effluent from an industrial process and sanitary waste. Eighty percent of the waste treated is industrial effluent. The equipment at the treatment plant is exempt as it is used directly and predominantly in production.

* * *

(2) Building materials, which become part of a capital improvement used as a waste treatment facility are not eligible for the exemption.

* * *

Example 7: A company increases the height of a smokestack as part of its pollution control program. The materials used to construct the smokestack are not machinery or equipment but are additions to real property and are not exempt although equipment contained therein may qualify for the exemption. (Emphasis added)

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Petitioner's contractors will construct a sewage treatment plant to be dedicated to the County of Suffolk, or its nominee, who will then own and operate the plant for the treatment of human and/or commercial wastes from surrounding areas. Since the equipment, materials, and supplies purchased for construction of the plant will ultimately be used to perform waste treatment services, Petitioner contends that such purchases should be exempt from the imposition of sales tax under the production exemption provided in Section 1115(a)(12) of the Tax Law.

To be eligible for the production exemption, equipment and supplies used in the production process must be used directly and predominantly in the production of tangible personal property for sale. Under Section 528.13(b)(1)(ii) of the Sales and Use Tax Regulations, the term "production" is defined to include "the production line of the plant starting with the handling and storage of raw materials at the plant site." "Producing" means the manufacture of a product from raw materials and any process in which raw materials lose their identity when the production process is completed. See Section 527.4(b) of the Sales and Use Tax Regulations. "Manufacturing" generally results in the creation of a product that is substantially different in form, character, composition and usefulness from its components. See New York State Department of Taxation and Finance Publication 852 (12/97), Sales Tax Information for Manufacturers, Processors, Generators, Assemblers, Refiners, Miners and Extractors, and Other Producers of Goods and Merchandise, at page 2.

With regard to waste treatment equipment and supplies, purchases of these items by a manufacturer that are used predominantly to prevent water or air pollution in the disposal of industrial waste that results from a production process during manufacturing qualify for the production exemption from sales and use taxes. See Section 528.13(d)(1) of the Sales and Use Tax Regulations. This exemption is not applicable in Petitioner's case since neither Petitioner nor the County of Suffolk is a manufacturer (see Central New York Industrial Services, Inc., Adv Op Comm T&F, October 24, 1986, TSB-A-86(44)S). Moreover, neither Petitioner nor the County of Suffolk is engaged in the production of tangible personal property for sale. Rather, the STP which will be operated by the County of Suffolk, or its nominee, will process, treat and dispose of human and commercial waste. Accordingly, the equipment and supplies at issue do not constitute equipment and supplies used in production, and the receipts from the retail sale of this property to Petitioner and its contractors do not qualify for the exemptions from sales and use tax provided under Sections 1115(a)(12) and 1105-B of the Tax Law (see Matter of Delta Sonic Car Wash Systems, Inc. v. State Tax Commission, 142 AD2d 828; BDT, Inc., Adv Op Comm T&F, December 1, 1986, TSB-A-86(47)S; Central New York Industrial Services, Inc., supra). It should be noted that during construction of the STP, the County of Suffolk does not own the land or STP, and does not purchase the tangible personal property for the construction project. Therefore, the exemptions provided in Sections 1115(a)(15) and 1115(a)(16) of the Tax Law for tangible personal property incorporated into the land, buildings, or structures of an exempt governmental entity, and the exemption provided in Section 1116(a)(1) of the Tax Law for purchases by governmental entities, are not applicable to the purchases made by Petitioner in erecting the STP.

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It is noted that the machinery and equipment exemption provisions enacted by Chapter 63 of the Laws of 2000 apply to sales or uses, occurring on or after March 1, 2001, of machinery or equipment that will be used or consumed in the control, prevention, or abatement of pollution or contaminants from manufacturing or industrial facilities. See Section 1115(a)(40) of the Tax Law. Since the STP is not expected to be processing waste from manufacturing and/or industrial facilities, it will not qualify for exemption under Section 1115(a)(40). This opinion makes no determination as to whether, under different facts, purchases for the construction of the STP could otherwise be eligible for the new exemption.

DATED: April 17, 2001

/s/
Jonathan Pessen
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Technical Services Division

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