

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

TSB-A-06(34)S
Sales Tax
December 29, 2006

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S060511A

On May 11, 2006, the Department of Taxation and Finance received a Petition for Advisory Opinion from Ray's Transportation, Inc., 360 Walsh Avenue, New Windsor, New York 12553. Petitioner, Ray's Transportation, Inc., provided additional information pertaining to the Petition on August 4, 2006.

The issue raised by Petitioner is whether any of its equipment or trucks qualify as production equipment pursuant to section 1115(a)(12) of the Tax Law.

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

Petitioner provides construction debris removal services to railroad companies and railroad contractors. Petitioner removes railroad ties and other railroad materials (steel and concrete) from railroad construction sites to Petitioner's yard. Petitioner takes title to the materials it removes from the construction sites. At Petitioner's yard, the materials are unloaded from Petitioner's trucks, sorted into usable and unusable items, and sold if usable or recyclable, or discarded if not usable or recyclable. When enough usable salvaged railroad ties are collected, they are strapped together (packaged) for sale. Unusable ties are discarded. Steel items may be salvaged for sale or sold as scrap. Concrete may be further processed for resale as described below.

Petitioner also pre-plates (assembles) new railroad ties with plates and spikes. Depending on its contract, Petitioner may purchase ties that it will assemble and resell or may assemble ties furnished by its customer.

Petitioner also operates trucks known as "boom" or "logging" trucks (hereinafter boom trucks). These boom trucks are capable of picking up material such as railroad ties, steel rails, scrap steel and scrap concrete and either loading the materials onto themselves or other trucks for transport to Petitioner's facility. The boom trucks operate on the highways and go to different construction sites to load materials to transport to Petitioner's yard. Once material is brought to Petitioner's yard, Petitioner uses its skid steers and front end loaders to sort, grade, and stack material. Some of the material is inventory for sale and some is scrap. The scrap is loaded onto Petitioner's trucks to be sold for recycling or taken to a facility for disposal.

Petitioner also has a material handler machine and a rock crusher. The material handler breaks up large pieces of concrete and loads them into the rock crusher. Once the concrete has been processed through the rock crusher, it can be sold as crushed stone. The material handler and crusher may also be used to process other non-concrete debris that is ultimately discarded by Petitioner.

Applicable law and regulations

Section 1105 of the Tax Law provides, in part:

On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax of four percent upon:

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

* * *

(c) 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 of the Tax Law provides:

Exemptions for certain parts, tools, supplies and services relating to tangible personal property used or consumed in production. . . . (a) 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.

(b) Receipts from every sale of the services of installing, repairing, maintaining or servicing the tangible personal property described in paragraph twelve of subdivision (a) of section eleven hundred fifteen of this article, including the parts with a useful life of one year or less, tools and supplies described in subdivision (a) of this section, to the extent subject to such tax, shall be exempt from the tax on sales imposed under subdivision (c) of section eleven hundred five of this article.

(c) Parts with a useful life of one year or less, tools and supplies described in subdivision (a) of this section and services described in subdivision (b) of this section shall be exempt from the compensating use tax imposed by section eleven hundred ten of this article.

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 . . . 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. . . .

Section 1139 (a) of the Tax Law provides, in part:

In the manner provided in this section the tax commission shall refund or credit any tax, penalty or interest erroneously, illegally or unconstitutionally collected or paid if application therefor shall be filed with the tax commission (i) in the case of tax paid by the applicant to a person required to collect tax, within three years after the date when the tax was payable by such person to the tax commission as provided in section eleven hundred thirty-seven Such application shall be in such form as the tax commission shall prescribe. . . .

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

Sale of services of producing, fabricating, processing, printing or imprinting.

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

(2) The enumerated services are not taxable when:

- (i) purchased for resale; or
- (ii) performed on property intended for resale.

* * *

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

* * *

(c) *Fabricating.* *Fabricating* is the alteration or modification of tangible personal property to the specifications of the purchaser of the service, without changing the identity of the property. . . .

* * *

(d) *Processing.* *Processing* is the performance of any service on tangible personal property for the owner which effects a change in the nature, shape, or form of the property.

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

(a) *Exemption.* (1) *Exemption from statewide tax.* An exemption is allowed from the tax imposed under subdivisions (a) and (c) of section 1105 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 useful life of more than one year) used or consumed directly and predominantly in the production for sale of tangible personal property . . . by manufacturing, processing, generating, assembling, refining, mining or extracting. . . .

* * *

(b) *Production.* (1) The activities listed in paragraph (a)(1) of this section are classified as administration, production or distribution.

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

(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.

(3) The determination of when production begins is dependent upon the procedure used in a plant. If on receiving raw materials, the purchaser weighs, inspects, measures or tests the material prior to placement into storage, production begins with placement into storage, and the prior activities are administrative. If the materials are unloaded and placed in storage for production without such activities, the unloading is the beginning of production.

Example 1: A crane is used to unload raw materials, which are immediately placed in storage at a plant. From the storage site, the material is placed on an assembly line without testing. The crane is being used in production.

Example 2: Testing equipment used to test incoming materials is not used in production and is subject to tax.

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

Example 3: A food processor sells canned food in cases of 48 cans. The canned food is stacked for later labeling and casing. The line of production is deemed to extend through the labeling and casing operation.

(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.

* * *

Example 7: Trucks which are required to be registered with the Department of Motor Vehicles used to transport raw materials from a pit to a processing plant over a public road are not 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.

Opinion

Petitioner provides construction debris removal services to railroad companies and railroad contractors. Petitioner recycles some of the materials it removes. Petitioner uses its boom trucks to pick up debris (i.e., railroad ties, scrap steel and concrete) from railroad construction sites and deliver it to Petitioner's yard. Once the debris is unloaded at Petitioner's yard, Petitioner uses skid steers and front end loaders to sort, grade and stack the debris into lots of usable materials that may be resold or recycled, and unusable material to be discarded.

Petitioner also pre-plates or assembles new railroad ties. Depending on its contract with a customer, Petitioner may either assemble ties it has purchased or assemble ties provided to it by the customer.

Section 1115(a)(12) of the Tax Law exempts from sales and use tax the sale or use of machinery or equipment used directly and predominantly in the production of tangible personal property for sale by manufacturing, processing, generating, assembling, refining, mining, or extracting. *Producing* is defined in section 527.4(b) of the Sales and Use Tax Regulations as the manufacture of a product from one or more raw materials or any process in which a raw material loses its identity when the production process is completed. *Processing* is defined in section 527.4(d) of the Sales and Use Tax Regulations as the performance of any service on tangible personal property which effects a change in the nature, shape, or form of the property. Except for the scrap concrete described in this Opinion, Petitioner does not appear to be engaged in production for sale by processing or any of the other activities listed in section 1115(a)(12) with respect to the materials it collects from railroad construction sites. Rather, Petitioner merely sorts through the debris and separates usable items from those that are unusable. For example, Petitioner collects scrap railroad ties from one or more railroad construction sites and uses its own trucks to deliver them to its yard. The individual ties are either usable as is or are discarded. Petitioner uses its skid steers and front end loaders to segregate the railroad ties into categories and stack them accordingly. When enough usable ties are collected, they are strapped together (packaged) for sale. Petitioner takes unusable ties to a disposal facility. Petitioner makes no change in the nature, shape, or form of these ties. Petitioner segregates its steel scrap. Some is inventory for sale and some is recycled and sold as scrap. These activities do not constitute

production of tangible personal property for sale by processing for purposes of section 1115(a)(12).

It should be noted that persons engaged in the processing of scrap material for sale may be considered as being engaged in *processing* within the meaning of section 1115(a)(12) of the Tax Law (*Lindemann Recycling Equipment, Inc.*, Adv Op Comm T & F, January 31, 1989, TSB-A-89(3)S). However, merely sorting scrap steel and railroad ties into saleable lots as described in this Advisory Opinion is not processing as contemplated by section 1115(a)(12) of the Tax Law. Therefore, Petitioner's skid steers and front end loaders, or any other machinery and equipment, used for such activities do not qualify for the exemption provided under section 1115(a)(12).

Petitioner also assembles new railroad ties with plates and spikes. Depending on the contract, Petitioner may purchase ties that it will assemble and resell or Petitioner may assemble ties provided to it for such purpose by a customer. Petitioner's assembly of railroad ties furnished by the customer is a service the receipt for which is subject to sales tax under section 1105(c)(2) of the Tax Law unless the service is purchased by the customer for resale. Petitioner's assembly of railroad ties it has purchased for resale constitutes the production of tangible personal property for sale for purposes of section 1115(a)(12) of the Tax Law. Likewise, Petitioner's assembly of railroad ties furnished by its customer qualifies as production of tangible personal property for sale if Petitioner's customer intends to resell the railroad ties as such. Accordingly, machinery or equipment used directly and predominantly (more than 50%) by Petitioner in assembling ties for sale qualifies for exemption from sales and use tax. It is further noted that the assembly of railroad ties furnished by a contractor who intends to install its assembled railroad ties as a capital improvement does not qualify as production of tangible personal property for sale. See *O. W. Hubbell & Sons, Inc.*, Adv Op Comm T & F, September 2, 2004, TSB-A-04(22)S.

Parts, tools, and supplies used directly and predominantly in the production of tangible personal property for sale are also exempt from sales and use tax. See sections 1105-B and 1115(a)(12) of the Tax Law.

Petitioner processes concrete using a material handler and rock crusher, creating a product that can be sold as crushed stone. This machinery or equipment is used to effect a change in the nature, shape, or form of the concrete, changing large pieces of concrete into a usable product, i.e., crushed stone. Petitioner sells the resultant crushed stone.

In order to qualify for the exemption from sales tax granted under section 1115(a)(12) of the Tax Law, the material handler and rock crusher must be directly and predominantly engaged in the production of tangible personal property for sale. Petitioner's material handler and rock crusher processes concrete into crushed stone. Thus, Petitioner's material handler and rock crusher are used directly in an activity that qualifies pursuant to section 1115(a)(12) of the Tax Law and section 528.13(c)(1) of the Sales and Use Tax Regulations. However, to be exempt, the

material handler and rock crusher must be used predominantly to process tangible personal property for sale as required by section 1115(a)(12) and section 528.13(c)(4) of the Sales and Use Tax Regulations. See *Vigliotti Recycling Corp.*, Adv Op Comm T & F, December 24, 1990, TSB-A-90(58)S.

Petitioner's skid steer and front end loader may be used to load concrete into the rock crusher. This activity qualifies as a production activity. See section 1115(a)(12) of the Tax Law and section 528.13(b)(1)(ii) of the Sales and Use Tax Regulations. However, this machinery and equipment is also engaged in the unloading of scrap materials from Petitioner's trucks, the sorting of scrap materials into usable and unusable materials in Petitioner's yard and the loading of recycled materials onto trucks for distribution. These other activities do not occur during the production of tangible personal property for sale. Therefore, Petitioner must establish that its skid steers and front end loaders are used predominantly in the production of tangible personal property for sale to be eligible for exemption pursuant to section 1115(a)(12) of the Tax Law.

At railroad construction sites, Petitioner uses its boom trucks to pick up the construction debris and either load itself or other trucks to transport materials over public highways to Petitioner's yard. It is well established that motor vehicles that travel over public highways are not used directly in production, but rather are used in transportation. See section 528.13(c)(2), Example 7 of the Sales and Use Tax Regulations, and *St. Joe Resources Co. v New York State Tax Commn.*, 72 NY2d 943 (1988). Accordingly, Petitioner's boom trucks do not qualify for the exemption from sales and use tax granted under section 1115(a)(12) of the Tax Law.

If Petitioner has paid sales tax on its purchase of a rock crusher, material handler, or any other machinery or equipment that Petitioner can establish is used directly and predominantly in the production of tangible personal property for sale, Petitioner may apply for a credit or refund of the sales tax paid on such machinery and equipment. Such application should be submitted on an *Application for Credit or Refund of Sales or Use Tax*, Form AU-11, and must be made within three years of the date when the tax was payable by the vendor who collected the tax from Petitioner. See section 1139(a) of the Tax Law.

DATED: December 29, 2006

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