New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-09(59)S
Sales Tax
December 9, 2009

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. S090220A

Petitioner, [redacted] requested an advisory opinion as to whether the components used to construct and operate a commercial wind farm and the construction service costs incurred in assembling and installing the components qualify for the exemptions from the sales and use tax for the purchase and installation of machinery and equipment used and consumed in the generation of electricity for sale. We conclude that the components of the wind farm used or consumed directly and predominantly in the generation of electricity for sale, and the services of installing those components qualify for the exemptions from sales tax provided in sections 1105-B and 1115(a)(12) of the Tax Law. Components otherwise used in the operation of the wind farm do not qualify for the production exemptions. Installations of property that are not exempt from sales tax under sections 1105-B and 1115(a)(12) might still qualify as capital improvements.

Facts

Petitioner furnished the following facts in its Petition and in additional submissions of facts. Commercial wind farms are comprised of various component parts including wind turbines, transformers, cables, and control systems. All of the components have a useful life greater than one year. Electricity generated by wind farms is nearly always sold to utility companies for resale. The electricity must be delivered with specific characteristics in order to be compatible with the utility's electrical grid. If electricity generated by a wind farm does not meet a utility buyer's specific characteristics, it will not be purchased by the utility.

The basic components of a wind generation facility:

1. Wind Turbine - A wind turbine consists primarily of a tower, a nacelle and 3 rotor blades. The rotor blades are constructed from glass reinforced polyester composite and are between 60 and 80 meters in diameter. The blades may weigh in excess of 72,000 lbs (38 metric tonnes). The rotor blades are bolted to a central hub that may weigh in excess of 200,000 lbs. The hub is bolted to the main drive shaft within the nacelle.

The nacelle houses the major mechanical components of each turbine, including the main drive shaft, gear box and generator. The nacelle also houses hydraulics, cooling systems, and control and monitoring equipment. The nacelle obtains its structural strength from a cast iron steel bed frame. The bed frame is bolted to the tower with anchor bolts. A reinforced fiberglass outer covering is bolted to the bed frame to protect the interior components from the elements. The total weight of the nacelle may be in excess of 132,000 lbs (68 metric tonnes).

Though the term "nacelle" is technically just the fiberglass or steel shroud that encloses the wind turbine generator components, within the industry this term is often used to refer to the generator components as a whole.

2. Wind Turbine Tower - Each tower is constructed in 3 or 4 sections, depending on necessary desired height, of high grade, multi-coated, tubular steel and is anchored with anchor bolts to a concrete foundation. The steel is painted for protection. A ladder may be affixed to the inside or outside of the tower. The towers and foundations must be of construction robust enough to support the weight and loads of the turbines which reach a tip height of 300 feet above grade and must withstand winds in excess of 100 mph. Towers when assembled may weigh in excess of 300,000 lbs (150 metric tonnes) for an 80 meter hub height to 400,000 lbs (200 metric tonnes) for a 95 meter hub height.

3. Wind Turbine Foundation - Each turbine foundation is made of concrete which is generally mixed in batch plants close to the wind farm. The reinforced poured concrete foundation houses a cylindrical pattern of anchor bolts. The tower is permanently bolted to the foundation with anchor bolts.

4. Step-Up Transformers (Padmount/External Transformer, Internal Transformer) and Substation Transformers

Each turbine is equipped with a transformer. The type of transformer will vary based on the model of turbine used, but will fall into one of two categories: a padmount or external transformer, and an internal transformer. External transformers will be connected to the turbine and will be positioned near the base of the tower and will be anchor bolted to a concrete foundation and hardwired into the turbine control panel and the Project electrical collection system (described below). Internal transformers will be located in the nacelle, where they will be anchor bolted to the machine floor and hardwired to the tower.

Substation transformers are located at substation sites and are designed to reconfigure the characteristics of the electricity to meet the required voltage levels of a public utility buyer.

5. SCADA Control System - A Supervisory Control And Data Acquisition (SCADA) system collects data from wind turbine sensors and sends them to a central computer for management and control. This integrated control system allows the plant operators to control each turbine remotely and to collect data on wind turbine performance. Each turbine has a SCADA System control panel which is located in the base of the turbine tower where it is bolted to the inside wall of the tower.

6. Meteorological Tower and Equipment - A tower used at a potential project site which has equipment attached to it which is designed to assess wind resources. Generally a meteorological tower will have anemometers, wind direction vanes, temperature and pressure sensors, and other measurement devices attached to it at various levels above the ground.

7. Intra-Wind Farm Electrical Collection/Processing Cables and Junction Boxes - The electrical collection system consists of electrical cables and junction boxes which transition electricity generated by the turbines through the transformers and substations. The majority of these collection cables and junction boxes will be buried underground.

8. Project Substation(s) - Project substations will be constructed whereby the electricity produced by the turbines will be collected via the electrical collection system and transmitted to the project substation. At the substation transformer, the electricity is stepped up to a final saleable voltage for transmission to the interconnect point via a below ground or an above ground transmission line. Each project substation will consist of a control house, transformer(s), outdoor breakers, metering and relay equipment, high voltage bus work, steel support structures, and overhead lightning suppression conductors. All of this equipment will be anchor bolted to concrete foundations.

9. FAA Safety Lights and Tower – The Federal Aviation Administration requires that safety lights be placed on top of the wind turbine towers to warn aircraft of their presence and avoid collisions. Typically, lights are affixed directly to the wind turbine towers. Occasionally, lights are set atop one or more separate FAA light towers.

10. Maintenance and Operations Building - The Maintenance and Operations Building is a small building constructed on the project site. The building houses a portion of the project control system, spare parts/equipment, and maintenance supplies, and may function as an office for the project operations team.

11. Substation Fencing - Fencing is installed around the perimeter of each substation for safety purposes.

12. Construction Materials (Gravel/Concrete) - A wind farm developer or its contractors will frequently purchase constructon materials *(e.g.,* gravel) and will construct service roads across key wind farm locations.

13. Overhead Poles and Cables- Transporting Electricity to the Interconnect Point. - Electricity produced by the wind turbines travels via a series of cables and wires to the interconnect point. Depending upon the project requirements, the cables may be placed below ground or above ground.

14. Reactive Power Compensation Equipment (DVAR or DstatCom System) - In a wind farm substation, a DVAR or DstatCom system dynamically stabilizes and regulates power factor or voltage immediately prior to the interconnect point where electricity flows from the wind farm to the public utility grid. Typical wind farm interconnection problems solved by application of the DVAR or DstatCom system include voltage regulation, power factor correction, and low voltage ride through.

Commercial wind farms generally have between 20 and 150 wind turbines. A wind turbine when fully assembled (tower, nacelle, rotor blades) can reach a height of over 300 feet and typically weighs in excess of a half million pounds.

The process for generating saleable electricity begins when wind passes across the rotor blades of a wind turbine. The kinetic energy from wind causes the blades to spin which in turn causes the generator, which is coupled to the rotor shaft through a gear box, to rotate.

The rotating shaft then turns the turbine generator creating electricity at approximately 600 volts. Modern and sophisticated control systems (SCADA systems) are now integrated into the wind turbines to allow for remote monitoring and management of the wind turbine for optimal production. These SCADA systems are in most cases purchased from turbine manufacturers. Additionally, most wind farms also employ one or more meteorological towers with state of the art weather collection and transmission equipment. This meteorological equipment may also be installed on or built into the wind turbines. This equipment is a necessary part of the industrial processing configuration because the data provided by the meteorological equipment is used to make wind turbine efficiency and safety adjustments in near *real time* via the electronic control system. Due to the vast distances between wind towers, meteorological towers play an important role in maximizing energy production. To alert low flying aircraft of their presence, commercial wind turbines are typically required to have Federal Aviation Administration (FAA) approved warning lights attached to the top of the towers. The wind turbines and towers are securely fastened to concrete and steel foundations designed to withstand the severe loads inherent from the horizontal forces of the wind.

The two primary characteristics of electricity are voltage (measured in volts or kilovolts (kV)) and current (measured in amps). Power (measured in kilowatts) is the product of voltage and current - so for a given amount of power, the higher the voltage the lower the current and vice versa. High voltage equipment is much more expensive than low voltage equipment.

Wind turbines produce power nominally at 600 volts. Each wind turbine is equipped with a transformer (either within the nacelle or at grade level outside the base of the tower) to increase the voltage up to something in the 20kV to 35kV range (considered "medium" voltage). Either underground or overhead cables (or both) are then used to transmit the power to the interconnection point with the utility. However, a wind farm cannot be connected to a utility unless the output voltage exactly matches that of the utility. Therefore a substation with another transformer is needed at or near the point of interconnection to further increase the voltage to that required by the utility. Utility transmission voltages typically range from 69kV to 500kV (considered "high" voltage), so the main step-up transformer(s) in the substation will increase the voltage from the medium voltage level of the collection circuits up to the high voltage level required by the utility. Substations also contain protective devices such as "breakers" that can immediately disconnect any of the wind farm collection circuits or even the entire wind farm in the event of a problem.

Substations may also include what is known as reactive power compensation equipment. This equipment, which regulates the power factor at the point of interconnection, may include dynamic compensation systems such as DVAR or DstatCom. The concept of power factor is somewhat esoteric, but it deals with the amount of reactive power (measured in vars) that is imported or exported from a wind farm. Power factor must be maintained within the limits specified by the utility as a condition of interconnection. Substations are almost exclusively outdoor installations although a small control house is provided to enclose certain sensitive equipment. Because of the potential hazard to the public, substations are fenced in and access is limited to trained personnel.

In order to obtain sufficient efficiency to be commercially viable, wind farms must be located over a relatively wide geographical area. To reduce construction costs, wind turbines are installed in rows that are perpendicular to the prevailing wind direction whenever possible. However, to avoid losses due to interference, turbines in each row generally need to be spaced at least 750-1000 feet apart, and the rows must be spaced several thousand feet apart. When accommodations are made for local terrain and turbine access, the spacing can wind up even more dramatic. Even a moderately sized wind farm can be miles across. Thus, wind farm sites are far more expansive in nature than are sites for traditional coal, gas, or nuclear supplied power plants. As such, the wind farm collection processing system of cables is critical because the cables link the wind turbines to the on-site step-up transformers at the wind farm substations where it is further recast into a higher voltage. The collection cables and transformers also serve to minimize power loss from the wind turbine to the public utility interconnect point because electricity at a higher voltage loses less energy over distance.

Finally, in addition to the wind generation assets described above, Petitioner or its contractors will be required to purchase other general construction materials for the wind farm, such as gravel for the wind farm roads and concrete for the wind tower and substation foundations. Specialty machinery and equipment such as cranes will be leased as part of the construction work.

Wind turbine manufacturer’s employees and consultants will assist with the installation of wind turbine towers, nacelles (including turbines), and turbine blades. The cost of the construction or installation services provided by the wind turbine manufacturers is separately stated in the wind turbine purchase contracts or in separate contracts.

Petitioner will also hire one or more general contractors to build other components of the wind farm including, in part, the collection cable system, the substation (with step-up transformer), meteorological towers, and access roads. Generally, the prime contractor on a wind farm project will hire local sub-contractors to assist with the construction work.

Petitioner will likely enter into multiple lease agreements with private and public land owners to lease small segments of land below and immediately surrounding the individual wind turbines, substation(s), and maintenance/operations buildings. Petitioner will likely enter into contracts with private land owners and public agencies for the right to install wind farm collection cables below or above ground and to build access roads where required. The lease agreements are expected to have terms of 40 to 50 years. The lease terms will likely require Petitioner to remove the wind farm assets installed upon the leased land subsequent to the expiration of the lease (if the term is not extended). Petitioner may also purchase a (relatively) smaller section of land from one public authority and install a portion of the wind farm on such land.

For purposes of the proposed New York wind farm project, Petitioner will likely serve as the primary project developer. Petitioner will contract for construction services with at least one prime contractor. The prime contractor is likely to contract segments of the engagement to local sub-contractors. Petitioner may also engage other contractors directly in addition to the prime contractor.

The commercial wind turbines are usually purchased by Petitioner as *fully manufactured integrated units* directly from wind turbine manufacturers. Petitioner may also *directly* purchase other wind farm components from other manufacturers or from distributors. Alternatively, Petitioner's contractor and/or sub-contractors may purchase wind farm components and materials. In these scenarios, Petitioner typically reimburses the contractor for the cost of the product or pays the contractor a lump sum for a specific wind farm construction sub-project.

Petitioner specifically asked:

1. Whether the production of saleable electricity at a commercial wind farm qualifies as a generating, manufacturing or processing activity for purposes of the New York sales and use tax production exemption provided by § 1115(a)(12) of the Tax Law.

2. If the operation of a commercial wind farm is a production activity eligible for the exemption, which wind farm assets are exempt?

3. Whether the costs for construction services and installation services incurred in the original construction of a commercial wind farm are subject to the New York sales and use tax.

4. Whether the application of the production exemption depends upon whether the qualifying tangible personal property and services are purchased by Petitioner or by one or more of its construction contractors.

Analysis

Tax Law section 1115(a)(12) provides an exemption from sales tax for machinery or equipment for use or consumption directly and predominantly in the production of electricity for sale by generating, 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. Parts with a useful life of one year or less, tools, and supplies used in connection with such generating machinery and equipment are exempt pursuant to section 1105-B of the

Tax Law. Section 1105-B also provides an exemption from the tax imposed by section 1105(c)(3) of the Tax Law for the services of maintaining and installing machinery and equipment that otherwise qualifies for the exemption provided for generating equipment in section 1115(a)(12).

1. Is the wind farm eligible for the production exemption?

Petitioner's wind farm is engaged in the generation of electricity for sale. Thus, the receipts from the purchase of the machinery and equipment used directly and predominantly by Petitioner to generate electricity for sale are eligible for the exemptions provided in Tax Law sections 1115(a)(12) and 1105-B.

2. Which wind farm assets are exempt?

It is obvious that the wind turbine can generate electricity only if its various parts function as an integrated unit. The blades must be sufficiently raised to clear the ground. The hub height and rotor blade height must clear ground and ridge lines so as to efficiently capture the wind. The nacelle (the housing which encases the generator which is connected to the hub which in turn is attached to the blades) needs to be adequately supported for its weight and to withstand the force of the wind and the spinning blades, at an appropriate height above the ground and ridge lines, and able to rotate to keep the rotor blades facing into the wind.

The determination as to whether a particular piece of machinery qualifies for the exemption depends upon the peculiarities of a taxpayer's operation and must be individually assessed on its own fact pattern (*Matter of Rochester Independent Packer, Inc. v. Heckelman*, 83 Misc 2d 1064, 374 NYS2d 991). Without any key piece of the wind turbine's machinery and equipment, including the tower (to provide support for the nacelle and to provide necessary height clearances for the rotor blades) and the rotor blades (to catch the wind to turn the hub that spins the generator), electricity could not and would not be produced. Only with all the parts working as an integrated unit is electricity generated. We thus conclude that the wind turbine (rotor blades, hub, nacelle and tower) constitute a unitary piece of machinery or equipment that is used directly and predominantly in the generation of electricity for sale. (*See Deco Builders* decision Tx App Trib No. 806415, May 9, 1991 holding that a one-quarter mile long wooden penstock tube designed to create sufficient water flow to power an electric turbine generator, which was assembled on-site, qualified as exempt generation equipment.) Accordingly, purchases of the wind turbine equipment are exempt from sales tax under Tax Law §1115(a)(12).

The Supervisory Control and Data Acquisition (SCADA) equipment and the meteorological equipment perform functions that provide for an integrated management of the operation and control of the wind turbine. The SCADA and the meteorological equipment being integrally connected to the operation of the wind turbines may also qualify as exempt electricity generation machinery and equipment pursuant to the provisions of section 1115(a)(12) of the Tax Law. (*See T.V. Data Inc* , decision Tx App Trib No. 803016, March 2 1999, which held that computers that formed a network [though not all of the computers were directly connected to the production machinery] to provide commands to drive the production equipment were exempt.)

However, the use of meteorological equipment to assess a site's potential as a wind farm is not an exempt use. Therefore, unless otherwise used directly and predominantly (more than 50% of the time) in the operation of the wind turbines, the meteorological equipment would not qualify for the exemption.

The wind turbine's concrete foundation (to which the tower is anchored) and the concrete foundations for the padmount transformers when purchased in the form of the raw materials (concrete, steel rebar, and connecting rods) or on an installed basis are neither machinery nor equipment. Nor do they perform a function which has an actual causal effect on the generation of the electricity. (*See Matter*

of Slattery Associates, Inc. v. Tully, 79 A.D.2d. 761.) Thus, the vendor's receipts from the sale of these materials are not exempt pursuant to the provisions of Tax Law section 1115(a)(12).

Matter of Niagara Mohawk Power Corporation v George W. Wanamaker, 286 App Div 446(4th Dept 1955), *affd* 2 NY2d 764, supports this conclusion. There, the court determined that for purposes of a local sales tax exemption for equipment used directly and exclusively in the generation of electricity for sale that the production process ended at the generator that produced the electricity. The court determined that other equipment at the plant that stepped up the voltage of the electricity was not used in production. In determining that the production process ended at the generating turbine, the court reasoned that, since the increased voltage was clearly in excess of what the majority of Niagara Mohawk's customers could use, the "reason for the increase involves economics of transmission and distribution. The voltage is radically increased, and then gradually decreased simply to facilitate distribution." The court concluded that items subsequent to the generator (various substations, transformers, towers, poles, conductors, voltage regulators, circuit breakers and similar equipment located at a steam plant and elsewhere) were used in the distribution of and not in the production of electricity. (*See also ABB Power Transmission, Inc.,* Adv Op Comm T&F, July 17, 1990, TSB-A-90(34)S and, with respect to transformers used in the regulation or transmission of electricity throughout a plant or mine, *see Gernatt Asphalt Products, Inc.,* Adv Op Comm T&F, December 5, 1985, TSB-A-85(64)S; *Akzo Salt, Inc.,* Adv Op Comm T&F, January 1993, TSB-A-93(8)S).

Accordingly, transformers, which as described by Petitioner are all located after the generation stage of the production process and are generally used to "step up" the voltage for transmission purposes, are considered to be used in distribution activities and are thus not used directly in production for purposes of section 1115(a)(12) of the Tax Law. *See* section 528.13(b) of the Sales and Use Tax Regulations. Therefore, the purchases of transformers by Petitioner, whether the transformers are situated inside the wind turbine, pad-mounted near the base of the wind towers, installed as part of a substation, etc. are not exempt under section 1115(a)(12). *See also Conti Enterprises, Inc*., Adv Op Comm Tx & Fin, September 27, 2005, TSB-A-05(35)S; *Western NY Beverage Industry Collection & Sorting*, Adv Op Comm Tx & Fin, July 23, 1997, TSB-A-97(40)S. The fact that Petitioner is not a utility transmission company and is not engaged in the transportation and distribution of electricity to consumers does not mean that Petitioner does not engage in its own distribution and delivery (albeit without charge) of its product (electricity) to the utility transmission company that will further transport the product to Petitioner's customers.

Production having ended at the generator, the collection system equipment (Intra-Wind Farm Collection/Processing Cables, and Junction Boxes) does not qualify as machinery and equipment used and consumed directly and predominantly in the generation of electricity for sale. Thus, purchases of such materials and installation thereof are subject to sales tax.

The Project Substation(s), consisting of a control house, transformer(s), outdoor breakers, metering and relay equipment, high voltage bus work, steel support structures and overhead lightning suppression conductors, transmission cables (above or below ground connecting to the interconnect point), and Reactive Power Compensation Equipment (which is located immediately prior to the interconnect with the public utility grid) are likewise used in distribution activities and thus do not qualify for the production exemption.

The FAA Safety Lights and Towers, Maintenance and Operations Building, Substation Fencing, and Wind Farm Road Materials are not machinery or equipment used directly or predominantly in

production of electricity for sale and thus are not exempt from tax pursuant to section 1115(a)(12) of the Tax Law.

3. Are installation services and construction costs for the wind farm subject to sales tax?

Due to the massive size (tower sections of 70-100 feet in length and blades of 100+ feet in length) and weight of the individual pieces (tower sections weighing 30 to 60 tons, blades weighing 12 tons each, nacelle of 60 tons and hub weighing 100 tons), it is not practical or possible for the manufacturers of this equipment to deliver a *preassembled* wind turbine to a customer. Based on its completed size and weight, such a piece of equipment could not be transported either over the public roads and highways or up the hills, ridges, mountains, etc. to be placed into position. Thus, as a practical necessity, the wind turbine parts must be individually transported and then assembled on-site prior to the wind turbine's installation. Charges for assembly of the wind turbine performed by the manufacturer or the manufacturer's subcontractor are considered part of its sales price and are exempt from sales tax under Tax Law §1115(a)(12). (*See* section 541.6(d) of the Sales and Use Tax Regulations discussing a manufacturer's on-site assembly of production equipment too large, heavy, etc. to be assembled at the factory.)

Charges for the installation of electricity-generating machinery and equipment qualifying for the exemption provided in Tax Law §1115(a)(12) are exempt from tax pursuant to the provisions of section 1105-B of the Tax Law. Thus, the receipts for the installation of the wind turbines, SCADA equipment, and qualifying meteorological equipment are exempt from sales tax.

With respect to the equipment and other tangible personal property purchased by Petitioner that do not qualify for the production exemption, the charges for installing this property will be taxable or exempt depending on whether the installations qualify as a capital improvement. Section 1101(b)(9) of the Tax Law provides that a capital improvement is an addition or alteration to real property which: (A) substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property; and (B) becomes part of the real property or is permanently affixed to the real property so that removal would cause material damage to the property or article itself; and (C) is intended to become a permanent installation.

When a contractor installs for the owner of the realty an improvement that meets all three of the conditions set forth in section 1101(b)(9)(i) of the Tax Law, the work is considered a capital improvement. In that case, charges for the installations are not subject to sales tax. *See* sections 1105(c)(3)(iii) and 1115(a)(17) of the Tax Law.

Items that are installed for a tenant, which if installed for the property owner would be a capital improvement, may qualify as a capital improvement depending on the terms of the tenant's lease. *See Matter of Flah's of Syracuse, Inc. v. James H. Tully, Jr. et al*, 89 AD 2d 729. Additions or alterations to real property for or by a tenant of the property are presumed to be temporary in nature for purposes of the definition of capital improvement set forth in section 1101(b)(9)(i) of the Tax Law, unless a contrary intention is demonstrated. Specific lease provisions that state that: 1) immediately upon installation, title to such installation vests in the lessor, and 2) the addition or alteration becomes part of and remains with the premises after the termination of the lease, may demonstrate an intention to make the installation permanent. Neither a provision granting the lessor the right to require removal of the improvement nor a provision stating that the improvement becomes the property of the lessor upon expiration of the lease or upon termination of the tenancy will negate this demonstration of intention of permanence. In the absence of a lease provision, other factors such as the nature of the installation, or written agreements other than a lease provision, may be considered in determining the intention of the parties with respect to the permanence of the installation. Factors that may indicate that a tenant installation is not intended to

be permanent include a lease provision requiring that the leased premises be restored to its original condition at the termination of the lease, and the rental of the installed property by the tenant from someone other than the lessor of the premises. *See Taxable Status of Leasehold Improvements for or by Tenants*, Technical Service Bureau Memorandum, June 15, 1983, TSB-M-83(17)S, and Publication 862, *Sales and Use Tax Classifications of Capital Improvements and Repairs to Real Property* (4/01) for further details.

Section 541.5 of the Sales and Use Tax Regulations provides, that for capital improvements contracts, all purchases of tangible personal property (excluding qualifying production machinery and equipment exempt under section 1115(a)(12) of the Tax Law) that are incorporated into and become part of the realty or are used or consumed in performing the contract are subject to tax at the time of purchase by the contractor or other purchaser. A certificate of capital improvement may not be validly given by any person or accepted by a supplier to exempt the purchase of these materials. However, a contractor or subcontractor may purchase tangible personal property exempt from tax if the property is used in erecting a structure or building owned by an organization or government entity exempt from tax under Tax Law section 1116(a), or in adding to, altering, or improving real property owned by the exempt organization or government entity, and the tangible personal property becomes an integral component part of the structure, building, or real property. *See* Tax Law section 1115(a)(15).

The regulations further provide that if a contract includes the sale of tangible personal property which remains tangible personal property after installation, the contractor must collect the appropriate New York State and local sales taxes from the customer on the selling price, including any charge for installation, of the tangible personal property unless some exemption applies and the purchaser gives the seller a properly-completed exemption certificate.

Thus, aside from the installation of property that is considered exempt from tax pursuant to section 1115(a)(12) of the Tax Law as equipment used directly and predominantly in the generation of electricity for sale (i.e., the wind turbines, etc.), the tax status of the installation depends on whether Petitioner owns or leases the underlying real property and the nature of the installation. Accordingly, the taxability of the charges for the installation of (i) concrete foundations and pads for the wind turbine towers, transformers, meteorological towers, project substations, maintenance and operations building, FAA light towers and overhead cables; (ii) roads; (iii) fencing; and (iv) the maintenance and operations building will depend upon whether those installations and structures are on property owned or leased by Petitioner and the terms of the lease contract. Other installations such as the FAA lights and the light towers, substation equipment anchor bolted to foundations, and overhead poles appear to constitute property of a kind that retains its identity as tangible personal property upon installation, and the receipts for both the property and installation are taxable whether installed on owned or leased property. *See West Mountain Corporation v. Miner*, 85 Misc 2d 416 (1976) and *Charles R. Wood Enterprises, Inc. v State Tax Commission*, 67 AD 2d 1042 (1979).

4. Does the production exemption depend on whether Petitioner or its contractor is the purchaser?

In general, property that is exempt from sales tax under section 1115(a)(12) or 1105-B will be exempt from tax whether purchased by Petitioner or purchased by and sold to Petitioner on an installed basis by a contractor or subcontractor. Installation charges that are exempt from tax under section 1105-B are nontaxable when performed on Petitioner's behalf by its contractors or subcontractors. Nonexempt property is subject to tax whether purchased by Petitioner or by one of Petitioner's contractors who install the property as part of a capital improvement. Petitioner's purchases of installation services for the nonexempt property are taxable if the property remains tangible personal property after installation. Petitioner's contractors may purchase the nonexempt property and installation service for resale if the

property remains tangible personal property after installation. A contractor should give the vendor a properly completed Contractor Exempt Purchase Certificate (ST-120.1) in order to make an exempt purchase for resale of such property.

Purchases and leases of construction tools and equipment for use by Petitioner, its contractors or subcontractors in constructing and erecting the facility are subject to sales tax.

DATED: December 9, 2009

/S/
Jonathan Pessen
Director of Advisory Opinions
Office of Counsel

NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.