

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

TSB-A-81(67)S  
Sales Tax  
April 6, 1982

STATE OF NEW YORK  
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S810901A

On September 1, 1981, a Petition for Advisory Opinion was received from Midstate Precast Systems, Inc., P.O. Box 1111, Binghamton, New York 13902.

The issue raised is whether Petitioner's purchases of machinery and equipment, and of energy used to operate such machinery and equipment, are subject to New York State and local sales taxes.

Petitioner is engaged in the business of producing precast concrete wideslab. The production of wideslab is accomplished as follows. Cement and aggregate are heated in a batch plant and then mixed with water. This mixture is conveyed in off-road mixers to casting beds. The casting beds are also heated. All energy used is consumed in production only, in the batch plant and under the casting beds.

Petitioner sells the wideslab either on an installed basis or on an uninstalled basis. When sold on an installed basis, Petitioner arranges to have the installation performed by a sub-contractor, as Petitioner's employees do not perform installations.

Petitioner indicates that during a four year period selected as a test period by Petitioner it sold 3,781,215 square feet of wideslab on an installed basis and 1,716,966 square feet on an uninstalled basis. Of this amount, 265,400 square feet of wideslab was sold on an installed basis within New York and 84,342 square feet was sold on an uninstalled basis within New York.

Section 1105(a) of the Tax Law imposes the State sales tax on the receipts from retail sales of tangible personal property. However, Section 1115(a)(12) of the Tax Law provides for an exemption from such tax with respect to "Machinery or equipment for use or consumption directly and predominantly in the production of tangible personal property . . . for sale, by manufacturing, processing . . ." Local sales tax laws are required to provide for an exemption with respect to all tangible personal property used directly and predominantly in the production of tangible personal property for sale. Tax Law, §1210(a)(1).

The Sales and Use Tax Regulations elucidate the meaning of the term "predominantly," as follows: "Machinery or equipment is used predominantly in production, if over 50% of its use is directly in the production phase of a process." 20 NYCRR 528.13(c)(4).

Inasmuch as more than 50% of the wideslab produced by Petitioner is sold on an installed basis, Petitioner is not predominantly engaged in manufacturing tangible personal property for sale, but in performing capital improvements. Accordingly, as the machinery and equipment purchased

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by Petitioner is not used predominantly in manufacturing wideslab for sale, the sales tax exemptions provided under Section 1115(a)(12), and pursuant to Section 1210(a)(1), of the Tax Law, are not applicable.

Section 1115(c) of the Tax Law provides for an exemption, applicable to State and local sales taxes, with respect to "Fuel, gas, electricity . . . and steam, and gas, electric . . . and steam service of whatever nature for use or consumption directly and exclusively in the production of tangible personal property . . . for sale, by manufacturing, processing . . .".

Only that portion of the fuel purchased by Petitioner for use and consumption in producing the wideslab for sale on an uninstalled basis is "exclusively" used in production for sale. The exemption contained in Section 1115(c) of the Tax Law is applicable to such portion of the fuel purchased, in accordance with the following provision of the Sales and Use Tax Regulations:

"(3)(i) "Exclusively" means that the fuel, gas, electricity, refrigeration and steam and like services are used in total (100%) in the production process.

(ii) Because fuel, gas, electricity, refrigeration and steam when purchased by the user is normally received in bulk or in a continuous flow and a portion thereof is used for purposes which would make the exemption inapplicable to such purchases, the user may claim a refund or credit for the tax paid only on that portion used or consumed directly and exclusively in production.

(iii) In the alternative, an Exempt Use Certificate (Form ST-121) may be used, providing full liability is assumed for any state and local tax due on any part of purchases used for other than the exempt purposes described in subdivision (a) of this section. [Subdivision (a) details the nature of the exemption provided for in Section 1115(c) of the Tax Law.] The taxable portion of these purchases is to be reported as a "purchase subject to use tax" on a sales and use tax return required to be filed with the Tax Commission.

(iv) The user must maintain adequate records with respect to the allocation of fuel, gas, electricity, refrigeration and steam used directly and exclusively in production and for non-exempt purposes.

(v) For the purpose of substantiating the allocation of fuel, gas, electricity, refrigeration and steam and like services used directly and exclusively in production from that used for non-exempt purposes, the user must, when claiming a refund or credit, submit an engineering survey or the formulae used in arriving at the amounts used in an exempt manner." 20 NYCRR 528.822(c).

DATED: December 9, 1981

s/LOUIS ETLINGER  
Deputy Director  
Technical Services Bureau