

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

TSB-A-02(27)S
Sales Tax
July 12, 2002

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S001219A

On December 19, 2000, the Department of Taxation and Finance received a Petition for Advisory Opinion from Richardson Brands Company, 6330 Manor Lane, South Miami, Florida 33143.

The issue raised by Petitioner, Richardson Brands Company, is whether charges for pipelines, metering and sampling equipment, a wastewater holding tank, and materials used in their installation, as described below, are exempt from the New York State and local sales and use taxes.

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

Petitioner is a manufacturer of various candy and chewing gum products. Petitioner's manufacturing process produces waste water which must be disposed of in an environmentally sound manner. Petitioner has undertaken a capital project which will enable Petitioner to comply with the Village of Canajoharie Industrial User Discharge Permit # 2 (IUDP) initially issued on April 1, 1998. The IUDP defines the effluent limitations, monitoring requirements and other conditions for Petitioner to discharge process wastewater generated by Petitioner's manufacturing process to the Municipal Waste Water Treatment Plant (Municipal Plant). The project consists of combining the wastewater flows from the Petitioner's north and south plant into a common discharge point by means of an underground piping system installed by a contractor. At this location a flow metering and sampling manhole is installed by the contractor for the purpose of determining the quantity and the contaminant levels of the wastewater being discharged to the Municipal Plant. A single pipe is installed from the sampling manhole (where the discharge pipes from the two plants join) to a holding tank, described below. The holding tank discharges wastewater into a pipeline that feeds directly to the Municipal Plant. Virtually all of the wastewater is produced by Petitioner's manufacturing processes.

In order to comply with the daily limitations set by the Village for various contaminants and discharges of wastewater, a Flow Equalization System will be installed by the contractor. This system is basically a 69,500 gallon above ground steel storage tank where all the daily process wastewater is temporarily stored, mixed and diluted in order to obtain compliance with the daily limits set by the Village. The proposed system does not provide for pre-treatment of any contaminants in the process wastewater before being discharged to the Municipal Plant. The objective of this system is to produce a more evenly distributed discharge flow to the Municipal Plant on a 24 hour per day, 7 day per week basis.

The project may also include the construction of manhole enclosures and footings or foundations for the manhole enclosures and for the holding tank.

Except for the installation of the 69,500 gallon holding tank, the project was completed prior to March 1, 2001.

Applicable Law and Regulations

Section 1101(b)(9)(i) of the Tax Law defines the term “capital improvement” as:

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.

Section 1105 of the Tax Law provides, in part:

Imposition of sales tax. 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:

* * *

- (3) Installing tangible personal property . . . or maintaining, servicing or repairing tangible personal property . . . not held for sale in the regular course of business . . . except:

* * *

- (iii) for installing property which, when installed, will constitute an addition or capital improvement to real property, property or land, as

the terms real property, property or land are defined in the real property tax law as such term capital improvement is defined in paragraph nine of subdivision (b) of section eleven hundred one of this chapter

* * *

- (5) Maintaining, servicing or repairing real property, property or land, as such terms are defined in the real property tax law, whether the services are performed in or outside of a building, as distinguished from adding to or improving such real property, property or land, by a capital improvement as such term capital improvement is defined in paragraph nine of subdivision (b) of section eleven hundred one of this article

Section 1105-B(b) of the Tax Law provides:

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.

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

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

Machinery and equipment used in production; telephone and telegraph equipment; parts, tools and supplies. (Tax Law, S 1115(a)(12)) (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, gas, electricity, refrigeration or steam, by manufacturing, processing, generating, assembling, refining, mining or extracting. . . .

* * *

(iv) The services of installing, repairing, maintaining or servicing the exempt machinery, equipment, apparatus, parts, tools or supplies identified in subparagraph (i), (ii) or (iii) of this paragraph.

(2) Exemption from taxes imposed by localities other than New York City.

(i) There is an exemption from all local sales and use taxes, other than the taxes imposed in New York City, for all sales and uses of:

(a) tangible personal property used or consumed directly and predominantly in the production for sale of tangible personal property, gas, electricity, refrigeration or steam by manufacturing, processing, generating, assembling, refining, mining or extracting

* * *

(c)(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.

Example 11: A fork lift is used 60 percent of the time on an assembly line and 40 percent of the time for loading finished products onto railroad cars for delivery. The fork lift is used predominantly in production.

* * *

(d) Waste treatment equipment. (1) Machinery and equipment used for disposing of industrial waste, as a 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.

Section 541.6(a) of the Sales and Use Tax Regulations provides:

Machinery and equipment which becomes realty. If a contractor, in the performance of a contract, is required to purchase and install production machinery and equipment that qualifies for the manufacturer's exemption provided for in section 1115(a)(12) of the Tax Law and such machinery and equipment subsequently becomes part of the real property, the contractor is required to obtain from the customer a properly completed certificate of capital improvement and an exempt use certificate which identifies the machinery and equipment that qualifies for the manufacturer's exemption and which, upon installation, becomes part of the real

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property. The contractor then may purchase such machinery or equipment exempt from the New York State and local taxes, including the sales and use taxes in New York City, upon issuance of a properly completed contractor exempt purchase certificate to his supplier.

Opinion

Petitioner's manufacturing process produces industrial wastewater which may need to be mixed and diluted to be in compliance with the IUDP issued by the Village of Canajoharie before it can be discharged into the Municipal Plant. Furthermore, the wastewater can only be released to the Municipal Plant at a rate in gallons per hour which is in compliance with the IUDP. Over 50 percent of the wastewater results from Petitioner's production process. The 69,500 gallon holding tank is designed to store the wastewater so that the wastewater produced each day can be continuously discharged into the Municipal Plant 24 hours per day, seven days per week at a rate which is in compliance with the IUDP.

In this case, Petitioner is hiring a contractor who will install underground pipelines connecting Petitioner's north and south manufacturing plants to a flow metering and sampling manhole which is, in turn, connected by a single pipeline to a 69,500 gallon above ground holding tank. The holding tank discharges into a separate underground pipeline which is connected to the Municipal Plant. The pipelines exiting the two plants, the flow metering and sampling equipment, the pipeline leading from the sampling manhole to the holding tank and the holding tank itself will be considered to be machinery or equipment used directly and predominantly in production by manufacturing, processing, generating, assembling, refining, mining or extracting, if the machinery and equipment is purchased by Petitioner and used predominantly to actually treat, bury, or store waste materials from Petitioner's production process, and over 50 percent of the waste treated, buried or stored results from Petitioner's production process. The 69,500 gallon holding tank is used to store the wastewater, albeit briefly, prior to its release to the Municipal Plant. The piping and flow metering equipment leading into the tank operates harmoniously with the tank to make an integrated and synchronized system that enables Petitioner to discharge its process wastewater in compliance with the IUDP.

Accordingly, the piping system exiting the plants, the flow metering and sampling equipment, the piping leading to the holding tank and the tank itself qualify as machinery and equipment used predominantly to actually treat, bury, or store waste materials from Petitioner's production process where over 50 percent of the waste treated, buried or stored results from Petitioner's production process. See Technical Services Bureau Memorandum, TSB-M-78(15)S, dated July 21, 1978, entitled Materials and Installation Contracts in Manufacturing Process, with respect to piping and metering and sampling equipment. The purchase of this tangible personal property, therefore, is exempt from sales and use tax under Section 1115(a)(12) of the Tax Law. Petitioner should issue an *Exempt Use Certificate* (Form ST-121) to the material supplier, or to the contractor if the contractor is purchasing this machinery and equipment. The contractor, in turn,

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should furnish a *Contractor Exempt Purchase Certificate* (Form ST-120.1) to the supplier. See Section 541.6(a) of the Sales and Use Tax Regulations.

The pipeline leading from the holding tank to the Municipal Plant does not qualify for exemption under Section 1115(a)(12) of the Tax Law since this section of piping is used merely to discharge waste water into the Municipal plant and not to actually treat, bury or store such waste. In this regard, it is similar to any sewer pipe leading from a manufacturing or other facility to a sewer main or other point where sewage is discharged. Purchases of the manhole enclosure and materials for footings or foundations for the manhole enclosure and holding tank are not purchases of machinery and equipment. These are purchases of building materials that do not qualify for exemption under Section 1115(a)(12) of the Tax Law and are subject to sales tax whether such material purchases are made by Petitioner or Petitioner's contractor. See Section 528.13(d)(2) of the Sales and Use Tax Regulations. However, since the installation of pipeline and building materials, as well as the exempt machinery and equipment described above, qualifies as a capital improvement to real property under Section 1101(b)(9) of the Tax Law, the charges by the contractor for such installation are exempt from sales tax pursuant to Section 1105(c)(3)(iii) of the Tax Law. Petitioner should provide a properly completed *Certificate of Capital Improvement* (Form ST-124) to the prime contractor to purchase these capital improvement services exempt from sales tax.

The prime contractor should keep records substantiating which purchases of tangible personal property qualify as machinery or equipment exempt under Section 1115(a)(12) of the Tax Law and which purchases are taxable.

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