

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

TSB-A-05(2)S  
Sales Tax  
January 31, 2005

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S040308A

On March 8, 2004, the Department of Taxation and Finance received a Petition for Advisory Opinion from JPW Riggers & Erectors, Inc., 6376 Thompson Road, Syracuse, New York, 13206.

The issue raised by Petitioner, JPW Riggers & Erectors, Inc., is whether a Qualified Empire Zone Enterprise (QEZE) can claim a sales tax exemption on tool trucks, cranes, other mobile equipment, tools and consumables under the circumstances described below.

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

Petitioner is a construction contractor whose main location has been included in an empire zone. For the purposes of this Advisory Opinion, it is assumed that Petitioner has been certified as a Qualified Empire Zone Enterprise (QEZE) for purposes of the General Municipal Law and Tax Law. Petitioner is the owner or lessee of cranes and mobile equipment that spend some of the time on Petitioner's premises (the yard) which are within the empire zone. Petitioner's cranes fall into one of three categories: small cranes that start the day in the yard and end the day in the yard every day they are used; large cranes that may sit in the yard for weeks until they are needed at a job site where they may remain for a few days before returning to the yard; and medium sized cranes that are at job sites most of the time and are only in the yard for short periods of time. Some of Petitioner's cranes and similar mobile equipment are of a type that may be operated or driven upon a public highway.

Petitioner also has tool trucks that start each day and end each day in the yard. Each tool truck is outfitted with welders, hand tools and consumables (such as welding rods, grease, paint, etc.) which it transports between construction sites and the yard.

**Applicable law and regulations**

Section 1115(z) of the Tax Law provides:

(1) Receipts from the retail sale of tangible personal property described in subdivision (a) of section eleven hundred five of this article, receipts from every sale of services described in subdivisions (b) and (c) of such section eleven hundred five and consideration given or contracted to be given for, or for the use of, such tangible personal property or services shall be exempt from the taxes imposed by this article where such tangible personal property or services are sold to a qualified empire zone enterprise, provided that (I) such property or property upon which such a service has been performed or such service (other than a service described in subdivision (b) of section eleven

hundred five) is directly and predominantly, or such a service described in clause (A) or (D) of paragraph one of such subdivision (b) of section eleven hundred five is directly and exclusively, used or consumed by such enterprise in an area designated as an empire zone pursuant to article eighteen-B of the general municipal law with respect to which such enterprise is certified pursuant to such article eighteen-B, or (ii) such a service described in clause (B) or (C) of paragraph one of such subdivision (b) of section eleven hundred five is delivered and billed to such enterprise at an address in such empire zone; provided, further, that, in order for a motor vehicle, as defined in subdivision (c) of section eleven hundred seventeen of this article, or tangible personal property related to such a motor vehicle to be found to be used predominantly in such empire zone, at least fifty percent of such motor vehicle's use shall be exclusively within such empire zone or at least fifty percent of such motor vehicle's use shall be in activities originating or terminating in such empire zone, or both; and either or both such usages shall be computed either on the basis of mileage or hours of use, at the discretion of such enterprise. For purposes of this subdivision, tangible personal property related to such a motor vehicle shall include a battery, diesel motor fuel, an engine, engine components, motor fuel, a muffler, tires and similar tangible personal property used in or on such a motor vehicle.

(2) Receipts from the retail sale of, and consideration given or contracted to be given for, or for the use of, tangible personal property sold to a contractor, subcontractor or repairman for use in (i) erecting a structure or building of a qualified empire zone enterprise, (ii) adding to, altering or improving real property, property or land of such an enterprise or (iii) maintaining, servicing or repairing real property, property or land of such an enterprise, as the terms real property, property or land are defined in the real property tax law, shall be exempt from the taxes imposed by this article; 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, real property, property or land located in an area designated as an empire zone pursuant to article eighteen-B of the general municipal law in, and with respect to which such enterprise is certified pursuant to such article eighteen-B.

(3) Except as otherwise provided by law, the exemptions provided in this subdivision shall not apply to taxes imposed by section eleven hundred seven of this article or to taxes imposed pursuant to the authority of article twenty-nine of this chapter.

Section 1117(c) of the Tax Law provides, in part:

For purposes of this section, the term :

(1) "Motor vehicle" shall include a motor vehicle as defined in section one hundred twenty-five of the vehicle and traffic law and a trailer as defined in section one hundred fifty-six of the vehicle and traffic law.

Section 125 of the Vehicle and Traffic Law provides:

**Motor vehicles** Every vehicle operated or driven upon a public highway which is propelled by any power other than muscular power, except (a) electrically-driven mobility assistance devices operated or driven by a person with a disability, (b) vehicles which run only upon rails or tracks, (c) snowmobiles as defined in article forty-seven of this chapter, and (d) all terrain vehicles as defined in article forty-eight-B of this chapter. For the purposes of title four, the term motor vehicle shall exclude fire and police vehicles other than ambulances. For the purposes of titles four and five the term motor vehicles shall exclude farm type tractors and all terrain type vehicles used exclusively for agricultural purposes, or for snow plowing, other than for hire, farm equipment, including self-propelled machines used exclusively in growing, harvesting or handling farm produce, and self-propelled caterpillar or crawler-type equipment while being operated on the contract site.

Section 156 of the Vehicle and Traffic Law provides:

**Trailer** Any vehicle not propelled by its own power drawn on the public highways by a motor vehicle as defined in section one hundred twenty-five operated thereon, except motorcycle side cars, vehicles being towed by a non-rigid support and vehicles designed and primarily used for other purposes and only occasionally drawn by such a motor vehicle.

## Opinion

Section 1115(z) of the Tax Law provides an exemption from sales and use tax for purchases and uses of tangible personal property by a QEZE which the QEZE uses directly and predominantly within the empire zone in which such QEZE is certified. Section 1115(z) further provides that in order for a motor vehicle or property related to a motor vehicle to qualify for this exemption, at least 50% of the vehicle's use shall be exclusively within such empire zone, or at least 50% of its use shall be in activities originating or terminating in such empire zone, or both. Usages shall be computed either on the basis of mileage or hours of use, at the discretion of the QEZE. Property related to a motor vehicle includes the vehicle's engine, engine components, battery, muffler, tires, fuel and similar property used in or on the vehicle.

Section 1115(z)(1) of the Tax Law provides that, for purposes of the QEZE exemption, a motor vehicle is defined as in section 1117(c) of the Tax Law. Section 1117(c) of the Tax Law provides that a motor vehicle is defined as in section 125 (or section 156 pertaining to trailers) of the Vehicle and Traffic Law (VTL). Section 125 of the VTL broadly defines the term *motor vehicles* to mean every vehicle operated or driven upon a public highway which is propelled by any power other than muscular power, with a number of exceptions not here relevant. Accordingly, Petitioner's construction equipment which has wheels and tires and is operated or driven upon a public highway is a motor vehicle for purposes of section 1115(z) of the Tax Law. Petitioner's tool trucks are also motor vehicles for purposes of section 1115(z). Petitioner's

construction equipment which does not have wheels or tires is not a motor vehicle when operated on construction sites.

Tool trucks transport equipment and supplies from Petitioner's yard to its construction sites and back to its yard located in the empire zone. If the tool trucks are used to transport supplies to the construction site and return to the empire zone to replenish those supplies consumed during the day, the tool trucks are considered to be used in activities that originate and terminate within the empire zone. If the transportation activities performed by a tool truck either originate or terminate, or both, in the empire zone in which Petitioner is certified as a QEZE under Article 18-B of the General Municipal Law, and at least 50% of the truck's use is in such activities, the tool truck, property related to such truck, and repair parts and services used to repair or maintain such truck, would qualify for exemption from sales and use tax.

Tools, machinery and construction supplies with which the tool trucks are equipped, such as welders, hand tools, welding rods, grease, paint, etc., are not tangible personal property related to a motor vehicle for purposes of section 1115(z) of the Tax Law. The use of such tools, machinery, and construction supplies does not occur until the supplies are used or consumed in the performance of a contract. Thus, such tools, machinery and construction supplies would be exempt from the sales tax only if such property is directly and predominantly (at least 50%) used or consumed by Petitioner in the empire zone in which Petitioner is certified.

Petitioner's cranes and similar mobile equipment that have wheels and tires and which may be operated or driven upon a public highway are motor vehicles under section 125 of the Vehicle and Traffic Law. Such wheeled equipment is, therefore, a motor vehicle for purposes of section 1115(z) of the Tax Law. However, regardless of whether the cranes and similar mobile equipment have wheels and tires and are defined as motor vehicles, they are principally used as construction equipment. For purposes of section 1115(z)(1) of the Tax Law, the activity in which the cranes and other equipment are used is not the operation as motor vehicles on and over the public highways, whether in the transportation of goods from Petitioner's yard to the construction site or otherwise, as discussed below. Rather, the cranes' and other equipment's activities generally consist of the lifting, installing and dismantling of property, performed at a particular construction site and not on the public highways. The activities of lifting, installing and dismantling are activities which originate and terminate at the construction (or other) site at which they are performed by the cranes. The movement of the cranes and similar mobile equipment to and from Petitioner's yard and a construction site, whether or not under their own power, does not constitute an activity of such equipment as contemplated by section 1115(z)(1) of the Tax Law, except as discussed below. Therefore, if at least 50% of the use of the cranes and similar mobile equipment occurs at construction sites located within the boundaries of the empire zone in which Petitioner is certified, the equipment will be used predominantly within such empire zone and the exemption under section 1115(z)(1) will apply. If, however, the use of the cranes and similar mobile equipment at construction sites located outside the empire zone in which Petitioner is certified exceeds the use of such equipment at construction sites located in such empire zone, such equipment will not qualify for exemption under section 1115(z)(1). This is true regardless of whether the cranes and similar mobile equipment return to Petitioner's yard

from the construction site each day, sit in Petitioner's yard for weeks at a time, or are at job sites most of the time.

It is possible that over the road cranes may be used in other activities that would qualify them for the exemption in section 1115(z)(1) of the Tax Law. A crane qualifying as a motor vehicle which is used to load materials or prefabricated structures at a location within the empire zone in which a taxpayer is certified, onto a truck or tractor-trailer combination in order to transport the materials or structures to a job site outside the empire zone, and which travels along with the truck or tractor-trailer to off-load the materials at the job site outside the empire zone, is engaged in activities originating or terminating within an empire zone. Such a crane used at least 50% of the time in activities at construction sites within the empire zone and transportation activities beginning or ending within the empire zone as described in this paragraph would qualify for exemption under section 1115(z) of the Tax Law. The exemption would also apply to purchases of repairs and services to the exempt crane.

The burden is on Petitioner to prove that the equipment, tools and consumables described in this Advisory Opinion are used or consumed by Petitioner directly and predominantly in the empire zone in which Petitioner is certified. With respect to motor vehicles, the burden is on Petitioner to show that at least 50% of the use of any motor vehicle is exclusively within such empire zone or at least 50% of its use is in activities originating or terminating in such empire zone, or both. Petitioner may determine either or both such usages of motor vehicles by computing either on the basis of mileage or hours of use, at Petitioner's discretion. Petitioner must maintain records substantiating that a qualifying exempt use occurred.

DATED: January 31, 2005

/s/  
Jonathan Pessen  
Tax Regulations Specialist IV  
Technical Services Division

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