

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

TSB-A-07(3)S
Sales Tax
February 8, 2007

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S060105B

On January 5, 2006, the Department of Taxation and Finance received a Petition for Advisory Opinion from R. L. Materials, Inc., 930A Old Medford Avenue, Medford, New York 11791. Petitioner, R. L. Materials, Inc., provided additional information pertaining to the Petition on May 5, 2006.

The issues raised by Petitioner are:

1. Whether Petitioner's rock crusher qualifies as machinery or equipment used in the production of tangible personal property for sales tax purposes.
2. Whether Petitioner is required to collect sales tax on its receipts from sales of recycled construction materials including transportation charges.

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

Petitioner operates a facility that accepts construction debris to be recycled. Petitioner's facility accepts sand, gravel, rock, asphalt, concrete, grass, brick, and wood and charges contractors and others to deposit their construction debris at Petitioner's site. Petitioner owns a rock-crushing machine that crushes and grinds these materials into reclaimed concrete aggregates for use in concrete and as fill or into topsoil depending on the composition of the debris sent through the rock crusher. Petitioner sells the resultant materials to construction contractors and others. However, at times, Petitioner's stockpiles of these materials become too large and the materials are given away free of charge or disposed of otherwise. With respect to its sales of reclaimed concrete aggregates and topsoil, Petitioner may deliver the materials in its own trucks, may engage third party trucks to deliver the materials, or Petitioner's customer may pick up the materials at Petitioner's site.

Applicable law and regulations

Section 1101(b) of the Tax Law provides, in part:

When used in this article for the purposes of the taxes imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and by section eleven hundred ten, the following terms shall mean:

* * *

(3) Receipt. The amount of the sale price of any property and the charge for any service taxable under this article, including gas and gas service and electricity and electric service of whatever nature, valued in money, whether received in money or otherwise, including any amount for which credit is allowed by the vendor to the purchaser, without any deduction for expenses or early payment discounts and also including any charges by the vendor to the purchaser for shipping or delivery . . . regardless of whether such charges are separately stated in the written contract, if any, or on the bill rendered to such purchaser and regardless of whether such shipping or delivery . . . is provided by such vendor or a third party

(4) Retail sale. (i) A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property, or (B) for use by that person in performing the services subject to tax under paragraphs (1), (2), (3), (5), (7) and (8) of subdivision (c) of section eleven hundred five where the property so sold becomes a physical component part of the property upon which the services are performed or where the property so sold is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax. Notwithstanding the preceding provisions of this subparagraph, a sale of any tangible personal property to a contractor, subcontractor or repairman for use or consumption in erecting structures or buildings, or building on, or otherwise adding to, altering, improving, maintaining, servicing or repairing real property, property or land, as the terms real property, property or land are defined in the real property tax law, is deemed to be a retail sale regardless of whether the tangible personal property is to be resold as such before it is so used or consumed

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.

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

Section 1132(c)(1) of the Tax Law provides, in part:

For the purpose of the proper administration of this article and to prevent evasion of the tax hereby imposed, it shall be presumed that all receipts for property or services of any type mentioned in subdivisions (a), (b), (c) and (d) of section eleven hundred five . . . are subject to tax until the contrary is established, and the burden of proving that any receipt, amusement charge or rent is not taxable hereunder shall be upon the person required to collect tax or the customer. Except as provided in subdivision (h) or (k) of this section, unless (i) a vendor, not later than ninety days after delivery of the property or the rendition of the service, shall have taken from the purchaser a resale or exemption certificate in such form as the commissioner may prescribe . . . to the effect that the property or service was purchased for resale or for some use by reason of which the sale is exempt from tax under the provisions of section eleven hundred fifteen . . . or (ii) the purchaser, not later than ninety days after delivery of the property or the rendition of the service, furnishes to the vendor: any affidavit, statement or additional evidence, documentary or otherwise, which the commissioner may require demonstrating that the purchaser is an exempt organization described in section eleven hundred sixteen, the sale shall be deemed a taxable sale at retail. . . .

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

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

* * *

(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.

* * *

(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 charges contractors and others to deposit their construction debris at Petitioner's site. The construction debris accepted by Petitioner is ultimately recycled and sold or disposed of otherwise by Petitioner. Petitioner owns a rock-crushing machine that crushes and grinds rock, asphalt, concrete, and other construction debris into usable reclaimed concrete aggregates and topsoil. Petitioner sells these resultant materials. However, if Petitioner's stockpiles of materials become excessive, Petitioner gives the materials away free of charge or disposes of the material otherwise.

In order to qualify for the exemption from sales tax granted under section 1115(a)(12) of the Tax Law, machinery and equipment must be *directly and predominantly* engaged in the production of tangible personal property for sale. Petitioner's rock crusher is used to effect a change in the nature, shape, or form of the construction debris received by Petitioner, crushing and grinding the debris into usable concrete aggregates and topsoil. Petitioner's rock crusher, therefore, *processes* construction debris into reclaimed concrete aggregates and topsoil within the meaning of section 527.4(d) of the Sales and Use Tax Regulations. Thus, Petitioner's rock crusher is used directly in an activity which may qualify as a production activity as contemplated in section 1115(a)(12) of the Tax Law and section 528.13(c)(1) of the Sales and Use Tax

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Regulations. See *Ray's Transportation, Inc.*, Adv Op Comm T&F, December 29, 2006, TSB-A-06(34)S. However, since the materials processed by Petitioner's rock-crushing machine are sometimes sold and sometimes given away free of charge or disposed of otherwise, it is necessary to determine whether the rock-crushing machine is used predominantly (over 50%) to process tangible personal property for sale as required in section 1115(a)(12) of the Tax Law 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.

Accordingly, if Petitioner can substantiate that more than 50% of the rock crusher's use is to process tangible personal property for sale, the rock crusher will qualify for exemption under section 1115(a)(12) of the Tax Law as machinery or equipment used directly and predominantly in the production of tangible personal property for sale.

When Petitioner sells reclaimed concrete aggregates or topsoil to contractors or others, it is making a retail sale of tangible personal property that is presumed to be subject to sales tax unless otherwise exempt. See sections 1101(b)(4) and 1105(a) of the Tax Law. Any charge made by Petitioner to its customer for transportation of its product is not deductible from the taxable receipt. See section 1101(b)(3) of the Tax Law. Accordingly, Petitioner is required to collect sales tax on receipts from its sales of topsoil and reclaimed concrete aggregates including any charge for transportation unless its customer provides Petitioner with a properly completed sales tax exemption document. See section 1132(c) of the Tax Law.

DATED: February 8, 2007

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