

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

TSB-A-90 (34)S
Sales Tax
July 17, 1990

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S880623A

On June 23, 1988 a Petition for Advisory Opinion was received from ABB Power Transmission, Inc., 1460 Livingstone Avenue, North Brunswick, New Jersey 08902.

The issue raised by Petitioner, ABB Power Transmission, Inc., is whether the receipts from its sale and installation of a Static Var Compensator (hereinafter referred to as SVC) to Niagara Mohawk Power Corporation (hereinafter referred to as Purchaser) for use in conjunction with Purchaser's generation and sale of electricity are exempt from New York State and Local Sales and Use Tax pursuant to Section 1115(a)(12) of the Tax Law.

The SVC consists of a series of components being separately sold by Petitioner and installed as part of Purchaser's facility near Leeds, New York. The SVC is principally comprised of a series of thyristor valves, reactors and capacitor banks, power transformers and a control system which is to be connected by step-down and step-up transformers to Purchaser's transmission system.

A brochure submitted by Petitioner refers to a project where two SVCs were installed at substations located within a transmission system. Power is transmitted over a distance of 100 miles from a nuclear power station to the area in which the SVCs are located via two 345kv lines. The stated purpose of the compensators is to stabilize the voltage of the transmission system in such area during various network conditions including major disturbances such as loss of either 345kv feeding line.

Section 1115 of the Sales Tax Law states:

Exemptions from sales and use taxes.

- (a) Receipts from the following shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five

* * *

- (12) Machinery or equipment for use or consumption directly and predominantly in the production of ... electricity ... for sale ...by ... generating

Section 528.13(c) of the Sales Tax Regulations provides as follows:

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... .

* * *

- (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.

In the Matter of Niagara Mohawk Power Corporation v. George W. Wanamaker, 286 App. Div. 446, aff'd. no op 2 2d 764, various substations, transformers, towers, poles, conductors, voltage regulators, circuit breakers and similar equipment located at the steam plant and elsewhere were deemed to be used in transmission or distribution rather than in production of electricity. Production was deemed to stop at the generator, and the increase in voltage by transformers at the plant was simply to facilitate distribution.

A report issued by the New York Power Pool and acquired from the New York State Department of Public Service, entitled N.Y.P.P. Post Marcy South Voltage Study, dated December 7, 1984, states that Purchaser's facility at Leeds, New York is part of and is located approximately midway within a N.Y.P.P. transmission system wherein electricity produced at various generating plants located in western and northern upstate New York and in Canada is transmitted to locations in southern and southeastern New York State.

The N.Y.P.P. Post Marcy South Voltage Study also indicates that the purpose for installing the SVC at Leeds is to provide for a more complete utilization of the transmission system. The report indicates the SVC is capable of accomplishing that objective, in that even though it is not a voltage source, it will provide automatic voltage regulation and adjustable reactive compensation.

The SVC at Leeds is not a generating device. The SVC does not and cannot generate electricity. Therefore, the SVC is not capable of producing electricity nor aiding in the production of electricity.

Inasmuch as the SVC is not a generating device and as it does not and cannot produce electricity nor aid in the production of electricity, it is not considered to be used directly and predominantly, as defined under Section 528.13(c) of the Sales Tax Regulations, in the production of electricity for sale. Accordingly, the SVC does not qualify for the exemption from sales tax afforded production equipment under the provisions of Section 1115(a)(12) of the Tax Law.

It is noted that Petitioner states that no sales tax was to be collected from Purchaser under the contract of sale for the SVC. However, the Tax law does not contain any provision whereby Purchaser's sales tax liability is determined by the language of a contract. Instead, the nature of the transaction between Petitioner and Purchaser will be the basis for determining whether the purchaser incurs a sales tax liability.

Section 525.2 of the Sales and Use Tax Regulations states:

Nature of Tax

- (a)(2) The sales tax is a "transaction tax", liability for the tax occurring at the time of the transaction. ...the taxed transaction is an act resulting in the receipt of consideration for the transfer of title, or possession or both to property or rendition of services from one person to another. ... the tax becomes due at the time of transfer of property or rendition of service.
- (4) The sales tax is a "consumer tax", that is, the tax is imposed on the retail sale of tangible personal property and certain services and is collected from the person who purchases at retail- the consumer. The consumer cannot shift the liability for payment of tax to another person nor otherwise relieve himself of such liability, although the vendor is personally liable for the tax he was responsible for collecting.
- (b) The compensating use tax is imposed on the use within the state of tangible personal property and services which would have been subject to sales tax if purchased in this State. It is designed to equalize the tax burden and to make the purchaser of property or services liable for tax, measured by the purchase price, where for various reasons, the sales tax was not paid at the time of purchase.

Section 1132 (c) of the Tax Law states:

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 ... is not taxable hereunder shall be upon the person required to collect tax or the customer. ... unless 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 certificate in such form as the tax commission may prescribe, signed by the purchaser and setting forth his name and address and ... the number of his registration certificate, together with such other information as said Commission may require, 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, ... the sale shall be deemed a taxable sale at retail.

Section 1105 of the Sales Tax Law imposes sales tax on:

- (a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

TSB-A-90(34)S
Sales Tax
July 17, 1990

(c) The receipts from every sale, except for resale, of the following service:

(3) Installing tangible personal property ... not held for sale in the regular course of business.

Petitioner's installation of the SVC at Leeds, New York is considered to be the installation of tangible personal property. Therefore, Petitioner is liable for collecting the state and local sales tax imposed under section 1105 of the Tax Law on the total charge to Purchaser for the sale and installation of the SVC at Leeds, New York since it did not receive an appropriate exemption document pursuant to Section 1132(c) of the Tax Law.

DATED: July 17, 1990

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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