

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

TSB-A-81 (28) S
Sales Tax
October 5, 1981

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S810514A

On May 14, 1981, a Petition for Advisory Opinion was received from New York State Monument Builders Association, Inc., 10 Marble Place, Ossining, New York 10562.

The issue raised is whether certain machine parts, tools, equipment and supplies used to produce, fabricate and process monuments and memorials are exempt from the sales and compensating use tax.

Section 1105(a) of the Tax Law imposes a tax on: "The receipts from every retail sale of tangible personal property, except as otherwise provided in this article." Section 1115(a)(12) exempts from tax: "Machinery or equipment for use or consumption directly and predominantly in the production of tangible personal property . . . for sale, by manufacturing, processing . . . but not including parts with a useful life of one year or less or tools or supplies used in connection with such machinery, equipment . . ." Fuel used directly and exclusively in the production of tangible personal property for sale is also exempt pursuant to section 1115(c) of the Tax Law.

The Sales and Use Tax Regulations provide that "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). The Regulations also define "directly" to mean "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." 20 NYCRR 528.13(c)(1).

Section 1105-B of the Tax Law provides a phase-out of the statewide tax on purchases of certain parts, tools and supplies used or consumed in production. Subdivision (a) of such section states: ". . . receipts from the retail sales of parts with a useful life of one year or less, tools, supplies . . . for use or consumption directly and predominantly in the production of tangible personal property . . . for sale by manufacturing, processing . . . shall be . . . exempt from such tax on and after March first, nineteen hundred eighty-one." Similarly, section 1105-B provides that with respect to

purchases of such items made between September 1, 1980 and February 28, 1981, the statewide tax shall be two percent. The tax imposed within the City of New York is not affected by this phase-out and these items continue to remain exempt from taxes imposed by all other localities. Section 1105-B also provides the same phase-out of the statewide tax on charges for installing, repairing, servicing and maintaining machinery, equipment, replacement parts, tools and supplies which are exempt from tax pursuant to sections 1115(a)(12) and 1105-B of the Tax Law. However, such services remain subject to all local taxes.

In defining the term "retail sale" the Tax Law states: "a sale of any tangible personal property to a contractor, subcontractor or repairman for use or consumption in erecting structures or building on, or otherwise adding to, altering, improving . . . 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." Tax Law § 1101(b)(4).

The Tax Law and the Sales and Use Tax Regulations define the term "capital improvement" as ". . . an addition or alteration to real property (i) which substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property, and (ii) which 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 (iii) is intended to become a permanent installation." Tax Law § 1101(b)(9) and 20 NYCRR 527.7(a)(3).

The installation of a monument or memorial is a capital improvement to real property. As such, the sale of the monument or memorial or its component materials to an installer is a retail sale pursuant to section 1101(b)(4) of the Tax Law which is subject to the tax imposed in accordance with section 1105(a).

When the installer is also the builder of the monument, the manufacturing exemption provided in sections 1115(a)(12) and 1105-B of the Tax Law is not applicable unless the builder's activities are predominantly the manufacture of monuments and memorials for sale uninstalled. If the predominant business activity of the builder is the sale and installation of monuments and memorials, all purchases of office supplies, shop supplies, foundation supplies and equipment repair services are subject to statewide and local taxes.

Provided the predominant business activity is the sale of monuments uninstalled, the builder is entitled to the manufacturing exemption set forth in section 1115(a)(12) and 1105-B of the Tax Law. In such instances, the builder may purchase the following replacement parts, tools, supplies and repair services tax exempt by issuing a properly completed Exempt Use Certificate (Form ST-121) to the supplier:

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| Layout tools | Carbide-tipped and other machine tools |
| Rubber stencil | Carbide-tipped and other hand tools |
| Rubber stencil filler (glue) | Air hoses and fittings |

Stencil knives and blades	Mineral and other glue solvents
Plastic stencil letters & designs (Stencil Cutting Machine)	Granite cleaner
Glue containers and brushes	Scrub brushes and sponges
Steeling shot	Detergent cleansing agents
Sandblast abrasive	Nylon and canvas stone handling slings
Wire sawing abrasive	Litho and other coloring agents
Sandblasting nozzles	Stone mending adhesives
Stone sawing wire	Stone cutters chalk, pencils, etc.
Diamond sawing blades	Repairs, including parts, to miscellaneous shop equipment such as:
Dust masks and filters	Compressors
Scroll and steeling wheels	Stencil Cutting Machines
Emery rings	Hand Trucks & Dollies
Finishing rings	Wire Saws
Polishing wheels and buffers	Grinders
Tin Oxide and other Polishing Powders	Polishing Machine
Abrasive Wheels	Sand Blast Equipment
Abrasive Stones (Hand)	Slab Splitter

To the extent that layout paper, carbon paper, rubbing paper, film and photocopy paper and toner - listed on office supplies - are used directly in production, as the term "directly" is defined in Sales and Use Tax Regulation 528.13(c), such items may also be purchased tax exempt by issuing a properly completed Exempt Use Certificate (Form ST-121) to the supplier.

Fuel consumed exclusively in a compressor which is used in the production of monuments or memorials for sale may be purchased tax exempt. Tax Law § 1115(c).

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However, the purchase of fuel for heating purposes is subject to the tax imposed pursuant to section 1105(a) of the Tax Law. Repairs to office equipment, including a photocopier, and shop heaters are taxable unless such equipment is eligible for exemption pursuant to section 1115(a)(12) of the Tax Law. Purchases of setting compound, sand, cement and concrete - identified as foundation and setting supplies - are also subject to the tax. Tax Law §§ 1101(b)(4) and 1105(a).

DATED: September 18, 1981

s/LOUIS ETLINGER
Deputy Director
Technical Services Bureau