

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

TSB-A-02(33)S
Sales Tax
July 25, 2002

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S010221A

On February 21, 2001, the Department of Taxation and Finance received a Petition for Advisory Opinion from Brian Knox, 527 S. Richard Street, Bedford, PA 15522. Petitioner, Brian Knox, provided additional information pertaining to the Petition on March 2, 2001.

The issue raised by Petitioner is whether its purchase on May 1, 1999, of an uninstalled greenhouse is subject to sales or compensating use tax.

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

Petitioner purchased a greenhouse in New York State on May 1, 1999, for the purpose of farming organic tilapia fish which are sold as food products. Tilapia are tropical fish that eat algae. They are bred in Petitioner's sustainable "closed loop" system which consists of the greenhouse at issue erected over a 17' x 70' in-ground pond. The pond is insulated, lined, filled with water, and seeded with spirulina algae.

In order for the fish to grow and breed, the pond water temperature must be maintained at 80 degrees Fahrenheit. The pond water is heated by a combination of solar input provided by the greenhouse and a circulating gas hot water system. The exposure to sunlight allowed by the greenhouse is also required for the growth of the algae.

The greenhouse is portable in nature. Petitioner assembled it himself. It is made of two layers of clear agricultural plastic bolted to tubes that are placed in the ground. Air is blown in between the layers to make it rigid enough to keep off the snow and wind. No fabric, canvas, glass, or wood is a part of the greenhouse. It can easily be unbolted, dismantled and reassembled.

Applicable Law and Regulations

Section 1105(a) of the Tax Law imposes sales tax on the receipts from every retail sale of tangible personal property, except as otherwise provided.

Section 1110(a) of the Tax Law provides, in part:

Except to the extent that property or services have already been or will be subject to the sales tax under this article, there is hereby imposed on every person a use tax for the use within this state . . . except as otherwise exempted under this article, (A) of any tangible personal property purchased at retail. . . .

Section 1115(a)(6) of the Tax Law, prior to September 1, 2000, exempted from the sales tax imposed by Section 1105(a) and from the compensating use tax imposed under Section 1110:

Tangible personal property, except property incorporated in a building or structure . . . for use or consumption directly and predominantly in the production for sale of tangible personal property by farming, including stock, dairy, poultry, fruit, fur bearing animal, graping and truck farming. The term farming shall also include ranching, operating nurseries, greenhouses, vineyard trellises or other similar structures used primarily for the raising of agricultural, horticultural, vinicultural, viticultural or floricultural commodities, and operating orchards. In addition, tangible personal property for use in erecting, adding to, altering or improving a silo used in farming to make and store silage on a farm, provided such tangible personal property is to become an integral component part of such silo.

Section 528.7 of the Sales and Use Tax Regulations provides, in part:

* * *

(b) *Farming*. The term *farming* means and includes the following types of farming and activities:

(1) raising stock, poultry or furbearing animals . . .

* * *

Example 1: Breeding, raising and feeding livestock, poultry, or other animals, which produce a product for sale or are themselves a food product, is farming.

(c)(1)(ii) Farm production begins . . . in the case of animals, from the beginning of the life cycle. Production ceases when the product is ready for sale in its natural state. . . .

* * *

(d) *Directly and predominantly*. (1) *Directly* means the tangible personal property must, during the production phase of farming:

(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. . . .

* * *

(2) *Predominantly* means that tangible personal property must be used more than 50 percent of the time directly in the production phase of farming.

Opinion

Section 1115(a)(6) of the Tax Law, as in effect on the date in question, May 1, 1999, provided a sales and use tax exemption with respect to all tangible personal property purchased for use or consumption directly and predominantly in the production of tangible personal property for sale by farming, except tangible personal property incorporated into a building or structure. The taxability of tangible personal property is determined according to its use and method of installation (permanent vs. nonpermanent), with property which is either portable in nature or is installed to be removable without substantial damage to the property (e.g., attached via removable bolts, etc.) being generally recognized as nonpermanent and thus, eligible for the exemption. See Cover-All Shelter Systems of New York, Inc., Adv Op Comm T&F, November 17, 1999, TSB-A-99(50)S.

Petitioner's growing, feeding, and raising of tilapia fish for sale as food products is included within the scope of farming. See Section 528.7(b) of the Sales and Use Tax Regulations. In the case of animals, production begins with the beginning of the life cycle and ends when the product is ready for sale. A greenhouse used to house tilapia fish being raised for sale as food products and to create conditions necessary for their growth is considered to be used directly and predominantly (more than 50%) in production by farming. See Section 528.7(d) of the Sales and Use Tax Regulations. The greenhouse in question, similar to the shelters in Cover-All Shelter Systems of New York, Inc., *supra*, is designed to be portable and can easily be unbolted, dismantled, and reassembled after installation without damage to itself or the realty. Therefore, Petitioner's purchase of the greenhouse on May 1, 1999, under the law in effect at that time, was exempt from sales and compensating use tax under Section 1115(a)(6) of the Tax Law (see Cover-All Shelter Systems of New York, Inc., *supra*).

It is noted that the above opinion is based on the law in effect prior to the enactment of Chapter 63 of the Laws of 2000. Beginning September 1, 2000, purchases by farmers of tangible personal property, whether or not incorporated into a building or structure, if used or consumed predominantly either in farm production or in a commercial horse boarding operation, or in both,

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are exempt under Section 1115(a)(6) of the Tax Law. The materials that are incorporated into buildings and structures may now qualify for the exemption.

DATED: July 25, 2002

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