

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

TSB-A-04(22)S
Sales Tax
September 2, 2004

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S031224A

On December 22, 2003, the Department of Taxation and Finance received a Petition for Advisory Opinion from O. W. Hubbell & Sons, Inc., P. O. Box 37, New York Mills, New York, 13417. Petitioner, O. W. Hubbell & Sons, Inc., provided additional information pertaining to the Petition on March 9, 2004.

The issue raised by Petitioner is whether its purchase of forklifts, supplies associated with such forklifts, and repairs to such forklifts are subject to sales or compensating use tax.

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

Petitioner is a processor of various galvanized steel products. Petitioner acquires steel from its customer and galvanizes this material pursuant to the customer's specifications. Galvanizing is a process by which a zinc coating is bonded to iron or carbon steel, thereby forming an impermeable barrier against corrosion. Once Petitioner has galvanized the customer's steel, it is a finished product ready to be returned to the customer. Petitioner does not install its product onto real property but merely delivers the product to its customer.

Petitioner uses its forklifts to unload raw materials consisting of zinc ingots and its customers' steel at its premises, and transport the ingots which are to be used in the galvanizing process and steel which is to be galvanized from the storage area (the yard) to the galvanizing plant. The forklifts are then used to return the finished product (the galvanized steel) to the yard after processing and subsequently load the product onto trucks for shipment from Petitioner's plant. Petitioner asserts that the forklifts are used 85% of the time to transport ingots and finished product between the storage area and galvanizing plant and 15% of the time for loading and unloading trucks.

Applicable law and regulations

Section 1105 of the Tax Law provides, in part:

Imposition of sales tax On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax . . . upon:

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

Section 1105-B of the Tax Law provides:

(a) Receipts from the retail sales of parts with a useful life of one year or less, tools and supplies for use or consumption directly and predominantly in the production of tangible personal property, gas, electricity, refrigeration or steam for sale by manufacturing, processing, generating, assembling, refining, mining or extracting shall be exempt from the tax imposed by subdivision (a) of section eleven hundred five of this article.

(b) Receipts from every sale of the services of installing, repairing, maintaining or servicing the tangible personal property described in paragraph twelve of subdivision (a) of section eleven hundred fifteen of this article, including the parts with a useful life of one year or less, tools and supplies described in subdivision (a) of this section, to the extent subject to such tax, shall be exempt from the tax on sales imposed under subdivision (c) of section eleven hundred five of this article.

(c) Parts with a useful life of one year or less, tools and supplies described in subdivision (a) of this section and services described in subdivision (b) of this section shall be exempt from the compensating use tax imposed by section eleven hundred ten of this article.

Section 1115 of the Tax Law provides, in part:

(a) 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, gas, electricity, refrigeration or steam for sale, by manufacturing, processing, generating, assembling, refining, mining or extracting. . . .

* * *

(c)(1) Fuel, gas, electricity, refrigeration and steam, and gas, electric, refrigeration and steam service of whatever nature for use or consumption directly and exclusively in the production of tangible personal property, gas, electricity, refrigeration or steam, for sale, by manufacturing, processing, assembling, generating, refining, mining or extracting shall be exempt from the taxes imposed under subdivisions (a) and (b) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten of this article.

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

Sale of services of producing, fabricating, processing, printing or imprinting.

(a) Imposition. (1) Section 1105(c)(2) of the Tax Law imposes a tax on the receipts from services of producing, fabricating, processing, printing or imprinting tangible personal property, performed for a person who directly or indirectly furnishes the property.

(2) The enumerated services are not taxable when:

- (i) purchased for resale; or
- (ii) performed on property intended for resale.

* * *

(d) 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.

* * *

(f) Resale. (1) When the services enumerated in this section are rendered on property held for resale, the services are not taxable.

Example 1: A manufacturer of home appliances has certain of the component appliance parts galvanized by a plating firm. The service of galvanizing is not taxable since it is being performed on a product which will be sold by the manufacturer.

(2) Where a person performing a service subject to tax purchases tangible personal property, which becomes a part of the property on which the services are performed or which is later transferred to the purchaser of the service in conjunction with the service performed, the purchase of the property is for resale and is not subject to the sales tax.

Example 2: A plating company purchases zinc for galvanizing steel which is furnished by its customer. The zinc becomes part of the steel. The purchase of the zinc by the plating company is a purchase for resale which is not subject to tax.

Section 528.13 of the Sales and Use Tax Regulations provides, in part:

Machinery and equipment used in production; telephone and telegraph equipment; parts, tools and supplies.

(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, gas, electricity, refrigeration or steam, by manufacturing, processing, generating, assembling, refining, mining or extracting. . . .

* * *

(iii) (a) Parts with a useful life of one year or less, tools or supplies for use or consumption directly and predominantly in the production of tangible personal property, gas, electricity, refrigeration or steam for sale by manufacturing, processing, generating, assembling, refining, mining or extracting.

* * *

(iv) The services of installing, repairing, maintaining or servicing the exempt machinery, equipment, apparatus, parts, tools or supplies identified in subparagraph (i), (ii) or (iii) of this paragraph.

* * *

(b) *Production.* (1) The activities listed in paragraph (a)(1) of this section are classified as administration, production or distribution.

(i) *Administration* includes activities such as sales promotion, general office work, credit and collection, purchasing, maintenance, transporting, receiving and testing of raw materials and clerical work in production such as preparation of work, production and time records.

(ii) *Production* includes the production line of the plant starting with the handling and storage of raw materials at the plant site and continuing through the last step of production where the product is finished and packaged for sale.

(iii) *Distribution* includes all operations subsequent to production, such as storing, displaying, selling, loading and shipping finished products.

(2) The exemption applies only to machinery and equipment used directly and predominantly in the production phase. Machinery and equipment partly used in the administration and distribution phases does not qualify for the exemption, unless it is used directly and predominantly in the production phase.

(3) The determination of when production begins is dependent upon the procedure used in a plant. If on receiving raw materials, the purchaser weighs, inspects, measures or tests the material prior to placement into storage, production begins with placement into

storage, and the prior activities are administrative. If the materials are unloaded and placed in storage for production without such activities, the unloading is the beginning of production.

Example 1: A crane is used to unload raw materials, which are immediately placed in storage at a plant. From the storage site, the material is placed on an assembly line without testing. The crane is being used in production.

* * *

(4) Production ends when the product is ready to be sold.

* * *

(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.

Example 11: A fork lift is used 60 percent of the time on an assembly line and 40 percent of the time for loading finished products onto railroad cars for delivery. The fork lift is used predominantly in production.

Opinion

Petitioner is a processor of various galvanized steel products. Petitioner acquires steel from its customers and galvanizes this material pursuant to the customers' specifications.

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Petitioner is engaged in the processing of its customers' materials (steel) by applying a galvanizing coating to the customers' materials. This application creates a material which, unlike raw steel, is extremely resistant to rust and corrosion. Since Petitioner sells a service performed on its customers' tangible personal property rather than making direct sales of tangible personal property to its customers, a threshold question in this case is whether Petitioner is a person engaged in the production for sale of tangible personal property for purposes of section 1115(a)(12) of the Tax Law.

Publication 852, entitled *Sales Tax Information For: Manufacturers, Processors, Generators, Assemblers, Refiners, Miners and Extractors, and Other Producers of Goods and Merchandise* (12/97), provides that "The purchase of machinery and equipment used by a subcontractor to perform part of a production process may also be entitled to exemption as production machinery and equipment."

Petitioner processes a material (raw steel) which is quite susceptible to rust and corrosion into a galvanized (zinc coated) material which is extremely rust and corrosion resistant, thereby effecting a change in the nature of the material. Petitioner's services clearly fall within the meaning of processing as defined under section 527.4(d) of the Sales and Use Tax Regulations. Section 1115(a)(12) of the Tax Law provides an exemption for machinery or equipment used or consumed directly and predominantly in the production for sale of tangible personal property by processing. If Petitioner's customer intends to sell the finished product (i.e., the galvanized steel), then Petitioner is performing a part of a production process for its customer and its services are, in effect, performed as part of a continuous production line which is an extension of its customer's manufacturing process. See *Burn Brite Metals Company, Inc.*, Adv Op Comm T & F, February 29, 1988, TSB-A-88(17)S. Accordingly, Petitioner's purchases of machinery and equipment qualify for exemption from sales and use tax pursuant to section 1115(a)(12) of the Tax Law, provided such machinery and equipment are used directly and predominantly (more than 50% of their use) to process material intended for resale by Petitioner's customers. Such intent is evidenced by the customer's issuance of a properly completed *Resale Certificate* (Form ST-120) to Petitioner pertaining to the customer's purchases of Petitioner's processing services.

It is noted that machinery and equipment used by Petitioner to process a customer's material which that customer intends to use itself (e.g., where Petitioner processes steel for a contractor who intends to install the steel as part of a capital improvement) are not used in the production of tangible personal property for sale. Such machinery and equipment will not qualify for the production exemption under section 1115(a)(12) of the Tax Law unless the machinery and equipment are otherwise used directly and predominantly in the production phase to process material intended for resale.

Petitioner uses its forklifts to unload raw materials consisting of zinc ingots and customers' steel at its plant, and transport the ingots which are to be used in the galvanizing process and steel which is to be galvanized from the storage area (the yard) to the galvanizing plant. The forklifts are

then used to return the finished product (the galvanized steel) to the yard after processing and subsequently load the product onto trucks for shipment from Petitioner's plant.

Petitioner uses the forklift to unload and place raw materials in storage prior to their being moved to the production area. Section 528.13(b)(3) of the Sales and Use Tax Regulations provides that, "If on receiving raw materials, the purchaser weighs, inspects, measures or tests the material prior to placement into storage, production begins with placement into storage, and the prior activities are administrative." Conversely, where raw materials are unloaded without being weighed, inspected, measured or tested prior to placement into storage, production begins with the unloading of raw materials. See *Henry & Henry Inc.*, Adv Op Comm T & F, June 26, 2002, TSB-A-02(17)S.

Presuming that Petitioner's customers intend to resell the finished product as such, Petitioner's use of forklifts to unload raw materials and place them in the yard, provided that such materials are not weighed, inspected, measured or tested prior to placement into storage, and to transport the raw materials from the yard to the galvanizing plant are uses directly in the production phase as described in section 528.13(b)(1)(ii) and (3) of the Sales and Use Tax Regulations. Petitioner's use of forklifts to move the finished product from the end of the production line to the yard, and to load the finished product onto trucks for shipment from the plant, are uses in the distribution phase rather than the production phase. See section 528.13(b)(1)(iii) and (4) of the Sales and Use Tax Regulations. Provided that Petitioner maintains records substantiating that the forklifts are used predominantly (more than 50% of use) to (1) unload raw materials which are used in the processing of materials intended by the customer for resale, and are not weighed, inspected, measured or tested prior to placement into storage, and (2) to move such materials between other areas of the production process, such equipment may be purchased exempt from sales tax. See section 528.13(c)(4) of the Sales and Use Tax Regulations. However, where 50% or more of a forklift's use is to move raw materials which are used in the processing of materials *not* intended by the customer for resale, to unload materials which are weighed, inspected, measured or tested prior to placement into storage, to move the finished product from the end of the production line to storage in the yard and/or to load the finished products for shipment from Petitioner's plant, such forklift is not eligible for the exemption under section 1115(a)(12) of the Tax Law and its purchase is subject to sales tax.

Charges for repair services to forklifts which qualify for exemption as described above are exempt from sales tax pursuant to section 1105-B(b) of the Tax Law. See section 528.13(a)(1)(iv) of the Sales and Use Tax Regulations. Consumable supplies used to keep the exempt forklifts in operating condition (e.g., lubricating oil, grease, etc.) may also be purchased without payment of sales tax pursuant to section 1105-B(a) of the Tax Law. See section 528.13(a)(1)(iii)(a) of the Sales and Use Tax Regulations. Fuel used in the forklifts must be used exclusively in the production phase as described above in order to qualify for the exemption from sales tax. See section 1115(c)(1) of the Tax Law. Petitioner must maintain records substantiating the amount of fuel used in the forklifts directly and exclusively in the production phase in order to obtain a refund or credit of the sales tax paid on fuel so used. It is noted that fuel used in the forklifts to unload or move

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materials between production areas will not be exempt where the materials are not intended for resale by Petitioner's customer.

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