

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Taxpayer Guidance Division

TSB-A-08(9)S
Sales Tax
February 14, 2008

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S070313A

On March 13, 2007, the Department of Taxation and Finance received a Petition for Advisory Opinion from Frey Concrete, Inc., 3949 Forest Parkway, Suite 400, North Tonawanda, NY 14120. Petitioner, Frey Concrete, Inc., provided additional information pertaining to the Petition on March 29, 2007, and February 5, 2008.

The issue raised by Petitioner is whether the conveyor used to move product outside of Petitioner's plant qualifies for the production exemption under section 1115(a)(12) of the Tax Law for equipment used directly and predominantly in the production process.

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

Petitioner produces various grades of concrete aggregate products. Petitioner's customers choose the grade of aggregate based on the intended use and the applicable industry standards. Petitioner has aggregate conveyors running inside and outside of its plant. The conveyors move Petitioner's products from inside its plant to stockpiles located outside of the plant. The conveyor run includes a series of screens that allow the products to be separated by the size or grade of the materials. The stockpiles are located by type of product at the end of each outside conveyor run. There is no way to load the product for delivery to the customer directly from the plant.

While the aggregate products are in the plant, they are placed in vats of water as part of the cleaning process. At the point where the aggregate products begin travel on the outside conveyor run they are very wet, having approximately a 70-80% moisture content. All Petitioner's products are sold by weight. The industry standards for an acceptable amount of moisture content are in a range below 5%. Loading the products directly from the plant onto a delivery truck would result in water content that would be unacceptable to the customer. The conveyors drop the products into the stockpiles in such a manner as to create conical shaped piles that promote additional dewatering of the products. Prior to being ready for purchase by customers, some of the aggregate needs an additional couple of days to drain. When the products are retrieved from the stockpile for delivery the outside layer of the stockpile must first be removed to assure that dry products are being loaded for delivery.

While in the stockpile, the product can be inspected by quality control monitors and tested for grade. It is necessary for Petitioner to determine that the product will meet the specifications required for the intended use. Some of the product, because of size, type, or grade, has to be returned to the plant for further processing. For example, product that has not been thoroughly cleaned or product that is too fine and needs to have coarser material added to bring it up to the industry specifications may have to go through the plant processing system again. If

the product had been loaded directly onto a delivery truck from the plant, there would be no way to prevent material contamination and to assure customers that the load was the quality, grade, and amount of material they were promised.

Staff monitors the product as it is moved on the conveyors to the stockpiles. The range of materials may also be viewed in the stockpile with the coarser materials on the outside of the pile and the finer grades on the inside of the pile. Samples from the stockpiles are analyzed to determine quality and grade rating to compare product to specifications. Petitioner is an approved New York State Department of Transportation source of aggregate. New York inspectors take quality control samples from the stockpiles and send them to Albany for testing. Testing samples cannot be taken from product that is still in the plant.

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 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. . . .

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. [Tax Law, § 1115(a)(12)]

(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. . . .

* * *

(ii) (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.

* * *

(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.

* * *

(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 is in the business of producing various grades of concrete aggregate products. Petitioner uses aggregate conveyors to move products to conical stockpiles outside of the production plant.

Section 1115(a)(12) of the Tax Law provides an exemption from sales and use tax for machinery or equipment used or consumed directly and predominantly in the production for sale of tangible personal property. Section 528.13(b) of the Sales and Use Tax Regulations provides that production continues up until the product is finished and packaged for sale and that distribution includes all operations subsequent to production, such as storing, displaying, selling, loading, and shipping finished products. Section 528.13(c)(1)(iii) of the Sales and Use Tax Regulations provides that machinery or equipment is used directly in production if, during the production process, it is used in the handling, storage, or conveyance of materials or the product to be sold. Machinery or equipment is used predominantly in production if over 50% of its use is directly in the production phase of a process. See 528.13(c)(4) of the Sales and Use Tax Regulations.

Petitioner states that when the aggregate products are moved from within the plant to be stockpiled outside the plant, the products begin a dewatering process that continues until after the products are dropped in the stockpiles. The products cannot be loaded for delivery directly from

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the plant and are not ready for sale or delivery as they leave the plant on the conveyor system. In order to be ready for sale, the product must have a moisture content in a range below 5%. The process of drying a product or removing water from a product is considered to be a production activity. (See *Matter of Albert H. Mast*, St Tax Comm, September 3, 1982, TSB-H-82(97)S; *Matter of National Fuel Distribution Corporation et. al.*, Dec Tax App Trib, March 14, 1991, DTA Nos. 801047 and 801048.) While Petitioner does not appear to “package” its products, based on the facts in this Opinion, the aggregate is not a finished product at the time it is placed on the conveyor and moved outside to the stockpile. Petitioner’s conveyor system is used to transport the aggregate from the plant to the outside stockpile, during which time the drying process continues. Thus, the conveyor system is used directly and predominantly in production activities and qualifies for exemption from sales and use tax pursuant to section 1115(a)(12) of the Tax Law.

DATED: February 14, 2008

/s/
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NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.