

New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-09(30)S
Sales Tax
July 21, 2009

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S090317A

On March 17, 2009, the Department received a Petition for Advisory Opinion from [REDACTED]. Petitioner asks whether its purchases of tangible personal property and utilities are exempt from sales and use tax under sections 1115(a)(6) and 1115(c)(2) of the Tax Law. We conclude that Petitioner is not engaged in the production for sale of tangible personal property by farming and, accordingly, Petitioner's purchases of tangible personal property and utilities are not exempt.

Facts

Petitioner is in the business of storing, cleaning, sorting, and packaging whole fruit that is then sold. Petitioner obtains fruit from various farmers, and then cleans, sorts, packages, and stores the fruit for sale and delivery to retail food stores.

Petitioner states that it obtains the fruit from farmers on consignment. Petitioner pays the farmers what the fruit is sold for after deducting an amount that reflects Petitioner's expenses in preparing the fruit for sale. A sample contract between Petitioner and a grower provides that Petitioner "will pay growers within 120 days of the date the farm products I sell for you are delivered to the purchaser or to any other person the purchaser may designate." Upon request, Petitioner will advance money to a farmer for the fruit. The label and packaging for the fruit when it is sold to retail food stores indicate Petitioner's name. The sales invoices for the fruit identify Petitioner as the seller. Petitioner generally sells all the fruit obtained from a farmer. On rare occasions poor quality fruit will be returned to a farmer if the farmer wants the fruit back.

According to Petitioner, the typical farmers that it represents do not have big enough farming operations to successfully go to market on their own. Petitioner provides packaging and shipping services that are necessary for these farmers to profitably market their crop.

Analysis

Section 1115(a)(6) of the Tax Law provides an exemption from sales and use tax for tangible personal property "for use or consumption predominantly . . . in the production for sale of tangible personal property by farming." Section 1115(c)(2) of the Tax Law provides a similar exemption from tax for utilities used in farm production.

Petitioner's purchases of tangible personal property and utilities may qualify for exemption from sales and use tax if the property and utilities are used in the farm production process. For purposes of the sales and use tax, farm production begins with the preparation of the soil or other growing medium and ends when the product is ready for sale in its natural state. Farm production ends for a specific farmer or producer when the product is in the form in which the farmer or producer will offer it for sale. See 20 NYCRR 528.7(c)(1)(ii), (2). In the present case, farm production ends for the farmers that supply Petitioner with fruit when Petitioner obtains the fruit from them on consignment. It does not appear from the facts in this case that Petitioner sells the fruit as the farmers' agent or representative. The fruit is labeled as Petitioner's

product and the sales invoices identify Petitioner as the seller. Accordingly, unless Petitioner itself is engaged in farm production, tangible personal property and utilities used or consumed in Petitioner's business operations cannot qualify for the farm production exemption. Petitioner's activities of storing, cleaning, sorting, and packaging fruit for sale are not farm production. These activities do not result in new products or effect a change in the nature, shape, or form of the fruit that Petitioner receives. See *Matter of Dobbins & Ramage, Inc.*, State Tax Commission, July 20, 1987; *Matter of Hudson Cold Storage & Freezer Corp.*, State Tax Commission, September 9, 1983; *Matter of J.H. Wattles, Inc.*, State Tax Commission, October 30, 1981; *General Produce Co. v Kosydar*, 297 NE2d 532 (Ohio, 1973). Accordingly, Petitioner's purchases of tangible personal property and utilities for use in its business activities as described in this Opinion are not exempt from sales and use tax under Tax Law, §1115(a)(6) or §1115(c)(2). It should be noted that because Petitioner is not engaged in the production of tangible personal property for sale, the production exemptions under Tax Law, §§1115(a)(12) and 1115(c) would also not apply to Petitioner's purchases.

DATED: July 21, 2009

/S/

Jonathan Pessen
Director of Advisory Opinions
Office of Counsel

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.