

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

TSB-A-09(31)S  
Sales Tax  
July 28, 2009

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S090624A

Petitioner [REDACTED] requests an advisory opinion on whether it is eligible for the exemptions contained in Tax Law §1115(a)(12) and §1115(c), and thus entitled to a refund of State and local sales taxes paid on purchases of electricity, gas, and fuel oil used directly in its reheating of hot liquid asphalt for sale. We conclude that Petitioner is not eligible for either exemption. Tax Law §1115(a)(12) applies to purchases of machinery or equipment used in the production of tangible personal property, not to purchases of utilities and fuel. Tax Law §1115(c)(1), which does exempt utility and fuel purchases used in the production of tangible personal property for sale, is not available when the use of the utilities facilitates storage and delivery rather than the production of the tangible personal property.

**Facts**

Petitioner purchases liquid asphalt from independent refineries and sells the liquid asphalt from a terminal located in New York City. The liquid asphalt is shipped to the terminal from refineries on heated barges or ships. Although loaded at the refineries as a hot liquid at a temperature of 325 degrees Fahrenheit or above, it arrives at the terminal in a semi-solid state, having cooled to an average temperature between 200 and 275 degrees Fahrenheit during shipping. If not stored at a higher temperature, the asphalt would further cool and revert to a semi-solid/solid state, which would make it useless for its intended purpose and undeliverable to customers. Therefore, upon arrival at the terminal, the asphalt is transferred via heated pipes into processing/holding tanks in which its average temperature is restored to 300 to 310 degrees, reconverting it from a semi-solid state into a hot liquid. Petitioner purchases fuel oil and electricity for the reheating process.

**Issue**

Do Petitioner's purchases of fuel oil and electricity for reheating liquid asphalt to the temperature required for sale qualify for exemption from State and local sales and use taxes pursuant to Tax Law §1115(a)(12) and Tax Law §1115(c)?

**Analysis**

Tax Law §1115(a)(12) provides an exemption from sales and use tax for purchases of "(m)achinery and equipment for use or consumption directly and predominantly in the production of tangible personal property... for sale." This exemption is not applicable to Petitioner's situation because fuel oil and electricity, although needed to power machinery and equipment, are not machinery or equipment. *See XO New York, Inc. v. Commissioner*, 51 A.D.3d 1154, 1156 (3d Dept. 2008).

For different reasons, the sales and use tax exemption contained in Tax Law §1115(c)(1) is also not available to Petitioner.

Tax Law §1115(c)(1) provides, in pertinent part:

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...

Petitioner argues that “directly” using fuel oil and electricity in the process of reheating asphalt to raise it to the appropriate temperature for sale qualifies as the “processing” of “tangible personal property,” which should qualify its fuel oil and electricity purchases for exemption from sales and use taxes pursuant to this section. However, Petitioner’s storage of the asphalt in a heated condition is not “directly” contributing to its “production,” as required to qualify for exemption pursuant to this section. *See 20 N.Y.C.R.R. §528.22(c)*, which provides that:

- (1) *Directly* means the fuel, gas, electricity...must during the production phase of a process, either:
  - (i) operate exempt production machinery or equipment; or
  - (ii) create conditions necessary for production; or
  - (iii) perform an actual part of the production process.
- (2) Usage in activities collateral to the actual production process is not deemed to be use directly in production.

Petitioner apparently believes that its use of fuel oil and electricity falls within subparagraphs (ii) and (iii) of the definition. However, in the instant case, the oil and electricity are neither creating “conditions necessary for production” nor performing “an actual part of the production process.” Although cooled from its optimal temperature during shipping, the asphalt is in final form and ready for use upon arrival at Petitioner’s premises. It must be reheated by Petitioner and stored in a hotter state than that in which it is received in order to facilitate delivery to purchasers. Petitioner’s storage of the asphalt in a heated state does not constitute production of tangible personal property by processing for purposes of Tax Law §1115(a)(12). *See KM Davies Co., Inc.*, Adv Op Comm T & F, TSB-A-05(47)S, December 28, 2005. Thus, the utilities here are being used in “activities collateral to the actual production process;” that is, in a post-production process.

Notably, the regulations, which differentiate distribution activities from the production process, provide further support for this position. “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.” *See 20 N.Y.C.R.R. §528.13(b)(1)(i-ii)*. With the exception of packaging, which is not relevant to the product in question, each of the aforementioned steps in the production process are completed at the asphalt refineries, prior to shipping to Petitioner. Petitioner does not handle the raw materials from which the liquid asphalt is produced, or add any materials to the asphalt to finish it for sale.

Rather, in order to store and deliver asphalt manufactured elsewhere to end-users, Petitioner reheats it. This is a post-production function. *See 20 N.Y.C.R.R. §528.13(b)(1)(iii)* which provides that “Distribution includes all operations subsequent to production, such as storing, displaying, selling, loading and shipping finished products.” “Storing,” “selling,” and “shipping finished products,” that is, distribution functions, best describe Petitioner’s role. *See also 20 N.Y.C.R.R. §528.22(a)(2)* which states, in part, “(f)uel, gas, electricity...used or consumed...in the storage of tangible personal property, are subject to the sales tax.”

Based upon the facts presented, Petitioner, as a reseller of liquid asphalt, does not qualify for the production exemption from State and local sales and use taxes.

DATED: July 28, 2009

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/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.