

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-96 (43)S
Sales Tax
July 11, 1996

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO.S950724B

On July 24, 1995, the Department of Taxation and Finance received a Petition for Advisory Opinion from Anthony J. Dapolito, CPA, Dapolito & Company, 2234 Jackson Avenue, Seaford, New York 11783.

The issue raised by Petitioner, Anthony J. Dapolito, CPA, is whether the sale by Petitioner's client of corrugated material and a machine used to form the corrugated material into boxes is subject to State and local sales and use taxes.

Petitioner submits the following facts as the basis for this Advisory Opinion. Petitioner's client sells corrugated boxes and cardboard to be formed into boxes at the customer's facility. The customers purchasing corrugated material are not in the box business, but manufacture the boxes to be used in the shipment of their products to retailers. Certain customers are sold box forming machinery. These machines are used directly and predominantly in the production of tangible personal property, i.e., the boxes. Customers may purchase only the box forming machinery, or may purchase the machinery in conjunction with the corrugated material.

The terms and conditions under which the corrugated material and machinery are sold are as follows:

1. No separate billing is made for the sales price of the machine. The customer agrees to purchase a certain quantity of corrugated material within a specified period of time. The sale price of the machine is included in the unit price of the corrugated material. The title to the machine is transferred at the time the customer complies with the terms of the agreement.

2. A separate billing is made for the sale price of the machine. A percentage of each purchase of corrugated material is used to reduce the sale price of the machinery. Title to the machine passes when the terms of the agreement to purchase corrugated material are complied with.

3. Installment billing - A fixed dollar amount is billed solely for the machine over a specified period of time. Title to the machine is transferred when all payments are collected.

Section 1115(a) of the Tax Law provides, in part, as follows:

(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. . .

* * *

(19) Cartons, containers, and wrapping and packaging materials and supplies, and components thereof for use and consumption by a vendor in packaging or packing tangible personal property for sale, and actually transferred by the vendor to the purchaser. (emphasis added)

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

Sec. 528.13. 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. (This exemption includes all pipe, pipeline, drilling rigs, service rigs, vehicles and associated equipment used in the drilling, production and operation of oil, gas and solution-mining activities to the point of sale to the first commercial purchaser.)

* * *

(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.

Section 528.20 of the Sales and Use Tax Regulations provides, in part, as follows:

Reg. Sec. 528.20. Cartons, containers, and wrapping and packaging materials and supplies.--(Tax Law, Sec. 1115(a)(19)). (a) Exemption. (1) The sale of cartons, containers, and wrapping and packaging materials and supplies, and components thereof for use and consumption by a vendor in packaging or packing tangible personal property for sale, and actually transferred by the vendor to the purchaser, is exempt from sales and use tax. (emphasis added)

In Matter of Colgate-Palmolive-Peet Company v Joseph, 308 N.Y. 333, the Court of Appeals held that when the taxpayer sold its products in corrugated cardboard cartons, there was a sale not only of the contents of the carton, but of the carton itself.

Pursuant to Section 1115(a)(19) of the Tax Law and Section 528.20(a) of the Sales and Use Tax Regulations corrugated boxes and material sold for use and consumption by a vendor in packaging or packing tangible personal property for sale, and actually transferred by the vendor to a purchaser, are not subject to sales tax. In addition, pursuant to Section 1115(a)(12) of the Tax Law, the sale of machinery or equipment for use or consumption directly and predominantly in the production of tangible personal property for sale is not subject to sales tax. Therefore, provided the boxes being manufactured by the customers of Petitioner's client for shipment of the customers' products are not returnable but are actually transferred to the purchasers of the products, the sale by Petitioner's client of the corrugated material will not be subject to sales and use taxes. Moreover, in accordance with Matter of Colgate-Palmolive-Peet Company v Joseph, *supra*, provided the boxes being manufactured by customers of Petitioner's client for shipment of the customers' products are not returnable, the transfers of the boxes to the purchasers of the products constitute sales of the boxes. Therefore, if a box forming machine is used directly and predominantly in the production of boxes that are actually transferred to purchasers, pursuant to Section 1115(a)(12), the sale of the box forming machine is not subject to sales and use taxes.

With respect to terms and conditions "1" and "2" Petitioner's client is not required to collect sales or compensating use tax on the receipts from the sale of the corrugated material and

the machine, if Petitioner's client receives a properly completed exempt use certificate, Form ST-121, with respect to both the corrugated material and the machine within 90 days after delivery of the property. See Section 1132(c) of the Tax Law and Section 532.4 of the Sales and Use Tax Regulations. If Petitioner's client does not receive within 90 days of delivery an exempt use certificate for either the corrugated material or the machine, the client must collect sales or compensating use tax on the receipts from the sale of both of these items.

If Petitioner's client timely receives a properly completed exempt use certificate for either the corrugated material or the machine, but not for both the corrugated material and the machine, the tax consequences will be different under terms and conditions "1" and "2".

With respect to term and condition "1", the corrugated material and the machine are sold as a single unit. Pursuant to Section 527.1(b) of the Sales and Use Tax Regulations, if either the corrugated material or the machine is not exempt, the total receipts from the sale of the material and machine are subject to sales or compensating use tax. Petitioner's client will have to collect tax on the total receipts, therefore, if an exempt use certificate is not timely received for both items. If, however, the exempt use certificate indicates that both the corrugated material and the machine are being purchased for an exempt purpose, Petitioner's client will not have to collect tax on the receipts from the sale.

With respect to term and condition "2", the sale prices of the corrugated material and the machine are billed separately. Provided the corrugated material and the machine can be purchased separately and independently of each other, if Petitioner's client timely receives an exempt use certificate for either the corrugated material or the machine, the client will not be required to collect tax on receipts from the sale of the exempt item. Petitioner's client will be required to collect tax on the item for which no exempt use certificate is timely received. It is noted that the separately stated prices for the corrugated material and the machine must be reasonably related to the true value of these items.

As for term and condition "3", pursuant to Section 1115(a)(12) of the Tax Law, the sale of machinery or equipment for use or consumption directly and predominantly in the production of tangible personal property for sale is not subject to sales tax. In accordance with Matter of Colgate-Palmolive-Peet Company v Joseph, *supra*, provided the boxes being manufactured by customers of Petitioner's client for shipment of the customers' products are not returnable, the transfers of the boxes to the purchasers of the products constitute sales of the boxes. Therefore, provided the box forming machines are used directly and predominantly in the production of boxes that are actually transferred to purchasers, pursuant to Section 1115(a)(12) the sale of the box forming machine is not subject to sales and use taxes. Petitioner's client will not be required to collect tax

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on the receipts from the sale of the machine if the client timely receives a properly completed exempt use certificate.

DATED: July 11, 1996

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

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