

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

TSB-A-96 (7)S
Sales Tax
February 13, 1996

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S950705A

On July 5, 1995, a Petition for Advisory Opinion was received from Gloria S. Friedman /DBA Damomics, 111 N. Main St., Elmira, New York 14901-2921.

The issue raised by Petitioner, Gloria Friedman /DBA Damomics, is whether Petitioner qualifies for the sales tax refund or credit for tax paid on the sale of tangible personal property purchased for use in constructing, expanding, or rehabilitating industrial or commercial real property located in an area designated as an economic development zone (an "EDZ").

Petitioner operates a business in the Elmira, New York EDZ and has been a certified zone business for many years. In accordance with the Business Description Codes set forth in Publication 750, A Guide to Sales Tax in New York State (formerly published in DTF-144), Petitioner states that it is currently involved in the following services:

<u>Code</u>	<u>Description</u>	<u>Pct. of Business</u>
7378	Computer maintenance and repair	31%
5734	Computer & computer software stores	25%
3500	Industrial & commercial machinery & computer equipment	19%
7373	Computer integrated systems design	9%
7379	Computer consultants	7%
7371	Computer programing services	4%
1731	Electrical work	3%
8721	Accounting services	1%
8748	Business consulting services	1%

Based on the above business codes and services, Petitioner contends that only 25% of the receipts from its business comes from the sale of tangible personal property. According to Petitioner, the remainder of its business receipts comes from the sale of computer maintenance services and consulting and programming services. Moreover, the building that Petitioner will occupy will not be used exclusively for the sale of tangible personal property. While Petitioner is only 25% involved in the sale of tangible personal property, the other expected tenant of the building is a beauty shop.

Section 1119 of the Tax Law provides, in pertinent part, as follows:

Section 1119. Refunds or credits based on proof of certain uses.--(a) Subject to the conditions and limitations provided for herein, a refund or credit shall be allowed for a tax paid pursuant to subdivision (a) of section eleven hundred five or section eleven hundred ten . . .

(6) on the sale of tangible personal property purchased for use in constructing, expanding or rehabilitating industrial or commercial real property (other than property used or to be used exclusively by one or more registered vendors primarily engaged in the retail sale of tangible personal property) located in an area designated as an economic development zone pursuant to article eighteen-B of the general municipal law, but only to the extent that such property becomes an integral component part of the real property. . . .(emphasis added)

There are no Sales and Use Tax Regulations that specifically address the refund or credit provided for in Section 1119(a)(6) of the Tax Law. However, the term "primarily" is defined by Sales and Use Tax Regulations to mean 50 percent or more of receipts. (See 20 NYCRR 528.9(a)(4), 528.14(c))

To qualify for the refund or credit for sales tax paid on the purchase of tangible personal property to be used in constructing, expanding or rehabilitating industrial or commercial real property located in a designated EDZ, the purchase cannot be for use in real property used exclusively by one or more registered vendors primarily engaged in the retail sale of tangible personal property. Neither Petitioner nor the other expected tenant is primarily engaged in retail sales of tangible personal property. Accordingly, the purchase of tangible personal property to be used in constructing, expanding or rehabilitating the building that Petitioner and the other tenant will occupy qualifies for the refund or credit provided in Section 1119(a)(6) of the Tax Law, provided the tangible personal property to be purchased is to become an integral part of the real property to be constructed, expanded or rehabilitated in an EDZ.

However, the credit or refund of sales tax paid on eligible purchases of tangible personal property to be used in constructing, expanding or rehabilitating industrial or commercial real property is available to the person who actually purchases the tangible personal property and pays the taxes (generally, the contractor). Therefore, unless Petitioner purchases the building materials and pays the applicable sales tax on those purchases, Petitioner will not be entitled to the credit or refund allowed under Section 1119(a)(6) of the Tax Law.

DATED: February 13, 1996

/s/
DORIS S. BAUMAN
Director
Technical Services Bureau

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