

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

TSB-A-98(90)S  
Sales Tax  
December 30, 1998

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S980724A

On July 24, 1998, the Department of Taxation and Finance received a Petition for Advisory Opinion from Ernst & Young LLP, 1400 Key Tower, 50 Fountain Plaza, Buffalo, New York 14202.

The issue raised by Petitioner, Ernst & Young LLP, is whether sales or use tax must be paid on parts that are assembled in New York into equipment which is subsequently shipped to a manufacturing facility out of state for use in the production of goods for sale.

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

Petitioner's client, headquartered in New York, purchases parts for the assembly of equipment to be used in a manufacturing process at its Mexico location. Petitioner's client purchases parts from vendors located throughout the United States, including New York State. These parts are incorporated into the equipment, which is built at the client's headquarters in New York. Upon completion, the equipment is sent to the client's Mexico location. The Mexico location is part of the same legal entity as the New York location. After shipment to Mexico, Petitioner's client retains title to the equipment. Petitioner states that the equipment is used in manufacturing or producing goods for sale.

**Applicable Law & Regulations**

Section 1105-B of the Tax Law provides, in part:

(a) Notwithstanding any other provisions of this article, but not for purposes of the taxes imposed by section eleven hundred seven or eleven hundred eight or authorized pursuant to the authority of article twenty-nine of this chapter, the taxes imposed by subdivision (a) of section eleven hundred five on the receipts from the retail sales of 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 . . . shall be paid at the rate of two percent for the period commencing September first, nineteen hundred eighty and ending February twenty-eighth, nineteen hundred eighty-one, and such retail sales shall be exempt from such tax on and after March first, nineteen hundred eighty-one.

\* \* \*

(d) Notwithstanding any other provisions of this section or this article to the contrary, on and after September first, nineteen hundred ninety-six, the exemptions provided by subdivisions (a), (b) and (c) of this section shall apply for purposes of the sales and compensating use taxes imposed by section eleven hundred seven of this article.

Section 1115(a)(12) of the Tax Law provides an exemption from sales and use tax for:

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, or telephone central office equipment or station apparatus or comparable telegraph equipment for use directly and predominantly in receiving at destination or initiating and switching telephone or telegraph communication, but not including parts with a useful life of one year or less or tools or supplies used in connection with such machinery, equipment or apparatus. This exemption shall include 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.

Section 1119(a) of the Tax Law provides, in part:

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 . . . (4) on the sale or use within this state of tangible personal property, not purchased for resale, if the use of such property in this state is restricted to fabricating such property (including incorporating it into or assembling it with other tangible personal property) processing, printing or imprinting property and such property is then shipped to a point outside this state for use outside this state, . . . Where the tax on the sale or use of such tangible personal property has been paid to the vendor, to qualify for such refund or credit, such tangible personal property must be incorporated into real property as required in clause (1) above, reshipped as required in clause (2) above, used in the manner described in clauses (3), (4), (5) and (6) above within three years after the date such tax was payable to the tax commission by the vendor pursuant to section eleven hundred thirty-seven. . . . Where an application for a credit has been filed, the applicant may immediately take such credit on the return which is due coincident with or immediately subsequent to the time that he files his application for credit. However, the taking of the credit on the return shall be deemed to be part of the application for credit and shall be subject to the provisions in respect to applications

for credit in section eleven hundred thirty-nine as provided in subdivision (e) of such section . . . .

Section 1210(a)(1) of the Tax Law provides, in part:

. . . Any local law, ordinance or resolution enacted by any city of less than one million or by any county or school district, imposing the taxes authorized by this subdivision, shall exclude from the operation of such local taxes all sales of tangible personal property for use or consumption directly and predominantly in the production of tangible personal property, gas, electricity, refrigeration or steam, for sale, by manufacturing. . . (emphasis supplied)

Section 528.13(c) of the Sales And Use Tax Regulations provides:

*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.

\* \* \*

(2) Usage in activities collateral to the actual production process is not deemed to be used directly in production.

\* \* \*

(3) Machinery used to produce other machinery or equipment or parts for self use in production is considered to be used directly in production.

\* \* \*

(4) Machinery and equipment is used predominantly in production, if over 50% of its use is directly in the production phase of a process.

Section 534.3(e) of the Sales and Use Tax Regulations provides, in part:

*Property, the use of which is restricted to fabricating, processing, printing, or imprinting.* (1) A purchaser who has paid the tax on the tangible personal property may claim a refund or credit for such tax provided:

(i) the use of the tangible personal property in New York is restricted to fabricating such property (including the incorporation of it into or assembling it with other tangible personal property), processing, printing, or imprinting such property; and

(ii) such property is then shipped to a point outside New York State for use outside the State, and

(iii) such property is so used within three years from the date the tax was payable to the Department of Taxation and Finance, and application for the credit or refund is filed within three years after the date the tax was payable to the Department of Taxation and Finance.

(2) The fabricator, assembler, processor, printer, or imprinter may be either the purchaser or a user distinct from the purchaser.

\* \* \*

*Example 2:* A multi-location firm purchases equipment and has it delivered to its New York State location. In New York State the firm's employees assemble the equipment and ship the finished product to New Jersey for installation. As delivery occurs in New York State, the firm is liable for New York State sales tax. When the finished product is shipped to New Jersey a refund or credit for the tax paid will be allowable even though the purchaser of the tangible personal property in this instance is both the assembler and the ultimate user.

### **Opinion**

Petitioner's client produces its own equipment which it will use in its manufacturing operations to produce goods for sale. Machinery and equipment used to produce other machinery and equipment is eligible for the exemption provided under Section 1115(a)(12) of the Tax Law, if the machinery or equipment produced is used directly and predominantly in the production of

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tangible personal property for sale. The exemption under Section 1115(a)(12) also applies to equipment used to make supplies that are used in the production of tangible personal property for sale. (See The Fairbanks Company, Det St Tx Comm, March 22, 1978, TSB-H-81(172)S). Parts, tools and supplies are also exempt from State and local sales and use taxes under Sections 1105-B and 1210(a) of the Tax Law when used directly and predominantly in production. Parts, tools and supplies will qualify for the production exemption when used in connection with machinery and equipment that qualifies for such exemption. See Section 528.13(e) of the Sales and Use Tax Regulations. The fact that Petitioner's client chooses to produce its own machinery rather than purchase it from another source, does not change the application of the exemption provided under Section 1115(a)(12) of the Tax Law. Thus, parts purchased by Petitioner's client to assemble equipment are considered to be used directly in production and will qualify for the exemption under Section 1115(a)(12) if the equipment is used directly and predominantly (over 50% of its use) to produce tangible personal property for sale. Whether the equipment is used in or outside of New York State is immaterial for purposes of the production exemption under Section 1115(a)(12).

In addition, it is noted that, under Section 1119(a)(4) of the Tax Law Petitioner's client may be entitled to a refund or credit on sales or use tax paid on parts if, in the course of making the equipment, the use of such parts is restricted to fabricating (including incorporating them into or assembling them with other tangible personal property to make the equipment), processing, printing or imprinting such parts, and the completed equipment is then shipped outside New York State for use outside New York State. See Section 527.4 of the Sales and Use Tax Regulations for definitions of "fabricating," "processing," "printing" and "imprinting."

DATED: December 30, 1998

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

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