

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

TSB-H-80 (176) S
Sales Tax
September 30, 1980

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S800616A

On June 12, 1980 a Petition for Advisory Opinion was received from Willets Point Contracting Corp., 127-50 Northern Boulevard, Flushing, New York 11368.

The issue raised is whether Petitioner's transfers of asphalt to its customers constitute "sales" so as to entitle Petitioner to the exemptions from sales and use tax provided for under Sections 1115(a)(12) and 1115(c) of the Tax Law with respect to (1) machinery and (2) fuel, gas, electricity, refrigeration and steam and like services used in the production of tangible personal property for sale. In addition, Petitioner inquires as to whether it is a "vendor" with respect to such transfers.

Petitioner states that it produces asphalt which it uses in performing capital improvements to streets for the City of New York and other governmental entities, and that more than 50% of the material so produced is used in fulfilling contracts for such capital improvements. Petitioner indicates that its provision of capital improvements is contracted for on a unit price basis. Petitioner has submitted a sample bid proposal and a sample payment voucher, both stating the cost of materials and labor (and other costs) separately, and both amalgamating such costs into a total aggregate bid and total cost of work done, respectively.

Section 1115(a)(12) of the Tax Law provides an exemption from sales and use taxes for "Machinery or equipment for use or consumption directly and predominantly in the production of tangible personal property ... for sale"

Section 1115(c) of the Tax Law provides a similar exemption for "Fuel, gas, electricity, refrigeration and steam and gas, electric, refrigeration and steam service used ... in the production of tangible personal property for sale"

Arrangements of the type described in Petitioner's submissions constitute the equivalent of lump sum contracts for the rendering of capital improvements. The contractor in such instances is the ultimate consumer of the materials which are incorporated into the capital improvement, whether purchased or manufactured by it, and cannot be considered to re-sell such materials to its customers.

Accordingly, Petitioner does not sell the asphalt produced by it and consequently is not a vendor with respect to the same. It follows that Petitioner's costs for machinery, fuel and utilities are not exempt from sales tax inasmuch as these items are not used for the production of tangible personal property for sale.

DATED: September 8, 1980

s/GABRIEL B. DiCERBO
Deputy Director
Technical Services Bureau