

**New York State Department of Taxation and Finance  
Office of Tax Policy Analysis  
Technical Services Division**

TSB-A-05(47)S  
Sales Tax  
December 28, 2005

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S050303A

On March 3, 2005, the Department of Taxation and Finance received a Petition for Advisory Opinion from KM Davies Co., Inc., 6509 Lake Avenue, Williamson, New York, 14589.

The issues raised by Petitioner, KM Davies Co., Inc., are:

- 1) Whether purchases of machinery and equipment, repair and maintenance services, and building improvements installed upon and used in a cold storage facility used to store fruit owned by fruit processors are subject to sales tax.
- 2) Whether purchases of utilities used in the operation of such cold storage facility are subject to sales tax.

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

Petitioner operates several cold storage facilities located in Williamson, New York. Petitioner's facility is used to store fruit, some of which is owned by fruit processors. The cold storage facility provides a cooling and conditioning process in a controlled environment which is necessary to retard the fruit's natural ripening process until the fruit is ready to be placed in the fruit processor's production line.

The production facilities for Petitioner's customers who are fruit processors may be as close as next door to Petitioner's cold storage buildings or may be located outside of New York State.

The fruit processor purchases the fruit from the grower. The fruit is then sized and graded to determine the purchase price. The fruit processor then contracts with Petitioner to store the fruit until the fruit processor is ready for the fruit to be placed in the fruit processor's production line. The fruit is considered part of the fruit processor's inventory while stored at Petitioner's facility. When the fruit processor is ready for the fruit to be placed in its production line, the fruit is transported to the fruit processor's plant site where the fruit is placed in the production line. Petitioner does not grow or process the fruit. Petitioner at no time takes title to the fruit.

**Applicable law and regulations**

Section 1101(b)(9) of the Tax Law provides, in part:

Capital improvement. (i) An addition or alteration to real property which:

(A) Substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property; and

(B) Becomes part of the real property or is permanently affixed to the real property so that removal would cause material damage to the property or article itself; and

(C) Is intended to become a permanent installation.

Section 1105 of the Tax Law provides, in part:

Imposition of sales tax. On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax . . . upon:

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

(b) (1) The receipts from every sale, other than sales for resale, of the following:  
(A) gas, electricity, refrigeration and steam, and gas, electric, refrigeration and steam service of whatever nature; . . .

\* \* \*

(c) The receipts from every sale, except for resale, of the following services:

\* \* \*

3) Installing tangible personal property, excluding a mobile home, or maintaining, servicing or repairing tangible personal property, including a mobile home, not held for sale in the regular course of business, whether or not the services are performed directly or by means of coin-operated equipment or by any other means, and whether or not any tangible personal property is transferred in conjunction therewith, except:

\* \* \*

(iii) for installing property which, when installed, will constitute an addition or capital improvement to real property, property or land, as the terms real property, property or land are defined in the real property tax law as such term capital improvement is defined in paragraph nine of subdivision (b) of section eleven hundred one of this chapter; . . .

\* \* \*

(5) Maintaining, servicing or repairing real property, property or land, as such terms are defined in the real property tax law, whether the services are performed in or outside of a building, as distinguished from adding to or improving such real property, property or land, by a capital improvement as such term capital improvement is defined in paragraph nine of subdivision (b) of section eleven hundred one of this article, . . .

Section 1105-B of the Tax Law provides:

(a) Receipts from the retail sales of parts with a useful life of one year or less, tools and supplies 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 shall be exempt from the tax imposed by subdivision (a) of section eleven hundred five of this article.

(b) Receipts from every sale of the services of installing, repairing, maintaining or servicing the tangible personal property described in paragraph twelve of subdivision (a) of section eleven hundred fifteen of this article, including the parts with a useful life of one year or less, tools and supplies described in subdivision (a) of this section, to the extent subject to such tax, shall be exempt from the tax on sales imposed under subdivision (c) of section eleven hundred five of this article.

(c) Parts with a useful life of one year or less, tools and supplies described in subdivision (a) of this section and services described in subdivision (b) of this section shall be exempt from the compensating use tax imposed by section eleven hundred ten of this article.

Section 1115 of the Tax Law provides, in part:

(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. . . .

\* \* \*

(17) Tangible personal property sold by a contractor, subcontractor or repairman to a person other than an organization described in subdivision (a) of section eleven hundred sixteen, for whom he is adding to, or improving real property, property or land by a capital improvement, or for whom he is about to do any of the foregoing, if such tangible personal property is to become an integral component part of such structure, building or real property; provided, however, that if such sale is made pursuant to a contract irrevocably entered into before September first, nineteen hundred sixty-nine, no exemption shall exist under this paragraph.

\* \* \*

(c) (1) 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 imposed under subdivisions (a) and (b) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten of this article.

(2) Fuel, gas, electricity, refrigeration and steam, and gas, electric, refrigeration and steam service of whatever nature for use or consumption either in the production of tangible personal property, for sale, by farming or in a commercial horse boarding operation, or in both, shall be exempt from the taxes imposed under subdivisions (a) and (b) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten of this article.

Section 1132(c)(1) of the Tax Law provides, in part:

For the purpose of the proper administration of this article and to prevent evasion of the tax hereby imposed, it shall be presumed that all receipts for property or services of any type mentioned in subdivisions (a), (b), (c) and (d) of section eleven hundred five . . . are subject to tax until the contrary is established, and the burden of proving that any receipt . . . is not taxable hereunder shall be upon the person required to collect tax or the customer. . . .

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

Machinery and equipment used in production; telephone and telegraph equipment; parts, tools and supplies.

(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:

\* \* \*

(iii) (a) 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 . . . processing . . . .

\* \* \*

(b) Production. (1) The activities listed in paragraph (a)(1) of this section are classified as administration, production or distribution.

(i) *Administration* includes activities such as sales promotion, general office work, credit and collection, purchasing, maintenance, transporting, receiving and testing of raw materials and clerical work in production such as preparation of work, production and time records.

(ii) *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.

(iii) *Distribution* includes all operations subsequent to production, such as storing, displaying, selling, loading and shipping finished products.

(2) The exemption applies only to machinery and equipment used directly and predominantly in the production phase. Machinery and equipment partly used in the administration and distribution phases does not qualify for the exemption, unless it is used directly and predominantly in the production phase.

\* \* \*

(4) Production ends when the product is ready to be sold.

\* \* \*

(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.

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

\* \* \*

(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 531.2(e) of the Sales and Use Tax Regulations provides:

Processing. *Processing* is the performance of any service on tangible personal property which effects a change in the nature, shape or form of the property.

## Opinion

Petitioner operates cold storage facilities in which fruit owned by fruit processors is stored. Petitioner does not grow or process the fruit. Petitioner at no time takes title to the fruit.

Section 1105(a) of the Tax Law imposes sales tax on receipts from the sale of tangible personal property. Section 1105(b) of the Tax Law imposes sales tax on receipts from the sale of gas, electricity, refrigeration and steam, and gas, electric, refrigeration and steam service of whatever nature. Purchases of tangible personal property or utility services taxed under section 1105 of the Tax Law are presumed to be subject to sales tax unless the contrary is established. See section 1132(c) of the Tax Law.

Section 1115(a)(12) of the Tax Law exempts from tax machinery and equipment used directly and predominantly in the production of tangible personal property for sale by processing. Section 528.13(b)(1)(ii) of the Sales and Use Tax Regulations provides that production includes the *production line of the plant* starting with the handling and storing of raw materials *at the plant site* and continuing through the last step of production where the product is finished and packaged for sale.

Petitioner's refrigeration of fruit is not processing as contemplated in sections 1105-B and 1115(a)(12) of the Tax Law. See *Matter of Middleport Cold Storage*, State Tax Commn,

October 20, 1986, TSB-H-86(190)S. While Petitioner's storage constitutes storage of raw materials for the processor, the storage does not occur at the processor's plant site as called for in section 528.13(b)(1)(ii) of the Sales and Use Tax Regulations. Petitioner's services and facilities are separate and distinct from its customer's production activities. The fruit stored for the processor at Petitioner's facilities is awaiting transportation to a processor's plant. Such storage is not part of a continuous production line. Therefore, Petitioner's machinery and equipment used to store fruit for its customers who are processors are not used directly in the production for sale of tangible personal property. Accordingly, Petitioner's purchases of machinery and equipment used to store fruit for its customers are not exempt from sales or use tax under section 1115(a)(12) of the Tax Law.

Since Petitioner's machinery and equipment used in its cold storage facilities for storage of fruit owned by processors are not exempt from sales or use tax, repair and maintenance services performed on such machinery and equipment are not exempt from tax under section 1105-B(b) of the Tax Law. Utilities used to operate equipment used in Petitioner's storage facilities to store fruit awaiting transportation to a processing facility are not used directly in the production of tangible personal property for sale as contemplated in section 1115(c) of the Tax Law. Therefore, purchases of such utilities are subject to sales tax under section 1105(b) of the Tax Law.

Lastly, building improvements to Petitioner's cold storage facilities fail to qualify as property used directly and predominantly in the production of tangible personal property for sale, and thus are ineligible for exemption from tax under either section 1105-B of the Tax Law or section 1115(a)(12) of the Tax Law. If such improvements meet the requirements of section 1101(b)(9)(i) of the Tax Law for a capital improvement, charges for the installation of such improvements would not be subject to sales tax. See sections 1105(c)(3)(iii) and 1115(a)(17) of the Tax Law.

DATED: December 28, 2005

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