

**New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit**

TSB-A-14(10)S
Sales Tax
July 2, 2014

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S101202A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. Petitioner asks whether it is engaged in farming at its facility in New York and whether its purchases and uses of machinery, equipment, and other property for use at its New York facility qualify for exemption from State and local sales and compensating use taxes.

We conclude that Petitioner is engaged in farming production with regard to particular plants, shrubs and trees until those products are ready for sale by Petitioner. As this determination may vary for particular products, we cannot conclude definitively whether the machinery, equipment and other tangible personal property Petitioner uses at its site in this State are used predominantly in the production of tangible personal property for sale by farming. This is a factual issue not susceptible to determination in an Advisory Opinion.

Facts

Petitioner grows and sells perennials, woody shrubs, deciduous flowering trees, deciduous shade trees, flowering shrubs, fruit trees, and evergreen trees and shrubs. Petitioner does not grow its products from seeds. Plants are brought to the nursery and grown for varying periods, depending on the plant material. The growing time can vary from two months to up to three years. During this time, the plants are irrigated, spaced, weeded, pruned, fertilized, mulched, reburlapped, and repotted as they grow. These plants are nurtured and cared for to maintain their value and ensure that they are healthy and free of disease. All trees are “balled and burlapped” in a process where the root ball is enclosed in burlap for protection and ease of movement. The trees are placed in trenches in the ground and mulched and irrigated for periods of up to three years depending on the size of the tree being grown. Petitioner fertilizes the trees three times a year with granular fertilizer. For the flowering and shade trees, the selling price is based upon the diameter of the trunk, known as the caliper. Container shrubs are grown and sold when they reach a saleable size. The determination of when to sell trees and shrubs is based upon the market price at a specific time and what size tree will provide Petitioner with the best value for its investment.

Petitioner must have inventory on hand every month of the year. Landscapers plant trees and shrubs until the ground freezes in early winter and start planting again immediately upon the ground thawing. The trees and shrubs planted outside at Petitioner’s facility stay planted in the ground for the winter. They are winter pruned for strength and shape, fertilized, and irrigated during thaws. Container plants are placed into “houses” made of metal hoops covered with

plastic. Some houses are heated and some are not. Irrigation takes place during the winter months during every thaw and teams do winter pruning on those plants that require it. All plants are fertilized and checked for rodent and deer activity and action taken if necessary.

Ninety-five percent of the plants at Petitioner's facility are grown in this fashion, with five percent being sold directly to customers from other growers and requiring no growing time at Petitioner's facility. In most cases, Petitioner's sales are of products that have been grown and repotted over a period of time running from two months to three years.

In addition to selling plants, shrubs, and trees, Petitioner also sells a small amount of stone and block materials for landscaping, as well as a few water gardens.

Petitioner grows nursery stock only for wholesale sales to garden centers, landscapers, general contractors, municipalities, schools, and other non-retail customers.

Petitioner uses tractors and similar equipment at its New York facility. These machines are used in the growing areas exclusively, with the exception of one machine that is used 30% of the time to load and unload. Petitioner employs its own mechanics to maintain and repair its tractors, loaders, and other equipment. Petitioner purchases the parts it needs for this maintenance and repair from third parties.

Analysis

As relevant here, § 1115(a)(6) of the Tax Law exempts from State and local sales and compensating use taxes tangible personal property, whether or not incorporated in a building or structure, for use or consumption predominantly in the production for sale of tangible personal property by farming. With respect to the exemption of motor vehicles under § 1115(a)(6)(B), use of a motor vehicle in the production phase of farming is defined as any use of the motor vehicle on property farmed by the motor vehicle purchaser or user or in direct and uninterrupted trips between properties farmed by the motor vehicle purchaser or user. "Predominantly" means that the tangible personal property must be used or consumed, the real property or land must be used or consumed, or the building, structure, or real property into which the tangible personal property has been incorporated must be used, more than 50 percent of the time in the production for sale of tangible personal property by farming. *See* 20 NYCRR § 528.7(d).

"Farming," as relevant here, includes agriculture, floriculture, horticulture, and silviculture; truck and tree farming; operating nurseries, greenhouses, vineyard trellises or other similar structures used primarily for the raising of agricultural, horticultural, floricultural or silvicultural commodities; raising, growing and harvesting crops, as defined in Agriculture and Markets Law § 301(2). *See* Tax Law § 1101(b)(19).

Farming activities are classified as administration, production, or distribution, but only farming activities that qualify as production are eligible for exemption under Section 1115(a)(6). 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. Distribution includes all operations subsequent to production, such as storing, displaying, selling, loading, and shipping products that are ready for sale. *See* 20 NYCRR § 528.7(c)(1)(i) and (iii).

Farm production begins with preparation of the soil or other growing medium. Production ceases when the product is ready for sale in its natural state. Production ends for a specific producer (farmer or other person) when the product is in the form in which the person will offer it for sale. However, production may again start for a specific purchaser when the person gains ownership of the product, and production will continue until the product is in a form in which it, in turn, will be offered for sale. *See* 20 NYCRR § 528.7(c)(1)(ii) and (2).

If the plants Petitioner purchases from its suppliers are ready to be sold by Petitioner when Petitioner receives them, Petitioner is not engaged in the production phase of farming with regard to those plants because farm production ceases when the plants are in the form in which they will be offered for sale. Even when Petitioner maintains, waters, fertilizes, stores, or displays plants that are in the form that Petitioner will offer them for sale, Petitioner is engaged in the administration phase of farming and not production. As a result, any equipment including, without limitation, hoop houses and irrigation piping that is used with respect to plants that are in the form that Petitioner will offer them for sale, does not constitute property used in the production phase of farming and is therefore not exempt from State or local sales or use taxes. *See* TSB-M-00(8)S, *Farmers and Commercial Horse Boarding Operations*.

Likewise, when Petitioner's tractors, loaders, and other equipment, and the parts it purchases to maintain and repair them, are used with respect to plants that are in the form in which they will be offered for sale, such equipment is not being used in the production phase of farming. Therefore, if this use is the predominant use, this equipment and the parts used to maintain and repair it would not be exempt from State or local sales or use taxes.

On the other hand, if Petitioner purchases plants for resale but the plants are not in the form that Petitioner will offer them for sale, then Petitioner's activities of raising such plants would qualify as farm production, but only to the point that the plants are ready for sale by Petitioner. In that case, tangible personal property used or consumed predominantly by Petitioner in the production phase of farming would be exempt from State and local sales and use taxes. Thus, if Petitioner does purchase some plants that are not in the form that Petitioner will offer them for sale, and Petitioner uses machinery, equipment, and other property (including parts to maintain and repair such property) to care for those plants, then property used predominantly with respect to those plants would qualify for the § 1115(a)(6) exemption. If Petitioner uses machinery, equipment and other property for such dual uses – i.e. if the same equipment is used with some plants that are in the form in which Petitioner will offer them for sale and some plants that are not in the form that Petitioner will offer them for sale – Petitioner must keep detailed records of its use of such machinery, equipment, and other property in order to establish whether or not more than 50% of its use is in farm production.

As relevant here, §§ 1105(c)(3) and 1110(a)(D) of the Tax Law impose sales and use taxes on the services of installing, maintaining, servicing, or repairing tangible personal property, not held for sale in the regular course of business. However, § 1105(c)(3)(vi) provides that such services are not subject to tax when rendered with respect to tangible personal property for use or consumption predominantly in the production for sale of tangible personal property by farming, as such property is described in § 1115(a)(6) of the Tax Law. Therefore, the exclusion from tax in § 1105(c)(3)(vi) for services to Petitioner's machinery, equipment, and other property will not apply unless such property is used or consumed predominantly in farm production and Petitioner's records demonstrate such use.

Petitioner states that it sells only to wholesale customers. However, its sales to landscapers and other contractors for use to improve real property are treated as retail sales under §1101(b)(4)(i), regardless of whether the tangible personal property is to be resold as such before it is so used or consumed. Petitioner, therefore, must collect State and local tax on all sales to contractors, unless the contractor is purchasing plants or other property for an exempt organization under Tax Law § 1116(a) and the contractor gives Petitioner a properly executed Form ST-120.1, *Contractor Exempt Purchase Certificate*.

DATED: July 2, 2014

/S/

DEBORAH R. LIEBMAN
Deputy Counsel

NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.