

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

TSB-A-06(25)S
Sales Tax
October 19, 2006

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S050815B

On August 15, 2005, the Department of Taxation and Finance received a Petition for Advisory Opinion from General Cable Industries, 4 Tesseneer Drive, Highland Heights, Kentucky 41076.

The issue raised by Petitioner, General Cable Industries, is whether the sale of cable for the construction of a wind farm is subject to sales tax.

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

Petitioner is a manufacturer of wire and cable products. Petitioner has a customer (“Customer”) located outside of New York State who is building a wind farm in New York to generate electricity. Petitioner sold and delivered T2 Osprey cable to Customer in New York. Since the cable will be used as an overhead conductor, it will be attached to wood poles and will be used to transport the electricity generated by the wind turbine to and from a substation. The electricity may be stepped up or stepped down at the substation before being sold to the final consumer.

Customer provided Petitioner with a *Contractor Exempt Purchase Certificate*, Form ST-120.1, claiming that the cable qualifies as production machinery and equipment that will be incorporated into real property.

Applicable law and regulations

Section 1101(b)(4)(i) of the Tax Law defines a retail sale, in part, as:

. . . a sale of any tangible personal property to a contractor, subcontractor or repairman for use or consumption in erecting structures or buildings, or building on, or otherwise adding to, altering, improving, maintaining, servicing or repairing real property, property or land . . . is deemed to be a retail sale regardless of whether the tangible personal property is to be resold as such before it is so used or consumed. . . .
(Emphasis added)

Section 1105 of the Tax Law provides, in part:

Imposition of sales tax. . . 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.

Section 1105-B(a) of the Tax Law provides:

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.

Section 1115 of the Tax Law provides, in part:

Exemptions from sales and use taxes. (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, but not including parts with a useful life of one year or less or tools or supplies used in connection with such machinery or equipment. . . .

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.* Except as provided in subdivision (h) or (k) of this section, unless (i) a vendor, not later than ninety days after delivery of the property or the rendition of the service, shall have taken from the purchaser a resale or exemption certificate in such form as the commissioner may prescribe . . . to the effect that the property or service was purchased for resale or for some use by reason of which the sale is exempt from tax under the provisions of section eleven hundred fifteen . . . or (ii) the purchaser, not later than ninety days after delivery of the property or the rendition of the service, furnishes to the vendor: any affidavit, statement or additional evidence, documentary or otherwise, which the commissioner may require demonstrating that the purchaser is an exempt organization described in section eleven hundred sixteen, the sale shall be deemed a taxable sale at retail. . . . Where such a resale or exemption certificate or such an affidavit, statement or additional evidence has been furnished to the vendor, the burden of proving that the receipt, amusement charge or rent is not taxable hereunder shall be solely

upon the customer. The vendor shall not be required to collect tax from purchasers who furnish a resale or exemption certificate, or such an affidavit, statement or additional evidence in proper form, . . . (Emphasis added)

Section 526.6 of the Sales and Use Tax Regulations provides, in part:

(a) The term *retail sale* or *sale at retail* means the sale of tangible personal property to any person for any purpose, except as specifically excluded.

(b) *Special rule – sales specifically included as retail sales.* (1) A sale of any tangible personal property to a contractor, subcontractor or repairman for use or consumption in erecting structures or buildings or adding to, altering, improving, maintaining, servicing or repairing real property, property or land, is deemed to be a retail sale, regardless of whether the tangible personal property is to be resold as such before it is used or consumed. . . .

Section 532.4(b) of the Sales Tax Regulations provides, in part:

Burden of proof. (1) The burden of proving that any receipt, amusement charge, or rent is not taxable shall be upon the person required to collect the tax and the customer.

(2) A vendor who in good faith accepts from a purchaser a properly completed exemption certificate or, as authorized by the Department, other documentation evidencing exemption from tax not later than 90 days after delivery of the property or the rendition of the service is relieved of liability for failure to collect the sales tax with respect to that transaction. The timely receipt of the certificate or documentation itself will satisfy the vendor's burden of proving the nontaxability of the transaction and relieve the vendor of responsibility for collecting tax from the customer.

(i) A certificate or other document is “accepted in good faith” when a vendor has no knowledge that the exemption certificate or other document issued by the purchaser is false or is fraudulently presented. If reasonable ordinary due care is exercised, knowledge will not be imputed to the seller required to collect the tax.

* * *

(5) A vendor is not relieved of the burden of proof when it failed to obtain an exemption certificate or accepted an improper certificate, or had knowledge that the exemption certificate issued by the purchaser was false or fraudulently presented.

Section 541.2 of the Sales Tax Regulations provides, in part:

(d) A *construction contractor* means any person who engages in erecting, constructing, adding to, altering, improving, repairing, servicing, maintaining, demolishing or excavating any building or other structure, property, development, or other improvement on or to real property, property or land.

(e) *Contractor* means a construction contractor, subcontractor or repairman.

Opinion

Petitioner is a manufacturer of wire and cable products. A customer (“Customer”) constructing a wind farm in New York State provided Petitioner with a *Contractor Exempt Purchase Certificate*, Form ST-120.1, indicating that the cable it purchased is production machinery and equipment that will be incorporated into real property.

Customer, in this case, is acting as a contractor when it engages in constructing a wind farm. See section 541.2(d) and (e) of the Sales and Use Tax Regulations. Section 1101(b)(4)(i) of the Tax Law and section 526.6 of the Sales and Use Tax Regulations provide that all sales of tangible personal property to a contractor, subcontractor or repairman for use or consumption in erecting structures or buildings are deemed to be retail sales subject to sales tax. Therefore, Petitioner’s sales of cable to Customer that are delivered in New York State are subject to sales tax under section 1105(a) of the Tax Law, unless otherwise exempt.

Machinery or equipment, as well as parts, tools and supplies, used directly and predominantly in the production of tangible personal property, gas, electricity, refrigeration or steam for sale are exempt from sales and use tax. See sections 1105-B(a) and 1115(a)(12) of the Tax Law. While coiled wire in a generator used to create electricity for sale could qualify for the production exemption, nothing in Petitioner’s statement of facts suggests that the cable in the present case is used in this manner. In the present case, Customer is engaged in the construction of a wind farm. The cable is described as being attached to wood poles to transport the electricity created via the wind turbines to a substation where the electricity may be stepped up or stepped down. With regard to electricity, the production phase of the manufacturing process ends at the generator that produces the electricity. See *Niagara Mohawk Power Corporation v Wanamaker*, 286 App Div 446, affd 2 NY2d 764; *ABB Power Transmission, Inc.*, Adv Op Comm T&F, July 17, 1990, TSB-A-90(34)S; *Conti Enterprises, Inc.*, Adv Op Comm T&F, September 27, 2005, TSB-A-05(35)S. Thus, it must be concluded that the cable Petitioner is selling to Customer is used in the distribution, rather than the production, of electricity and is not exempt from sales and use tax.

In order to foster the proper administration of the sales tax and to prevent tax evasion, section 1132(c) of the Tax Law presumes that all receipts from the sale of property or services of any type are subject to tax until the contrary is established. However, where the vendor, in good faith, accepts from the purchaser a properly completed exemption certificate which states that the property or service is either for resale, qualifies for one of the exemptions provided by section 1115 of the Tax Law, or that the purchaser is an exempt organization under section 1116 of the

Tax Law, the vendor may sell the tangible personal property or service without collecting the tax from the customer. The liability for the tax due in such case is solely upon the customer. An exemption certificate or other document is accepted in good faith when a vendor has no knowledge that the certificate or document presented by the purchaser is false or fraudulently presented. See section 532.4(b)(2)(i) of the Sales and Use Tax Regulations.

Since it appears that Petitioner knows how Customer intends to use the cable for the wind farm and, upon receipt of this Opinion, knows such use does not qualify for the production exemption set forth in section 1115(a)(15) of the Tax Law, Petitioner cannot in good faith accept a *Contractor Exempt Purchase Certificate*, Form ST-120.1, from Customer indicating that the cable it purchased is exempt production machinery and equipment.

DATED: October 19, 2006

/s/
Jonathan Pessen
Tax Regulations Specialist IV
Technical Services Division

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