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

TSB-A-09(62)S
Sales Tax
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STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. S080416A

Petitioner BP Wind Energy North America, Inc. requested an advisory opinion as to whether its construction and installation of a commercial wind farm on leased premises are considered a capital improvement and are subject to sales tax.

We conclude that Petitioner's installations of its equipment on leased property pursuant to the terms of its lease agreement do not constitute a capital improvement to the leased premises. The assembly and installation of its wind generation equipment used directly and predominantly in the generation of electricity for sale may nonetheless qualify for exemption from sales tax pursuant to the provisions of sections 1115(a)(12), 1105(c)(3) and 1105-B of the Tax Law. The purchases of property, machinery and equipment (and charges for installation of that property) that do not qualify for the exemption for machinery and equipment used directly and predominantly in the generation of electricity for sale are subject to tax.

Facts

Petitioner is contemplating construction and operation in New York of a wind farm to be engaged in the production and sale of electricity. The potential construction contemplates the installation of foundations, turbines, transmission lines and towers, interconnection equipment, electrical transformers, and cable. In addition to the costs directly associated with generation and transmission equipment, there would be costs related to land development, roads, and operation buildings. The turbine foundations are anticipated to be approximately 10 feet deep and approximately 50-60 feet in diameter, requiring 300 cubic yards of concrete. The wind turbine generators are anticipated to be mounted on a tubular tower of approximately 265 feet. Rotor blades are expected to be between 127 and 157 feet in length. The turbines weigh in excess of 8 tons. Erection, assembly, and disassembly of the towers require a main crane with a capacity of between 300 and 750 tons depending on the final design.

The real property on which the wind farm would be constructed would be leased to Petitioner by an individual ("Lessor"). The prospective terms of the lease are summarized as follows:

- The term of the lease would be 40 years unless terminated, revised or extended.
- Termination of the lease would occur upon expiration of the lease term, written agreement of the parties to terminate the lease, or material breach by either party.
- Lease payments would be comprised of guaranteed payments and/or a percentage of gross revenues based on the generation of electricity by the facility.
- Lessor would be responsible for all real and personal property taxes levied on the premises.
- Petitioner would be responsible for all personal property taxes levied on the wind facilities.

- Petitioner would be responsible for all utility services used by the wind facilities or by Petitioner on the premises.
- Petitioner would be responsible for maintaining Petitioner's wind facilities in good condition and repair, ordinary wear and tear excepted.
- All wind facilities that would be constructed, installed, or placed on the premises by Petitioner pursuant to this lease could be moved, replaced, repaired, or refurbished by Petitioner at any time.
- Upon termination or the end of the lease term, Petitioner would remove all its wind facilities, including foundations to a depth of 4 feet below grade, within eight months from termination or expiration.
- If Petitioner did not remove all its wind facilities in accordance with the lease terms, Lessor would have the option to remove these wind facilities from the premises and dispose of them.

Analysis

Petitioner inquires whether its costs related to the purchase of materials and services relating to the construction on leased realty of a commercial wind farm that is to be engaged in the generation of electricity for sale are subject to sales and use tax.

Section 1101(b)(9) of the Tax Law provides that a capital improvement is an addition or alteration to real property that: (A) substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property; (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.

When a contractor installs an improvement for the owner of the realty which meets all three of the conditions set forth in section 1101(b)(9)(i) of the Tax Law, the work is considered a capital improvement. In that case, charges for those installations are not subject to sales tax. *See* sections 1105(c)(3)(iii) and 1115(a)(17) of the Tax Law.

Items that are installed for a tenant that would otherwise be a capital improvement may not qualify as a capital improvement by virtue of the terms of the tenant's lease. *See Matter of Flah's of Syracuse, Inc. v. James H. Tully, Jr. et al*, 89 AD 2d 729. Additions or alterations to real property for or by a tenant of the property are presumed to be temporary in nature for purposes of the definition of capital improvement set forth in section 1101(b)(9)(i) of the Tax Law, unless a contrary intention is demonstrated. Specific lease provisions stating that: 1) immediately upon installation, title to such installation vests in the lessor, and 2) the addition or alteration becomes part of and remains with the premises after the termination of the lease, will demonstrate an intention to make the installation permanent. Neither a provision granting the lessor the right to require removal of the improvement nor a provision stating that the improvement becomes the property of the lessor upon expiration of the lease or upon termination of the tenancy will negate this demonstration of intention of permanence. In the absence of a lease provision, other factors such as the nature of the installation, or written agreements other than a lease provision, may be considered in determining the intention of the parties with respect to the permanence of the installation. Factors that may indicate that a tenant installation is not intended to be permanent

include a lease provision requiring that the leased premises be restored to its original condition at the termination of the lease, and the rental of the installed property by the tenant from someone other than the lessor of the premises. *See Taxable Status of Leasehold Improvements for or by Tenants*, Technical Service Bureau Memorandum, June 15, 1983, TSB-M-83(17)S, and Publication 862, *Sales and Use Tax Classifications of Capital Improvements and Repairs to Real Property* (4/01), for further details.

Petitioner's facilities and wind generation and other equipment do not become the property of Lessor upon their installation. Pursuant to the lease terms, it is Petitioner who will be responsible for maintaining the tenant improvements. In addition, Petitioner retains the right to move, replace, restore, and refurbish the tenant improvements at any time. At the end of the lease term or upon earlier termination of the lease, Petitioner is obligated to remove all the wind facilities, including foundations to a depth of 4 feet below grade. Based on the described lease provisions, the installations Petitioner is contemplating are not intended to be permanent and do not qualify as capital improvements as defined in section 1101(b)(9) of the Tax Law. *See also Merit Oil of NY Inc. v. State Tax Commission*, (3 Dept. 1986) 124 AD 2d 326, and *Emery Air Freight Corporation v. Tax Appeals Tribunal*, (3 Dept. 1992) 188 AD 2d 772 (installations and improvements to realty by tenants who were required to remove their installations, did not constitute capital improvements). Thus, unless eligible for other exemptions, Petitioner's purchases of the property and installation services in connection with the wind farm are subject to sales tax.

However, Petitioner is constructing and will operate a commercial wind farm engaged in the generation of electricity for sale. Tax Law section 1115(a)(12) provides an exemption from sales tax for machinery or equipment for use or consumption directly and predominantly in the production of electricity for sale by generating, 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. Parts with a useful life of one year or less, tools, and supplies used in connection with generating machinery and equipment are exempt pursuant to section 1105-B of the Tax Law. Section 1105-B also provides an exemption from the tax imposed by section 1105(c)(3) of the Tax Law for the services of maintaining and installing machinery and equipment that otherwise qualify for the exemption provided for generating equipment in section 1115(a)(12) of the Tax Law.

The operation of a commercial wind farm engaged in the generation of electricity for sale is an eligible activity for the purposes of the exemptions provided by Tax Law sections 1105-B and 1115(a)(12). Purchases of the machinery or equipment used and consumed directly and predominantly in generation of electricity for sale and the charges for installing that machinery and equipment are exempt from sales tax.

Thus, charges for the purchase, assembly, and installation of the electricity generation equipment are exempt. For the purposes of a commercial wind farm operation, the wind turbine is machinery or equipment used directly and predominantly in production activities. Without any key piece of the wind turbine's machinery and equipment, including the tower (to provide support and necessary height clearances for the rotor blades) and the rotor blades (to catch the wind to turn the hub that spins the generator), electricity could not and would not be produced. Only with all the parts working as an integrated unit is electricity generated. Thus, the purchase, assembly, and installation of the turbine, including the rotor blades, hub, nacelle (which contains the drive shaft,

gear box, generator, hydraulics, cooling system, control and monitoring equipment) and tower are exempt from tax. *See* Adv Op Comm Tx & Fin, December 9, 2009, TSB-A-09(59)S.

Supervisory Control and Data Acquisition (SCADA) equipment and meteorological equipment may perform functions that provide for an integrated management of the operation and control of the wind turbine. Thus, SCADA and meteorological equipment integrally connected to the operation of the wind turbines may also qualify as exempt electricity generation machinery and equipment pursuant to the provisions of section 1115(a)(12) of the Tax Law. *See T.V. Data Inc*, decision Tx App Trib No. 803016, March 2, 1999 (computers that formed a network [though not all of the computers were directly connected to the production machinery] to provide commands to drive the production equipment were exempt.)

However, the use of meteorological equipment to assess a site's potential as a wind farm is not an exempt use. Therefore, unless otherwise used directly and predominantly (more than 50% of the time) in the operation of the wind turbines, the meteorological equipment would not qualify for the exemption.

For purposes of the sales tax exemptions for machinery and equipment used or consumed directly and predominantly in the production of electricity for sale by generation, the production process is considered to have ended at the generating turbine. *See Matter of Niagara Mohawk Power Corporation v George W. Wanamaker*, 286 App Div 446(4th Dept 1955), *affd* 2 NY2d 764, which supports this conclusion. Thus, items subsequent to the generator are used in the distribution of and not in the production of electricity. Accordingly, internal step-up transformers within the wind generator or external transformers at the base of the tower, and intra-wind farm collection cables (including their circuit breakers and control equipment) are considered part of the distribution process and are thus subject to the sales tax. *See* TSB-A-09(59)S. Similarly, substations and other equipment installed in the wind farm (transformers, breakers, meters, relays, control and power equipment, grid interface equipment, transmission cables, etc.) are considered to be used in distribution functions and activities (i.e, used in activities not directly relating to production) and do not qualify for the production exemption *(see* Sales and Use Tax Regulations section 528.13(b); *ABB Power Transmission, Inc.,* Adv Op Comm T&F, July 17, 1990, TSB-A-90(34)S; *Gernatt Asphalt Products, Inc.,* Adv Op Comm T&F, December 5, 1985, TSB-A-85(64)S; *Akzo Salt, Inc.,* Adv Op Comm T&F, January 25, 1993, TSB-A-93(8)S).

Cement and other materials installed in foundations to support the towers and other equipment are not machinery or equipment. Nor do they have an actual causal effect on the generation of electricity. The charges for the cement and other materials, and for the installation (construction) of the foundations, are not exempt under Tax Law sections 1115(a)(12) and 1105-B.

Meteorological towers (as opposed to meteorological monitoring equipment); poles and conduit; control and maintenance buildings; fencing; and road materials are not machinery and equipment used directly in generation of electricity. Purchases of these items, and their materials and installation (construction), are not exempt pursuant to Tax Law sections 1115(a)(12)and 1105-B.

Sales And Use Tax Regulations section 541.5(b)(4)(iii) provides that where a contract includes the sale of tangible personal property that remains tangible personal property after installation, the contractor must collect from the customer the appropriate New York State and local taxes on the selling price, including any charge for installation, of that tangible personal property. Accordingly, Petitioner's purchases of nonexempt machinery, equipment, or other tangible personal property, such as transformers, cement for the foundations, cable and meteorological towers, substation equipment anchor bolted to foundations, and overhead poles, and charges for their installation, are taxable. *See West Mountain Corporation v. Miner*, 85 Misc 2d 416 (1976) and *Charles R. Wood Enterprises, Inc. v State Tax Commission*, 67 AD 2d 1042 (1979).

In general, the property that is exempt from sales tax under section 1115(a)(12) or 1105-B of the Tax Law will be exempt from tax whether purchased by Petitioner or purchased by and sold to Petitioner on an installed basis by a contractor or subcontractor. Installation charges that are exempt from tax under section 1105-B are nontaxable when performed on Petitioner's behalf by its contractors or subcontractors. Petitioner's purchases of nonexempt property and installation services for the nonexempt property are taxable if the property remains tangible personal property after installation. Petitioner's contractors may purchase nonexempt property and installation service for resale where the property remains tangible personal property after installation. A contractor may give its supplier a properly completed Contractor Exempt Purchase Certificate (ST-120.1) in order to make exempt purchases of qualifying exempt production machinery and installation services therefore, or nonexempt property that retains its identity as tangible personal property upon installation and installation services for that property.

Purchases and leases of construction tools and equipment for use by Petitioner, its contractors, or subcontractors in constructing and erecting the facility are subject to sales tax.

DATED: December 29, 2009

/S/
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Director of Advisory Opinions
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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.