

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

TSB-A-94 (11)S
Sales Tax
March 18, 1994

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S940127A

On January 27, 1994, a Petition for Advisory Opinion was received from Bell Aerospace Textron, P.O. Box One, Buffalo, New York 14240-0001.

The issue raised by Petitioner, Bell Aerospace Textron, is whether Petitioner's purchase of machinery and equipment used for the treatment of groundwater through a wastewater treatment plant will be subject to sales and use taxes.

Petitioner is in the process of constructing a wastewater treatment plant on its property located in Wheatfield, New York. This facility will consist of a 2,800 sq. ft. building, at an estimated cost of \$100,000. In addition to the building, equipment will be installed to treat groundwater. The estimated cost of this equipment is \$1,200,000. This facility will be used solely for the purpose of groundwater treatment.

During the period from 1948 to 1984, Petitioner used an unlined surface impoundment as a depository for chlorinated solvents, rocket fuels and various other hazardous materials used in its manufacturing process. The high specific gravity of the materials deposited in the pond caused them to migrate through various layers of soil and fractured bedrock, finally coming to rest in a mitten shaped plume of dense non-aqueous phase liquid (hereinafter "DNAPL"). Groundwater coming in contact with the DNAPL plume has created a larger, elliptical plume contaminated with aqueous (dissolved) phase organic compounds.

After years of study and as mandated under permit by the New York State Department of Environmental Conservation, Petitioner has designed a treatment plant to pump and treat contaminated water from the aqueous phase plume and control the DNAPL plume through hydraulic containment.

As part of the treatment project, pumping wells will be drilled to extract and transfer contaminated groundwater via an underground pipeline network to the treatment building. The treatment equipment will separate recovered DNAPL from the contaminated water and process the water through various treatment stations that filter the water, pass it through a series of air strippers where volatile components are separated from the water and destroyed in a thermal oxidizer and, finally, the water will be polished in carbon filters. The treated water will then be discharged to the sanitary sewer for further treatment.

Section 1115 of the Tax Law provides, in part, as follows:

Sec. 1115. 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:

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(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, or telephone central office equipment or station apparatus or comparable telegraph equipment for use directly and predominantly in receiving at destination or initiating and switching telephone or telegraph communication, but not including parts with a useful life of one year or less or tools or supplies used in connection with such machinery, equipment or apparatus. This exemption shall include all pipe, pipeline, drilling rigs, service rigs, vehicles and associated equipment used in the drilling, production and operation of oil, gas, and solution mining activities to the point of sale to the first commercial purchaser.

Section 528.13(d) of the Sales and Use Tax Regulations provides, in part, as follows:

(d) Waste treatment equipment. (1) Machinery and equipment used for disposing of industrial waste, as a part of a process for preventing water or air pollution, will be considered as being used directly and predominantly in production by manufacturing, processing, generating, assembling, refining, mining or extracting, if

(i) the machinery and equipment is purchased by a manufacturer and used predominantly to actually treat, bury, or store waste materials from a production process, and

(ii) over 50 percent of the waste treated, buried or stored results from the production process.

Example 1: A manufacturing plant has a pumping station to transmit effluent from an industrial process to a municipal sewage treatment system. The equipment at the pumping station is exempt.

Example 2: A manufacturing plant has a treatment plant at which it treats effluent from an industrial process and sanitary waste. Eighty percent of the waste treated is industrial effluent. The equipment at the treatment plant is exempt as it is used directly and predominantly in production.

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Example 4: A company uses a scrubber and ventilation system which places a gaseous mixture, generated in a manufacturing process, in contact with water. This converts the gaseous chemicals into a dilute solution. The scrubber and ventilation system is machinery or equipment used directly in production, as it treats industrial waste, and purchase thereof is exempt from tax.

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(2) Building materials, which become part of a capital improvement used as a waste treatment facility are not eligible for the exemption.

Example 6: A company builds a concrete waste treatment center that has equipment to treat effluent from a manufacturing process. The concrete building and tanks are real property and are not machinery and equipment. They are not exempt although the machinery and equipment contained therein may be exempt. (emphasis added)

Pursuant to Section 528.13(d) of the Sales and Use Tax Regulations machinery and equipment used for disposing of industrial waste, as a part of a process for preventing water pollution, is exempt from sales and use taxes where it is used directly and predominantly in production of tangible personal property. In the instant case, Petitioner during the period 1948 to 1984 deposited hazardous materials used in its then manufacturing process in an unlined surface impoundment which, in turn, contaminated surrounding groundwater. Petitioner, as mandated under permit by the New York State Department of Environmental Conservation, has now designed a process which will extract the contaminated groundwater to treat and purify the groundwater of contaminates. Therefore, Petitioner will not be preventing water pollution by such process, but will be extracting water which has already been polluted. Moreover, Petitioner will not be treating the waste material during the manufacturing process but will subsequently treat the contaminated groundwater to purify the groundwater of the contaminates. Accordingly, since Petitioner will not actually be treating the waste material to prevent water pollution during the manufacturing process, pursuant to Section 528.13(d) of the Sales and Use Tax Regulations the machinery

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and equipment in the wastewater treatment plant is not exempt from sales and use taxes under Section 1115(a)(12) of the Tax Law as machinery and equipment used or consumed directly and predominantly in the production of tangible personal property.

DATED: March 18, 1994

/s/
PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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