

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

TSB-A-95 (19)S
Sales Tax
June 12, 1995

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S941228B

On December 28, 1994, a Petition for Advisory Opinion was received from Formats Unlimited, Inc., 121 Toledo Street, E. Farmingdale, New York 11735.

The issue raised by Petitioner, Formats Unlimited, is whether its purchase of certain machinery and equipment which it uses to perform duplicating services, qualifies for exemption from sales tax under Section 1115(a)(12) of the Tax Law, and whether utilities used to power such equipment qualifies for exemption under Section 1115 (c) of the Tax Law.

Petitioner performs duplication service for the computer industry. It receives a master disc, which contains pre-written computer software, from its customer to duplicate. Petitioner supplies the blank discs, the packaging and the labels. The operation is run on an assembly-line basis. The blank discs are loaded into the equipment. The master disc is used to duplicate the information onto the blank disc. The discs are checked for errors before being labeled and packaged. The finished software package is then sent to Petitioner's customer who will resell it.

Section 1101(b)(6) of the Tax Law defines tangible personal property as, "Corporeal personal property of any nature. . . . Such term shall include pre-written computer software, whether sold as part of a package, as a separate component, or otherwise, and regardless of the medium by means of which such software is conveyed to a purchaser."

Section 1115(a)(12) of the Tax Law exempts from sales taxes "[m]achinery or equipment for use or consumption directly and predominantly in the manufacture of tangible personal property. . . .for sale by manufacturing, processing. . . ."

Section 528.13(c)(1) of the Sales and Use Tax Regulations defines the term "directly" to mean the machinery and equipment must, during the production process (i) act upon or effect a change in the 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. Under Section 528.13(c)(2) of the Sales and Use Tax Regulations machinery and equipment used in activities collateral to the production process is not deemed to be used directly in production.

Section 528.13(c)(4) of the Sales and Use Tax Regulation provides that machinery and equipment is used "predominantly" in the production of tangible personal property if it is so employed over 50% of the time. 20 NYCRR 528.13(c) (1), (2), (4).

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Pursuant to section 1115(c) of the Tax Law, electricity for use or consumption directly and exclusively in the production of tangible personal property for sale is not subject to sales or use tax.

Section 528.22(c) of the Sales and Use Tax Regulations explains that "directly" means the electricity must either operate exempt production machinery, or create conditions necessary for production, or perform a part of the production process. "Exclusively" means electric power is used 100% in the production process. However, utility purchases are subject to tax when the commodity is used to power equipment not entitled to the manufacturer's exemption and for general heating, cooling or lighting of offices and plant areas.

Because electricity when purchased by the user is normally received in bulk or in a continuous flow and a portion thereof is used for purposes which would make the exemption inapplicable to such purchases, the user may claim a refund or credit for the tax paid on the portion used or consumed directly and exclusively in the operation of exempt production equipment.

Petitioner is using its customer's master disc in much the same way that film producers and recording producers would use their customer's master to produce copies. Consequently, since pre-written software is considered to be tangible personal property and since Petitioner is producing copies of such tangible personal property for sale, the purchase of the machinery and equipment used by Petitioner for such purposes is exempt from sales tax in accordance with Section 1115(a)(12) of the Tax Law provided it is used more than 50% of the time in this manner. Electricity used to power machinery which is being used in production is also exempt from sales tax in accordance with Section 1115(c) of the Tax Law.

DATED: June 12, 1995

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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