

**TENNESSEE DEPARTMENT OF REVENUE
LETTER RULING #97 - 48**

WARNING

Letter rulings are binding on the Department only with respect to the individual taxpayer being addressed in the ruling. This presentation of the ruling in a redacted form is informational only. Rulings are made in response to particular facts presented and are not intended necessarily as statements of Department policy.

SUBJECT

Sales tax as applied to the building components of [PRODUCT] treatment and recycling facility and equipment used in the facility.

SCOPE

This letter ruling is an interpretation and application of the tax law as it relates to a specific set of existing facts furnished to the department by the taxpayer. The rulings herein are binding upon the Department and are applicable only to the individual taxpayer being addressed.

This letter ruling may be revoked or modified by the Commissioner at any time.

Such revocation or modification shall be effective retroactively unless the following conditions are met, in which case the revocation shall be prospective only:

- (A) The taxpayer must not have misstated or omitted material facts involved in the transaction;
- (B) Facts that develop later must not be materially different from the facts upon which the ruling was based;
- (C) The applicable law must not have been changed or amended;
- (D) The ruling must have been issued originally with respect to a prospective or proposed transaction; and
- (E) The taxpayer directly involved must have acted in good faith in relying upon the ruling; and a retroactive revocation of the ruling must inure to the taxpayer's detriment.

FACTS

[THE TAXPAYER] recycles spent [PRODUCT] and recovers the [PRODUCT 1] and [PRODUCT 2] values in the [PRODUCT]. After recycling the [PRODUCT], the Taxpayer sells refined [PRODUCT 1] and [PRODUCT 2]. The Taxpayer is a manufacturer and has an industrial machinery number issued by the Department. The Taxpayer plans to construct a new facility where it will continue its present activities of treating, pretreating, recycling, and/or disposing of the spent [PRODUCTS] and their components. The new facility will comply fully with all local, state, and federal laws concerning air and water pollution. The Taxpayer also intends to purchase new equipment for the new facility.

The current facility is in a [LOCATION], which prevents the Taxpayer from obtaining building permits to modernize or expand at that location. Because the current facility is comprised of several buildings, pollutants are inadvertently released as employees and vehicles move from building to building.

The new facility will be adjacent to the existing facility, but is not within the [LOCATION]. The new facility will employ the best available technology in all EPA and OSHA regulations and will constitute a substantial improvement over the existing plant. The Taxpayer has acquired all necessary EPA permits with respect to solid waste, air control, and water control and has obtained the approval of the [TENNESSEE COUNTY] Planning Commission.

The new facility will encompass approximately [NUMBER] square feet in a single building. The building will be specially constructed to operate in a vacuum and to contain nearly all pollutants more efficiently and thoroughly than was possible when the processes occurred throughout several buildings.

Sixty percent of the manufacturing space requires walls and roof systems of cast concrete to avoid the rapid corrosion caused by acid fumes released in the recycling process. Standard concrete panels cannot be used because controllable louvers must be in the wall panels. The louvers are part of the vacuum system being installed. The plant wide vacuum system is designed to prevent the fugitive emission of vapor from any internal point to the outside air. Fumes and vapors are trapped and treated before they can emerge. The system is designed so that if all the factory doors were opened at once, the air velocity would be [NUMBER] feet per minute.

The material storage area, comprising approximately [NUMBER] square feet, is designed to have a "sacrificial floor;" that is, an [NUMBER] inch standard floor is built, then covered with seamless plastic, and a second [NUMBER] inch floor is poured over the area and finished with an acid resistant coating. When the [NUMBER] inch floor erodes down to the plastic, it is removed and a new four inch layer is poured.

An area of about [NUMBER] square feet is sunken [NUMBER] feet below floor level and enclosed by a [NUMBER] foot high wall which is [NUMBER] inches thick, to accommodate the height of the special machinery used for disintegrating and separating the various components of the spent [PRODUCT]. This area requires a network of trenches for acid trapment and drainage. The trench and catchment systems are lined with stainless steel and are covered for heavy traffic. The [PRODUCT] storage area also requires the network of trenches and comprises [NUMBER] square feet.

The floor in front of the furnace area requires [NUMBER] circular combustion chambers to be recessed into the floor. These chambers are each [NUMBER] feet deep and [NUMBER] feet in diameter. They must support loads of up to [NUMBER] pounds and must resist temperatures up to [NUMBER] degrees Fahrenheit. Many areas of the plant require waste walls which are [NUMBER] inches thick and up to [NUMBER] feet high to segregate the recycled components.

The areas of the new facility that are not designed for containment, including an employee locker room, lunch room, equipment cleaning room, nurses station, and office space, will encompass approximately [NUMBER] square feet.

ISSUES

1. Whether the proposed facility constitutes pollution control facilities under Tenn. Code Ann. § 67-6-102(12), allowing the Taxpayer to purchase components of the facility exempt from tax pursuant to Tenn. Code Ann. § 67-6-206 or whether the facility is exempt under Tenn. Code Ann. § 67-6-346.
2. Whether the Taxpayer may purchase equipment and machinery for the new facility exempt from tax.

RULINGS

1. The proposed facility does not constitute a pollution control facility under Tenn. Code Ann. § 67-6-102(12). Components of the facility which are primarily for pollution control, however, may be purchased exempt from tax pursuant to Tenn. Code Ann. § 67-6-206. To the extent that any components related to pollution control are not exempt pursuant to Tenn. Code Ann. § 67-6-206, Tenn. Code Ann. § 67-6-346 would allow a credit or refund for any taxes paid provided that the components are mandated by federal, state, or local law.
2. The Taxpayer is a manufacturer and through proper use of its authorization, may purchase industrial machinery exempt from tax. Machinery that does not

qualify as industrial machinery may be purchased exempt from tax if required for pollution control under federal, state, or local law.

ANALYSIS

Tenn. Code Ann. § 67-6-206 exempts from sales tax the sale of industrial machinery used by manufacturers. A manufacturer is an entity which fabricates or processes tangible personal property for resale. The Taxpayer processes used [PRODUCTS] and produces refined [PRODUCT 1] and [PRODUCT 2] which are then sold to other entities for further use. Accordingly, the Taxpayer is a manufacturer. See, *Azcon Corp. v. Olsen*, slip op. (Tenn. 1983).

1. The definition of industrial machinery includes

pollution control facilities primarily used for air pollution control or water pollution control, where the use of such machinery, equipment or facilities is by one who engages in such fabrication or processing as one's principal business.

Tenn. Code Ann. § 67-6-102(12)(A). The Taxpayer's principal business is the recycling and processing of [. "Pollution control facilities" are defined in Tenn. Code Ann. § 67-6-102(12)(A)(iv) as

any system, method, improvement, structure, device, or appliance appurtenant thereto **used or intended for the primary purpose of eliminating, preventing or reducing air and water pollution**, or for the **primary purpose** of treating, pretreating, recycling or disposing of any hazardous or toxic waste, solid or liquid, when such pollutants are created as a result of fabricating or processing by one who engages in fabricating or processing as such person's principal business activity, which, if released without such treatment, pretreatment, modification or disposal, might be harmful, detrimental or offensive to the public and the public interest.

(Emphasis added). The definition clearly provides that a structure may be pollution control facilities for the purposes of the exemption, provided that other requirements are met. Based on the facts provided, it appears that the primary purpose of the plant as a whole is not to prevent or reduce both air and water pollution which naturally occur during the course of the Taxpayer's recycling processes, but to house the machinery and provide the manufacturing facilities.

Although the new facility has been specially designed and will be constructed of specialized materials to maximize pollution control, the primary purpose is clearly

the manufacture and processing of spent [PRODUCTS]. Pollution control is secondary.

The containment and construction of certain aspects of the new facility are primarily for and necessary to prevent harm to the environment and to employees of the facility. Accordingly, building components used primarily for pollution control, such as the louvers and components of the vacuum system, may be purchased exempt from tax pursuant to Tenn. Code Ann. § 67-6-206.

It is a more difficult question to address other elements of the plant, such as the roof, floors, and walls. Clearly, a manufacturing concern requires those elements of the plant in order to operate properly. The exemption of these items as industrial machinery is a two-fold inquiry. First, whether the items are industrial machinery, and second, whether they qualify as pollution control equipment under Tenn. Code Ann. § 67-6-102(12)(A).

A roof, floor, and walls do not qualify as industrial machinery because they are elements of a building. Buildings are not industrial machinery. *Tibbals Flooring v. Huddleston*, 891 S.W. 2d 196 (1994). Any specialized elements which are primarily for pollution control, however, such as an additional, separate liner in the roof, walls, or floor, which can be separately identified, are exempt. All such items qualifying for the exemption under this provision must be separate and distinct; sales and use tax are not apportioned according to the various uses of an item.

To the extent that other aspects of the new facility are not exempt pursuant to Tenn. Code Ann. § 67-6-206, the next inquiry is whether the pollution control credit in Tenn. Code Ann. § 67-6-346 may apply. This provision allows a credit or refund of any sales or use tax paid “with respect to any pollution control required to bring the purchaser into compliance with pollution control laws or regulations, whether federal, state or local.” A taxpayer may also apply for authorization to purchase the pollution control exempt from tax. Accordingly, to the extent that certain components or areas of the new facility are not exempt under Tenn. Code Ann. § 67-6-206 or any other credit, the Taxpayer will be able to receive a credit or refund for taxes paid provided that the Taxpayer can demonstrate that the components or areas of the facility are required by federal, state, or local law or regulation.

Components used in areas of the facility that are not designed for the containment of pollutants, including the employee areas, cafeteria, locker rooms, and offices, do not qualify under either the industrial machinery or pollution control exemptions. All building components which are used in these areas are subject to tax unless otherwise exempt.

2. The Taxpayer may purchase new industrial machinery exempt from tax because the Taxpayer is a qualified manufacturer and has an industrial machinery number. The industrial machinery authorization, properly used, allows the Taxpayer to purchase industrial machinery and pollution control equipment, if qualified under Tenn. Code Ann. § 67-6-206, free from sales or use tax. As stated above, to the extent that machinery or pollution control is not exempt under Tenn. Code Ann. § 67-6-206, the provisions of Tenn. Code Ann. § 67-6-346 may apply.

Caroline R. Krivacka
Tax Counsel

APPROVED: _____
Ruth E. Johnson
Commissioner

DATE: 10-31-97