



North Carolina Department of Revenue

Roy Cooper
Governor

Ronald G. Penny
Secretary

June 1, 2018

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Re: Private Letter Ruling

Taxpayer: [REDACTED]

Taxpayer's FEIN: [REDACTED]

Dear [REDACTED]

The Department has completed its review of your request for a written determination on behalf of your client, [REDACTED] ("Taxpayer"). In making this written determination, the Department has considered the facts presented in your initial request as well as any supplemental information provided to the Department.

Private letter rulings are written determinations issued under N.C. Gen. Stat. § 105-264.2 and apply the tax law to specific sets of existing facts furnished by you on behalf of Taxpayer. This written determination is applicable only to the taxpayer addressed herein and as such has no precedential value except to the taxpayer to whom the determinations are issued on behalf of the Department.

Overview and Relevant Facts

Taxpayer has submitted to the Department "[a] copy of the lease agreement ('Lease') entered between the ultimate parent of the taxpayer, [REDACTED], ('Parent') and North Carolina [State] Port[s] Authority ('Ports Authority'). . . [a] copy of a terminal services agreement ('Terminal Services Agreement') between [Taxpayer] and [Parent]" and "a [REDACTED] purchase and sale agreement ('Master [REDACTED] Purchase and Sale Agreement') between [Parent] and [A Third-Party], where both parties agreed to utilize [Taxpayer's] terminal as the delivery point." [REDACTED] specifications are included as exhibits or schedules in the Terminal Services Agreement and the Master [REDACTED] Purchase and Sale Agreement.

The information submitted to the Department states that "[i]n 2013, the Council of State in North Carolina authorized the [Ports Authority] to sign a 21-year lease with [Parent]. As part of the agreement, [Parent] agreed to build a [REDACTED] export facility capable of processing 2 million tons of [REDACTED] annually. This project includes the construction of [REDACTED] concrete storage domes, each with a capacity of [REDACTED] tons. Additionally, [Parent] was to construct a truck and rail unloading station, conveyor systems and a ship loading system." Paragraph B of the "Recitals" communicated in the Lease states "[Parent] seeks to have developed an at-Port [REDACTED] export facility . . . that will be operational for the receipt, storage, discharge and loading of [REDACTED] owned by or consigned to [Parent] . . . for export by ocean-going vessels."

Article 17.1 of the Lease states, in part, "[i]n the case of an assignment by [Parent] to an Affiliate, . . . any Affiliate to which this Lease is assigned shall (i) assume the obligations of [Parent] in writing, (ii) have taken

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ownership of and be operating [Parent's System] and related assets," and "[f]or purposes of this Lease, 'Affiliate' of a Person means any other Person that, directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with, such person."

Under the Terminal Services Agreement, Taxpayer is described in Paragraph A of the "Recitals" "as assignee of [Parent]" under the Lease between Parent and Ports Authority. This Recital also states "the [Ports Authority] has leased to [Taxpayer] certain real property located within a marine terminal . . . where [Taxpayer] will construct and operate a [redacted] export facility ('Terminal') for the receipt, discharge and loading of [redacted] for export by ocean-going vessel [*sic*]."

"[Taxpayer's] facility project has been broken down into six major cost categories. The categories are the receiving building, the conveyors, the domes, the ship loader, the aspiration systems, and the fire detection and suppression systems. These six categories of equipment work together to ensure that [Parent] can get the correct product to the correct client in an acceptable condition."

In describing the cost categories, Taxpayer states that "[Parent] manufactures [redacted] at different facilities throughout the State of North Carolina. In order to complete the orders for its customers, [Parent] ships the [redacted] via truck or railcar from the manufacturing site to [Taxpayer's] Port facility where the [redacted] are prepared for delivery overseas. The [redacted] arrive at the receiving building, where the [redacted] are unloaded from trucks and railcar onto the conveyors for transport to the domes. An aspiration system works to remove the dust rising from the [redacted] as they are shifted during the unloading and transit process.

"An inclined conveyor system carries the [redacted] from the ground floor of the receiving building to the top of the two domes where the [redacted] are dropped forming cone shaped piles within each dome. Each shipment of [redacted] is dropped into a separate cone shaped pile as each batch of [redacted] is made from wood harvested from different locations. Accordingly, each batch of [redacted] received from the manufacturing site has its own unique mineral and moisture content.

"The [redacted] are measured continuously to maintain appropriate moisture levels and temperature levels. This is accomplished partly through an air circulation system that is built into the floor of the domes. If the [redacted] are too moist, or the temperatures exceed a certain level, the air circulation systems work to cool the [redacted] and remove excess moisture. Due to the highly combustible nature of the [redacted] fire detection and suppression systems are located throughout the facility.

"Also in the domes, a tractor is used to sort and combine [redacted] from different batches so that the final [redacted] mixture transported to customers meets contract specifications. While in the domes, another aspiration system removes any excess dust.

"Once it has been determined that the [redacted] meet the appropriate temperature, moisture, and mineral content levels — as specified within each customer contract — the [redacted] are pushed on to another conveyor system built below the domes. These conveyors carry the [redacted] on an incline which ultimately leads to the ship loader which is used to deliver the [redacted] on to the ship for transportation.

"[Parent's] customers are industrial scale entities located in [redacted] who use [Parent's] [redacted] [redacted] as alternative fuel to generate (i.e., manufacture) power."

Taxpayer's initial letter requesting a private letter ruling states, "It is the position of Taxpayer that its purchases of specialized equipment to be used in its . . . facility qualify for the one percent, eighty dollar per article maximum treatment under N.C. Gen. Stat. § 105-187.51B(a)(5)."

Taxpayer states it purchased the following machinery or equipment that it believes qualifies under the requirements of N.C. Gen. Stat. § 105-187.51B(a)(5):

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1. Receiving building,
2. Rail and truck scales,
3. Specialized dumper equipment,
4. Fabric filter dust collector,
5. Conveyer system,
6. Dome storage facilities,
7. Additional concrete when constructing the domes,
8. Mylar coverings,
9. High capacity air handling (aspiration) system,
10. High-volume dust collector,
11. Fire detection and suppression system,
12. Temperature gauges,
13. Mechanized gates,
14. Reclaim conveyer system,
15. Outbound conveyer,
16. Shipboard loader conveyer,
17. Tipper,
18. Traveling shiploader conveyer,
19. Telescoping chute system,
20. Belt feeders,
21. Belt conveyers,
22. Reclaim conveyers, dome construction supplies, wheels/drives, winches, cables, belt drives, control cabs, pulleys, motors, air compressors, and other materials.

The letter dated January 21, 2016 sent to the Department on behalf of Taxpayer states that for purposes of Taxpayer's income tax reporting, the receiving building and the domes are "classified under MACRS as 39-year property."

"Unloading" is described by Taxpayer to the Department as occurring at the receiving building where "[s]pecially designed rail and truck scales weigh the [REDACTED] which will then be discharged to truck bottom dumps or rail bottom dumps which feed the facility's transfer conveyor belts. These dumps are not merely holes in the floor of the building, but specialized dumper equipment ("specialized dumper equipment") which enable the truck or rail car to be tilted upside down so that its contents will be conveyed through the floor of the Receiving Building directly onto an initial conveyer system running underneath."

Taxpayer indicates that following "unloading [REDACTED] from incoming transport . . . [t]he remainder of the specialized equipment that [Taxpayer] purchased is used to process the [REDACTED] to make them suitable for delivery to [Parent's] customers."

"The [REDACTED] shipped from [Parent's] manufacturing site(s) to [Taxpayer's] facility are *not* final products" and that "it is critical to understand the role that temperature and moisture levels play in the creation of [Parent's] final product, the fuel [REDACTED] from [REDACTED] that are ultimately shipped to customers overseas. . . .Further processing of the in-process products [*sic*] occurs within the 'domes'. . .specifically designed to create the optimal conditions to further dry the in-process fuel [REDACTED] through temperature and moisture control, which ultimately determines how much [Parent] can charge its customers. . . .For example, under [Parent's] contracts, customers will reject product where the moisture content is greater than 10%. But conversely, they will pay a higher price for the product for every 0.001 decrease in moisture content."

Issue

Do Taxpayer's purchases of machinery and equipment, which Taxpayer describes as the receiving building, the conveyors, the domes, the ship loader, the aspiration systems, and the fire detection and suppression systems, qualify as eligible purchases of machinery or equipment pursuant to N.C. Gen. Stat. § 105-187.51B(a)(5) on which a one percent (1.00%) privilege tax is imposed, with a maximum tax of eighty dollars (\$80.00) per article?

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Applicable Statutes and References

Under Chapter 105 of the North Carolina General Statutes, Article 5 (“Article”) of the North Carolina Revenue Act (“Act”)¹, N.C. Gen. Stat. § 105-164.1 *et. seq.*; Subchapter VIII, Local Government Sales and Use Tax, N.C. Gen. Stat. § 105-463 *et. seq.*; and Chapter 1096 of the 1967 Session Laws; State, local, and applicable transit sales and use taxes are imposed on a retailer engaged in business in the State on the retailer’s net taxable sales or gross receipts of tangible personal property, certain digital property, and certain services at the applicable State, applicable local, and applicable transit rates of sales and use tax. N.C. Gen. Stat. §§ 105-164.3(1k), 105-164.3(9), 105-164.3(14), 105-164.3(24), 105-164.3(35), 105-164.3(46), 105-164.4, 105-164.8, 105-467, 105-468, 105-483, 105-498, 105-507.2, 105-509.1, and 105-537.

N.C. Gen. Stat. § 105-164.6(a) provides that an excise tax at the applicable rate set in N.C. Gen. Stat. § 105-164.4 is imposed on the purchase price of “tangible personal property or digital property purchased, leased, or rented inside or outside [the] State for storage, use, or consumption in [the] State.” N.C. Gen. Stat. §§ 105-164.3(14), 105-164.3(32), 105-164.3(33), 105-164.3(44), 105-164.3(49), and 105-164.6. “Purchase price” “has the same meaning as the term ‘sales price’ when applied to an item subject to use tax.” N.C. Gen. Stat. § 105-164.3(33). “Sales price” is defined, in part, as “[t]he total amount or consideration for which tangible personal property, digital property, or services are sold, leased or rented.” N.C. Gen. Stat. § 105-164.3(37). The “person who purchases, leases or rents tangible personal property” is liable for payment of the use tax. “If the property purchased becomes a part of a building or other structure in the State and the purchaser is a contractor or subcontractor, the contractor, the subcontractor, and the owner of the building are jointly and severally liable for the tax. The liability of a contractor, a subcontractor, or an owner who did not purchase the property is satisfied by receipt of an affidavit from the purchaser certifying that the tax has been paid.” *Id.*

N.C. Gen. Stat. §105-164.13(5a) provides an exemption from the sales and use tax imposed by Article 5 of the Act for the sale at retail and the use, storage, or consumption in this State of products that are subject to tax under Article 5F of the Act. Under Article 5F of the Act, N.C. Gen. Stat. § 105-187.50 *et. seq.*, a privilege tax is imposed on certain industries that purchase machinery or equipment that meets certain requirements. The privilege tax rate is one percent (1.00%) of the purchase price of the eligible machinery, equipment, or other personal property purchased, with a maximum of eighty dollars (\$80.00) per article. *Id.*

The 1% privilege tax rate set forth in Article 5F is a lesser tax rate than the generally applicable rate of sales tax set forth in N.C. Gen. Stat. § 105-164.4. For this reason, Article 5F constitutes a partial exemption from taxation and must therefore be strictly construed against the claim of partial exemption and in favor of the imposition of the higher rate of tax. *Hatteras Yacht Co. v. High*, 265 N.C. 653, 144 S.E.2d 821 (1965). A taxpayer bears the burden of establishing it is eligible for the partial exemption and entitled to remit at the 1% privilege tax rate. *Piedmont Canteen Service, Inc. v. Johnson*, 256 N.C. 155, 123 S.E. 2d 582 (1962) (one whom claims an exemption from tax has burden of bringing itself within the exemption).

Session Laws 2011-302, signed into law June 24, 2011 by the Governor with an effective date of July 1, 2013, added the sub-section in N.C. Gen. Stat. § 105-187.51B(a)(5) that expanded the 1.00% privilege tax rate to “[a] company located at a ports facility for waterborne commerce” on its purchases of specialized equipment “used at the facility to unload or process bulk cargo to make it suitable for delivery to and use by manufacturing facilities.” *Id.*

Session Laws 2016-94 signed into law July 14, 2016 by the Governor, re-writes N.C. Gen. Stat. § 105-187.51B(a)(5) and provides that the new provisions of the statute **apply retroactively to purchases made on or after July 1, 2013**. The statute, as re-written, provides that a privilege tax is imposed on “[a] company located at a ports facility for waterborne commerce that purchases. . . [m]achinery and equipment that is

¹ References to the Act and North Carolina General Statutes are based on the laws in effect as of the date of issuance of this private letter ruling except as otherwise noted herein.

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used at the facility to unload or to facilitate the unloading or processing of bulk cargo to make it suitable for delivery to and use by manufacturing facilities” and includes purchases of “[p]arts, accessories, or attachments used to maintain, repair, replace, upgrade, improve, or otherwise modify such machinery and equipment.”

In the case *Deep River Farms Ltd. v. Lynch*, 58 N.C. App. 165, 292 S.E.2d 752, the court found that substantial human activity within a structure excludes it from being considered machinery stating, “. . . giving the term machine its ordinary meaning, we find it difficult to discern how this greenhouse could be called a machine. To hold such would allow any building or structure within which there are moving parts, systems or devices powered by machines to be classified as a machine. Such an interpretation would lead to absurd results not intended by the Legislature.”

Pursuant to N.C. Gen. Stat. § 105-264, “[i]t is the duty of the Secretary to interpret all laws administered by the Secretary. . . .An interpretation by the Secretary is prima facie correct.”

“The words used in a statute must be given their natural or ordinary meaning, unless the act itself indicates that a different meaning is intended.” *Byrd v. Piedmont Aviation, Inc.*, 256 N.C. 684, 124 S.E. 2d 880. The definitions in N.C. Gen. Stat. § 105-164.3 apply to Article 5F. N.C. Gen. Stat. § 105-187.50.

The word “**machinery**” is defined, in part, in the Merriam-Webster Dictionary as “a group of devices with moving parts that are used to perform specific jobs.”

The word “**equipment**” is defined, in part, in the Merriam-Webster Dictionary as “all the fixed assets other than land and buildings of a business enterprise.”

The word “**unload**” is defined, in part, in the Merriam-Webster Dictionary as “to remove something (such as cargo) from a truck, ship, etc.”

The word “**facilitate**” is defined, in part, in the Merriam-Webster Dictionary as “to make (something) easier; to help cause (something).”

The word “**process**” is defined, in part, in the Merriam-Webster Dictionary as “to subject to or handle through an established usually routine set of procedures.”

The definition of the word “**bulk**” includes the definition of the term, “**in bulk**,” which is defined, in part, in the Merriam-Webster Dictionary as “not divided into parts or packaged in separate units.”

The word “**cargo**” is defined, in part, in the Merriam-Webster Dictionary as “the goods or merchandise conveyed in a ship, airplane, or vehicle; freight.”

The word “**suitable**” is defined, in part, in the Merriam-Webster Dictionary as “having the qualities that are right, needed, or appropriate for something.”

The word “**delivery**” is defined, in part, in the Merriam-Webster Dictionary as “the act of taking something to a person or place.”

Ruling

As discussed in **Overview and Relevant Facts**, Parent entered into a lease with the Ports Authority to build a [REDACTED] export facility in order to export its [REDACTED] by ocean-going vessels to industrial scale entities located in [REDACTED] who use [Parent’s] [REDACTED] [REDACTED] as alternative fuel to generate (i.e., manufacture) power. The lease entered into by Parent was assigned to Taxpayer, making Taxpayer a company located at a ports facility for waterborne commerce.

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N.C. Gen. Stat. § 105-187.51B(a)(5) provides machinery and equipment purchased by a company located at a ports facility for waterborne commerce must be used at the facility to unload or to facilitate the unloading or to process bulk cargo in order to qualify for the one percent 1.00% privilege tax rate, with a maximum tax of eighty dollars (\$80.00) per article. Parts, accessories, or attachments used to maintain, repair, replace, upgrade, improve, or otherwise modify such machinery and equipment also qualify under the provisions of N.C. Gen. Stat. § 105-187.51B(a)(5).

The following machinery and equipment qualify for the preferential 1% rate with a maximum tax of eighty dollars (\$80.00) per article under the provisions of N.C. Gen. Stat. §105-187.51B(a)(5):

1. Specialized dumper equipment,
2. Fabric filter dust collector,
3. Conveyer system,
4. High capacity air handling (aspiration) system,
5. High-volume dust collector,
6. Temperature gauges,
7. Mechanized gates,
8. Reclaim conveyer system,
9. Outbound conveyer,
10. Shipboard loader conveyer,
11. Tipper,
12. Traveling shiploader conveyer,
13. Telescoping chute system,
14. Belt feeders,
15. Belt conveyers,
16. Reclaim conveyers, wheels/drives, winches, cables, belt drives, control cabs, pulleys, motors, air compressors, and other materials which are parts, accessories, or attachment to machinery and equipment that is used at a company located at a ports facility for waterborne commerce to unload or to facilitate the unloading or processing of bulk cargo to make it suitable for delivery to and use by manufacturing facilities.

This ruling is based solely on the facts submitted to the Department for consideration of the transactions described. If the facts and circumstances given are not accurate, or if they change, then the taxpayer requesting this ruling may not rely on it. If a taxpayer relies on this letter ruling and the Department discovers, upon examination, that the fact situation of the taxpayer is different in any material aspect from the facts and circumstances given in this letter ruling, the letter ruling will not afford the taxpayer any protection. It should be noted that this letter ruling is not to be cited as precedent and that a change in statute, a regulation, or case law could void this ruling.

Issued on behalf of the Secretary of Revenue
By the Sales and Use Tax Division