

Technical Assistance Advisement, No. 07A-006-- Sales and use-- Taxability of persons and transactions-- Manufacturing, processing, assembling or refining-- Production of electrical or steam energy exemption, (Mar. 15, 2007)

<http://prod.resource.cch.com/resource/scion/document/default/%28%40%40STATEFL+FL-TAA07A-006%29ifl0109013e2>

Technical Assistance Advisement, No. 07A-006, Florida Department of Revenue, March 15, 2007.

Sales and use:

Taxability of persons and transactions:

Manufacturing, processing, assembling or refining:

Production of electrical or steam energy exemption.--

An exemption from Florida sales and use taxes provided for the purchase of machinery and equipment for use at a fixed location to produce electrical or steam energy resulting from the burning of boiler fuels other than residual oil is available, as specified, to a generating plant that will be burning natural gas and synthesis gas (syngas) in the process of generating electrical energy. The natural gas and syngas that will be burned at the generating facility are not residual oil fuels. The exemption also requires that such electrical or steam energy must be primarily used in manufacturing, processing, compounding, or producing tangible personal property for sale. As such, machinery and equipment at the generating facility will qualify for exemption since the facility does not burn residual oil and electrical energy is the tangible personal property produced for sale.

See ¶60-510.

SUMMARY

QUESTION: Whether all purchases of machinery and equipment and components, as enumerated in an attachment to the TAA request, for a combined cycle and gasification facility at an electrical generating facility qualify for exemption under s. 212.08(5)(c), F.S. The attachment divided the purchases into the following major categories: "Indirects," "Combined Cycle," "Fuel Facilities," "Gasification Facilities," and "Balance of Plant."

ANSWER—Based on Facts Below : All purchases for the categories of "Combined Cycle" and "Gasification Facilities" qualify for exemption under s. 212.08(5)(c), F.S. Purchases in the category "Indirects" do not qualify for exemption under s. 212.08(5)(c), F.S., but may qualify for exemption as professional services under s. 212.08(7)(v), F.S. All purchases in the category "Fuel Facilities," except above ground fuel storage tank systems, qualify for exemption under s. 212.08(5)(c), F.S. In the category "Balance of Plant," only those purchases representing sub-surface improvements or foundations and shelter for qualifying machinery and equipment, and process water systems qualify for exemption under s. 212.08(5)(c), F.S.

March 15, 2006

Re: Technical Assistance Advisement 07A-006 Sales and Use Tax Construction of combined cycle electric generating plant Section 212.08(5)(c), F.S.

Dear:

This is a response to your letter of September 26, 2006, requesting a Technical Assistance Advisement (TAA) on behalf of XXX, XXX, and XXX (hereinafter "Power Company") is a limited liability company formed by XXX (hereinafter "Utility") and XXX a wholly-owned subsidiary of XXX. This response to your request constitutes a TAA under Chapter 12-11, Florida Administrative Code (F.A.C.), and is issued to you under the authority of Section 213.22, Florida Statutes (F.S.).

RELEVANT FACTS

Based on your letter and other information, the following is understood. Power Company has entered into an agreement with Utility for the construction of a combined cycle and a gasification facility at a site owned by

Utility. The project is referred to as the Integrated Gasification Combined Cycle, or IGCC. Utility will own 100 percent of the combined cycle portion of the project, and Utility and Power Company will jointly own the gasification facility. Combined cycle technology involves the use of gas turbines in combination with conventional steam turbines and condensers. Gasification is a process whereby a carbonaceous material (e.g., coal) is converted to a synthesis gas ("syngas") by means of partial oxidation with air, oxygen, and/or steam. The syngas is then burned as a fuel in the process of producing electrical energy. The issue to be considered is whether an exemption from tax is applicable for machinery and equipment that will be purchased for this project.

TAXPAYER'S POSITION

The gasification process not only provides the syngas to be burned in the combustion turbine, but steam and water are continuously transferred between the syngas cooler in the gasification facility and the heat recovery steam generator in the generating plant. Accordingly, all purchases of machinery and equipment and components for the IGCC project as enumerated in "Attachment A" to the TAA request would be tax exempt pursuant to the "integrated plant theory" as provided in the FPL/JEA declaratory statement as issued by the Department of Revenue and under the provisions of s. 212.08(5)(c), F.S.

Attachment A may be generally divided into the following major category headings as used by Power Company.

- Indirects
- Combined Cycle
- Fuel Facilities
- Gasification Facilities
- Balance of Plant

RELEVANT AUTHORITY

The following passage from the Florida Statutes (F.S.) is pertinent to your request for a Technical Assistance Advisement.

Section 212.08(5)(c), F.S., provides:

(c) Machinery and equipment used in production of electrical or steam energy.—

1. The purchase of machinery and equipment for use at a fixed location which machinery and equipment are necessary in the production of electrical or steam energy resulting from the burning of boiler fuels other than residual oil is exempt from the tax imposed by this chapter. Such electrical or steam energy must be primarily for use in manufacturing, processing, compounding, or producing for sale items of tangible personal property in this state. Use of a de minimis amount of residual fuel to facilitate the burning of nonresidual fuel shall not reduce the exemption otherwise available under this paragraph.

2. In facilities where machinery and equipment are necessary to burn both residual and nonresidual fuels, the exemption shall be prorated. Such proration shall be based upon the production of electrical or steam energy from nonresidual fuels as a percentage of electrical or steam energy from all fuels. Purchasers claiming a partial exemption shall obtain such exemption by refund of taxes paid, or as otherwise provided in the department's rules.

3. The department may adopt rules that provide for implementation of this exemption. Purchasers of machinery and equipment qualifying for the exemption provided in this paragraph shall furnish the vendor with an affidavit stating that the item or items to be exempted are for the use designated herein. Any person furnishing a false affidavit to the vendor for the purpose of evading payment of any tax imposed under this chapter shall be subject to the penalty set forth in s. 212.085 and as otherwise provided by law. Purchasers with self-accrual authority shall maintain all documentation necessary to prove the exempt status of purchases.

DETERMINATION

Exemption of Facility

The exemption provided under s. 212.08(5)(c), F.S., is applicable to those facilities that produce electrical or steam energy from the burning of fuels other than residual oil. It is understood that the generating plant will be burning natural gas and syngas in the process of generating electrical energy. The natural gas and the syngas that will be burned at the generating facility are not residual oil fuels. The exemption further requires that such electrical or steam energy must be primarily used in manufacturing, processing, compounding, or producing tangible personal property for sale. Electrical energy is the tangible personal property that is produced for sale. Accordingly, since the facility does not burn residual oil and electrical energy is produced for sale, machinery and equipment at the generating facility will qualify for exemption. Further, since residual oil is not a fuel source, Power Company and/or Utility are not obligated under the provisions of subparagraph 2. of the exemption statute to pay tax on the purchases of machinery and equipment and seek a subsequent refund of the exempt portion. Power Company's and/or Utility's purchases of qualifying machinery and equipment will be exempt at the time of the purchase transaction.

JEA/FPL Declaratory Statement

The scope of s. 212.08(5)(c), F.S., as determined in "Exhibit B" of the JEA/FPL Declaratory Statement was reviewed by the First District Court of Appeal of Florida in *Jacksonville Electric Authority v. Department of Revenue*, 486 So. 2d 1350 (Fla. 1st DCA 1986). That case involved the taxable status of certain machinery and equipment purchased by the Jacksonville Electric Authority to be used in the burning of coal to produce electrical energy.

The District Court of Appeal determined that it was the legislative intent, based on the tape recorded proceedings of the Florida Senate Committee on Ways and Means, to embrace the "integrated plant theory" as a basis for interpreting the exemption for machinery and equipment provided in s. 212.08(5)(c), F.S. Under the "integrated plant theory," machinery and equipment used in the process of generating electrical energy, regardless of the fact that such machinery and equipment was not intrinsically necessary to generate electrical energy or the sole purpose of such machinery and equipment was to make the plant function more practically, would be considered a component part of the manufacturing process. Therefore, the machinery and equipment used in the process of generating electrical energy, but not distribution, would qualify for the exemption provided in s. 212.08(5)(c), F.S.

Qualifying Purchases

Based on the court's findings in connection with the JEA/FPL Declaratory Statement, the Department now finds that the machinery and equipment as enumerated in Attachment A of the TAA request qualify for exemption as follows.

The Indirects may be generally described as expenditures that are necessary for the overall administration of the total construction project. Among these expenditures are various services, such as engineering and civil services, that are not subject to tax as professional services pursuant to s. 212.08(7)(v), F.S. The Indirects also contain the subcategories labeled "Construction Management Equipment & Expenses" and "Temporary Facilities & Services." "Construction Management Equipment & Expenses" lists anticipated expenditures, such as construction equipment, small tools and consumables, non-expendable tools and supplies, and scaffolding. "Temporary Facilities & Services" lists such items as temporary buildings and temporary fencing, which will be removed once the construction project is completed.

The exemption under s. 212.08(5)(c), F.S., is only applicable to items that are installed as a permanent part of the machinery and equipment that is integral to the production of electrical energy. Accordingly, the rental of any construction equipment, such as cranes, scaffolding, or earthmovers, or expenditures for temporary structures will remain fully taxable.

The Combined Cycle category covers all the machinery and equipment that is used in the generating plant. All items as enumerated under this category in Attachment A are integral to the production of electrical or steam energy and will qualify for exemption.

Fuel Facilities includes the natural gas system and the coal handling system. The exemption as provided under s. 212.08(5)(c), F.S., generally begins at the point where the fuel source is received by the facility. For natural gas, this beginning point may be regarded as the gas metering station. The gas metering station may be located within the plant property or at a point which is at the boundary of the property. Accordingly, any gas piping from the metering station to the combustion equipment will qualify for exemption, regardless of the distance.

It has not been expressly disclosed how coal is received at Power Company's gasification facility. It is presumed that the coal is received by rail. In the JEA case, it was determined that the exemption pursuant to s. 212.08(5)(c), F.S., included the coal unloading facilities and yard equipment (e.g., locomotives, rail cars,

and payloaders). However, the exemption did not extend to the fuel oil storage tanks for the yard equipment. Accordingly, the exemption at Power Company's facility would include any coal unloading facilities and yard equipment, but not the above ground fuel storage tank system.

The purpose of the Gasification Facility is to convert the coal into syngas for the generating plant. Accordingly, its purpose is fully integral to the production of electrical or steam energy, and the gasification facility fully qualifies for exemption.

The category of Balance of Plant includes site preparation and site improvements. The exemption provided by s. 212.08(5)(c), F.S., does not extend to real property improvements. Accordingly, site improvements that do not constitute foundations or sub-surface improvements for foundations for machinery and equipment that are integral to the production of electrical energy or for gasification machinery and equipment will not qualify for exemption. Contractors performing real property improvements are subject to the provisions of Rule 12A-1.051, F.A.C. Generally, the contractor will be subject to tax on all materials consumed in the real property improvement activities. Structures or facilities whose only purpose is to enclose, provide shelter, or control environments for qualifying items of machinery and equipment are considered to be an integral part of that machinery and equipment and do not constitute real property improvements. Accordingly, such structures or facilities will qualify for exemption.

The category of Balance of Plant also includes plant water systems. Those systems that are integral to the production of electrical or steam energy will qualify for exemption. However, the exemption does not extend to potable water systems or sewage (septic) systems, since these systems are not integral to the production of electrical or steam energy.

It is important to understand that the exemption under s. 212.08(5)(c), F.S., is only applicable to machinery and equipment that are necessary in the production of electrical or steam energy. Accordingly, the exemption does not extend to switchyard, distribution, or transmission machinery and equipment at a facility. Generally, the exemption is considered as ending at the first step-up transformer, or at that point where the electrical power is at such a voltage level that is necessary for transmission to the electrical grid. The exemption will include all such electrical equipment as is necessary for internal plant purposes, such as cabling, rack systems, ducts, instrumentation, monitoring equipment, grounding, cathodic protection, and interconnect facilities.

Affidavit Procedures

The benefit of the exemption inures to Power Company, to Utility, and to their contractors. The exemption is implemented by extending an affidavit to the machinery and equipment or materials vendors at the time of the purchase transaction. At no time when extending an affidavit for the exemption provided in s. 212.08(5)(c), F.S., should anyone include another business entity's Certificate of Registration number (sales tax number), Consumer's Certificate of Exemption number, or Direct Pay Certificate number. Each of those numbers may only be used by the business entity to which it was assigned.

Procedurally, an affidavit must be given by Power Company and/or Utility to the contractor. The contractor, in turn, would then issue its own affidavit to any subcontractors along with a copy of the affidavit provided by Power Company. This process continues from subcontractors to sub-subcontractors until the actual purchase order is issued to the vendor or supplier for the qualifying machinery and equipment or materials.

The affidavit may be a separate document attached to purchase orders or it may be incorporated within the purchase order itself. If the affidavit is incorporated within the purchase order, a statement that would have the same effect as the statement regarding a false affidavit, as provided in the sample affidavit, must be incorporated within the purchase order. Further, it is the position of the Department that the affidavit must be notarized regardless of whether the affidavit is incorporated within the purchase order or is an independent affidavit attached to the purchase order. (See Attachment for a suggested format for the affidavit.)

This response constitutes a Technical Assistance Advisement under Section 213.22, F.S., which is binding on the Department only under the facts and circumstances described in the request for this advice, as specified in Section 213.22, F.S. Our response is predicated upon those facts and the specific situation summarized above. You are advised that subsequent statutory or administrative rule changes or judicial interpretations of the statutes or rules upon which this advice is based may subject similar future transactions to a different treatment from that which is expressed in this response.

You are further advised that this response, your request and related documents are public records under Chapter 119, F.S., which are subject to disclosure to the public under the conditions of Section 213.22, F.S. Your name, address, and any other details, which might lead to identification of the taxpayer, must be deleted before disclosure. In an effort to protect the confidentiality of such information, we request you provide the undersigned with an edited copy of your request for Technical Assistance Advisement, backup material and response within fifteen days of the date of this advisement.

Sincerely,

Jeffery L. Soff Tax Law Specialist Technical Assistance and Dispute Resolution

Attachment to Technical Assistance Advisement

AFFIDAVIT

STATE OF FLORIDA COUNTY OF _____.

On this day, personally appeared the undersigned who, being first duly sworn, deposes and says:

That all machinery and equipment purchased from will be incorporated into and/or become a component part of the _____ located in _____, Florida, County of _____.
Further that said machinery and equipment is necessary for the production of electric or steam energy resulting from the burning of boiler fuels other than residual oil and is exempt from the tax imposed by Chapter 212, Florida Statutes, Sales and Use Tax Act, pursuant to Section 212.08(5)(c), Florida Statutes.

I understand any person furnishing a false affidavit to a vendor for the purpose of evading payment of any tax imposed under Chapter 212, Florida Statutes, shall be subject to the penalty set forth in Section 212.085, Florida Statutes, and as otherwise provided by law.

Purchaser's Name

Signature

Sworn to and subscribed before me this _____ day of _____, A.D., 20 ____.

Notary Public

(Seal).

My Commission Expires

