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Governor

STATE OF LOUISIANA
DEPARTMENT OF REVENUE

CYNTHIA BRIDGES
Secretary

Private Letter Ruling No. 01-011

Redacted Version

January 22, 2002

A Private Letter Ruling based upon the following scenario was requested:

A Louisiana manufacturer ("the manufacturer") enters into an agreement with an out-of-state limited liability company ("OSLLC") engaged in the business of financing, designing, constructing, upgrading, and owning and operating power generation and cogeneration plant equipment.

OSLLC and the manufacturer have formed a project company, Company A, which is qualified to transact business in Louisiana. Company A is owned 50.1% by OSLLC and 49.9% by the manufacturer.

OSLLC and Company A will enter into a ground lease for the real property located at the manufacturer's facilities in Louisiana. With the ground lease in place, OSLLC, or its wholly owned subsidiary, Construction LLC (a Louisiana company) (hereafter "Construction") will design, construct, finance and own (until the date of commercial operation) a cogeneration power plant on the leased premises of the manufacturer.

Upon completion and achievement of commercial operation, OSLLC or Construction will transfer ownership of and title to the cogeneration power plant and the interconnection facilities to Company A. Company A will then own, operate, and maintain the cogeneration power plant pursuant to the terms of a Joint Operating Agreement executed by the manufacturer, OSLLC, and Company A. All the rights and obligations of OSLLC/Construction under the applicable ground lease will terminate upon transfer of the plant. The ultimate lessee then under the ground lease will be the owner of the cogeneration power plant and the interconnection facilities, that is, Company A. Consideration for the transfer of each of the power plants will be nominal, but will include an assumption of the debt relating to the plant.

The Joint Operating Agreement and the ground leases has a term of twenty years with up to four five-year renewal periods. At the end of the term, or upon earlier termination as permitted by the Agreement, the ownership and title of the cogeneration power plant and interconnection facilities will be transferred to the manufacturer.

The cogeneration power plant is intended for permanent or long-term use. Substantial and critical portions, but not the entirety of the cogeneration power plant will have walls and roofs to house their contents. The cogeneration power plant will be constructed of permanent building materials; further, substantial and critical portions, but not all, of the cogeneration power plants permanent building materials cannot be removed without damage to the plants.

The department was asked to rule that:

1. The cogeneration power plant to be built, and to be situated during its construction and operation stages on leased land, will be considered immovable property for purposes of Louisiana sales and use tax law.
2. The transfer of title and ownership of the completed cogeneration power plant from OSLLC/Construction to Company A will not be a sale for Louisiana sales and use tax purposes since it will involve the transfer of immovable property.
3. The eventual transfer of ownership and possession of the cogeneration power plant at the termination of the Joint Operating Agreement from Company A to the manufacturer will not be a sale subject to the Louisiana sales and use tax law since it would be the transfer of immovable property.

The department answered as follows:

Louisiana Revised Statutes Title 47, Sections 302(A) and (B), 321(A) and (B), 331(A) and (B), and the sales tax ordinance of the Louisiana Tourism Promotion District levy a tax at the total rate of four percent upon the sale at retail, the use the consumption, the distribution, the storage for use or consumption, the lease, and the rental in this state of each item or article of tangible personal property.

La. R.S. 47:301(16)(a) defines tangible personal property as personal property that can be seen, weighed, measured, felt, touched, or is perceptible to the senses. A First Circuit Court of Appeal decision, *Exxon Corp. v. Traigle* [353 So.2d 314 (La. App. 1st Cir. 1977)], has held that tangible personal property is equivalent to corporeal movable property as defined in Article 471 of the Louisiana Civil Code.

The Louisiana Civil Code describes corporeal movable property (tangible personal property) as things that exist physically and normally move or can be moved from one place to another.

Examples of tangible personal property include but are not limited to:

- durable goods such as appliances, vehicles, and furniture;
- consumable goods such as food products, cleaning supplies, and medicines;
- utilities such as electricity, water, and natural gas; and
- computer software.

Items that are not tangible personal property include but are not limited to:

- incorporeal property that exists only by an understanding of the mind such as patents, copyrights, rights of inheritance, servitudes, and legal rights or obligations; and
- immovable property, which is defined by the Louisiana Civil Code to include:
 - tracts of land (La. Civil Code Article 462);
 - component parts of a tract of land when they belong to the owner of the land (La. Civil Code Article 463);

- buildings and standing timber even when owned by someone other than the owner of the land (La. Civil Code Article 464);
- things, such as building materials, incorporated into a tract of land or incorporated into a building or other construction that belongs to the owner of the land, so as to become integral parts of the immovable (La. Civil Code Article 465);
- things permanently affixed to a building or other construction, such as plumbing, heating, cooling, electrical or other installations, so that they cannot be removed without substantially damaging them or the immovable to which they are attached (La. Civil Code Article 466); and
- machinery, appliances, and equipment that have been declared immovable by the owner in the parish conveyance records (La. Civil Code Article 467) except when being repaired as defined by R.S. 47:301(14)(g).

In order for the cogeneration power plant ruling to be considered immovable for sales purposes when located on leased land, the power plant will have to be classifiable as “buildings”, under Article 464 of the Louisiana Civil Code. Neither the Louisiana sales tax statutes nor the Louisiana Civil Code provides a definition of the term “building”.

Black’s Law Dictionary (6th edition, 1990, page 194) defines a building as a “structure designed for habitation, shelter, storage, trade, manufacture, religion, business, education, and the like” or as a “structure or edifice inclosing a space within its walls, and usually, but not necessarily, covered with a roof.” Because it is to be used for manufacturing, has a roof and walls, and has the degree of permanency indicated in the request for ruling, the cogeneration power plant, as described in the request for ruling, is considered a “building” for state sales tax purposes. The things that are permanently attached to plant, including plumbing, heating, cooling, electrical, and other installations that cannot be removed without substantial damage to themselves or the cogeneration power plant, will be considered component parts of the plants. Under Articles 462, 463 and 464 of the Louisiana Civil Code, buildings and their component parts will be considered immovable whether they belong to the owner of the ground on which they are situated or to another person.

Ruling

1. The cogeneration power plant to be built, and to be situated during its construction and operation stages on leased land will be considered immovable property for purposes of Louisiana sales and use tax law. Immovable property status will extend to the building structure of the plant and to things that are permanently attached to the plant, including plumbing, heating, cooling, electrical, and other installations that cannot be removed without substantial damage to themselves or the cogeneration power plant.

2. The transfer of title and ownership of the completed cogeneration power plant from OSLLC /Construction to Company A will not be a taxable sale for Louisiana sales and use tax purposes since it will involve the transfer of immovable property. Likewise, the eventual transfer of ownership and possession of the cogeneration power plant at the termination of the Joint Operating Agreement from Company A to the manufacturer will not be a taxable sale subject to the Louisiana sales and use tax law since it would also be the transfer of immovable property.

Equipment and other property within the plant that does not constitute components of the plant will be considered movable property for sales tax purposes.

If additional information is needed, please contact the Policy Services Division at (225) 219-2780.

Sincerely,

Cynthia Bridges
Secretary

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A Private Letter Ruling (PLR) is issued under the authority of LAC 61:III.101(C). A PLR provides guidance to a specific taxpayer at the taxpayer's request. It is a written statement issued to apply principles of law to a specific set of facts or a particular tax situation and is limited to the matters specifically addressed. A PLR does not have the force and effect of law and may not be used or cited as precedent. A PLR is binding on the Department only as to the taxpayer making the request and only if the facts provided with the request were truthful and complete and the transaction was carried out as proposed. The Department's position concerning the particular tax situation addressed remains in effect for the requesting taxpayer until a subsequent declaratory ruling, rule, court case, or statute supersedes it.