

UT 97-4

Tax Type: USE TAX

Issue; Pollution Control Equipment (Exemption)
Use Tax on Purchases, Fixed Assets or Consumables

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS

DEPARTMENT OF REVENUE)
STATE OF ILLINOIS)
)
v.)
)
TAXPAYER,)

FINAL ADMINISTRATIVE DECISION

Appearances: Mr. Richard Kates, for TAXPAYER; Mr. John Alshuler, Special Assistant Attorney General, for the Illinois Department of Revenue

This matter presented itself in these administrative hearings following the protest by TAXPAYER (hereinafter referred to as "TAXPAYER" or the "Taxpayer") of a Notice of Tax Liability SF-9323585401006 for tax due on its purchases of tangible personal property which taxpayer claimed as exempt pursuant to the pollution control facilities exemption of the Use Tax Act, 35 ILCS 105/2a.

The Administrative Law Judge determined that particular items were exempt and made the corresponding recommendation that his determination be finalized. I specifically disagree with his conclusion as to "eye wash units" and, find that this item of tangible personal property is not exempt from the application of the Use Tax based upon the evidence of record. Although I agree with the ALJ that specific other items are exempt, I believe that his conclusions of law with regard to these items is insufficient to support his conclusions.

One might read the ALJ's recommendation as a conclusion that the pollution control facilities exemption is extremely broad and includes within its parameters all things which touch upon the elimination, prevention, reduction, treatment, modification or disposal of pollutants. This is, in fact, not

supported by Illinois case law which has interpreted the pertinent statutory provision.

In order to qualify for this particular exemption, the "system, method, construction, device or appliance appurtenant thereto" (35 **ILCS** 105/2a) must be sold, used or intended for the "primary purpose of eliminating, preventing, or reducing air and water pollution" (emphasis added) (*id.*) or for the "primary purpose of treating, pretreating modifying or disposing" of any potential pollutant. (emphasis added) *Id.* Thus, there is a "primary purpose" test which is applied to determine, in an objective fashion (Shell Oil Co. v. Department of Revenue, 117 Ill. App.3d 1049 (4th Dist. 1983) (asphalt storage tanks not exempt because objective primary purpose was to enable Shell to produce a certain type of asphalt and to burn certain pitch as fuel); Central Illinois Public Service Co. v. Department of Revenue, 158 Ill. App.3d 763 (4th Dist. 1987)) the "function and ultimate objective of the equipment alleged to be exempt", and that "[o]nly those facilities directly involved in the pollution abatement process are to be afforded special tax status." Central Illinois Public Service Co. v. Department of Revenue, *supra* at 768 (railway cars not exempt because objective, primary purpose was to transport minerals, albeit necessary ones, to the pollution control system). Accord, Illinois Cereal Mills, Inc. v. Department of Revenue, 37 Ill. App.3d 379 (4th Dist. 1976) (gas fired boilers not exempt because objectively, the primary purpose was for steam to dry grain and for heat for the plant); Columbia Quarry Co. v. Department of Revenue, 154 Ill. App.3d 129 (5th Dist. 1987) (sole purpose of limestone, crucial to the functioning of a filter absorbing air pollution, was pollution control)

Nor is the benchmark for qualification for exemption that the law requires the items. In Illinois Cereal Mills, Inc. v. Department of Revenue, *supra*, the court denied this exemption to gas fired boilers used in plaintiff's corn processing mills in spite of the fact that the polluter put the gas fired boilers into operation to replace coal boilers which the EPA charged were causing improper air pollution, and had threatened the plaintiff with action to

force compliance with statute. Likewise, the appellate court in Shell Oil Company v. Department of Revenue, *supra*, denied the pollution control facilities exemption to storage tanks which were installed in order to comply with EPA sulphur emission requirements. That court found that, although the storage tanks were required for compliance with EPA regulations, the primary purpose of the tanks was to enable the plaintiff "to produce asphalt from high sulphur pitch and burn the low sulphur pitch as fuel in the refinery." *Id.* at 1053

It is therefore essential, in determining whether items qualify for the exemption, that the objective, primary purpose analysis is applied. This record very clearly establishes that the items remaining at issue and which the ALJ recommended exemption, except for the eye wash units, had as their primary purpose the elimination and/or prevention of pollution and were used by the taxpayer in its pollution control work.

Wherefore, for the reasons stated above, I accept the recommendation of the ALJ as to all items at issue at hearing, except for the eye wash units, which I find not to be exempt based upon the evidence of record.

Ken Zehnder, Director
Illinois Department of Revenue