



**FLORIDA**

Executive  
Director

Leon M. Biegalski

## **QUESTIONS/ANSWERS:**

### **1. IS TAXPAYER CONSIDERED AN “ELIGIBLE MANUFACTURING BUSINESS,” AS DEFINED IN S. 212.08(7)(KKK), F.S.?**

BASED ON THE INFORMATION SUBMITTED, RESEARCH CONDUCTED, AND DISCUSSION, TAXPAYER DOES NOT QUALIFY FOR THE EXEMPTION FROM TAX PROVIDED UNDER S. 212.08(7)(KKK), F.S. TO BE ELIGIBLE FOR THE EXEMPTION FROM TAX, THE BUSINESS’S NAICS CODE WOULD HAVE TO FALL UNDER EITHER NUMBER 31, 32, 33, 115114, OR 423930. TAXPAYER’S BUSINESS ACTIVITIES ARE IDENTIFIABLE UNDER NAICS NUMBER 2211, ELECTRIC POWER GENERATION, TRANSMISSION, AND DISTRIBUTION. NAICS NUMBER 2211 IS NOT A QUALIFYING NAICS CODE FOR THE EXEMPTION PROVIDED BY S. 212.08(7)(KKK), F.S.

### **2. DOES THE HOLDING OF A PERMIT AS A WASTE TO ENERGY FACILITY ISSUED BY THE FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION PRECLUDE TAXPAYER FROM QUALIFYING FOR THE EXEMPTION CONTAINED IN S. 212.08(5)(C), F.S.?**

THE ELIGIBILITY FOR THE EXEMPTION FROM TAX PROVIDED UNDER S. 212.08(5)(C), F.S., WOULD NOT BE PRECLUDED BASED ON TAXPAYER’S HOLDING OF A PERMIT ISSUED BY THE FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION. FOR A TAXPAYER TO BE EXEMPT FROM TAX FOR MACHINERY AND EQUIPMENT USED IN THE PRODUCTION OF ELECTRICAL OR STEAM ENERGY, IT MUST STRICTLY ADHERE TO THE PROVISIONS PROVIDED IN S. 212.08(5)(C), F.S.

### **3. DO THE OPERATORS’ REPAIRS, MAINTENANCE, OR REPLACEMENT OF EQUIPMENT PREVIOUSLY EXEMPTED UNDER S. 212.08(7)(Q), F.S., QUALIFY FOR EXEMPTION UNDER S. 212.08(5)(C), F.S. OR S. 212.08(7)(XX), F.S., AS REPAIRS TO MACHINERY AND EQUIPMENT NECESSARY TO PRODUCE ELECTRICAL OR STEAM ENERGY? WHERE MORE THAN ONE EXEMPTION MAY APPLY TO MACHINERY AND EQUIPMENT, DOES ONE EXEMPTION CONTROL?**

THE EXEMPTION FROM TAX PROVIDED FOR MACHINERY AND EQUIPMENT UNDER S. 212.08(5)(C), F.S., EXTENDS TO THE REPAIR, MAINTENANCE, AND REPLACEMENT OF QUALIFYING MACHINERY, EQUIPMENT, AND PARTS. TAXPAYER WOULD NOT QUALIFY FOR THE EXEMPTION PROVIDED BY S. 212.08(7)(XX), F.S. THE EXEMPTION IS LIMITED TO INDUSTRIES CLASSIFIED UNDER SPECIFIED STANDARD INDUSTRY

CLASSIFICATION (SIC) NUMBERS<sup>1</sup>. TAXPAYER'S SIC NUMBER WOULD BE 4911, WHICH IS NOT A QUALIFYING SIC NUMBER. REGARDING MULTIPLE TAX EXEMPTIONS THAT TAXPAYER MAY BE ELIGIBLE FOR, TAXPAYER MAY USE ITS DISCRETION TO CHOOSE THE EXEMPTION THAT PROVIDES THE MOST BENEFIT TO ITS BUSINESS OPERATIONS.

**4. DOES OWNERSHIP OF THE FACILITY BY A MUNICIPALITY OR TAXPAYER AFFECT THE APPLICABILITY OF S. 212.08(5)(C), F.S.?**

NO. THE ELIGIBILITY REQUIREMENTS FOR THE EXEMPTION FROM TAX PROVIDED UNDER S. 212.08(5)(C), F.S., ARE BASED ON LOCATION, TYPE, AND PURPOSE OF THE MACHINERY AND EQUIPMENT AND THE TYPE OF FUELS USED TO POWER THE MACHINERY AND EQUIPMENT. THERE ARE NO PROHIBITIONS BASED ON THE TYPE OF BUSINESS OWNERSHIP OF THE FACILITY (I.E., PUBLIC OR PRIVATE). ACCORDINGLY, ANY BUSINESSES SEEKING AN EXEMPTION FROM TAX UNDER S. 212.08(5)(C), F.S., MUST COMPLY ONLY WITH THE REQUIREMENTS SET FORTH BY THE EXEMPTION STATUTE AND APPLICABLE RULE 12A-1.059(2)(A), F.A.C.

**5. WHERE DOES THE MANUFACTURING PROCESS BEGIN AND END FOR THE PURPOSES OF THE EXEMPTION PROVIDED WITHIN S. 212.08(5)(C)?**

IN GENERAL, FOR THE EXEMPTION PROVIDED UNDER S. 212.08(5)(C), F.S., THE MANUFACTURING PROCESS BEGINS AT THE POINT WHERE THE FUEL SOURCE IS RECEIVED BY THE FACILITY. IN THIS PARTICULAR INSTANCE, IT IS WHEN THE SOLID WASTE IS DELIVERED TO THE SCALE HOUSE FOR INSPECTION. MACHINERY AND EQUIPMENT USED TO DIRECTLY SORT AND GRADE MATERIALS TO BE USED AS FUELS TO GENERATE ELECTRICAL ENERGY WOULD BE EXEMPT FROM TAX. HOWEVER, THE SCALES USED TO MEASURE THE AMOUNTS OF MATERIALS RECEIVED AND THAT ARE NOT INTEGRAL TO THE MANUFACTURING PROCESS WOULD NOT QUALIFY FOR THE EXEMPTION FROM TAX PROVIDED AND ARE SUBJECT TO TAX. THE MANUFACTURING PROCESS ENDS AT THE POINT WHERE THE ELECTRICITY IS PREPARED AT THE FIRST STEP-UP POINT/TRANSFORMER AT THE PRODUCTION FACILITY LOCATION, WHICH IS PRIOR TO DISTRIBUTION TO CUSTOMERS.

February 9, 2017

Re: Technical Assistance Advisement  
XXXX ("Taxpayer")  
Florida Sales and Use Tax  
Exemption For Machinery and Equipment  
Sections 212.05, 212.055, 212.08(5)(c), (7)(q), (xx), (kkk), Florida Statute (F.S.)  
Rules Rule 12A-1.059(2)(a), 12A-1.096, Florida Administrative Code (F.A.C.)  
BP#: XXXX

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<sup>1</sup> This exemption applies only to industries classified under SIC Industry Major Group Numbers 10, 12, 13, 14, 20, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, and 39 and Industry Group Number 212. See s. 212.08(7)(xx)2., F.S.

Dear XXXX:

This letter is in response to your request dated September 29, 2016<sup>2</sup>, and received in this office on November 20, 2016, for issuance of a Technical Assistance Advisement (“TAA”) pursuant to Section 213.22, F.S., and Rule Chapter 12-11, F.A.C., concerning the taxability of machinery and equipment. An examination of your request has established you complied with the statutory and regulatory requirements for issuance of a TAA. Therefore, the Department is hereby granting your request for a TAA.

### **FACTS PRESENTED**

Taxpayer indirectly owns the following six (6) businesses (collectively “Operators”) which operate, manage and maintain Energy from Waste (“EfW”) facilities on behalf of municipalities located in Florida:

1. XXXX
2. XXXX
3. XXXX
4. XXXX
5. XXXX
6. XXXX

With the exception of one facility, which is owned by Taxpayer, each of the listed facilities is owned by the municipality in which it is located. The Operators have contracted with the municipality owners to operate, maintain, manage, and guarantee the performance of each facility. The primary purpose of each facility is to use the heat generated from the burning of solid waste to convert water into steam energy. The steam energy is used to generate electricity, which is then sold to local utilities under a Power Production Agreement between the utilities and the municipality. The revenue generated from the sale of electricity is shared by the Operators and the owners of each facility.

The contracts require that the Operators operate, manage, and maintain the facility in a manner consistent with the standards applicable to solid waste handling and electric generating industries. Each of the facilities meets the requirements to be treated as “Qualifying Facilities,” as defined in the Public Utility Regulatory Policies Act of 1978. Each of the EfW Operators holds a permit issued by the Florida Department of Environmental Protection to operate each facility as a waste to energy facility (Class Type 820).

#### **Production of Electrical or Steam Energy Process**

The process of producing energy from waste begins when the waste arrives at the Operator’s location. Upon entering the Operator’s facility, the waste is weighed at the scale house and inspected for any unacceptable material (as defined by permit; for example, hazardous or radioactive materials). The waste then proceeds to the “tipping floor,” where it is dumped and sorted. At one end of the tipping floor is a “refuse holding pit.” Various equipment moves/sorts the waste before ultimately depositing the waste into the “refuse holding pit.” The waste is picked up by overhead crane and deposited into a “feed chute,” which moves the waste into the combustion chamber, where it is burned.

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<sup>2</sup> A revised TAA request was submitted and received on November 21, 2016, containing minor additions to the original request.

The heat from combustion converts water into steam energy, which is then used to drive turbines generating the electricity. The electricity is then distributed to the power grid via transformers and transmission equipment. The residual ash produced from the combustion of waste is moved out of the combustion chamber for further processing and/or disposal, to increase the efficiency of the combustion chamber. Pollutants are removed from the air to meet or exceed specifications mandated by the Department of Environmental Protection via certified pollution control equipment.

### Energy Production Equipment

In performing their duties under the contracts, the Operators are required to purchase, lease, repair, and maintain machinery and equipment necessary for the production of electrical or steam energy, including equipment directly related to the production of electrical or steam energy (e.g., boilers, turbines, cooling systems, water filtration equipment, etc.) and equipment required by federal and state law (e.g., continuous emissions monitoring systems [“CEMS”] equipment, pollution control equipment, etc.).

### Resource Recovery Equipment

One or more of the Operators had previously purchased tax exempt machinery and equipment qualifying as resource recovery equipment pursuant to s. 212.08(7)(q), F.S. The equipment was certified as resource recovery equipment pursuant to Rule Chapter 62-704, F.A.C. The Operators from time to time will repair, maintain, or replace such equipment. Resources recovered from the operation of each of the EfW facilities are ultimately sold to third parties. These resources include, but are not limited to, the recovery of both ferrous and non-ferrous metals and ash that is produced when the solid waste is burned.

## **APPLICABLE LAW**

Unless a specific exemption applies, s. 212.05, F.S., provides it is the legislative intent that every person is exercising a taxable privilege that engages in the business of selling or repairing tangible personal property<sup>3</sup> in this state. For exercising such a privilege, a tax is levied on each taxable transaction or incident. The tax is due and payable at the rate of 6 percent, plus any applicable surtaxes imposed under s. 212.055, F.S., on the total consideration received for each item or article of tangible personal property when sold at retail or repaired in this state. Exemptions from tax are strictly construed against the claimant. Wanda Marine Corp. v. Dep’t of Revenue, 305 So. 2d 65, 69 (Fla. 1st DCA 1975).

### Certain Machinery and Equipment

Pursuant to s. 212.08(7)(kkk), F.S., eligible manufacturing businesses may purchase industrial machinery and equipment<sup>4</sup> tax exempt, if the machinery and equipment is used at a fixed location in this state for the manufacture, processing, compounding, or production of items of tangible personal property for sale.

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<sup>3</sup> Tangible personal property means and includes personal property which may be seen, weighed, measured, or touched or is in any manner perceptible to the senses. *See* s. 212.02(19), F.S.

<sup>4</sup> “Industrial machinery and equipment,” in part, means tangible personal property or other property that has a depreciable life of 3 years or more and that is used as an integral part in the manufacturing, processing, compounding, or production of tangible personal property for sale. *See* 212.08(7)(kkk)2.c., F.S.

Also, based on this statute, an “eligible manufacturing business” means any business whose primary business activity at the location where the industrial machinery and equipment is located is within the industries classified under NAICS<sup>5</sup> codes 31, 32, 33, 423930, and 115114. Primary business activity means an activity representing more than 50 percent of the activities conducted at the location where the industrial machinery and equipment is located.

#### Machinery and Equipment used in Production of Electrical or Steam Energy

Section 212.08(5)(c), F.S., provides that the purchase of machinery and equipment for use at a fixed location in which the machinery and equipment are necessary in the production of electrical or steam energy resulting from the burning of fuels other than residual oil is exempt from Florida sales and use the tax. Such electrical or steam energy must be primarily for use in manufacturing, processing, compounding, or producing for sale items of tangible personal property in Florida. Additionally, the exemption provided by s. 212.08(5)(c), F.S., is not limited to the original machinery and equipment used in the construction of an electrical or steam generation facility. The exemption also extends to repairs, maintenance, and replacement of such machinery, equipment, and parts thereof.

To secure the above referenced exemption from tax, the statute requires an eligible business provide the selling dealer an affidavit attesting to its entitlement for the expressed exemption. The statute further requires that the affidavit state that the item(s) purchased are exempt for the use designated within the exemption statute. Accordingly, it is the Department’s position an affidavit should include the language provided on the suggested affidavit attached to this advisement, inclusive of a fixed location.

The scope of s. 212.08(5)(c), F.S., as determined in 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.

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<sup>5</sup> “NAICS” means those classifications contained in the North American Industry Classification System, as published in 2007 by the Office of Management and Budget, Executive Office of the President.

### Resource Recovery Equipment

Section 212.08(7)(q), F.S., provides an exemption from tax for resource recovery equipment which is owned and operated by or on behalf of any county or municipality, certified by the Department of Environmental Protection under the provisions of s. 403.715.

### **REQUESTED ADVISEMENTS**

**6. Is Taxpayer considered an “eligible manufacturing business,” as defined in s. 212.08(7)(kkk), F.S.?**

Based on the information submitted, research conducted, and discussion, Taxpayer does not qualify for the exemption from tax provided under s. 212.08(7)(kkk), F.S. To be eligible for the exemption from tax, the business’s NAICS code would have to fall under either number 31, 32, 33, 115114, or 423930. Taxpayer’s business activities are identifiable under NAICS number 2211, Electric Power Generation, Transmission, and Distribution. NAICS number 2211 is not a qualifying NAICS code for the exemption provided by s. 212.08(7)(kkk), F.S.

**7. Does the holding of a permit as a waste to energy facility issued by the Florida Department of Environmental Protection preclude Taxpayer from qualifying for the exemption contained in s. 212.08(5)(c), F.S.?**

The eligibility for the exemption from tax provided under s. 212.08(5)(c), F.S., would not be precluded based on Taxpayer’s holding of a permit issued by the Florida Department of Environmental Protection. For a taxpayer to be exempt from tax for machinery and equipment used in the production of electrical or steam energy, it must strictly adhere to the provisions provided in s. 212.08(5)(c), F.S.

**8. Do the Operators’ repairs, maintenance, or replacement of equipment previously exempted under s. 212.08(7)(q), F.S., qualify for exemption under s. 212.08(5)(c), F.S. or s. 212.08(7)(xx), F.S., as repairs to machinery and equipment necessary to produce electrical or steam energy? Where more than one exemption may apply to machinery and equipment, does one exemption control?**

The exemption from tax provided for machinery and equipment under s. 212.08(5)(c), F.S., extends to the repair, maintenance, and replacement of qualifying machinery, equipment, and parts. Taxpayer would not qualify for the exemption provided by s. 212.08(7)(xx), F.S. The exemption is limited to industries classified under specified Standard Industry Classification (SIC) numbers<sup>6</sup>. Taxpayer’s SIC number would be 4911, which is not a qualifying SIC number. Regarding multiple tax exemptions that Taxpayer maybe eligible for, Taxpayer may use its discretion to choose the exemption that provides the most benefit to its business operations.

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<sup>6</sup> This exemption applies only to industries classified under SIC Industry Major Group Numbers 10, 12, 13, 14, 20, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, and 39 and Industry Group Number 212. See s. 212.08(7)(xx)2., F.S.

**9. Does ownership of the facility by a municipality or Taxpayer affect the applicability of s. 212.08(5)(c), F.S.?**

No. The eligibility requirements for the exemption from tax provided under s. 212.08(5)(c), F.S., are based on location, type, and purpose of the machinery and equipment and the type of fuels used to power the machinery and equipment. There are no prohibitions based on the type of business ownership of the facility; i.e., public or private. Accordingly, any businesses seeking an exemption from tax under s. 212.08(5)(c), F.S., must comply only with the requirements set forth by the exemption statute and applicable Rule 12A-1.059(2)(a), F.A.C.

**10. Where does the manufacturing process begin and end for the purposes of the exemption provided within s. 212.08(5)(c)?**

In general, for the exemption provided under s. 212.08(5)(c), F.S., the manufacturing process begins at the point where the fuel source is received by the facility. In this particular instance, it is when the solid waste is delivered to the scale house for inspection. Machinery and equipment used to directly sort and grade materials to be used as fuels to generate electrical energy would be exempt from tax. However, the scales used to measure the amounts of materials received and that are not integral to the manufacturing process would not qualify for the exemption from tax provided and are subject to tax. The manufacturing process ends at the point where the electricity is prepared at the first step-up point/transformer at the production facility location, which is prior to distribution to customers.

For more information concerning all of the taxes administered by the Department of Revenue, please refer to the Department's Internet site at:

[www.floridarevenue.com](http://www.floridarevenue.com)

This response constitutes a Technical Assistance Advisement under s. 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 s. 213.22, F.S. Our response is predicated on 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 than expressed in this response.

You are further advised that this response and your request and related backup documents are public records under Chapter 119, F.S., and are subject to disclosure to the public under the conditions of s. 213.22, F.S. Confidential information must be deleted before public disclosure. In an effort to protect confidentiality, we request you provide the undersigned with an edited copy of your request for Technical Assistance Advisement, the backup material and this response, deleting names, addresses and any other details which might lead to identification of the taxpayer. Your response should be received by the Department within 15 days of the date of this letter.

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Kind Regards,

Alan R. Fulton  
Tax Law Specialist  
Technical Assistance & Dispute Resolution  
850-717-6735

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