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Letter Ruling 05-2: Water Desalination Plant

March 8, 2005

You request a letter ruling in the matter of ***** (Corporation) and ***** LLC (LLC) (together, the “taxpayers”) regarding their plans to build a water purification plant (the “plant”) and to supply Massachusetts municipalities with water. Taxpayers have their principal place of business at ***** , ***** . The plant will be constructed in ***** (the “Town”) and will supply water to ***** (the “City”), and probably to other municipalities. You have submitted several ruling requests on the tax implications of the project, with issues concerning the non-income measure of the corporate excise, the effect of this project on local property tax liabilities, certain corporate excise tax credits that may apply, and sales and use tax issues.

I. Facts

The following is the statement of facts you present and on which we base this ruling. LLC is a Delaware limited liability company that will be taxed as a partnership for federal and state income tax purposes. Corporation is a Delaware corporation that will own between 80 and 90 percent of LLC. Another corporation, ***** (“Minority Member”) will own between 10 and 20 percent of LLC. Corporation and LLC are required to be included in the same consolidated or combined financial statements under Generally Accepted Accounting Principles (“GAAP”). Corporation and LLC will be using GAAP in preparing their financial statements.

Corporation is a wholly owned subsidiary of a Spanish corporation, (“S.A. 1”), a *Sociedad Anónima* under Spanish law, with its principal place of business in Spain. That corporation is, in turn, a wholly-owned subsidiary of another *Sociedad Anónima*, the ultimate parent also having its principal place of business in Spain.

The plant is expected to generate between 3.5 and 10 million gallons of fresh water per day. LLC will own and operate a 16.5 mile water transmission pipeline that will cross through several towns (the “pipeline”). The pipeline, together with the plant, comprise the “project.”

LLC will sell and distribute the water it produces to the City pursuant to a 20-year water purchase agreement that will be assigned to LLC between the City, S.A.1, and the minority member (the “agreement”). Other municipalities will be encouraged to purchase water from LLC. LLC expects to be regulated by the Massachusetts Department of Telecommunications and Energy.

Pursuant to a set of engineering contracts with LLC, an unrelated corporation has designed the project and is obtaining the necessary permits and licenses for its construction. The “contractor” or “contractors” are as yet undetermined, and may include one or more subsidiaries of S.A.1, and/or one or more unrelated third parties.

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Under the terms of the proposed contract, LLC agrees to pay the contractor a fixed price (the "contract price") that covers compensation and reimbursement for all fees, costs, charges and expenses incurred, including overhead, profit and certain taxes. The proposed contract provides that the contractor, and any subcontractor engaged by the contractor, will act as an agent of LLC in connection with the purchase of exempt property under Massachusetts sales and use tax laws.

The projected building and start-up costs of the project are: approximately \$14.4M for engineering, pilot plant, and other initial costs; approximately \$5.3M for project finance costs and interest; approximately \$27.1M for buildings, tanks, equipment, land and related items; and approximately \$11.2M for underground pipelines. The cost of the land is nominal. The estimated \$58M of costs will be funded as follows: approximately \$26M from the LLC members, and approximately \$32M from third-party debt financing.

Once the project is operational, LLC or a subcontractor will (a) operate the plant and sell the potable water, (b) distribute the water through the pipeline, (c) transport waste products and discharge deposited products, and (d) maintain all project facilities, machinery and equipment and make all repairs and replacements when necessary.

The plant will perform purification and desalination functions to convert river water into potable water. Because of changing river conditions, desalination will be required approximately six months per year. As described below, the desalination and purification processes are elaborate, involving extensive use of technology and chemicals. Generally, the processes will involve:

1. Water intake from the river. The water will pass through "exclusionary netting" that is to be installed in the river surrounding the intake structure, which filters the water to prevent material from the river from entering the system. The netting is equipped with a compressed air system for cleaning purposes. The concrete intake structure will be used to withdraw water from the river and direct it towards the raw water pump station through two channels. The channels will be covered with a metal cover to prevent leaves from entering the raw water stream.
2. Water filtration. These include racks and screens to prevent debris and small fish from entering the intake structure. These screens will be equipped with a compressed air system for cleaning purposes.
3. Raw water pump station. A well receives the raw water stream from the intake structure and directs the water towards four pumps and then to the raw water tanks.
4. Raw water tanks. These tanks hold the water to allow flow equalization^[1] and to allow a constant flow rate when there is no salinity in the river.
5. Process building. The desalination process occurs here, a building comprised of basins and tanks, some integrated in the foundation and structure of the building.
6. Feed water pumps. These direct the water from the raw water tanks to the mixing and agitation basins.
7. Chemical dosing systems. Several chemical processes condition the raw water prior to ultrafiltration. They require a filling station, holding tanks, transfer pumps, day tanks, dosing pumps, and piping.
8. Mixing and rapid agitation basins. Provide a blend of coagulant and water before the water enters the flocculation basins. The concrete basins are integrated in the structure of the building.
9. Flocculation basins. The suspended solids transported by the water are converted into flocks. The concrete basins are integrated in the structure of the building.

10. The ultrafiltration system. This system consists of basins, membranes, permeate pumps, vacuum pumps, blowers, the reject water basin and the membrane cleaning system, which together remove suspended solids, colloidal solids, bacteria and viruses from the water stream. The concrete basins are integrated in the structure of the building. Airflow at the bottom of the membrane creates turbulence, which scrubs and cleans the outside of the membrane filters. The process allows for pre-chlorinating the feed water for zebra mussel or microbial control.

11. Filtered water system. A concrete well, integrated in the structure of the building, provides the storage capacity required to keep the reverse osmosis running at a constant production rate.

12. Chemical treatment systems. Several chemical dosing systems will be used to condition the water prior to the reverse osmosis process. They include filling stations, holding tanks, transfer pumps, day tanks, dosing pumps and piping.

13. Reverse osmosis system. The reverse osmosis system removes salts from the water stream. It consists of high-pressure pumps, reverse osmosis membranes and a reverse osmosis membrane cleaning system. Upon discharge from the reverse osmosis unit, the water is pure and practically free from salts and minerals. The further processes of chlorination, pH adjustment and calcium dosing are the final steps for producing potable water.

14. Treated water tank. This tank stores treated water.

15. Brine tank. This tank is used for holding brine that will be discharged into the river when the river reaches a certain salinity level.

16. Dewatering system. This system removes the suspended solids contained in the water rejected by the ultrafiltration system prior to being discharged into the local sewer system. It consists of lamella decanters, the settled sludge well, a clarified water basin, clarified water pumps, sludge feed pumps, centrifuges, a polymer dosing system and piping to interconnect all the elements of the system. Both the settled sludge well and the clarified water basin are made of concrete and will be integrated in the structure of the building. This system generates three streams: (a) the clarified water stream, which will be directed to the raw water tank; (b) the sludge stream, which will be delivered to a local landfill; (c) the dirty water stream, which will be discharged into the local sewer system.

17. Neutralization system. This system neutralizes the cleaning solutions used in cleaning the ultrafiltration and reverse osmosis membranes before they are discharged into the sewer system. It consists of a neutralization basin, integrated in the structure of the building, neutralization pumps, and chemical neutralization systems.

18. Swing tank. This tank will be used as either a raw water tank or a brine tank when either of the tanks needs maintenance.

19. Final water adjustment. Several chemical dosing systems will condition the water prior to transmission, and will consist of storage structures, day tanks, dosing pumps and piping.

20. Transmission system. This system, comprised of ductile iron pipe, valves, instrumentation and insulation, pumps the treated water to the City.

II. Rulings

CORPORATE EXCISE/LOCAL PROPERTY TAX ISSUES.

1. Ruling Request 1. Corporation can elect to account for its investment in LLC under either (i) the equity method or (ii) by consolidating or combining its assets and activities with those of LLC in the manner required under GAAP for determining (a) whether Corporation is a tangible property corporation or an intangible property corporation under G.L. c. 63, § 30.10, 30.11, and (b) the value

of Corporation's tangible property or net worth subject to the non-income measure of the corporate excise.

Ruling 1. Because LLC is taxed for state purposes as a partnership, Corporation will apply the apportionment rules for corporate partners to its interest in LLC. Corporation, as owner of an interest in LLC where Corporation and LLC are required to be included in the same consolidated or combined financial statements under GAAP, and in fact are using GAAP in preparing the financial statements, may account for its investment in LLC under either (i) the equity method or (ii) by consolidating or combining its assets and activities with those of LLC in the manner required under GAAP for determining (a) whether Corporation is a tangible property corporation or an intangible property corporation under G.L. c. 63, §§ 30.10, 30.11, and (b) the value of Corporation's tangible property or net worth subject to the non-income measure of the corporate excise. The corporation must use the same method to report its interest in LLC consistently from taxable year to taxable year.

Discussion 1. This ruling request asks that the rules for accounting for a corporate interest in a partnership in the Apportionment of Income regulation (830 CMR 63.38.1) be applied to a corporate interest in an LLC that is taxed as a partnership. The Massachusetts corporate excise comprises three elements: the income measure, the non-income measure, and the minimum excise. G.L. c. 63, §§ 32, 39. The non-income measure is imposed on either: (i) the value of the corporation's tangible property located in Massachusetts if the taxpayer is a tangible property corporation; or (ii) the net worth of the corporation apportioned to Massachusetts if the taxpayer is an intangible property corporation. *Id.* As a threshold matter, a taxpayer must perform a calculation to determine whether it is a tangible property corporation or an intangible property corporation; part of the calculation includes the book value of the taxpayer's tangible and intangible property. See G.L. c. 63, §§ 30.7, 30.8, 30.9, 30.10, 30.11.

An LLC that is taxed as a partnership for federal purposes is treated as a partnership for Massachusetts income tax purposes. See TIR 97-8. By extension, Massachusetts requires that a corporate owner of an LLC that is taxed as a partnership treat its ownership interest in the LLC as an interest in a partnership for corporate excise purposes.

You state that Corporation and LLC are required to be included in the same consolidated or combined financial statements under GAAP, and in fact use GAAP in preparing their statements. For corporate partners, where (i) a corporation owns any interest in a general or limited partnership and (ii) the corporation and the partnership are required to be included in the same consolidated or combined financial statement under GAAP, the corporation may account for its investment in the partnership either (i) by using the equity method or (ii) by consolidating or combining its assets and activities with those of the partnership in the manner required by GAAP; provided that the corporation must use the same method to report its interest in partnerships consistently from taxable year to taxable year. 830 CMR 63.38.1(13)(e)(3). The Department will permit Corporation to account for its interest in LLC by treating LLC as a partnership, because LLC is taxed as a partnership for state purposes.

ECONOMIC OPPORTUNITY AREA CREDIT ISSUE.

Ruling Request 2. To the extent the economic opportunity area credit (EOAC) is available to the project pursuant to G. L. c. 23A, LLC will be treated as a flow-through entity for purposes of determining the credit.

Ruling 2. While making no ruling on whether the project will be eligible for the EOAC, the Department rules that to the extent that the project qualifies for the EOAC, LLC, because it is taxed as a partnership, will be treated as a flow-through entity for purposes of determining the credit. All amounts relevant to calculating the credit will be attributed to the Corporation and Minority Member, and will be taken into account in determining the credit for the taxable year during which the taxable year of LLC ends.

Discussion 2. The EOAC is a credit against the personal income tax and the corporate excise. G.L. c. 62, § 6(g), G.L. c. 63, § 38N. A corporation that participates in a certified project under G.L. c. 23A, § 3A may take a credit of 5% of the cost of qualified property that is used exclusively in the

project in an economic opportunity area as that term is defined in c. 23A. A certified project is one that has been approved by the Economic Assistance Coordinating Council under the provisions of G.L. c. 23A, § 3F. 830 CMR 63.38.1(2). The project has not received this approval, and the Department expresses no opinion on whether the project will qualify for certification.

The regulations governing the EOAC provide that unincorporated flow-through entities are treated as flow-through entities for purposes of determining the credit. 830 CMR 63.38N.1(12). All amounts relevant to the calculation of the credit are attributed to the owners of the flow-through entity (the Corporation and Minority Member) in accordance with I.R.C. § 704, and are taken into account in determining the credit for the taxable year during which the taxable year of the unincorporated flow-through entity ends. See 830 CMR 63.38N.1(12). LLC is taxed as a partnership and thus is treated as a flow-through entity for corporate excise purposes. The EOAC may not be taken for any property if the investment tax credit (ITC) is taken with respect to the same property. 830 CMR 63.38N.1(8). See Ruling 3, following.

INVESTMENT TAX CREDIT ISSUE

Ruling Request 3. (a) LLC is engaged in manufacturing within the meaning of 830 CMR 58.2.1(6)(a)(1); (b) Corporation and Minority Member may take into account their pro rata shares of the manufacturing activities of LLC in determining whether each is a manufacturing corporation within the meaning of G.L. c. 63, § 31A; and (c) provided that all of the other requirements of G.L. c. 63, § 31A are met and that records are kept showing in detail LLC's property investments, Corporation and Minority Member are eligible to use their pro rata shares of the ITC for the eligible property of LLC for which the EOAC is not taken.

Ruling 3. (a) LLC is engaged in manufacturing within the meaning of 830 CMR 58.2.1(6)(a)(1); (b) Corporation and Minority Member may take into account their pro rata shares of the manufacturing activities of LLC in determining whether each is a manufacturing corporation within the meaning of G.L. c. 63, § 31A; and (c) provided that all of the other requirements of G.L. c. 63, § 31A are met and that records are kept showing in detail LLC's property investments, Corporation and Minority Member are eligible to use their pro rata shares of the ITC for the eligible property of LLC for which the EOAC is not taken.

Discussion 3. A manufacturing corporation may take the ITC, equal to three percent of the cost or other basis for federal income tax purposes of qualifying tangible property acquired, constructed, reconstructed, or erected during the taxable year. G.L. c. 63, § 31A. To be eligible for the ITC a corporation does not need to be classified as a manufacturing corporation for property tax exemption purposes, but must at least have manufacturing "status" as defined in 830 CMR 58.2.1(5)(a), (6). A corporation has manufacturing status if its activities involve manufacturing and its manufacturing activities are substantial. 830 CMR 58.2.1(6)(a). Manufacturing is the process of substantially transforming raw or finished materials by hand or machinery, and through human skill and knowledge, into a product possessing a new name, nature, and adapted to a new use. 830 CMR 58.2.1(6)(b). Determining whether an activity qualifies as manufacturing requires a review of the facts and circumstances, in light of a series of principles, among which is that a process that involves a chemical change to property is more likely to be manufacturing. *Id.*

The water treatment processes to be conducted by the plant constitute manufacturing. The plant takes salty and impure water from the river and substantially transforms it by use of machinery, and through human skill and knowledge, into potable water, a product possessing a new name and nature, and adapted to a new use.

To meet the substantiality requirement of the manufacturing status test the corporation must satisfy at least one of four regulatory calculations, at 830 CMR 58.2.1(6). The four tests evaluate the percentage of manufacturing activities in relation to the entire activity of the corporation, taking into account the corporation's gross receipts, its tangible property, and its Massachusetts payroll.

The Department has stated that in determining whether a corporation satisfies the manufacturing corporation tests of 830 CMR 58.2.1, a corporation may take into account its pro rata share, as that term is defined in 830 CMR 63.38.1(13)(f), of the manufacturing activities of an LLC taxed as a partnership of which it is a member. DD 00-4, Directive 3. A corporate member of an LLC that is

taxed as a partnership is also eligible to use its pro rata share of the ITC for eligible property of the LLC provided that all of the other requirements of G.L. c. 63, § 31A are met and that the corporation keeps records showing in detail the LLC's property investments. DD 00-4, Directive 4(b)(1). Thus, Corporation and Minority Member may perform the manufacturing corporation qualifying tests taking into account their proportionate share of the manufacturing activities of LLC, and if they satisfy one of the tests, may take the ITC on qualifying property. Corporation and Minority Member may take either the EOAC or the ITC on qualifying property, but not both on the same property. 830 CMR 63.38N.1(9).

SALES AND USE TAX ISSUES

Ruling Request 4. The sale, furnishing or servicing of water by LLC to any purchaser will be exempt from sales and use taxes under G.L. c. 64H, § 6(i) and G.L. c. 64I, § 7(b).

Ruling 4. The sale, furnishing or service of water by LLC to any purchaser is exempt from sales and use taxes under G.L. c. 64H, § 6(i) and G.L. c. 64I, § 7(b).

Discussion 4. Unless otherwise exempted, Massachusetts imposes a sales tax of five percent on the sale at retail in the state of tangible personal property. G.L. c. 64H, § 2. A complementary use tax is imposed on the storage, use or other consumption in the state of tangible personal property purchased from any vendor. G.L. c. 64I, § 2. There is an exemption for the sales, furnishing, or service of water that applies to both the sales and the use tax. See G.L. c. 64H, § 6(i), c. 64I, § 7(b).

Ruling Request 5. For purposes of the sales and use tax exemptions allowed by G.L. c. 64H, § 6(r), and (s), the Contractor and subcontractors engaged by Contractor will qualify for exemptions for the purchases it or they make under the Contract to the extent that LLC would qualify for the exemptions if LLC made the purchases directly.

Ruling 5. The Contractor and subcontractors that are in a true agency relationship with LLC with respect to the purchases will qualify for the exemptions for purchases of tangible personal property identified in G.L. c. 64H, § 6(r), and (s), if LLC purchasing on its own account would qualify for the exemptions.

Discussion 5. Purchases of tangible personal property by a party on behalf of an exempt entity are exempt from the sales and use tax if the party is acting as the agent of the exempt entity. See TIR 99-4, TIR 99-21. In addition, the Department extends the exemptions set forth in G.L. c. 64H, § 6(r), (s) to purchases made by agents of exempt users, that is, agents of entities that will use the property in an exempt manner under the 6(r) and (s) exemptions. See TIR 99-21. Thus, to the extent that purchases made by LLC would be exempt under G.L. c. 64H, § 6(r), (s), the exemption extends to LLC's agents, whether contractors or subcontractors.

Whether an agency relationship exists between LLC and its contractors and subcontractors under Massachusetts law is a question of fact based on a review of the actual course of dealings between the parties. In this case, LLC has not formed a relationship with any contractor or subcontractor, and because of the Department's policy of not ruling on hypotheticals, it cannot make a finding of agency in fact.

In an effort to provide guidance to the taxpayer as it forms its relationships with contractors and subcontractors, we note that the Department uses the common law rules of agency in determining whether an agency relationship exists. The characteristics of agency include the power of the agent to change legal relations of the principal, such as the power to subject the principal to legal liability; the fiduciary duty owed by the agent to the principal; and, the right of the principal to control the agent's conduct. The proposed contract submitted by taxpayers indicates that the contractor will act as agent for the taxpayers with respect to purchases. The words of a contract can be useful in describing the extent of an agent's powers and liabilities, but only the actual course of dealings between the parties is determinative of agency. In drafting a contract between an agent and principal for expected purchases, persuasive evidence of a genuine agency relationship could include highly detailed specifications of purchases that must be made on behalf of the LLC, or incorporation of a detailed project plan that gives specific purchasing instructions.

Ruling Request 6. The specific items of tangible personal property listed in the statement of facts will qualify for the exemptions for purchases of materials, tools and fuel to be consumed and used, and machinery and replacement parts to be used, directly and exclusively in the furnishing of water when delivered to consumers through mains, lines, or pipes under G.L. c. 64H, § 6(r) and 6(s) and G.L. c. 64I, § 7(b).

Ruling 6. Generally, the items of tangible personal property listed in the statement of facts will qualify for the exemptions for purchases of materials, tools and fuel to be consumed and used, and machinery and replacement parts to be used, directly and exclusively in the production, storage or delivery of water under G.L. c. 64H, § 6(r) and 6(s) and G.L. c. 64I, § 7(b). However, tangible personal property used by the contractor in fulfilling its obligations under the construction contract that do not become part of the water furnishing apparatus are not exempt, and are taxable to the contractor. These non-exempt items would include materials, tools, fuels, machinery, and replacement parts that are not physically incorporated in the plant or are not used in the actual furnishing of water, or that are consumed and used before the plant begins furnishing water to consumers.

Discussion 6. This request considers the following statutory exemptions from sales and use taxes in G.L. c. 64H, § 6:

(r) Sales of materials, tools and fuel, or any substitute therefor, . . . which are consumed and used directly and exclusively . . . in the furnishing of gas, water, steam or electricity when delivered to consumers through mains, lines, or pipes

(s) Sales of machinery, or replacement parts thereof, used directly and exclusively . . . in the furnishing of gas, water, steam or electricity when delivered to consumers through mains, lines or pipes

The exemptions for materials, tools, fuel, machinery and replacement parts in the context of furnishing water extend to all items that operate harmoniously to make an integrated and synchronized system. See *Lowell Gas Co. v. Commissioner of Corporations and Taxation*, 377 Mass. 255, 260 (1979). The phrase “furnishing” as used in these exemptions denotes operations that are distinct from such terms as “manufacturing” and “production,” used elsewhere in the same exemptions; the term furnishing includes the distribution function. *Id.*, at 257. In *Lowell Gas*, the Court held that pipes, meters, production, storage and pressure regulating equipment were all integral components required in the company’s system, and were all exempt from sales and use tax as machinery used directly and exclusively in the furnishing of gas.^[2]

The individual items of tangible personal property listed in the statement of facts appear to fall within the categories of materials, tools, fuels, machinery or replacement parts that are eligible for the tax exemptions at G.L. c. 64H, § 6(r), (s). Note that under G.L. c. 64H, § 6(r), materials, tools and fuel are eligible for the exemption only if they are used exclusively in the furnishing of water, meaning that they are not employed in any other way, and if they have a normal useful life of less than one year or if their costs are allowable as ordinary and necessary business expenses for federal income tax purposes. Items that would normally be considered materials, but that have a useful life of greater than one year will not be exempt under G.L. c. 64H, § 6(r); they may, however, be exempt under G.L. c. 64H, § 6(s) if they become a part of the integrated and synchronized system, or machine, that furnishes water to consumers. To be eligible for the exemption, machinery and replacement parts must also satisfy the test of being used exclusively in the furnishing of water. G.L. c. 64H, § 6(s). Cf. DD 99-8. With respect to the process building named in the statement of facts, only those elements of the building that actually are used in the furnishing of water, namely the basins and tanks that are integrated in the structure of the building, are exempt items.

We find that the 64H, § 6(r) and (s) exemptions extend to all elements of the water desalination plant, even the waste product processing functions that occur after the pure water is pumped away.

We base this on the following excerpt from *Niagara Mohawk Power Corp. v. Wanamaker*, 286 App. Div. (N. Y.) 446, 449 *aff'd*. 2 N. Y. 2d 764 (1955), which has been cited with approval by the Supreme Judicial Court:[\[3\]](#)

There is no simple test of what constitutes 'consumption directly and exclusively in the production' of electricity. The basic questions are the following: (1) Is the disputed item necessary to production? (2) How close, physically and causally, is the disputed item to the finished product? (3) Does the disputed item operate harmoniously with the admittedly exempt machinery to make an integrated and synchronized system? After much study of the matter, we have concluded that the purchase or use of the coal and ash handling equipment [also waste processing equipment] is not taxable. That equipment is as essential to production as the generator itself. A serious breakdown in it would quickly stop or impair the output of electricity. We are further impressed with the synchronization and integration of the boiler and coal and ash equipment. The one could not operate without the other. Working together they make up a system which supplies the power from which electricity is produced. A taxing statute should receive a practical construction That is particularly true here, for the resolutions are designed to achieve a practical, economic result -- avoidance of multiple taxation, at least to some extent. It is not practical to divide a generating plant into 'distinct' stages. It was not built that way, and it does not operate that way. The words 'directly and exclusively' should not be construed to require the division into theoretically distinct stages of what is in fact continuous and indivisible.

These items fall within the part of the G.L. c. 64H, § 6(r), (s) that exempts items that "are consumed and used directly and exclusively . . . in the furnishing of gas, water, steam or electricity when delivered to consumers through main, lines or pipes" This part of the exemption is less restrictive than the exemption for items used "in an industrial plant in the actual manufacture of tangible personal property to be sold." *Compare Lowell Gas Co. v. Commissioner of Corporations and Taxation*, 377 Mass. 255, 259 (1979)(finding that the furnishing of gas includes the distribution function) *with Associated Testing Laboratories, Inc. v. Commissioner of Revenue*, 429 Mass. 628, 630 (1999)(delineating the five elements of the "manufacturing" piece of the exemption, including that the exempt items must be used in actual manufacture, conversion, or processing).

Items that are used by the Contractor or its subcontractors in fulfilling their obligations under the contract, however, are not exempt from tax; the Contractor and its subcontractors are considered the users of the materials, tools, fuel, machinery and replacement parts, and are liable for the tax. See *Ace Heating Service, Inc. v. State Tax Commission*, 371 Mass. 254, 256 (1976). See also G.L. c. 64H, § 6(r), (s). For example, the contractor will be liable for the excise on fuels it consumes during the construction phase, both for operating its machinery and for heating the plant before the plant is actually furnishing water. It will be liable for the excise on materials and tools that are not physically incorporated into the plant. *Cf. S.J. Groves & Sons Co. v. State Tax Commission*, 372 Mass. 140, 144 (1977). It will be liable for the excise on machinery and replacement parts that are used in the construction activities.

You have submitted a series of alternate requests for finding individual tax exemptions for items listed in the statement of facts in the event the exemption was not found under the furnishing of water provisions. G.L. c. 64H, § 6(r), (s). In particular, you seek exemptions under G.L. c. 64H, § 6(r), (s), for the actual manufacture of tangible personal property to be sold and for the furnishing of power to an industrial manufacturing plant; G.L. c. 64H, § 6(i), for gas, steam and electricity used in an industrial plant in the actual manufacture of personal property to be sold or in the heating of the plant; and under G.L. c. 64H, § 6(j), for fuel used for heating purposes in an industrial plant. Because we find that all the listed items of tangible personal property fall within the purview of G.L. c. 64H, § 6(r), (s) as used in the furnishing of water when delivered to consumers through mains, lines or pipes, it is unnecessary to consider these alternate requests.

Very truly yours,

/s/Alan LeBovidge

Alan LeBovidge
Commissioner of Revenue

AL:LEM:dt

LR 05-2

[1] The term “equalization” means that the intake water in the raw water tank is mixed to respond to changing conditions of quality because of the tidal dynamic; as the tide goes up and down, salinity and solids in the water change.

[2] The phrase “when delivered to consumers through mains, lines or pipes” is intended to distinguish entities that employ main, pipe, or line delivery systems from those that use bottling or other delivery systems. See *Lowell Gas Company et al. v. Commissioner of Corporations and Taxation*, 377 Mass. 255, 259 (1979). The phrase describes both wholesale and retail sellers of gas, water, steam or electricity: “As long as [gas] is ultimately delivered to consumers through mains, lines or pipes as opposed to some other delivery system, the statutory requirement is satisfied.” *Tennessee Gas Pipeline Co. v. Commissioner of Revenue*, Appellate Tax Board (Docket Nos. 171876-171879 and 194866-194869) (1998).

[3] See, e.g. *Courier Citizen v. Commissioner of Corporations and Taxation*, 358 Mass. 563, 571 (1971), *Rowe Contracting Co. v. State Tax Commission*, 361 Mass. 158 (1972), *Commissioner of Revenue v. V. H. Blackinton & Co.*, 420 Mass. 259 (1995).