

802.1 (2)(2)

Verne, B. Michael

From: [REDACTED]
Sent: Wednesday, March 01, 2006 11:10 AM
To: Verne, B. Michael
Subject: Question under 802.1 (I think)

I have an odd situation that doesn't fit neatly under any of the provisions of 802.1 but seems to me should, in concept, be an acquisition in the ordinary course. It's kind of a reverse outsourcing arrangement.

X owns a plant. Some time ago, X allowed Y to construct a cogeneration facility on the premises of X's plant. Y sells the electricity from the cogeneration plant to third parties. A by-product of the cogeneration facility is steam, which is created in boilers owned by Y as part of its cogeneration facility. Y supplies all of the steam back to X, for use in X's plant.

Y files for bankruptcy. The bankruptcy trustee proposes to sell the boilers back to X. (Y will continue to own the rest of the cogen facility and will enter into a new contract to supply steam to X.) The boilers are used durable goods but not held by either party for resale or leasing. The acquired person is not going to replace the boilers (because it is bankrupt). The boilers might look like a used facility under 802.2, but they don't fit that language either.

What leads me to want to characterize them as ordinary course assets is that they don't produce anything that's resold to anybody. They produce steam (which if anything, would be classified as current supplies) used captively by X because that's where the boilers are located. If X were just going out and buying new boilers for its plant, the acquisition of those assets would clearly be exempt. Seems to me the answer can't be different if the boilers happen to be used.

Have you got a shoe horn handy?



following annotations.

BOILERS ARE ASSETS
INCIDENTAL TO THE
CURRENT SUPPLY
(STEAM)

[Handwritten signature]

3/1/06

This message may contain confidential and privileged information. If it has been sent to you in error, please reply to advise the sender of the error and then immediately delete this message.
=====

=