

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-83(11)S
Sales Tax
March 15, 1983

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S820120A

On January 20, 1982 a Petition for Advisory Opinion was received from Fancher Chair Co., Inc., South Work Street, Falconer, New York.

The issue raised is whether Petitioner's purchases of natural gas, for use and consumption in connection with its production of furniture for sale, are subject to New York State and local sales and use taxes. It is concluded herein that a portion of such purchases qualify for the exemption from tax available under Tax Law § 1115(c), applicable to purchases of ". . . gas . . . for use or consumption directly and exclusively in the production of tangible personal property . . . for sale, by manufacturing "

Petitioner manufactures furniture for sale. Petitioner states that the relative humidity inside its manufacturing plant must be controlled in order to permit its manufacturing operations. This is accomplished by maintaining the indoor temperature between 60 and 65° F. and by adding the appropriate amount of moisture to the air by means of humidifiers. By means of this process Petitioner is able to control the moisture content of the wood used in the manufacturing process. Such control is necessary because the moisture content of the wood affects the workability of the wood and the absorption, bonding and drying of the glue used in joining the various components. The indoor temperature also affects the workability of the glue and the drying of the wood finishes.

The Sales and Use Tax Regulations elaborate on the statutory exemption provision referred to above, as follows:

- (c) Directly and exclusively. (1) "Directly" means the . . .gas. . . must during the production phase of a process, either:
- (i) operate exempt production machinery or equipment, or
 - (ii) create conditions necessary for production, or
 - (iii) perform an actual part of the production process.
- . . .
- (3)(i) "Exclusively" means that the . . .gas. . . is used in total (100%) in the production process.
- (ii) Because. . .gas, . . .when purchased by the user is normally received in bulk or in a continuous flow and a portion thereof is used for purposes which would make the exemption inapplicable to such purchases, the user may claim a refund or credit for the tax paid only on that portion used or consumed directly or exclusively in production.
 - (iii) In the alternative, an Exempt Use Certificate (Form ST-121) may be used, providing full liability is assumed for any state and local tax due on any part of purchases used for other than the exempt purposes described in subdivision (a) of this section. The taxable portion of these purchases is to be reported as a "purchase subject to use tax" on a sales and use tax return required to be filed with the Tax Commission.

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- (iv) The user must maintain adequate records with respect to the allocation of . . . gas . . . used directly and exclusively in production and for non-exempt purposes.
- (v) For the purpose of substantiating the allocation of . . . gas . . . used directly and exclusively in production from that used for non-exempt purposes, the user must, when claiming a refund or credit, submit an engineering survey or the formulae used in arriving at the amounts used in an exempt manner.

Example 3: A commercial greenhouse purchases natural gas to create a heated atmosphere for growing plants. The gas is also used to heat salesrooms. The gas used to heat the greenhouse is used directly in production while the gas used to heat salesrooms is not used in production. 20 NYCRR 528.22.

Petitioner controls the relative humidity inside its plant by maintaining the indoor temperature at certain levels and by adding the appropriate amount of moisture to the air. As this procedure, by controlling the moisture content of the wood, has a direct effect on the workability of the wood, the workability, bonding and drying of the glue and the drying of the wood finishes, Petitioner is considered to be creating conditions necessary for production, within the meaning of section 528.22(c)(1)(ii) of the Sales and Use Tax Regulations. As Petitioner uses natural gas to maintain the indoor temperature, the amount of natural gas so used is thus considered to be used directly in production. However, the statutory exemption is applicable only to gas used exclusively in production. If gas is used for more than one function it does not qualify for the exemption. In the present case the gas is used for heating Petitioner's plant, such heating being necessary to maintain environmental conditions necessary for production. However, such winter heating, to a level of only 60-65° F., is presumably also for the purpose of ensuring employee comfort. This is not a case like that described in the Regulations, supra, wherein gas used to heat a commercial greenhouse is held to be exempt. There the gas is required to heat the premises to a level higher than normal, such heating being required for the exclusive purpose of ensuring the life of the plants. In the present case, the dual use of the gas renders it generally ineligible for the exemption provided for in section 1115(c) of the Tax Law. The exemption would, however, apply to gas used to heat areas where employee comfort is not a factor. In Petitioner's plant this would include the first floor room used for the storage of lumber prior to carving, and the second floor room used for the storage of unfinished chairs.

Accordingly, Petitioner may purchase a portion of the natural gas tax exempt, or may claim a credit or refund of tax paid, in accordance with the provisions of the Sales and Use tax Regulations quoted above.

DATED: February 25, 1983

s/FRANK J. PUCCIA
Deputy Director
Technical Services Bureau