

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

TSB-A-84(9)S
Sales Tax
March 13, 1984

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S820930D

On September 30, 1982 a Petition for Advisory Opinion was received from The Southland Corporation, 425 Cherry Street, Bedford Hills, New York 10507.

The issue raised herein is whether the electricity used to power transit and deli coolers is exempt from sales tax.

Petitioner states that the transit and deli coolers are used to hold cold cuts, cheeses and other deli products prior to sales. These include meat and cheese in bulk form, to be sold in slices by weight. The meat and cheese is also used to prepare sandwiches for off-premises consumption. The coolers are also used to store potato salad, cole slaw, macaroni salad, as well as other salads in a ready to eat format. "Deli-coolers" are used for display as well as the cooling of foods. "Transit coolers" are coolers which are built into the building and used solely for the cooling of foods.

Section 1115(c) of the Tax Law provides, in part, that: ". . . electricity for use or consumption directly and exclusively in the production of tangible personal property . . . for sale . . . shall be exempt from the taxes imposed under subdivisions (a) and (b) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten." (emphasis added)

The sale of sandwiches and salads in a ready to eat format is subject to the tax imposed under section 1105(d), and thus does not constitute the sale of tangible personal property within the meaning of the Article 28 of the Tax Law. Burger King v. State Tax Commission, 51 N.Y. 2d 614. Accordingly, electricity used in the cooling of the foods used in sandwiches and of ready to eat salads is not used in the production of tangible personal property, and thus does not qualify for the exemption. Where, however, meat, cheese and the like is sliced and sold by weight, such sales are of tangible personal property. The electricity used, prior to slicing or preparation in ready to eat form, of such food is used directly in production. 20 NYCRR 528.13(c)(2) Ex. 6; 20 NYCRR 528.13(b)(1); 528.22(c)(1)(ii). Accordingly, the electricity used exclusively with respect to the latter process would not be subject to tax. The following provisions of the Sales and Use Tax Regulations apply to the situation under discussion:

ii) Because fuel, gas, electricity, refrigeration and steam 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 and 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.

(iv) The user must maintain adequate records with respect to the allocation of fuel, gas, electricity, refrigeration and steam used directly and exclusively in production and for non-exempt purposes.

(v) For the purpose of substantiating the allocation of fuel, gas, electricity, refrigeration and steam and like services 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. 20 NYCRR 528.22(c)(3).

DATED: February 27, 1984

s/FRANK A. PUCCIA
Director
Technical Services Bureau