

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

TSB-A-85 (20)S
Sales Tax
June 12, 1985

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S840308A

On March 8, 1984, a Petition for Advisory Opinion was received from MOD-PAC Corp., 873 Hertel Avenue, Buffalo, New York 14216.

The issue raised is whether natural gas consumed in space heaters in the production area of a manufacturing plant is used directly and exclusively in the production of tangible personal property for sale and, as such, exempt from New York State sales and use taxes under Section 1115(c) of the Tax Law.

Petitioner manufactures packing cartons to customer's specifications by a process of cutting, folding, glueing and imprinting paper board stock it purchases either in sheet or rolled form. The plant operates in two shifts, six days a week. Manufacturing functions occupy three main facilities; administrative and design offices, warehouse, and production area.

Petitioner maintains the temperature in the offices at above 70°F. and does not heat the warehouse to exceed 40°F. Petitioner concedes that natural gas used for these purpose is subject to sales tax.

However, Petitioner contends that the gas consumed to keep a constant temperature of 68 to 70°F. in the production area is creating conditions necessary for production and is therefore exempt from the imposition of sales tax.

Petitioner states that the paperboard, cellophane, glue and the printing supplies are moved to the production area well before use to permit warming of the material to the temperature necessary for efficient processing. Also, the machinery, and the printing rollers in particular, must be kept in the 68 to 70 degree temperature range to function effectively. Petitioner claims natural gas is used in this area exclusively to maintain an environment necessary for production.

Section 1115(c) of the Tax Law provides an exemption for gas and gas services of whatever nature for use and consumption directly and exclusively in the production of tangible personal property by manufacturing.

Sales and Use Tax Regulations Section 528.22 provides, in part, as follows:

"(a) . . . (2) Fuel, gas, electricity . . . consumed in the heating of buildings . . . are subject to sales tax.

(b) Definitions (2) The term gas as used in this section means any gaseous substance . . . used in a production function or to create an atmosphere which is conducive to or necessary for production.

(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.

(2) Usage in activities collateral to the actual production is not deemed to be used directly in production."

Inasmuch as Petitioner heats the production space to create an environment suitable for the manufacturing process the natural gas consumed for this purpose is used directly in production. However, the statutory exemption applies only to fuel used directly and exclusively in production. If gas is used for any function other than production, it does not qualify for the exemption.

In consequence, the fuel needed to keep the indoor temperature between 68 and 70 degrees for proper processing of material is exempt only if maintenance of the temperature is not also necessary for employee comfort. See Fancher Chair Co., Inc., Advisory Opinion, March 15, 1983, TSB-A-83(11)S.

Since Petitioner would be required to heat the production area in any event for purposes of employee comfort, the natural gas so consumed in heating the production area is not used exclusively in production and, accordingly, is subject to the applicable New York State sales and use taxes.

DATED: May 20, 1985

FRANK J. PUCCIA
Director
Technical Services Bureau

NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth herein.