

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

TSB-H-81(88)S
Sales Tax
April 30, 1981

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S801023A

On October 23, 1980 a Petition for Advisory Opinion was received from Airweld, Inc., 94 Marine Street, Farmingdale, New York 11735.

The issues raised are:

- (1) whether gases such as nitrogen, argon, oxygen, acetylene, etc. which are used in production either to operate machinery, control atmosphere or physically change a product, are subject to "the 2% sales tax," and
- (2) whether an exempt use certificate (form ST-121) is required in order to make tax exempt purchases of machinery parts, tools or supplies used directly in the manufacturing of tangible personal property for sale and, if so, which box on the certificate should be utilized.

Section 1105(a) of the Tax Law imposes a tax on the receipts from "every retail sale of tangible personal property," while section 1105(b) imposes a tax on the receipts from the retail sale of "gas," among other things. However, section 1115(c) provides for an exemption from these taxes with respect to the receipts from certain sales of gas, as follows:

"Fuel, gas...for use or consumption directly and exclusively in the production of tangible personal property...for sale, by manufacturing, processing...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."

Applicable provisions of the Sales and Use Tax Regulations define the term "gas," as used in the foregoing exemption provision, to mean

"any gaseous substance inert or otherwise, whether taxed under subdivision (a) or (b) of section 1105 of the Tax Law, used in the performance of a production function or to create an atmosphere which is conducive to or necessary for production." 20 NYCRR 528.22(b)(2).

To qualify for the exemption provision the gas must not only be used exclusively in production, but it must be "directly" so used. The Regulations elucidate this requirement, as follows:

"Directly and exclusively. (1) 'Directly' means the fuel, gas, electricity, refrigeration and steam and like services, 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.

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

JAMES H. TULLY, JR., COMMISSIONER LOUIS M. JACOBSON, DEPUTY COMMISSIONER
FRANK J. PUCCIA, DIRECTOR

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Example 1: A welding shop produces stainless steel railings. In order to carry out the production, the railings must be welded in an inert atmosphere. The welding shop purchases an inert gas which is used to create the inert atmosphere. The gas is used directly in production." 20 NYCRR 528.22(c) (1).

In accordance with the foregoing, Petitioner's purchases of gases to be used as described are not subject to either of the taxes imposed under section 1105(a) and (b) of the Tax Law. The 2% State sales tax rate referred to by Petitioner was a rate applicable not to gases used as described above, but to "certain parts, tools, supplies and services relating to tangible personal property used or consumed in production" for the period September 1, 1980 through February 28, 1981. Such sales became exempt from the State sales tax as of March 1, 1981. The sales of gases described by Petitioner have been exempt since the very inception of the State sales tax.

As to the question of the necessity of using an Exempt Use Certificate (Form ST-121) section 1132(c) of the Tax Law provides, in relevant part, as follows:

"...it shall be presumed that all receipts for property or services...are subject to tax until the contrary is established, and the burden of proving that any receipt, amusement charge or rent is not taxable hereunder shall be upon the person required to collect tax or the customer. Unless (1) a vendor shall have taken from the purchaser a certificate in such form as the tax commission may prescribe, signed by the purchaser and setting forth his name and address and, except as otherwise provided by regulation of the tax commission, the number of his registration certificate, together with such information as said commission may require, to the effect that the property or service was purchased for resale or for some use by reason of which the sale is exempt from tax under the provisions of section eleven hundred fifteen...the sale shall be deemed a taxable sale at retail..."

Accordingly, in order for Petitioner to purchase either gases or machinery parts, tools and supplies exempt from tax it must supply the vendor with a properly completed Exempt Use Certificate, utilizing the box marked "(h) Fuel, gas, electricity, refrigeration or steam for use or consumption directly and exclusively in the production of tangible personal property, gas, electricity, refrigeration or steam for sale." The same was true with respect to purchases of machinery parts, tools and supplies purchased between September 1, 1980 and February 28, 1981, with respect to the applicability of the then 2% State sales tax rate.

DATED: April 15, 1981

s/LOUIS ETLINGER
Deputy Director
Technical Services Bureau