

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-03(16)S
Sales Tax
April 4, 2003

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S010709A

On July 9, 2001, the Department of Taxation and Finance received a Petition for Advisory Opinion from Airgas East, Inc., 17 Northwestern Drive, Salem, NH 03079.

Petitioner, Airgas East, Inc., submitted the following facts as the basis for this Advisory Opinion.

Petitioner is a manufacturer and distributor of medical and industrial gases and related supplies. The gases that are sold by Petitioner include, but are not limited to, oxygen, acetylene, helium, nitrogen, and argon. Additionally, supplies that are provided by Petitioner include personal protective equipment, welders, cylinders, hoses, regulators, welding screens, and fire blankets. Petitioner's products are sold to and used by many different types of businesses, including agricultural producers.

Typically, the products which are sold by Petitioner are utilized by agricultural producers in welding applications for the maintenance and repair of farm equipment and machinery. They may also be utilized to maintain farm buildings and other real property, such as fences. For purposes of this Petition, it is assumed that Petitioner's customers are producing property for sale in a qualifying agricultural activity eligible for exemption from sales tax under Sections 1115(a)(6)(A) and 1115(c)(2) of the Tax Law.

Petitioner asks whether the receipts from the sales of its products are exempt from tax as property purchased for use or consumption predominantly in the production for sale of tangible personal property by farming. Petitioner sets forth five questions, which are found in the opinion portion of this Advisory Opinion, concerning the application of the New York State sales and use tax to the sale of its products to agricultural producers.

Applicable Law and Regulations

Section 1105 of the Tax Law imposes sales tax, in part, on:

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

(b) (1) The receipts from every sale, other than sales for resale, of the following: (A) gas, electricity, refrigeration and steam, and gas, electric, refrigeration and steam service of whatever nature. . . .

* * *

(c) The receipts from every sale, except for resale, of the following services:

* * *

(3) . . . maintaining, servicing or repairing tangible personal property . . . not held for sale in the regular course of business . . . whether or not any tangible personal property is transferred in conjunction therewith, except:

* * *

(vi) such services rendered . . . with respect to tangible personal property for use or consumption predominantly either in the production for sale of tangible personal property by farming or in a commercial horse boarding operation, or in both, as such tangible personal property is specified in paragraph six of subdivision (a) of section eleven hundred fifteen of this article. The exemption provided by this subparagraph shall not apply to the taxes imposed pursuant to section eleven hundred seven of this article.

* * *

(5) Maintaining, servicing or repairing real property, property or land, as such terms are defined in the real property tax law, whether the services are performed in or outside of a building . . . but excluding . . . services rendered with respect to real property, property or land used or consumed predominantly either in the production of tangible personal property, for sale, by farming or in a commercial horse boarding operation, or in both.

Section 1115 of the Tax Law provides, in part:

(a) Receipts from the following shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten:

* * *

(6)(A) Tangible personal property, whether or not incorporated in a building or structure, for use or consumption predominantly either in the production for sale of tangible personal property by farming or in a commercial horse boarding operation, or in both.

* * *

(15) Tangible personal property sold to a contractor, subcontractor or repairman for use in (i) erecting a structure or building . . . used predominantly either in the production phase of farming or in a commercial horse boarding operation, or in both, or (ii) adding to, altering or improving real property, property or land . . . used predominantly either in the production phase of farming or in a commercial horse boarding operation, or in both, as the terms real property, property or land are defined in the real property tax law; provided, however, no exemption shall exist under this paragraph unless such tangible personal property is to become an integral component part of such structure, building or real property.

(16) Tangible personal property sold to a contractor, subcontractor or repairman for use in maintaining, servicing or repairing real property, property or land . . . used predominantly either in the production phase of farming or in a commercial horse boarding operation, or in both, as the terms real property, property or land are defined in the real property tax law; provided, however, no exemption shall exist under this paragraph unless such tangible personal property is to become an integral component part of such structure, building or real property.

* * *

(c)(2) Fuel, gas, electricity, refrigeration and steam, and gas, electric, refrigeration and steam service of whatever nature for use or consumption either in the production of tangible personal property, for sale, by farming or in a commercial horse boarding operation, or in both, 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 of this article.

Section 526.8(b) of the Sales and Use Tax Regulations provides, in part:

Gas, electricity, refrigeration and steam are not considered tangible personal property for the purpose of the tax imposed on utility services. Gas sold in containers or in bulk for purposes other than heating, cooking or lighting is considered tangible personal property. . . .

Section 527.2(b)(3) of the Sales and Use Tax Regulations provides:

Sales of gas in containers or cylinders having a capacity of less than 100 pounds of gas are considered to be sales of tangible personal property subject to tax under subdivision (a) of section 1105 of the Tax Law and not the sale of gas service or gas for the purposes of this section.

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Example 5: A welding shop purchases a tank of oxygen and a tank of acetylene. The transaction is not the purchase of a gas service but is the purchase of tangible personal property.

Opinion

The following are the questions presented by Petitioner concerning its sales and the appropriate answers:

- 1. Petitioner's agricultural customers utilize the fuel and shielding (inert) gases during their welding processes. The gases provide the heat and environmental conditions necessary to ensure a proper weld. Typically, the items will be used in the maintenance and repair of farm production equipment, such as tractors.**

Q. Do the gases, as described, qualify for exemption from the sales and use tax under either Section 1115(a)(6)(A) or 1115(c)(2) of the Tax Law?

A. The sale of welding gas is considered the sale of tangible personal property and not the sale of a gas service. See Sections 526.8(b) and 527.2(b)(3) of the Sales and Use Tax Regulations. Section 1115(a)(6)(A) of the Tax Law provides an exemption from sales and use tax on purchases of tangible personal property used "predominantly" (more than 50%) in the production of tangible personal property for sale by farming. Effective September 1, 2000, Chapter 63 of the Laws of 2000 eliminated the requirement that property be used "directly" in the production phase of farming in order to be eligible for exemption under Section 1115(a)(6)(A) of the Tax Law.

Technical Services Bureau Memorandum Farmers and Commercial Horse Boarding Operations, September 13, 2000, TSB-M-00(8)S, describes supplies used in administrative activities (e.g., maintaining feed or animal weight records) related to production as an example of tangible personal property that, beginning September 1, 2000, is considered to be used in farm production. Petitioner's welding gas is as closely related to the production process as these administrative activities are related to production. Accordingly, welding gases used predominantly to repair production equipment essential to the farm production process qualify for exemption from sales tax under Section 1115(a)(6)(A) of the Tax Law. See TSB-M-00(8)S, supra.

- 2. The gases described in Question #1 are provided in specially designed cylinders that are essential to maintaining the conditions necessary in order to utilize the gases. There is no other way of conveying these products. The cylinders are returnable and refillable. They may be purchased, leased or rented by Petitioner's customers. Although durable, the cylinders occasionally require repair, refurbishment, painting, and the replacement of parts. Periodic hydrostatic testing, which ensures the integrity and the safety of the cylinders, is required by law.**

Additionally, various accessories are needed in order to remove the gases from the cylinders and utilize them for their intended purposes, such as:

- regulators required to control the pressure of the cylinderized gases;**
- gauges used in conjunction with the regulators to display the gas pressures;**
- hoses necessary to connect and allow the passage of gases from the regulator to the torch;**
- the torch that directs the flow of the gases;**
- the welding or cutting tip that is mounted on the end of the torch handle through which the gas mixture feeds the flame; and**
- flashback arresters (safety devices) that shut off the gas flow if a flashback occurs within the hose.**

Q. 2a. Will the sale, rental, or lease of cylinders qualify for the exemption from sales tax available under Section 1115(a)(6)(A) of the Tax Law?

A. Yes, when such cylinders are used predominantly to repair production equipment essential to the farm production process. The cylinders are considered items eligible for the farming exemption provided under Section 1115(a)(6)(A) of the Tax Law for the same reason as given in Question #1, i.e., they form a part of the production operation because they are an integral part of the welding process. Accordingly, Petitioner's receipts from the sale, rental, or lease of gas cylinders to its customers for the described use are not subject to tax.

Q. 2b. Will the sale of cylinder accessory items, as described above, qualify for the exemption available under Section 1115(a)(6)(A)?

A. Yes. The cylinder accessory items, like the cylinders, are considered to be used in the production phase of farming when used predominantly to repair production equipment essential to the farm production process and are therefore eligible for this exemption.

Q. 2c. Will the cylinder repair and maintenance services and replacement parts qualify for exemption?

A. The services of repair and maintenance of tangible personal property are included in Section 1105(c)(3) of the Tax Law as taxable services, with an exception being made in Section 1105(c)(3)(vi) for these services to property that is used predominantly in the production for sale of tangible personal property by farming. Since the cylinders are used in the production phase of farming (see Question #2a above), the repair and maintenance of the cylinders by farmers are also excepted by Section 1105(c)(3)(vi). Likewise, replacement parts purchased by farmers for repair of cylinders used by them in farm production operations are exempt from tax.

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Purchases of parts by Petitioner for sale to farmers as components of a repair service are exempt if the components are actually transferred to the farmer in conjunction with the performance of a repair service. See Section 1101(b)(4)(i) of the Tax Law.

It should be noted that, generally, the resale exemption does not apply to purchases of gas cylinders used by a vendor of gas and occasionally rented to customers where the receipts collected for the rentals are “purely incidental” to the vendor’s primary business of selling gas. (See Matter of Albany Calcium Light Co. v. State Tax Comm., 44 NY2d 986, 988). The answer for Q.2c. presumes that the repairs are purchased by farmers for cylinders owned or leased by the farmers. If, however, Petitioner is the owner of the cylinders which it is using in its business of selling gas to customers, Petitioner will owe tax on its costs for the repairs to the cylinders.

- 3. Petitioner also sells items which are used by agricultural producers for the proper storage of cylinders and welding supplies. For example, cylinder carts and wall brackets are used by Petitioner’s customers to safely store cylinders in a secure and upright manner. Cylinder caps are screwed onto the top of the cylinder when not in use in order to protect the cylinder valves. Rod guards are used for the storage of welding rods, which become a physical component of the property repaired.**

Q. Will Petitioner’s sales of property of the type described above qualify for exemption from sales and use tax?

A. With the exception of items which become a physical component of property repaired, or added to or improved, no specific statutory exemption exists with regard to Petitioner’s sales of the property described above. Welding rods sold to a contractor, subcontractor, or repairman for use in repairing and maintaining real or tangible personal property used predominantly in the production phase of farming are exempt from the imposition of sales tax, provided they become an integral component part of such real or tangible personal property. See Section 1115(a)(16) of the Tax Law.

- 4. Q. Will the purchase or lease of the following items by Petitioner’s agricultural customers qualify for exemption from sales and use tax under Section 1115(a)(6)(A) of the Tax Law as tangible personal property for use or consumption in the production for sale of tangible personal property by farming?**

– welding machines which will be used predominantly in the repair and maintenance of exempt production equipment;

– safety products (which do not qualify as personal protective items) that are utilized to ensure safety during the welding process, such as:

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- **welding screens** – these are typically flame retardant vinyl or PVC screens which surround the welding work area and block sparks and UV rays; they may be free-standing or permanently installed.
- **fire blankets** – these are used in an emergency to smother flaming clothing or objects.
- **signage** – these include signs such as “WARNING,” “DANGER,” and “HAZARD,” which are intended to ensure the safety of farm personnel and visitors.

A. With the exception of signage, which is not actually a part of the welding process, sales of the above items qualify for exemption. See Question #1. The functions of the above described items used in conjunction with the repair and maintenance of farm production equipment occur during and in connection with welding operations.

5. **Q. Helium is sometimes purchased by agricultural producers. The helium is typically used to inflate balloons which are used for advertising purposes. Would the helium which is used in this manner qualify for exemption from sales and use tax?**

A. There is no provision in the Tax Law to exempt the sale of helium gas for such purpose. Helium used in this manner is not used in farm production for purposes of Section 1115(a)(6)(A) of the Tax Law. Accordingly, sales of helium gas used to inflate balloons are subject to tax under Section 1105(a) of the Tax Law. See Sections 526.8(b) and 527.2(b)(3) of the Sales and Use Tax Regulations.

DATED: April 4, 2003

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