

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

TSB-A-82(52)S
Sales Tax
December 31, 1982

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S811221A

On December 21, 1981 a Petition for Advisory Opinion was received from AGA Burdox, Inc., 3300 Lakeside Avenue, Cleveland, Ohio 44114.

The issue raised is whether Petitioner's acquisitions of cryogenic converters constitute acquisitions of manufacturing and production equipment exempt from sales tax pursuant to the provisions of section 1115(a)(12) of the Tax Law.

The bulk of Petitioner's business centers around the manufacture and distribution of oxygen, nitrogen and argon. These products are manufactured by separating air into its constituent components. At an air separation plant air is cooled to a very low temperature until it condenses into a liquid. Then, by utilizing the relative boiling points of the different elements, the liquid air is separated into its major components. The end product of the air separation process is liquid oxygen, liquid nitrogen and liquid argon. These products are then maintained in their liquid form in order to facilitate storage and handling.

Most of Petitioner's customers are unable to use the oxygen, nitrogen and argon in liquid form. Consequently, Petitioner warms the liquid product until it vaporizes and then packages the resultant gases under pressure in heavy steel cylinders. Most of the accounts Petitioner serves receive their requirements in this manner. However, there are some industrial gas users with gas consumption requirements which are too high to be effectively and efficiently handled with compressed gas cylinders. Accordingly, Petitioner services these large volume customers with the elements in their liquid form, in the following manner.

Petitioner supplies the user with a cryogenic vessel or converter. This unit is used to store the liquid and to convert it into a useable vapor at the customer's location. Title to the liquid product passes to the customer upon delivery. Petitioner retains title to the vessels located on the customer's premises. The customers utilize the gases in question in the production of tangible personal property for sale, and thus buy the gas without the payment of sales tax, presenting Petitioner with an exempt use certificate.

Section 1115(a)(12) of the Tax Law provides for an exemption from sales tax with respect to receipts from the sale of "Machinery or equipment for use or consumption directly and predominantly in the production of tangible personal property, gas . . . for sale by manufacturing, processing . . .". The Sales and Use Tax Regulations define the terms "directly" and "predominantly" as follows:

"Directly' means the machinery or equipment must, during the production phase of a process,

- (i) act upon or effect a change in material to form the product to be sold, or
- (ii) have an active causal relationship in the production of the product to be sold, or
- (iii) be used in the handling, storage, or conveyance of materials or the product to be sold, or
- (iv) be used to place the product to be sold in the package in which it will enter the stream of commerce.

(2) Usage in activities collateral to the actual production process is not deemed to be use directly in production." 20 NYCRR 528.13(c)(1)

"Machinery or equipment is used predominantly in production, if over 50% of its use is directly in the production phase of a process." 20 NYCRR 528.13(c)(4)

Inasmuch as Petitioner's customers take title to Petitioner's products at the time of delivery, the converters cannot be said to be used in Petitioner's manufacturing processes. However, section 528.13(c)(5) of the Sales and Use Tax Regulations provides that "Machinery or equipment used in production by someone other than its owner is exempt under the same conditions as other machinery and equipment." Accordingly, where a converter purchased by Petitioner is purchased solely to be used directly and predominantly, by its customers, in the production of tangible personal property for sale, such converter may be purchased by Petitioner without the payment of tax. 20 NYCRR 528.13(c)(2), Ex.3; Union Carbide Corporation, State Tax Commission, June 24, 1977, STH 77-51. It may be noted that should a converter be predominantly used for some purpose other than production for sale, a use tax liability would arise.

DATED: December 22, 1982

s/FRANK J. PUCCIA
Director
Technical Services Bureau