

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

TSB-A-86(46)S  
Sales Tax  
December 1, 1986

STATE OF NEW YORK  
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S840103B

On January 3, 1984, a Petition for an Advisory Opinion was received from Jackson Welding Co. 535 Buffalo Rd., Rochester, New York 14611.

Petitioner raises the issue of whether its purchases of gas cylinders which it provides to customers as part of its business of selling industrial welding supplies and gases, are exempt from sales tax as purchases for resale within the meaning of Section 1101(b)(4) of the Tax Law.

Petitioner is engaged in the business of selling industrial gases as well as welding supplies and industrial accessories. A component of Petitioner's business includes the sale and rental of gas cylinders to industrial customers. Petitioner states that due to stringent safety requirements the sale of gas cylinders is rare and that, therefore, Petitioner engages almost exclusively in the leasing of such cylinders either under a long term arrangement or on a month to month basis. Petitioner contends that its cylinder leasing business is independent of its sale of industrial gases. In support of this contention, Petitioner emphasizes the following facts:

1. Customers need not lease Petitioner's cylinders in order to buy gas.
2. The cylinders leased by Petitioner to its customers may be filled by other industrial gas distributors, provided those distributors meet Petitioner's safety requirements.
3. Petitioner bills its customers separately for cylinder rental and gas purchases.
4. Petitioner keeps separate accounts for its cylinder leasing business and can demonstrate a separate profit center arising from this business.
5. Petitioner does not insist on the return of its cylinders within any set time period, but permits customers to lease them as long as they wish.

Generally, section 1105(a) of the Tax Law imposes a sales tax on receipts from every retail sale of tangible personal property unless otherwise excluded or exempted. Section 1101(b)(4)(i) defines "retail sale" as "a sale of tangible personal property to any person for any purpose, other than (A) for resale as such. . .". The effect of this provision is to remove property purchased for resale from the application of the sales tax imposed under Section 1105(a) of the Tax Law.

Section 1101(b)(5) of the Tax Law defines "sale" as any transfer of title or possession or both, exchange or barter, rental lease or license to use or consume, conditional or otherwise, in any manner or by any means whatsoever for a consideration. ...

It is well settled that tangible personal property purchased by a vendor and supplied to its customers as a component of its services to its customers is not purchased for resale within the meaning of section 1101(b)(4) of the Tax Law. Thus, it has been held that gas cylinders were not purchased for resale where the seller of the gas did not impose a separate charge for the use of its cylinders, but rather treated the cost as a cost of selling the gas itself. Albany Calcium Light, Inc. v. State Tax Commission, 44 NY2d 987 (1978). Moreover, the nominal demurrage charge imposed by the seller for the late return of cylinders was regarded by the court as merely incidental to the selling of the gases since the seller did not acquire the cylinders with the expectation of collecting these unusual charges.

Similarly, it has been held that where a vendor purchased trash containers for use as part of a trash removal service with no distinguishable consideration being paid by the customers of such service for the containers, such containers were not purchased for resale. U-Need-A-Rolloff Corporation, Decision of the State Tax Commission, January 20, 1984, TSB-H-84(16)S; aff'd 67 NY2d 690, (1986). (See also: Amherst Cablevision, Inc., Decision of the State Tax Commission, September 19, 1980, TSB-H-80(208)S; Radiac Research Corp., Decision of the State Tax Commission, December 29, 1982, TSB-H-83(32)S; Laux Advertising, Inc. v. Tully, 67 A.D.2d 1066 (1979)).

Thus to qualify as a purchase for resale, tangible personal property must be purchased with the intent to resell it as such and not to use it as a component of a service provided to a customer. A resale will be deemed to occur only where a specific charge is made for the rental of the tangible personal property in question. See Niagara Lubricant Company, Inc. v. State Tax Commission, 502 NYS2d 312. However, the mere separate statement on an invoice of charges for tangible personal property where such tangible personal property is furnished as a component of services rendered will not be deemed a resale of the tangible personal property.

To qualify as a resale, the substance of the transaction must be such that the customer has a true option to rent the tangible personal property without also purchasing the services or to purchase the services without renting the tangible personal property. There is nothing to indicate that Petitioner ever provides cylinders except in conjunction with the sale of its industrial gases. The mere separate statement of a charge for cylinders as a component of the charge for industrial gas does not make their purchase a purchase for resale. Petitioner's offer to rent cylinders without the purchase of gas is of no weight if no customer would rent such cylinders without also purchasing gas.

Accordingly, Petitioner has failed to demonstrate that its purchases of cylinders were purchases for resale.

Of course, if Petitioner actually rents any empty cylinders, such cylinders may qualify for exemption on their purchase. However, it should be noted that if a vendor both rents tangible personal property and uses the same type of tangible personal property for other non-qualifying uses

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(e.g. self use), he must segregate the tangible personal property used for rental purposes. If the vendor uses tangible personal property interchangeably for rental and for non-qualifying uses, none of the tangible personal property will qualify for exclusion from sales and use tax since none of the tangible personal property is used exclusively for resale. Micheli Contracting Corp. v. State Tax Commission, 109 A.D. 2d 957 (1985).

Inasmuch as the issue raised in this Advisory Opinion was raised in the context of an audit of the taxpayer, the factual determination of whether Petitioner rents cylinders to its customers will be determined within the context of the audit based upon all of the facts and circumstances of the case in a manner consistent with the policy of the Tax Commission as set forth herein.

DATED: December 1, 1986

s/FRANK J. PUCCIA  
Director  
Technical Services Bureau

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