

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

TSB-A-88 (15)S
Sales Tax
February 22, 1988

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S870804A

On August 4, 1987, a Petition for Advisory Opinion was received from the Southland Corporation, 2828 North Haskell Avenue, Dallas, Texas 75221-0719.

The issue raised is whether Petitioner, as the purchaser of fuel, gas or electricity used in the production of tangible personal property for sale, is entitled to a refund of sales tax when such fuel, gas or electricity is used in an exempt manner by its franchisees.

Petitioner operates the nationwide 7-Eleven retail chain of convenience food stores. Of the stores located in New York, a minority are owned and operated by Petitioner. The majority are owned by Petitioner but operated by franchisees. Petitioner states that, in the operation of all 7-Eleven convenience stores, a portion of the fuel, gas and/or electricity is used or consumed directly and exclusively in the production of tangible personal property for sale.

Petitioner states that it purchases the fuel, gas and electricity used in the franchisee operated stores. The issue raised relates to such purchases.

Petitioner's Store Franchise Agreement contains the following provision.

18. Maintenance and Utilities . . . 7-Eleven shall, when it deems necessary: (vi) pay for sewer, water, gas heating, oil, and electricity for operation of the Store . . .

For purposes of this advisory opinion, Petitioner does not ask and no opinion is rendered regarding what portion of Petitioner's purchases are gas and electricity used in production of tangible personal property.

Section 1105(b) of the Tax Law imposes a sales tax upon "[t]he receipts from every sale, other than sales for resale, of gas, electricity, refrigeration and steam, and gas, electric, refrigeration and steam service of whatever nature "However, section 1115(c) of the Tax Law provides that:

Fuel, gas, electricity, refrigeration and steam, and gas, electric, refrigeration and steam service of whatever nature 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.

Section 528.22 (c)(1) of the sales tax regulations states that:

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

Section 528.13(c)(5) states that "Machinery or equipment used in production by someone other than its owner is exempt under the same conditions as other machinery and equipment."

The exemptions allowed for machinery and equipment and fuel, gas, electricity, refrigeration and steam are companion exemptions. In order to qualify for exemption, the regulations require that the electricity etc. must be used to power exempt machinery. If machinery and equipment need not be used by its owner to enjoy the exemption (20 NYCRR 528.13(c)(5)) then it must follow that neither would the gas, electricity, refrigeration and steam used to power such machinery or equipment.

To the extent that Petitioner paid sales tax on any of its purchases of fuel, gas or electricity, it is entitled to a refund or credit of the sales tax paid on that portion of such fuel, gas or electricity used in an exempt manner. However, if Petitioner's franchisees make any purchases of fuel, gas or electricity and pay sales tax thereon, the franchisee and not Petitioner is entitled to a refund. Such application for refund must be filed in accordance with the provisions of Part 534 of the sales and use tax regulations.

However, to the extent that Petitioner purchases fuel, gas or electricity and resells it to Petitioner's franchisees, Petitioner is deemed to be the vendor of such fuel, gas or electricity. Under such circumstances, Petitioner may purchase such fuel, gas or electricity tax free but must collect sales and use tax on such sales to Petitioner's franchisees.

DATED: February 22, 1988

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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