

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

TSB-A-88 (17)S
Sales Tax
February 29, 1988

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S870911A

On September 11, 1987, a Petition for Advisory Opinion was received from Burn Brite Metals Company, Inc., 109 Baker Street, P.O. Box 171, Syracuse, New York 13206.

The issue raised is the taxable status, under Article 28 and 29 of the Tax Law, of natural gas and electricity consumed in converting metal, glass or plastic parts, rejected in the manufacturing process, into reusable form.

Petitioner, who performs this reprocessing service for manufacturers, does not take title to the materials. The separated components or reclaimed raw materials are returned to re-enter the owner's production process and are ultimately sold as parts or ingredients of a finished product.

The Tax Law (§ 1115[c]) exempts from sales and use tax the purchases of fuel, gas or electricity for use or consumption directly and exclusively in the production of tangible personal property for sale by manufacturing or processing.

The Sales and Use Tax Regulations define "processing" as the performance of any service on tangible personal property for the owner which effects a change in the nature, shape, or form of the property. Processing services are taxable unless performed on property intended for sale. 20 NYCRR 527.4(a)(2),(d). Gas or electricity is used "directly" in production if it operates machinery or equipment while employed directly in production, or creates conditions necessary for production, or performs an actual part of the production process. "Exclusively" means the gas or electricity must be used in total (100%) in the production process. 20 NYCRR 528.22(c).

The Sales and Use Tax Regulations explain further: "'Production' includes the production line of the plant starting with handling and storage of raw materials at the plant site and continuing through the last step of production where the product is finished and packaged for sale." 20 NYCRR 528.13(b)(1)(ii).

When employed in reprocessing material intended for sale, as described by the Petitioner, machinery and equipment is used directly in production because it is performing a step in a manufacturing process; it is therefore eligible for the exemption provided in section 1115(a)(12) of the Tax Law whether its owner sells the property produced or merely acts as a subcontractor processing material for the seller.

Consequently, gas and electricity consumed by the Petitioner is fully exempt when operating machinery and equipment employed 100% of the time directly in production. When providing power to machinery used for both production and nonproduction purposes, gas or electricity must be apportioned accordingly and exemption may be claimed only for the quantity consumed directly and exclusively in the production process.

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Since purchases of machinery, equipment, gas and electricity qualify for exemption only when employed to produce property for sale (with certain exceptions not here at issue), Petitioner must establish eligibility for the exemption by obtaining a resale certificate (form ST-120) from each customer purchasing its processing service for sale.

If the use of exempt and taxable gas and electricity is recorded on a single meter, sales tax is normally charged on the total amount billed. In this event, the user may request a refund or credit (on form AU-11) for the tax paid on the exempt portion of the power purchase. In the alternative, a consumer may purchase gas or electricity without payment of tax (by furnishing the supplier with an Exempt Use Certificate, form ST-121) and report the taxable portion as a "purchase subject to use tax" on the sales tax return covering the time of purchase. The consumer must maintain records substantiating exempt use and, when claiming a refund or credit, submit an engineering survey or other formulae showing calculations of exempt use. 20 NYCRR 528.22(c)(3).

Petitioner may find it helpful to review the Department of Taxation and Finance publication on Determining Electricity Used in the Production of Tangible Personal Property for Sale, September 7, 1982, TSB-M-82(25)S.

DATED: February 29, 1988

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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