

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
AGL WELDING SUPPLY CO., INC.	:	DECISION
for Revision of a Determination or for Refund	:	DTA No. 807194
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period September 1, 1984	:	
through May 31, 1987.	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on July 1, 1993 with respect to the petition of AGL Welding Supply Co., Inc., 600 Route 46 West, Clifton, New Jersey 07150. Petitioner appeared by Orbe, Nugent, Collins & Darcy, Esqs. (John F. Darcy, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (James Della Porta, Esq., of counsel).

Both the Division of Taxation and petitioner filed briefs. The Division of Taxation filed a reply letter brief which was received on November 9, 1993 and began the six-month period for the issuance of this decision. Oral argument, requested by the Division of Taxation, was denied.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether petitioner's purchases of industrial gas cylinders were purchases for resale within the meaning of Tax Law § 1101(b)(4) and, thus, not subject to the imposition of sales tax.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "5" which has been modified and finding of fact "10" which has been omitted. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

Petitioner, AGL Welding Supply Co., Inc. ("AGL"), is engaged in the business of selling industrial and medical gases, as well as hard goods for welding such as rods, wire, cable and welding machines. Petitioner also sells medical breathing assistance devices. The industrial and medical gases sold by petitioner are delivered in compressed gas cylinders which have substantial steel walls allowing the gas to be contained under pressure. As more fully detailed hereinafter, petitioner sells gas to various customers in those customers' own cylinders, and also sells gas contained in cylinders owned (or rented) by petitioner.

On May 2, 1989, the Division of Taxation ("Division") issued to petitioner two notices of determination and demands for payment of sales and use taxes due. The first of such notices assessed sales tax due for the period September 1, 1984 through May 31, 1987 in the amount of \$47,187.00, plus penalty and interest. The second such notice assessed omnibus penalty (only) in the amount of \$2,934.50 for the period September 1, 1985 through February 28, 1987. Petitioner had previously executed a series of consents extending the period of limitations on assessment whereby assessment for the period September 1, 1984 through February 28, 1986 could be made at any time on or before June 20, 1989.

Neither the audit methodology employed by the Division nor the mathematical accuracy of the resulting dollar amount of tax as calculated are contested. In fact, petitioner has conceded and paid \$2,385.00 against the above assessment, relating to certain nontaxable sales disallowed upon audit. Therefore, remaining at issue herein is the sum of \$44,802.00 assessed on petitioner's purchases (or rentals) of gas cylinders, plus related penalties and interest.

As described, petitioner sells industrial and medical gases to customers who do not lease cylinders from petitioner. Petitioner also leases empty cylinders to one customer (IBM) who does not purchase its gas from petitioner. This latter transaction involves the leasing of approximately 735 cylinders. However, most of petitioner's customers obtain from petitioner industrial or medical gases contained in cylinders owned (or rented) by petitioner.

We modify finding of fact "5" of the Administrative Law Judge's determination to read as follows:

Petitioner invoices its customers separately for gas purchases and for cylinder rentals. Petitioner ships or delivers filled cylinders to its customers and takes back empty cylinders in return. Petitioner's customers are billed on the 25th day of each month for all cylinders then in their possession. The charge for each cylinder depends on the type of cylinder involved. A customer who purchased no gas in the rental period would nonetheless be charged a rental fee for all cylinders in its possession on the 25th day of the month. As described in testimony a customer could, in theory, avoid a rental charge by returning all cylinders in its possession before the 25th day of the month. However, in contrast, a party who took an initial delivery of cylinders on the 24th day of the month would be billed for possession of those cylinders on the 25th day of the month (i.e., the next day). It would appear that, in practice, those customers who purchased gas contained in petitioner's cylinders did so on an ongoing "rollover" or "running count" basis, as evidenced by petitioner's accounting/invoicing system for cylinders (i.e., cylinders delivered beginning balance, plus cylinders delivered during the month, minus cylinders returned, equals ending balance of cylinders [as of the 25th of each month]). At hearing, petitioner produced actual invoices issued to one of its customers, together with a "monthly cylinder rental invoice," which provided the following transaction information for the month ended April 25, 1986:

	<u>Cylinders received</u>	<u>Cylinders returned</u>	<u>Balance</u>
Beginning balance at March 25, 1986	--	--	23
April 1, 1986	10	12	21
April 8, 1986	13	12	22
April 23, 1986	<u>14</u>	<u>15</u>	21
	37	39	
Ending balance on April 25, 1986	--	--	21 ¹

Petitioner had total sales of \$13,492,223.85 for the year 1986, out of which gas sales totalled \$5,096,929.88, and cylinder rental fees totalled \$1,963,436.76. From these figures, petitioner calculates cylinder rental fees as 14.5% of total sales, and 38.5% of the amount of gas sales.

Petitioner collected from its customers and paid to the Division sales tax on all of its rental

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We modified the Administrative Law Judge's finding of fact "5" by deleting the words "a full month's" immediately preceding the word "possession" in the seventh sentence and by adding the last sentence and chart to more clearly reflect the record.

charges for cylinders (except where such rentals were otherwise exempt, e.g., to tax-exempt organizations). It did not, however, pay sales tax on its own purchases (or rentals) of such cylinders, as it considered the same to be purchases for resale (by rental).

The reverse side of each of petitioner's cylinder rental invoices, at paragraphs "5," "6" and "7," contains the following language:²

- "5. Buyer agrees that gas cylinders remain the property of Seller and are loaned on rental and not sold; that gas cylinders appreciate rather than depreciate in value through age or usage. Buyer therefore agrees to pay Seller at Seller's then current price, as shown in Seller's monthly cylinder rental invoice and monthly cylinder master file book, for any loss, destruction, or damage beyond repair of any cylinder, fitting or equipment resulting from any cause after delivery to the Buyer. In case of damage permitting repairs, Buyer agrees to pay the actual cost of repair incurred by Seller plus cost of transportation and any other charges. Failure to return any cylinder after ninety (90) days shall be deemed to be a loss within the meaning of paragraph 5. No claim that cylinders have been returned by Buyer will be valid unless Buyer holds a valid signed receipt on the form provided by Seller evidencing such return. The refilling of cylinders by another supplier without Seller's written consent is prohibited, a violation of law, and a breach of this agreement.
- "6. It is agreed that, until all cylinders loaned by the Seller to the Buyer are returned to Seller, any loss or damage except ordinary wear and tear to such cylinders or to any part or accessory thereof, are assumed by Buyer even though such loss or damage is attributable to an act of God or other catastrophic occurrence. The quantity of cylinders and applicable rental charges set forth on Seller's monthly rental statement shall be conclusively presumed to be correct unless, with respect to any such monthly statement, Buyer shall notify Seller in writing, within thirty (30) days of receipt thereof, that Buyer disputes the correctness thereof and sets forth in such notice, in reasonable detail, the facts upon which dispute is based. Until such cylinders are returned or until the cylinders are paid for if lost, Buyer shall be responsible for payment of rent on the cylinders and compounded Finance Charges on any unpaid rental charges, charges for lost cylinders, charges for product, and unpaid Finance Charges.
- "7. Payment of Cylinder Rental invoices acknowledges that the total cylinders shown in Buyer's possession on the date shown is correct. Buyer therefore agrees that if legal proceedings are insituted [sic] to collect charges for lost cylinders, proof of cylinders shipped and returned need only commence with the last Cylinder Rental Invoice which was paid in full."

Petitioner noted that the one customer who rented empty cylinders on a monthly basis

²The quoted language appears in the record in a rider attached to the petition (and is also repeated in petitioner's brief). While actual invoices carrying such language were not offered in evidence, there does not appear to be any dispute that such language in fact appears on petitioner's cylinder rental invoices.

(IBM) was charged the same cylinder rental fees as were petitioner's other customers. Petitioner also noted that approximately 5% of its gas sales were not sales of gas contained in petitioner's cylinders (i.e., a customer would bring in its own cylinders for fill-up). In these instances, petitioner charged the same price for the gas as was charged for gas delivered in petitioner's cylinders.

OPINION

In the determination below, the Administrative Law Judge held that the cylinders that petitioner provided to its customers were purchased for resale within the meaning of Tax Law § 1101(b)(4)(i) and 1101(b)(5) (citing Matter of Valley Welding Supply Co. v. Chu, 131 AD2d 917, 516 NYS2d 366). Specifically, it was held that: 1) petitioner separately states a charge on each invoice for the sale of gas and the rental of the cylinder in which the gas is delivered; 2) petitioner rents unfilled cylinders and derives a substantial amount of revenue from its overall cylinder rental charges; and 3) petitioner intended to and did, as evidenced by its practices, collect a rental charge each time one of its cylinders was delivered to and used by a customer, and there is no evidence to show that cylinders were not rented.

In rejecting the Division's argument that a customer has the option of avoiding petitioner's rental charge on cylinders held on the 25th day of each month by returning all cylinders to petitioner before this date, the Administrative Law Judge stated that "there is no evidence to show that such an event has occurred or that the same would be anything but highly unusual" (Determination, conclusion of law "F").

The Administrative Law Judge did not address the issues of whether the Division was estopped from asserting the tax at issue based on its prior determination not to impose tax and whether the penalty should be abated because the Administrative Law Judge held these issues to be moot.

On exception, the Division argues that there is no de minimis rule by which taxable use of a cylinder is disregarded for purposes of the resale exemption. Thus, the Division asserts, the mere possibility that a cylinder may be used by a customer under petitioner's system establishes

that the cylinders were not used for resale (citing Matter of Valley Welding Supply Co. v. Chu, supra). The Division disagrees with the Administrative Law Judge's assumption that if a customer starts and ends a billing period (i.e., the month ended the 25th of a given month) with the same number of cylinders, a rental charge is billed for each cylinder used during this period. It contends that "[t]his analysis ignores the fact that the number of cylinders used by a customer during a billing period may be much higher than the beginning and/or ending figures for the period" (Division's brief on exception, p. 5). The Division asserts that not only has petitioner failed to meet its burden of proving that the cylinders were used exclusively for resale, petitioner's own evidence supports a contrary conclusion. In its reply letter brief, the Division argues that it cannot be estopped from issuing this assessment because of its decision not to tax like purchases of petitioner in a prior period.

In response, petitioner initially asserts that the exception filed by the Division was untimely. With respect to the merits of the case, petitioner contends that unlike distributors who loan cylinders to customers with only a "demurrage" charge, petitioner's rental of its cylinders to its customers constitutes a resale because there is no "30 day free time" which could preclude the collection of a fee (Petitioner's brief in response, p. 5). Petitioner also asserts that because the assessment is without basis in law or fact, attorneys' fees and costs should be imposed pursuant to the New York Equal Access to Justice Act.

We reverse the determination of the Administrative Law Judge.

We first address whether the Division's notice of exception was timely filed. The Tax Appeals Tribunal's regulations state that where an envelope containing a document bears a postmark made by other than the United States Postal Service (i.e., office metered mail), the postmark must bear a date which falls on or before the prescribed filing date and the document must be received by the Tax Appeals Tribunal not later than the time when an envelope would ordinarily be received (20 NYCRR 3000.16[b][1]). Because the envelope containing the Division's exception had a metered postmark dated August 2, 1993 (the date that the exception was due), and was received by the Tax Appeals Tribunal the following day, August 3, 1993, the

exception was timely.

We will now address the issue of whether the gas cylinders owned and rented by petitioner were purchased "for resale," thus, rendering these purchases exempt from sales tax. The taxing statute at issue, Tax Law § 1105(a), imposes a sales tax of four percent upon "[t]he receipts from every retail sale of tangible personal property" with certain exceptions not relevant here. "Retail sale" is defined as a sale of tangible personal property to any person for any purpose other than for resale (Tax Law § 1101[b][4][i]). Section 1101 defines the term "sale" but not "resale." However, it has been held that a purchaser who acquires an item for the purpose of sale or rental³ purchases it for resale within the meaning of the statute (Matter of Albany Calcium Light Co. v. State Tax Commn., 44 NY2d 986, 408 NYS2d 333).

Where a vendor incidentally supplies tangible personal property to its customers as a part of the vendor's rendering of a taxable service, and there is no separate charge for the property, the property is not purchased by the vendor for resale (Matter of Albany Calcium Light Co. v. State Tax Commn., *supra*; Matter of U-Need-A-Roll Off Corp. v. New York State Tax Commn., 67 NY2d 690, 499 NYS2d 921). Moreover, it has been held that to qualify for the resale exclusion, the tangible personal property must be purchased exclusively for the purpose of resale (Matter of Micheli Contr. Corp. v. New York State Tax Commn., 109 AD2d 957, 486 NYS2d 448, *emphasis added*).

The issue before us was addressed in Matter of Valley Welding Supply Co. v. Chu (*supra*), a case whose facts are closely analogous to those present here. In Valley Welding, the petitioner was a welding concern which sold industrial gases that it delivered to its customers in cylinders owned by petitioner. The customer was presented with three payment alternatives with respect to its use of the cylinders, one of which was an arrangement, referred to as demurrage, where no initial charge would be imposed for use of the cylinder for the balance of the calendar month in which delivery was made, but thereafter a monthly charge was imposed. The former State Tax Commission concluded that because under this alternative the

³Under Tax Law § 1101(b)(5) "rental" falls within the definition of sale.

possibility existed that customers would return the cylinders during the grace period without any rental fee for their use, the petitioner's purchases were not exclusively for resale (Matter of Valley Welding Supply Co., State Tax Commission, November 7, 1985, confirmed Matter of Valley Welding Supply Co. v. Chu, supra).

At the outset, we emphasize that petitioner has the burden of proving that the tax assessed by the Notice of Deficiency is incorrect (Tax Law § 1132[c]). In light of the clear requirement that each cylinder purchased or rented by petitioner be used exclusively for resale in order for the former transactions to be not subject to sales tax, petitioner must establish that its method of determining this fee ensures that a fee is received for each cylinder issued to its customers.

The Administrative Law Judge, in an attempt to distinguish this case from Valley Welding, states that:

"[a] customer with a beginning monthly inventory of 20 cylinders, which returned 20 empty cylinders and took delivery of 20 filled cylinders during the month, would have 20 cylinders in its inventory on the 25th day of the month. This customer would pay a rental charge on 20 cylinders under petitioner's plan but would have paid no rental charge under the Valley Welding demurrage plan" (Determination, conclusion of law "F").

In citing this example, the Administrative Law Judge appears to suggest that the fee paid for cylinders held on the 25th is in essence a charge for the customer's use of a uniform number of cylinders (in this case 20) throughout the month. However, the terms of the agreement belie this suggestion. With respect to a customer's use of the cylinders, the only relevant evidence supplied by petitioner is its uncontroverted assertion that a fee is charged for each cylinder in the customer's possession on the 25th day of each month. In light of a customer's ability to obtain a cylinder on the 26th of the month, return it as late as the 24th of the following month and avoid a fee entirely, it is clear that this fee is not a payment for the customer's possession and use of the cylinder for any period longer than one day, i.e., the 25th day of the month.

In the example cited by the Administrative Law Judge petitioner would pay a charge for

each of the cylinders held;⁴ however, actual

invoices produced by petitioner at hearing indicate a contrary result:

	<u>Cylinders received</u>	<u>Cylinders returned</u>	<u>Balance</u>
Beginning balance at March 25, 1986	--	--	23
April 1, 1986	10	12	21
April 8, 1986	13	12	22
April 23, 1986	<u>14</u>	<u>15</u>	21
	37	39	
Ending balance on April 25, 1986	--	--	21

The table illustrates that 37 cylinders were received during this month-long cycle. However, petitioner collected a fee for only the 21 cylinders in the customer's possession on April 25, 1986. This arrangement resulted in the customer having use of 16 cylinders during this period without charge. Because of this fact, together with the contract term present in this case, we hold that all of petitioner's purchases during the period at issue were not exclusively for the purpose of resale (Matter of Micheli Contr. Corp. v. New York State Tax Commn., supra; Matter of Valley Welding Supply Co. v. Chu, supra). Moreover, because petitioner's cylinders were apparently used interchangeably and petitioner failed to demonstrate what portion, if any, of its cylinders were used exclusively for resale purposes, we conclude that the purchases of all the cylinders at issue were subject to sales tax (see, Matter of Valley Welding Supply Co. v. Chu, supra, 516 NYS2d 366, 368).

In light of our decision above, this matter must be remanded to the Administrative Law Judge for a determination on the issues of estoppel and penalty that were not addressed by the Administrative Law Judge. We make this remand because petitioner has a right to an administrative determination on the issues raised before the Administrative Law Judge (Matter of Riehm v. Tax Appeals Tribunal, 179 AD2d 970, 579 NYS2d 228, lv denied 79 NY2d 759,

⁴In the Administrative Law Judge's example (supra), the customer would pay a fee for the 20 cylinders held on the 25th day of month 1. Because the customer exchanged these 20 cylinders only once during the next one-month period, it would also pay a fee for the 20 "new" cylinders which are held on the 25th day of month 2.

584 NYS2d 447) and we believe that this determination should be rendered first by the Administrative Law Judge (Matter of United States Life Ins. Co. in the City of New York, Tax Appeals Tribunal, March 24, 1994). We direct the Administrative Law Judge to issue his determination as expeditiously as possible without further briefs or hearings. If either of the parties disagrees with the Administrative Law Judge's determination on remand, the party may obtain review of the determination by filing a timely exception to the determination on remand. If no exception is filed to the determination on remand, this decision shall become final for purposes of section 2016 of the Tax Law after the period for filing an exception to the determination on remand has expired.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is granted;
2. The determination of the Administrative Law Judge is reversed;
3. The petition of AGL Welding Supply Co., Inc. is denied to the extent that the gas cylinders are held not to have been purchased exclusively for resale; and
4. This matter is remanded for a determination on the issues of penalty and estoppel consistent with this decision.

DATED: Troy, New York
April 28, 1994

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner