

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
VALLEY WELDING SUPPLY CO., INC.	:	DECISION
	:	
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period March 1, 1978	:	
through May 31, 1981.	:	

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Petitioner, Valley Welding Supply Co., Inc., 29 Moore Street, Binghamton, New York 13903, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1978 through May 31, 1981 (File No. 36712).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, 164 Hawley Street, Binghamton, New York, on December 20, 1984 at 9:15 A.M., with all briefs to be submitted by April 3, 1985. Petitioner appeared by David G. Stearns, Esq. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

#### ISSUE

Whether cylinders used in delivering industrial gases to customers were purchased for resale.

#### FINDINGS OF FACT

1. Petitioner, Valley Welding Supply Co., Inc., is engaged in the sale of welding equipment and materials, industrial supplies and gases and other similar products.

2. On December 20, 1981, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner covering the period March 1, 1978 through May 31, 1981 for taxes due of \$8,194.06, plus interest of \$1,570.23, for a total of \$9,764.29.

3. Petitioner executed consents extending the period of limitation for assessment of sales and use taxes for the period March 1, 1978 through August 31, 1978 to December 20, 1981.

4. An audit of petitioner's books and records disclosed additional sales and use taxes due as follows:

(a) Mathematical errors	\$ 304.05
(b) Recurring purchases	1,027.69
(c) Assets	6,862.32
Total	<u>\$8,194.06</u>

At the hearing, petitioner conceded its liability for the taxes determined due in (a), (b), and \$892.96 of (c), above. The unresolved portion of the audit, \$5,969.36, represents the tax due on purchases of cylinders.

5. The cylinders were used by petitioner in delivering industrial gases to its customers. The customers were given a choice from among three alternative payment plans for the use of the cylinders, as distinguished from payment for the gas being delivered in those cylinders. The first such alternative was a per diem charge for the cylinder, starting with the first day of delivery to or pickup by the customer. The second alternative involved a straight relatively long-term rental of the cylinder, for periods of one year or more. The third alternative granted the customer the use of the cylinder without charge, for a specified short period of time (30 days) followed by a periodic use charge referred to as "demurrage".

The charge for the use of cylinders was invoiced separately from the charge for the gas. Petitioner collected sales tax from the customer on the cylinder use as well as the gas.

6. The charges for the cylinders for the years 1978, 1979 and 1980 under alternative one, two and three above in the aggregate comprised, respectively, 37.2%, 35.7% and 44.2% of the revenues derived by petitioner from the sale of the gas contents of those same cylinders.

Petitioner recorded the charges on its books and records under "cylinder rental income" with no distinction as to rental plan.

7. Approximately fifty percent of petitioner's receipts from cylinder usage are from the "demurrage" payment alternative.

8. The sales price of gases did not reflect petitioner's expense for purchasing cylinders.

9. The cylinders vary in size however, they were interchangeable among the three payment plans.

10. The Audit Division has conceded that alternative plans one and two were in fact for the rental of cylinders and that cylinders purchased solely for rental under these plans were for resale. The Division's position differed with respect to the demurrage arrangement (alternative 3) because a rental did not occur unless the cylinder had not been returned within the specified time period. Consequently, since the same cylinders were used interchangeably between the three plans, the Audit Division considered that the cylinders were not purchased exclusively for resale and thus held all cylinders subject to tax.

11. Petitioner argued that there is no statutory authority for the proposition that its purchases of cylinders must be exclusively for rental. The cylinders were acquired and placed in service with the express intent, and for the purpose of producing revenues through the plans described above. Petitioner took the position that this was a sufficient basis for the cylinder purchases to qualify for the "resale" exclusion under the Tax Law. In addition, petitioner argued that the Audit Division's position would give rise to a pyramiding of tax, rather than to avoid such pyramiding as provided in 20 NYCRR 526.6(c).

#### CONCLUSIONS OF LAW

A. That sections 1101(b)(1) and 1101(b)(4)(i) defines "purchase at retail" and "retail sale" as a sale or purchase of tangible personal property to or by any person for any purpose, other than for resale.

The term "sale" as defined in section 1101(b)(5) of the Tax Law includes rental or lease.

"A charge by a vendor to a customer for the retention of tangible personal property beyond a stipulated time is deemed to be a taxable receipt from the rental or lease of tangible personal property retained." [20 NYCRR 526.5(i)(1)].

B. That in order to qualify for the resale exclusion in the Tax Law, tangible personal property must be purchased exclusively for resale [Matter of Micheli Contracting Corp. v. State Tax Commission, \_\_A.D.2d\_\_, (3d Dept., March 14, 1985)].

Under petitioner's "demurrage" plan, there was no fixed charge for the use or rental of cylinders. The charge was conditional upon the cylinders being held for more than thirty days. As evidenced by Finding of Fact "7", petitioner collected revenue from demurrage charges, however, not all of the cylinders were subjected to such charge. A rental did not occur without a specified charge

for the use of the cylinder for the initial thrity day period. (Matter of Albany Calcium Light Co., Inc. v. State Tax Commission, 44 N.Y.2d 986).

Since all the cylinders at issue were used interchangeably by petitioner and revolved between the three plans set forth in Finding of Fact "5", they were not purchased exclusively for resale and were therefore subject to the tax imposed under section 1105(a) of the Tax Law.


C. That the petition of Valley Welding Supply Co., Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued December 20, 1981 is sustained.

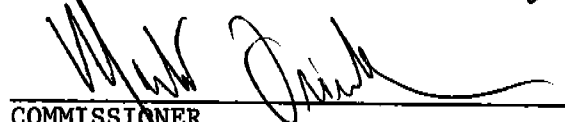
DATED: Albany, New York

STATE TAX COMMISSION

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