

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

TSB-A-85(15)S  
Sales Tax  
May 29, 1985

STATE OF NEW YORK  
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S840123A

On January 23, 1984, a Petition for Advisory Opinion was received from Weber-Knapp Company, 441 Chandler Street, Jamestown, New York 14701.

The issue raised is whether the purchase of energy which is used to heat "make-up air" (outside air which replaces exhausted contaminated air) is subject to or exempt from state and local sales tax.

Petitioner contends that many industrial processes require mechanical ventilating systems to remove toxic, flammable and/or explosive vapors from employees' working environment.

Mechanical ventilating systems consist of two major subsystems: (1) exhaust air and (2) make-up air. An exhaust air subsystem generally consists of exhaust collection ductwork, an exhaust fan and an exit point from the building. A mechanical make-up air system generally consists of a supply fan, distribution ductwork and a means of heating the air during the heating season.

Section 1115(c) of the Tax Law provides for an exemption from sales tax for purchases of "...gas [and] electricity. . . for use or consumption directly and exclusively in the production of tangible personal property. . . for sale, . . . by manufacturing. . . ."

Section 1115(a)(12) of the Tax Law provides for an exemption from sales tax with respect to machinery or equipment purchased ". . . for use or consumption directly and predominantly in the production of tangible personal property. . . for sale, by manufacturing, . . .". The Sales and Use Tax Regulations provide that machinery and equipment. . . used for disposing of industrial waste, as a part of a process for preventing water or air pollution, will be considered as being used directly and predominantly in production. . . if (i) the machinery and equipment is purchased by a manufacturer and used predominantly to actually treat, bury, or store waste materials from a production process. . . ." 20 NYCRR 528.13(d).

Since Petitioners ventilating system is not used to actually treat, bury, or store waste materials, but merely to remove it from the work area, it does not constitute machinery or equipment used directly and predominantly in production. Accordingly, the energy used to operate the ventilating system, including energy used to heat make-up air, is not used directly in production.

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Additionally, energy used to heat make-up air is being used to heat the plant area. Such use is not deemed to be directly and exclusively in production within the meaning and intent of section 1105(c) of the Tax Law. (See Fancher Chair Co., Inc., State Tax Commission Advisory Opinion, TSB-A-83(11)S.

Petitioner's purchase of energy to heat "make-up air" is therefore subject to both State and local sales tax.

DATED: May 14, 1985

s/FRANK J. PUCCIA  
Director  
Technical Services Bureau

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