

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

TSB-A-94 (41)S  
Sales Tax  
September 9, 1994

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S940426A

On April 26, 1994, a Petition for Advisory Opinion was received from Utility Reduction Consultants, 2470 Hull Road, N. Bellmore, NY 11710.

The issue raised by Petitioner, Utility Reduction Consultants, is whether the Department of Taxation and Finance at its discretion may substitute a credit toward future required sales tax payments rather than issuing a refund where Petitioner's client applies for a refund of sales tax paid on electricity used directly and exclusively in the production of tangible personal property by manufacturing or processing as described in Section 1115(a)(12) of the Tax Law.

Petitioner on behalf of its client filed an AU-11, Application for Credit or Refund, to obtain a refund for sales tax paid on electricity used directly and exclusively in the production of tangible personal property by manufacturing or processing. However, since the refund claim was smaller than the next anticipated quarterly sales tax payment due from Petitioner's client, the Department, without the consent of Petitioner's client, issued a credit toward that required payment, regardless of the fact that a refund was requested on Form AU-11.

Section 1115 of the Tax Law provides, in part, as follows:

Exemptions from sales and use taxes.--(a) Receipts from the following shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section hundred ten:

\* \* \*

(12) Machinery or equipment for use or consumption directly and predominantly in the production of tangible personal property, gas, electricity, refrigeration or steam for sale, by manufacturing, processing, generating, assembling, refining, mining or extracting, or telephone central office equipment or station apparatus or comparable telegraph equipment for use directly and predominantly in receiving at destination or initiating and switching telephone or telegraph communication, but not including parts with a useful life of one year or less or tools or supplies used in connection with such machinery, equipment or apparatus. This exemption shall include all pipe, pipeline, drilling rigs, service rigs, vehicles and associated equipment used in the drilling, production and operation of oil, gas, and solution mining activities to the point of sale to the first commercial purchaser.

Section 1139 of the Tax Law provides, in part, as follows:

(a) In the manner provided in this section the tax commission shall refund or credit any tax, penalty or interest erroneously, illegally or unconstitutionally collected or paid if application therefor shall be filed with the tax commission (i) in the case of tax paid by the applicant to a person required to collect tax, within three years after the date when the tax was payable by such person to the tax commission as provided in section eleven hundred thirty-seven, or (ii) in the case of a tax, penalty or interest paid by the applicant to the tax commission, within three years after the date when such amount was payable under this article, or (iii) in the case of a tax due from the seller, transferor or assignor and paid by the applicant to the tax commission where the applicant is a purchaser, transferee or assignee liable for such tax pursuant to the provisions of subdivision (c) of section eleven hundred forty-one of this chapter, within two years after the giving of notice by the tax commission to such purchaser, transferee or assignee of the total amount of any tax or taxes which the state claims to be due from the seller, transferor or assignor. Such application shall be in such form as the tax commission shall prescribe. No refund or credit shall be made to any person of tax which he collected from a customer until he shall first establish to the satisfaction of the tax commission, under such regulations as it may prescribe, that he has repaid such tax to the customer. Notwithstanding any other provision of this article, if the time to file an application for refund or credit of any tax, penalty or interest would otherwise have expired on or before December nineteenth, nineteen hundred sixty-nine, the time for filing such application is hereby extended, as provided in subdivision (c) of section eleven hundred forty-seven, where a taxpayer has consented in writing to the extension of the period for assessment of additional tax.

Section 534.2 of the Sales and Use Tax Regulations provides, in part, as follows:

- (a) Application for a refund or credit
  - (1) Application required.
    - (i) To claim a refund or credit for any tax, penalty or interest collected or paid which may be credited or refunded, a person must file an application for such refund or credit with the Department of Taxation and Finance.
    - (ii) Where an application for credit has been filed, the applicant may immediately take such credit on the return which is due coincident with or immediately subsequent to the time that the applicant files his application for credit, except with respect to the refund described in section 534.8 of this Part.

(iii) The taking of a credit on a sales and use tax return is deemed to be part of the application for such credit. The application for credit or a copy of the application, if filed earlier, must be attached to the return on which the credit is taken.

(2) Form of application

(i) An application for a refund or credit must contain the following information:

- (a) name of applicant;
- (b) address of applicant;
- (c) applicant's vendor identification number (if the applicant is registered);
- (d) period covered by claim, in the case of a claim for credit or refund by an omnibus carrier under section 534.4 of this Part, the claim must cover a period of not less than three months;
- (e) amount of refund or credit claimed;
- (f) name and address of authorized representative (if the applicant has a representative);
- (g) a full explanation of facts on which the claim is based, including substantiation of the basis for and the amount of the claim;
- (h) a certification that no part of the tax paid for which the claim is made has been refunded or credited to the applicant by the person to whom it was paid, or, in the case of an application by a vendor, a certification and evidence satisfactory to the Department of Taxation and Finance that he has refunded the tax to his customer;
- (i) date of application; and
- (j) signature of the applicant and, if the applicant is an officer of a corporation or a partner in a partnership, the individual's title.

(ii) All applications for refunds or credits of sales or use taxes are to be filed with the Central Office Audit Bureau, Sales Tax Section, Building 9, W.A. Harriman Campus, Albany, N.Y. 12227. Preprinted refund and credit application forms may be obtained from the

Department of Taxation and Finance by contacting the Taxpayer Assistance Bureau at the phone number or address listed in subdivision (c) of section 525.3 of the Title.

\* \* \*

- (d) Action by the Department of Taxation and Finance
- (1) The Audit Division on behalf of the Department of Taxation and Finance will grant or deny, in whole or in part, an application for a refund or credit.
  - (2) The Audit Division will notify the applicant of its determination by mail.
  - (3) The determination will be final and irrevocable unless the applicant, within 90 days after the date of mailing of the notice of determination, applies to the Bureau of Conciliation and Mediation Services of the Division of Taxation for a conciliation conference or to the Division of Tax Appeals for a hearing to review the determination.

\* \* \*

(f) Comptroller's approval and review. All refunds approved by the Department of Taxation and Finance must, before payment is made, also be reviewed and approved by the Department of Audit and Control as provided for by section 1 of article V of the State Constitution.

Form AU-11 (4/94), Application for Credit or Refund, contains two separate and distinct boxes respectively entitled "Refund Claimed" and "Credit Claimed". Claimants indicate their choice for a credit or refund by including the amount of credit or refund claimed in the specific box.

Pursuant to Section 1139 of the Tax Law, Section 534.2 of the Sales and Use Tax Regulations and Form AU-11, Application for Credit or Refund, where an applicant applies for and is entitled to a refund of sales tax erroneously, illegally or unconstitutionally collected or paid the Department may not substitute at its discretion a credit for a refund without the applicant's consent. Accordingly, since Petitioner's client filed Form AU-11 and requested in the appropriate box the amount of refund claimed and it was subsequently determined by the Department to be

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entitled to a refund, the Department may not substitute a credit toward future quarterly payments due from Petitioner's client in place of issuing a refund without the consent of Petitioner's client.

DATED: September 9, 1994

s/PAUL B. COBURN  
Deputy Director  
Taxpayer Services Division

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