STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
GENERAL ELECTRIC COMPANY	:	
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 September 1, 1993 through August 31, 1996.	:	DETERMINATION DTA NO. 818425

Petitioner, General Electric Company, 9000 Central Park West, Suite 500, Atlanta, Georgia 30329, 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 September 1, 1993 through August 31, 1996.

On June 26, 2002 and July 9, 2002, respectively, petitioner by its representative, Hodgson Russ LLP (Christopher L. Doyle, Esq., and Timothy P. Noonan, Esq., of counsel), and the Division of Taxation by Barbara G. Billet, Esq. (Robert A. Maslyn, Esq., of counsel), waived a hearing and agreed to submit the matter for determination based on documents and briefs to be submitted by November 15, 2002, which commenced the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Thomas C. Sacca, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner is entitled to a refund of tax paid on its purchase and use of natural gas and electricity in New York State.

FINDINGS OF FACT

The parties executed a Stipulation of Facts in connection with this proceeding. These stipulated facts are set forth as Findings of Fact herein.

1. General Electric Company ("petitioner") is a corporation with facilities located in the State of New York (the "Facilities").

2. The Division of Taxation ("Division") of the New York State Department of Taxation and Finance conducted a sales and use tax field audit of petitioner (the "audit") for the period September 1, 1993 through August 31, 1996 (the "audit period").

3. The audit of petitioner was conducted prior to the filing of the refund claims that are the subject of this proceeding.

4. During the audit period, petitioner purchased natural gas and electricity that was delivered to its Facilities in the State of New York.

5. The natural gas and electricity purchased by petitioner was delivered to it in a continuous stream.

6. The Facilities were primarily used by petitioner in research and development ("R&D") and manufacturing of tangible personal property for sale.

7. Not all of the gas and electricity delivered to the Facilities was used or consumed in R&D and manufacturing functions. The use or consumption of gas and electricity in non-R&D and nonmanufacturing functions will hereafter be referred to as "Other Usage." The gas and electricity used in Other Usage is the subject of the dispute between the parties and will be hereafter referred to as the Disputed Gas and Electricity.

8. The dispute between the parties in this case turns on whether the purchase or use of the Disputed Gas and Electricity was subject to the tax imposed by Tax Law § 1105(b)(1) ("Sales Tax").

9. If the purchase or use of the Disputed Gas and Electricity is not subject to the Sales Tax, then the petition should be granted because, during the audit period, the tax imposed by Tax Law § 1110 ("Use Tax") did not apply to use in New York of gas and electricity.

10. If the purchase or use of the Disputed Gas and Electricity is subject to the Sales Tax, then the petition should be denied because, during the audit period, there was no exemption from Sales Tax contained in Articles 28 and 29 for gas and electricity used in Other Usage.

11. Delivery of the natural gas and electricity to petitioner was effected at meters ("Actual Meter"), which measured the volume of natural gas and electricity passing through them.

12. At the point of delivery of the Actual Meter, petitioner knew that a portion of the gas and electricity would be used or consumed in Other Usage and the remaining portion of the gas and electricity flowing through the Actual Meter would be used or consumed in R&D and manufacturing functions.

13. Petitioner did not have separate meters attached to each piece of equipment or other apparatus used in R&D and manufacturing that were capable of measuring the gas and electricity used exclusively in R&D and manufacturing.

14. It is unclear whether it was possible to attach separate meters capable of measuring gas and electricity used in R&D and manufacturing to each piece of equipment or other apparatus used in R&D and manufacturing. If such attachments were possible, the costs would exceed the benefits of improved accuracy over use of surveys and allocation formulas.

15. Petitioner was not required, under either the Tax Law, the applicable regulations, or any other legal authority, to attach separate meters capable of measuring gas and electricity used exclusively in R&D and manufacturing to each piece of equipment or other apparatus used in R&D and manufacturing.

16. Hypothetically, if separate meters were attached to each piece of equipment or other apparatus used by petitioner in R&D and manufacturing, and those separate meters were able to measure gas and electricity consumed while the equipment or other apparatus was used exclusively in R&D and manufacturing, petitioner would have been able to determine the precise amount of gas and electricity consumed exclusively in R&D and manufacturing.

17. At the point of delivery of the Actual Meter, petitioner did not know, by identity, which molecules of gas or electrons of electricity moving through the meter would be used or consumed in R&D and manufacturing, and which molecules of gas or electrons of electricity would be used or consumed in Other Usage.

18. At the point of delivery of the Actual Meter, petitioner did not know the precise volume of gas or electricity used or consumed in R&D and manufacturing functions and did not know the precise volume of gas and electricity used or consumed in Other Usage.

19. With respect to Claim 1, as described more fully at Finding of Fact "32", petitioner reported the gas and electricity it used or consumed in Other Usage as a "purchase subject to use tax" on its periodic returns and remitted the tax directly to the Division of Taxation.

20. In reporting such tax directly to the Division on Forms ST-100, petitioner calculated the tax to report on its returns using surveys or allocation formulae ("Allocation Studies") which provide a reasonable estimate of the gas or electricity used or consumed in R&D and manufacturing functions.

21. During the audit, petitioner represented to the Division that it had relied upon its Allocation Studies in reporting tax.

22. The Allocation Studies were used by the Division to determine the tax due on Other Usage.

23. Petitioner issued Exempt Use Certificates (Form ST-121, hereafter an "Exemption Certificate") to its vendors for the gas and electricity delivered to the Facilities in a continuous stream and, as a result, did not pay sales or use tax to its vendors at the time the natural gas and electricity were delivered to it at the Facilities.

24. As a result of the audit, the Division determined that additional taxes imposed under Articles 28 and 29 were due from petitioner, which included additional tax attributable to petitioner's purchases of natural gas and electricity at the Facilities that were for Other Usage, and for which no tax was paid by petitioner at the time of the purchase ("Audit Determination").

25. At the conclusion of the Division's audit, petitioner executed a waiver of the restrictions on assessment pursuant to Tax Law § 1138(c), thereby consenting to an assessment of the Audit Determination while preserving petitioner's right to file the instant refund claims.

26. Petitioner paid the Audit Determination at the conclusion of the Division's audit.

27. In 1999, petitioner filed four separate claims for refund of sales and use taxes paid.

28. All four of the refund claims relate to Article 28 and 29 taxes paid by petitioner for transactions that occurred during the Audit Period.

29. Petitioner paid all of the tax for which refund was, and is, sought.

30. Each of the four refund claims filed by petitioner were timely filed.

31. Petitioner's first relevant claim for refund ("Claim 1") was in the amount of $1,650,537.22.

32. Claim 1 represents tax on Disputed Gas and Electricity which was reported and remitted by petitioner on its periodic returns (Forms ST-100) in that area of the return designated for reporting purchases subject to use tax.

33. By letter dated September 28, 1999, the Division denied Claim 1 in its entirety and assigned it identifying number 1999070020.

34. Petitioner's second relevant claim for refund ("Claim 2") was in the amount of $977,059.02.

35. Claim 2 represents tax remitted by petitioner on the Disputed Gas and Electricity at the conclusion of the Division's audit when it paid the Audit Determination. Claim 2 does not reflect taxes remitted by petitioner on a return filed by it.

36. In addition to Claim 2, petitioner filed another refund claim ("Claim 3") for a portion of the Audit Determination that was unrelated to natural gas or electricity. Claim 3 was in the amount of $1,002,079.84. Claim 3, like Claim 2, arose as a result of payment by petitioner of the Audit Determination. Together, Claim 2 and Claim 3 total $1,979,138.86.

37. By a single letter dated November 24, 1999, the Division denied both Claim 2 and Claim 3.

38. Because Claim 2 and Claim 3 both arose as a result of payment by petitioner of the Audit Determination, the two claims were assigned one consolidated identifying number by the Division: 1999100723.

39. Also by way of background, petitioner filed a fourth refund claim for the Audit Period ("Claim 4"). Claim 4, like Claim 3, was unrelated to natural gas or electricity. Claim 4 was denied by the Division by letter dated September 28, 1999 and given the identifying number 1999080475.

40. On December 20, 1999, petitioner filed a request for conciliation conference with the Bureau of Conciliation and Mediation Services which protested the denial of all four refund claims.

41. Petitioner's request for conciliation conference was timely filed.

42. On December 29, 2000, a Conciliation Order was issued.

43. The Conciliation Order denied, in full, Claim 1 and Claim 2.

44. The Conciliation Order granted $904,357.62 and denied $97,722.22 of the $1,002,079.84 refund sought by petitioner in Claim 3.

45. The Conciliation Order also granted Claim 4 filed by petitioner in its entirety.

SUMMARY OF THE PARTIES' POSITIONS

46. Petitioner contends that the only tax that could apply to its use of the Disputed Gas and Electricity is the Use Tax because no Sales Tax was paid at the time of the purchase. According to petitioner, the relevant statutes, regulations and case law provide that where no Sales Tax is charged on retail sales of tangible personal property or services, the purchaser owes Use Tax. In the alternative, petitioner claims that its purchases of gas and electricity were not subject to sales tax because the commodities were purchased for manufacturing or R&D activities. The subsequent nonexempt use of the Disputed Gas or Electricity could only create use tax consequences. Finally, petitioner argues that it has established that the Division has historically taken the position that the tax paid by petitioner in this case is a use tax, and that the Division is required to follow that previously established and long-standing interpretation in this case.

47. The Division of Taxation contends that petitioner's purchases of gas and electricity were subject to sales tax at the time of the purchase, and that the use of an exemption certificate

did not exempt the purchase from sales tax, but only delayed payment of the sales tax on the nonexempt portion of the utilities. According to the Division, the sales tax remained due from the time of the purchase. The Division also argues that the use of the term "use tax" in its forms does not determine the matter at issue, as such term has become interchangeable for tax due on purchases.

CONCLUSIONS OF LAW

A. Tax Law § 1105(b)(1) provides in relevant part as follows:

> On and after June first nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax of four percent upon: [t]he receipts from every sale, other than sales for resale, of the following: gas, electricity, refrigeration and steam, and gas, electric, refrigeration and steam service of whatever nature . . . .

According to Tax Law § 1105(b)(1), petitioner's purchases of natural gas and electricity that were delivered to its Facilities in the State of New York were subject to the imposition of sales tax at the time of purchase. However, petitioner issued Exemption Certificates to its vendors for the gas and electricity delivered to its facilities in a continuous stream, because petitioner knew that a portion of the gas and electricity delivered was to be used or consumed in research and development and the manufacturing of tangible personal property for sale, both of which are exempt from the imposition of sales tax under Tax Law § 1115(b)(ii) and (c). As a result of the issuance of the Exemption Certificates, petitioner did not pay sales tax to its vendors at the time of the delivery of the natural gas and electricity to its facilities.

Delivery of the natural gas and electricity was effected at meters which measured the volume of product passing through it. At the point of delivery, petitioner did not know the precise volume of gas or electricity that was to be consumed in R&D and manufacturing functions, nor did petitioner know the precise volume of gas and electricity that was to be used or consumed in Other Usage. Petitioner did know, however, that a portion of the gas and

electricity would be used or consumed in Other Usage, making this portion of its purchases subject to the imposition of sales tax, despite the presentation by petitioner of Exemption Certificates to its vendors. The Exemption Certificates only covered those purchases of gas and electricity which were used or consumed in an exempt manner, i.e., for R&D or manufacturing. The portion of petitioner's purchases which were not used or consumed in an exempt manner remained subject to sales tax.

B. The sales and use tax regulations permit the use of an exempt use certificate on the purchase of gas and electricity "provided full liability is assumed for any State and local tax due on any part of the purchases used for other than the exempt purposes described in subdivision (a) of this section" (20 NYCRR 528.22[c][3][iii]). The use of the exemption certificate only exempted the vendor from collecting the sales tax at the time of the sale. The sales tax remained due and owing on that portion of the gas and electricity not used for exempt purposes. The exempt use certificate delayed payment of the sales tax on the nonexempt portion of the gas and electricity and transferred responsibility for remitting the sales tax due on the transaction from the vendor to the purchaser.

C. Further, because it is a transaction tax, petitioner, as the purchaser, became liable for sales tax when the sales occurred. The Tax Appeals Tribunal in ***Matter of BAP Appliance Corp.*** (June 29, 1989) noted as follows:

> The sales tax is a transaction tax; liability for the tax occurs when the transaction takes place. Generally, the taxed transaction consists of the transfer of title or possession of property or the rendition of services in exchange for consideration, and the vendor collects the tax from the customer when the transaction occurs. The time or method of payment is immaterial since the tax becomes due at the time of the transfer of property or rendition of services (***see generally***, 20 NYCRR 525.2).

D. Tax Law § 1133(b) provides, in relevant part, as follows:

> Where any customer has failed to pay a tax imposed by this article to the person required to collect the same, then in addition to all other rights, obligations and remedies provided, such tax shall be payable by the customer directly to the tax commission . . . .

At the time of the delivery of the gas and electricity, petitioner became liable for the sales tax due on that portion of the product which was not to be consumed in either R&D or manufacturing. Pursuant to Tax Law § 1133(b), petitioner is specifically directed to pay "such tax" directly to the tax commission, "such tax" obviously being the sales tax that petitioner became liable for at the time of the delivery of the gas and electricity (***see***, ***Matter of East End Student Transportation Corp.***, Tax Appeals Tribunal, March 26, 1992; ***Matter of Kadish***, Tax Appeals Tribunal, January 12, 1989).

E. Tax Law § 1110(a) provides, in relevant part that "[e]xcept to the extent that property or services have already been or will be subject to the sales tax under this article, there is hereby imposed on every person a use tax . . . ." As previously discussed, the transactions at issue were subject to sales tax at the time of the purchase and delivery of the gas and electricity to petitioner. A use tax is imposed, according to the statute, where the property or services at issue have not already been, or will not in the future be, subject to the imposition of sales tax. As the sale of the gas and electricity was subject to sales tax at the time of delivery, it follows that the use tax is inapplicable.

F. Petitioner has cited several cases in support of its position that where no sales tax is paid at the time of purchase, then the use tax is applicable (***see***, ***Matter of Mohawk Airlines, Inc. v. State Tax Commission***, 75 AD2d 249, 429 NYS2d 759; ***Matter of Waxlife USA, Inc. v. State Tax Commission***, 67 AD2d 1040, 413 NYS2d 494). Petitioner has also pointed to the Division's own regulations (20 NYCRR 528.22[3][iii]) and sales and use tax returns (Forms ST-

100 and ST-121) which instruct purchasers like petitioner which purchase gas and electricity in a continuous flow to use an exempt use certificate to avoid payment of the sales tax at the time of the purchase and to report the taxable portion of these purchases as "purchases subject to use tax" on its sales and use tax returns.

As both parties have indicated, the courts, as well as the Division itself, have often used the term "use tax" where the transaction at issue is one in which sales tax is actually due on purchases. An agency has no authority to create a rule out of harmony with the statute, and any regulation which is contrary to the Tax Law is invalid (***McNulty v. State Tax Commission***, 70 NY2d 788, 522 NYS2d 103). Tax Law §§ 1105 and 1110 evince a clear legislative intent that under the circumstances presented herein, sales tax was due at the time petitioner purchased the natural gas and electricity, and that the use tax is inapplicable. The regulations and forms are insufficient to change this result.

G. The petition of General Electric Company is denied; and the Division of Taxation's denial of petitioner's refund claim is sustained.

DATED: Troy, New York
May 15, 2003

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE