

1993

Miller Welding Supply, Inc. v. Auditing Division Utah State Tax Commission : Brief of Appellee

Utah Court of Appeals

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UTAH COURT OF APPEALS

BRIEF

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APR 1

FILE NO. 930119

IN THE UTAH COURT OF APPEALS

MILLER WELDING SUPPLY, INC.,

Petitioner/Appellant,

vs.

AUDITING DIVISION OF THE
STATE TAX COMMISSION OF UTAH,

Respondent/Appellee.

BRIEF OF THE APPELLEE

(Utah State Tax Commission
Appeal No. 90-1659)

(Supreme Court
Appeal No. 920432)

Appeal No. (Not Yet Docketed)
Priority 15

APPEAL FROM A DECISION OF THE UTAH STATE TAX COMMISSION

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FILED

Utah Court of Appeals

MAR 1 1993


Mary F. Noonan
Clerk of the Court

IN THE UTAH COURT OF APPEALS

MILLER WELDING SUPPLY, INC.,)	
)	BRIEF OF THE APPELLEE
Petitioner/Appellant,)	
)	(Utah State Tax Commission
vs.)	Appeal No. 90-1659)
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JURISDICTION

Petitioner filed for review in the Supreme Court. Under Utah Code Ann. § 78-2-2(4)(Supp. 1992), this case was transferred to the Court of Appeals.

ISSUE

Whether the Commission erred in ruling that the machine known as an "oxygen concentrator" does not qualify for the sales tax exemption for "oxygen" under Commission Rule R865-19-37S that exempts "oxygen," but not "oxygen concentrators"?

Standard of Review: The agency action should be reviewed for abuse of discretion. Utah Code Ann. § 63-46b-16(4)(h)(i) (1989). The Commission's ruling was based in part on law and in part on fact. In ruling on such issues, the Commission must necessarily exercise a degree of discretion, and its ruling should not be upset unless it is arbitrary or unreasonable. Chicago Bridge & Iron Company v. State Tax Comm'n, 196 Utah Adv. Rep. 18, 20 (Utah 1992). See also, Nucor Corp. v. Utah State Tax Comm'n, 1987 Utah Adv. Rep. 17, 18 (Utah 1992); Morton International, Inc. v. Auditing Division of the Utah State Tax Comm'n, 814 P.2d 581 (Utah 1991).

DETERMINATIVE LAW

Appendix 1.

- A. Utah Code Admin. P. R865-19-37S(1992).
- B. Utah Code Ann. § 59-12-104(10)(1992).
- C. Utah Code Ann. § 59-12-102(4)(1992).

STATEMENT OF THE CASE

On September 4, 1990, Miller Welding was sent a Statutory Notice for delinquent sales tax. (R. 90.) One of the items taxed was an oxygen concentrator. On September 26, 1990, Miller Welding filed a Petition for Redetermination of the tax assessment. (R. 89.) It alleged that sales of oxygen concentrators should be tax exempt. Id. A formal hearing in the matter was waived, and the case was decided on the written arguments and stipulations of the parties. (R. 4.)

The Commission found that pursuant to Tax Rule 37S, and the legislative history, Miller Welding's claimed tax exemption should be denied. (R. 5-7.) A Petition for Writ of Review was filed in the Supreme Court. (R. 2.) Thereafter, the case was transferred to the Court of Appeals.

STATEMENT OF FACTS

On September 4, 1991, Miller Welding Supply was sent a statutory notice of sales and use tax liability. (R. 90.) A 10% penalty was assessed. (R. 92.) On September 26, 1990, Miller

Welding filed a petition for redetermination. (R. 89.) At issue was whether a machine known as an "oxygen concentrator" qualifies for the "oxygen" exemption set forth in Utah Code Admin. P. R865-19-37S(C)(2)(1992) (exempt sales include "stoma supplies, oxygen . . ."), Utah Code Ann. § 59-12-104 (10)(1992) (the sale of medicine is exempt from sales and use tax), and Utah Code Ann. § 59-12-102(1)(c)(iii)(1992) (definition of medicine).

The legislature has exempted "oxygen and stoma supplies." Utah Code Ann. § 59-12-104(10)(1992). Miller Welding argued that this should include its "oxygen concentrator" because it is an oxygen supply. (R. 39.)

In a 1981 senate floor debate, the sponsor of a bill amending the definition of medicine determined the origins of the terms "oxygen and stoma supplies" in the medicine exemption."

He stated:

As sponsor of this bill, I would like to explain this is the same bill we considered previously and it's the exactly the same bill that was passed two years ago out of this body. I'm sure that there is some question as to why in our attempt to exempt the oxygen as it's used for medical purposes that the bill did not pass all the way through to the House. I am afraid that because of it being a tax bill and it got side stepped in the house on a couple of occasions and then came out late in the session that we had kind of a comedy of errors, that I will have to admit to, and maybe not given the proper supervision over there but, at any rate, it was lost. . . . In our last working with this bill, Sen. Carling added an amendment to include stoma supplies and considering that after the treatment of the exemption for

medicine we did add on syringes, and the use of insulin for the few people who had to use oxygen for medical purposes, we felt that this really should be included . . .

(R. 31-32, attached as Appendix 2)(emphasis added).

The machine known as an "oxygen concentrator" has the following characteristics:

a. It is an "engineered device that draws oxygen from the surrounding air and delivers it to the patient at a prescribed rate." (R. 25, attached as Appendix 3.)

b. It efficiently "processes oxygen . . ." (R. 26, attached as Appendix 3.)

The Commission found:

A fair reading of the discussion that took place in the legislature regarding the oxygen exemption provision indicates that the legislative intent of the bill was to exempt oxygen and, as a separate consideration, an exemption for stoma supplies was also considered. There was nothing in the transcript of the floor debate which would support a conclusion that the legislature intended to exempt oxygen supplies and stoma supplies.

* * *

Under this interpretation of the definition of "medicine" it is clear that the device which the Petitioner rents or sells is not oxygen, but rather, is a mechanical device which operates to take existing surrounding oxygen, concentrate it and deliver it at that concentrated level. Thus, when one rents or purchases such a device, one does not rent or purchase oxygen as an item of tangible personal property or medicine but rather one is renting or purchasing a mechanical device that subsequently provides the oxygen needed.

The Petitioner argues that to draw such a fine distinction between purchasing oxygen in its gaseous state or purchasing a device which manufactures oxygen is nonsensical. Although it may be true that ultimately, both items deliver oxygen to those who are medically dependent upon supplemental oxygen, the above described distinction can and has been made by the legislature and the Commission is bound by the legislature's determinations.

(R. 6-7, attached as Appendix 4.)

SUMMARY OF THE ARGUMENT

In the absence of express legislative intent to the contrary, a tax exemption should be construed narrowly against the party seeking it. The taxpayer bears the burden of showing that he is entitled to an exemption. Utah Code Ann. § 59-12-104(10) (1992) exempts "sales of medicine" from sales and use tax. Medicine means, among other things, "any oxygen or stoma supplies prescribed by a physician or administered under the direction of a physician or paramedic." Utah Code Ann. § 59-12-102(4)(a)(iii) (1992). The plain language of the statute exempts "oxygen" only; it does not exempt "oxygen concentrators" as Miller Welding argues.

Even if there were confusion about the statutory phrase "oxygen or stoma supplies," which there is not, "the history of events during the process of enactment [of a bill], from its introduction in the legislature to its final validation, has generally been the first extrinsic aid to which courts have

turned in attempting to construe an ambiguous act." The legislative history shows that "oxygen" was considered alone when the legislation was introduced. Later, "stoma supplies" were added to the bill as an amendment. This legislative history shows that the exemption is in accord with Commission rule 37S and the Commission's decision in this case.

The Commission's interpretation of the medicine exemption in Rule 36S provides no exemption for oxygen concentrators. Miller Welding has neither mentioned nor challenged the validity of the Commission's rule. Accordingly, the rule should be applied. Pursuant to the Commission's interpretation of the statute as set forth in Utah Code Admin. P. R865-19-37S(C)(2)(1992) only oxygen can be exempted from taxation. The Commission has been given discretion to promulgate rules for sales tax. Utah Code Ann. § 59-12-118(1992). Putvin v. Tax Comm'n, 914 Utah Adv. Rep. 63, 64 (Utah Ct. App. 1992). The language of Rule 37S provides no exemption for "oxygen concentrators."

Although Miller Welding makes no distinction between oxygen and the oxygen concentrators it sells, the record, in support of the Commission's finding, clearly shows that they are different. Accordingly, an oxygen concentrator does not qualify for the sales tax exemption given to oxygen.

ARGUMENT

INTRODUCTION

In the absence of express legislative intent to the contrary, a tax exemption should be construed narrowly against the party seeking it. Miller Welding seeks exemption for "oxygen contractors." The plain language of the statute exempts oxygen only. The legislative history of the oxygen exemption shows that "oxygen," and not "oxygen concentrators," is exempt. Tax Commission Rule 37S has interpreted the oxygen exemption statute to mirror the legislative history. Finally, the facts show that an oxygen concentrator is true to its name. It concentrates oxygen that exists in the atmosphere, but it does not create oxygen on its own. Therefore, an oxygen concentrator does not qualify for the oxygen exemption.

- I. THE STATUTE PROVIDING FOR TAX EXEMPTION OF MEDICINE SHOULD BE STRICTLY CONSTRUED AGAINST THE TAXPAYER IN SUPPORT OF THE COMMISSION'S DECISION THAT THE TERM "OXYGEN" DOES NOT INCLUDE "OXYGEN CONCENTRATORS."

Statutes providing tax exemptions are strictly construed against the taxpayer in harmony with legislative intent. Parson Asphalt Products v. Tax Comm'n, 617 P.2d 397, 398 (Utah 1980); see also Putvin v. Tax Comm'n, 194 Utah Adv. Rep. 63, 65 (Utah Ct.App. 1992)(quoting Morton Int'l, Inc. v. Tax Comm'n, 814 P.2d 58 (Utah 1991)). The taxpayer bears the burden of showing that he is entitled to an exemption. Accordingly, "the tax exemption provision is to be construed strictly against the one who asserts

the claim of exemption, in the absence of expressed legislative intent that the exemption is to be construed otherwise" 71 Am Jur. 2d, State and Local Taxation, § 326 (1973)(footnotes omitted).

Miller Welding misunderstands the framework for analyzing its claim for a tax exemption. It relies on three cases for the proposition that the term "any" in the statutory phrase "any oxygen or stoma supplies" should be construed broadly to include oxygen concentrators. (Petitioner's Opening Brief at 14.) None of those cases involves a tax exemption.¹ Parson Asphalt requires that the statute be construed narrowly against the taxpayer.

II. THE COMMISSION'S INTERPRETATION OF THE MEDICINE EXEMPTION MIRRORS THE PLAIN LANGUAGE OF THE EXEMPTION AND ITS LEGISLATIVE HISTORY.

"[I]n the absence of any ambiguity, a statute should be construed according to its plain language." Berube v. Fashion Centre, Ltd., 771 P.2d 1033, 1038 (Utah 1989). Furthermore, where it involves a tax exemption it should be strictly construed against the taxpayer in harmony with the over arching principle of legislative intent. Parson Asphalt Products v. Tax Comm'n, 617 P.2d 397, 398 (Utah 1980); see also Putvin v. Tax Comm'n, 194

¹ Petitioner cites Winslow v. Morgan County Commissioners, 697 P.2d 1141 (Colo. Ct. App. 1985)(zoning and subdivision regulation); Vytar Assoc. v. Annapolis, 483 A.2d 1263 (Md. Ct. App. 1984)(refund of license fees); State v. Caprio, 477 A.2d 67 (R.I. 1984)(arson).

Utah Adv.Rep. 63, 65 (Utah Ct.App. 1992)(quoting Morton Int'l, Inc. v. Tax Comm'n, 814 P.2d 58 (Utah 1991)). Utah Code Ann. § 59-12-104(10) exempts "sales of medicine" from sales and use tax. Medicine means, among other things, "any oxygen or stoma supplies prescribed by a physician or administered under the direction of a physician or paramedic." Utah Code Ann. § 59-12-102(4)(a)(iii) (1992). The plain language of the statute exempts "oxygen" only; it does not exempt "oxygen concentrators." Accordingly, sales by Miller Welding of oxygen concentrators are subject to tax.

Miller Welding argues that based on "obvious legislative intent . . . it becomes clear that whether the oxygen comes in a metal container or whether it must be produced by an oxygen concentrator, the State Legislature intended that patients who have to purchase oxygen, or a machine that produces that same oxygen, by prescription and under the direction of a physician, be exempt from sales tax . . ." (Petitioner's Opening Brief at 12. Emphasis added.) Accordingly, Miller Welding would have the Court believe that the statutory language exempting "oxygen and stoma supplies" really exempts "oxygen concentrators" and "stoma supplies." Miller Welding argues that this is the legislature's intent. (Id. at 12.) However, it fails to provide one word of legislative history in support of this argument.

In a 1981 Senate floor debate the sponsor of a bill amending the definition of medicine delineated the origins of the terms "oxygen and stoma supplies." He stated:

As sponsor of this bill, I would like to explain this is the same bill we considered previously and it's the exactly the same bill that was passed two years ago out of this body. I'm sure that there is some question as to why in our attempt to exempt the oxygen as it's use for medical purposes that the bill did not pass all the way through to the House. I am afraid that because of it being a tax bill and it got side stepped in the house on a couple of occasions and then came out late in the session that we had kind of a comedy of errors, that I will have to admit to, and maybe not given the proper supervision over there but, at any rate, it was lost. . . . In our last working with this bill, Sen. Carling added an amendment to include stoma supplies and considering that after the treatment of the exemption for medicine we did add on syringes, and the use of insulin for the few people who had to use oxygen for medical purposes, we felt that this really should be included . . .

(R. 31-32, attached as Appendix 2)(emphasis added).²

Even if there were confusion about the phrase "oxygen or stoma supplies," which there is not, "the history of events during the process of enactment [of a bill], from its introduction in the legislature to its final validation, has

² It is interesting to note from this legislative history that the Legislature found it necessary to exempt "syringes" as well as "insulin." (See R. 32.) This is contrary to the logic of Miller Welding . It argues that equipment delivering oxygen should be treated like the oxygen itself. See Petitioner's Opening Brief at 12. ("It borders on the absurd to think that the Legislature intended to exempt oxygen in its gaseous state, but that it did not intend to exempt the equipment that produces the oxygen less expensively and more conveniently . . ."). This flawed theory fails to explain why the same Legislature would find it necessary to exempt syringes used to inject intravenous drugs, instead of merely concluding that they are necessary to deliver intravenous drugs to the patient, and therefore are already exempt.

generally been the first extrinsic aid to which courts have turned in attempting to construe an ambiguous act." Sutherland Stat Const. § 48.04 (5th Ed)(footnote omitted, emphasis added).³ The legislative history shows that "oxygen" was considered alone when the legislation was introduced. Later, "stoma supplies" were added to the bill as an amendment. This legislative history shows that the exemption is in accord with the Commission's decision. Therefore, the statute should not be construed to mean oxygen supplies or "oxygen concentrators."

III. THE COMMISSION'S INTERPRETATION OF THE MEDICINE EXEMPTION IN RULE 37S PROVIDES NO EXEMPTION FOR OXYGEN CONCENTRATORS.

Miller Welding has neither mentioned nor challenged the validity of the Commission's rule. Accordingly, the rule should be applied. See Putvin v. Tax Comm'n, 194 Utah Adv. 63, 65 (Utah Ct.App. 1992)(Court applies tax exemption rule on appeal because its propriety went unchallenged).

Utah Code Admin. P. R865-19-37S(C)(1992) provides: "[t]he following classes of tangible personal property and services are specifically exempted even though sold to the final consumer: . . . prescribed medicines, including stoma supplies, oxygen,

³ This should be done before application of the last antecedent rule argued by Miller Welding. (Petitioner's Opening Brief at 15-16.) Petitioner erroneously argues that Salt Lake City v. Salt Lake County, 568 P.2d 738 (Utah 1977), is a tax exemption case. That case examines payment of filing fees to the County Clerk by tax exempt officials; it does not interpret a tax exemption statute. The Court's analysis should proceed under the rule in Parson Asphalt, supra.

insulin, and syringes"

Pursuant to Utah Code Admin. P. R865-19-37S(C), only oxygen can be exempt from taxation. The language of Rule 37S provides no exemption for "oxygen concentrators." To overturn the language of this rule would require the Court to disregard the statute's plain language and its legislative history. As set forth above, the Legislature intended to exempt oxygen only, and not oxygen supplies. Accordingly, Rule 37S mirrors the intent of the Legislature.

IV. THE FACTS SHOW THAT AN OXYGEN CONCENTRATOR IS A MACHINE AND IS NOT OXYGEN.

Miller Welding draws no distinction between the oxygen concentrator and the oxygen itself. (Petitioner's Opening Brief at 12.) Accordingly, under this analysis, both should receive the same sales tax treatment. However, the documents submitted below by Miller Welding provide that the machine known as an "oxygen concentrator" has the following characteristics:

a. It is an "engineered device that draws oxygen from the surrounding air and delivers it to the patient at a prescribed rate." (R. 25, attached as Appendix 3.)

b. It efficiently "processes oxygen" (R. 26, attached as Appendix 3.)

The record is void of any evidence showing that the oxygen concentrator is oxygen. Instead, the documentation provides that it is an "engineered device." (R. 25.) This engineered device

draws oxygen from the surrounding air," (R. 25), but does not create the oxygen. It solely "processes oxygen" from the surrounding environment. (R. 25-26.) Accordingly, it is separate from the oxygen it processes. Only oxygen qualifies for the exemption.

CONCLUSION

The exemption must be construed against Miller Welding. The statutes plain language and the legislative history of this exemption show that the legislature intended that only "oxygen" and not "oxygen concentrators" be exempt. The Commission, in Rule 37S, interpreted the medicine exemption. That interpretation mirrors the legislative history. The Commission's holding is also supported by the record. An oxygen concentrator is not oxygen and is not entitled to the oxygen exemption. Accordingly, the decision of the Commission must be sustained.

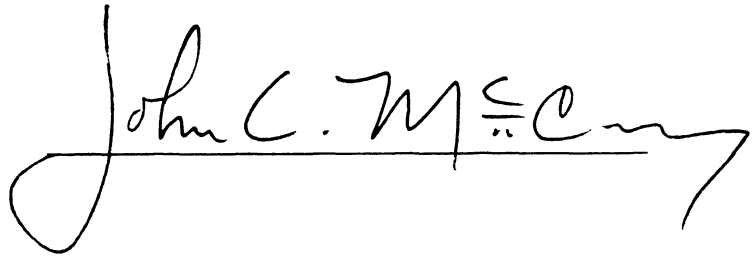
DATED this 1st day of March, 1993.


JOHN C. MCCARREY
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby declare that on the 1st day of March, 1993, I caused two (2) copies of the foregoing BRIEF OF APPELLEE to be mailed, postage prepaid, to:

David O. Black, Esq.
THOMPSON, HATCH, MORTON & SKEEN
1245 Brickyard Road #600
Salt Lake City, Utah 84106

A handwritten signature in cursive script, reading "John C. McEwen". The signature is written in dark ink and is positioned above a horizontal line that spans the width of the signature.

APPENDIX 1

R865-19-33S

Tax Commission

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property for no additional consideration or nominal additional consideration upon compliance with the lease agreement. Nominal consideration in this sense means ten percent or less of the original lease amount.

G. If the lessee treats a conditional sale lease as a sale, and if the lessor is also the vendor of the property, the sales price for sales tax purposes must be at least equal to the average sales price of similar property.

H. If the lessee treats a conditional sale lease as a sale, the sales tax must be collected by the lessor on the full purchase price of the property at the time of the purchase.

R865-19-33S. Admission Defined Pursuant to Utah Code Ann. Section 59-12-103.

A. "Admission" means the right or privilege to enter into a place. Admission includes the amount paid for the right to use a reserved seat or any seat in an auditorium, theater, circus, stadium, schoolhouse, meeting house, or gymnasium to view any type of entertainment. Admission also includes the right to use a table at a night club, hotel, or roof garden whether such charge is designated as a cover charge, minimum charge, or any such similar charge.

1. This applies whether the charge made for the use of the seat, table, or similar accommodation is combined with an admission charge to form a single charge, or is separate and distinct from an admission charge, or is the sole charge.

B. If the original admission charge carries the right to remain in a place, or to use a seat or table, or other similar accommodation for a limited time only, and an additional charge is made for an extension of such time, the extra charge is paid for admission within the meaning of the law. Where a person or organization acquires the sole right to use any place or the right to dispose of all of the admissions to any place for one or more occasions, the amount paid is not subject to the tax on admissions. Such a transaction constitutes a rental of the entire place and if the person or organization in turn sells admissions, sales tax applies to amounts paid for such admissions.

R865-19-34S. Admission to Places of Amusement Pursuant to Utah Code Ann. Section 59-12-103.

A. The phrase "place of amusement, entertainment, or recreation" is broad in meaning but conveys the basic idea of a definite location.

B. The amount paid for admission to such a place is subject to the tax, even though such charge includes the right of the purchaser to participate in some activity within the place. For example, the sale of a ticket for a ride upon a mechanical or self-operated device is an admission to a place of amusement.

C. Charges for admissions to swimming pools, skating rinks, and other places of amusement are subject to tax. Charges for towel rentals, swimming suit rentals, skate rentals, etc., are also subject to tax. Locker rental fees are subject to sales tax if the lockers are tangible personal property.

R865-19-35S. Residential or Commercial Use of Gas, Electricity, Heat, Coal, Fuel Oils or Other Fuels Pursuant to Utah Code Ann. Section 59-12-103.

A. "Commercial consumption" is as defined in 59-12-102(1).

B. "Noncommercial consumption" is defined as fuel used in:

1. mining or extraction of minerals;
2. off highway agriculture, including commercial greenhouses, irrigation pumps, farm machinery, and other farming activities to produce the agricultural product up to the time of harvest or placing products into storage facilities; and

3. use in manufacturing tangible personal property or use in producing or compounding of a product which will be resold.

C. All activities not specifically defined as noncommercial or residential consumption are considered as commercial consumption.

D. "Other fuels" means products which burn independently to produce heat or energy.

1. Explosives or material used as active ingredients in explosive devices are not fuels.

E. If a firm has activities which are commercial and noncommercial and all fuels are furnished at given locations through single meters, the predominant use of the fuels shall determine taxable status of the fuels.

R865-19-36S. Street Railway and Other Fares Pursuant to Utah Code Ann. Section 59-12-103.

A. "Street railway fare" means an amount paid to a street railway or bus, or an extension thereof, by whatsoever power operated, for passenger transportation service rendered over a line operating mainly upon, along, above, or below any street, avenue, road, highway, bridge, or public place within any city or town.

1. The term does not include a railway or bus used as part of a commercial or interurban system.

B. All fares paid for intrastate transportation of persons to common carriers having established routes are subject to tax, except:

1. street railways fares,
2. amounts paid for chartered transportation rendering service only to specific parties with whom a contract has been made, and
3. amounts paid for persons traveling in air commerce.

R865-19-37S. Exempt Sales Pursuant to Utah Code Ann. Section 59-12-104.

A. Definitions.

1. "Commercials," "audio tapes," and "video tapes" mean tapes, films, or discs used by television or radio stations in regular broadcasting activities but do not include blank tapes purchased for newscasts and similar uses by radio and television stations.

2. "Motion picture exhibitor" means any person engaged in the business of operating a theater or establishment in which motion pictures are regularly exhibited to the public for a charge.

3. "Distributor" means persons who purchase or sell motion picture films and video tapes which are used by a commercial television broadcaster or a motion picture exhibitor.

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Auditing

B. In general, the laws exempt sales of tangible personal property and services which will later be resold.

C. The following classes of tangible personal property and services are specifically exempted even though sold to the final consumer:

1. motor fuels and special fuels upon which the state excise tax has been imposed;
2. prescribed medicines, including stoma supplies, oxygen, insulin, and syringes;
3. street railway fares;
4. newspapers and certain newspaper inserts;
5. commercials, motion picture films, prerecorded audio and prerecorded video tapes sold by a producer, distributor or studio to a motion picture exhibitor, distributor, commercial television or radio broadcaster;
6. certain farm machinery or farm equipment used by commercial agricultural producers (see Rule R865-19-49S for additional agricultural exemptions);
7. charges for intrastate movements of freight and express covered in Rule R865-19-71S;

8. proceeds from coin-operated vending machine sales of food, beverages and dairy products where the proceeds from each sale do not exceed \$1 (provided proper costs of vended items are reported as explained in Rule R865-19-74S);

9. materials, machinery, equipment and services for use in new construction, expansion, or modernization of any mine or mineral facility in Utah (see Rule R865-19-84S for further explanation of this exemption);

10. tooling and equipment sold to aerospace or electronic industry contractors (see Rule R865-19-87S);

11. machinery and equipment purchased by manufacturers for use in new or expanding operations in this state (see Rule R865-19-85S);

12. food paid for with federal food stamps; or with vouchers issued under the federal WIC program;

13. meals served by public elementary and secondary schools and inpatient meals provided at medical or nursing facilities. Tax must be paid on the purchase price of food by nonexempt medical or nursing facilities.

14. meals served by religious and charitable institutions and institutions of higher education if the meals are not available to the general public (see Rule R865-19-61S on taxation of meals); and

15. boats of a type required to be registered under the State Boating Act, vehicles of a type required to be registered under the motor vehicle laws of this state, boat trailers, and outboard motors, when sold to a bona fide nonresident for use outside Utah. This exemption requires completion of a nonresident affidavit which may be sent to the purchaser's home state tax authorities.

D. A blanket exemption is provided for sales made directly to the state of Utah and to its departments, institutions and political subdivisions. Direct sales to the federal government are exempt when taxation is prohibited by federal law. Sales to or by religious or charitable institutions are normally exempt if used or sold in the conduct of the regular religious or charitable functions and activities. (see rule R865-19-61S on taxation of meals)

E. Effective July 1, 1989 a sale within the state of Utah of materials which are taken out of state and incorporated into and become real property are exempt from sales tax, providing that the state where such

materials are used does not allow credit for tax paid in Utah. The purchaser is required to issue a special sales tax exemption certificate to the vendor indicating the job description or job number and the out-of-state location where the materials will be used. The purchaser is required to maintain separate records of such exempt purchases which are subject to audit by a representative of the Utah State Tax Commission.

R865-19-38S. Isolated and Occasional Sales Pursuant to Utah Code Ann. Section 59-12-104.

A. Sales made by officers of a court, pursuant to court orders, are occasional sales, with the exception of sales made by trustees, receivers, assignees and the like, in connection with the liquidation or conduct of a regularly established place of business. Examples of casual sales are those made by sheriffs in foreclosing proceedings and sales of confiscated property.

B. If a sale is an integral part of a business whose primary function is not the sale of tangible personal property, then such sale is not isolated or occasional. For example, the sale of repossessed radios, refrigerators, etc., by a finance company is not isolated or occasional.

C. Sales of vehicles required to be titled or registered under the laws of this state are not isolated or occasional sales, except that any transfer of a vehicle in a business reorganization where the ownership of the transferee organization is substantially the same as the ownership of the transferor organization shall be considered an isolated or occasional sale.

D. Isolated or occasional sales made by persons not regularly engaged in business are not subject to the tax. The word "business" refers to an enterprise engaged in selling tangible personal property or taxable services notwithstanding the fact that the sales may be few or infrequent. Any sale of an entire business to a single buyer is an isolated or occasional sale and no tax applies to the sale of any assets made part of such a sale (with the exception of vehicles subject to registration).

E. The sale of used fixtures, machinery, and equipment items is not an exempt occasional sale if the sale is one of a series of sales sufficient in number, amount, and character to indicate the seller deals in the sale of such items.

F. Sales of items at public auctions do not qualify as exempt isolated or occasional sales.

G. Wholesalers, manufacturers, and processors who primarily sell at other than retail are not making isolated or occasional sales when they sell such tangible personal property for use or consumption.

R865-19-39S. Sales by Farmers and Agricultural Producers Pursuant to Utah Code Ann. Section 59-12-102 and 59-12-104.

A. The seasonal sale of crops, seedling plants, garden, farm or other agricultural produce by the producer thereof is not subject to tax. The exemption does not extend to the retail sale of seasonal products by anyone other than the producer thereof, and the burden of proof that any such sale is not subject to the tax is on the vendor.

B. Poultry, eggs, and dairy products are not seasonal products and are not exempt from tax if a producer sells such products and his sales to consumers have an average sales value of \$125 or more per month.

COLLATERAL REFERENCES

Am. Jur. 2d. — 68 Am. Jur. 2d Sales and
Use Taxes §§ 128 to 138, 230, 231.

C.J.S. — 85 C.J.S. State and Local Taxation
§ 1245.

Key Numbers. — Taxation — 1231 et seq.

59-12-104. Exemptions.

The following sales and uses are exempt from the taxes imposed by this chapter:

- (1) sales of motor fuels and special fuels subject to a Utah state excise tax under Title 59, Chapter 13, Motor and Special Fuel Tax Act;
- (2) sales to the state, its institutions, and its political subdivisions;
- (3) sales of food, beverage, and dairy products from vending machines in which the proceeds of each sale do not exceed \$1 if the vendor or operator of the vending machine reports an amount equal to 120% of the cost of items as goods consumed;
- (4) sales of food, beverage, dairy products, similar confections, and related services to commercial airline carriers for in-flight consumption;
- (5) sales of parts and equipment installed in aircraft operated by common carriers in interstate or foreign commerce;
- (6) sales of commercials, motion picture films, prerecorded audio program tapes or records, and prerecorded video tapes by a producer, distributor, or studio to a motion picture exhibitor, distributor, or commercial television or radio broadcaster;
- (7) sales made through coin-operated laundry machines, coin-operated dry cleaning machines, or coin-operated car washes;
- (8) sales made to or by religious or charitable institutions in the conduct of their regular religious or charitable functions and activities and, after July 1, 1993, if the requirements of Section 59-12-104.1 are fulfilled;
- (9) sales of vehicles of a type required to be registered under the motor vehicle laws of this state which are made to bona fide nonresidents of this state and are not afterwards registered or used in this state except as necessary to transport them to the borders of this state;
- (10) sales of medicine;
- (11) sales or use of property, materials, or services used in the construction of or incorporated in pollution control facilities allowed by Sections 19-2-123 through 19-2-127;
- (12) sales or use of property which the state is prohibited from taxing under the Constitution or laws of the United States or under the laws of this state;
- (13) sales of meals served by:
 - (a) public elementary and secondary schools;
 - (b) churches, charitable institutions, and institutions of higher education, if the meals are not available to the general public; and
 - (c) inpatient meals provided at medical or nursing facilities;
- (14) isolated or occasional sales by persons not regularly engaged in business, except the sale of vehicles or vessels required to be titled or registered under the laws of this state;
- (15) sales or leases of machinery and equipment purchased or leased by a manufacturer for use in new or expanding operations (excluding normal operating replacements, which includes replacement machinery and

Constr. Co. v. State Tax Comm., 12 Utah 2d 53, 362 P.2d 422 (1961).

Purpose of use tax.

The obvious purpose of the former Use Tax Act was to impose a tax on the use in this state of property the sale of which, because that sale took place outside the state, was beyond the reach of the Utah Sales Tax Act. *Union Port-*

land Cement Co. v. State Tax Comm., 110 Utah 152, 176 P.2d 879 (1947).

Redress from assessment.

Procedure set forth in this chapter itself is the exclusive method of seeking redress from an assessment. *Pacific Intermountain Express Co. v. State Tax Comm.*, 7 Utah 2d 15, 316 P.2d 549 (1957).

COLLATERAL REFERENCES

Am. Jur. 2d. — 69 Am. Jur. 2d Sales and Use Taxes §§ 1 to 243.

C.J.S. — 85 C.J.S. State and Local Taxation §§ 1231 to 1257.

A.L.R. — Sales or use tax on motor vehicle purchased out of state, 45 A.L.R.3d 1270.

Applicability of sales tax to "tips" or service charges added in lieu of tips, 73 A.L.R.3d 1226.

Sales and use taxes on leased tangible personal property, 2 A.L.R.4th 859.

Freight, transportation, mailing, or handling charges billed separately to purchaser of goods subject to sales or use taxes, 2 A.L.R.4th 1124.

Cable television equipment or services as subject to sales or use tax, 5 A.L.R.4th 754.

Retailer's failure to pay to government sales or use tax funds as constituting larceny or embezzlement, 8 A.L.R.4th 1068.

Eyeglasses or other optical accessories as subject to sales or use tax, 14 A.L.R.4th 1370.

Use or privilege tax on sales of, or revenues from sales of, advertising space or services, 40 A.L.R.4th 1114.

Sales and use taxes on sale or lease of mailing or customer list, 80 A.L.R.4th 1126.

Key Numbers. — Taxation — 1201 to 1345.

59-12-102. Definitions.

As used in this chapter:

(1) "Commercial consumption" means the use connected with trade or commerce and includes:

(a) the use of services or products by retail establishments, hotels, motels, restaurants, warehouses, and other commercial establishments;

(b) transportation of property by land, water, or air;

(c) agricultural uses unless specifically exempted under this chapter; and

(d) real property contracting work.

(2) "Commission" means the State Tax Commission.

(3) "Component part" includes:

(a) poultry, dairy, and other livestock feed, and their components;

(b) baling ties and twine used in the baling of hay and straw;

(c) fuel used for providing temperature control of orchards and commercial greenhouses doing a majority of their business in wholesale sales, and for providing power for off-highway type farm machinery; and

(d) feed, seeds, and seedlings.

(4) (a) "Medicine" means:

(i) insulin, syringes, and any medicine prescribed for the treatment of human ailments by a person authorized to prescribe treatments and dispensed on prescription filled by a registered pharmacist, or supplied to patients by a physician, surgeon, or podiatrist;

(ii) any medicine dispensed to patients in a county or other licensed hospital if prescribed for that patient and dispensed by a

registered pharmacist or administered under the direction of a physician; and

(iii) any oxygen or stoma supplies prescribed by a physician or administered under the direction of a physician or paramedic.

(b) "Medicine" does not include:

(i) any auditory, prosthetic, ophthalmic, or ocular device or appliance; or

(ii) any alcoholic beverage.

(5) "Person" includes any individual, firm, partnership, joint venture, association, corporation, estate, trust, business trust, receiver, syndicate, this state, any county, city, municipality, district, or other local governmental entity of the state, or any group or combination acting as a unit.

(6) "Purchase price" means the amount paid or charged for tangible personal property or any other taxable item or service under Subsection 59-12-103(1), excluding only cash discounts taken or any excise tax imposed on the purchase price by the federal government.

(7) "Residential use" means the use in or around a home, apartment building, sleeping quarters, and similar facilities or accommodations.

(8) (a) "Retail sale" means any sale within the state of tangible personal property or any other taxable item or service under Subsection 59-12-103(1), other than resale of such property, item, or service by a retailer or wholesaler to a user or consumer.

(b) "Retail sale" includes sales by any farmer or other agricultural producer of poultry, eggs, or dairy products to consumers if the sales have an average monthly sales value of \$125 or more.

(9) (a) "Retailer" means any person engaged in a regularly organized retail business in tangible personal property or any other taxable item or service under Subsection 59-12-103(1), and who is selling to the user or consumer and not for resale.

(b) "Retailer" includes commission merchants, auctioneers, and any person regularly engaged in the business of selling to users or consumers within the state.

(c) "Retailer" includes any person who engages in regular or systematic solicitation of a consumer market in this state by the distribution of catalogs, periodicals, advertising flyers, or other advertising, or by means of print, radio or television media, by mail, telegraphy, telephone, computer data base, cable, optic, microwave, or other communication system.

(d) "Retailer" does not include farmers, gardeners, stockmen, poultrymen, or other growers or agricultural producers producing and doing business on their own premises, except those who are regularly engaged in the business of buying or selling for a profit.

(e) For purposes of this chapter the commission may regard as retailers the following if they determine it is necessary for the efficient administration of this chapter: salesmen, representatives, peddlers, or canvassers as the agents of the dealers, distributors, supervisors, or employers under whom they operate or from whom they obtain the tangible personal property sold by them, irrespective of whether they are making sales on their own behalf or on behalf of these dealers, distributors, supervisors, or employers.

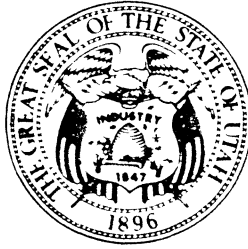
APPENDIX 2

UTAH STATE SENATE

JOAN B. THOMAS

**ADMINISTRATIVE ASSISTANT,
JOURNAL AND AMENDING CLERK**

319 STATE CAPITOL
SALT LAKE CITY, UTAH 84114
O-(801) 538-1457



RESIDENCE:
5771 BEAUMONT DRIVE
SALT LAKE CITY, UTAH 84121
H-(801) 278-9101

April 19, 1991

CERTIFICATION

SB 53, SALES TAX EXEMPTION FOR OXYGEN

by Senator Karl G. Swan

I hereby certify that the attached transcript is a verbatim record of the discussion regarding SB 53, SALES TAX EXEMPTION FOR OXYGEN, by Senator Karl G. Swan, which occurred in the Senate Chamber on January 20 and 21, 1981 and is recorded on Discs 29 and 30 on January 20, 1981, and on Disc 33 on January 21, 1981.

A handwritten signature in cursive script, reading "Joan B. Thomas", is written over a horizontal line.

Joan B. Thomas

Administrative Assistant and Journal Clerk

April 19, 1991
Date certified

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Floor Debate, Utah State Senate, January 20, 1981, Day 9, Discs 29
30.

SEC. OF THE SENATE: Senate Bill 53, SALES TAX EXEMPTION FOR OXYGEN
report Mr. President. The Revenue and Taxation Committee which was
referred Senate Bill 53, Sales tax exemption for oxygen by Senator
Karl Swan and others has carefully considered, and reports it out
of the committee with a favorable recommendation. Respectfully,
Charles A. Bullen, Committee chairman.

SEN. SWAN: Senator I would move the adoption of the committee
report.

MR. PRESIDENT: You heard the motion to adopt the committee report.
All in favor of the motion, aye. Aye. Opposed? No. Motion
carries. The bill is before us.

SEN. SWAN: Mr. President. As sponsor of this bill, I would like to
explain this is the same bill we considered previously and it's the
exactly the same bill that was passed two years ago out of this
body. I'm sure that there is some question as to why in our
attempt to exempt the oxygen as it's used for medical purposes that
the bill did not pass all the way through to the House. I am
afraid that because of it being a tax bill and it got side stepped
in the house on a couple of occasions and then came out late in the
session that we had kind of a comedy of errors, that I will have to
admit to, and maybe not given the proper supervision over there

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but, at any rate, it was lost. I don't think it should have been lost. It is just simply a correction, I think an inequity, an oversight on our part several years ago when we exempted from sales tax the medicine and this extends the definition of medicine practically to the use of oxygen which is used by asthmatics and would simply exempt it from the sales tax. We felt that it was improper that this should be taxed. In our last working with this bill, Sen. Carling added an amendment to include stoma supplies and considering that after the treatment of the exemption for medicine we did add on syringes, and the use of insulin for the few people who had to use oxygen for medical purposes, we felt that this really should be included, so I was very happy with the committee who voted it unanimously with the recommendation and I would ask for your favorable vote on this. If there are any questions, I would be glad to answer them.

SEN. BARTON: Mr. President. Just one question for all clarifications. What is stoma supplies, Senator?

SEN. SWAN: People who have had, I guess, colitis, and Senator Carling could explain more on this. My understanding is that those who have colitis are required to carry a bag for the elimination of human wastes. That particular apparatus would also be exempt from sales tax.

SEN. BLACK: I assume that, one question Senator Swan, I don't normally pass exemption on medicine and prosthetic devices that

oxygen was already exempted in that?

SEN. SWAN: It has not been interpreted as including that. It was necessary to amend the code to add the wording that, well the, I think it might be well to take the whole section as used in this section, medicine means insulin, syringes and any medicine prescribed for the treatment of human ailments by a person authorized to prescribe treatments and dispense prescriptions filled by a registered pharmacist or supplied to patients by physicians, surgeon or pediatricist and it also includes any medicine dispensed to patients in a county or other licensed hospital, well the present language would be, and the medicine is prescribed to such patients and dispensed by registered pharmacists and administered under the direction of a physician. This then does extend the definition of medicine and also any oxygen or stoma supplies prescribed by physician or administered under the direction of the physician or paramedic. If there are no more questions on this Mr. President I would move that the bill be passed to third reading.

MR. PRESIDENT: [this portion was poorly recorded and therefore was unable to be transcribed. It discusses a third reading of S.B. 53.]

SEN. PUGH: [portions were poorly recorded and, therefore, not able to be transcribed] We have exempted everything else that has to do

with medicine and I think it was an oversight really that we did not include it in the first place so I am going to vote for it and recommend that you do also in spite of the fact that it cost us a little bit of money.

MR. PRESIDENT: Question can be called on S.B. 53. The question is shall it be read for a third time. Roll call.

[S.B. 53 placed on the calendar for a third reading. See, State of Utah Senate Journal, 44 Legislature Session, Jan. 12 to Mar. 12, 1981 at 198-99]

Floor debate, Utah State Senate, January 21, 1981, Day 10, Disc 33.

SEC. OF THE SENATE: Senate Bill Number 53 - SALES TAX EXEMPTION FOR OXYGEN, by Senators Swan and Carling.

SEN. SWAN: Mr. President and members of the Senate, I think we discussed this yesterday. I think we answered the questions that were opposed. I appreciated the comment made by the appropriation chairman yesterday that this is indeed a bill which corrects an equity. It is a housekeeping type of adjustment here and if there are no further questions I would call for the question.

MR. PRESIDENT: Are there any questions Senator Swan? Seeing none, I call for the question on the bill. The question is shall S.B. 53 on final passage will pass? Roll call.

[S.B. 53 passed: Yeas, 24; Nays, 2. See, State of Utah Senate Journal, 44 Legislature Session, Jan. 12 to Mar. 12, 1981 at 198-99]

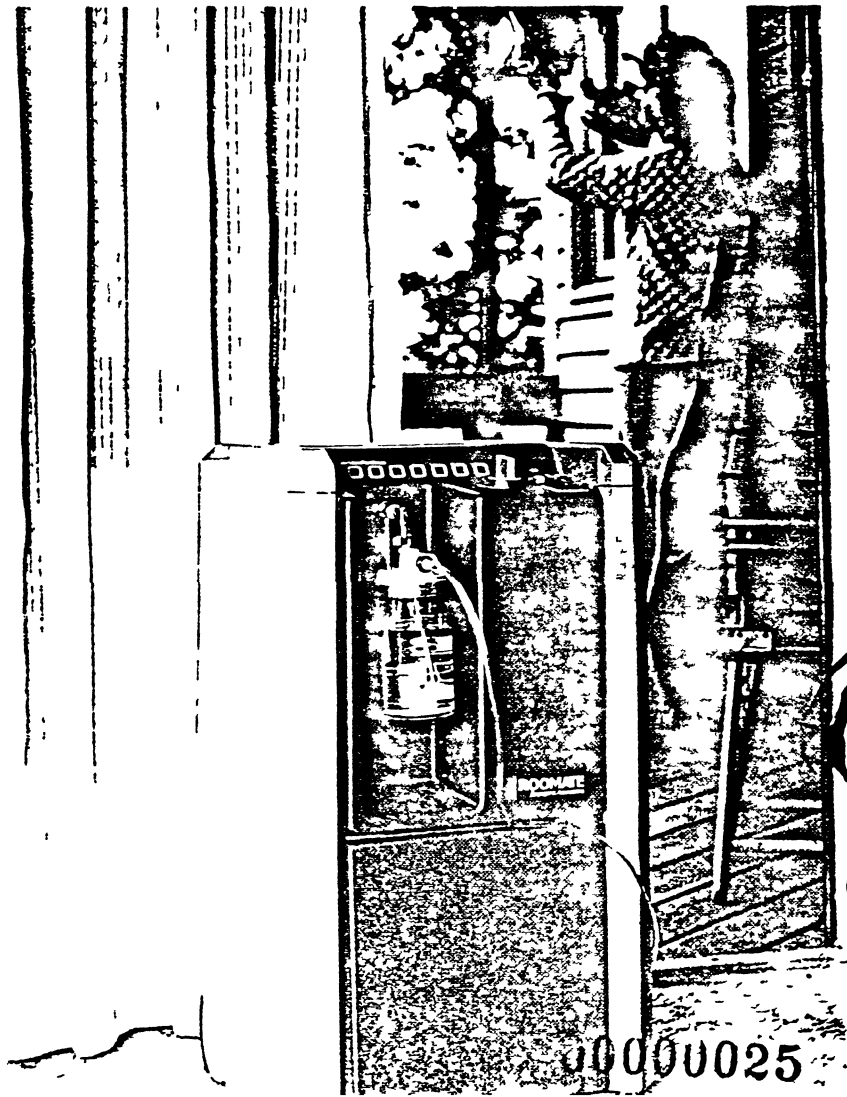
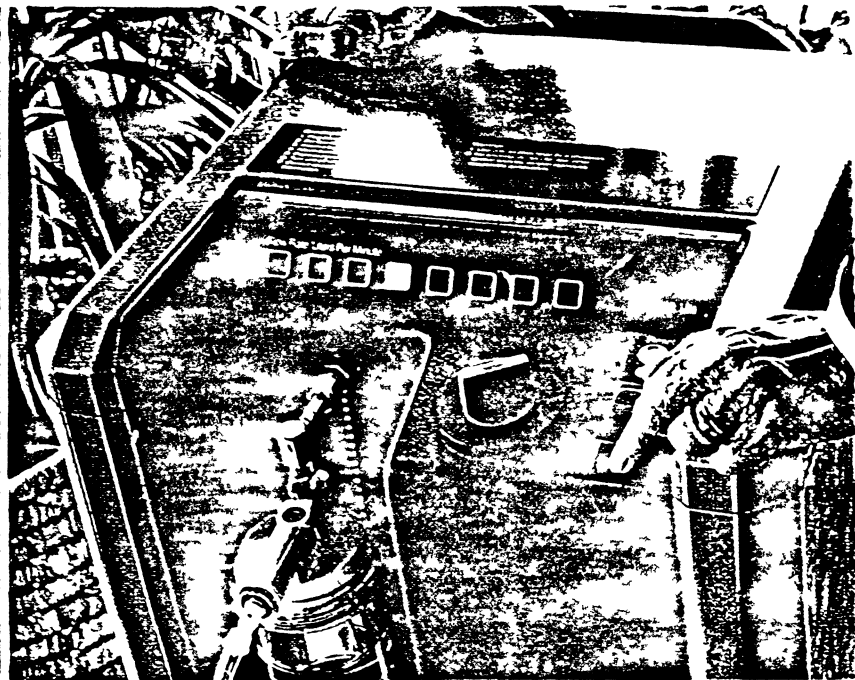
APPENDIX 3

There's Something In The Air

And it means a hard working, reliable source of oxygen for the patient largely confined to the home. The Roomate oxygen concentrator is a meticulously engineered device that draws oxygen from the surrounding air, concentrates and delivers it to the patient at a prescribed rate.

Designed to blend into home surroundings, the Roomate's presence can almost be taken for granted as the patient goes about daily activities. And the features incorporated in the Roomate with precise care, are precisely what make this concentrator so dependable.

- High concentrations
- Light weight
- Low power consumption
- Easy-to-read indicators
- Optimum flow control
- Minimal service
- Rugged construction



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Benefits

High concentrations. The Roomate generates an oxygen concentration of 92% at 4 liters per minute while keeping total weight low.

Light weight. A weight of only 75 pounds, a strategically placed handle and large wheels make the Roomate easy to handle and to relocate.

Low power consumption. The Roomate, though it efficiently processes oxygen at high concentrations, uses very little power in its uncommonly quiet operation . . . for meaningful energy savings.

Easy-to-read indicators. The Roomate indicates rate of flow on a uniquely lighted panel that makes even night reading a snap.

Optimum flow control. Flow rates are achieved by the simple adjustment of a knob, from one through four liters in ½ liter increments. Flow is determined by a precision fixed orifice device. And the Roomate's "Flow Lock" device can be pre-set by the distributor to ensure that the patient will not exceed the prescribed rate.

Minimal service. The Roomate's modular construction, superior engineering and low weight keep service time and costs at a minimum.

Rugged construction. The Roomate case is molded of high-impact, self extinguishing material with beveled edges for increased safety and rigidity.

CRYOGENIC ASSOCIATES

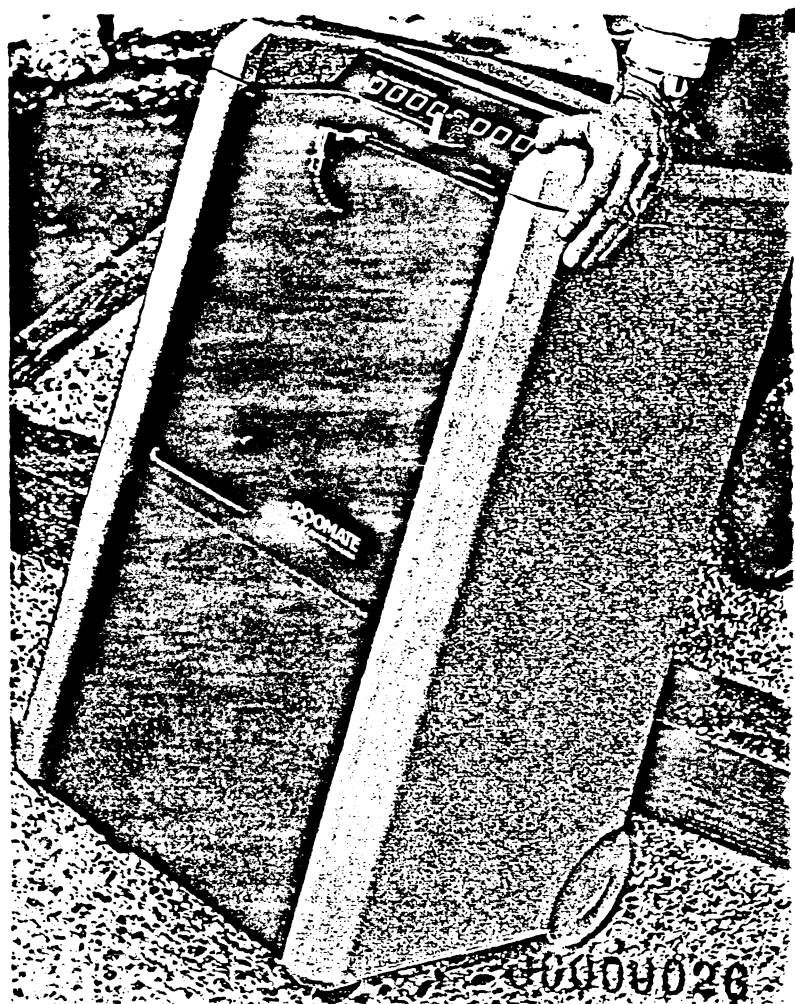
6565 Coffman Road
Indianapolis, Indiana 46268
317/298-7333

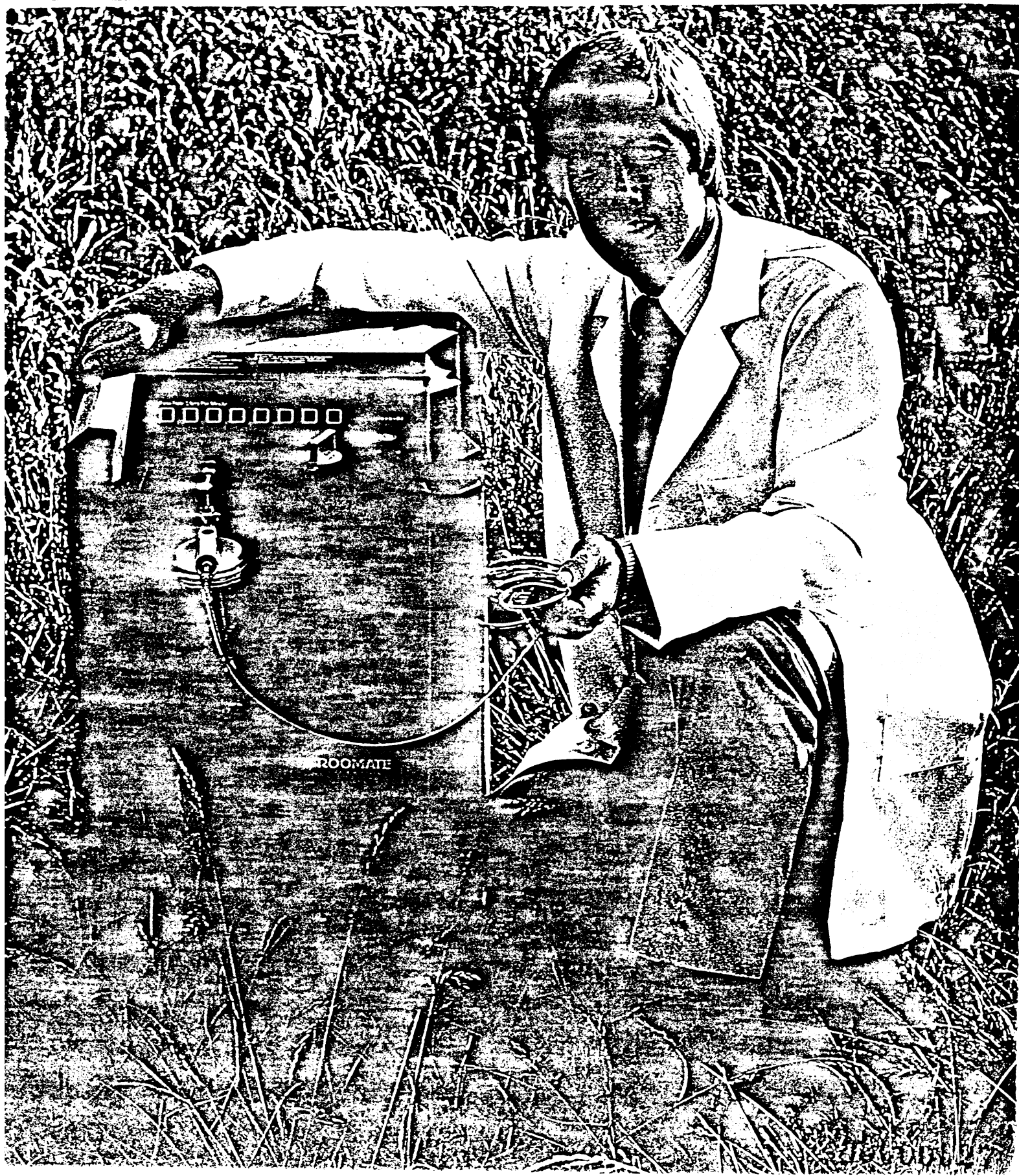
Specifications

Concentration	Flow Selections liters/minute	Percent Oxy Concentrat
	1	96%
	1.5	96%
	2	96%
	2.5	96%
	3	95%
	3.5	94%
	4	92%

Power Consumption	330 watts
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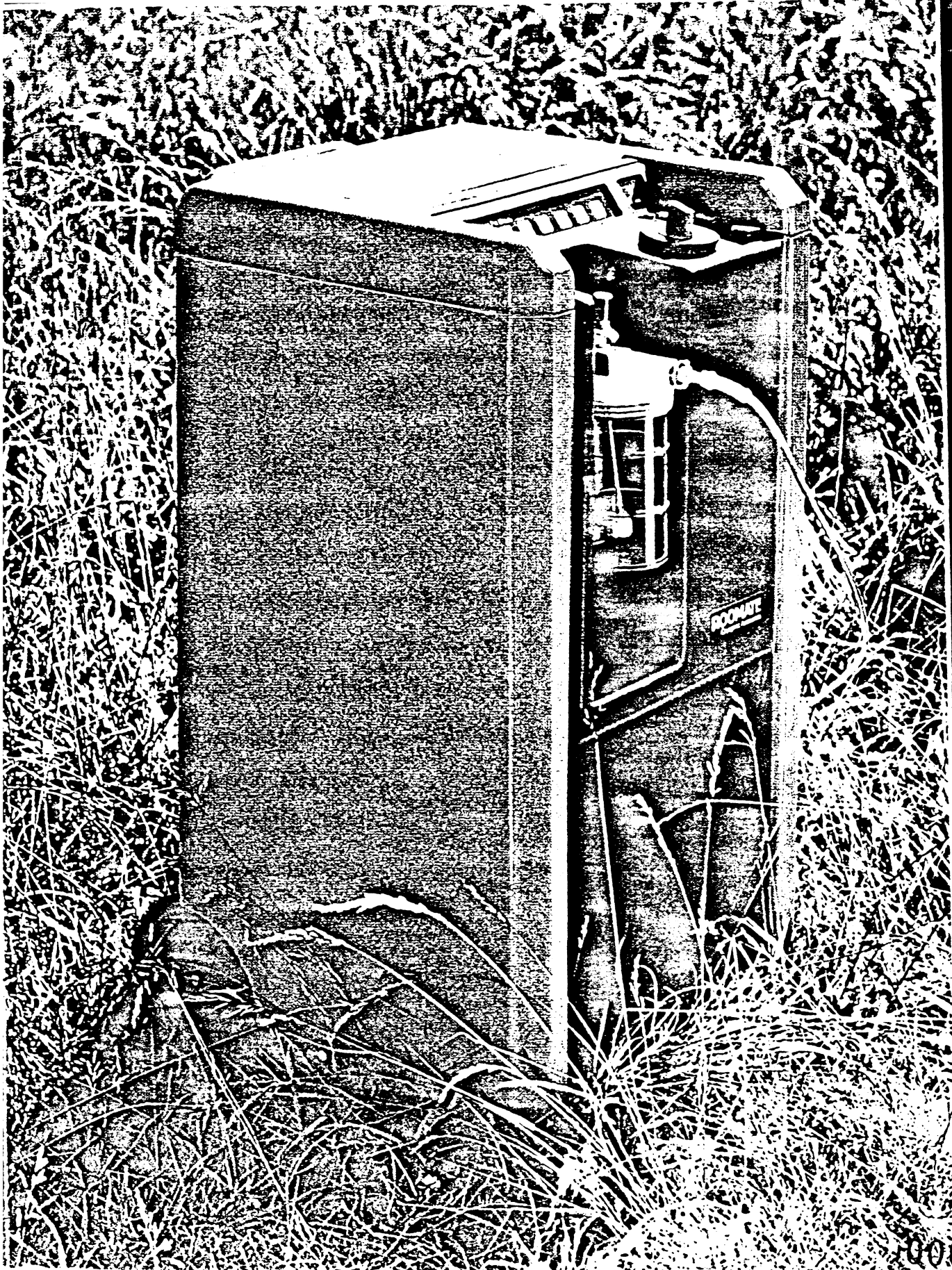
Dimensions	Height 31.5 inches
	Width 17.0 inches
	Depth 16.0 inches
	Weight 75 pounds





ROOMATE

A new oxygen
concentrator
from Cryogenic
Associates.



0000028

BEFORE THE UTAH STATE TAX COMMISSION

MILLER WELDING SUPPLY, INC.,)	
	:	FINDINGS OF FACT,
Petitioner,)	CONCLUSIONS OF LAW,
	:	AND FINAL DECISION
v.)	
	:	
AUDITING DIVISION OF THE)	Appeal No. 90-1659
UTAH STATE TAX COMMISSION,	:	
)	Account No. C33493
	:	
Respondent.)	

STATEMENT OF CASE

This matter came before the Utah State Tax Commission pursuant to the Petitioner's Petition for Redetermination dated September 26, 1990. At the request of counsel for the parties, formal hearing in this matter was waived and the determination of the Tax Commission is based upon the facts as stipulated to by the parties and the arguments contained in their respective briefs.

Based upon the foregoing, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. The tax in question is sales tax.
2. The audit period in question is April 1, 1987 through December 31, 1989.
3. The Petitioner rented and sold, pursuant to a medical prescriptions, a device known as an "oxygen concentrator" to individuals in need of such a device. No sales tax was collected on the rentals or sales of that device.

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4. The oxygen concentrator is described in its sales brochure as an "engineered device that draws oxygen from the surrounding air, concentrates and delivers it to the patient at a prescribed rate." The device takes the place of bottled oxygen for those individuals who are medically in need of supplemental oxygen.

CONCLUSIONS OF LAW

The sale of medicine is exempt from sales and use tax. (Utah Code Ann. §59-12-104(10).)

"Medicine" means any oxygen or stoma supplies prescribed by a physician or administered under the direction of a physician or paramedic. (Utah Code Ann. §59-12-102(4)(a)(iii).)

Prescribed medicines, including stoma supplies, oxygen, insulin, and syringes are specifically exempted even though sold to the final consumer. (Utah State Tax Commission Administrative Rule R865-19-37S(1C)(12).)

DECISION AND ORDER

The issue before the Commission is whether or not the sales and rentals of the oxygen concentrator were exempt from sales tax as sales of oxygen as contemplated under Utah Code Ann. §59-12-104 and §59-12-102.

The Petitioner argues that the word "supplies" modifies both "oxygen and stoma". Therefore "provision (iii) can just as accurately be read as defining medicine as oxygen supplies prescribed by a physician versus oxygen and stoma supplies" (Petitioner's Trial Brief at page 4.)

The Respondent argues that a more restrictive interpretation of that statutory language is appropriate and that the word "supplies" does not modify the word oxygen but applies only to stoma supplies. In support of its argument, the Respondent submitted a transcript of the floor debate held at the Utah State Senate which discussed Senate Bill 53 which provided the sales tax exemption for oxygen.

A fair reading of the discussion that took place in the legislature regarding the oxygen exemption provision indicates that the legislative intent of the bill was to exempt oxygen and, as a separate consideration, an exemption for stoma supplies was also considered. There was nothing in the transcript of the floor debate which would support a conclusion that the legislature intended to exempt oxygen supplies and stoma supplies.

This finding is consistent with Administrative Rule R865-19-37S(1C)(12) which specifically exempts "prescribed medicines, including stoma supplies, oxygen, insulin, and syringes." Clearly, under this rule, stoma supplies and oxygen are separate items of tangible personal property which are exempt from sales tax and that the word "supplies" does not apply to both items.

Under this interpretation of the definition of "medicine" it is clear that the device which the Petitioner rents or sells is not oxygen, but rather, is a mechanical device which operates to take existing surrounding oxygen, concentrate it and deliver it at that concentrated level. Thus, when one rents or purchases such a device, one does not

rent or purchase oxygen as an item of tangible personal property or medicine but rather one is renting or purchasing a mechanical device that subsequently provides the oxygen needed.

The Petitioner argues that to draw such a fine distinction between purchasing oxygen in its gaseous state or purchasing a device which manufactures oxygen is nonsensical. Although it may be true that ultimately, both items deliver oxygen to those who are medically dependent upon supplemental oxygen, the above described distinction can and has been made by the legislature and the Commission is bound by the legislature's determinations.

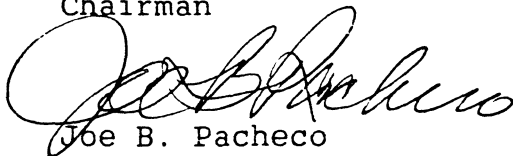
Based upon the foregoing, the Tax Commission finds that the sale or rental of the "oxygen concentrator" constitutes a sale or rental of tangible personal property that is not exempt as a sale of medicine. Therefore, the determination of the Auditing Division is affirmed. It is so ordered.

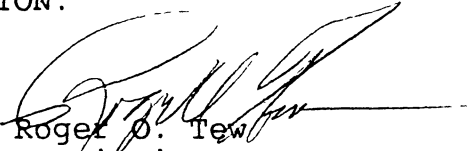
DATED this 20th day of August, 1992.

BY ORDER OF THE UTAH STATE TAX COMMISSION.

APPROVE

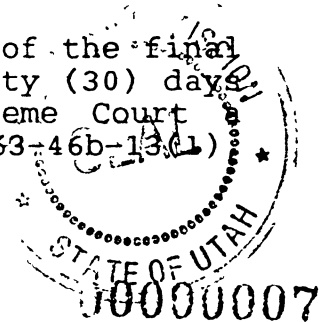
R. H. Hansen
Chairman


Joe B. Pacheco
Commissioner


Roger O. Tew
Commissioner


S. Blaine Willes
Commissioner

NOTICE: You have twenty (20) days after the date of the final order to file a request for reconsideration or thirty (30) days after the date of final order to file in Supreme Court petition for judicial review. Utah Code Ann. §§63-46b-13(1) 63-46b-14(2)(a).
PFI/sj/3303w



MAILING CERTIFICATE

I hereby certify that I mailed a copy of the foregoing
Decision to the following:

Miller Welding Supply, Inc.
c/o David O. Black
Thompson, Hatch, Morton & Skeen
1245 E. Brickyard Rd. #600
Salt Lake City, UT 84106

Craig Sandberg
Assistant Director, Auditing
Heber M. Wells Building
Salt Lake City, UT 84134

James H. Rogers
Director, Auditing Div.
Heber M. Wells Bldg.
Salt Lake City, UT 84134

John McCarrey
Assistant Attorney General
36 South State, 11th Floor
Salt Lake City, UT 84111

DATED this 21st day of August, 1992.

Sara Jensen
Secretary