

1993

# Miller Welding Company, Inc. v. State Tax Commision of Utah : Reply to Brief in Opposition

Utah Court of Appeals

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## Recommended Citation

Legal Brief, *Miller Welding Company, Inc. v. State Tax Commision of Utah*, No. 930535 (Utah Court of Appeals, 1993).  
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IN THE UTAH SUPREME COURT

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MILLER WELDING SUPPLY, INC.,        )  
  )  
      Petitioner/Appellant,         )  
  )  
      vs.                                 )    Appeal No. 930535  
  )                   930119-CA  
STATE TAX COMMISSION OF UTAH,     )  
  )  
      Respondent/Appellee.         )                   90-1659  
  )    Priority 14

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RESPONDENT'S REPLY BRIEF IN SUPPORT  
OF PETITION FOR WRIT OF CERTIORARI

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UTAH

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TABLE OF CONTENTS

SUMMARY OF ARGUMENT AND INTRODUCTION . . . . . 1

    I.    THE COURT OF APPEALS AND MILLER WELDING  
          MISUNDERSTAND THAT A SALES TAX IS A TRANSACTIONAL  
          TAX. . . . . 1

    II.   THE MAJORITY BELOW AND MILLER WELDING IGNORE THIS  
          COURT'S DECISIONS THAT TAX EXEMPTIONS ARE NARROWLY  
          CONSTRUED AGAINST THE TAXPAYER. . . . . 3

CONCLUSION . . . . . 4

ADDENDUM:

1. Utah Code Admin. P. R865-19-2S (1993)

**TABLE OF AUTHORITIES**

**CASES:**

BJ-Titan Services v. State Tax Comm'n,  
842 P.2d 822 (Utah 1992) . . . . . 2

Hales Sand & Gravel v. Audit Div. of the State Tax  
Comm'n of Utah,  
842 P.2d 887 (Utah 1992) . . . . . 2

Mark L. Haroldson, Inc., v. State Tax Comm'n,  
805 P.2d 176 (Utah 1990) . . . . . 2

Miller Welding Supply, Inc. v. Tax Comm'n,  
No. 930119-CA (Utah Ct. App. September 2, 1993  
(Judge Russon dissenting)) . . . . . 3

Union Pacific R.R. Co. v. Auditing Div. of the Utah  
State Tax Comm'n,  
842 P.2d 876 (Utah 1992) . . . . . 2

Valgardson Housing Systems, Inc. v. State Tax  
Comm'n,  
849 P.2d 618 (Utah App. 1993) . . . . . 2

**RULES:**

Utah Code Admin. P. R865-19-2S (1993) . . . . . 1

## SUMMARY OF ARGUMENT AND INTRODUCTION

The majority opinion below failed to concentrate on the taxable transaction that consisted of the sale or lease of an oxygen concentrator. Miller Welding's Brief in opposition to this petition makes the same error. Both focus on whether this machine could later produce oxygen, and both conclude that an oxygen concentrator is the same as oxygen. However, Miller Welding's machines fail to qualify for the exemption for "oxygen," because the taxable transaction involved the sale or lease of an oxygen concentrator. No oxygen is involved in the taxable transaction.

In addition to this error, the dissent below vigorously urged the majority to apply this Court's decisions that tax exemptions must be narrowly construed. Miller Welding asks this Court to ignore this rule of statutory construction. However, application of this rule to the statutory term "oxygen" precludes expanding that term to include oxygen concentrating machines.

For these reasons, the decision of the Court of Appeals is in error. Its decision on this case of first impression should be overturned.

### **I. THE COURT OF APPEALS AND MILLER WELDING MISUNDERSTAND THAT A SALES TAX IS A TRANSACTIONAL TAX.**

It is a fundamental principle of sales tax law, that sales tax is a transactional tax. See Utah Code Admin. P. R865-19-2S (1993) ("sales and uses tax are transaction taxes. . ."). Utah appellate

courts have consistently treated sales tax as a transactional tax.<sup>1</sup> Miller Welding argues that "the comparison that the Court of Appeals [majority opinion] made between concentrated oxygen in a green bottle and concentrated oxygen from the oxygen concentrators is compelling." (Respondent's Brief in Opposition at 13.) This analysis fails to examine the taxable transaction; instead, it views subsequent events. No tax is levied on concentrated oxygen. A tax is levied on the oxygen concentrator at the time that it is sold or leased -- this is the taxable transaction. It is leased or sold only as a machine; it is not oxygen. It is "an engineered devise that draws oxygen from the surrounding air. . . ." (R. 25.) Both the majority below and Miller Welding misunderstand that a sales tax is levied on the transaction which involves a machine, but not oxygen. This confusion should be clarified by this Court through a writ of certiorari to review the decision of the Utah Court of Appeals.

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<sup>1</sup> See Valgardson Housing Systems, Inc. v. State Tax Comm'n, 849 P.2d 618 (Utah App. 1993) (the transaction, rather than the physical characteristics of the item at issue, determines whether or not sales tax is imposed); Hales Sand & Gravel v. Audit Div. of the State Tax Comm'n of Utah, 842 P.2d 887 (Utah 1992) (sales tax is imposed on a transaction when title passes from seller to buyer); Union Pacific R.R. Co. v. Auditing Div. of the Utah State Tax Comm'n, 842 P.2d 876 (Utah 1992) ("the sales tax imposes a transaction tax. . . ."); BJ-Titan Services v. State Tax Comm'n, 842 P.2d 822 (Utah 1992) (sales tax is imposed on transactions involving the sale of tangible personal property, but not services); Mark L. Haroldson, Inc., v. State Tax Comm'n, 805 P.2d 176 (Utah 1990) (the "essence of the transaction" test should be applied to determine whether or not sales tax should be imposed.)

II. THE MAJORITY BELOW AND MILLER WELDING IGNORE THIS COURT'S DECISIONS THAT TAX EXEMPTIONS ARE NARROWLY CONSTRUED AGAINST THE TAXPAYER.

The dissent below vigorously urged the majority to apply this Court's holdings on statutory construction of sales tax exemptions. Miller Welding Supply, Inc. v. Tax Comm'n, No. 930119-CA at 4-5 (Utah Ct. App. September 2, 1993 (Judge Russon dissenting)). It said that narrow construction of the oxygen exemption, as this Court requires, would result in no exemption for Miller Welding. Id. This was argued by the Commission in its petition to this Court. (See Tax Commission's Petition for Writ of Certiorari at 6-7.) Miller Welding now argues that the Commission has made no showing why this matters. (See Miller Welding's Brief in Opposition to Petition for cert at 4.) It matters because it dictates a result opposite to that of the majority below.

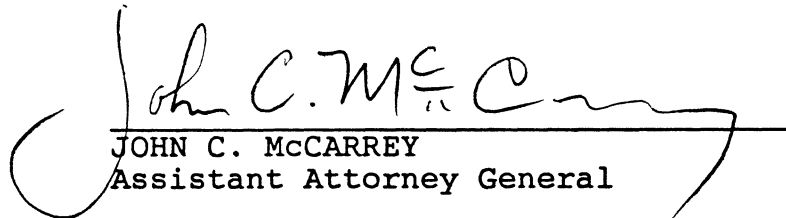
The statute uses the term "oxygen." To determine that this term means "oxygen concentrator" requires a broad reading of the word "oxygen." If narrow construction is used, as required by this Court's decisions, an oxygen concentrator is not oxygen; it is a machine that concentrates oxygen. Had the majority below correctly applied this principle, it would have come to the same conclusion as the dissent. Accordingly, this Court should grant the Commission's petition for writ of certiorari and make the Court of Appeals' decision consistent with this Court's decisions.



CONCLUSION

The dissent below was correct. This Court should grant this petition for writ of certiorari because the majority below failed to apply recent decisions of this Court, failed to analyze this sales tax issue by analyzing the taxable transaction, failed to apply the plain language of the statute, and failed to correctly interpret the legislative history.

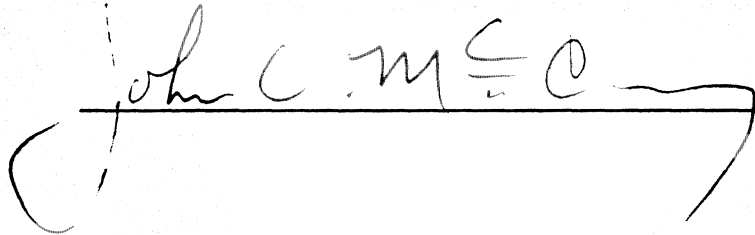
DATED this 13<sup>th</sup> day of December, 1993.

  
JOHN C. MCCARREY  
Assistant Attorney General

**MAILING CERTIFICATE**

I hereby certify that on the 13<sup>th</sup> day of December, 1993, I caused a copy of the foregoing RESPONDENT'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI to be mailed, postage prepaid, to:

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ADDENDUM 1

**R865-19-2S. Nature of Tax Pursuant to Utah  
Code Ann. Section 59-12-103.**

A. The sales and use taxes are transaction taxes imposed upon certain retail sales and leases of tangible personal property, as well as upon certain services.

B. The tax is not upon the articles sold or furnished, but upon the transaction, and the purchaser is the actual taxpayer. The vendor is charged with the duty of collecting the tax from the purchaser and of paying the tax to the state.

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