

## AIR PUMP SALES NOT TAXABLE

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In a divided panel decision, the Commonwealth Court held that sales from coin operated air vending machines located in gas stations and convenience stores were not taxable for Sales and Use Tax purposes. *Air-Serv Group, LLC v. Commonwealth*, No. 459 F.R. 2008 (Pa. Cmwth. April 14, 2011). The majority held that the sales were not taxable for several reasons. The court concluded that the statute, regulations, and case law established that air from the atmosphere is taxable only when it has been changed, separated, processed, or bottled and then sold commercially. Section 201(m) of the statute specifies that steam and natural and manufactured and bottled gases sold for nonresidential purposes are taxable. Atmospheric air is not in the same category. Case law supports the conclusion, as a manufactured product does not come into existence until air is transformed by an industrial process. *Commonwealth v. Air Products and Chemicals, Inc.*, 380 A.2d 741 (Pa. 1977). In addition, only tangible *personal property* is subject to sales tax. Since atmospheric air is not capable of personal possession, it is not personal property. Finally, compressed air is not chemically different than atmospheric air and the parties stipulated that a customer pays only for the right to use an air vending machine; the customer is not charged for the air itself.

The court further held that the use of a vending machine is not the kind of service subject to tax under the statute. The legislature specifically provided that self-service carwash services are taxable, but made no similar provision for coin operated air vending services.

A dissent by Bonnie Brigance Leadbetter, President Judge, stated that the use by a customer of an air vending machine constituted the lease of tangible personal property. The majority opinion rejected that view on the grounds that the parties never factually developed the point and the Commonwealth never argued it. In any event the machine might well be considered part of the real estate and therefore not personal property.

One judge concurred in the majority opinion.

Your reporters represented the taxpayer in the appeal.