

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-06(6)C
Corporation Tax
TSB-A-06(23)S
Sales Tax
August 25, 2006

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. Z050426A

On April 26, 2005, the Department of Taxation and Finance received a Petition for Advisory Opinion from the Board of Managers of the Time Warner Center Condominium and the Unit Owners, 10 Columbus Circle, Suite 310, New York, New York, 10019.

The issues raised by Petitioners, the Board of Managers of the Time Warner Center Condominium and the Unit Owners, are:

1. Whether utilities purchased by the Board of Managers for its consumption in the operation of Time Warner Center Condominium and for consumption by the Unit Owners (or their tenants) and by the residential unit boards are subject to sales tax.

2. Whether, commencing in 2005, the amount charged to the Board of Managers and two of the Unit Owners, Time Warner Inc. and Jazz @ Lincoln Center, Inc., for electric transmission services provided by a utility company subject to the supervision of the New York State Public Service Commission may include an amount for gross receipts tax that is imposed under section 186-a of the Tax Law.

Petitioners submit the following facts as the basis for this Advisory Opinion.

The Time Warner Center Condominium is located at Columbus Circle in New York City. The Time Warner Center Condominium is comprised of the following condominium units:

1. Time Warner Inc.'s Unit - TWI Unit;
2. Time Warner Inc.'s Unit - North Office Unit;
3. The Hotel Unit;
4. The North Residential Unit;
5. The South Residential Unit;
6. The Office Unit;
7. The Retail Unit;
8. The Parking Unit; and

9. The Jazz Unit.

The Time Warner Center Condominium is managed by a board (hereinafter the "Board of Managers") on behalf of the owners of the condominium units listed above (the "Unit Owners"). The Board of Managers is an unincorporated association composed of representatives of each of the Unit Owners and, in the case of the residential units, representatives selected by each residential unit's condominium board. Though currently operating as an unincorporated association, the Board of Managers may determine to incorporate at some future date. The Board of Managers' sole function is the management of Time Warner Center Condominium.

Appurtenant to each condominium unit is an interest in Time Warner Center Condominium's common elements. Each of the units in Time Warner Center Condominium, together with its appurtenant common elements interest, is referred to herein as a "major unit," and collectively these constitute the "major units." The owners of the major units other than the residential units are referred to as the "Unit Owners." The persons occupying space in all the major units except the residential units are either the Unit Owners or their tenants.

The North and South Residential units, which are composed of residential subunits (condominium apartments), are operated by their own condominium boards (hereinafter the residential unit board or boards), which function as the management of the North and South Residential units, respectively. The other major units are operated by their respective Unit Owners.

Each major unit shares common elements in Time Warner Center Condominium and maintains common elements within itself. The common elements operated by the Board of Managers include a central HVAC plant (the "Central Plant"), in which chilled water is produced and HVAC services are provided for the major units¹ and common areas shared by the entire condominium.

The major units vary in both form and function. Time Warner Inc. ("TWI") owns two units. The first unit (the "TWI Unit") includes corporate offices and broadcast studio space for TWI and its affiliates. The second unit (the "North Office Unit") comprises approximately 100,000 feet of office space. Currently TWI intends to occupy both the TWI Unit and the entire North Office Unit. However, in the future it is possible that some part or all of the North Office Unit could be leased to third-party tenants.

¹ Other than the TWI Unit. TWI also has its own HVAC plant within the TWI Unit, which provides HVAC to the TWI Unit.

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Each other unit (listed in three through eight above) is used primarily for the purposes described in its name. The two residential units are subdivided into numerous individual resident apartments, each one owned, together with an interest in the common areas within that particular residential unit, as a condominium subunit by an individual owner. The Hotel Unit is owned and occupied by a single hotel operator. The Jazz Unit consists of an auditorium and related facilities and is used by Jazz @ Lincoln Center Inc. ("Jazz"), a not-for-profit organization affiliated with Lincoln Center.

The Board of Managers, TWI and Jazz each have separate direct meters through which a utility company provides electricity or electric service and steam. In addition, New York City charges the Board of Managers for water used by it in the operation of Time Warner Center Condominium. The electricity or electric service and steam purchased by the Board of Managers from the utility company are consumed in the operation of the Central Plant, consumed in the operation of Time Warner Center Condominium's common areas, or distributed to the major units for consumption within the particular units.

The Board of Managers charges each of the Unit Owners and the residential unit boards for electricity, steam and water used in that major unit (in the case of the TWI and Jazz Units, the Board of Managers charges for the portion of these utilities not provided directly by the utility company). Currently and until all units' specific submeters are fully operational, some charges are being estimated. Even after the submeters are fully operational, the Board of Managers may charge the Unit Owners and the residential unit boards for certain utilities based on allocations rather than submeters.

The Board of Managers charges each of the Unit Owners and the residential unit boards for each unit's share of the Board of Managers' total costs of the Central Plant based on the "AC Factor." The AC Factor charges include the cost of electricity, steam and water consumed in producing chilled water and providing HVAC services, as well as the costs of central plant labor, equipment and supplies. Each major unit's AC Factor charge is determined based upon a combination of the actual design capacity for the particular major unit (for fixed costs) and actual usage as measured by BTU meters for the particular major unit (for variable costs).

The Board of Managers charges each of the Unit Owners and the residential unit boards for its agreed-upon share of the costs for utilities, including electricity, steam (if any) and water, used in Time Warner Center Condominium's common areas based upon the agreed-upon common areas percentages. These common charges are computed using factors such as square footage of the particular unit and percentage of space occupied and are not based on actual metered usage.

Each of the Office, Retail, and Parking Unit Owners and the board of each residential unit bills the occupants of its unit for such occupants' actual electric usage, measured by

submeters. The Unit Owners and residential unit boards may also recoup some part of the cost of their electric usage through general common or rental charges, some of which may be based on allocations. Thus, the boards of the residential units bill each individual owner for the electric usage determined for such individual owner's apartment based on a specific submeter; and the Office, Retail and Parking Unit Owners bill their respective tenants for electricity based on submeters measuring electric usage within each tenant's premises. The Unit Owners and residential unit boards recoup their steam and water costs through general common charges or rents. The Retail Unit Owner also may bill its tenants in part based on submeters measuring the use of steam and/or water by its tenants. In addition, steam is used to heat water for space heating within the Retail Unit, and some Retail Unit tenants are then billed "Hot Water Charges" for such heating based on BTU meters measuring usage.

As noted above, the Board of Managers charges each Unit Owner and residential unit board the AC Factor representing the Unit Owner's and the residential unit board's share of the costs of the Central Plant. The North and South Residential unit boards recoup their respective shares of the AC Factor and the cost of electricity used in operating Time Warner Center Condominium's common areas as part of the residential units' condominium common charges to the individual owners. The residential unit boards further recoup through common charges the costs of electricity consumed within the common areas (e.g.; the lobby) of the residential units and not specifically submetered to a particular resident.

The Parking Unit Owner passes its entire AC Factor charge directly through to its single tenant. It does not separately meter or charge its tenant for the AC Factor based on BTU load. The Parking Unit Owner recoups its share of Time Warner Center Condominium's common area electric usage through rent charges to its tenant.

The Retail and Office Unit Owners bill certain tenants for AC Factor charges based upon metered BTU loads. These Unit Owners recoup the costs of their respective shares of Time Warner Center Condominium's common area electric usage and the electric usage within the major units' common area through rent charges to their tenants.

As noted above, TWI currently plans to occupy all of the TWI Unit and all of the North Office Unit. It is possible, however, that TWI may in the future lease part or all of the North Office Unit, and TWI may bill tenants for submetered electricity or electric service, steam, water, AC Factor and/or hot water. It is at this point unknown whether, should TWI submeter utilities to tenants, specific metered charges for utilities to TWI could be identified as either utilities that are solely consumed by TWI or utilities that are solely resold to its tenants or instead whether some of the metered charges to TWI would relate to utilities that are in part consumed by TWI and in part resold by TWI to its tenants.

Applicable law and regulations

Section 1101(a) of the Tax Law provides, in part:

When used in this article the term "person" includes an individual, partnership, limited liability company, society, association, joint stock company, corporation, estate, receiver, trustee, assignee, referee, and any other person acting in a fiduciary or representative capacity ... and any combination of the foregoing.

Section 1101(b) of the Tax Law provides, in part:

When used in this article for the purposes of the taxes imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and by section eleven hundred ten, the following terms shall mean:

* * *

(8) Vendor. (i) The term "vendor" includes:

(A) A person making sales of tangible personal property or services, the receipts from which are taxed by this article;

Section 1105 of the Tax Law provides, in part:

Imposition of sales tax On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax . . . upon:

* * *

(b)(1) The receipts from every sale, other than sales for resale, of the following:
(A) gas, electricity, refrigeration and steam, and gas, electric, refrigeration and steam service of whatever nature; . . .

Section 1105-A of the Tax Law provides, in part:

Reduced tax rate on certain energy sources and services (a) Notwithstanding any other provisions of this article, but not for purposes of the taxes imposed by section eleven hundred seven or eleven hundred eight or authorized pursuant to the authority of article twenty-nine of this chapter, the taxes imposed by subdivision (a) or (b) of section eleven hundred five on . . . the receipts from every sale, other than for resale, of . . . natural gas, electricity, steam and gas, electric and steam services used for residential

purposes shall be paid at the rate of . . . zero percent on and after October first, nineteen hundred eighty. . . .

Section 1107 of the Tax Law provides, in part:

Temporary municipal assistance sales and compensating use taxes for cities of one million or more (a) General. On the first day of the first month following the month in which a municipal assistance corporation is created under article ten of the public authorities law for a city of one million or more, in addition to the taxes imposed by sections eleven hundred five and eleven hundred ten, there is hereby imposed on such date, within the territorial limits of such city, and there shall be paid, additional taxes . . . which except as provided in subdivision (b) of this section, shall be identical to the taxes imposed by sections eleven hundred five and eleven hundred ten. Such sections and the other sections of this article, including the definition and exemption provisions, shall apply for purposes of the taxes imposed by this section in the same manner and with the same force and effect as if the language of those sections had been incorporated in full into this section and had expressly referred to the taxes imposed by this section.

Section 1109 of the Tax Law provides, in part:

Sales and compensating use taxes for the metropolitan commuter transportation district (a) General. In addition to the taxes imposed by sections eleven hundred five and eleven hundred ten of this article, there is hereby imposed within the territorial limits of the metropolitan commuter transportation district created and established pursuant to section twelve hundred sixty-two of the public authorities law, and there shall be paid, additional taxes . . . which shall be identical to the taxes imposed by sections eleven hundred five and eleven hundred ten of this article. Such sections and the other sections of this article, including the definition and exemption provisions, shall apply for purposes of the taxes imposed by this section in the same manner and with the same force and effect as if the language of those sections had been incorporated in full into this section and had expressly referred to the taxes imposed by this section.

Section 1115(a) of the Tax Law provides, in part:

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 eleven hundred ten:

* * *

(2) Water, when delivered to the consumer through mains or pipes.

Section 1132 of the Tax Law provides, in part:

(a) (1) Every person required to collect the tax shall collect the tax from the customer when collecting the price, amusement charge or rent to which it applies. If the customer is given any sales slip, invoice, receipt or other statement or memorandum of the price, amusement charge or rent paid or payable, the tax shall be stated, charged and shown separately on the first of such documents given to him. The tax shall be paid to the person required to collect it as trustee for and on account of the state.

* * *

(c) (1) For the purpose of the proper administration of this article and to prevent evasion of the tax hereby imposed, it shall be presumed that all receipts for property or services of any type mentioned in subdivisions (a), (b), (c) and (d) of section eleven hundred five, all rents for occupancy of the type mentioned in subdivision (e) of said section, and all amusement charges of any type mentioned in subdivision (f) of said section, are subject to tax until the contrary is established, and the burden of proving that any receipt, amusement charge or rent is not taxable hereunder shall be upon the person required to collect tax or the customer. Except as provided in subdivision (h) or (k) of this section, unless (i) a vendor, not later than ninety days after delivery of the property or the rendition of the service, shall have taken from the purchaser a resale or exemption certificate in such form as the commissioner may prescribe, signed by the purchaser and setting forth the purchaser's name and address and, except as otherwise provided by regulation of the commissioner, the number of the purchaser's certificate of authority, together with such other information as the commissioner may require, to the effect that the property or service was purchased for resale or for some use by reason of which the sale is exempt from tax under the provisions of section eleven hundred fifteen, and, where such resale or exemption certificate requires the inclusion of the purchaser's certificate of authority number or other identification number required by regulations of the commissioner, that the purchaser's certificate of authority has not been suspended or revoked and has not expired as provided in section eleven hundred thirty-four, or (ii) the purchaser, not later than ninety days after delivery of the property or the rendition of the service, furnishes to the vendor: any affidavit, statement or additional evidence, documentary or otherwise, which the commissioner may require demonstrating that the purchaser is an exempt organization described in section eleven hundred sixteen, the sale shall be deemed a taxable sale at retail. . . . here such a resale or exemption certificate or such an affidavit, statement or additional evidence has been furnished to the vendor, the burden of proving that the receipt, amusement charge or rent is not taxable hereunder shall be solely upon the customer. The vendor shall not be required to collect tax from purchasers who furnish a resale or exemption certificate, or such an affidavit, statement or additional evidence in proper form, . . .

Section 1134(a)(1)(i) of the Tax Law provides, in part:

Every person required to collect any tax imposed by this article . . . commencing business or opening a new place of business, (ii) every person purchasing or selling tangible personal property for resale commencing business or opening a new place of business . . . shall file with the commissioner a certificate of registration, in a form prescribed by the commissioner, at least twenty days prior to commencing business or opening a new place of business or such purchasing, selling or taking of possession or payment, whichever comes first. . . .

Section 1139(a) of the Tax Law provides, in part:

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. . . . Such application shall be in such form as the tax commission shall prescribe. . . .

Section 527.2 of the Sales and Use Tax Regulations provides, in part:

Sale of utility and similar services. (a) Imposition. (1) Section 1105(b) of the Tax Law imposes a tax on the receipts from every sale, except a sale for resale . . . of

(i) gas, electricity, refrigeration and steam, and gas, electric, refrigeration and steam service of whatever nature; . . .

* * *

(2) Although this tax is generally known as the "consumer's utility tax," the intention of the statute is to tax the enumerated sales and services whether or not rendered by a company subject to regulation as a utility company. The words "of whatever nature" indicate that a broad construction is to be given the terms describing the items taxed. The inclusion of the word "service" indicates an intent to tax, under this provision, items that are furnished as a continuous supply while the vendor-vendee relationship exists.

Section 527.13 of the Sales and Use Tax Regulations provides, in part:

(a) Reduction in rate. (1) Section 1105-A of the Tax Law provides for a reduction in the . . . statewide sales tax rate imposed under sections 1105(a) and 1105(b) of the Tax

Law and in the . . . statewide compensating use tax rate imposed under section 1110(a) of the Tax Law, as set forth in subdivision (c) of this section, on the receipts from every sale, other than for resale, used for residential purposes of:

* * *

(vi) electricity;

(vii) steam; and

(viii) gas, electric and steam services.

For purposes of this regulation, the term *energy sources* is used to describe the above-mentioned tangible personal property and services.

(2) The reduction in the sales and compensating use tax rates does not apply to those tax rates imposed by localities, pursuant to article 29 of the Tax Law, nor to the . . . sales and compensating use tax rate in New York City which is imposed by section 1107 of the Tax Law. . . .

* * *

(d) Definitions. (1) The term *residential purposes* means any use of a structure or part of a structure as a place of abode, maintained by or for a person, whether or not owned by such person, on other than a temporary or transient basis with the exclusion of accommodations subject to tax under subdivision (e) of section 1105 of the Tax Law.

(2) The term *nonresidential purposes* means any use other than for residential purposes, as defined in paragraph (1) of this subdivision, including any use in the conduct of a trade, business or profession, whether such trade, business or profession is carried on by the owner of the structure or some other person.

(3) The term *common area* means any area of the premises of a structure used without distinction for both residential and nonresidential purposes.

(e) Certification and allocation. (1) Purchases of energy sources used exclusively for residential purposes shall receive the reduced tax rate without the necessity of certification.

(2) Where energy sources billed on a single meter or in a lump sum are used for both residential and nonresidential purposes, and the residential purposes constitute 75

percent or more of the usage, the entire amount billed shall be taxed at the reduced sales tax rate without certification. See paragraph (5) of this subdivision to determine the percentage of residential use.

(3) Where energy sources billed on a single meter or in a lump sum are used for both residential and nonresidential and less than 75 percent of the usage is for residential purposes, the purchaser is entitled to the reduced tax rate on only the percentage of energy sources used for residential purposes. This percentage shall be determined in accordance with paragraph (5) of this subdivision and shall be rounded off to the nearest 10 percent. A certificate shall be filed in the form provided and shall be given by the purchaser to the supplier of the energy sources. In the absence of such a certificate, the supplier of energy sources shall collect the full tax on the entire usage.

(4) Where a structure is exclusively used for nonresidential purposes, no certification or statement is required, since no eligibility for a reduced sales tax rate shall exist for purchases of energy sources and services.

(5) To determine the percentage of the area of a structure used for residential purposes, the following formula shall be used by the purchaser of the energy sources and services: total area of space used for residential purposes, excluding common areas, divided by the total area (residential and nonresidential), excluding common areas, equals the percentage rounded off to the nearest 10 percent applicable to use for residential purposes. Thus, if the percentage before rounding is 74.9 percent, the percentage when rounded is 70 percent.

(6) Certifications, when needed, may be obtained from the Taxpayer's Assistance Bureau at the State Campus in Albany, from any district tax office or from the supplier of the energy sources and services.

(f) Customer classification. (1) Vendors of energy sources which are regulated by the New York State Public Service Commission and which have on file therewith a tariff or rate schedule which classifies its customer either as residential or nonresidential, may request from the Department of Taxation and Finance approval to use such classifications for determining the eligibility of its customer for a reduced sales tax rate without certification.

(2) All other vendors of energy sources may use from their records any classifications presently in use which classifies a customer as either a residential or nonresidential customer. If there is no such classification, the vendor is required to make a visual inspection of the structure to determine his customer's classification in

accordance with subdivision (e) of this section for eligibility for a reduced sales tax rate without certification.

* * *

(4) Where a customer is eligible for the reduced tax rate, as a residential customer described in paragraph (1) or (2) of subdivision (e) of this section, but the supplier of energy sources has not classified him as a residential user, the customer should furnish the supplier with a certification.

(g) Collection of tax. (1) Every vendor, making a sale of energy sources to a customer who is classified as a residential customer, shall collect the sales tax at the reduced sales tax rate on such customer's total purchase.

(2) Every supplier of energy sources who has received from his customer a certification shall collect the sales tax at the reduced rate on the portion of the purchase shown as being used for residential purposes and shall collect the tax at the full rate on the remainder which is used for nonresidential purposes.

(3) Every vendor making sales of energy sources which are used for nonresidential purposes shall collect the sales tax at the full rate.

Section 186-a of the Tax Law imposes a tax on the furnishing of utility services, and provides, in part:

1. Notwithstanding any other provision of this chapter, or of any other law,

* * *

(b) a tax equal to (1) ... two percent commencing January first, two thousand five and thereafter of that portion of its gross income derived from the transportation, transmission or distribution of gas or electricity by means of conduits, mains, pipes, wires, lines or the like ... is hereby imposed upon every utility not taxed under paragraph (a) of this subdivision doing business in this state which is subject to the supervision of the state department of public service which has a gross income for the year ending December thirty-first in excess of five hundred dollars ...; and

(c) a tax equal to ... zero percent commencing January first, two thousand five of its gross operating income is hereby imposed upon every other utility doing business in this state which has a gross operating income for the year ending December thirty-first in

excess of five hundred dollars, which taxes shall be in addition to any and all other taxes and fees imposed by any other provision of law for the same period.

2. As used in this section,

(a) the word "utility" includes every person ... subject to the supervision of the state department of public service ... and also includes every person (whether or not such person is subject to such supervision) who sells gas, electricity, steam, water or refrigeration, delivered through mains, pipes or wires, or furnishes gas, electric, steam, water or refrigerator service, by means of mains, pipes, or wires; regardless of whether such activities are the main business of such person or are only incidental thereto, or of whether use is made of the public streets;

(b) the word "person" means persons, corporations, companies, associations ...;

(c) the words "gross income" mean and include receipts received in or by reason of any sale, conditional or otherwise ... made or service rendered for ultimate consumption or use by the purchaser in this state ... without any deduction therefrom....

(1) Provided, however, that all receipts from sales of the transportation, transmission or distribution of gas or electricity by means of conduits, mains, pipes, wires, lines or the like, rendered or performed in this state, shall be included in gross income except receipts from ... (iv) sales of the transportation, transmission or distribution of gas or electricity, not otherwise excluded, to nonresidential customers, but only in accordance with the following schedule: ... for sales during the calendar year two thousand four, seventy-five percent of the receipts from such sales shall be excluded; and for sales thereafter, one hundred percent of such sales shall be excluded. For the purposes of this clause, the term "nonresidential customers" means those customers whose use of gas or electricity, or gas or electric service does not qualify for the reduced rate of sales and compensating use tax on gas, electricity, or gas or electric service under section eleven hundred five-A of article twenty-eight of this chapter.

* * *

6. The tax imposed by this section shall be charged against and be paid by the utility and may be added as a separate item to bills rendered by the utility to customers. Upon request the utility shall furnish a statement of the amount of tax imposed by this section to its customers for bills rendered on or after January first, two thousand.

Opinion

Issue 1

The Time Warner Center Condominium is located at Columbus Circle in New York City. The Time Warner Center Condominium is comprised of nine major condominium units that can, for purposes of determining sales tax liability on energy sources, be divided into two categories: residential and nonresidential. The Hotel Unit, North Residential Unit, South Residential Unit, Office Unit, Retail Unit and Parking Unit are used primarily for the purposes described in their names. The TWI and North Office Units and the Jazz Unit can be described as nonresidential units. Accordingly, the North and South Residential units are used for residential purposes and the remaining seven major units are used for nonresidential purposes.

Each of the major units shares various common elements in Time Warner Center Condominium and maintains common elements within the unit itself that, for sales tax purposes, are considered to be common areas. In some cases, utilities are purchased by the major units (TWI and Jazz) directly from a utility company. More often, utilities are purchased by the Board of Managers from a utility company through single meters for electricity or electric service, steam, and water and are either consumed by the Board of Managers in the operation of Time Warner Center Condominium or redistributed by the Board of Managers to the major units. The utilities are, in turn, redistributed to the subunits (residents or tenants) by the major units by various means. For example, the Office Unit purchases the following from the Board of Managers: electricity or electric service and steam through submeters and HVAC services using the AC Factor; and is billed for its share of Time Warner Center Condominium common charges for electricity used in Time Warner Center Condominium's common areas. The Office Unit, in turn, bills each of its tenants for submetered electricity or electric service, passes AC Factor charges through to some of its tenants by means of an allocation method based on BTU loads, and bills its tenants for rent that covers the Office Unit's share of electricity or electric service, steam, and water used in Time Warner Center Condominium's common areas and the cost of utilities used in the common areas of Office Unit.

Receipts from the sale of water, when delivered to the consumer through mains or pipes, are exempt from sales tax pursuant to section 1115(a)(2) of the Tax Law. Accordingly, charges to the Board of Managers and Unit Owners for water are not subject to sales tax.

Section 1105(b) of the Tax Law imposes the sales tax on receipts from the sale of enumerated utilities and utility services. The tax is on the receipts from the sale of utilities furnished in separate, identifiable transactions which have as their primary purpose the furnishing of utilities or utility services. See *Matter of Mutual Redevelopment Houses, Inc. v Arthur J. Roth*, 307 AD 2d 422 (3d Dept 2003). The Board of Managers bills each of the Unit Owners and residential unit boards for electricity or electric service and steam based on actual

usage as determined by submeter readings, bills the Unit Owners and residential unit boards for HVAC services using the AC Factor and bills the Unit Owners and residential unit boards for Time Warner Center Condominium common elements electricity usage (common charges) using the agreed upon common area percentages. Charges to the Unit Owners and residential unit boards for submetered electricity or electric service and steam are sales subject to sales tax under section 1105(b) unless otherwise exempt. See *Matter of Mutual Redevelopment Houses, supra*.

Since the Board of Managers is a person making sales of electricity or electric service and steam, the receipts from which are taxed by Article 28 of the Tax Law, it is required to register as a vendor for sales tax purposes and undertake the responsibilities of a registered vendor, including the collection and remittance of the applicable sales tax upon its taxable sales. See sections 1101(a), 1101(b)(8), 1105(b), 1132(a)(1) and 1134 of the Tax Law.

Sales and purchases of utilities by the Board of Managers

The TWI, North Office, Hotel, Office, Retail, Parking and Jazz units are nonresidential units. Receipts from sales of metered electricity or electric service and steam either by the Board of Managers or by a utility company to these nonresidential units are subject to State and local sales tax at the full rate in effect at the location at which such utilities are delivered. Sales tax is required to be collected on the sale of metered or submetered electricity or electric service and steam to these units. However, if Jazz, the owner of a nonresidential unit, is an organization which qualifies for exemption from sales tax (see section 1116(a)(4) of the Tax Law) and if it is the purchaser and payer of record of the metered or submetered electricity or electric service and steam sold by a utility company or the Board of Managers, Jazz may provide the utility company or the Board of Managers with a properly completed *Exempt Organization Exempt Purchase Certificate* (Form ST-119.1) to make its purchases of metered or submetered electricity or electric service and steam without payment of sales tax. Such certification accepted in good faith will relieve the utility company and Board of Managers of its obligation to collect sales tax on sales of metered or submetered electricity or electric service and steam sold to Jazz. See section 1132(c) of the Tax Law.

The North and South Residential units are owned by the individual subunit owners and are each operated by a condominium board (residential unit board). Section 1105-A of the Tax Law exempts energy sources and services used for residential purposes from New York State sales and use tax, but not from the sales and use taxes imposed by localities. If the residential metered usage of these units is shown to be 75% or more of the total metered usage as determined by the formula described in section 527.13(e)(5) of the Sales and Use Tax Regulations, the residential unit boards' purchases of metered electricity or electric service and steam in their entirety are exempt from the statewide portion of the tax as well as the tax imposed within the Metropolitan Commuter Transportation District pursuant to section 1109 of the Tax Law. If such metered usage is shown to be less than 75% of the total metered usage as

determined by the formula described in section 527.13(e)(5), only the portion of the electricity or electric service and steam determined to be used for residential purposes is exempt from the statewide portion of the tax and the tax imposed within the Metropolitan Commuter Transportation District. The metered sales of utilities and utility services are subject to the local portion of the sales tax imposed within New York City under section 1107 of the Tax Law. The residential unit boards should provide a properly completed *Certification of Residential Use of Energy Purchases* (Form TP-385) to the Board of Managers.

The Board of Managers also operates an HVAC facility (Central Plant) which serves all of the major units. The costs of operating the Central Plant (including purchases of electricity or electric service and steam used to operate the Central Plant) are shared by the Unit Owners and the residential unit boards based on the AC Factor. The AC Factor charge is based upon a combination of the actual design capacity for the particular unit (for fixed costs) and actual usage as measured by BTU meters for the particular unit (for variable costs).

Each Unit Owner and residential unit board is charged for its agreed upon share of the costs for utilities, including electricity, steam (if any) and water, used in Time Warner Center Condominium's common areas based on the agreed upon common areas percentages. These common charges are computed using factors such as square footage of the particular unit and percentage of space occupied and are not based on actual metered usage.

The payment of common charges by the Unit Owners and residential unit boards to the Board of Managers is not a purchase of taxable services. The payment merely provides the Board of Managers with the financial means to operate the condominium and purchase services necessary to such operation. Such common charges are not subject to sales tax. See *Locy Development, Inc.*, Dec Tax App Trib, May 14, 1991, DTA No. 802499. The AC Factor charges to the Unit Owners and residential unit boards included in the common charges are not the sale of taxable utility services. See *Debevoise & Plimpton v New York State Dept. of Taxation & Fin.*, 80 NY2d 657; *Matter of British Airways, PLC*, Dec Tax App Trib, June 3, 2004, DTA No. 818259. Therefore, AC Factor charges imposed by the Board of Managers on the Unit Owners and residential unit boards are not subject to sales tax.

Since the Board of Managers is consuming the electricity or electric service and steam in the case of its common charges and AC Factor charges, its purchases from a utility company of electricity or electric service and steam are not purchases exclusively for resale even if a portion of these utility services are, in fact, resold on a submetered basis. See *Bruce A. Mekul, CPA*, Adv Op Comm T & F, March 18, 2005, TSB-A-05(8)S. Accordingly, the entire purchase price of such utilities is subject to the full rate of sales tax. The Board of Managers may apply for a credit or refund of the sales tax paid on charges for that portion of the utilities purchased by it that are resold as metered or submetered utility services. See section 1139(a) of the Tax Law.

Sales of utilities by Unit Owners and residential unit boards to subunit owners and tenants

The Unit Owners or the residential unit boards purchase metered or submetered electricity or electric service and steam from the Board of Managers and also pay AC Factor and common charges relating to the operation of Time Warner Center Condominium. Each of the Office, Retail and Parking Unit Owners and the North and South Residential unit boards bills the occupants of its unit for such occupants' actual electric usage, measured by submeters. Thus, the North and South Residential unit boards bill each individual owner for the electric usage determined for such individual owner's apartment based on a specific submeter measuring such usage; and the Office, Retail, and Parking Unit Owners bill their respective tenants for electric usage based on submeters measuring such usage within each tenant's premises. Therefore, these Unit Owners and residential unit boards are persons making sales of electricity or electric service, the receipts from which are taxed by section 1105(b) of the Tax Law. Accordingly, they are each required to register as vendors for sales tax purposes and undertake the responsibilities of a registered vendor, including the collection and remittance of the applicable sales tax on their taxable sales. See sections 1132(a)(1) and 1134 of the Tax Law. TWI would also be required to register and collect tax if it sold metered or submetered utility services to tenants of the North Office Unit. The remaining major units, including the Hotel Unit, do not appear to have tenants, and their owners purchase metered or submetered electricity or electric service and steam for their own consumption.

The owners of the Office, Retail and Parking units (which are nonresidential) are required to collect State and local sales tax at the full rate on charges to their tenants for metered utilities unless the tenant provides an appropriate and properly completed New York State sales tax exemption certificate or governmental purchase order.

Sales by the North and South Residential unit boards of submetered electricity or electric service to the individual subunit owners are not subject to the sales tax imposed by sections 1105(b) and 1109 of the Tax Law. See section 1105-A of the Tax Law. However, the residential unit boards must collect the local portion of the sales tax imposed by section 1107 of the Tax Law on their receipts for utilities sold for residential use through meters or submeters.

Charges by the Unit Owners and the residential unit boards for water supplied to their occupants are not subject to sales tax. See section 1115(a)(2) of the Tax Law. General common or rental charges for steam or steam service by a Unit Owner or residential unit board to its occupants are not subject to sales tax; however, if the Retail Unit sells a portion of the steam or steam service it purchases to its tenants on a metered basis, such sales are subject to sales tax pursuant to section 1105(b) of the Tax Law. Sales by the Retail Unit of chilled or heated water are not subject to sales tax. See *Matter of British Airways, PLC*, *supra*.

If the Unit Owners (including the North Office Unit Owner in the event that it leases space to tenants) and residential unit boards purchase from the Board of Managers metered or submetered electricity or electric service and steam that are intended exclusively for resale to the subunit owners or tenants on a submetered basis, such purchases of utilities are not subject to sales tax. Such Unit Owners and residential unit boards should provide a properly completed *Resale Certificate* (Form ST-120). See section 1132(c)(1) of the Tax Law.

However, if a Unit Owner or residential unit board purchases from the Board of Managers metered or submetered utilities where some are resold and some are used to operate that major unit's common elements, the total purchase has not been made exclusively for resale and, therefore, cannot be purchased without payment of sales tax. In this case, the Unit Owner or residential unit board cannot properly issue a resale certificate and must pay sales tax on its purchases of metered utility services. Where a Unit Owner or residential unit board purchases metered or submetered utilities and has paid sales tax on such purchase, it may apply for a refund or credit of the sales tax paid on those utilities subsequently resold through meters or submeters to its subunit owners and/or tenants. The residential unit boards may submit a properly completed *Certification of Residential Use of Energy Purchases* (TP-385) showing the percentage of energy purchases used for residential purposes (including utilities consumed in the operation of the residential units' common elements such as hallways, elevators, etc.) computed as described in section 527.13 of the Sales and Use Tax Regulations. See *Bruce A. Mekul, supra*.

The Unit Owners and residential unit boards may pass through the AC Factor charges by allocating the charges among their tenants or residents. The Unit Owners and residential unit boards may also pass through the units' allocated charges for Time Warner Center Condominium common elements. In addition to these passed-through charges, the Unit Owners and residential unit boards charge their tenants or residents common charges attributable to electricity consumed within the common areas of their units. The payment of common charges by tenants or subunit owners to the Unit Owners and residential unit boards as part of their rent does not constitute the purchase of taxable utility services from Unit Owners or residential unit boards. The payment merely provides the Unit Owners and the residential unit boards with the financial means to operate the unit and purchase the utility services necessary for such operation. These common charges are not subject to sales tax. See *Locy Development, Inc., supra*.

Each of the Unit Owners and residential unit boards is charged for its share of the total costs of operating the Central Plant based on the AC Factor. The Unit Owners and residential unit boards in turn pass these costs through to their tenants or occupants. The AC Factor charges include the cost of electricity, steam and water consumed in producing chilled water and providing HVAC services, as well as the costs of central plant labor, equipment and supplies. The Unit Owners' or residential unit boards' AC Factor charges to their tenants or occupants included in the tenants' or occupants' common charges are not the sale of a taxable utility service. See *Debevoise & Plimpton v New York State Dept. of Taxation & Fin., supra*; *Matter of*

British Airways, supra. Therefore, such AC Factor charges by the Unit Owners and residential unit boards are not subject to sales tax.

Issue 2

The Board of Managers, TWI, and Jazz, which are nonresidential customers of a utility company, each have separate direct meters through which the utility company sells electric transmission services.

Pursuant to section 186-a.2(a) of the Tax Law, a *utility* includes every person subject to the supervision of the New York State Public Service Commission and also includes every person (whether or not subject to such supervision) who sells gas, electricity, steam, water, or refrigeration delivered through mains, pipes, or wires or furnishes gas, electric, steam, water, or refrigeration service by means of mains, pipes, or wires. The Board of Managers, TWI, and Jazz are not subject to the supervision of the Public Service Commission, but the Board of Managers makes sales of submetered electricity, steam, and water to the major units, and TWI in the future may also make sales of such submetered utilities. Accordingly, the Board of Managers is, and TWI may be, a utility subject to the tax imposed under section 186-a.1(c) of the Tax Law. However, the rate of tax under section 186-a.1(c) is 0% as of 2005. Jazz is not a utility for purposes of section 186-a since it is not subject to the supervision of the Public Service Commission and does not make sales of submetered utilities.

The utility company furnishing electricity to the Board of Managers, TWI, and Jazz, as a person subject to the supervision of the New York State Public Service Commission, is subject to the tax under section 186-a of the Tax Law on all receipts from the sale of electric transmission services pursuant to section 186-a.1(b)(1) of the Tax Law. However, as of 2005, pursuant to section 186-a.2(c)(1)(iv) of the Tax Law, receipts from sales of the transportation, transmission, or distribution of gas or electricity to nonresidential customers are not included in gross income subject to tax under section 186-a. Since the Board of Managers, TWI, and Jazz are nonresidential units, the utility company's gross income should not include receipts from the electric transmission services provided for the Board of Managers, TWI, and Jazz.

It should be noted that the tax imposed on utilities under section 186-a of the Tax Law is an expense of the utility that may be included in the price that the utility charges for transmission services provided to its customers. However, the inclusion of such expense in the amount charged for transmission services is not the equivalent of directly taxing the purchaser of the service. See *New York Telephone Company v County of Nassau*, 122 AD2d 124; *Sempra Energy Trading Corp.*, Adv Op Comm T&F, December 18, 2002, TSB-A-02(23)C; and *Village of Springville Electric System*, Adv Op Comm T&F, January 4, 2005, TSB-A-05(1)C.

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In this case, when the utility company computes the monthly charge to the Board of Managers, TWI, and Jazz for electric transmission services, the utility company may include amounts to recover its operating expenses, including an amount for the gross receipts tax imposed on the utility company under section 186-a of the Tax Law. However, the inclusion in the Board of Managers', TWI's, and Jazz's monthly charge of an amount for the recovery of the gross receipts tax imposed on the utility company that is separately stated on the Board of Managers', TWI's, and Jazz's bill pursuant to section 186-a.6 of the Tax Law is not the equivalent of directly taxing the Board of Managers, TWI, and Jazz. The tax imposed on a utility company under section 186-a of the Tax Law is not being imposed on the Board of Managers, TWI, and Jazz through the monthly charges the Board of Managers, TWI, and Jazz pay the utility company for provision of transmission services. See *Village of Springville Electric System, supra*.

It should be noted that the conclusions of this Advisory Opinion with respect to the application of section 186-a of the Tax Law are not binding with respect to any taxpayer other than the Board of Managers, TWI, and Jazz.

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