New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-96 (34)S
Sales Tax
May 22, 1996

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. S950922A

On September 22, 1995, a Petition for Advisory Opinion was received from Mutual Redevelopment Houses, Inc., 321 Eighth Avenue, New York, NY 10001.

The issues raised by Petitioner, Mutual Redevelopment Houses, Inc., are:

1. Whether Petitioner's charges to its residential and commercial tenants for electricity provided pursuant to their leases or Occupancy Agreements are subject to New York State and New York City sales taxes under sections l105(b), l107(a) and 1109 of the Tax Law.

2. If Petitioner's charges to its residential and commercial tenants for electricity provided pursuant to their leases or Occupancy Agreements are subject to New York State and New York City sales taxes, (a) whether the reduced State sales tax rate under section ll05-A(a) of the Tax Law applies to Petitioner's charges to residential tenants and (b) whether Petitioner may claim a refund for the State sales taxes paid on its purchases of oil used in operating electrical generators under the exemption set forth in section 1115(c) of the Tax Law.

Petitioner presented the following facts.

Petitioner is a corporation organized under the Redevelopment Companies Law of the State of New York. Petitioner owns and operates a large cooperative housing development for persons of moderate income (the "Cooperative") located in the Borough of Manhattan, City of New York. Petitioner operates the Cooperative on a non-profit basis. Under Petitioner's Indentures or occupancy Agreements with its tenants, each tenant is required to pay an annual carrying charge in equal monthly installments. The annual carrying charge is deemed to be a payment of each tenant's proportionate share of the operating costs of the Cooperative. The tenants' annual carrying charges equal the estimated annual expenses of the Cooperative. Any excess carrying charges paid in any year are applied to the ensuing year's expenses.

Petitioner's residential "tenants" are in fact members of Petitioner, and are owners of or have subscribed to shares of the capital stock of the Cooperative. The Cooperative leases apartments to its members pursuant to Indentures or Occupancy Agreements. Petitioner provides electricity to its residential tenants and commercial tenants pursuant to its obligations as landlord under its respective Indentures, Occupancy Agreements and leases with those tenants.

Petitioner produces all of the electricity it provides to its tenants through operation of electrical generators which Petitioner owns and maintains on Petitioner's premises and which are beneficially owned by Petitioner's tenants who collectively share the sole economic interest in the Cooperative. Petitioner's monthly electrical service charge appears on each respective tenant's monthly rental bill.

Petitioner purchases oil which it uses exclusively in the operation of the electrical generators. Petitioner paid approximately $1,000 per month for this oil, on which it paid sales taxes at a rate of 8¼%.

The typical provisions of the Indentures or Occupancy Agreements between Petitioner and its residential tenants governing the carrying charges imposed on the residential tenants for receipt of electricity provide:

> The Cooperative covenants and agrees:
>
> 1. To provide elevator service; ... electricity; ....
> Cooperative may without further notice discontinue the unmetered service of electric current to demised premises in which event the carrying charges hereinabove provided for shall be reduced by that portion thereof allocated to the cost of electricity on the books of the Cooperative. In the event such condition occurs and if electric current be supplied by the Cooperative through a meter, Member covenants and agrees to purchase the same from Cooperative or Cooperative's designated agent at the terms, classification and rates not in excess of those charged to such consumers by the public utilities corporation serving the part of the city where the building is located. Bills therefor shall be rendered at such times as Cooperative may elect and the amount, as computed from a meter, shall be deemed to be, and be paid as additional carrying charges.

Petitioner did in fact convert from unmetered electric service for its tenants to metered service.

Petitioner calculates the monthly service charge for metered electricity to its residential tenants based upon Con Edison's published per-kilowatt rate as well as Con Edison's fuel adjustment factor for the preceding month. However, Petitioner's actual costs of providing electricity to its tenants are reflected in the tenants' maintenance charges which are increased or decreased in accordance with those actual costs, among other items. Where the per-kilowatt rate is too low (i.e., it results in charges to tenants that are less than Petitioner's actual cost in providing electricity to its tenants), the maintenance charges borne by Petitioner's tenants will be increased accordingly, based upon the amount needed to balance the budget. If the per-kilowatt rate is too "high" (i.e., it results in charges that are more than Petitioner's actual cost in providing electricity to its tenants), the tenants' maintenance charges will be decreased. The residential tenants do not have the option of purchasing electricity from Con Edison.

The sole reasons for Petitioner's conversion from a rent inclusion basis for provision of electricity, i.e., inclusion of electric charges in rent without regard to actual usage, to submetering, were (a) the encouragement of conservation of electricity by compelling Petitioner's tenants to pay for the electricity that they consume, and (b) the desire to achieve a fairer allocation of electrical cost based upon consumption rather than on apartment size and floor. (For example, an allocation based on square footage would require a tenant with a balcony to pay a higher rent for electrical service

than a tenant in the same size apartment without a balcony irrespective of the tenant's actual usage of electricity.) Petitioner did not convert to submetering to make a profit and it makes no profit on submetering.

The typical provision of the lease agreements between Petitioner and its commercial tenants governing the additional rent charged the commercial tenants for receipt of electricity provides:

> ELECTRICITY.
>
> (a) Landlord shall furnish to tenant all electricity reasonably required in connection with the use of the demised premises, and tenant shall pay to Landlord as additional rent each month an amount which shall be the sum of the cost of Landlord of the kilowatt-hours of electricity used by Tenant during the preceding month plus an administrative surcharge of two cents ($.02) per kilowatt hour used by Tenant during the preceding month. The administrative surcharge shall be increased annually as of January 1 of each year by the same percentage of increase in the average annual cost of electricity paid by landlord for the preceding year. Landlord shall keep in good repair any necessary meter or meters for measuring Tenant's consumption of electricity, and shall have the right to enter the demised premises at reasonable times for such purpose.

The commercial tenants have the option of purchasing electricity directly from Con Edison. (Prior to the institution of submetering, the commercial tenants were billed for electrical charges by estimated actual usage.)

As provided in written leases or Occupancy Agreements, Petitioner's tenants (both residential and commercial) are charged for their electricity separately from each tenant's proportionate share of operating costs or rent by means of individual sub-meters.

The provisions of paragraph SECOND (2) of the Indenture or Occupancy Agreement states, in part:

> Proportionate share, as used herein, shall mean that proportion which the carrying charge fixed herein bears to the total carrying charges paid by all Members to the Cooperative. <u>In computing the proportionate share of each member, the amount of the carrying charge allocated to the cost of gas and electricity on the books of the Cooperative shall not be considered.(Emphasis</u> Added)
>
> Paragraph FIFTH (13) of the Indenture Agreement states, in part: ...Bills therefor shall be rendered at such times as Cooperative may elect and the amount, as <u>computed from a meter,</u> shall be deemed to be, and be paid as additional carrying charges.(Emphasis Added)

Petitioner has submitted copies of its Statements of Operations which indicate that electrical charges from both residential and commercial tenants are part of its operating income and not part of its rental income.

Section l105(b) of the Tax Law imposes a tax on "The receipts from every sale, other than sales for resale, of ... electricity ... and electric ... service of whatever nature ..."

Section l105-A of the Tax Law states, 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 propane (except when sold in containers of less than one hundred pounds), natural gas, electricity, steam and gas, electric and steam services used for residential purposes shall be paid at the rate of three percent for the period commencing January first, nineteen hundred seventy-nine and ending December thirty-first, nineteen hundred seventy-nine; at the rate of two and one-half percent for the period commencing January first, nineteen hundred eighty and ending September thirtieth, nineteen hundred eighty, and at the rate of zero percent on and after October first, nineteen hundred eighty.

Section 1107 of the Tax Law states, 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, at the rate of four percent, 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 states, 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, at the rate of one-quarter of one percent, 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(c) of the Tax Law States in part:

(c) Fuel, gas, electricity, refrigeration and steam, and gas, electric, refrigeration and steam service of whatever nature for use or consumption directly and exclusively in the production of tangible personal property, gas, electricity, refrigeration or steam, for sale, by manufacturing, processing, assembling, generating, refining, mining, extracting, farming, agriculture, horticulture or floriculture, shall be exempt from the taxes imposed under subdivisions (a) and (b) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten.

Section 527.2(a)(2) of the Sales and Use Tax Regulations explain the imposition of the section l105(b) tax, stating in part:

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, as follows:

(a) Reduction in rate. (1) Section l105-A of the Tax Law provides for a reduction in the four-percent statewide sales tax rate imposed under sections l105(a) and l105(b) of the Tax Law and in the four-percent statewide compensating use tax rate imposed under section lll0(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:

(i) fuel oil (except diesel motor fuel);

(ii) coal;

(iii) wood (for heating purposes only);

(iv) propane (except when sold in containers of less than 100 pounds);

(v) natural gas;

(vi) steam; and

(vii) 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.

* * *

(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.

* * *

(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.

In Debevoise and Plimpton v. New York State Department of Taxation and Finance, 80 N.Y.2d 657, 661 the Court of Appeals stated that:

> ... it seems evident that if the words of section l105(b) are given their natural and most obvious meaning, the statute authorizes a tax only on the receipts from those transactions which can be identified as independent sales of utilities or utility services.

Petitioner submitted copies of its Statements of Operations which indicate electrical charges from both residential and commercial tenants are part of its operating income and not part of its rental income. As noted in Petitioner's statement of facts, the electrical charges to tenants are based on individual meter readings for each tenant. Petitioner's lease agreement for commercial tenants also provides that commercial tenants have the option of purchasing electricity directly from Con Edison. In this case, Petitioner's charges to its residential and commercial tenants are identifiable as independent sales of utilities and utility services.

Therefore, the furnishing of electricity by the Petitioner to its tenants (whether residential or commercial) through the use of individual meters falls within the definition of sale pursuant to Section l105(b) of the Tax Law. See Debevoise and Plimpton, 80 NY2d 657, 661.

Petitioner is liable as a vendor of utility services for the collection of sales tax on these sales of electricity or electric service. Petitioner's invoices to its residential and commercial tenants for the electricity provided to the tenants pursuant to their leases or Occupancy Agreements are properly subject to New York State and local sales and use taxes under Sections ll05(b), l107(a) and 1109 of the Tax Law. For those tenants classified as residential, Petitioner's charges for electric service which are based on each tenant's meter reading will be subject to the reduced rate of tax pursuant to Section ll05-A(a) of the Tax Law. Thus, these charges for residential services are subject only to the 4 percent tax imposed in New York City by Section 1107 of the Tax Law. Petitioner's charges for electric service to its commercial tenants, however, are subject to sales tax at the rate of 8% percent.

To the extent that Petitioner is producing electricity for sale, Petitioner is entitled to the production exemption for fuel provided by Section 1115(c) of the Tax Law. (However, this exemption does not apply to the 4 percent tax imposed in New York City by Section 1107 of the Tax Law. See Section l107(b)(1) of the Tax Law.) Thus, the purchase of any oil used to produce electricity used or consumed by Petitioner itself would not be exempt. Petitioner must allocate its purchases of oil between exempt and non-exempt uses.

Petitioner is entitled to a refund or credit of the State sales taxes imposed under Sections 1105 and 1109 of the Tax Law at the combined rate of 4¼ percent and paid on its purchase of oil used directly and exclusively in its electrical generators in the production of electricity for sale. Accordingly, Petitioner may apply for a refund or credit of these taxes paid on that oil pursuant to the authority of Section 1139 of the Tax Law and in accordance with Part 534 of the Sales and Use Tax Regulations. Petitioner may not obtain a refund of the 4 percent tax imposed in New York City by Section 1107 of the Tax Law.

/s/
DATED: May 22, 1996 Doris S. Bauman
Director
Technical Services Bureau

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