

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

TSB-A-05(8)S
Sales Tax
March 18, 2005

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S030827A

On August 27, 2003, the Department of Taxation and Finance received a Petition for Advisory Opinion from Bruce A. Mekul, CPA, c/o Firooznia & Mekul, 111 Brook Street, Scarsdale, New York, 10583-5151.

The issue raised by Petitioner, Bruce A. Mekul, CPA, is whether Petitioner's client, an unincorporated condominium management association (hereinafter Condo) is required to collect sales tax on the sub-metered electric charges to the unit owners, and, if so, what is the correct rate of sales tax to be charged.

Petitioner submits the following facts as the basis for this Advisory Opinion.

Condo is an unincorporated condominium management association that was organized under Article 9-B of the New York State Real Property Law. The condominium is located in Brooklyn, New York, and consists of 42 residential apartment condominium units and 2 commercial condominium units. Each owner of a unit is a member of Condo.

The commercial units are separately metered and billed directly by Consolidated Edison Company of New York, Inc. (hereinafter ConEd) for their electric usage. ConEd sends Condo a single bill for purchases of electricity which are consumed by the residential units and in the common areas. The electricity purchased by Condo runs through a master meter that monitors the total usage for the building including common areas of the condominium (elevators, hallway lighting, and the like shared by all residential and commercial units) and the residential units. ConEd's bill includes a separate charge for sales tax.

Condo has engaged a company which has installed sub-meters to monitor the usage of each of the residential units. The usage for the residential units is billed to the unit owners by Condo based on actual usage as determined by the sub-metering. The sub-metering company provides Condo with a written report each month that details the amount to be charged to each unit based upon each unit's actual consumption of electricity. The amount billed to each residential unit includes, in addition to the actual cost of the electricity as purchased from ConEd (including the sales tax charged by ConEd), a 7.5% administrative fee computed on the unit's electric usage bill including the sales tax charged by ConEd, and a \$4 sub-meter fee that is used to defray the expense of the sub-metering fee paid by Condo to the sub-metering firm.

Condo pays for the portion of the electricity purchased from ConEd and consumed in the common areas of the condominium out of the monthly common charges that are paid to Condo by all of the unit owners for various services received by the unit owners.

Applicable law and regulations

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:

* * *

(3) Receipt. The amount of the sale price of any property and the charge for any service taxable under this article, including gas and gas service and electricity and electric service of whatever nature, valued in money, whether received in money or otherwise, including any amount for which credit is allowed by the vendor to the purchaser, without any deduction for expenses or early payment discounts and also including any charges by the vendor to the purchaser for shipping or delivery, and, with respect to gas and gas service and electricity and electric service, any charges by the vendor for transportation, transmission or distribution, regardless of whether such charges are separately stated in the written contract, if any, or on the bill rendered to such purchaser and regardless of whether such shipping or delivery or transportation, transmission, or distribution is provided by such vendor or a third party, but excluding any credit for tangible personal property accepted in part payment and intended for resale. . . .

* * *

(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 . . . electricity . . . and . . . electric . . . 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, 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 526.5(e) of the Sales and Use Tax Regulations provides, in part:

Expenses. All expenses, including telephone and telegraph and other service charges, incurred by a vendor in making a sale, regardless of their taxable status and regardless of whether they are billed to a customer are not deductible from the receipts.

Section 527.2(a) 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;

* * *

(viii) . . . electric . . . 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 four-percent 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.

Opinion

Petitioner's client (Condo) is an unincorporated condominium management association. The condominium is located in Brooklyn, New York, and consists of 42 residential apartment

condominium units and 2 commercial condominium units. The commercial units have separate electric meters and purchase electricity and electric service directly from ConEd.

Condo purchases electricity from ConEd through a master meter that monitors the total non-commercial usage for the building including common areas of the condominium (elevators, hallway lighting, and the like, shared by all residential and commercial units) and the residential units. Condo has had separate sub-meters installed to monitor the electric usage of each of the residential units. Condo bills the residential unit owners for their actual electric usage based on the sub-metering. The amount billed to each residential unit as a charge for electricity includes in addition to the actual cost of the electricity as purchased from ConEd (including the sales tax charged by ConEd), an administrative fee and a sub-meter fee.

Condo pays for the portion of the electricity purchased from ConEd and consumed in the common areas of the condominium out of the monthly common charges that are paid to Condo by all of the unit owners for various services received by the unit owners.

Condo's responsibility as vendor

Section 1105(b) of the Tax Law imposes the sales tax on utility services furnished as a separate identifiable sales transaction as a commodity and applies to separate transactions which have as their primary purpose the furnishing of utilities or utility services. Condo bills each of the residential unit owners for electricity or electric service based on actual usage as determined by sub-meter readings. Accordingly, Condo is making sales of electricity or electric service to its residential unit owners through sub-metering, which sales are presumed to be subject to sales tax unless the contrary is established. See section 1132(c) of the Tax Law and *Matter of Mutual Redevelopment Houses, Inc. v Arthur J. Roth*, 307 AD 2d 422 (3d Dept 2003).

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 tax imposed by localities). Therefore, Condo's sales of electricity or electric service to its residential unit owners 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. However, such sales are subject to the local portion of the sales tax imposed within New York City under section 1107 of the Tax Law.

Since Condo is a person making sales of electricity or electric service, the receipts from which are taxed by Article 28 of the Tax Law, Condo 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.

Tax treatment of electricity used in common areas

In the case of residential condominium associations, under the circumstances where communal areas are closed to the general public, such as parking lots, play areas, community buildings or club houses, swimming pools, hallways and stairways, these areas are considered used for residential purposes. Energy sources and services purchased exclusively to heat or light these communal areas are exempt from State sales and use taxes and will be subject to reduced local rates or exempt from local taxes if the locality has elected to provide reduced rates or such an exemption, as the case may be. See *Cynthia Havey*, Adv Op Comm T & F, August 22, 2000, TSB-A-00(31)S.

A portion of Condo's purchases of electricity or electric service from ConEd is used or consumed in the common areas of the condominium shared by both residential and commercial condominium units. These purchases are paid for by Condo from the monthly charges that are paid to Condo by both the residential and commercial unit owners for various services received by both these unit owners. These charges are not based on electric usage, actual or otherwise, are not separately stated as charges for electricity or electric service on a bill or invoice to the unit owners and are merely a part of Condo's monthly charges to both the residential and commercial unit owners and are not separately sold. Therefore, the purchase by Condo of this portion of the electricity or electric service is not considered to be a purchase of electricity or electric service for resale by Condo. See *Debevoise & Plimpton v New York State Dept. of Taxation & Fin.*, 80 NY2d 657; *Empire State Bldg. Co. v New York State Dept. of Taxation & Fin.*, 81 NY2d 1002. Since the unit owners are not separately billed for actual usage in this instance, Condo should not collect sales tax on these monthly charges. However, the purchase by Condo of the electricity used in such common areas is presumed to be subject to sales tax unless the contrary is established. See section 1132(c) of the Tax Law.

In order to determine what rate of sales tax is to be paid where a condominium association purchases electricity and electric service for use in its common areas, it is necessary to allocate the portion of electricity and electric services attributable to residential purposes and the portion attributable to nonresidential purposes. Condo is liable only for the residential rate of sales tax (currently 4 1/8% in New York City) on the portion of electricity or electric service attributable to residential purposes. Condo is liable for the full rate of sales tax (currently 8 3/8% in New York City) on the portion of electricity or electric service attributable to commercial purposes.

In this case, the commercial units are metered and billed separately by ConEd. ConEd sends Condo a single bill which includes Condo's purchases of electricity consumed by its residential units and in Condo's common areas. Condo sub-meters the residential units, and is therefore able to determine precisely the amount of electricity used in the common areas.

The provisions of section 527.13(e) of the Sales and Use Tax Regulations prescribe a formula for allocating utility usage among a building's residential and nonresidential usage where the utilities are purchased in bulk through a single meter. Petitioner has separate meters

for its commercial (nonresidential) and residential users and separately measures its electrical usage in common areas.

Under the circumstances described in this Advisory Opinion, where the only energy source that needs to be allocated is the energy consumed in common areas used for residential and nonresidential purposes, the formula described in section 527.13(e)(5) of the Sales and Use Tax Regulations to determine an allocation for residential and nonresidential use does not apply. Instead, Condo may allocate the electricity and electric service used in common areas by any reasonable method which accurately reflects the usage in common areas (e.g., number and wattage of lights in commercial hallways, entrances, etc., compared to number and wattage of lights in residential hallways, entrances, etc.; or square footage of commercial hallways compared to square footage of residential hallways). If a common area, such as a hallway, is shared by both the residential and commercial unit owners, a method based on the total square footage of the residential units (excluding the common areas) divided by the total square footage of all units (excluding the common areas) might be used.

Payment and reporting of the sales tax

Electricity and electric service is purchased by Condo from ConEd on a master meter. A portion of this electricity and electric service is consumed by Condo for use in the common areas (which is a taxable purchase by Condo) and the other portion is resold by Condo to the residential condominium owners. Such electricity and electric service is not exclusively purchased for resale by Condo since a portion of the purchased electricity and service is consumed in the common areas. Therefore, Condo cannot properly issue a resale certificate to ConEd to make such purchase without payment of sales tax.

Pursuant to the provisions of section 527.13(f) of the Sales and Use Tax Regulations, Condo's purchases of the electricity and electric services being delivered through the master meter may have previously been classified by ConEd as nonresidential, in which instance Condo would currently be charged tax at the nonresidential rate. However, assuming 75% or more of the *total* electricity and electric services purchased is consumed for residential purposes (i.e., the sum of the electricity and electric service allocable to the residential portion of the common areas plus the electricity and electric service resold to the residential unit owners), Condo may submit a *Certification of Residential Use of Energy Purchases* (Form TP-385) stating that the total residential use constitutes 75% or more of the service purchased by Condo from ConEd via the master meter. ConEd would then bill Condo for all of the electricity and electric service purchased through the master meter at the New York City residential rate.

If Condo has paid tax at the residential rate on its purchases of electricity used in the common areas, Condo will be liable for the difference between the residential rate and the full rate of tax on that portion of its purchase of electricity or electric service attributable to nonresidential usage in the common areas. Condo should pay such additional sales tax at the current rate of 4½% directly to the Tax Department on its periodic sales and use tax return.

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As mentioned above, Condo is also required to collect sales tax on electricity and electric service sold to its sub-metered residential customers at the residential rate imposed in New York City. Sales tax so collected must be remitted with Condo's periodic sales and use tax return. Since Condo will have already paid sales tax to ConEd on its purchases of the electricity or electric service, including the service actually resold to its residential customers, Condo may apply the sales tax it paid to ConEd on the portion of the electricity or electric service which Condo resells to its residential customers as a credit against the sales tax collected from its residential customers on its sales tax return. Condo will then remit with its sales tax return the difference between the amount of tax it has collected from its residential customers and the amount it has paid to ConEd on electricity or electric service which it resold. The taxable receipt for electricity and electric service sub-metered and resold to the residential unit owners is based on the amount Condo bills its customers. This amount includes Condo's cost of such electricity and electric service paid to ConEd, any administrative fee charged the unit owners for their electric usage, the sub-meter fee that is used to defray the expense of the sub-metering fee paid by Condo and any markup and fees billed the unit owners as part of such service. Condo is entitled to apply any sales tax charged to Condo by ConEd on that portion of the electricity resold by Condo to residential customers as a credit against the sales tax it is required to collect from its customers. However, if Condo bills its customer for the amount of sales tax it was charged by ConEd, such amount is considered included in Condo's markup and, therefore, would be a part of the taxable receipt charged by Condo to its customers. See section 526.5(e) of the Sales and Use Tax Regulations.

DATED: March 18, 2005

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