

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

TSB-A-07(8)S
Sales Tax
March 19, 2007

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S060321A

On March 21, 2006, the Department of Taxation and Finance received a Petition for Advisory Opinion from M. B. Real Estate, LLC/Seven Hanover Associates, 181 West Madison, Suite 3900, Chicago, Illinois 60602. Petitioner, M.B. Real Estate, LLC/Seven Hanover Associates, submitted additional information with respect to the Petition on January 30, 2007.

The issues raised by Petitioner are:

1. Whether a landlord's charges to a tenant for electricity or electric service, including administrative charges, are subject to sales tax.
2. Whether a landlord's common area maintenance charges (CAM charges) to its tenants are subject to sales tax.
3. Whether a landlord's purchases of electricity from a utility, as described below, are subject to sales tax.
4. When is the sales tax due on a landlord's sales of electricity that are subject to tax.
5. Whether a landlord's charges to a tenant for trash removal services are subject to sales tax.

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

Petitioner's client (hereinafter "Landlord") owns a commercial building in New York State and leases office space to business tenants. Landlord purchases electricity from a utility company through a master meter. Landlord distributes electricity to tenants through submeters. Tenants are billed monthly for electricity based on submeter readings. The rate charged to tenants is determined by using Landlord's cost per kilowatt hour of electricity multiplied by the submetered usage. In addition to the cost per kilowatt hour, some tenants are charged a management fee that covers the cost of reading the meter, billing, and administration of the submetering.

Tenants are billed a separate amount for CAM charges, which include a charge for electrical usage in the common areas. A survey and tenant's leased square footage are used to estimate electrical usage for the common areas, and tenants pay CAM charges based on the survey and square footage. Tenants are billed a fixed, monthly CAM charge for the year that is identified in Landlord's tenant leases as additional rent.

Landlord provides trash removal for tenants pursuant to the terms of the lease. Landlord's charge to tenants for trash removal is based on square footage leased and is the same amount each month. The amount of trash generated by the tenant is not reflected in the monthly charge. The tenants do not have the option of hiring an outside contractor for trash removal.

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; . . .

* * *

(c) The receipts from every sale, except for resale, of the following services:

* * *

(5) Maintaining, servicing or repairing real property, property or land, as such terms are defined in the real property tax law, whether the services are performed in or outside of a building, as distinguished from adding to or improving such real property, property or land, by a capital improvement as such term capital improvement is defined in paragraph nine of subdivision (b) of section eleven hundred one of this article, . . .

Section 1132(c)(1) of the Tax Law provides, in part:

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 . . . are subject to tax until the contrary is established, and the burden of proving that any receipt . . . is not taxable hereunder shall be upon the person required to collect tax or the customer. . . . 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 . . . 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. . . .

Section 1133(a) of the Tax Law provides:

Except as otherwise provided in section eleven hundred thirty-seven, every person required to collect any tax imposed by this article shall be personally liable for the tax imposed, collected or required to be collected under this article. Any such person shall have the same right in respect to collecting the tax from his customer or in respect to nonpayment of the tax by the customer as if the tax were a part of the purchase price of the property or service, amusement charge or rent, as the case may be, and payable at the same time; provided, however, that the tax commission shall be joined as a party in any action or proceeding brought to collect the tax.

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

Every person required to collect any tax imposed by this article . . . 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 1136(a) of the Tax Law provides, in part:

(1) Every person required to register with the commissioner as provided in section eleven hundred thirty-four whose taxable receipts, amusement charges and rents total less than three hundred thousand dollars, or in the case of any such person who is a distributor whose sales of automotive fuel total less than one hundred thousand gallons, in every quarter of the preceding four quarters, shall only file a return quarterly with the commissioner.

(2) Every person required to register with the commissioner as provided in section eleven hundred thirty-four whose taxable receipts, amusement charges and rents total three hundred thousand dollars or more, or in the case of any such person who is a distributor whose sales of automotive fuel total one hundred thousand gallons or more, in any quarter of the preceding four quarters, shall, in addition to filing a quarterly return described in paragraph one of this subdivision, and except as otherwise provided in section eleven hundred two or eleven hundred three of this article, file either a long-form or short-form part-quarterly return monthly with the commissioner.

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, or (ii) in the case of a tax, penalty or interest paid by the applicant to the tax commission, within three years after the date when such amount was payable under this article, or (iii) in the case of a tax due from the seller, transferor or assignor and paid by the applicant to the tax commission where the applicant is a purchaser, transferee or assignee liable for such tax pursuant to the provisions of subdivision (c) of section eleven hundred forty-one of this chapter, within two years after the giving of notice by the tax commission to such purchaser, transferee or assignee of the total amount of any tax or taxes which the state claims to be due from the seller, transferor or assignor.

...

Section 525.2 of the Sales and Use Tax Regulations provides, in part:

Nature of tax. (a) Sales tax. (1)(i) Except as specifically exempted or excluded, sales tax is imposed on the receipts from:

* * *

(b) every sale, other than a sale for resale, of specifically enumerated services, as provided in sections 1105(b) and (c); . . .

* * *

(2) Except as specifically provided otherwise, the sales tax is a "transactions tax," with the liability for the tax occurring at the time of the transaction. Generally, a taxed transaction is an act resulting in the receipt of consideration for the transfer of title to or possession of (or both) tangible personal property or for the rendition of an enumerated service. The time or method of payment is generally immaterial, since the tax becomes due at the time of transfer of title to or possession of (or both) the property or the rendition of such service

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 527.7(a)(1) of the Sales and Use Tax Regulations provides:

Maintaining, servicing and repairing are terms which are used to cover all activities that relate to keeping real property in a condition of fitness, efficiency, readiness or safety or restoring it to such condition. Among the services included are services on a building itself such as painting; services to the grounds, such as lawn

services, tree removal and spraying; trash and garbage removal and sewerage service and snow removal.

Section 532.1(a)(2) of the Sales and Use Tax Regulations provides:

Where a vendor makes a sale for which payment is not received at the time of delivery, such sale must be reported on the return covering the period in which the sale is made. Thus, if the sale is a taxable sale, the full amount of tax must be remitted with the return whether or not any money was collected at the time of sale.

Opinion

Landlord owns a commercial building in New York State and leases office space to business tenants. Landlord purchases electricity from a utility company through a master meter. The electricity is distributed to Landlord's tenants through submeters. The tenants are billed monthly for electricity based on submeter readings. The rate charged to tenants is determined by using Landlord's cost per kilowatt hour of electricity multiplied by the submetered usage, and, in some cases, a fee (called a management fee) that covers the cost of reading the meter, billing, and administrative costs of the submetering is also included in the bill to tenants.

Section 1105(b) of the Tax Law imposes the sales tax on utility services furnished as a separate identifiable commodity. The tax applies to separate sales transactions whose primary purpose is furnishing utilities or utility services. Landlord bills each of its tenants for electricity or electric service based on actual usage as determined by submeter readings. Accordingly, Landlord is making sales of electricity or electric service to its tenants through sub-metering and such sales are presumed to be subject to sales tax unless the contrary is established. See *Matter of Mutual Redevelopment Houses, Inc. v Arthur J. Roth*, 307 AD 2d 422 (3d Dept 2003); and section 1132(c) of the Tax Law. In some cases, Landlord's bill also includes a fee to cover administrative costs, such as reading the meter and issuing the bills. Since the fee is merely reimbursing Landlord for its cost of providing electricity, the fees are part of Landlord's taxable receipts from its sales of electricity. See section 1101(b)(3) of the Tax Law.

Landlord charges tenants a monthly common area maintenance charge (CAM charge). This charge is a fixed monthly amount, includes an allocated cost of electricity for common areas based on the results of a survey and on each tenant's leased square footage, and is identified in Landlord's lease with tenants as additional rent.

Common area charges of the kind described by Petitioner that are designated as "additional rent" or similar language in the lease agreement are considered to be receipts from the rental of real property and are not subject to sales tax when billed to tenants. See Technical Services Bureau Memorandum entitled *Charges By Shopping Mall Operators*, May 7, 1984, TSB-M-84(9)S. Accordingly, Landlord's common area charges to its tenants are not subject to sales tax.

Landlord's purchases of tangible personal property, utilities, or other enumerated services taxable under section 1105 of the Tax Law that Landlord uses to maintain such common areas are subject to sales tax. See *Jeffrey J. Coren CPA, P.C.*, Adv Op Comm T & F, July 25, 2006, TSB-A-06(21)S.

Electricity is purchased by Landlord from a utility company on a master meter. One portion of this electricity is consumed by Landlord in the common areas (making it a taxable purchase by Landlord) and the other portion is resold by Landlord to its tenants. The electricity is not exclusively purchased for resale by Landlord since a portion of the purchased electricity is consumed by Landlord in the operation of common areas of the commercial building. Therefore, Landlord cannot properly issue a resale certificate to the utility company to make such purchase without payment of sales tax. Accordingly, Landlord must pay sales tax on all of the electricity it purchases from the utility company. Landlord may apply for a credit or refund of the sales tax it paid for the portion of the electricity Landlord resold as submetered utility services to its tenants. See section 1139(a) of the Tax Law. The credit may be claimed on Landlord's sales tax return and may be deducted from the amount of sales tax remitted by Landlord when filing its sales and use tax return. See *Bruce A. Mekul, CPA*, Adv Op Comm T & F, March 18, 2005, TSB-A-05(8)S.

Since Landlord is a person making sales of electricity or electric service, the receipts from which are taxed by Articles 28 and 29 of the Tax Law, Landlord is required to register as a vendor for sales tax purposes and undertake the responsibilities of a registered vendor, including filing sales and use tax returns and collecting and remitting sales tax on its taxable sales for the period covered by the return. See *Bruce A. Mekul, CPA, supra*. Landlord must remit the sales tax on its taxable sales whether or not such tax has actually been collected from its tenants, as well as any tax due that the utility company failed to collect on its sales of electricity to Landlord. See sections 1134(a)(1) and 1136 of the Tax Law.

The sales tax is a "transactions tax," with liability for the tax occurring at the time of the transaction. Generally, in the case of the sale of services, the taxed transaction occurs when the service is rendered. The time or method of payment is immaterial, since the tax becomes due at the time of the rendition of the service. See section 525.2(b)(2) of the Sales and Use Tax Regulations. Utility services, including metered electric services, unlike other taxable services, are generally furnished as a continuous supply while the vendor-vendee relationship exists, and such services are billed on a periodic basis. See section 527.2(a)(2) of the Sales and Use Tax Regulations. The utility company or other vendor (in this case, Landlord) cannot know the quantity of service rendered to its customer for the period for which the electric service has been provided and the amount the customer is to be billed until the meter or submeter is read or an estimated reading is made. Therefore, for purposes of Landlord's obligation to remit the sales tax with its sales tax return, the electric service provided to a tenant will be considered to have been rendered at the time the tenant's submeter is read or an estimated reading is made establishing the amount of service consumed by the tenant for the particular billing cycle.

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Accordingly, the sales tax will be due with Landlord's sales tax return covering the period in which the submeter reading or an estimated reading is made establishing the tenant's purchase for the billing cycle, whether or not the tenant has paid the tax to the Landlord. See section 532.1(a)(2) of the Sales and Use Tax Regulations.

Landlord charges its tenants a fixed monthly fee for trash removal based on each tenant's leased square footage. Tenants may not hire an outside contractor for trash removal; rather, payment is made directly to Landlord. Landlord is required by its lease to provide trash removal for its tenants, and Landlord charges a flat rate that does not vary with the actual amount of a tenant's garbage. Accordingly, the trash removal service provided by Landlord is incidental to the lease of real property and, therefore, Landlord's charges for trash removal are not subject to sales tax. The purchase by Landlord of trash removal services from a third party is subject to sales tax under section 1105(c)(5) of the Tax Law. See *Jeffrey J. Coren CPA, P.C., supra*; and section 527.7(a)(1) of the Sales and Use Tax Regulations.

DATED: March 19, 2007

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