

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

TSB-A-85 (22)S  
Sales Tax  
June 12, 1985

STATE OF NEW YORK  
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. S840316A

On March 16, 1984 a Petition for Advisory Opinion was received from The Richman Brothers Company, 1600 East 55th Street, Cleveland, Ohio 44103.

The issue raised is whether the charge for energy costs related to Petitioner's leased space in a shopping mall is subject to State or local sales tax when billed to Petitioner by the mall operator. If such charge is subject to tax, Petitioner inquires further as to whether a twenty percent charge representing the landlord's administrative and overhead charges, added to such energy costs pursuant to the lease agreement, is subject to tax.

Petitioner is a retailer of men's clothing. During the years 1980 through 1983, Petitioner leased and operated retail stores in certain shopping malls located in New York State. In each of these mall locations Petitioner entered into a lease agreement with the landlord whereby Petitioner became obligated to pay additional rent to cover the energy costs associated with said rental premises. Each lease agreement states that the tenant will not pay more for "energy costs" than if billed directly and metered separately by the utility company furnishing such energy.

Petitioner contends that during the aforementioned period in each of the store locations the landlord received monthly payments from Petitioner to cover the energy costs. When paying such costs to the utility company, the landlord also paid the sales tax charged by the utility company.

Section 1105(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 . . ." The Sales and Use Tax Regulations expound on the imposition of such tax stating in part:

"Although this tax is generally known as the 'consumer 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." 20 NYCRR 527.2(a)(2).

The term "vendor" is defined in the Tax Law to include: "A person making sales of tangible personal property or services, the receipts from which are taxed by this article;". Tax Law 1101(b)(8)(i)(A).

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When a mall operator makes taxable sales of tangible personal property or services to its tenants, it is acting as a vendor within the meaning of section 1101(b)(8)(i)(A) of the Tax Law. Petitioner is therefore required to pay State and applicable local tax on its purchases of energy from the mall operator notwithstanding the fact that the lease agreement specifies such charge as "additional rent".

If the mall operator has paid sales tax to its supplier on this energy, the mall operator may file an Application for Credit or Refund of State and Local Sales and Use Tax (Form AU-11) on the portion of the energy costs on which it has charged tax to the tenant.

Section 1101(b)(3) of the Tax Law defines the term receipt in pertinent part as, "The amount of the sale price of any property and the charge for any service taxable under this article. . . ". The twenty percent charge, representing the landlords administrative and overhead charges added to the energy costs, is part of the "receipt" and is therefore also subject to State and applicable local sales tax.

For additional information on charges made by shopping mall operators, Petitioner should consult Taxpayer Services Bureau Memorandum TSB-M-84(9)S.

DATED: May 23, 1985

FRANK J. PUCCIA  
Director  
Technical Services Bureau

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