

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

TSB-A-90(60)S
Sales Tax
December 19, 1990

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S900816B

On August 16, 1990 a Petition for Advisory Opinion was received from Dianne Germany, 611 Canyon Ridge Drive, Euless, Texas 76040.

The issues raised by Petitioner, Dianne Germany, are:

1. Whether long-term rehabilitation centers and long-term psychiatric care facilities are considered to be residential facilities for purposes of the sales tax exemption applicable to purchases of certain energy sources and services as provided under Section 1105-A of the Tax Law?
2. Whether if the rehabilitation centers and psychiatric care facilities are considered to be residential facilities for sales tax purposes, are they entitled to a refund of the New York State sales tax paid on purchases of those certain energy sources and services during the appropriate three year period immediately preceding the filing date of the claim for refund submitted by or on behalf of such centers or facilities?

A long-term rehabilitation center is a facility wherein a person with a debilitating injury (such as head or spinal) might go for extensive physical therapy and constant care.

A long-term psychiatric care facility is a facility which caters to patients needing constant care and mental rehabilitation. Such facility would be similar to a state mental hospital, except it would be privately or corporately owned.

In either type of facility, "long-term" is considered to be anywhere from thirty days to the rest of the patient's life. The care at either facility includes living facilities, meals, etc. Such care does not include out-patient care or a stay of less than thirty days.

Section 1105-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 the retail sale of fuel oil and coal for residential purposes; the receipts from the retail sale of wood used for residential heating purposes; and 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 zero percent on and after October first, nineteen hundred eighty. The provisions of this subsection shall not apply to a sale of (i) diesel motor fuel which involves a delivery at a filling station or into a repository which is equipped with a hose or other apparatus by which fuel can be dispensed into the fuel tank of a motor vehicle and (ii) enhanced diesel motor fuel except in the case of a sale of such enhanced diesel motor fuel used exclusively for residential purposes which is delivered into a storage tank which is not equipped with a hose or other apparatus by which such fuel can be dispensed into the fuel tank of a motor vehicle and such storage tank is attached to the heating unit burning such fuel, provided that each delivery of such fuel of over four thousand five hundred gallons shall be evidenced by a certificate signed by the purchaser stating that the product will be used exclusively for residential purposes.

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

Certain energy sources and services. [Tax Law, §1105-A]

(a) Reduction in rate. (1) Section 1105-A of the Tax Law provides for a reduction in the four-percent statewide sales tax rate imposed under sections 1105(a) and 1105(b) of the Tax Law and in the four-percent statewide compensating use tax rate imposed under section 1110(a) of the Tax Law, . . . 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) 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 four-percent sales and compensating use tax rate in New York City. . .

(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.

Section 1116 of the Tax Law states, in part:

Exempt organizations.--

(a) Except as otherwise provided in this section, any sale or amusement charge by or to any of the following or any use or occupancy by any of the following shall not be subject to the sales and compensating use taxes imposed under this article:

(1) The State of New York, or any of its agencies, instrumentalities, public corporations. . . or political subdivisions where it is the purchaser, user or consumer, or where it is a vendor of services or property of a kind not ordinarily sold by private persons; . . .

(4) Any corporation, association, trust, or community chest, fund or foundation, organized and operated exclusively for religious, charitable, scientific testing for public safety, literary or educational purposes. . . or for the prevention of cruelty to children. . . , no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation, (except as otherwise provided in subsection (h) of section five hundred one of the United States internal revenue code of nineteen hundred fifty-four as amended), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office; . . .

Section 527.9 of the Sales and Use Tax Regulations states, in part:

Hotel occupancy. [Tax Law, §1105(e)]

(e) Nontaxable occupancy. The following occupancies are not subject to tax on hotel occupancy.

(2) nursing homes, rest homes, convalescent homes, maternity homes for expectant mothers, residences or homes for adults or retardates. When such facilities registered with the New York State Department of Social Services or Department of Mental Hygiene, whether publicly or privately owned and operated, accept as patients persons who require special care on account of age, illness, mental or physical condition or the like, and provide this special care either by nurses, orderlies or aides, they are deemed not to be hotels with respect to such patients.

Example 1: A senior citizen's lodging facility which only furnishes hotel facilities and services and does not furnish services or special care provided by attendants, etc., is a hotel.

Example 2: A maternity residence for expectant unwed mothers which is registered with the State Department of Social Services provides care and service for mothers-to-be. Such care and service includes maintaining a residence, social services, medical care, and arranging for delivery at a local hospital. This facility is not subject to the tax on occupancy.

Section 2801 of the Public Health Law states, in part:

Definitions

The following words or phrases, as used in this article, shall have the following meanings, unless the context otherwise requires:

1. "Hospital" means a facility or institution engaged principally in providing services by or under the supervision of a physician or, in the case of a dental clinic or dental dispensary, of a dentist, for the prevention, diagnosis or treatment of human disease, pain, injury, deformity or physical condition, including, but not limited to, a general hospital, public health center, diagnostic center, treatment center, dental clinic, dental dispensary, rehabilitation center other than a facility used solely for vocational rehabilitation, nursing home, tuberculosis hospital, chronic disease hospital, maternity hospital, lying-in-asylum, out-patient department, out-patient lodge, dispensary and a laboratory or central service facility serving one or more such institutions, but the term hospital shall not include an institution, sanitarium or other facility engaged principally in providing services for the prevention, diagnosis or treatment of mental disability and which is subject to the powers of visitation, examination, inspection and investigation of the department of mental hygiene except for those distinct parts of such a facility which provide hospital service. The provisions of this article shall not apply to a facility or institution engaged principally in providing services by or under the supervision of the bona fide members and adherents of a recognized religious organization whose teachings include reliance on spiritual means through prayer alone for healing in the practice of the religion of such organization and where services are provided in accordance with those teachings.

2. "Nursing home" means a facility providing therein nursing care to sick, invalid, infirm, disabled or convalescent persons in addition to lodging and board or health related service, or any combination of the foregoing, and in addition thereto, providing nursing care and health-related service, or either of them, to persons who are not occupants of the facility.

3. "Residential health care facility" means a nursing home or a facility providing health-related service.

Section 414.1 of the Department of Health Regulations states, in part:

Definitions. (a) Except for Article 2, the following definitions of medical facilities,

based on standards approved by the commissioner, shall apply to this Subchapter unless the context otherwise requires:

(1) Health-related facility shall mean a facility, institution, intermediate care facility, or a separate or distinct part thereof, providing therein lodging, board and social and physical care, including but not limited to the recording of health information, dietary supervision and supervised hygienic services incident to such care to six or more residents not related to the operator by marriage or by blood within the third degree of consanguinity.

(2) Hospital shall mean an institution with beds for one or more inpatients not related to the operator which is primarily engaged in providing services and facilities to inpatients by or under the supervision of a physician, and which meets the following requirements:

(i) provides diagnostic and therapeutic services for medical diagnosis, treatment and care of injured and sick persons and has, as a minimum, laboratory and radiology services and organized departments of medicine and surgery;

(ii) has an organized medical staff which may include, in addition to doctors of medicine, doctors of osteopathy and dentistry;

(iii) has bylaws, rules and regulations pertaining to standards of medical care and service rendered by its medical staff;

(iv) maintains medical records for all patients;

(v) has a requirement that every patient be under the care of a member of the medical staff;

(vi) provides 24-hour patient service;

(vii) has in effect a written, currently applicable utilization review plan, acceptable to the department, which provides for utilization review studies designed to evaluate the appropriateness of admissions to the hospital, lengths of stay, discharge practices, use of medical and hospital services and all related factors which may contribute to the efficient provision of hospital and physician services; and

(viii) has in effect agreements with a home health agency for referral and transfer of patients to home health agency care when such service is appropriate to meet the patient's requirements.

(3) Nursing home shall mean a facility, institution, or portion thereof, providing therein by or under the supervision of a physician, nursing care and other health, health-related, and social services as specified in this Subchapter for 24 or more consecutive hours to three or more nursing home patients who are not related to the operator by marriage or by blood within the third degree of consanguinity, including,

but not limited to, an infirmary section which is identifiable as a nursing home unit in a special area, wing or separate building of a public or voluntary home or of a general or special hospital.

(8) A health-related facility resident shall mean a person, who because of social, physical, developmental or mental condition, requires institutional care and services above the level of room and board in order to secure basic services necessary to function, but who does not require the inpatient care and services provided by a hospital or skilled nursing facility and, in addition, may have one or more but is not limited to the following characteristics:

(i) possesses a degree of functional capacity permitting varied degrees of independence that reflect chronic disease conditions which may be stabilized, or mental and emotional impairment requiring medications and a range of care and services which stress health and social maintenance and prevention of further deterioration;

(ii) whose stay in the health-related facility is usually long-term and whose admission, which is not for social reasons along (sic), reflect the absence of alternate community, family or personal resources to meet the individual's needs;

(iii) needs a planned program of care and supervision on a continuous 24-hour-a-day basis emphasizing personal care and services under the direction of a physician;

(iv) needs assistance in securing planned, basic recreational and diversional activities and services of other disciplines such as nutritional and social work counseling, through coordinated resident care plans which also include sustaining contacts with the community and which support the need and desire to function as independently as possible and prevent withdrawal and other symptoms of early deterioration;

(v) needs health services which are under the direct supervision of a registered nurse or other health professionals who have responsibility for developing and coordinating nursing care and resident care plans and who periodically review and revise such plans;

(vi) needs periodic or intermittent skilled nursing care and services but not continuous skilled services which in the aggregate require the direct supervision by licensed nursing personnel; and

(vii) requires services which can usually be delivered by nonlicensed personnel and are primarily support kinds of services such as assistance with activities of daily living.

(11) Nursing home patient shall mean a person:

(i) diagnosed by a physician as having one or more clinically determined illnesses or conditions that cause the person to be so incapacitated, sick, invalid, infirm,

disabled or convalescent as to require at least medical and nursing care; and

(ii) whose assessed health care needs in the professional judgment of his physician or a medical team:

(a) do not require care or active treatment of the patient in a general or special hospital in or near his community;

(b) cannot be met satisfactorily in the person's own home or home substitute through providing such home health services, including medical and other health and health--related services as are available in or near his community; and

(c) cannot be met satisfactorily in a physician's office, hospital clinic or other ambulatory care setting because of the unavailability of medical and other health and health-related services for the person in such setting in or near his community.

Section 1.03 of the Mental Hygiene Law states, in part:

Definitions

When used in this chapter, unless otherwise expressly stated or unless the context otherwise requires:

6. "Facility" means any place in which services for the mentally disabled are provided and includes but is not limited to a psychiatric center, developmental center, institute, clinic, ward, institution, or building, except that in the case of a hospital as defined in article twenty-eight of the public health law it shall mean only a ward, wing, unit, or part thereof which is operated for the purpose of providing services for the mentally disabled. It shall not include a place where the services rendered consist solely of non-residential services for the mentally disabled which are exempt from the requirement for an operating certificate under article sixteen or thirty-one of this chapter, nor shall it include domestic care and comfort to a person in the home.

10. "Hospital" means the in-patient services of a psychiatric center under the jurisdiction of the office of mental health or other psychiatric in-patient facility in the department, a psychiatric in-patient facility maintained by a political subdivision of the state for the care or treatment of the mentally ill, a ward, wing, unit or other part of a hospital, as defined in article twenty-eight of the public health law, operated as a part of such hospital for the purpose of providing services for the mentally ill pursuant to an operating certificate issued by the commissioner of mental health, or other facility providing in-patient care or treatment of the mentally ill which has been issued an operating certificate by such commissioner.

28. "Community residence" means any facility operated by or subject to licensure by the office of mental health or the office of mental retardation and developmental disabilities which provides a supervised residence or residential respite services for mentally disabled persons and a homelike environment and room, board and responsible supervision for the habilitation or rehabilitation of mentally disabled persons as part of an overall service delivery system. A community residence shall include an intermediate care facility with fourteen or fewer residents that has been approved pursuant to law, and a community residential facility as that term is used in section 41.36 of this chapter. Such term does not include family care hotels.

28-a. "Supervised living facility" means a community residence providing responsible supervisory staff on-site twenty-four hours per day for the purpose of enabling residents to live as independently as possible.

28-b. "Supportive living facility" means a community residence providing practice in independent living under supervision but not providing staff on-site on a twenty-four hour per day basis.

33. "Residential treatment facility for children and youth" shall mean an inpatient psychiatric facility which provides active treatment under the direction of a physician for individuals who are under twenty-one years of age, provided that a person who, during the course of treatment attains the age of twenty-one may continue to receive services in a residential treatment facility for children and youth until he or she reaches the age of twenty-two. The term "residential treatment facility for children and youth" does not apply to the children's psychiatric centers described in Section 7.17 of this chapter or to facilities specifically licensed by the office of mental health as children's hospitals. Residential treatment facilities for children and youth are a sub-class of the class of facilities defined to be "hospitals" in subdivision ten of this section.

36. "Residential care center for adults" means a facility which provides long term residential care and support services to mentally ill adults, provides case management and medication management services, and assists residents in securing clinical, vocational and social services necessary to enable the resident to live in the community. No residential care center for adults established after September first, nineteen hundred eighty-six shall have more than one hundred fifty residents. A residential care center for adults is not an adult care facility subject to licensure by the department of social services nor is it an inpatient treatment facility.

Accordingly, in any instance where a long-term rehabilitation center or long-term psychiatric care facility falls within the definition of a health-related facility or nursing home as defined under Section 2801.2 or 2801.3 of the Public Health Law and Section 414.1(a)(1) and (3) of the Department of Health Regulations, respectively, or a community residence, supervised living facility, supportive living facility, residential treatment facility for children and youth or residential care center for adults as defined under Section 1.03 28, 28-a, 28-b, 33, and 36, respectively, of the Mental Hygiene Law and is registered with the New York State Department of Social Services or Department of Mental

Hygiene, as similarly required when determining nontaxable occupancy under Section 527.9 of the Sales and Use Tax Regulations, such facilities will be considered to be residential in nature. Therefore, if such facilities are residential in nature, purchases of energy sources and services for use in such facilities will be subject to the reduced rate of zero percent as provided under Section 1105-A of the Tax Law and Section 527.13 of the Sales and Use Tax Regulations for purposes of computing the statewide portion of the sales tax due on such purchases. However, such facilities will be subject to any local sales tax imposed on purchases of energy sources or services.

If such facilities are residential for the purposes of Section 1105-A of the Tax Law, such facilities will be entitled to a refund of the New York State sales tax (statewide portion only) paid on purchases of applicable energy sources and services during the appropriate three year period immediately preceding the filing date of the claim for refund submitted by or on behalf of such facilities.

Conversely, in any instance where the facilities at issue are not residential in nature or where the facilities fall within the definition of hospital as defined under Section 2801.1 of the Public Health Law and Section 414.1(a)(12) of the Department of Health Regulations or Section 1.03 10 of the Mental Hygiene Law and as such are determined to not be residential in nature, such facilities will not be entitled to the reduced rate of zero percent provided under Section 1105-A of the Tax Law. However, if any of the facilities at issue, applies for or has applied for and is granted or has been granted exempt organization status pursuant to the provisions of section 1116(a)(4) of the Tax Law, purchases of energy sources and services for use by such facility, with the exception of purchases of diesel motor fuel used for heating purposes, may be exempt from the statewide tax and any applicable local tax.

Due to several recent legislative changes, the sales tax status of purchases of diesel motor fuel for use as heating oil for nonresidential purchases by an organization which has been granted exempt organization status pursuant to the provisions of section 1116(a)(4) of the Tax Law is as follows:

- 1) Prior to September 1, 1988, purchases of diesel motor fuel for nonresidential heating use were exempt from the retail sales and use tax, provided the exempt organization furnished the supplier a properly completed form ST-119.1, Exempt Organization Certification.
- 2) For the period September 1, 1988 through July 4, 1989, exempt organizations could no longer issue form ST-119.1, Exempt Organization Certification to their suppliers when making purchases of heating oil. Instead, they were required to pay the applicable local sales tax on purchases of heating oil for residential heating and both the state and applicable local sales tax on purchases of fuel for nonresidential heating purposes. However, the exempt organizations were subsequently entitled to a refund of the sales tax paid. The exempt organizations could claim a refund of the sales tax paid by filing Form FT-1009, Application for Refund of Sales Tax on Diesel Motor Fuel Purchased at Retail with the Department of Taxation and Finance within three years of the date the tax was paid.

- 3) Effective July 5, 1989 organizations which have been granted exempt organization status pursuant to the provisions of section 1116(a)(4) of the Tax Law may purchase diesel motor fuel for their own heating use exempt from the sales and use tax.

In order to be deemed exempt from tax, the fuel must be delivered into a storage tank which is not equipped with a device capable of dispensing the fuel into a motor vehicle.

The fuel must be ordered, received and paid for directly by an organization which is exempt according to the provisions of section 1116(a)(4) of the Tax Law. The exempt organization must furnish the seller of the fuel a properly completed form FT-1020, Exemption Certificate for Certain Taxes Imposed on Diesel Motor Fuel and Propane, such form being issued either as a single-purchase exemption certificate or as a blanket exemption certificate. Where the exempt organization purchases more than 4500 gallons of enhanced diesel fuel at one time for heating use, form 1025, Certificate for Exemption from Certain Taxes Imposed on Diesel Motor Fuel, a single-purchase exemption certificate only, must be issued to the seller.

An organization that establishes its exempt status pursuant to the provisions of section 1116(a)(4) of the Tax Law may be entitled to a refund of sales tax it has previously paid subject to a three year statute of limitations.

Taxes paid before exempt status is recognized are refundable if the organization met the requirements for exemption when the purchases were made. However, an organization that is required to amend its documents or change its operations in order to qualify for exemption is not entitled to a refund of taxes paid before the effective date of those changes.

In any instance where the purchase use or consumption of energy services or sources, including heating oil is by the State of New York or any of its agencies, instrumentalities, public corporations or political subdivisions, the purchase of such energy service or source including heating oil, will be exempt from state and local tax pursuant to the provisions of Section 1116(a)(1) of the Tax Law provided the supplier is presented a governmental purchase order.

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Requests for exemption certificates or refund applications may be made by telephone from within New York State by calling 1-800-462-8100 or from outside New York State by calling 1-518-438-1073. Written requests should be mailed to NYS Tax Department, Taxpayer Assistance Bureau, W.A. Harriman Campus, Albany, N.Y. 12227.

DATED: December 19, 1990

PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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