

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

TSB-A-93 (57) S
Sales Tax
November 1, 1993

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S930611B

On June 11, 1993, a Petition for Advisory Opinion was received from Pyramid Company of Ithaca, c/o Pyramid Group, Inc., The Clinton Exchange, Four Clinton Square, Syracuse, New York 13203.

The issue raised by Petitioner, Pyramid Company of Ithaca, is whether its purchases of utilities that are redistributed to its tenants, are subject to sales tax under Section 1105(b) of the Tax Law or may they be purchased for resale, and if resold, are the administrative fees charged in connection therewith subject to sales tax.

Petitioner operates a shopping mall by the name of Pyramid Mall-Ithaca located in the village of Lansing, New York. The mall has approximately 65 tenants. Petitioner supplies its mall tenants with electricity by means of a redistribution system in which the electricity is delivered by the utility to Petitioner's master meter from which Petitioner redelivers electricity to tenant spaces, without further metering, according to the electricity requirements of each individual tenant. In addition, some of the electricity is used in the mall's common areas.

As provided in written leases, the mall's tenants are charged for their electricity by means of an individual engineering survey of electricity demand and use for each tenant space. They are also charged a pro rata share for electricity used in common areas. Petitioner then charges its tenants a fee that will reimburse Petitioner for its overhead expenses in administering its electricity redistribution system.

In each of the tenants leases it is stated that charges for tenant-space electricity, common area electricity and landlord expense reimbursement on each of these items are "additional rent" to be paid by the tenants to the landlord.

The pertinent parts of Petitioner's lease with its tenants states:

8.01 - Energy and Utility Costs

(a) From and after the date Tenant first enters into possession of the Premises, Tenant shall pay to Landlord monthly in advance on the first day of each month its "Energy Costs," as hereinafter defined . . .

(b) As used in this Lease "Energy Costs" shall mean the Landlord's cost, determined in accordance with the then current utility rates applicable to Landlord, of all energy used or consumed in the Premises including without limitation, electricity, oil and gas, together with a charge of twenty-five percent (25%) of such costs. Following the date that Tenant opens for business in the Premises, Landlord

shall calculate Tenant's energy requirements on the basis of Tenants construction plans, equipment and lighting lists and the as-built condition of the Premises, assuming a usage for an eighty (80) hour week and a loading factor based upon the total connected load of the electrical fixtures and equipment in the Premises. Landlord shall provide Tenant with a detailed statement of such Energy Cost calculations. Prior to the completion of such Energy Cost calculation and submission to Tenant, Tenant shall pay Energy Costs as estimated by Landlord based upon energy requirements for a typical store layout comparable to Tenant's proposed use and size of the Premises. Following completion of Landlord's Energy Cost calculations, Tenant's energy billings and payment of Energy Costs shall be adjusted accordingly. Any delay in Landlord's furnishing such Energy Cost calculations to Tenant shall not in any way affect Tenant's obligations herein.

8.03 - Charge for Heating, Ventilating and Cooling the Common Areas

In addition to the charges set forth in sections 7.04 and 8.01 above, from and after the Term Commencement Date Tenant shall pay to Landlord, as Additional Rent, an annual charge of \$.86 per square foot of the Premises or \$950.00, whichever is greater, representing Tenants contribution toward the cost of heating, ventilating and cooling the Common Areas. Such annual charge shall be paid to Landlord in equal monthly installments, in advance, on the first day of each calendar month during the term.

Section 1105(b) of the Tax Law imposes a tax upon "[T]HE receipts from every sale, other than for resale, of gas, electricity, refrigeration and steam, and gas, electric, refrigeration and steam service of whatever nature . . ."

In Empire State Building Company v. New York State Department of Taxation and Finance, 81 NY2d 1002 the Court of Appeals held that:

Plaintiff's tenants' payment of an Electricity Rent Inclusion Factor (ERIF) was for electric service provided only as an incident to the rental of commercial premises in plaintiff's building and not as part of "separate transactions which have as their primary purpose the furnishing of utilities or utility services" (Debevoise & Plimpton v New York State Dept. of Taxation & Fin., 80 NY2d 657, 661). The taxing of the ERIF payments as a sale of utility services under Tax Law § 1105(b) was therefore improper.

Based upon the decision in Empire, supra, charges by Petitioner for utilities in accordance with the terms of its leases with its tenants are a part of the rental of real property and not a resale of a utility service. Therefore, charges by Petitioner to its tenants for electricity supplied under provisions of its leases and the administration fees charged in connection with the lease payments are not subject to the sales tax imposed under Section 1105(b) of the Tax Law.

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It is noted that purchases of the aforesaid utilities by Petitioner are purchases at retail which are subject to the sales tax imposed under Section 1105(b) of the Tax Law.

DATED: November 1, 1993

/s/
PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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