

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

TSB-A-06(35)S
Sales Tax
December 29, 2006

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S061020A

On October 20, 2006, the Department of Taxation and Finance received a Petition for Advisory Opinion from Interstate Properties, 210 Route 4 East, Paramus, New Jersey 07562.

The issues raised by Petitioner, Interstate Properties, are:

1. Whether charges by a landlord to a tenant for electricity, trash removal and common area maintenance are subject to sales tax.
2. Whether purchases by a landlord of trash removal services and electric service are subject to sales tax.

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

Petitioner is the lessor of a commercial property (the "mall") in New York State. Petitioner purchases electricity from a public utility or private generating plant measured by a single meter and trash removal service from a third party trash removal company for the entire mall.

Petitioner charges tenants a monthly electricity reimbursement charge based on an engineering survey used to estimate tenants' annual electrical usage. The tenants' electricity usage is not metered. Petitioner's electricity reimbursement charge to tenants is a fixed amount each month for the entire year. Monthly charges to tenants for electricity can exceed the actual cost of electricity used by the tenant. Petitioner may impose annual increases to electricity reimbursement charges due to increases in the cost of electricity over the term of the lease. Tenants pay this monthly charge as additional rent under Petitioner's lease agreement. Petitioner bills tenants a separate charge for this amount.

Tenants also pay Petitioner a fixed monthly trash removal fee that is calculated on the basis of each tenant's leased square footage. Petitioner is required under its lease agreement to provide trash removal service. Tenants may not hire an outside trash removal service. Tenants pay for trash removal as additional rent under Petitioner's lease agreement. Petitioner bills tenants a separate charge for this trash removal fee.

Petitioner charges tenants a monthly common area maintenance charge (CAM Reimbursement). This charge is a fixed monthly amount and includes an allocated cost of electricity for common areas based on the results of the engineering survey and on each tenant's leased square footage. Petitioner bills tenants a separate charge for this amount.

Applicable law and regulations

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 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.

Opinion

Petitioner is the lessor of a commercial mall in New York State. Petitioner purchases electricity from a public utility or private generating plant measured by a single meter. Petitioner recoups its cost of electricity by charging its tenants a fixed monthly electricity reimbursement charge based on an engineering survey used to estimate tenants' annual electricity usage. The tenants' electricity usage is not metered.

Section 1105(b) of the Tax Law imposes sales tax on utility services furnished as a separate identifiable sale of a commodity. The tax applies to separate, identifiable transactions which have as their primary purpose the furnishing of utilities or utility services. See *Matter of Mutual Redevelopment Houses, Inc. v Arthur J. Roth*, 307 AD 2d 422 (3d Dept 2003).

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*, since Petitioner's charges to its tenants are not based on meter readings and are, therefore, not based on actual usage, charges by Petitioner for electricity in accordance with the terms of its leases with its tenants are a part of the rental of real property and not a sale of a utility service. Therefore, charges by Petitioner to its tenants for electricity supplied under its leases are not subject to the sales tax imposed under section 1105(b) of the Tax Law. See *Jeffrey J. Coren CPA, P.C.*, Adv Op Comm T & F, July 26, 2006, TSB-A-06(21)S.

Consequently, purchases of electricity by Petitioner are not purchases for resale and are subject to the sales tax imposed under section 1105(b) of the Tax Law.

Petitioner purchases trash removal service for the entire mall from a third party trash removal company. Petitioner charges its tenants a fixed monthly fee for trash removal based on each tenant's leased square footage. Tenants pay for trash removal as additional rent under Petitioner's lease agreement.

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

Petitioner charges tenants a monthly common area maintenance charge (CAM Reimbursement). This charge is a fixed monthly amount and includes an allocated cost of

electricity for common areas based on the results of an engineering survey and on each tenant's leased square footage.

Technical Services Bureau Memorandum entitled *Charges By Shopping Mall Operators*, May 7, 1984, TSB-M-84(9)S, states the following with regard to common area charges:

Common area charges which are designated as "additional rent" or similarly provided for by specific provisions 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. An "anchor" store which owns its own building within a mall complex is normally subject to common area charges which are determined by a method similar to the method used for tenants, and will receive the same treatment as mall tenants for sales tax purposes.

The mall operator is responsible for paying tax to his supplier on purchases of any taxable tangible personal property or services used or consumed by him in the operation of the common area. . . .

Accordingly, Petitioner's CAM reimbursement charges to its tenants are not subject to sales tax. Tangible personal property, utilities or other services subject to sales tax under section 1105 of the Tax Law that Petitioner purchases for use in maintaining such common areas are subject to sales tax. See *Jeffrey J. Coren CPA, P.C., supra*.

DATED: December 29, 2006

/s/
Jonathan Pessen
Tax Regulation Specialist IV
Technical Services Division

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