

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

TSB-A-93 (53)S
Sales Tax
October 5, 1993

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S930219A

On February 19, 1993, a Petition for Advisory Opinion was received from The Tower At Montauk Condominium, Edgemore Street, Montauk, New York 11954.

The issue raised by Petitioner, The Tower At Montauk Condominium, is whether certain purchases of electricity by Petitioner are eligible for the reduced rate of sales tax provided by Section 1105-A of the Tax Law.

The Tower At Montauk Condominium is made up of 21 unit owners. Each unit owner pays for electricity in his own unit. The condominium covers the cost of electricity for the common area (outside lights, hall lights, stairway lights, heaters, etc.). The condominium has a small laundry room with coin-operated machines, a swimming pool, and in addition, rents out part of the roof to an antenna company.

Section 527.13 of the Sales and Use Tax Regulations provides, in part, as follows:

(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, as set forth in subdivision (c) of this section, 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) steam; and
- (vii) 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.

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(d) Definition

(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.

(3) The term common area means any area of the premises of a structure used without distinction for both residential and nonresidential purposes.

(e) Certification and allocation

(1) Purchases of energy sources used exclusively for residential purposes shall receive the reduced tax rate without the necessity of certification. (emphasis added)

(2) Where energy sources billed on a single meter or in a lump sum are used for both residential and nonresidential purposes, and the residential purposes constitute 75 percent or more of the usage, the entire amount billed shall be taxed at the reduced sales tax rate without certification. See paragraph (5) of this subdivision to determine the percentage of residential use.

(3) Where energy sources billed on a single meter or in a lump sum are used for both residential and nonresidential and less than 75 percent of the usage is for residential purposes, the purchaser is entitled to the reduced tax rate on only the percentage of energy sources used for residential purposes. This percentage shall be determined in accordance with paragraph (5) of this subdivision and shall be rounded off to the nearest 10 percent. A certificate shall be filed in the form provided and shall be given by the purchaser to the supplier of the energy sources. In the absence of such a certificate, the supplier of energy sources shall collect the full tax on the entire usage.

(4) Where a structure is exclusively used for nonresidential purposes, no certification or statement is required, since no eligibility for a reduced sales tax rate shall exist for purposes of energy sources and services.

(5) To determine the percentage of the area of a structure used for residential purposes, the following formula shall be used by the purchaser of the energy sources and services: total area of space used for residential purposes, excluding common areas, divided by the total area (residential and nonresidential), excluding common area, equals the percentage rounded off to the nearest 10 percent applicable to use for residential purposes. Thus, if the percentage before rounding is 74.9 percent, the percentage when rounded is 70 percent.

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(f)(4) Where a customer is eligible for the reduced tax rate, as a residential customer described in paragraph il) or (2) of subdivision (e) of this section, but the supplier of energy sources has not classified him as a residential user, the customer should furnish the supplier with a certification.

Swimming pools owned in common by the owners of units in a condominium are not considered residential in nature but social or athletic. Thus, energy used in the operation of the pool owned by Petitioner does not qualify for the reduced rate of sales tax. (see: Stratford RP Inc., TSB-A-87(40)S, Windsor Square Homes Assoc. TSB-A-92(34)S.) In addition, the energy consumed by the antennas and laundry machines is not used for residential purposes and thus does not qualify for the reduced rate of sales tax. The hall lights, stairway lights, heaters and outside lighting used in conjunction with the residential building are considered common area uses for purposes of Section 1105-A of the Tax Law and Section 527.13 of the Sales and Use Tax Regulations.

It is noted that pursuant to Section 527.13(e)(2) of the Sales and Use Tax Regulations if the energy source for the above items is billed on a single meter or in a lump sum and the energy used for residential purposes constitutes 75% or more of the usage then the entire amount billed will be taxed at the reduced rate. On the other hand pursuant to Section 527.13(e)(3) of said regulations if the residential usage is less than 75%, then the Petitioner would be entitled to a reduced rate only on the residential portion of energy usage calculated in accordance with the regulations.

DATED: October 5, 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.