

New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-09(58)S
Sales Tax
December 9, 2009

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S090403A

On April 3, 2009, the Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. Petitioner asks whether payments it makes to its landlord (Medical Center) pertaining to the lease of real property are subject to sales tax. Petitioner's payments are a component of rent for real property; therefore, they are not subject to sales tax or use tax.

Facts

Petitioner is a limited liability company owned by Medical Center, a tax exempt organization for purposes of Tax Law section 1116(a)(4). Petitioner sells technology and data support services to Medical Center and other not-for-profit organizations. Petitioner leases facilities from Medical Center, which provides utilities and other building services as part of the lease. Medical Center provides utilities to Petitioner on an unmetered basis and does not separately charge Petitioner for utilities. Utility companies bill Medical Center, which is solely liable for the utility services purchased. Petitioner will pay Medical Center's utility bill, but is reimbursed by Medical Center for making these payments.

Analysis

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). Effective September 1, 2008, sales of utility services by tax exempt organizations for purposes of Tax Law section 1116(a)(4) are subject to sales tax. *See Tax Law §1116(b)(1)(ii) and Tax Law Amendments Related to Sales Made by Certain Sales Tax Exempt Organizations Effective September 1, 2008*, TSB-M-08(5)S.

A landlord's base rent charge is not subject to sales tax even if the landlord provides utilities as part of a lease *Cf. See Jeffrey J. Coren CPA, P.C.*, Adv Op Comm T&F, July 26, 2000, TSB-A-06(21)S. Therefore, Petitioner's rent payments to Medical Center are not subject to the sales tax imposed under section 1105(b) of the Tax Law.

If Petitioner does pay Medical Center's utility bill, its payment will be subject to sales tax under Tax Law section 1105(b) unless the payment is made in lieu of an amount due Medical Center for fixed rent or Petitioner is otherwise reimbursed by Medical Center for paying the utility. *See RSM McGladrey, Inc.*, Adv Op Comm T&F, April 4, 2005, TSB-A-05(10)S.

This advisory opinion takes no position on the taxability of Medical Center's purchase of utility services.

DATED: December 9, 2009

/S/
Jonathan Pessen
Director of Advisory Opinions
Office of Counsel

NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.