

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

TSB-A-11(28)S  
Sales Tax  
October 17, 2011

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S110516B

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. Petitioner asks whether “condenser water” charges billed and collected by a landlord from a tenant in a commercial office building are subject to New York State sales tax.

We conclude that the condenser water that Petitioner describes is chilled water used to cool the interior space of premises that the tenant leases from Petitioner and that Petitioner’s charges to its tenant for this condenser water are not subject to State or local sales or compensating use tax.

**Facts**

Petitioner is the landlord of a commercial office building at [REDACTED]. Petitioner has always considered the condenser water charges subject to State sales tax as a sale of utilities and thus has collected sales tax on its condenser water charges to its tenants. As part of its petition, Petitioner attached a relevant provision in its lease with [REDACTED], a tenant in the building, designated as Section 20(g)(i) - Water Charge, that reads as follows:

“(g)(i) Landlord hereby agrees to provide Tenant with up to 60 tons of condenser water for Tenant's air-conditioning system in the portions of the Premises above the eighteenth (18th) floor of the Building (the "System") twenty-four (24) hours per day, seven (7) days per week, for which service Tenant shall pay to Landlord, as Additional Charges, an amount equal to six cents (6¢) per hour per ton of connected air-conditioning capacity (such amount, as increased pursuant to Section 20(g)(iii) below is hereinafter referred to as the "Water Charge"). The Water Charge shall be payable by Tenant to Landlord monthly, as Additional Charges, within ten (10) days after rendition by Landlord to Tenant of a statement (the "Water Charge Statement") setting forth (i) Tenant's hourly use of the System, as determined by Landlord, during the preceding calendar month, and (ii) the amount of the Water Charge payable as a result thereof. Landlord's failure to render a Water Charge Statement with respect to any calendar month shall not prejudice Landlord's right to thereafter render a Water Charge Statement setting forth the amount of the Water Charge payable by Tenant since the date of the last such Water Charge Statement (or, if no Water Charge Statement shall have been rendered hereunder, since the Effective Date). The Water Charge shall be deemed an Additional Charge under this Lease.”

Petitioner provides basic heating and cooling to all floors in the subject building. Some tenants in the building use the rented space for activities that require additional cooling. For example, one tenant uses some floors in the building for its data center. The equipment in the data center generates considerable heat and requires additional cooling to protect the computer servers and other equipment from overheating. This tenant purchased and installed its own air conditioning (AC) equipment in its leased premises, as could any other tenant that had additional cooling needs. At the time of entering into the lease, and before it could know the precise size and capacity of AC equipment the tenant would need, Petitioner assured tenant that Petitioner would provide up to 70 tons of AC per hour per floor. The lease also provides that, once tenant took possession of the premises and installed its own AC equipment, the actual amount of AC capacity it would use, based on the equipment installed, could be determined. At that point, Petitioner would determine the number of tons of cooling capacity the tenant would need and would charge tenant a monthly charge based on that amount. If the tenant later installed additional AC equipment, Petitioner would adjust the charge going forward to reflect that additional equipment. But no tenant could exceed the original 70 tons per floor. Conversely, if, for example, a tenant suffered some major computer equipment failure and turned off its AC equipment because it did not need the cooling capacity and demonstrated that to Petitioner, then Petitioner would adjust downward the monthly charge to that tenant to reflect the decreased usage.

Petitioner also indicated that it does not meter the flow of water from Petitioner's system to the tenant's own system. Nor does Petitioner measure the temperature of its water as it goes into the tenant's system or the temperature of its water as it returns from the tenant's system to its own system.

### **Analysis**

Section 1105(a) of the Tax Law imposes sales tax on retail sales of tangible personal property. Section 1110(a)(A) imposes compensating use tax on the use of tangible personal property purchased at retail. Water is tangible personal property. Section 1115(a)(2) exempts water, when delivered to the consumer through mains or pipes, from sales and compensating use taxes. Petitioner transfers the condenser water, through pipes, to the tenant's possession for the time that the water is in the tenant's cooling system. Since Petitioner transfers the water through pipes, the exemption in section 1115(a)(2) would exempt that transaction from the sales tax imposed on the retail sale of tangible personal property.

Section 1105(b) of the Tax Law, as relevant here, imposes the State's sales tax on sales, other than for resale, of refrigeration and steam, and refrigeration and steam service of whatever nature. There is no use tax on the use of refrigeration or refrigeration service. The condenser water that Petitioner provides to its tenant, and for which the tenant pays charges to Petitioner, is used in tenant's own air-conditioning system to cool certain areas that the tenant occupies under its lease with Petitioner. This condenser water cools down the tenant's rented premises. As such, the condenser water amounts to "chilled water" and Petitioner's providing of this chilled water for consideration could be construed as the sale of the service of refrigeration.

However, the State Tax Appeals Tribunal, in its joint decision in *Matter of the Petition of British Airways, PLC* and *Matter of the Petition of Terminal One Group Associates, LLP*, DTA Nos. 818259 and 818429 (June 3, 2004), decided that the sale of chilled water by the landlord Port Authority to its tenants for use in cooling their rented premises was not a service subject to sales tax. The Tribunal said, “We agree with the determination of the Administrative Law Judge that petitioners' purchases of heated and chilled water from the Port Authority were not purchases of refrigeration and steam services. As a result, the services are not subject to tax because they are not included among the enumerated taxable services in Tax Law § 1105(b)(1).” Thus, Petitioner’s charges for the condenser water it provides to its tenant is not for the sale of refrigeration service and Petitioner’s charges for that chilled water are not subject to sales tax imposed by section 1105(b).

To the extent that Petitioner collected sales tax on its charges to its tenants for such condenser water, Petitioner was required to pay any amounts it collected from its tenants with its sales tax returns as money collected purportedly as tax under section 1137(a)(iii) of the Tax Law. If Petitioner refunds those amounts to its tenants, Petitioner can apply for a refund or credit under section 1139(a) of the Tax Law for those amounts it can demonstrate it refunded to its tenants, provided the application for refund or credit is timely made. Or, the tenant that paid the money can instead file a refund or credit for amounts it paid to Petitioner by filing an application for refund or credit under section 1139(a).

DATED: October 17, 2011

/S/  
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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.