

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

The Department of Taxation and Finance (Department) received a Petition for Advisory Opinion from [REDACTED] (Petitioner) asking whether Petitioner may take a credit for sales tax paid on purchases of electricity where the electricity is resold to its tenants. We conclude that Petitioner may take a credit on its periodic sales tax return for sales tax paid on purchases of electricity subsequently resold to tenants.

Facts

Petitioner is a commercial real estate company that acquires and manages commercial properties throughout New York City. Petitioner purchases electricity and electric service (i.e., transmission) for its buildings, and pays sales tax on those purchases. The bulk of the electricity Petitioner purchases is used by its tenants. However, a portion is consumed in common areas of the buildings. Petitioner submeters the electricity provided to its tenants, and invoices tenants based on their actual usage as measured by those submeters. Each invoice generally includes a "mark-up" as determined by the applicable lease agreement. Petitioner states that it computes and collects sales tax for each tenant on the entire invoice, including the mark-up.

Analysis

Sales tax is imposed on the receipts from every sale, other than sales for resale, of electricity and electric service. *See* Tax Law § 1105(b)(1); 20 NYCRR 527.2. Petitioner purchases electricity and electric service for use in its buildings. Petitioner states that it resells a portion of that electricity and electric service to its tenants based on actual usage measured by submeters. Petitioner is selling electricity and electric service to its tenants, and is, therefore, a person required to collect tax. *See* Tax Law § 1131(1). Petitioner must collect sales tax on the entire charge to its tenants for electricity and electric service, including any administrative fee or markup. *See* Tax Law §§ 1101(b)(3), 1105(b)(1)(A). Petitioner also is required to be registered for sales tax purposes, timely file periodic sales tax returns and remit the tax it collects to the Department.

Because some of the electricity and electric service Petitioner purchases is for its own use in common areas, the electricity and electric service is not purchased exclusively for resale. As a result, Petitioner cannot issue a resale certificate to purchase electricity and electric service without paying sales tax. *See Empire State Bldg. Co. v. NYS Dept. of Tax. & Fin.*, 81 NY2d 1002 (1993); TSB-A-07(8)S. However, Petitioner knows the amount of electricity it resells to tenants based on its submeters, and it knows the amount of sales tax it paid for such resold electricity. Accordingly, Petitioner may claim a

credit for the sales tax it paid for the resold electricity against sales tax collected from tenants. *See* TSB-A-05(8)S; TSB-A-07(8)S. This credit may be claimed on Petitioner's sales tax return, provided it also submits a properly completed Form AU-11 and any required documentation. *See* TB-ST-350.

DATED: November 10, 2020

/S/

DEBORAH R. LIEBMAN
Deputy 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. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.