

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

TSB-A-89 (12)S
Sales Tax
May 15, 1989

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITIONER NO. S881220A

On December 20, 1988, a Petition for Advisory Opinion was received from Niagara Mohawk Power Corporation, 300 Erie Boulevard West, Syracuse, New York 13202.

The issue raised is whether Petitioner may refund sales tax to its customer when such sales tax was collected more than three years prior to its customer requesting a refund.

Niagara Mohawk Power Corporation, during the period commencing November 19, 1981 and continuing through December 6, 1986 collected from a corporate apartment owner on its total monthly utility bill a seven percent New York State Sales and Use Tax Law under circumstances where the taxpayer was apparently entitled to an exemption from the tax as a residential user under subdivision (e) of Section 1105A of the Tax Law. However the taxpayer did not file a Certificate of Residential Use Sales Tax Reduction on Energy Purchases (form TP 385) for such exemption until December 5, 1986. Thereafter the customer filed for and received from the State of New York a refund of sales tax so paid on its utility bills within the last three years. The customer now seeks to sue the utility for tax collected by the utility for the period from November 19, 1981 to December 6, 1983, a period for which the tax was not refundable from the State by virtue of the Statute of limitations.

Section 1105(A)(e) of the Tax Law provides that "...[w]here a certificate is required, unless such vendor shall have received such certificate... the provisions of this section shall not apply and the tax shall be imposed at the rate provided for in sections eleven hundred five and eleven hundred ten...."

Since Petitioner did not receive the required certificate of residential use from its customer until December 5, 1986, Petitioner was required to collect the full amount of sales tax for the period prior to that date.

Section 1139(a) of the Tax Law provides that a refund or credit shall be granted "... if application therefor shall be filed with the Tax Commission:

- (i) in the case of tax paid by the applicant to a person required to collect tax, within three years after the date when the tax was payable by such person to the tax commission as provided in section eleven hundred thirty-seven, or
- (ii) in the case of a tax . . . paid by the applicant to the Tax Commission. . .

Section 1139(a) further provides that "[n]o refund or credit shall be made to any person of tax which he collected from a customer until he shall first establish to the satisfaction of the tax

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commission, under such regulations as it may prescribe, that it has repaid such tax to the customer."

In as much as more than three years has expired since the tax collected from Petitioner's customer was payable to the Tax Commission, even if Petitioner were to refund the tax to its customer, Petitioner itself would not be eligible for a refund of the tax.

DATED: May 15, 1989

s/FRANK J. PUCCIA
Director
Technical Services

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