

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

TSB-A-94 (34)S  
Sales Tax  
August 8, 1994

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S940418A

On April 18, 1994 a Petition for Advisory Opinion was received from Gabe Silver, 26 Hilltop Lane, Monsey, New York 10952.

The issue raised is whether the statewide sales tax is due on receipts from the sale of electricity or gas which is consumed for residential purposes where the utility company's tariff allows the utility company to classify the sale as other than residential for rate purposes.

Approximately 17 years ago, Petitioner installed a hot tub in his backyard. The utility company from whom Petitioner purchases electricity and gas installed a separate meter for use in measuring the energy consumed by the hot tub.

Because Petitioner used a second meter to measure the energy used in the operation of the hot tub, the utility company billed Petitioner at a "general secondary" rather than a "residential" rate. (The "general secondary" classification is typically used for billing customers for consumption of energy for commercial purposes.) The utility company's tariff on file with the New York State Public Service Commission permits the utility company to use a "general secondary" rate classification when a second meter is used for residential purposes such as the separate meter for Petitioner's hot tub. The utility company has always collected the statewide sales tax on the receipts from the sales of energy for use in connection with Petitioner's hot tub.

Section 1105 of the Tax Law states, in part:

Imposition of sales tax.---...there is hereby imposed and there shall be paid a tax of four percent upon:

(b) The receipts from every sale, other than sales for resale, of gas, electricity, ... and gas, electric, ... service of whatever nature....

Section 1105-A of the Tax Law states, in part:

Reduced tax rate on certain energy sources and services.- (a) Notwithstanding any other provisions of this article, but not for purposes of the taxes imposed by section eleven hundred seven or eleven hundred eight or authorized pursuant to the authority of article twenty-nine of this chapter, the taxes imposed by subdivision (a) or (b) of section eleven hundred five on the ... receipts from every sale, other than for resale, of propane (except when sold in containers of less than one hundred pounds), natural gas, electricity, steam and gas, electric and steam services used for residential purposes shall be paid at the rate of three percent for the period commencing January

first, nineteen hundred seventy-nine and ending December thirty-first, nineteen hundred seventy-nine; at the rate of two and one-half percent for the period commencing January first, nineteen hundred eighty and ending September thirtieth, nineteen hundred eighty, and at the rate of zero percent on and after October first, nineteen hundred eighty....

Section 527.13 of the New York State Sales and Use Tax Regulations states, in part:

Certain energy sources and services. [Tax Law, §1105-A]

(d) Definitions. (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.

(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.

(f) Customer classification. (1) Vendors of energy sources which are regulated by the New York State Public Service Commission and which have on file therewith a tariff or rate schedule which classifies its customer either as residential or nonresidential, may request from the Department of Taxation and Finance approval to use such classifications for determining the eligibility of its customer for a reduced sales tax rate without certification.

(3) Every supplier of energy sources who has received from his customer a certification claiming eligibility for a reduced sales tax rate shall not be held liable, except in the case of his fraud, for any misrepresentations made by the customer on the certification or for any tax not collected by granting the sales tax rate reduction based on such certification.

(4) Where a customer is eligible for the reduced tax rate, as a residential customer described in paragraph (1) ... 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.

(g) Collection of tax. (1) Every vendor, making a sale of energy sources to a customer who is classified as a residential customer, shall collect the sales tax at the reduced sales tax rate on such customer's total purchase.

(2) Every supplier of energy sources who has received from his customer a certification shall collect the sales tax at the reduced rate on the portion of the purchase shown as being used for residential purposes and shall collect the tax at the full rate on the remainder which is used for nonresidential purposes.

(3) Every vendor making sales of energy sources which are used for nonresidential purposes shall collect the sales tax at the full rate.

It is Department policy that the purchases of electricity and gas for use in the operation of an individual homeowner's personal residential recreational appurtenances and equipment, in a non-commercial manner, are considered purchases of electricity and gas for residential purposes.

Therefore in the instant matter, Petitioner's purchases of electricity and gas, including purchases of electricity and gas for use in the operation of Petitioner's hot tub, are considered as purchases of electricity and gas for residential purposes.

Accordingly, Petitioner's purchases of electricity and gas during the period January 1, 1979 through December 31, 1979 were subject to the reduced statewide sales tax rate of 3%. Petitioner's purchases of electricity and gas during the period January 1, 1980 through September 30, 1980 were subject to the reduced statewide sales tax rate of 2 1/2%. Petitioner's purchases of electricity and gas on and after October 1, 1980 were exempt from the statewide sales tax.

The fact that the utility company, which supplied Petitioner's electricity and gas, was allowed, under its tariff on file with the Public Service Commission, to classify the sales of electricity or gas for use in the operation of Petitioner's hot tub as "general secondary" rather than "residential" did not preclude such sales from being considered as "residential" sales of electricity and gas for sales tax purposes.

However, in accordance with section 527.13(f)(4) of the Regulations, since the utility company collected and continues to collect sales tax at the full amount on the receipts from sales of energy for use in the operation of Petitioner's hot tub, Petitioner should give the utility company a properly completed form TP-385, Certification of Residential Use of Energy Purchases. Under the provisions of Section 527.13(g)(2) of the Regulations, the utility company, upon receipt of the completed form TP-385, should collect the statewide sales tax at the reduced rate of 0% on the receipts from sales of energy for use in the operation of Petitioner's hot tub. Under the provisions of Section 527.13(f)(4) of the Regulations form TP-385 will also substantiate that the utility company is relieved from any liability to collect the statewide sales tax on the receipts from sales of energy for use in Petitioner's hot tub.

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Additionally, since the statewide portion of the sales tax was collected erroneously from Petitioner, Petitioner is entitled to a partial refund of such erroneously collected tax. Section 1139 of the Tax Law provides that "the tax commission shall refund ... any tax ... erroneously ... collected ... 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...." Accordingly, Petitioner may apply for a refund of the statewide sales tax which was erroneously collected during the three year period immediately preceding the filing date of Petitioner's claim, by completing a form AU-11, Application for Credit or Refund and mailing such form to State of New York Department of Taxation and Finance, Central Office Audit Bureau - Sales Tax, W. A. Harriman Campus, Albany, NY 12227.

DATED: August 8, 1994

/s/  
PAUL B. COBURN  
Deputy Director  
Taxpayer Services Division

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